UNITED STATES REPORTS

VOLUME 288

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1932

FROM JANUARY 9 (CONCLUDED)
TO AND INCLUDING (IN PART) MARCH 13, 1933

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Erratum.—P. 263, line 7, " 1932 " should read 132.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

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

WILLIAM D. MITCHELL, Attorney General.[2]
HOMER S. CUMMINGS, Attorney General.[2]
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. Mitchell submitted his resignation to become effective upon the qualification of his successor. On March 4, 1933, President Roosevelt nominated Mr. Homer S. Cummings, of Connecticut. On the same day, the nomination of Mr. Cummings was confirmed by the Senate, he was commissioned, and took the oath of office.

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, Louis Dembitz Brandeis, 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, Benjamin N. Cardozo, 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.

March 28, 1932.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1932

UNITED STATES *v.* CHICAGO NORTH SHORE & MILWAUKEE RAILROAD CO.

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

No. 264. Argued December 16, 1932.—Decided January 9, 1933.

1. An independent electric railroad, built and equipped primarily for interurban and suburban passenger service, and whose traffic is mainly of that character, but which interchanges passengers and freight with steam railroads, and competes with them, the freight business being, however, subsidiary in amount and function and not fairly comparable to the ordinary freight business of a standard steam railroad,—*held* an "interurban electric railway," within the meaning of § 20a of the Interstate Commerce Act, and therefore excepted, by par. 1 of that section, from the necessity of obtaining authority from the Commission before issuing bonds. P. 10.
2. In so holding, the Court assumes the question to be doubtful but decides that the status of the carrier as an "interurban electric railway" is settled by the uniform construction of § 20a applied to it by the Interstate Commerce Commission, the Commission having for many years resolved doubt in favor of the carrier, and the carrier having issued large amounts of bonds in reliance upon this administrative construction and without any objection from the Commission. P. 13.

Affirmed.

APPEAL from a decree dismissing a bill filed by the United States praying that the railroad company be enjoined from issuing securities or assuming obligations without authority from the Interstate Commerce Commission.

181684°—33——1

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston* and *Elmer B. Collins* were on the brief, for the United States.

The words "interurban electric railway" have the same meaning in § 20a as in § 1 (22).

The principle to be deduced from the *Piedmont & Northern* case is that when the volume of a carrier's interstate business is such as to constitute it an important competitor, on substantially equal terms, with interstate steam railroads, it falls within the class of carriers "long recognized as objects of national concern and regulation" and is not a "street, suburban, or interurban electric railway" exempted from the regulatory provisions governing extensions and abandonments of lines and security issues. A carrier does not have to be predominantly a freight-carrying road in order to be a substantial factor in the business of interstate transportation.

In passenger traffic, appellee furnishes the same character of service as that of its steam-railroad competitors, including sales of through tickets for railroads, steamship lines, air and motor-bus lines, for points throughout the country and in Canada.

It may be estimated that in 1930 it had a revenue of over $2,300,000 from passenger traffic between Chicago and Waukegan, Illinois and cities in Wisconsin. For 1926 this revenue would be more—approximately the same as the entire freight revenue for that year of the Piedmont and Northern.

The interrelation between appellee's intrastate and interstate traffic is shown by the fact that it has twice applied to the Commission alleging that intrastate rates imposed by state authority caused unjust discrimination against interstate commerce, or undue prejudice to persons or localities in interstate commerce, in violation of paragraph (4) of § 13 of the Act. In both cases the

Commission found that the intrastate rates caused unjust discrimination against interstate commerce, as well as undue prejudice, and raised the intrastate rates to the level of the interstate rates. 62 I. C. C. 188, 193; 136 I. C. C. 165, 168.

The findings of the District Court do not support its statement that the Commission by its failure to act, and by affirmative recommendations in its annual reports to Congress, has given to this road by contemporaneous construction the status of an interurban electric railway.

The exception as to electric railroads in § 15a differs from the exception in § 20a.

Administrative and statutory classifications have not been uniform, and in any event would not control this litigation. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm'n,* 286 U. S. 299.

Mr. Robert E. Quirk, with whom *Messrs. Ralph R. Bradley* and *Claude D. Cass* were on the brief, for appellee.

It is clear from the legal history of the phrase "interurban electric railway" that Congress used it as descriptive of a class of independently operated electric railways, as that phrase had the sanction of time and common usage. It is also apparent from § 20a and other sections of the law that the fact that such a railroad interchanges freight and passenger traffic with steam railroads and competes for such traffic does not make it any the less an interurban electric railroad. Appellee does not forfeit its character merely by complying with the duties imposed upon it by other and older provisions of the law in establishing through routes and interchange arrangements with steam railroads. *United States* v. *Munson S. S. Line,* 283 U. S. 43. There were and are only four classes of electric railways in this country, namely, urban, suburban, interurban, and electrified parts of steam railroads.

In *Spokane & Inland Empire R. Co.* v. *United States*, 241 U. S. 344, the Court described the electric railroad there involved which handled freight and passenger traffic and maintained freight and passenger rates on a national scale as an interurban electric railroad. There is striking similarity between the traffic characteristics of the Spokane line at the time of that decision and the traffic characteristics of appellee as it is today. Congress is presumed to have known of that decision and to have known that at the time of the amendments of 1920 the Interstate Commerce Commission had in numerous cases required the establishment of through routes and joint rates between interurban electric railroads and steam railroads, and that interurban electric railroads had developed at that time to the point where many or most of them engaged in a general way in the transportation of freight and passengers under through routes with steam railroads.

The court below correctly described the common characteristics of interurban electric railways as railways which use electric power in the transportation of passengers and freight, occupy city streets and highways in addition to private rights of way, stop cars or trains at street intersections and country highways for the reception and discharge of passengers, maintain loading platforms and shelter sheds without agents, have short radius curves, and operate part of their systems under municipal and village franchises, charters and restrictions.

By common consent and by contemporaneous construction of both federal and state authorities, the appellee has been described and treated as an interurban electric railway. In 162 I. C. C. 188, and 136 I. C. C. 165, the Interstate Commission described the appellee as an interurban electric railroad. In its annual reports to Congress and by other informal acts the Commission has given the statute the construction relied upon by appellee. Securities aggregating more than $39,000,000 have been issued

in good faith by appellee, from time to time, with the knowledge and without objection of the Interstate Commission and under the specific authority of the regulating commissions of Wisconsin and Illinois. Such acts of these State commissions should be given full faith and credit under the Constitution and in comity are entitled to highest respect. *Cooper* v. *Newell,* 173 U. S. 555; *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265.

The reason for federal control over the securities of steam railroads did not exist as to independently operated electric railroads. Hence the exclusion of this class from § 20a and from certain other of the new provisions of the law enacted in 1920.

Appellee is clearly distinguishable from the Piedmont & Northern which was before the Court in 286 U. S. 299.

The same phrase may have a different meaning in different connections in the same Act, and in the *Piedmont & Northern* case the Court answered some of the contentions of the Piedmont & Northern as to the significance of the similarity of phraseology in other sections of the Act by this observation: "But it is so used with other purposes in view." *American Security Co.* v. *District of Columbia,* 224 U. S. 491, 494; *Alabama Midland Ry. Co.* v. *Interstate Commerce Comm'n,* 168 U. S. 144. Cf. *Wight* v. *United States,* 167 U. S. 512.

Paragraph 11 of § 20a provides that any security issued or obligation assumed by a carrier subject to that section without the authority of the Interstate Commerce Commission shall be void, and that any such void security acquired by any person for value in good faith and without notice that it is void, entitles such person to hold the carrier and its directors, officers and attorneys jointly and severally liable for the full amount of damages sustained, in a suit in any court of competent jurisdiction. Since 1920 the appellee has issued securities aggregating about $39,000,000, under state authority and without the

authority, but with the knowledge and tacit sanction, of the Interstate Commerce Commission. Other electric lines similarly situated have issued securities aggregating more than $239,000,000 since 1920 without the approval of the federal Commission and under authority of the state regulating bodies. If appellant's theory of the law be sustained, the effect under the statute if valid will be to make void the securities of the appellee and of other electric lines, the result of which may be a plethora of law suits for damages which staggers the imagination. Moreover, should the Court adopt appellant's theory of the law and hold that the appellee is not an interurban electric railway, such a finding will raise for the appellee and for the whole electric railway industry a fog of uncertainty as to classification and jurisdiction which will make it impossible for any electric railway to know in advance of a decision by this Court what its status is under § 20a; and such a finding will work untold injury to appellee and to the entire railway industry.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is a suit brought pursuant to § 12 (1) of the Interstate Commerce Act, as amended,[1] to enjoin the appellee from issuing any securities or assuming any obligation or liability in respect of the securities of others without first having obtained an order from the Interstate Commerce Commission authorizing such action, as required by § 20a of the Act.[2] The petition avers appellee's intention to issue or become guarantor of securities in violation of the last mentioned section.

The District Court, after making detailed and elaborate fact findings, concluded as matter of law that the rail-

[1] U. S. Code, Tit. 49, § 12 (1).

[2] U. S. Code, Tit. 49, § 20a.

road was an independently operated electric interurban railway expressly excepted from the requirements of the section. The question is whether the facts found warrant the decision.

Section 20a forbids a carrier to issue shares, bonds or obligations, evidence of interest or indebtedness, or to assume any obligation or liability of any other person or corporation, unless the Commission, upon application, after investigation, shall by order authorize such issue or assumption, as within the applicant's corporate purpose and compatible with the public interest. After prescribing the procedure before the Commission, and declaring its jurisdiction plenary and exclusive, the section enacts that securities or obligations not issued pursuant to its terms shall be void, and imposes civil and criminal liability upon officers and directors participating in their creation.

Paragraph 1 provides: "As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation). . . ."

The properties of the appellee have developed, through various transfers and reorganizations, out of a street railway company organized more than twenty-five years ago. The company has for some years owned and operated in interstate commerce an electrified railroad, the main line of which extends from Chicago, Illinois, to Milwaukee, Wisconsin. There are 138 route miles of line, 132 miles of second track and 42 miles of yard and other track. About 40 miles of main and second track are in city streets, on some of which the appellee operates in common with street cars and vehicular traffic. In addition to the main line between Chicago and Milwaukee there is an alternate line for part of the distance; a branch some 36 miles in length; and two other branches, one of which is 3 and

the other 8 miles long. Operation in Chicago is over the elevated tracks of the Chicago Rapid Transit Company from the south side northerly through the loop district to a point on the north side (approximately 16 miles). Thence the line runs northerly through Chicago and Evanston to Wilmette, approximately 8 miles, over elevated dirt fill tracks owned by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, leased by the appellee jointly with the Chicago Rapid Transit Company. The remainder of the appellee's lines are upon its own right of way, or in streets the use of which is granted by local franchise. The total laid under local franchises, outside of Milwaukee, is approximately 3 miles; in the latter city the operation for 2.67 miles is over the tracks of a street surface railway owned by the appellee.

Twenty fast through passenger trains are operated daily in each direction between downtown Chicago and downtown Milwaukee with a running time equalling that of the fastest trains of the Chicago and Northwestern Railway, which operates fifteen through trains daily between the same cities. Dining cars and parlor cars are included in some of the appellee's fast trains. Modern, well equipped passenger stations are maintained at a number of points; 51 have agents selling passenger tickets; at some 96 places shelters and platforms are maintained, at 35 platforms only; and at 42 locations at which certain trains stop at streets or highways no facilities are provided. Through railroad and Pullman tickets are sold to any part of the United States, Canada or Mexico. Local passenger fares are computed on the mileage basis used by steam railroads.

Appellee's tracks are of standard gauge and are physically connected with those of four steam railroads at some thirteen points, and with those of three electric lines. Eight connections are used for handling interchange carload freight. The railroad has substantial facilities for

serving various industries located on its lines, such as side, industrial, team and switch tracks, and freight classification tracks. It owns seven electric locomotives which are of a small type and unable to haul freight trains of the size usually employed by steam railroads, and 114 freight cars which have no electrical equipment and are interchangeable with steam railroads. Sixteen local freight tariffs are published; in 206 tariffs the railroad participates as initial carrier, and in more than 800 as a delivering or intermediate carrier, in conjunction with steam railroads.

The total transportation revenue in 1930 was over $6,000,000, about 76% from passenger traffic and about 22% from freight. This ratio has been substantially maintained for some years. In 1930, 87% of carload freight traffic was interchange and 78% of all freight traffic was interline, but only 42% of freight revenue was derived from interline business.

Locomotives are not employed in the passenger service, the cars having installed electrical equipment, and being somewhat shorter and narrower than standard passenger railroad coaches. Freight is hauled by electric locomotives. A merchandise package delivery freight service is supplied by cars similar to baggage cars used on steam railroads, having self-contained electric equipment, operated from the loop in Chicago to Milwaukee in trains of from one to five cars. At certain points gantlet tracks are required for handling freight cars, as the clearances on the main line are insufficient to permit their passage. Grades are much heavier than those customary on steam railroads, and some of the curves are of so short a radius as not to permit the passage of a steam locomotive. The company maintains no facilities for receipt or delivery of carload freight at its termini in Chicago and Milwaukee, and cannot accomplish interchange of such freight at either, connections for this purpose being outside those cities.

The railroad was constructed to afford a fast electric passenger service between Chicago and Milwaukee and suburban passenger service into and out of Chicago. The freight business is subsidiary to this primary function, and is not fairly comparable to that ordinarily transacted by a standard steam railroad. Passenger traffic, whether measured by car service or by gross earnings, heavily preponderates over interline freight business. The main terminals serve only the passenger and merchandise freight traffic.

We thus have a typical example of an interurban electric line for passenger service, which has developed, in addition, such freight traffic as could advantageously be undertaken without interfering with performance of the main purpose of the carrier. The facts differentiate the present case from *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commn.*, 286 U. S. 299. There the railway was predominantly a carrier of interchange carload freight and the proposed extension of line, which was the subject of that litigation, had as its object the creation of a link in a trunk-line route composed of the electric line and a number of steam railroads, which would divert from other steam railroad trunk-line routes some $4,000,000 of revenue annually. The purely local traffic in freight, passengers, baggage and express was there relatively inconsequential; but here greatly preponderates. It was there said: "In cases where an appreciation of the facts is requisite to proper classification it is not always easy to draw the line. Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception of paragraph (22) [which is couched in the same words as the exception in § 20a (1)]. But this is not such a case. The facts clearly require a holding that petitioner's railway is not within the true intent and purpose of the exclusion intended by the paragraph." If the

status of the appellee were a matter of first impression, we should, though the decision is not free from difficulty, be inclined to hold § 20a inapplicable. But for the reasons about to be stated, we consider the question settled.

The definitions embodied in § 1, paragraphs (2) (a) and (3), embrace the appellee and render it subject to the jurisdiction conferred upon the Commission by the remaining sections, unless excepted by their terms. Interurban electric railways are expressly saved from the requirements of §§ 1 (18) to (21) inclusive, 15a and 20a. The language of the excepting clauses in the first and third instances is identical except for the use in one case of the singular and in the other of the plural number. That applicable to 15a, which is the section providing for fixing rates to yield a fair return, and for recapture, differs in substance from the two others and is: "excluding . . . (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation *or engaged in the general transportation of freight. . . .*"

As indicated in the *Piedmont* case, *supra,* the phrase "interurban electric railway" may not in all circumstances be susceptible of exact definition. The Commission has realized the difficulty. In its 35th annual report, for 1921, this was said (p. 21):

"Under the law as it now stands, we have no jurisdiction over the issuance of securities of a 'street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation.' Certain electric railways independently operated are engaged in the general transportation of freight in interstate commerce in addition to the transportation of passengers. The use of electricity as motive power for railways is rapidly increasing. Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. Under Section 15a

of the act we are given authority to include in groups of carriers for rate-making purposes such interurban electric lines as are engaged in the general transportation of freight. It seems desirable that Section 20a of the interstate commerce act be so amended as to indicate definitely the classes of electric railway companies subject to that section."

The recommendation was repeated in the annual reports for 1923, 1924 and 1925.[3] In the report for 1928 (p. 83) the following appears:

"That the present exemption provisions of paragraph (22) of section 1, paragraph (1) of section 15a, and paragraph (1) of section 20a, applicable to electric railways, be amended by substituting provisions exempting all electric railways except such as interchange standard freight equipment with steam railways and participate in through interstate freight rates with such carriers; provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission, after notice and opportunity to be heard, that they are not affected with an important national interest so far as the provisions in question are concerned."

See also the 1929 report, p. 89.

The position heretofore taken by the Commission with respect to the appellee is of great significance. In 1923 a brief was filed with the Commission supporting the view that § 15 (a) had no application to the company because it was an interurban electric railway not operated as part of a general steam railroad system of transportation and not engaged in the general transportation of freight. The Director of the Bureau of Finance replied that unless later advised to the contrary the carrier would

[3] Annual Report of Interstate Commerce Commission for 1923, p. 70; Report for 1924, p. 78; Report for 1925, p. 72.

not be required to file returns under the section. No such advice has ever been communicated to the appellee.

The District Court finds that since July, 1916, when the Chicago, North Shore and Milwaukee Railroad, the immediate predecessor of appellee, acquired the properties, the appellee and its predecessors have issued securities aggregating $71,327,200 par value. Of this total $61,662,600 have been issued since March 1, 1920, the date of the incorporation of § 20a into the Interstate Commerce Act. All of these securities were issued upon the authority and with the approval of the regulating commissions of Wisconsin and Illinois, and of those issued since March 1, 1920, $38,935,608 were outstanding in the hands of the public on April 30, 1931. The required annual reports filed by the appellee with the Commission have shown all securities issued since March 1, 1920, and in compliance with the rules have stated that these issues were each approved by the state commissions.

With this knowledge of the situation the Commission never, until it requested the Attorney General to institute the present suit, by word or act intimated that the procedure followed by the railroad was illegal or the state regulatory bodies without jurisdiction. It would be difficult indeed to conceive a clearer case of uniform administrative construction of § 20a as applied to this company. Conceding that the proper classification of the railway is not free from difficulty, all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commn.,* 200 U. S. 361, 401; *Logan* v. *Davis,* 233 U. S. 613, 627; *Brewster* v. *Gage,* 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Interstate Commerce Commn.* v. *New York, N. H. & H. R. Co.,* 287 U. S. 178.

The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under § 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation.

Affirmed.

INTERSTATE COMMERCE COMMISSION ET AL. *v.* OREGON-WASHINGTON RAILROAD & NAVIGATION CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 23. Argued November 8, 9, 1932.—Decided January 9, 1933.

1. In a suit to set aside an order of the Interstate Commerce Commission requiring a railroad extension, that Commission and commissions representing interested States, having intervened to defend the order, are entitled as "aggrieved parties" to appeal to this Court from a decree annulling it, even though the United States, as represented by the Attorney General, will not join in the appeal. Urgent Deficiencies Act, Oct. 22, 1913; Commerce Court Act, §§ 2, 5. P. 22.
2. Upon such an appeal a decree may be obtained enforcing the rights of the United States. P. 25.
3. An official may be designated to stand in judgment on behalf of the United States so that a decree against him binds the Government; Congress had power, in naming the United States as the defendant in such suits, to give the Commission, and others having an interest, authority to litigate the validity of such orders, and, regardless of joinder by the Attorney General, to obtain by appeal a review effective as to the United States. P. 27.
4. That part of par. 21 of § 1 of the Interstate Commerce Act which authorizes the Commission to require a carrier "to extend its line

or lines," provided the Commission find that such extension is reasonably required in the interest of public convenience and necessity and that the expense involved therein will not impair the ability of the carrier to perform its duty to the public, refers to extensions within the carrier's undertaking and does not empower the Commission to compel the building of what is essentially a new line to reach new territory which the carrier never agreed to serve. Pp. 35 *et seq.*

5. This provision of par. 21 is in contrast with that part of par. 18 of the same section which provides that no company shall undertake "the extension of its line, or the construction of a new line of railroad," without having first obtained a certificate of present or future public convenience and necessity from the Commission. P. 36.
6. The Act distinguishes between three sorts of facilities,—new lines, or extensions, voluntarily undertaken (§ 18); compulsory extensions within the area which the carrier has bound itself to serve (§ 21); and spur, industrial, team, switching or side tracks located wholly within one State, which are left within state control (§ 22). Pp. 38–40.
7. A statute should be construed, if fairly possible, so as to avoid grave doubt of its constitutionality. P. 40.
8. Having charter authority to build a line of railroad does not commit the company to an obligation to build. P. 43.

47 F. (2d) 250, affirmed.

APPEAL from a decree of the District Court of three judges which set aside, and enjoined the execution of, an order of the Interstate Commerce Commission requiring the Oregon-Washington Railroad & Navigation Co., (a subsidiary of the Oregon Short Line, which in turn is a subsidiary of the Union Pacific Co.,) to build an "extension" from a point on its railroad in Oregon, 185 miles across an arid, sparsely settled and unproductive country, to a point on one of the lines of the Southern Pacific System, west of the Cascade Range. The report of the Commission is 159 I. C. C. 630. See also 111 *id.* 3.

Mr. J. Stanley Payne, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission, appellant.

Under the applicable statutes, this Court has jurisdiction over, and appellants have the right to prosecute, this appeal. The provisions of the Urgent Deficiencies Act and so much of the Commerce Court Act as remains in force now appear in the U. S. Code, as amended by Supplement V, in Title 28, §§ 41 (27) and (28), 43, 44, 45, 45a, 46, 47, 47a and 48.

The provision giving the Commission and parties in interest the right to " continue said suit or proceeding unaffected by the action or non-action of the Attorney General," together with the provision for direct appeal, seems clearly to give the Commission the right to pursue the case to its final determination in this Court. For the history of the legislation see: H. R. 17536, 61st Cong., 2d Sess., H. Rep. No. 923, p. 158; 45 Cong. Rec., Pt. V, p. 5524; Sen. Rep. 355, Pt. 2, pp. 5, 6, 7, 61st Cong., 2d Sess.; 45 Cong. Rec., Pt. 5, pp. 4604, 4607; *id.* Pt. 6, pp. 6406, 6445, 6451.

Paragraph 21 confers jurisdiction upon the Commission in reference to two distinct matters—car service facilities and extensions of lines. The provision relating to extensions is subject to both limitations prescribed in the proviso. The provision relating to car service facilities is subject only to the second limitation.

The Commission interpreted § 1 (21) in Cooke *v.* Chicago, B. & Q. R. Co., 66 I. C. C. 452; Gunderson *v.* Chicago, M. & St. P. Ry. Co., 91 I. C. C. 702; Clarkston Chamber of Commerce *v.* Northern Pac. Ry. Co., 160 I. C. C. 752; and Public Service Commission of Wyoming *v.* Chicago, B. & Q. R. Co., 185 I. C. C. 741.

Although the Commission has been requested repeatedly to exercise the power conferred by § 1 (21), the case at bar is the only case in which it has found that the facts justified the exercise of the authority. This Court, like the Commission, has given the language its natural import. *Railroad Comm'n of California* v. *Southern Pac.*

Co., 264 U. S. 331; *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244; *Atchison Ry.* v. *Railroad Comm'n*, 283 U. S. 380; *Interstate Commerce Comm'n* v. *U. S. ex rel. Los Angeles*, 280 U. S. 52.

The plain import of its terms is confirmed when it is read with paragraphs 18, 19, 20, and 22. The first three confer upon the Commission a negative or restraining power. Paragraph 22 restricts the power conferred. It makes it clear that the authority of the Commission over voluntary constructions and over compulsory extensions, applies to extensions which are more than merely spur, industrial, team, switching, or side tracks. See *Railroad Comm'n* v. *Southern Pac. Co.*, 264 U. S. 331. Cf. also § 6 (13).

The provisions of paragraphs 18–22 of § 1 and paragraph 13 of § 6 are not to be confused with the power conferred by paragraph 9 of § 1 authorizing the Commission to require by order the construction, installation, and operation of switch connections. Cf. *C., C., C. & St. L. Ry. Co.* v. *United States*, 275 U. S. 404; *United States* v. *New York Central R. Co.*, 272 U. S. 457.

The extensions mentioned in paragraph 21 are such as the Commission has authorized in many cases under pars. 18–20.

The length of the extension alone is not important. A relatively long extension in the open country might not cost as much to construct as a very short one in a congested metropolitan area where property values are high. It would obviously have been impracticable for Congress to attempt to prescribe legislatively the definite maximum mileage of an extension which the Commission might require. No such limitation was needed, for the conditions that were prescribed operate as definite limitations.

An interpretation of the compulsory extension provision broad enough to embrace such an extension as here

ordered is in strict conformity with the Commission's recommendation for enactment.

The facts developed in the exhaustive record before the Commission demonstrate the public convenience and necessity for the extension, and fully justify the order requiring its construction. The extension will aid in more adequately serving and developing a large area in eastern and central Oregon that is now either wholly unserved or inadequately served by existing railroad lines. This area is probably the largest within the United States that is without rail facilities. The construction of the extension would provide shorter routes which would make it possible to ship perishable commodities to available markets. Joining the lines of the Southern Pacific on the west with those of the Union Pacific on the east, the extension would afford a new, shorter, more expeditious and more economical transcontinental route between western Oregon and the East. With the resulting shorter routes to Pacific Coast markets, the extension across central Oregon would be of great advantage to southwestern Idaho. This section looks principally to California for markets.

The ultimate aim of the extension is to afford more adequate transportation to the State of Oregon as a whole. The Union Pacific system, of which the O.-W. R. & N. is a dependent part, is one of the principal carriers to which the State must look for its transportation service. The Union Pacific has many miles of main and branch lines in Oregon. By these it holds itself out to serve those portions of Oregon that are tributary thereto. Much of its present traffic could be better served with the aid of the extension.

The proposition that a carrier is under no duty with respect to traffic originating at points not directly served by its lines is erroneous. *Wisconsin, M. & P. R. Co.* v. *Jacobson,* 179 U. S. 287.

If Congress is without power to require a carrier to construct this extension, then it would seem that it is without power to require the construction of a track connection between the main lines of interstate carriers, *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U. S. 244; *Wisconsin, M. & P. R. Co.* v. *Jacobson, supra,* or the construction of a switch connection with a lateral branch line of railway, *C., C., C. & St. L. Ry. Co.* v. *United States,* 275 U. S. 404, or the construction of a connecting track to the dock of a water carrier, *United States* v. *New York Central R. Co.,* 272 U. S. 457, or even the establishment of through routes and joint rates, *United States* v. *Express Co.,* 265 U. S. 425, 435; *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, 142, Cf. *Minneapolis & St. L. Ry. Co.* v. *Minnesota,* 186 U. S. 257, and Missouri & I. C. Co. *v.* Illinois Central R. Co., 22 I. C. C. 39, 44–46. For in all such instances the carrier would be required to engage in a new service which it had not theretofore professed to render.

Moreover, for many years the O.-W. R. & N. held a franchise to build the extension which is here ordered. Although this permissive franchise did not compel the company to build the line, nevertheless the fact that it held this franchise was no doubt sufficient to discourage any other carrier from attempting to enter the territory. In this broad sense, at least, the Union Pacific has " occupied the territory."

The principle applicable in cases involving extensions of service by such public utilities as have been given franchises for definite territories, *New York & Queens Gas Co.* v. *McCall,* 245 U. S. 345; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Comm'n,* 173 Cal. 577, is not applicable to extensions of railroad lines. Railroads are not given franchises conferring upon them the right to serve exclusively any particular territory, district, or community. Hence,

no extension of a railroad line could under any circumstances be required if it were necessary to find, as a condition precedent, that the railroad held an exclusive franchise to serve the territory. Nevertheless the company owes a duty to the territory through which it has been given a franchise to construct its line. The Transportation Act places a duty upon railroads, in the interest of public convenience and necessity, to adequately serve and develop the territory through which their lines run.

The provision for extensions is one of many provisions of Transportation Act, 1920, *in pari materia,* having for their ultimate purpose the development and maintenance of an adequate national transportation system. The provision is therefore a valid exercise of the plenary power of Congress to regulate interstate commerce.

The extension ordered is such an enlargement of transportation facilities as is contemplated by the Act, provision for which is made by rate adjustment to yield revenue sufficient to provide a return fixed at a level which takes into consideration the necessity of providing adequate national transportation service.

The requirement, considered with regard to the interests both of the carrier and of the public, is reasonable and appropriate, meets the test of constitutional validity laid down by this Court in cases which reviewed state commission orders, and does not take the carrier's property. *Atchison Ry.* v. *Railroad Comm'n,* 283 U. S. 380; *Wisconsin, M. & P. R. Co.* v. *Jacobson,* 179 U. S. 287; *Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 530; *Grand Trunk Ry.* v. *Michigan Railroad Comm'n,* 231 U. S. 457, 469–470; *Alabama & V. Ry.* v. *Jackson & E. Ry.,* 271 U. S. 244; *Chicago & N. W. Ry. Co.* v. *Ochs,* 249 U. S. 416; *Phoenix Ry. Co.* v. *Geary,* 239 U. S. 277; *Minneapolis & St. L. R. Co.* v. *Railroad Comm'n,* 193 U. S. 53; *Missouri Pac. Ry. Co.* v. *Kansas,* 216 U. S. 262; *N. & W. Ry. Co.* v. *Public Service Comm'n,* 265 U. S. 70.

It was affirmatively shown that a large traffic is available for movement over the extension ordered, and that the construction of it will create additional traffic; and the Commission found that the extension would be a valuable asset to the Union Pacific system. The validity of the order is not dependent upon the profitableness of the extension, considered separately from the remainder of the transportation system of which it will form a part.

Messrs. William C. McCulloch and *James M. Thompson,* with whom *Mr. I. H. Van Winkle,* Attorney General of Oregon, was on the brief, for the Public Utilities Commissions of Oregon and Idaho, appellants.

Mr. Arthur C. Spencer, with whom *Messrs. Henry W. Clark* and *James M. Souby* were on the brief, for the Oregon-Washington Railroad & Navigation Co., appellee.

Mr. Ben C. Dey, with whom *Messrs. Guy V. Shoup* and *Alfred A. Hampson* were on the brief, for the Southern Pacific Co., intervener-appellee.

Mr. Justice Roberts delivered the opinion of the Court.

The Public Service Commission of Oregon filed a complaint with the Interstate Commerce Commission, against eleven railroads, including the Oregon-Washington Railroad & Navigation Company, asserting they had failed and refused to provide reasonable and adequate transportation facilities to an area of some 33,000 square miles within the State. The prayer was that one or more of them be required to extend or build a line of railroad from a point near Crane, to Crescent Lake, or some adjacent point. Several municipalities and commercial organizations, and the Public Utilities Commission of Idaho, were given leave to be heard in support of the petition. The respondents answered that public necessity and con-

venience would not be served by the proposed construction and that there was no authority in law for granting the requested relief. After hearing, the Commission entered an order requiring Oregon-Washington Railroad & Navigation Company to "extend its line of railroad, now terminating near Burns, Oreg., from, or near, a station thereon designated as Crane, Oreg., to a connection with the Cascade line of the Southern Pacific Company at, or near, Crescent Lake, Oreg." [1]

The Oregon-Washington Company thereupon filed a petition against the United States, in the District Court, to set aside, annul and suspend the order and to enjoin the Government, its officers and agents, from enforcing the Commission's mandate. The Southern Pacific Company intervened in support of the petition, and the Interstate Commerce Commission, the Public Utilities Commissioner (the successor of the Public Service Commission) of Oregon, and the Public Utilities Commission of Idaho, were permitted to intervene, and participated in the defense of the suit. From a decree setting aside the order and granting an injunction the three intervening defendants appealed. The United States refused to join in the appeal, and a summons and severance was duly served upon it. The appellees insist that if we should reverse the decree as to the appellants the United States would remain bound by its terms; that we may not pass upon the merits in the absence of the Government, a necessary party, and should therefore dismiss the appeal for want of jurisdiction. We shall first dispose of the question thus presented.

Before the Commerce Court was established suits to enjoin orders of the Commission were brought against that body, and appeals from the judgments rendered were

[1] 159 I. C. C. 630. The order contained ancillary provisions which it is unnecessary here to recite.

prosecuted by it in its own name.[2] The Act of June 18, 1910,[3] created the Commerce Court, defined the jurisdiction and regulated the procedure of that tribunal, and authorized a direct appeal to this court. The Urgent Deficiencies Act,[4] under which this suit was instituted, abolished the Commerce Court, transferred the jurisdiction theretofore vested in it to the several district courts, and made the procedure therein the same as that previously followed in the Commerce Court. Existing statutes were repealed only insofar as inconsistent with the new jurisdiction conferred on district courts.[5]

Section 4 of the Commerce Court Act directed

"That all cases and proceedings in the commerce court [now District Court] which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the commerce court [District Court] whenever, though it has not been made a party, public interests are involved."

Other sections permit the Commission, or complainants before the Commission, or any party in interest in a proceeding before that body, or any other interested party, to become parties to a suit involving the validity of an order of the Commission; forbid the Attorney General

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[2] *Interstate Commerce Commn.* v. *B. & O. R. Co.*, 145 U. S. 263; *Interstate Commerce Commn.* v. *C., R. & P. Ry. Co.*, 218 U. S. 88; *Interstate Commerce Commn.* v. *Goodrich Transit Co.*, 224 U. S. 194; *Interstate Commerce Commn.* v. *B. & O. R. Co.*, 225 U. S. 326.

[3] Chap. 309, 36 Stat. 539, §§ 1–6.

[4] Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220. See U. S. C., Tit. 28, §§ 47 and 48.

[5] Those portions of the Commerce Court Act which remained in force, and the new provisions substituted for those superseded, may be found in the U. S. Code, Tit. 28, §§ 41 (27) and (28), and 43–48, inclusive, as amended by Supplement V, Tit. 28, §§ 41 (27), 44, 45, 45a, 46, 47, 47a and 48.

to control, dispose of, or discontinue the suit against the objection of anyone so becoming a party; allow the intervenor to prosecute, defend or continue the proceeding unaffected by the action or non-action of the Attorney General; and accord to any aggrieved party the right of appeal to this court.[6]

The Commission, by entering its appearance in the District Court, became a party defendant, as did the two state utilities commissions. The court below decided adversely to all these bodies. They are aggrieved parties granted a review by § 2; the Interstate Commerce Commission for the reason that the decree set aside its order,

[6] Section 5 enacted "That the Attorney-General shall have charge and control of the interests of the Government in all cases and proceedings in the commerce court, and in the Supreme Court of the United States upon appeal from the commerce court; . . . *Provided,* That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party;" [for "Commerce Court" read "District Court"]. And further: "That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this Act, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney-General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney-General of the United States therein."

By section 2 it was ordained: "That a final judgment or decree of the commerce court [District Court] may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. . . ."

the state commissions because they officially represent the interest of their states in obtaining adequate transportation service.

Though the present appellants were parties in the court below, as of right, and not by grace or favor, were aggrieved by the decree, and have a right of appeal, the appellees maintain this court may not hear and decide the case in the absence of the United States. While admitting intervenors' right to be heard as to the substance of the decree the District Court entered against the Government, the appellees assert the appellants have no standing in this court to ask modification or reversal of the decree as it affects the United States when the latter seeks no review.

We may concede that, unless the Act so directs, a reversal at the suit of the appellants will not affect the judgment as respects the United States. The injunction will stand as against the United States and its agents, because unchallenged by that defendant. Summons and severance does not cure the defect, for though the United States has been severed by that process, if this court should reverse the decree as to other parties, but allow it to remain in force against the Government, the appeal would be a vain thing. The appellants, however, contend that the legislation creates an exception to the ordinary rule governing our jurisdiction. They assert that the purpose of Congress is to permit proper parties in the District Court to carry the litigation to a final conclusion in this court.

The statute clearly provides that in the trial of the case the intervening parties shall not be foreclosed by the action or nonaction of the Attorney General. Even though he concludes not to defend, they are permitted to do so. If notwithstanding their defense a decree goes against them and the United States, can it have been the purpose of Congress that the failure of the Attorney

General to prosecute an appeal concludes such intervenors? We think not. So to hold would render meaningless and superfluous § 2 of the act, which permits a review of the action of the court below "if appeal to the Supreme Court be taken by an aggrieved party . . ." The section can be given effect only by holding that an aggrieved party may challenge the decree not only to vindicate his own rights, but those of the United States as well. Congress evidently intended the Attorney General should represent and protect the interests of the United States as such, but should not at any stage control the litigation against the objection of the other parties and to their disadvantage; and that any aggrieved party might obtain a decree which the United States could have secured had it defended the action or prosecuted an appeal.

This conclusion is confirmed by comparing the form of § 5 of the Commerce Court Act as first presented and as subsequently altered by amendment. The section as originally introduced precluded the Commission and its attorneys from taking any part in suits brought to review its orders. This provision was stricken out in committee. The clause giving the Attorney General control of such cases was also modified. The stated purpose of the amendments was to prevent his forestalling the Commission or any other interested party desiring to litigate the questions involved.[7] The movers of the amendments which were ultimately incorporated in the act insisted that a party affected by the order should have the right to follow the case "through the Commerce Court and Supreme Court"; and that "A party litigant should always have the right to follow his case to final judgment."

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[7] House Report No. 923, 61st Cong., 2nd Sess., p. 158; Cong. Rec., Vol. 45, Part 5, p. 5524. Senate Report 355, Part 2, pp. 5, 6, 7, 61st Cong., 2nd Sess. Cong. Rec., Vol. 45, Part 5, pp. 4604, 4607; Part 6, pp. 6406, 6445, 6451, 6462.

An official may be designated to stand in judgment on behalf of the United States, so that a decree against him binds the Government.[8] As has been stated, this was the accepted practice in suits by and against the Commission prior to the adoption of the Commerce Court Act. The new legislation might have left the rights of the United States arising out of orders of the Commission to be thus determined in the court of first instance and on appeal. But Congress had undoubted power, in naming the United States as the defendant in such suits, to give the Commission, and others having an interest, authority to litigate the validity of such orders, and, regardless of joinder by the Attorney General, to obtain by appeal a review effective as to the United States. The act plainly exhibits this purpose. Should a reversal be required the mandate may vacate the judgment against the United States though it did not join in the appeal. We think that review may not be denied for want of a necessary party, and we are therefore brought to a consideration of the merits of the cause.

The Oregon Short Line owns all of the capital stock of the Oregon-Washington Company, and the Union Pacific owns all the capital stock of the Short Line; these three companies, with the Los Angeles and Salt Lake, make up the Union Pacific System. The main lines of the Union Pacific Railroad extend from Council Bluffs, Iowa and Kansas City, Missouri, to Ogden, Utah. The Short Line runs from a connection with Union Pacific at Granger, Wyoming, to Huntington, Oregon. From Huntington the Oregon-Washington follows a northwesterly direction to the Columbia River, thence along the south bank of that stream to Portland. Branches extend southerly and westerly from the main line between Huntington and Portland, east of the Cascade Mountains, but the company

[8] See *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387–388; *Johnson* v. *Fleet Corporation*, 280 U. S. 320, 326–327.

operates no lines south of Portland and west of the Cascade Range. Crane, just beyond which the required extension would begin, is in eastern Oregon on a line known as the Ontario-Burns Branch, which connects with the Oregon Short Line at Ontario, forty miles south of Huntington, and runs westward to Crane, 127 miles, and thence northwest 30 miles to Burns. The extension would run west from Crane across central Oregon a distance of 185 miles to Crescent Lake, which is on the Cascade Line of the Southern Pacific. The latter operates lines from Ogden, Utah, and New Orleans, Louisiana, to San Francisco, and from Roseville, California, on the Ogden-San Francisco line, to Sacramento and Portland. To Portland it has two alternate main lines between Black Butte, California and Eugene, Oregon, that on the west, the original main line, passing through Medford, Grants Pass and Roseburg, and a newer line to the east, known as the Cascade or Natron cut-off, passing through Klamath Falls, Kirk, Chemult, Paunina, Crescent Lake, the western terminus of the required extension, and Natron.

Prior to 1913 the railways of the Union Pacific and Southern Pacific were jointly operated under control of the Harriman interests. A cross-state line was then planned to run from Malheur Junction, just south of Ontario, Oregon, to Eugene. The Natron cut-off between Eugene and Weed was also in contemplation. In 1911 construction of the cross-state road was begun at both ends. 73.6 miles were completed from Ontario to Juntura; and eastward from Eugene 40 miles were built as far as Oakridge. Work on the Natron cut-off was begun and proceeded through Klamath Falls to Kirk, 127 miles. The line would have joined with the Natron cut-off at Odell Lake, just north of Crescent Lake, the present proposed terminus.

In January, 1913, this court, in *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 470, declared control of South-

ern Pacific by Union Pacific through stock ownership offensive to the Sherman Anti-Trust Act, and the combination was dissolved. All work on the Oregon projects ceased and was not resumed, except that in 1915 the Ontario-Juntura line was extended to Riverside, 92.7 miles, and in 1916 to Crane, an additional 34 miles.

After the passage of the Transportation Act the Oregon Public Service Commission applied to the Commission under paragraph 21 of § 1 of the Interstate Commerce Act as amended, asserting that the cross-state line was needed and asking that some one or more of the respondents named in the complaint be ordered to build it; and further requesting that the Commission require completion of the Natron cut-off and order certain other railroad construction in central Oregon. The Southern Pacific voluntarily assumed the completion of the Natron cut-off and to that end was granted a certificate of public convenience and necessity under § 1 (18). The Oregon-Washington also applied for and obtained a certificate for construction of the branch from Crane to Burns. Other applications by various carriers were granted. The Commission then dismissed the complaint, holding that the record was not adequate to support the requested order.[9]

On May 24, 1927, the Oregon Commission filed the present complaint against eleven railroads, including the Oregon-Washington, the Oregon Short Line, the Southern Pacific, and others serving the State, and also the Union Pacific. The failure and refusal to provide railroad facilities to a large area of central Oregon was the gravamen of the complaint. Consequences of the neglect to build this line were enumerated as prevention of the development of a vast area, hindrance of exploitation of the natural resources of the State, unreasonably circuitous routes, with consequent delays, and car shortages, all causing

[9] Construction of Railroad Lines in Eastern Oregon, 111 I. C. C. 3.

losses to the people of Oregon. The relief prayed was an order that one or more of the respondents be required to construct the cross-state line, from Crane to Crescent Lake.

This line, 185 miles in length, after leaving Crane would traverse about 20 miles of swampy area and 15 miles of alkali flats, and would then pass over the Great Sandy or High Desert for 115 miles. The region is in part sparsely settled and in part wholly uninhabited, and contains no towns except Crescent and Crescent Lake, at the western extremity, neither of which has a population of 100. There is no town within 20 miles north or south of the proposed line. Certain of the lands have possibilities of cultivation through irrigation, and the evidence for complainants is that if the railroad were built such activity would be stimulated. There seems to be no dispute that traffic to be obtained from the region will fall far short of supporting the line. The appellants are of opinion that sufficient traffic for this purpose may be secured by diverting to the new line freight originating west of the Cascade Range, and now moving east on the Southern Pacific through Ogden. In the total haul between Crescent Lake and Granger, Wyo., the route via the cross-state line would be some 214 miles, or 11%, shorter. Neither the Oregon-Washington nor any other portion of the Union Pacific System serves the territory south of Portland and west of the Cascade Mountains. The Southern Pacific lines cover this area. Freight may, however, be routed either over the Southern Pacific via Ogden, or over the Union Pacific via Portland and Granger, Wyoming. The latter furnishes a reasonably short route with adequate and quick service. Inasmuch, however, as the freight originates in Southern Pacific territory, very little is sent over the Union Pacific, the Southern Pacific routing it so as to obtain the long haul. The contention is that even if the proposed line were constructed the same condition

would obtain and that the Union Pacific System could get little or none of the traffic from western Oregon, unless in addition to the cross-state line the Oregon-Washington should build across the Cascade Range into the agricultural counties now served by the Southern Pacific.[10]

The Union Pacific System, composed as above stated, has a total trackage of 15,045.17 miles. The required extension would add 1.2 per cent. to the existing mileage, and can be constructed at a cost of between $9,900,000 and $11,700,000. The finding of the Commission is that operation of the line will not seriously affect the ability of the Union Pacific System adequately to serve the public. Recognizing that the Oregon-Washington has not the necessary funds, and perhaps cannot borrow them, the order permits the financing of construction by advances from the Union Pacific Railroad, which is found to be in position to make them. Union Pacific and the Oregon-Washington consider the venture unprofitable and wasteful, and have refused to make the investment. In the Commission's judgment, the railroad, if constructed, while not profitable at first, will ultimately obtain valuable traffic for the Union Pacific System, will aid the Ontario-Burns branch, which now operates at a serious deficit, and consequently prove a remunerative investment. The court below held,[11] as we must, that these findings, based upon evidence, may not be disturbed.

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[10] The court below found: "5. The proposed line in large part would extend through a sparsely settled desert waste which the petitioner has not undertaken or professed to serve. One of the dominant purposes of the order complained of was to provide for the construction of a new east and west line of railroad, whereby lumber traffic originating hundreds of miles from petitioner's present line may find a shorter route to eastern markets, and traffic from southwestern Idaho may find a shorter route to northern California points."

[11] The court below said: "If we were at liberty to review this testimony independently of the findings made by the commission, we might find no little difficulty in reaching the same conclusion." 47 F. (2d) 252.

The appellees' challenge of the order as beyond the power of the Commission was sustained by the District Court, and this decision is assigned as error. The Commission thought its authority to order extension of existing lines was without limitations, save the two which are expressed in paragraph 21,—that public necessity and convenience require the construction, and that the building and operation of the road will not impair the ability of the carrier to render adequate public service. Having determined that the requested extension complied with both conditions the Commission ordered the road built.

Prior to the adoption of the Transportation Act, 1920, the Commission had no authority to authorize or to compel extensions of existing lines of railroad. Such power as existed in that behalf rested in the States. In a number of cases this court passed upon and defined the authority of a State to require extensions of existing service and facilities.[12] Orders made were attacked as compelling the companies, against their will and judgment, to devote property to the public service without compensation, con-

[12] *Wisconsin, Minnesota & Pacific R. R.* v. *Jacobson,* 179 U. S. 287; *Michigan Central R. Co.* v. *Michigan R. R. Commn.,* 236 U. S. 615 (requirement of track connections and facilities for interchange of traffic); *Minneapolis & St. Louis R. Co.* v. *Minnesota,* 193 U. S. 53 (erection and maintenance of depots); *Missouri Pac. Ry. Co.* v. *Kansas,* 216 U. S. 262; *Atlantic C. L. R. Co.* v. *North Carolina Corp. Commn.,* 206 U. S. 1; *Chesapeake & O. Ry.* v. *Public Service Commn.,* 242 U. S. 603 (orders relating to passenger service to be rendered and train schedules to be maintained); *Phoenix Ry. Co.* v. *Geary,* 239 U. S. 277 (requirement that a street railway company double-track a portion of its lines); *Chicago & N. W. Ry. Co.* v. *Ochs,* 249 U. S. 416 (extension of a sidetrack as a public track and as part of the railroad's property and system for the service of a private plant); *Norfolk & Western Ry. Co.* v. *Public Serv. Commn.,* 265 U. S. 70 (requirement that railroad provide certain facilities for removal of freight from its premises).

trary to the guaranty of due process. They were sustained, however, upon the express ground that the railroads had undertaken the service and must supply facilities adequate and reasonably necessary to its performance. The requirements were found not to involve the rendition of a new or different service from that to which the owners had agreed when they dedicated their property to a public use. Where, however, the State's mandate involved the rendition of a service beyond the agreement of the carrier, the order was annulled.[13]

The regulations adopted by the States were not uniform; statutory authority to order additions and extensions existed in some States and not in others. Congress was informed of this condition, and urged to exercise the federal power to promulgate a uniform system of regulation of interstate commerce.[14] Legislation to effectuate this purpose was enacted.

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[13] *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403, 417; *Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510; compare *Northern Pac. Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595.

[14] See 33d Annual Report of the Interstate Commerce Commission, 1919, p. 3, where the following quotation is given from a statement furnished by the Commission to the Senate Committee on Interstate Commerce:

"In some of the States the State officers are authorized to require such extensions, but in such cases they are necessarily primarily concerned with, if not confined to, a consideration of State traffic. Some of the States have not vested such authority in any State official. Ordinarily such extensions would be desired for the purpose of facilitating or making possible the transportation of interstate traffic. The desirability of uniformity is obvious. The exercise of Federal authority should not depend upon whether or not the State has acted and should not be different as to the State that has legislated on the subject and the State that has not so legislated. It therefore seems desirable that the Congress should exercise its jurisdiction in this regard in a plenary way and that where such extensions are desired in connection with the movement of presently existing or prospective

By act of May 29, 1917,[15] new paragraphs were added to § 1 of the Interstate Commerce Act; and by the Transportation Act, 1920,[16] these were amended and others inserted. As a result paragraphs 10 to 17 inclusive, all dealing with car service, were given their present form. Paragraphs 18 to 20 inclusive first appear in the Transportation Act. They regulate voluntary extensions of lines or building of new lines, require a certificate of convenience and necessity therefor, and prescribe the procedure for obtaining it. The paragraph with which we are here concerned, numbered 21, was also added by the Transportation Act. It is:

"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 for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues,

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interstate traffic and the carrier is unwilling to construct them, it may, upon proper showing and after full hearing, be required to do so by the Federal tribunal."

Compare *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244, 248, 250.

[15] Chap. 23, 40 Stat. 101.

[16] Chap. 91, § 402, 41 Stat. 456, 476.

which shall accrue to the United States and may be recovered in a civil action brought by the United States."

The appellants maintain that if the Commission finds the conditions stated in the proviso exist, the power given to compel a carrier " to extend its line or lines " is unlimited and the way is open for an order to extend for any distance, at any cost, for the purpose of developing virgin territory hitherto unreached by railroads, or for supplying competition in a remote region served by other carriers.

The phrase " and to extend its line or lines " is part of a single sentence committing to the Commission the power to require carriers to provide safe and adequate facilities for car service as defined in the act. The reasonable conclusion is, therefore, that the extensions mentioned have to do with car service, and are not intended to create a wholly independent subject of jurisdiction. In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, if Congress were intending to grant to the Commission a new and drastic power to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, the intention would be expressed in more than a clause in a sentence dealing with car service. As said in *Interstate Commerce Commn.* v. *Los Angeles,* 280 U. S. 52, 70:

" If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act."

Moreover, if the purpose were that claimed by the Commission support should be found in legislative history. But none has been called to our attention. In the

report to Congress for 1919 the Commission reiterated an outline of the policies previously suggested for legislative action in view of the approaching termination of federal control.[17] No intimation is given that carriers should be required to build into territory they had not undertaken to serve. The scope of the recommendation was not enlarged in the testimony before the committee of the Senate having the Transportation Act in charge.[18]

The terms of paragraph 18, by contrast, throw light on the meaning of paragraph 21. The former presupposes voluntary action by a carrier, and provides that no company shall undertake "the extension of its line of railroad, *or the construction of a new 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 and operation thereof. The difference of phraseology in the two paragraphs emphasizes the distinction between extensions and new lines. The diversity is significant.

The purpose of Congress in enacting paragraph 18, as repeatedly explained by this court, was that though a carrier should desire to extend existing facilities or to construct new ones in territory not previously served, the free

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[17] In that report the Commission says, at p. 2:

"3. Limitation of railway construction to the necessities and convenience of the Government and of the public and assuring construction to the point of these limitations. . . . The thought underlying the second part of this suggestion is that a railroad having been permitted, by public franchise and the powers that go with it, to build into a given territory, it should be required to properly serve and develop that territory. And in developed territory it is important to provide for the extension of short branch or spur lines or spur tracks to communities and industries that should be served and that can furnish sufficient traffic to justify such extension."

[18] Hearings before the House Committee on Interstate and Foreign Commerce, in H. R. 4378, Vol. 1, p. 53, 66th Cong., 1st Session.

exercise of discretion should not be permitted, but the Commission must be convinced that the proposed venture would not drain the railroad's resources and disable it from performing those duties of public service under which it then rested, with consequent detriment to the public in the matter of service and rates.[19] If a railroad company can prove that the proposal either presently or in the reasonably near future will be self-sustaining, or so nearly so as not unduly to burden interstate commerce, the Commission may issue a certificate authorizing the proposed line. Paragraph 21, on the other hand, contains no provision whatever for new lines. If the power be as broad as contended by the Commission there seems to be no good reason for the omission. The same principles and the same needs might equally require the building of a new line as the extension of an existing one, unless, indeed, Congress recognized a radical difference between compelling embarkation in a new venture and ordering a mere extension of facilities required as the natural concomitant and complement of those presently used for the rendition of the service to which the carrier has committed itself.

That paragraph 21 refers to the service the carrier has bound itself to render is further emphasized by the omission to make the future public convenience a factor to be considered. A presently existing public need is expressly stated as prerequisite to the compulsory extension of a line. On the other hand, paragraph 18, which covers voluntary construction, conditions approval on present or future convenience or necessity. Congress therefore drew a distinction between what might be permitted and what compelled. These differences in the two sections were

[19] See *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277; *Chesapeake & O. Ry. Co.* v. *United States*, 283 U S. 35, 42. Compare *Transit Commission* v. *United States*, 284 U. S. 360.

disregarded by the Commission, and are overlooked by the appellants.

We are told that if paragraph 22 be given due weight the word "extend" in 21 must have a broader connotation than we attribute. This paragraph enacts that the powers conferred upon the Commission by paragraphs 18 to 21, both inclusive, are not to "extend to the construction or abandonment of spur, industrial, team, switching, or sidetracks, located or to be located wholly within one state. . ." The argument is that if the phrase "to extend its line" be so limited as to apply only to existing commitments of the carrier it becomes synonymous with the matters excluded from the Commission's jurisdiction by paragraph 22, with the result that the one becomes contradictory of the other in the matter of line extension. The practice in the application of paragraphs 18 and 21 negatives this view. In *Alabama & Vicksburg Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U. S. 244, an order of the Commission made under paragraph 21 was sustained which directed the building of a connection between two railroads for interchange of traffic near the outskirts of Jackson, Mississippi. In *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 283 U. S. 380, it was held that under paragraphs 18–21 a certificate was required for the necessary rearrangement of main tracks to comply with an order of the Railroad Commission of California that the interstate carriers entering Los Angeles should combine in the construction and use of a union depot. The court called attention (264 U. S. 345) to the palpable distinction between the main line tracks of an interstate carrier and its spur, industrial, switching or sidetracks, and declared the act exhibited the legislative intent to retain within the control of the Commission any substantial change in the former. Although under the station plan the proposed extensions of lines and main tracks were not great in distance, they involved a new intramural desti-

nation for each railway attended by great expense. As was said, the necessary outlay might well be such as to cripple the railroads and hamper their service. Such an extension was held to require the finding of the Interstate Commerce Commission that the changes would not impair the ability of the carriers to perform their public duties. (Compare *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266.)

From what has been said it is plain that an extension, though something other than a team, switching, industrial or side track, need not, in order to be distinguished therefrom, be a building into a new and previously unserved locality.

The cases above cited, dealing with the powers of state authorities in the matter of extensions of lines and service, furnish a background which must have been in the minds both of the Commission and of the Congress at the time of the passage of the Transportation Act. Those decisions show that due process is denied by requiring service which goes beyond the undertaking of the carrier. Orders for extensions of line were sustained whenever reasonably required in the interest of car service and for interchange of traffic. No extension ordered for the service of new territory had been approved.[20] Wherever the state attempted to enforce a regulation or demand extension of

[20] See the cases passing on state commission orders, cited *supra*, notes 12 and 13; also those cited in note 24, *infra*. The same rule has been applied in the case of other public service corporations. Gas or electric light or telephone companies may be compelled to extend their facilities within the territory covered by the franchises granted them: *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345; *New York ex rel.* v. *Public Service Commn.*, 269 U. S. 244. But they may not be compelled to extend their lines beyond these limits or to serve other communities. *Southern Bell Tel. Co.* v. *Calhoun*, 287 Fed. 381; *State* v. *Pub. Serv. Commn.*, 287 Mo. 522; 229 S. W. 782; *Oklahoma Nat. Gas Co.* v. *Corp. Commn.*, 88 Okla. 51; 211 Pac. 401; *United Fuel Gas Co.* v. *Pub. Serv. Commn.*, 105 W. Va. 603; 144 S. E. 723.

facilities outside the company's undertaking to serve the public, the power was negatived for the very reason that the attempted exercise called on the railroad company for something beyond its agreement.[21]

The Act, reasonably construed, distinguishes between three sorts of facilities,—new lines, or extensions, voluntarily undertaken (¶ 18); compulsory extensions within the area which the carrier has bound itself to serve (¶ 21); and spur, industrial, team, switching or side tracks located wholly within one State, which are left within state control (¶ 22). The second class is distinct from the others and embraces, as the decisions show, a substantial field. But this field is not, as the Commission holds, coterminous with that created by paragraph 18. If it were, power would exist to compel a carrier having lines reaching Chicago and St. Louis, but none connecting those cities, to build a railroad between them. Though in truth a new line, the appellants would call this an extension of the existing lines. If the grant of authority is broad enough to support the order in the present case it would also justify such a hypothetical requirement as we have supposed. We cannot so read the statute, but think the power granted by paragraph 21 is confined to extensions within the undertaking of the carrier to serve, and cannot be extended to embrace the building of what is essentially a new line to reach new territory.

There is another consideration which supports the construction adopted. Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.[22] The views advanced by the appellants, to say the least, raise serious questions in this respect. The rail-

[21] See note 13, *supra;* note 24, *infra.*

[22] *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492; *United States* v. *LaFranca,* 282 U. S. 568, 574.

roads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation.[23] The Transportation Act has not abolished this proprietorship. State courts have uniformly held that to require extension of existing lines beyond the scope of the carrier's commitment to the public service is a taking of property in violation of the federal constitution.[24] The decisions of this court will be searched in vain for the announcement of any principle of Constitutional interpretation which would support the order of the Commission. The statements in *New England Divisions Case,* 261 U. S. 184, and *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, in respect of the purposes of the Transportation Act, on which appellants rely, must be read having in mind the situations there presented and the nature of the orders approved. Care was taken in those cases to demonstrate that the sections upheld did not, in application, go beyond the regulation of rates and the disposition of the excess over a fair return collected by a carrier, and it was shown that no taking or confiscation of property resulted. Those decisions are far from sustaining the validity of an order which seeks to require the investment of millions of dollars in a new venture in undeveloped areas. Such a compulsion imposes upon the carrier and its property "burdens that are not incident to its engagement." *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. at p. 595. The

[23] *Interstate Commerce Commn.* v. *Chicago Great Western Ry. Co.,* 209 U. S. 108, 118; *Missouri Pac. Ry. Co.* v. *Nebraska,* 217 U. S. 196, 206; *Northern Pac. Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595; *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340, 346; *Banton* v. *Belt Line Ry.,* 268 U. S. 413, 421.

[24] *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commn.,* 173 Cal. 577; 160 Pac. 828; *Hollywood Chamber of Commerce* v. *Railroad Commn.,* 192 Cal. 307; 219 Pac. 983; *Public Service Commn.* v. *United Railways & Electric Co.,* 126 Md. 478; 95 Atl. 170; *Morgan Run Ry. Co.* v. *Public Utilities Commn.,* 98 Oh. St. 218; 120 N. E. 295.

construction we adopt makes it unnecessary to pass upon the grave questions of constitutional validity raised by appellants' argument.

It is urged that as the order involved trackage amounting to only 1.2% of that now maintained by the Union Pacific System, the requirement may properly be considered an extension rather than a new line, though a different view might prevail if the Oregon-Washington alone be considered. But whether the order be treated as a command to the Oregon-Washington Company as a separate corporate entity, or as an injunction to the Union Pacific System, it is an attempted exertion of a power not conferred. Assuming, without deciding, that the Commission was entitled to treat the Oregon-Washington company as an instrument of the Union Pacific System, and the required extension, therefore, as one adding only a small percentage to the present mileage of the system, still the purpose is to compel a new investment for the development of a new area at the request and in the interest of the State of Oregon, whose desire is that its natural resources shall be exploited.[25]

Finally it is claimed that however narrowly the power to compel extensions be construed, the order was justified by the facts developed before the Commission. They are said to disclose an undertaking by the Oregon-Washington Company to serve the region in question. Much

[25] The Commission said: "It is urged that Oregon's development, as compared with other States, has been held back and seriously hampered, due to the lack of direct routes to the markets for her products and that the construction of the proposed extension is an important part of anticipated development of adequate rail transportation facilities within the State. The evidence of complainant and defendants brings out clearly and forcibly that no section can develop without transportation. The major portion of the State of Oregon is without adequate transportation facilities and this is particularly true with respect to the portion which would be served by the proposed construction." 159 I. C. C. 635.

is made of the circumstance that when the complaint was filed the company had a charter under which it was authorized to build a line on the location of that which the order describes. The possession of the franchise is said to give rise to an implied agreement to serve the district. The company's having in contemplation the building of the road would in this view render the Commission's action unassailable. But authority to build the line, if the company were so minded, involved no commitment to construct it.[26] Though by appropriate legislation the State might forfeit the charter for non-user, the continued existence of the franchise imposed no obligation to exercise the charter powers. The Oregon-Washington Company chose not to serve the territory which the cross-state line would reach; has not desired and does not now desire to enter upon the project. The possession of a charter which would have made the building of a railroad legal is insignificant as to the company's actual undertaking. Whether the railroad held itself out to serve the region in question must be decided in the light of all the facts. The record demonstrates that the territory to be traversed was one the company had neither actually nor impliedly agreed to serve with transportation facilities.

The decree is *Affirmed.*

MR. JUSTICE CARDOZO, dissenting.

Unable to concur in the decision of the Court, I place upon record without extended argument the grounds of my dissent.

The Transportation Act of 1920 was framed with the design of securing to the United States an adequate and

[26] *Northern Pac. Ry. Co.* v. *Dustin,* 142 U. S. 492, 499, and cases cited; *Bentler* v. *Cincinnati, C. & E. Ry. Co.,* 180 Ky. 497; 203 S. W. 199; *State* v. *Public Service Commn.,* 287 Mo. 522; 229 S. W. 782. Compare *Railroad Commission* v. *Eastern Texas R. Co.,* 264 U. S. 79, 85.

efficient system of railroad transportation. Everything contained in it with reference to extensions, voluntary and involuntary, is tributary to that end, and unless related thereto, is misconceived and misapplied. On the one hand, the carriers are to be permitted to make voluntary extensions of their lines, but only with the consent of the Commission, lest waste may otherwise ensue. *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 277, 278. On the other hand, they are made subject to a correlative duty, if so ordered by the Commission, to build extensions, even though unwillingly, when transportation will otherwise be inefficient or inadequate. The limits of this duty are not appropriately defined by dividing the field into extensions big and little, with a power of regulation excluded from the one section and admitted in the other. On the contrary, the word extension is to be taken in no forced or artificial sense, but with the meaning attributed to it in the common speech of men. It does not fairly connote a prolongation so vast and sudden as to work an utter transformation of the character of the road, making what was extended the incident and the extension the principal. The action of the Commission must have a basis in reason, and its order must be viewed with reference to the length and other conditions of the line or lines to be enlarged. No doubt there is a point at which the enlargement of a road becomes " the construction of a new line " (par. 18) rather than the extension of an old one. On the other hand, the power of the Commission is not limited to extensions that are merely trivial. The purpose of the Congress to make the power more than this, to make it an effective instrument for the development of railroad transportation, is revealed at every step. It is revealed in the legislative history of the measure, and particularly in the report of the Commission explaining the mischiefs to be remedied and recommending the fitting

cure.* It is revealed very distinctly on the face of the statute, which provides that the extension may not be ordered without a certificate of convenience and necessity, nor ordered even then if the expense to be incurred " will impair the ability of the carrier to perform its duty to the public," a precautionary proviso that was omitted in the requirement of adequate facilities for car service contained in the same section, and that would surely have been thought to be superfluous if the subject matter of the extension was to be a short or unimportant spur. In the case at hand, the proposed addition increases only by 1.2 per cent the mileage of the Union Pacific System, and is to be laid across a region which the Oregon-Washington Railroad & Navigation Company, the subsidiary most directly affected, had marked out in its certificate of incorporation as territory that it planned to serve. An increment thus related to the thing to be increased is not so extraordinary in size, so lacking in proportion, as to remake or transform under the guise of improving or extending. *New York & Queens Gas Co.* v. *McCall,* 245 U. S. 345; *Woodhaven Gas Light Co.* v. *Public Service Commn.,* 269 U. S. 244; *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 308, 309.

Another basis of division, in addition to that of size, is put forward in argument as separating the extensions that

* Of the four major recommendations made by the Commission in its annual report of December, 1918, the third was as follows: "(3) limitation of railway construction to the necessities and convenience of the Government and of the public, and assuring construction to the point of these limitations."

Accompanying these recommendations was a statement of their fundamental aim or purpose. " Whatever line of policy is determined upon, the fundamental aim or purpose should be to secure transportation systems that will be adequate to the Nation's needs, even in time of national stress or peril, and that will furnish to the public safe, adequate and efficient transportation at the lowest cost consistent with that service."

Congress had in view from others so substantial that they are to be taken as excluded. We are to find the test, so it is said, in the expectation or intention, presumable or actual, of the corporators or stockholders. The test, however, is illusory. If expectation or intention is the measure of the power of the nation, development must always wait upon the pleasure of the carrier affected. By hypothesis, the territory already served is the only territory that the carrier has evinced a willingness to serve. If its road is to be built for a greater distance or between other points, there is a frustration of its purpose that the terminus for construction shall be wherever stockholders and directors have willed that it shall be. In the thought of the lawmakers the power of the Government was not to be conditioned upon consent. It was to operate by compulsion upon whatever came within its sphere. The railroads of the nation had been brought together by the Transportation Act into a system of transportation national in its dimensions and under national control. Not the wishes of the component units, but the needs of the public which they are organized to serve, were to give the rule and measure for command and for obedience. Let expectation be the test, and cases such as *New York & Queens Gas Co.* v. *McCall, supra, Woodhaven Gas Light Co.* v. *Public Service Commn., supra,* and *United Fuel Gas Co.* v. *Railroad Commission, supra,* must have been decided otherwise than they were. In these instances and others, carriers serving a particular territory were compelled to serve another in response to a public need that the field of service be enlarged. *Railroad Commission of California* v. *Southern Pacific Co.,* 264 U. S. 331, is cited as pointing another way, but its implications are misread. Its precise holding is that an order of a state commission cannot coerce an interstate carrier to make extensive changes and relocations of its main tracks at great expense in connection with the construction of a

new union station, but that the consent of the Interstate Commerce Commission is necessary in such circumstances even though the new tracks are short. The case is far from holding, however, that the relevant sections of the Transportation Act apply to short additions to the exclusion of all others. On the contrary, the fact that the additions were "not great in distance," (p. 346) even though expensive, is recognized as giving color to the argument that no consent is necessary. "It is argued," wrote Chief Justice Taft (p. 344), "that paragraphs 18 to 21 of § 402 refer only to extensions of a line of railroad having the purpose to include new territory to be served by the interstate carrier and do not refer to an extension of new main track for the mere purpose of rearranging terminals within the same city. We do not think the language of paragraphs 18 to 21 can be properly so limited." In such words there is surely no suggestion that the power of the federal Commission is inadequate to compel an extension into territory not served, nor any acceptance of the test of presumable intention.

If the test proposed were not illusory, it would none the less be inappropriate. The time has gone by when the subjection of a public service corporation to control and regulation by the agencies of government is to have its origin and justification in the terms of a supposed contract between the corporation and the state. The origin of the subjection and its justification are to be found, not in contract, but in duty, a duty imposed by law as an incident to the enjoyment of a privilege. The discretion of managers and stockholders, at one time nearly absolute, is now subject in countless ways to compulsion or restraint in the interest of the public welfare. No longer may the carrier abandon any portion of its road without the consent of the Commission, though the portion to be abandoned has been operated at a loss. 41 Stat. 477 (18); 49 U. S. Code, § 1 (18). No longer, without the consent of

the Commission, may it extend the length of its road by its voluntary act. 49 U. S. Code, § 1 (18). No longer may securities be issued, in the form either of stock or of evidences of debt, unless the Commission has found the proposed action of the carrier to be compatible with the public good. 49 U. S. Code, § 20a. All these limitations upon ancient rights and privileges have had the approval of this court. The new act, said the Chief Justice in *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478, " puts the railroad systems of the country more completely than ever under the fostering guardianship of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged." The argument is not persuasive that alone among all these inroads upon the freedom of managerial discretion the provision for compulsory extensions is to be struck down as ineffective. As long as governmental orders are kept within the range of reason, their operation is unaffected by expectation or desire.

The Fifth Amendment of the Constitution is invoked by the carriers but invoked without avail. Consistently with that Amendment Congress may delegate to the Commission the power to force upon unwilling carriers an extension of their lines into fields of old service and of new. Much of what has been written in this opinion as to the meaning of the statute is pertinent also to an inquiry as to power. Again the thought is to be kept before us that the need of the public, not the acquiescence of the carrier, is the measure of the service, provided only that for such service there is adequate requital. Whether such requital has been assured is a question not susceptible of answer

except in the setting of the circumstances. Objection that it is lacking is to be viewed in the light of the entire scheme and framework of the Act of 1920, and of all the relevant provisions for the carriers' protection. There must be kept in view the provision whereby rates are to be maintained at such a level as to yield to the carriers of the country, or to the several groups into which they are to be divided, a fair and reasonable return, and whereby the surplus earnings of the strong roads may be recaptured and applied to the use of weaker ones. True indeed it is that courts are wont to lean to the construction of a statute that will avoid serious doubts of its validity, though they might hold it to be valid if pressed to a decision. *United States* v. *La Franca,* 282 U. S. 568, 574; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401. Even so, they will not carry hesitation to the point of devitalizing the essence to preserve the husk alone. When the scheme of the Act is viewed in the totality of its meaning and probable operation, there is a quick end to the objection that in fixing the bounds of duty to render service to the public, the area of the possible must coincide, at least generally and roughly, with that of the actual and voluntary. Congress does not transcend the limits of the Constitution when it establishes a national system of transportation by rail. It does not transcend those limits when in aid of the system thus established, it lays a duty upon the railroads to furnish the extensions requisite for the attainment of the end in view. The conclusion is the same whether the immediate purpose of the order is to develop the resources of the country in territory contiguous to roads already built, or to promote the convenience of communities served imperfectly or not at all.

I have said that governmental orders to be valid must be kept within the range of reason. The record gives no support to a contention that those bounds have been exceeded. The cost of the improvement "will not impair

the ability of the carrier or carriers involved to perform their duty to the public." So the Commission finds, and the fact is not disputed. The improvement when made will be "a valuable asset to the Union Pacific System," and will be "an effective feeder for that system after a reasonable development period." This finding brings us into the realm of prophecy, and so, not unnaturally, into the field of contention and uncertainty. Much deference is due to the judgment of the Commission, "a tribunal appointed by law and informed by experience" (*Illinois Central R. Co.* v. *Interstate Commerce Commn.*, 206 U. S. 441, 454; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665). The conclusion that it has expressed is no arbitrary judgment, but has a basis of fact and reason in the pages of this record. But if doubt were greater than it is, the binding force of the decision would not thereby be defeated. The order of the Commission does not depend for its validity upon the certainty of a prophetic judgment as to all the consequences to follow. Once more we are to keep in mind the changes that have been wrought by the Transportation Act of 1920. In cases unaffected by that Act, two lines of decisions, following separate and yet neighboring channels, are to be found in the reports. The first, represented by *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595, and *Brooks-Scanlon Co.* v. *Railroad Commn.*, 251 U. S. 396, is made up of cases where the return for particular services was considered in isolation without reference to earnings generally. The second, represented by *St. Louis & S. F. Ry. Co.* v. *Gill*, 156 U. S. 649; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574; and *United Fuel Gas Co.* v. *Railroad Commission, supra*, is marked by the cases where the compulsory enlargement of the range of public service has been held to be permissible if the combined return is adequate for the system as a whole. By force of the Act of 1920, the zone has been narrowed for the application of

the principle which has illustration in the first group, and correspondingly widened for the application of the principle which has illustration in the second. Irrelevant, or nearly so, are the decisions of this court defining the jurisdiction of the Commission as it stood before the Act of 1920 had brought a new system into being. Irrelevant also are the decisions of state courts or of the lower federal courts determining the validity of very different statutes under which there are no compensatory guarantees to mitigate the burden of statutory duties, the carriers affected being viewed as separate units and not as members of a group. See, e. g. *Southern Bell Tel. & Tel. Co.* v. *Calhoun,* 287 Fed. 381; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission,* 173 Cal. 577; 160 Pac. 828; *Hollywood Chamber of Commerce* v. *Railroad Commission,* 192 Cal. 307; 219 Pac. 983. For the first time in the history of our railroads a nationalized system of interstate transportation has made it necessary to consider the earnings of the system, or at least the earnings of the group, in determining whether rates or profits have been unreasonably reduced. There is nothing in this record to justify, still less to necessitate, the conclusion that as a result of the proposed extension the appellees, or the group of railroad carriers including them, were to be placed in such a position that it would be impossible thereafter, through any action of the Commission increasing rates or otherwise, to assure to them " a fair return upon the aggregate value of the railway property of such carriers held for and used in transportation." Interstate Commerce Act, § 15 a (2).

This Court has said of the Transportation Act of 1920 that it " seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country." *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478.

The end is placed in jeopardy by a construction of the statute that debilitates the means.

The judgment of the District Court should therefore be reversed and the order of the Commission reinstated.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this dissent.

HAWKS ET AL. *v.* HAMILL ET AL.

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

No. 147. Argued December 9, 1932.—Decided January 9, 1933.

Claiming a perpetual franchise under Oklahoma statutes to maintain and operate a toll bridge constructed by them over a navigable stream, plaintiffs sued state and county officers, in the federal court, to restrain threatened interference. Jurisdiction rested on diversity of citizenship. The case did not involve any claim of federal right, nor the right of the plaintiffs to remove the bridge. It depended on the purely local question whether the franchise was void *ab initio* under the state constitution. *Held:*

1. As construed by the Supreme Court of Oklahoma, the provision of the state constitution prohibiting "perpetuities," (Art. II, § 32,) includes franchises such as the perpetual franchise to operate a toll bridge. P. 55.

2. The federal court will follow the clear and unequivocal opinion of the state court to this effect, even though uttered after the date of the franchise and as a considered dictum rather than a definitive decision. P. 56.

3. Federal courts are especially reluctant to restrain the activities of state officers where the rights set up by plaintiffs are strictly local and jurisdiction has no other basis than the accident of residence,—the case must be clear. P. 60.

58 F. (2d) 41, reversed.
District Court affirmed.

CERTIORARI [1] to review the reversal of a decree denying an injunction and dismissing the bill, in a suit to restrain state and county officers and other persons from threatened interference with the maintenance and operation of a toll bridge.

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[1] 287 U. S. 582.

Messrs. W. C. Lewis, Assistant Attorney General of Oklahoma, and *Purman Wilson,* with whom *Mr. J. Berry King,* Attorney General, was on the brief, for petitioners.

Mr. Charles B. Cochran, with whom *Mr. Lessing Rosenthal* was on the brief, for respondents.

Mr. Justice Cardozo delivered the opinion of the Court.

The respondents, claiming to be the owners of a perpetual franchise to collect tolls for the use of a bridge across the Canadian River, brought suit in the United States District Court against the members of the State Highway Commission of Oklahoma, the Attorney General of that State, the County Attorneys of McClain and Cleveland Counties, and other persons, residents of the neighborhood, to restrain a threatened interference with the maintenance of the bridge or the collection of tolls. The jurisdiction of the federal court was invoked upon the ground of diversity of citizenship. The defendants (petitioners in this court) made a motion, without answering, to dismiss the complaint. The complainants moved at the same time for an injunction *pendente lite.* The District Court denied the motion for an injunction, and granted the motion to dismiss. The Circuit Court of Appeals for the Tenth Circuit reversed the decree and directed judgment in favor of the complainants for the relief demanded in the complaint. 58 F. (2d) 41. A writ of certiorari brings the case here.

The facts exhibited in the bill are these. On April 22, 1911, the County Commissioners of McClain County, Oklahoma, adopted a resolution whereby there was granted to Carter and Halsell, or their assigns, a franchise to construct and operate a toll bridge across the Canadian River at the City of Purcell, the bridge to be erected within the time prescribed by law. The tolls enumerated in a

schedule were not to be increased "by the bridge company," though they might be reduced. By the terms of the resolution, the grant was to be "perpetual," subject only to such limitations as were provided by law. The grantees were to be at liberty to transfer their rights and privileges to "any individual or corporation," with the same effect as if the grant had been made to the assigns directly. On May 16, 1911, the County Commissioners of Cleveland County on the other side of the Canadian River adopted a like resolution for the grant of a like franchise to the same grantees. On May 18, 1911, Carter, one of the grantees, together with Walling and Hamill, the present respondents, caused a corporation, known as the Purcell-Lexington Toll Bridge Company, to be organized under the laws of Oklahoma, with a corporate life of twenty years. Thereafter in December, 1911, while the bridge was in course of construction, the grantees of the franchises, together with the respondents, conveyed the bridge, its approaches and all the rights and privileges embraced within the franchises or either of them to the Purcell-Lexington Toll Bridge Company, its successors and assigns. The corporate life of the Purcell-Lexington Toll Bridge Company was to expire, as we have seen, on May 18, 1931. Before that time, and on April 2, 1931, the bridge company conveyed to the respondents and to Carter, and their assigns, the bridge and the accompanying franchises, the respondents receiving afterwards from Carter an assignment of his interest, whatever it might be. Thereupon the defendants, who are the petitioners here, gave notice that on May 18, 1931, the bridge would become a free bridge and part of the free highway system of the State of Oklahoma. The members of the State Highway Commission, the Attorney General, the County Attorneys, as well as the neighboring residents, who, it seems, are also the County Commissioners, announced a purpose to prevent the collection of tolls by the respond-

ents, and to cause the bridge to be kept open for free and unimpeded passage. This suit for an injunction followed.

The District Court held that the County Commissioners were without authority to grant a franchise to individuals except in trust for a corporation organized under the bridge law; that the term of the corporate life was also the limit of the duration of the privilege to charge and levy tolls; that a perpetual franchise, if intended, would be void under Article II, § 32 of the Constitution of Oklahoma, prohibiting "perpetuities"; and that the bill should be dismissed. The Circuit Court of Appeals, in reversing this judgment, held that the franchises were not invalid because granted to individuals; that upon assignment to a corporation organized for a term of twenty years, the franchises were not cut down in respect of their duration, but continued in full force when conveyed by the assignee to others; that the term "perpetuities" as used in Article II, § 32 of the Constitution of Oklahoma had in view the creation of future estates and did not limit the enjoyment of a privilege or franchise; and that the complainants should have an injunction as prayed for in the bill.

Article II, § 32 of the Constitution of Oklahoma provides: "Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed, nor shall the law of primogeniture or entailment ever be in force in this state." Construing that provision the Court of Appeals said: "We do not doubt that the word 'perpetuities' . . . was not intended to mean or be equivalent to perpetual franchises, but was intended to limit the power to pass titles that would vest *in futuro*." But the Supreme Court of Oklahoma has not circumscribed the word so narrowly. It has said that a forbidden perpetuity is created when there is granted to an individual or corporation a perpetual privilege or franchise

It has gone farther: it has said that a privilege or franchise is perpetual if indefinite in duration, though it be subject to revocation at the pleasure of the legislature. The question came before the court in *Okmulgee* v. *Okmulgee Gas Co.*, 140 Okla. 88; 282 Pac. 640. The legislature of Oklahoma had passed an act whereby a public service corporation holding a franchise from a municipality for a fixed term of years was to be at liberty to exchange it for a revocable permit. The court said that such a permit, if viewed as a grant from the municipality, was forbidden by Article XVIII, § 5a, which provides in effect that no franchise shall be granted by a municipal corporation for a longer term than twenty-five years. On the other hand, if the permit could be viewed as one proceeding directly from the state, the court said that it would then be a perpetuity within the prohibition of Article II, § 32. The permit was not saved by the reservation to the legislature of a power to revoke it. In the view of the court (p. 98), a franchise "not limited in its existence to a fixed and definite period of years" is to be classified as "a perpetual franchise," and hence an unlawful perpetuity. To avoid misapprehension the court at the end of its opinion summarized its conclusions (p. 100). "Any act of the legislature which provides for issuing a license, revocable permit, indeterminate permit, or other instrument in the nature of a franchise which is not limited as to its time of existence, violates section 32 of Article II of our Constitution." See, to the same effect: *In re Okmulgee Gas Co.*, 141 Okla. 98; 284 Pac. 70; *In re Oklahoma Power Co.*, 141 Okla. 100; 284 Pac. 12.

We do not now determine what meaning we would give to the Oklahoma Constitution if the question were before us as an original one, unhampered by any pronouncement of the courts of that state. Much can be said in support of the respondents' position that the perpetuities denounced are those arising from the creation of future

estates or from restraints upon alienation without reasonable limit. The question is one distinctively local in origin and content. The prohibition is embodied in the local Constitution. Not only that, but it is designed to give effect to " the genius " of the government, an impalpable existence that can best be apprehended and defined by perceptions and experiences sharpened and developed through the associations of the vicinage. " In a case involving local history, as this does, we should be slow to overrule the decision of courts steeped in the local tradition, even if we saw reason for doubting it." *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 32; cf. *Diaz* v. *Gonzalez,* 261 U. S. 102, 105, 106. To define a " perpetuity " for a young and developing community there must be recourse to something more than the pages of a dictionary. The word to be defined, in common with words generally, will have a color and a content that will vary with the setting. *Towne* v. *Eisner,* 245 U. S. 418, 425; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Surace* v. *Danna,* 248 N. Y. 18, 21; 161 N. E. 315. It comes down to its interpreters freighted with subtle implications, with the " tacit assumptions," the " unwritten practices," the " thousand influences " and " values " that " logic and grammar never could have got from the books." *Diaz* v. *Gonzalez, supra.* Out of two or more meanings that were possible and plausible, the State of Oklahoma has picked the one comporting best in the thought of her official spokesmen with the " genius " of her history. The mists of our own uncertainties are scattered when pierced by this authentic evidence of the law of the locality. *Chicago, M., St. P. & P. R. Co.* v. *Risty,* 276 U. S. 567, 570; *Sioux County* v. *National Surety Co.,* 276 U. S. 238; cf. *Porter* v. *Investors Syndicate,* 287 U. S. 346.

We are urged by the respondents to exert a power of independent judgment though the law to be interpreted be a constitution or a statute, and not merely the form of

law which has come to be spoken of as general. Cf. *Burgess* v. *Seligman,* 107 U. S. 20. The power, we are told, exists because at the grant of these franchises in 1911, the Courts of Oklahoma had not yet spoken as to the meaning of the Constitution by defining the "perpetuities" within the zone of its restraints. *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349; *Moore-Mansfield Construction Co.* v. *Electrical Installation Co.,* 234 U. S. 619, 625; *Edward Hines Trustees* v. *Martin,* 268 U. S. 458, 463. Obedience is due to the courts of the state if the decisions claiming fealty are so many and unequivocal as to make out a "rule of property." *Edward Hines Trustees* v. *Martin, supra,* at pp. 463, 464. As to this there is no denial. The argument is that the fetters of obedience are released when there is only a single state decision, and this subsequent to the transaction out of which rights and duties have developed. *Kuhn* v. *Fairmont Coal Co., supra; Edward Hines Trustees* v. *Martin, supra.* One hurdle, it is said, will be overlept if there are no barriers beyond.

Choice is not so free as the argument assumes. If the single decision interpreting a constitution or a statute is clear and unequivocal, submission to its holding has developed in these days into a practice so nearly uniform that there is little need to consider whether under pressure of extraordinary circumstances there is a privilege to deviate. Whatever doubt as to the practice may have prevailed in days gone by has been dispelled by recent judgments. *Chicago, M., St. P. & P. R. Co.* v. *Risty, supra; Sioux County* v. *National Surety Co., supra.* Indeed the radiating potencies of a decision may go beyond the actual holding. A wise comity has decreed that deference shall at times be owing, though there may be lacking, in the circumstances, a strict duty of obedience. Cf. *Sim* v. *Edenborn,* 242 U. S. 131, 135. An opinion may be so framed that there is doubt whether the part of it invoked as an authority is to be ranked as a definitive hold-

ing or merely a considered dictum. What was said in *Okmulgee* v. *Okmulgee Gas Co., supra,* as to the meaning of perpetuities was probably intended to be a definitive holding. Cf. 141 Okla. 98; 141 *id.* 100. To be sure there is room for argument that limiting distinctions will have to be drawn in the future. We must leave it to the courts of Oklahoma to declare what they shall be. But the result will not be changed though the definition of perpetuities be something less than a decision. At least it is a considered dictum, and not comment merely *obiter.* It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement. Cf. *Sim* v. *Edenborn, supra; Lankford* v. *Platte Iron Works,* 235 U. S. 461, 474. No controversy is here as to the impairment of the obligation of a contract in violation of the restraints of the federal constitution. We are not to confuse the standards of independent judgment appropriate in such conditions (*Coombes* v. *Getz,* 285 U. S. 434, 441; *Shriver* v. *Woodbine Bank,* 285 U. S. 467, 475) with those appropriate where the only basis of jurisdiction is diversity of citizenship. The Oklahoma decision as to the validity of a grant in perpetuity is not an act of legislation, and would not have impaired the contract embodied in the grant though it had overruled a contrary decision previously rendered. *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444; *Fleming* v. *Fleming,* 264 U. S. 29; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358. What is at issue in this case is not an actual or even a claimed impairment of any right or privilege assured to the respondents by the Constitution of the nation. What is at issue is the validity of a privilege or claim of privilege to obstruct a bridge across a public stream. The case does not call for a decision as to the ownership of the structure of the bridge or the right of the complainants to tear it down hereafter. Cf. *State* v. *Lawrence Bridge Co.,* 22 Kan. 438, 463. The decision that is called for is one as to

the privilege of the complainants, while maintaining an obstruction of navigable waters, to exact payments from the public. The statutes of Oklahoma are explicit that tolls may never be collected unless permitted by a franchise (Wagon Road Act, Consolidated Oklahoma Statutes, § 5627; Toll Bridge Corporations Act, Consolidated Oklahoma Statutes, § 5367). In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible, is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot.

The case thus far has been considered from the viewpoint of the substantive law, the basic rights and duties contested by the litigants. There is another path of approach that brings us to the same goal, an approach along the line of the law of equitable remedies. Caution and reluctance there must be in any case where there is the threat of opposition, in respect of local controversies, between state and federal courts. Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue "unless in a case reasonably free from doubt." *Massachusetts State Grange* v. *Benton,* 272 U. S. 525, 527. The rule has been characterized as an "important" one, to be "very strictly observed." 272 U. S. at 527, 529. Compare *Gilchrist* v. *Interborough Rapid Transit Co.,* 279 U. S. 159; *Cavanaugh* v. *Looney,* 248 U. S. 453, 456. It is such interference by the process of injunction with the activities of state officers that the respondents now seek. The members of the State Highway Commission believe it to be

their official duty to take possession of the bridge, and propose to act accordingly. The Attorney General of the state is about to institute proceedings at law and in equity to vindicate the public rights or what he believes to be such rights. The County Attorneys of McClain and Cleveland Counties propose to sue for fines and penalties. All these activities the respondents ask us to enjoin. Indeed all have been enjoined by the decree under review. Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. *Massachusetts State Grange* v. *Benton, supra; Stratton* v. *St. Louis S. W. Ry. Co.,* 284 U. S. 530; *Matthews* v. *Rodgers,* 284 U. S. 521. There must be reluctance even greater when the rights are strictly local, jurisdiction having no other basis than the accidents of residence. The need is clamant in such circumstances for cautious hesitation. If there were to be a concession *arguendo* that the meaning of "perpetuities" is still an unsettled question after the decisions in Oklahoma, there is surely no room for a contention that a meaning in opposition to those decisions is reasonably free from doubt. Our process does not issue unless the path is clear.

What has been written has had its basis in the assumption that an indeterminate franchise is a perpetuity within the meaning of the Constitution of Oklahoma, or at the very least that state officers acting in that belief are not subject to an injunction at the instance of the federal courts. The case for the respondents would be beset, however, with other doubts and difficulties if all these were

to be removed. There would still remain the uncertainty whether the franchise granted by the county was to the grantees for their own use or for the use of a corporation to be organized thereafter; whether the corporation was to be one under the "Wagon Road" law, with an indeterminate duration, or under the "Bridge Companies" act, with a duration of twenty years; and whether the public policy of Oklahoma, disclosed by her statutes and decisions, and irrespective of decisions elsewhere, sets a limit upon the toll right, or what is known as the secondary franchise, coterminous with the primary franchise to exist and engage in business in a corporate capacity. By the statement of these questions we convey no hint as to the answer. We do no more than emphasize the complexities of law as well as of policy in which the respondents' title is involved, and the unwisdom of superseding the official acts and powers of the agents of the vicinage by writ out of a federal court.

The decree of the Circuit Court of Appeals must be reversed, and the judgment of the District Court dismissing the complaint affirmed.

Reversed.

UNITED STATES *v.* MEMPHIS COTTON OIL CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 308. Argued December 9, 1932.—Decided January 9, 1933.

1. A claim for a tax refund which has been seasonably filed, but which fails to conform to Treasury Regulations in that it omits to state the grounds upon which the refund is demanded, may be amended by specifying the grounds at any time before the claim in its original form has been finally rejected, though it be after the time when a wholly new claim would be barred by limitation. Pp. 69, 71, *et seq.*

So *held* under § 1318, Rev. Act of 1921, as amended March 4, 1923, which provides that no suit for recovery shall be maintained in any court until a claim for refund has been duly filed with the Commissioner "according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in

pursuance thereof"; where the regulation required that "all the facts relied upon in support of the claim should be clearly set forth under oath"; and where the claim, originally exhibiting only the taxpayer's statement of amounts of net income, tax, previous payments and overpayment, was amended, before its final rejection on that ground, so that it set forth in detail the facts showing overassessment as they had been revealed by the Bureau's own investigation.

2. Rulings as to what amendments of pleadings may (or may not) by relation avoid the bar of an intervening limitation, and as to what, in that connection, is but a revised statement of the same cause of action and what the substitution of a new one, furnish helpful analogies, though subordinate to administrative considerations, in determining the effect of an amendment of a claim for refund before the Commissioner. P. 67.
3. To give effect by relation to the amendment here in question harmonizes with the Commissioner's practice of reauditing returns when refunds are claimed (*Lewis* v. *Reynolds*, 284 U. S. 281), and particularly with his action in entertaining the original claim (instead of rejecting it promptly for defect of form,) examining completely the taxpayer's business, and announcing that the overassessments so found would be rectified. P. 69.
4. The function of a statute limiting the time within which claims may be presented is to give protection against stale demands; the function of a regulation making provision as to the form of claims is to facilitate research; the line dividing the two functions should be kept a sharp one. P. 71.
5. Notice by the Deputy Commissioner to a taxpayer that his claim for refund would be rejected and that the rejection would be officially announced in a schedule to be approved thereafter, *held* not a final rejection. P. 72.

75 Ct. Cls. 195; 59 F. (2d) 276, affirmed.

CERTIORARI [1] to review a recovery of overpayments of income taxes.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Bradley B. Gilman*, and *Wm. H. Riley, Jr.*, were on the brief, for the United States.

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[1] 287 U. S. 585.

Mr. Walter E. Barton for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Respondent, the plaintiff in the court below, brought suit against the United States in the Court of Claims to recover overpayments of incomes taxes for the years 1922 and 1923. The government opposed recovery upon the ground that the claims filed with the Commissioner of Internal Revenue for the refund of the tax were too general and indefinite to comply with the provisions of the statutes and regulations, and that amendment came too late. The Court of Claims gave judgment in favor of the taxpayer. 59 F. (2d) 276. A writ of certiorari brings the case here.

The central question in the controversy can be stated in a sentence: May a claim for a tax refund which has been seasonably filed, but which fails to state the grounds upon which the refund is demanded, be amended by specifying the grounds at any time before the claim in its original form has been finally rejected, though it be after the time when a wholly new claim would be barred by limitation?

The respondent made and filed its income tax returns for 1922 and 1923 in accordance with the statute. It paid the last instalment of the earlier tax on December 7, 1923, and the last instalment of the later one on December 6, 1924. Claims for refund of overpayments were filed in June, 1927, within the time prescribed by law.

In the refund claim for 1922 there was a statement of the amount of the tax paid ($25,626.25), a statement of the correct amount due ($24,296.56), a statement that there had been overpaid in error $1,329.69, and a request for refund of that amount with interest as provided by law, or such greater amount as might be legally refundable. Attached to the claim was the following summary

of the method of computation: net income, $194,372.46; 12½ per cent, $24,296.56; previously paid, $25,626.25; overpaid, $1,329.69. There was no other specification of supporting facts or reasons.

In the refund claim for 1923 the claimant followed the same form that was used for 1922, but with appropriate changes of the figures. The overpayment was stated to be $1,813.39, and there was a request for the return of that amount or of any greater amount due.

Upon receipt of these claims, the Commissioner of Internal Revenue, in order to pass upon the merits, made an investigation and an audit of the claimant's books and records for 1922 and 1923 through a duly appointed agent. The agent reported to the Commissioner that there had been overassessments for both years, the excess being fixed at $1,660.70 for 1922 and $4,835.76 for 1923. Thereupon a Deputy Commissioner notified the taxpayer in writing under date of October 13, 1928, that its refund claims had been considered, that the taxes had been readjusted in accordance with the new audit, and that the overassessments for the two years would be made the subject of certificates of overassessment, which would be transmitted in due course through the office of the appropriate collector. Nothing further was said or done as to the matter till January 26, 1929, when the same Deputy Commissioner who had signed the notice last mentioned, transmitted to the taxpayer another notice that the claims were defective in form in that they failed to satisfy the requirements of the Treasury Regulations. After quoting the pertinent provisions, he stated: "Since the information on file with the claims does not meet the requirements" of the regulations, "and the claims do not indicate [*i. e.*, apart from the investigations of the Revenue Agent] that the taxes have been illegally assessed, they will be rejected. The rejection will officially appear in a schedule to be approved by the Commissioner." Thereupon the claim-

ant, protesting that an amendment was unnecessary, filed a new claim with the Commissioner on April 2, 1929, in which the facts were set forth in detail. The Commissioner gave final notice of rejection on October 23, 1929, placing his ruling on the ground that the claims as first presented were defective and irregular. In this suit by the taxpayer, the Court of Claims has given judgment for the moneys overpaid.

Statutes make it necessary that claims for the refunding or crediting of any internal revenue tax erroneously or illegally assessed or collected shall be presented to the Commissioner within a prescribed period of time and prohibit allowance of the claims if these conditions are not satisfied. Revenue Act of 1926, § 284 (b). Statutes also provide that no suit or proceeding shall be maintained in any court for the recovery of such a tax "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof." Revenue Act of 1921, § 1318 as amended by Act of March 4, 1923, c. 276. During the period of these transactions, there had been promulgated under the Revenue Act of 1921 and was continuously in force a treasury regulation which provides as follows: "Claims by the taxpayer for the refunding of taxes and penalties erroneously or illegally collected shall be made on Form 843. In this case the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath." Treasury Regulations 62, Article 1036.[1]

The claim for refund filed with the Commissioner in June, 1927, was not subject to rejection on the score of

[1] A later regulation, different in form, is applicable to claims filed on or after May 1, 1929. Treasury Decision 4265, Cumulative Bulletin VIII—1, p. 110.

the time of its submission. As to this the parties are agreed. Indefinite and general it was, and hence, until amended or supplemented, an inadequate compliance with the Treasury requirement that the facts relied upon in support of a claim are to be stated under oath. Beyond doubt it might have been rejected as irregular while its form was uncorrected. This is far from saying that there was the presentation of a new claim and not the perfecting of an old one when the gaps were filled thereafter.[2]

Both the government and the taxpayer invoke analogies suggested by pleadings in a lawsuit. The general rule is said to be that an amendment of a pleading will take effect by relation and thus relieve against the bar of an intervening limitation if the identity of the cause of action is still substantially the same, but that the limitation will prevail if under the guise of an amendment there is the substitution of a new cause of action in place of another wholly different. *Baltimore & O. S. W. R. Co.* v. *Carroll,* 280 U. S. 491; *Seaboard Air Line Ry.* v. *Renn,* 241 U. S. 290, 293; *Harriss* v. *Tams,* 258 N. Y. 229, 242; 179 N. E. 476. The analogy is helpful, yet it will confuse, instead of helping, if we do not insist at the beginning upon a definition of our terms or at least a recognition of their shifting meanings. A " cause of action "

[2] Official statistics indicate that " eighty-five 20/100 per cent of all the overassessments are attributable to clerical or bookkeeping adjustments or to causes beyond the control of either the Treasury or the taxpayer, that is to adjustments after the payment of taxes based upon causes which could not fairly be considered prior to the payment." Refunds and Credits of Internal Revenue Taxes, Report of the Joint Committee on Internal Revenue Taxation, 1929, pursuant to § 710 of the Revenue Act of 1928, H. Doc. No. 43, Supplement to Part II, p. 29. Cf. H. Doc. No. 478, 71st Cong., 2d Sess. (1930). These statistics, covering adjustments of taxes under the Act of 1928, give support to the conclusion that in determining the application of a statute of limitations the word " claim " should be interpreted with reasonable liberality.

may mean one thing for one purpose and something different for another.[3] It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of *res judicata*. Cf. *Chicago, R. I. & P. Ry. Co.* v. *Schendel,* 270 U. S. 611, 617; *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 321. At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty.[4] At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ.[5] Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed.[6] This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed. None the less, it has fixed the limits of amendment with increasing liberality. A change of the legal theory of the action, "a departure from law to law," has at times been offered as a test. *Union Pacific Ry. Co.* v. *Wyler,* 158 U. S. 285, 295. Later decisions have made it clear that this test is no longer accepted as one of general validity. Thus, in *Missouri, Kansas & Texas Ry. Co.* v. *Wulf,* 226 U. S. 570, plaintiff suing in her individual capacity under a Kansas statute for her son's death was allowed to amend to sue as administratrix under the

[3] The uncertainties of the phrase have been well developed by Dean Clark with full citation of the decisions in his treatise on Code Pleading, pp. 75–87, 501–508.

[4] Clark, Code Pleading, p. 81 and cases there cited. Pomeroy, Code Remedies, 4th ed., § 347.

[5] Clark, *supra,* p. 502, and cases there cited.

[6] Clark, *supra,* pp. 83, 84, 505, and cases there cited.

Federal Employers' Liability Act after the statute of limitations would have barred another action. In *New York Central & H. R. R. Co.* v. *Kinney,* 260 U. S. 340, there was in substance the same ruling. In *Friederichsen* v. *Renard,* 247 U. S. 207, a cause of action by a defrauded buyer to set aside a contract was turned into a cause of action to recover damages for deceit. "Of course an argument can be made on the other side, but where a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied." *New York Central & H. R. R. Co.* v. *Kinney, supra,* p. 346.[7]

With this background of analogy, we reach the specific problem that calls for answer here. The respondent filed a claim for taxes overpaid, a claim for money had and received to his use by the agents of the government. The identity of the cause of action may be said in one aspect to depend upon the mere fact of overpayment, the existence of a net balance owing to the taxpayer after the ascertainment of all items of debit and of credit. In another aspect it may be said to depend upon the identity of the items illegally exacted, and hence upon the particular grounds that determine illegality. Choice between these meanings must avoid a doctrinaire adherence to abstract definitions. It must keep in view the realities of administrative practice, for its effect will be to regulate the conduct of administrative officers. Definitions and analogies borrowed from pleadings in a lawsuit will have their place and recognition, but in due subordination to differences of end and aim. Viewing the problem thus, we must say whether a statement by the taxpayer of supporting facts

[7] Other cases are collected by Clark, *supra,* pp. 504, 505.

and reasons is to be assimilated to a bill of particulars explanatory of a claim, or is something so essential that there can be no claim without it.

Our decision in *Lewis* v. *Reynolds*, 284 U. S. 281, goes far to point the answer. The court there ruled that upon a claim for the refund of a tax because of the disallowance of a particular deduction, the Commissioner might sustain the result by the disallowance of another deduction, and this though the time had gone by within which he would have been at liberty, if a claim had not been filed, to make a new assessment. The court applied the analogy of a common law action for money had and received. "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." No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear. Commonly, though, it seems, not always, a general audit will be necessary or will be at least a wise precaution, whether the claim is broad or narrow, if the government is to have the benefit of any compensating adjustments.[8] There is little doubt that this conception of duty and of prudence has had recognition and emphasis in administrative practice.

The practice is portrayed in action in the pages of this record. We are there informed in a striking way of the actual procedure where a notice, general in its terms, is not rejected at the beginning for irregularity of form, but is considered on the merits. At once upon the filing of the claim for refund, there was an order for the complete examination of the business of the taxpayer, to the end

[8] Compare Report of the Joint Committee on Internal Revenue Taxation, 1928, pursuant to § 1203 of the Revenue Act of 1926, vol. III, pp. 25, 30.

that the net amount of its tax liability might be reported to the Bureau. Every claim put forward in its amended notice has been investigated, every fact alleged in its behalf has been verified and found. The files of the Bureau contain the report of an examiner informing his superior that the tax has been overpaid, and the files of the taxpayer contain an official notice that the overassessment is recognized and that justice will be done. Of a sudden, at the end, the discovery is made that the inquiry is mere futility because the notice starting it in motion has departed in form from the requirements of a rule.

In the light thus supplied by the practice of the Bureau and the analogy of pleadings, the way is cleared for a conclusion. The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old.

The cases in this court are not at all at variance with the conclusion now arrived at, though they leave the problem open. *Tucker* v. *Alexander,* 275 U. S. 228, holds that it is within the power of the Commissioner to waive the objection that the supporting facts or reasons have not been stated in the claim. *United States* v. *Felt & Tarrant*

Co., 283 U. S. 269, holds that a defective claim for refund will not supply a basis for a suit against the government when there has been neither waiver by the Commissioner nor amendment by the taxpayer. *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, holds that a letter from the taxpayer, accompanied by a form of waiver requested by the Bureau, will be the equivalent of a notice of claim if the Commissioner has so treated it.

The cases in the lower federal courts may not be wholly harmonious as to the extent to which amendments are allowable after the running of the statute, but there is general agreement that the applicable analogy is to be found in the rules governing the amendment of a pleading. *McKesson & Robbins, Inc.* v. *Edwards*, 57 F. (2d) 147; *Art Metal Construction Co.* v. *United States*, 47 F. (2d) 558; *Lancaster Cotton Mills* v. *United States*, 59 F. (2d) 270; *Lehigh & Wilkes Barre Coal Co.* v. *United States*, 38 F. (2d) 637. Cf. Peruna Co., 11 B. T. A. 1180, 1189; Sevier *v.* Commissioner, 14 B. T. A. 709, 716.

One other question, less general in its significance, is yet to be considered. An argument is made that at the time of this amendment the claim had been finally rejected and the proceeding thereby ended. If so, it was too late. *McKesson & Robbins* v. *Edwards, supra; Solomon* v. *United States*, 57 F. (2d) 150. When correction is thus postponed, there is no longer anything to amend, any more than in a lawsuit after the complaint has been dismissed. We think the matter was still *in fieri*. True the Deputy Commissioner had given notice to the taxpayer that the claims would be rejected, and that the rejection would be officially announced in a schedule to be approved thereafter. No reason is apparent why at any time before such approval the Commissioner or his Deputy was not at liberty to recall the first announcement, and dispose of the case otherwise. *Michel* v. *United States*,

37 F. (2d) 38, reversed, but on other grounds, 282 U. S. 656. We are not now considering what the practice ought to be if there were need to open the proceeding for the submission of other evidence extrinsic to the claims themselves. Neither in the record nor in the argument do we find a suggestion of that need. Long before the amendment the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of its claims and of the ruling of the Bureau that adjustments would be made accordingly. The dismissal of the claims, when finally announced, was for defects of form only. The defects had been corrected, and the dismissal may not stand.

We find it unnecessary to determine whether the conduct of the Commissioner in investigating the claims upon their merits and reporting to the claimant the result of his inquiry was a waiver of defects of form which would call for the return of overpayments though no amendment had been offered.

The judgment is

Affirmed.

UNITED STATES *v.* HENRY PRENTISS & CO., INC.

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

No. 234. Argued December 8, 9, 1932.—Decided January 9, 1933.

1. A general claim for refund, though irregular in form under the Treasury Regulations, may be amended after the period of limitation by specifying the grounds, if the amendment is made before final rejection. *United States* v. *Memphis Cotton Oil Co., ante,* p. 62. P. 83.
2. A statement, without explanation, to the effect that overpayments have been made in an aggregate amount, is broad enough to cover any deviation from the normal statutory rule in making the computation or assessment. *Id.*

3. The taxpayer claimed a refund of income and excess profits taxes, assessed under § 326 of the Revenue Act 1918, upon the ground that, owing to abnormal conditions affecting its capital and income, there could be no fair appraisal of its property in accordance with that section, and that it should have the benefit of a special assessment under §§ 327 (d) and 328, which provide for computation of the tax in such cases without reference to value of invested capital, by the ratio which the average tax of representative corporations engaged in a similar business bears to their average net income. *Held*, that the claim could not be turned by amendment into one for the revision of the assessment by increasing the value of real estate included in invested capital; and that a claim on that ground, coming after the time limited by statute for filing claims, was barred. Pp. 81, 83.
4. A request for a special assessment in accordance with § 327 (d) of the Revenue Act, 1918, calls for discretionary, administrative action not ordinarily reviewable in court, and suggests no challenge of the valuation, or need of a revaluation, of invested capital. P. 84.
5. Such an application so differs in essence and in its relation to administration from a claim based on undervaluation of the taxpayer's real estate capital in computing income and profits by the normal method of the statute, that the two must be regarded as different claims or "causes of action," the one not amendable by the other, tested either by the analogies of pleading or by the necessities and realities of administrative practice. P. 84.
6. Application for the special assessment being an appeal to discretion, a condition may reasonably be imposed that the inquiry shall be postponed until other and unrelated objections—in this case, reassessment of invested capital—have been either determined or abandoned. P. 88.
7. The taxpayer in this case having elected to pursue its application for a special assessment after having been informed by the Commissioner that, by the Bureau's practice, the invested capital and net income must first be definitely determined, either by acquiescence in figures already reported or through an appeal,—*held* equivalent to an agreement that the claim for a special assessment should be deemed to be a distinct one from that for a revision of the values; so that retraction, if ever possible, was too late when the statute of limitations had interposed its bar. P. 87.
8. Whether this Court has jurisdiction on certiorari to review parts of a judgment adverse to the respondent although the respondent

has neither secured nor applied for a writ of certiorari, will not be decided where, assuming the existence of the power, the case does not impel its exercise. P. 88.

57 F. (2d) 676, reversed.

CERTIORARI [1] to review the reversal in part of a judgment recovered by the present respondent in a suit against the United States based on overpayments of income and excess profits taxes.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, John G. Remey, Joseph H. Sheppard, Erwin N. Griswold,* and *Wm. H. Riley, Jr.,* were on the briefs, for the United States.

A suit can not be maintained for taxes illegally collected unless a claim for them has been filed within the time prescribed by law. *Savings Institution* v. *Blair,* 116 U. S. 200. See also, *Jonesboro Grocer Co.* v. *United States,* 66 Ct. Cls. 320, cert. den., 280 U. S. 562; *Feather River Lumber Co.* v. *United States,* 66 Ct. Cls. 54; *Grays Harbor Motorship Corp.* v. *United States,* 71 Ct. Cls. 167; *Snead* v. *Elmore,* 59 F. (2d) 312; *Art Metal Const. Co.* v. *United States,* 47 F. (2d) 558, cert. den., 283 U. S. 863.

The relief granted by allowing a special assessment is not similar to that which is sought in this suit. *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269, 271.

The distinction between what may be amended and what may not is no doubt one of degree. *Solomon* v. *United States,* 57 F. (2d) 150.

Where a pleading is amended to allege a new cause of action the new cause is subject to a defense of the statute of limitations although the action was commenced before the statute ran. *Seaboard Air Line* v. *Renn,* 241 U. S.

[1] 287 U. S. 585.

290; *Union Pacific Ry.* v. *Wyler,* 158 U. S. 285; *Baltimore & Ohio S. W. R. Co.* v. *Carroll,* 280 U. S. 491.

Recognition of a right to sue based upon an amended claim, filed after expiration of the statutory period, stating a new ground for refund, would involve a departure from the rule that where the United States consents to be sued a literal and meticulous compliance by the taxpayer with statutory requirements is imperative. See *United States* v. *Michel,* 282 U. S. 656; *Maas & Waldstein Co.* v. *United States,* 283 U. S. 583; *Rock Island, A. & L. R. Co.* v. *United States,* 254 U. S. 141; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342.

If notice on July 16, 1925, that the original claim would be rejected is equivalent to a rejection, recovery is barred for another reason. A claim for refund can not be amended after rejection but must be considered as a new claim. *Jonesboro Grocer Co.* v. *United States, supra; Solomon* v. *United States, supra; Mutual Life Ins. Co.* v. *United States,* 72 Ct. Cls. 204, cert. den., 284 U. S. 628; *Wausau Sulphate Fibre Co.* v. *United States,* 72 Ct. Cls. 189.

The statutory period within which claims may be filed is measured, not by the period within which a claim timely filed is considered by the Commissioner, but by the five-year period after the return was due, or the four-year period after the tax was paid. The decision below would dispense with the statute in all such cases.

Some cases have held that if facts and reasons are stated in the claim the taxpayer need not mention a provision of law applicable to his claim, nor is he precluded from advancing in court a new reason or theory applicable to his claim, nor from amending a defective claim by submitting additional evidence to the Commissioner relating to the ground presented in the claim. See *Dreyfuss* v. *Lines,* 24 F. (2d) 29; *McKesson & Robbins* v. *Edwards,* 57 F. (2d) 147; *Swift & Co.* v. *United States,* 67 Ct. Cls.

322; *Paul Jones & Co.* v. *Lucas,* 33 F. (2d) 907; *Union & N. H. Trust Co.* v. *Eaton,* 20 F. (2d) 419; *Wunderle* v. *McCaughn,* 38 F. (2d) 258. Those conditions are not present here. No reference to the real estate item is found in the original claim. The only claim upon which a timely suit could have been brought was the original claim; but, as the ground there stated is not the ground urged in the present suit, recovery is barred. *United States* v. *Felt & Tarrant, supra; Bemis Bro. Bag. Co.* v. *United States,* 60 F. (2d) 944; *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626; *Snead* v. *Elmore, supra; J. P. Stevens Engraving Co.* v. *United States,* 53 F. (2d) 1; *H. Lissner Co.* v. *United States,* 52 F. (2d) 1058; *Solomon* v. *United States, supra; J. H. Williams & Co.* v. *United States,* 46 F. (2d) 155; *Taylor-Lockwood Co.* v. *United States,* 71 Ct. Cls. 360. The facts disclose no waiver by the Commissioner which would bring the case within the rule of *Tucker* v. *Alexander,* 275 U. S. 228.

Mr. Joseph F. Murray, with whom *Messrs. William P. Jeffery* and *Arthur Mattson* were on the brief, for respondent.

The claim for refund, duly filed March 25, 1924, is sufficient to support the maintenance of this suit.

The controlling regulation provides merely that the facts upon which the claim is based "should"—not "must" or "shall"—be set forth under oath. But does it require that such facts be set forth in the claim? Neither the statute nor the regulation tells us definitely. When are such facts to be submitted? How? Where? Certainly there is no positive direction that the facts must be set forth in the claim itself at the time it is filed. The very words of the regulation itself show that the word "facts" is not used synonymously with the word "claim." The regulation does not say that all the facts relied upon should be set forth in the claim or that the claim shall contain all

the facts relied upon. The obvious answer is that the facts could be submitted with or in the claim, or later, as the exigencies of the particular case demanded. Any facts not already in the possession of the Commissioner were required to be furnished to him before the claim had been disposed of finally by allowance or rejection. *Union & N. H. Trust Co.* v. *Eaton,* 20 F. (2d) 419; *Warner* v. *Walsh,* 24 F. (2d) 449, 450.

This also is the only practical view. *Lancaster Cotton Mills* v. *United States,* 59 F. (2d) 270, 275. Frequently the Commissioner will pass on a refund claim upon the data set forth in the return itself or upon data which he secures through his own independent examination of the books of the taxpayer. He is not restricted to the data or grounds advanced by the claimant. *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Lancaster Cotton Mills* v. *United States, supra.* Often claims for refund are determined upon information conveyed to the Commissioner for the first time at the oral hearing, which usually is granted if requested by the taxpayer. There are many other practical reasons why, at least before experience taught differently, the Commissioner thought it would be unwise to frame a positive requirement that all facts and all theories of relief had to be set forth in the claim itself.

A seasonably filed claim was a "duly filed" claim within the meaning of the statute and the regulation, whether or not at the time it was filed it set forth all the facts and theories upon which suit was brought later. *Union & N. H. Trust Co.* v. *Eaton,* 20 F. (2d) 419; *Tucker* v. *Alexander,* 15 F. (2d) 356; reversed, 275 U. S. 228; *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626; *Warner* v. *Walsh,* 24 F. (2d) 449, 450, s. c., 27 F. (2d) 952; *Wunderle* v. *McCaughn,* 38 F. (2d) 258.

The brief filed with the Commissioner April 12, 1926, was a permissible amendment of a "duly filed" claim for

refund sufficient to support the maintenance of this suit. *Tucker* v. *Alexander,* 275 U. S. 228; *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Union Trust Co.* v. *McCaughn,* 24 F. (2d) 459, 461.

A recovery based on an amendment of a timely filed claim for refund was allowed in the following cases, among others, although in each instance the amendment was filed after the time for filing claims had expired: *Lehigh & Wilkes Barre Coal Co.* v. *United States,* 38 F. (2d) 637; *Zeller* v. *United States,* 35 F. (2d) 870; *McKesson & Robbins* v. *Edwards,* 57 F. (2d) 147; *Lancaster Cotton Mills* v. *United States,* 59 F. (2d) 270; *Memphis Cotton Oil Co.* v. *United States,* 59 F. (2d) 276.

The basis of the decisions is two-fold, first, that the purposes of the statute had been complied with in that the Commissioner by his acceptance and consideration of the claim was being sued on a ground of relief of which he had been fully advised in time to make a refund; and, secondly, even assuming that strict compliance with the statute was necessary, there had been a permissible waiver by the Commissioner of such strict compliance.

The Circuit Court of Appeals erred in refusing to include in respondent's invested capital for 1918 and 1920 the actual value of the intangible property acquired in 1916.

Mr. Justice Cardozo delivered the opinion of the Court.

Respondent (the plaintiff in the court below) brought suit against the United States in a District Court to recover overpayments of income and excess-profits taxes for the years 1918 and 1920. The overpayments had come about, so it was claimed, from the undervaluation by the Commissioner of the respondent's invested capital, with a consequent exaggeration of the profits to be taxed. Two items or classes of property were the subject of the con-

troversy. In each year there has been an omission to include the full value of the real estate; indeed the parties have stipulated that the value of the real estate was greater by the sum of $46,371.08 than the sum allowed in the assessment. In each year also there had been an omission to include the value of intangible property, and particularly good will. The District Court held that there could be no relief in respect of either item for the year 1918 because the claim for refund filed with the Commissioner did not comply with the statute and the Treasury Regulations. In respect of both items, real estate and intangibles, relief was granted to the taxpayer to the extent of overpayments for the year 1920. The result was a judgment in favor of the respondent for $7,975.21. Cross-appeals followed to the Court of Appeals for the second circuit. Upon the taxpayer's appeal, the decision was that the defective refund claim for 1918 had been made good by amendment, and that the tax for that year, as well as for 1920, had been overpaid as to the real estate. Upon the government's appeal, the decision was that the item of intangibles should have been excluded for both years. 57 F. (2d) 676. A writ of certiorari, designed to bring up the ruling as to the amendment of the claim for 1918, was granted by this court on the petition of the government. No petition for a writ was submitted by the taxpayer.

On June 16, 1919, respondent filed its income and excess profits tax return for the year 1918, showing a total tax of $535,144.20, which it paid. On December 28, 1920, it paid for the year 1918 an additional tax of $119,191.19, as the result of an additional assessment, receiving back, however, $9,559.19 on the completion of the audit. Within the time prescribed by law there was filed with the Commissioner, on March 14, 1924, a claim for refund. In this claim, the respondent demanded the repayment of $200,000. It stated in substance as the ground for this demand

that owing to abnormal conditions affecting its invested capital and income, there could be no fair computation of the tax by the appraisal of the cash value of its property in accordance with § 326 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1091, 1092, 1093), and that it should have the benefit of a special assessment under §§ 327 and 328.

Section 327 of the Act provides in subdivision (d) that the tax shall be determined in accordance with § 328 " where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in Section 328."

Section 328 provides in effect that in cases covered thereby the tax shall be computed without reference to the value of the invested capital and shall be determined by the ratio which the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income.

The respondent's claim for refund, with the specification of the erroneous denial of a special assessment as the statement of its grievance, was filed, as we have seen, in March, 1924. On May 14 of that year, the respondent received from the Commissioner a letter acknowledging the filing and notifying the claimant of the procedure to be followed. " No consideration," it was there written, " may be given under the provisions of Sections 327 and 328 until statutory net income and invested capital are definitely determined. It is therefore necessary that you acquiesce in the net income and invested capital as shown in the revenue agent's report of March 25, 1920, for the

year 1918, or submit exceptions, if any, which you may take thereto. If exceptions are taken they should be presented in the form of an appeal prepared in accordance with the provisions of Treasury Decision 3492, a copy of which is enclosed."

The respondent does not assert that in response to this notice it took any appeal or filed any exceptions complaining of the assessment of capital or income. If any such document were in existence, it would have been equivalent to an amendment of the claim, and no doubt would be in evidence. What the respondent chose to do was obviously to acquiesce in the report that the cash value of the capital had been fairly ascertained, and to take its stand on the position that under §§ 327 and 328 its tax should be determined without reference to such value and in accordance with other methods both exceptional and discretionary. Accordingly the Commissioner proceeded to a consideration of the claim that error had been committed in failing to give the taxpayer the benefit of a special method of assessment. On July 16, 1925, the respondent was advised by written notice that there was no evidence of abnormal conditions sufficient to call for a departure from the usual forms of computation. The notice, signed by an acting deputy commissioner, closes with these words: " In accordance with the above conclusions, your claim will be rejected." To this is added a statement that the collector for the taxpayer's district will be officially notified of the rejection at the expiration of thirty days.

Notwithstanding this notice, the Bureau of Internal Revenue kept the proceeding open. Writing to the respondent on February 23, 1926, the Solicitor of the Bureau states that his office has before it for consideration the application for a special assessment of the taxes for 1918, and that " before a final decision is reached " the taxpayer " will be granted an opportunity to be heard

orally." If such a hearing is not desired, "the decision in the matter will be based upon the record as it now stands." In answer to that invitation the respondent requested an oral hearing, which it received, and also filed on April 8, 1926, a statement under oath, which, by concession, was equivalent in form to an amended proof of claim. In this statement the respondent put before the Commissioner the evidence both as to the undervaluation of the real estate and as to the exclusion of intangibles.* The Commissioner rejected the claim on September 3, 1926, by signing the rejection schedule.

We are holding in *United States* v. *Memphis Oil Co.*, decided herewith, *ante,* p. 62, that a general claim for refund, though irregular in form under the Treasury Regulations, may be amended after the period of limitation by specifying the grounds, if the amendment is made before final rejection. A statement, without explanation, to the effect that overpayments have been made in an aggregate amount is broad enough to cover any and all grounds for reassessment and return. This at all events is true where the basis of the grievance is that the tax has been erroneously computed even by the normal method—that there has been a deviation, in other words, from the statutory rule. Such is not the claim in controversy here. Here the taxpayer by its claim as originally presented abandoned the position that there had been any error of fact or law in the assessment of the tax according to the normal method, and planted itself on the position that the special method would be fairer. We are to say whether the ground thus deserted may be recovered by amendment.

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* Certain forms of intangibles, for example, good will, are excluded in general from the definition of invested capital, but there are special conditions in which there is a duty to include them. Revenue Act of 1918, § 326, (4) and (5).

The act of the Commissioner of Internal Revenue in granting or refusing a special assessment under § 327 (d) of the Act of 1918 is discretionary and administrative, not subject to be challenged in any court, at least in the absence of fraud or other irregularities. *Williamsport Co.* v. *United States,* 277 U. S. 551, 562. Discretionary and administrative also is the review of his determination by the Board of Tax Appeals. *Williamsport Co.* v. *United States, supra.* If this amendment is permissible, a request for the exercise of a discretionary jurisdiction will have been turned after the running of the statute (Revenue Act of 1921, c. 136, § 252, 42 Stat. 227, 268; Revenue Act of 1924, c. 234, § 1011; 43 Stat. 253, 342; Revenue Act of 1926, c. 27, § § 284, 1113, 44 Stat. 9, 66, 116) into a claim of error of law or fact, and hence into a controversy within the jurisdiction of a court. What at the beginning was non-justiciable, with exceptions few and narrow (*Williamsport Co.* v. *United States, supra,* p. 562) will have become justiciable at the end.

An amendment so far-reaching, a metamorphosis so complete, may well be thought to destroy the identity of the claim or cause of action if the analogies of pleading in a lawsuit are to govern our decision. A declaration according to the common count for money had and received may be good though it does not tell us how the money was received or the use established. *United States* v. *Memphis Oil Co., supra.* This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure. All will then depend on the degree and kind of the departure. A cause of action alleging as a grievance that there has been a deviation from a rule of law or the breach of a legal duty in the collection of a tax is far apart from an appeal to an administrative officer to abandon the normal rule or method and substitute another, the substi-

tution being dependent upon administrative discretion. Overpayments there may have been in each case, yet in senses widely different. But the analogies of pleadings are not decisive of the controversy before us, wherever they may point and however helpful they may be. To make our conclusion sound, we must keep in mind also the necessities and realities of administrative practice. A demand for a special assessment in accordance with § 327 (d) of the statute of 1918 is not a challenge to any act of the Commissioner in the valuation of invested capital. On the contrary, the valuation of invested capital is irrelevant if the special method is accepted. The very basis of the application for the use of such a method is the presence of abnormal conditions whereby an unfair and disproportionate burden will be laid upon the taxpayer if invested capital is to be reckoned according to the statutory definition (§§ 325, 326) and the profits of the taxpayer subjected to a tax accordingly. Let the new method be adopted, and the value of the invested capital ceases to be a factor in the process. The taxpayer, it is true, may complain even then that there is a variance between such capital when restricted to the elements covered by the statute and invested capital when viewed as an economic concept, and that by reason of special conditions there should be an addition of other elements commonly excluded. See, e. g., J. H. Guild Co. *v.* Commissioner, 11 B. T. A. 914, 921. Indeed that is the very reason why a special assessment becomes necessary. The fact remains, however, that the grievance does not grow out of a failure of the assessors to value the invested capital truly according to the statute. It has no relation, for example, to an assessment of tangible property, such as land or buildings, at less than the cash value. The grievance that will support an application for a special method of assessment under subdivision (d) of § 327 assumes adherence to the statute, and counts upon extraordinary conditions as justi-

fying a claim that the statute is oppressive. If the special method is accepted, the income of the taxpayer is considered without reference to capital as commonly determined, and the tax becomes proportionate to that of other representative corporations engaged in a like business.

A claim or cause of action will be ill-defined for the purpose of an administrative remedy if the definition gives no heed to the understanding or conduct of administrative officers. We are to ask ourselves how a request for a special method of assessment might be expected to be viewed or acted on by those required to consider it. The presentation of such a claim, unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of assets and liabilities.* The two proceedings, alike in form and in consequences, are essentially diverse. By the very terms of the statute, § 327 (d), the special assessment is the outcome of a special application; it is made on motion of the taxpayer. A revision for error of fact or law, on the other hand, may be made by the Commissioner on his own motion, and indeed is commonly so made, for it is incidental to his general duty to audit the accounts. Upon an application for special relief—under subdivision (d)—there are no compensating adjustments favorable to the government that will move an examiner to reconsider the value of the tangibles, and make it either less or greater. *Lewis* v. *Reynolds,* 284 U. S. 281. He will conceive of the invested capital as deposited in a separate compartment which there is no need for him to open. Upon a claim of deviation from the statute, the taxable balance for the

* The range of investigation upon special applications is considered by Albert E. James, a former member of the Board of Tax Appeals in an article "Special Assessment Cases in the Courts and the Board," published in vol. 8, part 1, National Income Tax Magazine, 287, 289, 290, August, 1930. See, also, Investigation of Bureau of Internal Revenue, Senate Report No. 27, Part I, 69th Congress, 1st Session, p. 215.

year will be subject to re-audit as if the tax were laid anew. The grievances differ so essentially that the assertion of the one must be felt to be unrelated to any complaint as to the other.

The conclusion derived from the analogies of pleadings in a lawsuit is thus seen to be confirmed by the probabilities, if not the certainties, of administrative practice. If this is not enough, however, there is confirmation from other sources. In the pages of this record we find convincing evidence that by the understanding of the parties the claim for a special assessment was to exclude any claim for the revision of the value of the capital, and that no such claim would be pressed, at all events while the claim for a new method of assessment was alive and undetermined. We have seen that in May, 1924, the Commissioner of Internal Revenue gave notice to the taxpayer that there could be no consideration of the prayer for relief under §§ 327 and 328 of the applicable statute "until statutory net income and invested capital are definitely determined." The taxpayer was accordingly informed in conformity, it seems, with the usual practice of the department, that it would be necessary to do one or other of two things: to appeal from the report as to invested capital and income in accordance with a prescribed form, or to acquiesce in it. Cf. *Commissioner* v. *Ohio Falls Dye & F. Works,* 50 F. (2d) 660; *Norton Co.* v. *Commissioner,* 50 F. (2d) 664. The notice would tend to show, though assent to its requirements were lacking, that in the judgment of the men intrusted with the administration of the act, the two subjects of inquiry are diverse and independent. Coupled with the assent of the taxpayer, its significance is heightened. There is no suggestion that the taxpayer, when faced with this alternative, resorted to an appeal. In these circumstances its conduct in proceeding with its application for a special assessment was a tacit assent to the condition imposed by the Commissioner and

an abandonment of any objection that capital and income had been erroneously valued if valuation was to be ascertained according to the normal method. We have seen that an application for a special assessment involves an appeal by the taxpayer to the Commissioner's discretion. The application being of that order, a condition may reasonably be imposed that the inquiry shall be postponed until other and unrelated objections have been either determined or abandoned. There is room for argument that the taxpayer, having won the privilege of a hearing on those terms, is estopped from retracting its assent and resuming the abandoned ground. *Sturm* v. *Boker,* 150 U. S. 312, 333, 334; *Davis* v. *Wakelee,* 156 U. S. 680, 689. At least its assent is equivalent to an agreement that the claim for a special assessment shall be deemed to be a distinct one from that for a revision of the values. Retraction, if ever possible, must be held to be too late when the statute of limitations has interposed a bar.

The respondent complains of the ruling of the Court of Appeals whereby the value of intangibles was excluded from the invested capital for the year 1920 and the judgment of the District Court modified accordingly. The argument is that this court has jurisdiction in the exercise of its discretion to review those parts of the judgment adverse to the respondent, though no writ of certiorari was granted except to the petitioner, the government, nor was any other even asked for. We are not required at this time either to affirm or to deny the existence of the power that the argument imputes to us. If the power exists, the respondent has not persuaded us that our discretion should be moved to use it.

The judgment of the Circuit Court of Appeals should be reversed to the extent of the petitioner's objections thereto, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

Counsel for Parties.

UNITED STATES *v.* FACTORS & FINANCE CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 141. Argued December 8, 1932.—Decided January 9, 1933.

1. While a full examination of the taxpayer's affairs was being made by the Bureau for the purpose of determining the income and profits tax for 1917, the taxpayer filed a claim for refund stating only an amount, to cover any overpayment that might be found, and not specifying the grounds. After the statutory period for filing claims had run, an amended claim was filed, setting forth the grounds in detail, with reasons why a special assessment should be made under § 210 of the Revenue Act of 1917, which permits such procedure if the Department is unable in any case satisfactorily to determine the amount of invested capital. Thereafter the Commissioner decided that the case was one for such special assessment, and, pursuing that method, found an overpayment in a stated amount; but he refused to refund, upon the ground that the first claim was too general and the second filed too late. *Held:*

   (1) That the first claim was subject to amendment until final rejection, irrespective of a limitation running in the interval. *United States* v. *Memphis Oil Co., ante,* p. 62. P. 93.

   (2) The second claim was not an abandonment of or departure from the first—not a new and independent claim—but properly an amendment. *United States* v. *Henry Prentiss & Co., ante,* p. 73, distinguished. *Id.*

   (3) The Commissioner's certificate that assessment should be under § 210 is binding in the absence of evidence impeaching his conclusion; and the taxpayer is entitled to recover the overpayment so found by the Commissioner. P. 96.

2. There are clear and important differences between the provisions for special assessments made by § 210 of the Revenue Act of 1917, and those made by § 327 (d) of the Revenue Act of 1918. P. 94.

73 Ct. Cls. 707; 56 F. (2d) 902, affirmed.

CERTIORARI [1] to review a judgment allowing a claim based on overpayment of income and excess profits taxes.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Whitney North Seymour,*

[1] 287 U. S. 582.

George H. Foster, Bradley B. Gilman, and *Wm. H. Riley, Jr.,* were on the brief, for the United States.

Mr. J. Gilmer Korner, Jr., for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The suit is by a taxpayer to recover $19,995.44, with interest, an overpayment of income and profits tax. Here, as in other cases decided at this session, the judgment stands or falls according to our determination of the time within which a notice of a claim for refund is subject to amendment.

On June 15, 1918, respondent, a corporation, filed an income and profits tax return for the calendar year ending December 31, 1917, and made payment of the tax in accordance therewith. The amount of the payment was $177,338.72. In May, 1920, the Commissioner made an assessment of an additional tax for 1917 in the sum of $267.32, which was paid by the respondent on June 29, 1920. In August, 1920, the Commissioner made another assessment of an additional tax for the same year in the sum of $25,327.91. On account of this additional tax respondent on October 4, 1920 made a payment of $9,388.57, and in the same month filed a claim for the abatement of $15,933.34, the amount of the unpaid balance. In connection with this claim for abatement the Commissioner made an order on May 6, 1921, for a full examination of the affairs of the taxpayer by an agent of the Bureau of Internal Revenue. Such an examination was made, and a report by the examiner was filed with his superior.

In February, 1923, the audit by the Commissioner was still incomplete, and the amount of the assessment not finally determined. The taxpayer was fearful, so it seems, that the time might go by within which claims for overpayments were due under the law. To forestall any

default it lodged with the Commissioner on February 27, 1923, a claim for $177,606.04 in terms of sweeping generality. It stated in so doing that there had been at that time no final audit of its return or assessment of the tax, and that the purpose of the notice was to save the taxpayer's rights under the applicable statutes " and to permit the Commissioner to refund to deponent any excess paid over taxes actually found to be due." There was no statement in this notice as to the grounds of the claim that the payments were excessive. No such statement was made until July 17, 1925, when there was filed with the Commissioner an amended claim for refund, setting forth the grounds in detail. In this amended claim the taxpayer explains the reasons why a special assessment should be made in accordance with § 210 of the Revenue Act of 1917 (c. 63, 40 Stat. 300, 307), permitting that procedure where the amount of the tax cannot otherwise be determined with accuracy or justice. A copy of that section is quoted in the margin.*

* Section 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States, $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

In the interval between February, 1923 and July, 1927, there had been action by the Commissioner upon the claim for abatement which had been filed by the taxpayer in October, 1920. A claim for abatement, unlike a claim for refund, has relation to a tax assessed, but still unpaid. *Rock Island, A. & L. R. Co.* v. *United States,* 254 U. S. 141. The Commissioner declined to abate the whole amount of $15,933.34 withheld by the taxpayer, but did declare an overassessment of $3,293.89, leaving a balance of $12,639.45, with interest, then determined to be due. This balance the taxpayer discharged by payment to the Collector in November, 1923.

The claim for abatement had thus been disposed of, but no action had yet been taken upon the claim for refund. The Commissioner permitted this to slumber, without deciding or considering it, till after the filing of the amendment in July, 1925. Upon receipt of that amendment, or soon afterwards, he proceeded to a consideration of the claim upon the merits. There were hearings and rehearings at which the taxpayer gave evidence in support of its claim that its payments had been excessive and that there was need of a special assessment to arrive at a computation consistent with equity and justice. The Commissioner decided the merits of the controversy in favor of the taxpayer. He held that a case had been made out for a special assessment in accordance with § 210 of the Revenue Act of 1917. He held, after computing the tax accordingly, that there had been an overpayment of taxes in the sum of $32,634.89. He held, however, that the notice of claim of February 27, 1923, was defective for failure to state the grounds of the taxpayer's objections; that the notice of July 17, 1925, was without avail as an amendment in respect of overpayments made in 1918 and 1920, since as to these it was too late; that it was good as an original claim for the refund of the overpayment made in November, 1923;

and hence that of the total overpayments of $32,634.89 there should be a refund of $12,639.45, the 1923 instalment, with $3,028.24, interest paid thereon, and that as to the residue of the overpayments, $19,995.44, a refund should be refused. A very different case would be here if the Commissioner had ruled that no adequate reason for a special assessment had been established, and had refused relief upon that ground. We do not say that a justiciable controversy would then have arisen for a court. *Williamsport Co.* v. *United States,* 277 U. S. 551, 562; *United States* v. *Henry Prentiss & Co.,* decided herewith, *ante,* p. 73. What he did was to find that there was need for a special method, that the application of such a method would reduce the tax by a stated sum, but that because of defects in the form of the claimant's notice, there could be relief only in part. For the amount thus disallowed the taxpayer brought suit in the Court of Claims which overruled the action of the Commissioner and gave judgment accordingly. 56 F. (2d) 902; 73 Ct. Cls. 707. A writ of certiorari brings the case here.

We are holding in *United States* v. *Memphis Oil Co., ante,* p. 62, that a general claim for refund, not specifying grounds, is subject to amendment until final rejection irrespective of a limitation running in the interval. We are holding in *United States* v. *Henry Prentiss & Co., ante,* p. 73, that under the Revenue Act of 1918 a claim specifying as the sole ground for relief the necessity for a special assessment by reason of anomalous conditions prevailing in the claimant's business may not be turned by amendment into one for the revision of an assessment by increasing the value of real estate included in invested capital. The present case falls midway, or near to that, between the other two. Here the taxpayer did not specify any ground in the claim first presented, but offered an amendment afterwards setting forth the reasons why the assessment should be special.

The case is a close one, giving fair opportunity for argument either way, but we think the better reasons uphold the privilege of amendment.

1. The conclusion favorable to the privilege has support in the analogies of pleadings in a law suit. The claim in its original form is one for money had and received to the use of the respondent after the manner of the common counts in a suit at common law. It does not specify a particular state of facts, as did the claim in the *Prentiss* case, abandoning all others. It charges overpayment generally, and thus brings within its range whatever facts reside in the domain of equity and conscience.

2. The conclusion thus supported by the analogy of pleadings is not inconsistent with the necessities of administrative practice.

This is not a case where the grounds injected by the amendment have already been abandoned by agreement tacit or express. Such abandonment and agreement there was in the *Prentiss* case, the claimant seeking at the beginning the privilege of the special method of assessment and reverting thereafter to another ground of challenge which by implication, if not expressly, it had promised to renounce. This is a case where the claimant has left the grounds of challenge open, and where the Bureau has itself to blame for not insisting at the outset upon a full disclosure of the grievance.

There are other elements of difference, however, besides the presence or absence of agreement, that divide the *Prentiss* case from this one. These other elements of difference are even more important, for the Prentiss ruling would have been the same if agreement had been absent. When the two cases are considered in the light of administrative practice a distinction is to be noted at the outset between the nature of a special assessment under the Revenue Act of 1918, § 327 (d), and the nature of such an assessment under the Act of 1917,

§ 210. The application in the *Prentiss* case was made under § 327 (d) of the Act of 1918, whereby the taxpayer, ignoring a possible challenge of the computation of invested capital, plants itself upon the ground of a variance between the statutory definition and the economic concept, and calls upon the Commissioner to exercise a dispensing power given to him, in circumstances of hardship, by the provisions of the statute. In an application for special relief under § 210 of the Act of 1917, the grounds of challenge are very different if the letter of the section is the measure of relief thereunder. The value of the invested capital under the statutory definition (Revenue Act of 1917, § 207) is not put aside in such circumstances as an irrelevant inquiry. On the contrary it becomes the very essence of the claim by the taxpayer that there must be a recourse to another method. Under § 210 of the Act of 1917, the special method is not permissible unless "the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital." In brief, § 210 of the Act of 1917 is the precursor of § 327 (a) of the Act of 1918, and is not at all the analogue of § 327 (d). Cf. *Williamsport Co.* v. *United States,* 277 U. S. 551, 558.

We are not forgetful of the fact that by the regulations of the Commissioner and the practice of his Bureau, the distinction between the two acts has been obscured, if not destroyed. Relief has been granted under the Act of 1917 as if its provisions were the same as those of the act adopted later. Treasury Regulations 41, 1918, Art. 52; cf. R. H. Montgomery, Excess Profits Tax Assessment (1920), pp. 242, 243. The validity of the regulations, if applied to proceedings under the Act of 1917, is a question not now before us. The practice, we may say in passing, has not been left unchallenged, but has been criticized in the Report of the Senate Committee for the Investigation of the Bureau of Internal Revenue. See

Report No. 27, Pt. I, pp. 214, 215, *et seq.*, 69th Congress, First Session, 1925–1926. Certain at all events it is that an appeal to the Commissioner to exercise his jurisdiction under § 210 of the Act of 1917 is not confined to the occasions stated in § 327 (d) of the Act of 1918, if indeed it covers them at all. It is at least broad enough to give notice that jurisdiction should be exercised in accordance with the letter of § 210, upon the ground, that is to say, of the inability of the Commissioner to arrive at a conclusion as to value satisfactory to himself. Under § 327 (d) of the Act of 1918, a special assessment is not ordered except on the motion of the taxpayer, setting forth the special reasons why the statutory definition is oppressive, and why another method should be adopted. Under § 210 of the Act of 1917, as under § 327 (a) of the Act of 1918, the Commissioner acts of his own motion whenever he is unable to satisfy himself that the valuation will be accurate if there is adherence to the statute.

This question, if no other, he must have considered and determined when a claim for refund was submitted by the taxpayer without specifying the grounds. *United States* v. *Memphis Oil Co., ante,* p. 62. This question, if no other, he must again have considered and determined when he certified to the taxpayer, after the claim had been amended and after submission of the evidence, that § 210 of the Act of 1917 supplied the applicable rule. It is a question that in last analysis is addressed to his own conscience, and in the absence of any evidence impeaching his conclusion his certificate of satisfaction or the contrary is binding on the courts.

The cumulative force of these administrative opportunities and these procedural analogies upholds the claim and the amendment.

The judgment of the Court of Claims is accordingly

Affirmed.

Counsel for Parties.

WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. CHESTATEE PYRITES & CHEMICAL CORP.

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

No. 335. Argued December 6, 1932.—Decided January 16, 1933.

1. Upon applications within the War Minerals Relief Acts of October 5, 1918, and March 2, 1919, allowances on account of purchase of equipment and machinery, or salaries paid to executive officers of the claimant corporation who were its only stockholders, or payments for legal services,—are not inhibited as a matter of law; and it is for the Secretary of the Interior to determine, as a matter of fact, whether and to what extent such allowances would be just and equitable in the peculiar facts of the case. *Wilbur* v. *Vindicator Co.*, 284 U. S. 231. P. 100.
2. Under the Act of February 13, 1929, the Secretary of the Interior may be required by mandamus to reconsider on the facts allowances claimed under the War Minerals Relief Act which he is shown to have rejected in the erroneous belief that, because of their nature, they were not permitted by the law. P. 101.

61 App. D. C. 212; 59 F. (2d) 887, affirmed.

CERTIORARI [1] to review the affirmance of a judgment in mandamus requiring the Secretary of the Interior to proceed with the adjustment of a claim under the War Minerals Relief Act.

Assistant Attorney General Richardson, with whom *Solicitor General Thacher,* and *Messrs. W. Marvin Smith, E. C. Finney,* and *O. H. Graves* were on the brief, for petitioner.

Mr. Edgar Watkins, with whom *Messrs. Marion Smith, Mac Asbill,* and *Edgar Watkins, Jr.,* were on the brief, for respondent.

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[1] 287 U. S. 588.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Act of February 13, 1929, c. 182, 45 Stat. 1166, provides—

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any claimant who has heretofore filed with the Secretary of the Interior within the time and manner provided by existing law a claim under said Acts generally known as the War Minerals Acts (Fortieth Statutes, page 1272, and its amendments) may within one year from the date of the passage and approval hereof petition the Supreme Court of the District of Columbia to review the final decision of the Secretary of the Interior upon any question of law which has arisen or which may hereafter arise in the adjustment, liquidation, and payment of his claim under said Acts, but the decision of the Secretary of the Interior on all questions of fact shall be conclusive and not subject to review by any court."

Proceeding under the quoted provision, respondent corporation presented a petition to the Supreme Court—February 18, 1929—which alleged that, while endeavoring to develop supplies of pyrites, it suffered allowable losses through expenditures for salaries of executive officers, for taxes, for legal services, also by depreciation of property taken over upon request of the Department, and that the Secretary had erroneously decided as matter of law that it was not entitled to reimbursement therefor. The prayer asked review and determination of points of law upon which the Secretary's decision turned and a writ of mandamus directing him to take jurisdiction and allow whatever he might ascertain upon the facts to be just and equitable.

March 15, 1929, the Secretary made a commendably frank response to the rule to show cause. He admitted

disallowance of the specified items "as shown by copies of the various decisions of the Secretary of the Interior and recommendations of the War Minerals Relief Commissioners marked, respectively, Exhibits A, B, C, D and E, attached to the response," which "are hereby referred to and made a part hereof." And he further said "Under the act of February 13, 1929, Public No. 728, 70th Congress, this court is vested with jurisdiction to review such questions of law as may have been decided in the disposition of petitioner's said claim by the Secretary of the Interior, and respondent makes no objection to, but on the other hand invites, a review of such questions. The petition for review presents the sole question for which petitioner prays a review herein, and it is assumed that the court will confine its review to the single question raised." On the same day a demurrer to the response was interposed.

September 24, 1929, by permission of the court, the Secretary withdrew the original response and presented a substituted answer. The order permitting this appears in the margin.*

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* "In accordance with the stipulation of counsel for the respective parties in this case, dated September 2, 1929, and duly filed herein, it is this 24th day of September, 1929, adjudged and ordered:

"1. That the respondent be and he hereby is permitted to withdraw from the record the response to the relator's petition for mandamus heretofore filed by him.

"2. That the respondent be and he hereby is permitted to file and serve an answer in lieu of said response, and that the relator's demurrer to said response which is now on file, be permitted to stand and be considered a demurrer to such answer.

"3. That the uncertified copies of the findings of the Secretary of the Interior, of the War Minerals Relief Commission and of the Assistant Commissioner of War Minerals, which are attached to the substituted answer to be filed by the respondent in case at law No. 76361, entitled United States of America *ex rel.* Chestatee Pyrites and Chemical Corporation *v.* Ray Lyman Wilbur, Secretary of the

The writings designated " Exhibits A, B, C, D and E," by the original response, were attached to the substituted answer. They show Departmental action relative to the matter in controversy, June 5, 1919, August 8, 1919, October 15, 1919, September 22, 1922, and September 28, 1922. Nothing affirmatively points to other important action.

Exhibit " D "—" Memorandum " by Assistant Commissioner Briar—recommends rejection of all the contested items and states the reasons therefor. Secretary Fall—Exhibit E (September 28, 1922)—accepted this recommendation and made the suggested award.

The item based on purchase price of equipment and machinery was rejected because " to allow for its purchase would be in fact to allow for the purchase of property." The Secretary's decision rested upon an erroneous conclusion as to a point of law which arose in the adjustment of respondent's claim. His view of the law thus announced, and long held by the Department, met disapproval in *Wilbur* v. *Vindicator Consolidated G. M. Co.,* 284 U. S. 231. The respondent was and is entitled to an adjustment of this and other items as the Secretary " shall determine to be just and equitable " under the law as here construed.

Payments for salaries to the officers, who were also respondent's sole stockholders, were disallowed upon the view that, as matter of law, recovery on account of them would amount to forbidden profits to owners. Whether the sole stockholders of a corporation, acting as officers and managers, should be allowed anything by way of salary or compensation depends on the peculiar facts of each case. There is no positive legal inhibition; it is not matter of law.

Interior, may be considered in this case by the court with the same effect as though they were original papers.

" 4. That this case remain in statu quo upon the docket of this court until further order of the court."

The Briar report does not state why the item for legal services was disallowed—whether because of some undisclosed facts or upon some theory of the law. The latter appears the more probable. Certainly, it cannot be said that any rule of law inhibited payment necessary or proper for legal services.

Here petitioner presents no objection to the ruling below concerning taxes.

Counsel for respondent correctly states the issue presented to the trial court: "Are the losses suffered for expenditures for the items involved here within the provisions of the Act of October 5, 1918, as amended and supplemented by the Act of March 2, 1919?" And, "with the issue as stated, the only showing required is that a claim for such losses was made and that such claim was disallowed because of the belief of the petitioner that the law did not permit such allowance."

The record discloses that the Secretary's action was based upon improper construction and application of the law. The matter must go back for final adjustment upon consideration of the facts.

We have not overlooked the argument submitted for petitioner that the five Exhibits above referred to were not parts of the substituted and amended answers. Nor the assertions in these answers that the items in question were rejected upon consideration of the facts. The Exhibits show what was really done and the reasons therefor. Conflicting general statements in the answers must yield. And it seems proper to add that if these answers had been more carefully prepared, with purpose to disclose to the court all relevant facts and circumstances, unnecessary difficulties would have been avoided.

The final judgment of the Supreme Court recites that the cause came on to be heard "upon petition as amended and answer thereto as amended together with Exhibits A, B, C, D, and E to said answer, and the demurrer"

etc. The Exhibits were correctly treated as parts of the amended answer. But a requirement that the parties recast the pleadings would have been proper and helpful.

The petition here for certiorari does not mention the conflicting view in respect of the Exhibits or deal with them as parts of the record. It failed adequately to advise us concerning the real situation. But to avoid possible misunderstanding, it has seemed best to retain jurisdiction rather than to dismiss the writ because improvidently granted.

The judgment of the Supreme Court affirmed by the Court of Appeals authorized a writ of mandamus directing that the Secretary of the Interior should treat the disputed items in the respondent's claim as permissible as matter of law and to proceed with their final adjustment upon consideration of all the facts. We approve this action and affirm the judgment.

Affirmed.

COOK *v.* UNITED STATES.

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

No. 82. Argued December 7, 1932.—Decided January 23, 1933.

1. The Treaty of May 22, 1924, with Great Britain, as both its language and its history show, was intended to deal completely with the search and seizure beyond our territorial limits of British vessels suspected of smuggling intoxicating liquors into this country. P. 112.
2. Article II of the treaty declares that His Britannic Majesty "will raise no objection" to the boarding of private vessels under the British flag outside of the three mile limit of territorial waters in order that inquiries may be made of those on board and an examination be made of the ship's papers, for the purpose of ascertaining whether the vessel or those on board are endeavoring to import, or have imported, alcoholic beverages into the United States, in violation of the laws there in force. When this shows reasonable

ground for suspicion, a search is permitted; and if there is reasonable cause for belief that the vessel has committed, or is committing or attempting to commit, an offense against the laws of the United States prohibiting importation of alcoholic beverages, she may be seized and taken into a port for adjudication. But it expressly provides that the rights conferred by this Article shall not be exercised at a greater distance from the coast of the United States than can be traversed in one hour by the vessel suspected, etc.

Held that the treaty not only permits boarding, etc., beyond the three mile limit, if the vessel is within one-hour's sailing distance, but also forbids it beyond the three mile limit as to vessels not within such sailing distance. Pp. 111, 118.

3. The treaty is self-executing, in that no legislation was necessary to authorize executive action in pursuance of its provisions; and it had the effect, (and was so interpreted in practice,) of superseding, so far as inconsistent with it, the authority conferred by § 581 of the Tariff Act of 1922 upon officers of the Coast Guard to board, search and seize within four leagues of the coast. P. 118.
4. The treaty was not abrogated by reënacting § 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. P. 119.
5. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed; and here the contrary appears, in that the committee reports and the debates upon the Act of 1930, like the reënacted section itself, make no reference to the treaty. P. 120.
6. Any doubt as to the construction of § 581 in this regard is resolved by the consistent departmental practice existing before the reënactment. P. 120.
7. Section 581 continued in force, except as modified by treaties. P. 120.
8. A British ship with unmanifested intoxicating liquors for illegal importation was seized beyond the three-mile limit, and not within one hour's sailing distance of the coast, and was brought into port, where ship and cargo were libeled. *Held:*

(1) That the libels should be dismissed because, by reason of the treaty, this Government lacked the power to seize the ship and the power to subject her to our laws. P. 121.

(2) The doctrine that permits the United States to enforce forfeitures for violation of its laws against property of which it has gained possession through the wrongful act of an individual, applies where the act was such as it might have authorized beforehand,

but not where the United States itself would have had no jurisdiction to make the seizure. *Id.*

9. *The Ship Richmond,* 9 Cranch 102, and *The Merino,* 9 Wheat. 391, also are distinguished. P. 122.

56 F. (2d) 921, reversed.

CERTIORARI[1] to review the reversal of a decree, 51 F. (2d) 292, dismissing two libels, against a vessel and its cargo.

Messrs. Joseph E. Fitzpatrick and *Edmund M. Toland,* with whom *Mr. Mortimer W. Newton* was on the brief, for petitioner.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Whitney North Seymour, A. W. Henderson,* and *W. Marvin Smith* were on the brief, for the United States.

A libel for forfeiture must allege a seizure which has not been abandoned but the seizure need not be valid to sustain the jurisdiction. See *The Richmond,* 9 Cranch 102; *The Ann,* 9 Cranch 289, 291; *Gelston* v. *Hoyt,* 3 Wheat. 246, 310; *The Merino,* 9 Wheat. 391, 402–403; *Wood* v. *United States,* 16 Pet. 342, 359; *Taylor* v. *United States,* 3 How. 197, 205, 206; *Dodge* v. *United States,* 272 U. S. 530. See also *Strong* v. *United States,* 46 F. (2d) 257, 260–261, dismissed pursuant to stipulation, 284 U. S. 691; *The Conejo,* 16 F. (2d) 264, 265; *The Underwriter,* 13 F. (2d) 433, 434, affirmed on other grounds *sub nom. Maul* v. *United States,* 274 U. S. 501; *The Rosalie M.,* 12 F. (2d) 970, 971; *United States* v. *Story,* 294 Fed. 517, 519.

The question concerns the venue; and the United States by filing its libel for forfeiture may ratify what would otherwise have been an illegal seizure. The treaty did not change any law of the United States prescribing penalties and forfeitures. It related merely to the arrest of

[1] 287 U. S. 581.

persons and the seizure of property suspected of offending against the laws designed to prevent the smuggling into this country of intoxicating liquor. *Ford* v. *United States*, 273 U. S. 593. The seizure, if contrary to the treaty, could not relieve the District Court of the duty to determine whether the *res* had offended against a law of the United States and to condemn the *res* as forfeited.

Instead of questioning the power of the court to consider the causes alleged in the libels the claimant filed answers which made defense upon the merits of the case. By so doing, it would seem that he waived the right, if any was afforded to him under the treaty, to object that the court was without jurisdiction.

If the question of the legality of the seizure is material and was properly raised, it becomes necessary to consider the effect of the treaty upon the provisions of the tariff acts. The court below held that the treaty did not repeal the clause fixing a four-league zone in the federal customs and revenue laws, and, therefore, that the validity of the seizure beyond the treaty limits but within four leagues of the coast was not affected. The opinion does not discuss the decision of this Court in *Ford* v. *United States*, 273 U. S. 593, 618–619.

The Department of Justice, since 1926, has entertained a contrary view of the treaty in its relation to the tariff acts.

The Commandant of the U. S. Coast Guard was advised in 1927 that all seizures of British vessels captured in the rum-smuggling trade should be within the terms of the treaty and that seizing officers should be instructed to produce evidence, not that the vessel was found within the four-league limit, but that she was apprehended within one hour's sailing distance from the coast. This construction of the treaty finds support in the following cases: *The Frances Louise*, 1 F. (2d) 1004, appeal dis-

missed on motion of the Solicitor General, 270 U. S. 666; *The Marjorie E. Bachman,* 4 F. (2d) 405, appeal dismissed on motion of the Solicitor General, 270 U. S. 666; *The Sagatind,* 4 F. (2d) 928, aff'd 11 F. (2d) 673; *The Over the Top,* 5 F. (2d) 838; *Ford* v. *United States,* 10 F. (2d) 339, aff'd 273 U. S. 593; *Hennings* v. *United States,* 13 F. (2d) 74; *United States* v. *Ferris,* 19 F. (2d) 925; *United States* v. *Schouweiler,* 19 F. (2d) 387; *United States* v. *Cargo ex British Schooner Patara,* 40 F. (2d) 74. After the passage of the Tariff Act of 1930 the Department continued to follow this construction. The view of the treaty taken by the Department of Justice is in accord with that of the District Court in this case. If that view is correct and if the question of the legality of the seizure is material and was properly raised in the District Court, the judgment of the court below should be reversed.

Lawyers for the Government other than those employed in the Department of Justice take a different view of the treaty in its relation to the tariff acts. In their view the result reached by the court below was correct. The contention is that the treaty was not a limitation upon the right to search and seize British vessels within the twelve-mile limit, but was an extension of the right always conceded to search and seize within the three-mile limit so as to permit seizures beyond territorial waters, provided the vessel was within one hour's sailing distance; that there was no intention on the part of the United States or Great Britain to surrender claims of sovereign right, except that Great Britain waived its right to protest seizures beyond the three-mile limit in a very limited number of cases defined in the treaty, in return for which her ships were permitted to transport intoxicating liquors within the territorial waters of the United States as part of their stores.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The main question for decision is whether § 581 of the Tariff Act of 1930, c. 497, 46 Stat. 590, 747, is modified, as applied to British vessels suspected of being engaged in smuggling liquors into the United States, by the Treaty between this country and Great Britain proclaimed May 22, 1924. (43 Stat. 1761.) That section—which is a re-enactment in identical language of § 581 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 979—declares that officers of the Coast Guard are authorized to stop and board any vessel at any place within four leagues (12 miles) of the coast of the United States "to examine the manifest and to inspect, search and examine" the vessel and any merchandise therein; and if it shall appear that any violation of any law of the United States has been committed by reason of which the vessel or merchandise is liable to forfeiture, it shall be the duty of such officers to seize the same.

On the evening of November 1, 1930, the British motor screw Mazel Tov—a vessel of speed not exceeding 10 miles an hour—was discovered by officers of the Coast Guard within four leagues of the coast of Massachusetts and was boarded by them at a point 11½ miles from the nearest land. The manifest was demanded and exhibited. Search followed, which disclosed that the only cargo on board, other than ship stores, was unmanifested intoxicating liquor which had been cleared from St. Pierre, a French possession. The vessel ostensibly bound for Nassau, a British possession, had, when boarded, been cruising off our coast with the intent that ultimately the liquor should be taken to the United States by other boats. But the evidence indicated that she did not intend to approach nearer than four leagues to our coast; and, so far as ap-

peared, she had not been in communication with our shores and had not unladen any part of her cargo. The boarding officers seized the Mazel Tov at a point more than 10 miles from our coast; took her to the Port of Providence; and there delivered the vessel and cargo to the customs officials.

The Collector of Customs, acting pursuant to § 584 of the Tariff Act of 1930, assessed against Frank Cook, as master of the Mazel Tov, a penalty of $14,286.18 for failure to include the liquor in the manifest. By § 584, if merchandise not described in the manifest is found on board a vessel "bound to the United States," the master is subject to a penalty equal to its value, and the merchandise belonging or consigned to him is subject to forfeiture. By § 594, whenever a master becomes subject to a penalty, the vessel may be seized and proceeded against summarily by libel to recover the penalty. The Government proceeded, in the federal court for Rhode Island, to collect the assessed penalty by means of libels against both the cargo and the vessel. The cases were consolidated.

Cook, claiming as master and bailee of the vessel and as consignee and claimant of the cargo, alleged that the Mazel Tov was of British registry and owned by a Nova Scotia corporation. He answered to the merits; and excepted to the jurisdiction on the ground that the "vessel was not seized within the territorial limits of any jurisdiction of the United States, but, on the contrary, was captured and boarded at a point more than four (4) leagues from the coast," and that "it was not the intention at any time to enter any of the territorial limits of the United States."

The District Court, having found the facts above stated, dismissed the libels. 51 F. (2d) 292. The Government appealed to the Circuit Court of Appeals, which held that the Treaty did not "effect a change in the customs-revenue laws of the United States wherein Congress had

fixed a four league protective zone"; reversed the judgments; and remanded the cases to the District Court for further proceedings. 56 F. (2d) 921. This Court granted certiorari.[1]

Cook contends, among other things, that by reason of the Treaty between the United States and Great Britain proclaimed May 22, 1924 (43 Stat. 1761), the seizure was unlawful under the laws of the United States; that the authority conferred by § 581 of the Tariff Act of 1922 to board, search and seize within the four league limit, was, as respects British vessels,[2] modified by the Treaty so as

[1] The view that the Treaty modified the limits within which British vessels might be seized for violation of the laws prohibiting alcoholic liquors is supported by the following cases: *The Frances Louise,* 1 F. (2d) 1004; *The Marjorie E. Bachman,* 4 F. (2d) 405; *The Sagatind,* 11 F. (2d) 673, 675; *The Over the Top,* 5 F. (2d) 838, 844; *Ford* v. *United States,* 10 F. (2d) 339, 347, affirmed, 273 U. S. 593; *Hennings* v. *United States,* 13 F. (2d) 74, 75; *United States* v. *Ferris,* 19 F. (2d) 925, 926; *United States* v. *Schouweiler,* 19 F. (2d) 387; compare *United States* v. *Cargo ex British Schooner Patara,* 40 F. (2d) 74. In other cases the view has been expressed that the treaties did not restrict, at all events, the right of seizure. *The Vinces,* 20 F. (2d) 164, 174, affirmed sub nom. *Gillam* v. *United States,* 27 F. (2d) 296 (compare *id.,* p. 301); *The Panama,* 6 F. (2d) 326, 327; *The Resolution,* 30 F. (2d) 534, 537–538; *The Pescawha,* 45 F. (2d) 221, 222. Compare, also, the following cases in which seizure was made within twelve miles but in which it does not appear whether it was made within an hour's sailing distance or whether the question of the effect of the treaties was raised. *The Mistinguette,* 27 F. (2d) 738; *United States* v. *63 Kegs of Malt,* 27 F. (2d) 741; *The Newton Bay,* 30 F. (2d) 444, affirmed, 36 F. (2d) 729; *The Amaranth,* 35 F. (2d) 872; *The Marion Phillis,* 36 F. (2d) 688; *The Deauville,* 49 F. (2d) 372; *The Throndyke,* 53 F. (2d) 239; *The Miss C. B.,* 59 F. (2d) 744.

[2] Similar treaties have been entered into with fifteen other countries. Norway, July 2, 1924 (43 Stat. 1772); Denmark, July 25, 1924 (43 Stat. 1809); Germany, August 11, 1924 (43 Stat. 1815); Sweden, August 18, 1924 (43 Stat. 1830); Italy, October 22, 1924 (43 Stat. 1844); Panama, January 19, 1925 (43 Stat. 1875); Netherlands, April 8, 1925 (44 Stat. 2013); Cuba, June 19, 1926 (44 Stat. 2395); Spain,

to substitute for four leagues from our coast, the distance which "can be traversed in one hour by the vessel suspected of endeavoring to commit the offense"; that Congress by re-enacting § 581 in the Tariff Act of 1930 intended to continue in force the modification effected by the Treaty; and, hence, that the Mazel Tov, being a British vessel of a speed not exceeding 10 miles an hour, could not be lawfully boarded, searched and seized at a distance of 11½ miles from the coast because suspected of "endeavoring to import or have imported alcoholic beverages into the United States in violation of the laws there in force."

The Government insists that the Treaty did not have the effect of so modifying § 581 of the Act of 1922; and that, if it did, the re-enactment of § 581 without change, by the Act of 1930, removed the alleged modification. It contends further that the validity of the seizure was not material; and if ever material had been waived.

The Treaty provides, among other things, as follows:

"Article I. The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

"Article II. (1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial

November 17, 1926 (44 Stat. 2465); France, March 12, 1927 (45 Stat. 2403); Belgium, January 11, 1928 (45 Stat. 2456); Greece, February 18, 1929 (45 Stat. 2736); Japan, January 16, 1930 (46 Stat. 2446); Poland, August 8, 1930 (46 Stat. 2773); Chile, November 26, 1930 (46 Stat. 2852). The only substantial difference in these treaties is in Article One, dealing with the general principle of a three-mile limit; in the treaties with Great Britain, the Netherlands, Germany, Cuba, Panama and Japan, the principle is declared to be accepted, while in the others rights and claims in that regard are declared to be reserved.

waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

"(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."

We are of opinion that the decrees entered by the District Court should have been affirmed.

First. It is suggested on behalf of the Government that the power to search and seize within the twelve-mile zone conferred upon officers of the Coast Guard by § 581 of the Tariff Act of 1922, was unaffected by the Treaty, save that the British Government agreed not to protest where the seizure was within an hour's sailing distance of the

coast. The argument is that the Treaty settled the validity of the seizure only for those cases where it was made within the limits described in the Treaty; and that since this seizure was made beyond one hour's sailing distance from the coast the Treaty did not apply.[3] In construing the Treaty its history should be consulted. Compare *United States* v. *Texas,* 162 U. S. 1; *Oklahoma* v. *Texas,* 260 U. S. 606; *Nielsen* v. *Johnson,* 279 U. S. 47, 52. Both its language and its history show that the high contracting parties did not intend so to limit its operation. The preamble states that they entered into the Treaty "being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages." The history reveals that serious differences had arisen between the two Governments in that connection; and that, for the purpose of resolving them, the parties determined to deal completely with the subject of search and seizure, beyond our territorial limits, of British vessels suspected of smuggling liquors.

Prior to the Eighteenth Amendment the United States had never attempted, in connection with the enforcement of our customs laws, to board foreign vessels beyond the three-mile limit except where consent was implied from the fact that the vessel, being hailed, answered that she was bound for the United States, or where a vessel had been discovered violating our laws within the three-mile limit and, while endeavoring to escape, was hotly pursued. Although Hovering Acts conferring authority to board and search vessels, foreign and domestic, "within four leagues of the coast," had existed since the foundation of our Government, see Act of August 4, 1790, c. 35, § 31,

[3] The argument was advanced by the Solicitor General as representing the view not of the Department of Justice but of other lawyers for the Government.

1 Stat. 145, 164,[4] the authority therein conferred had, prior to the Tariff Act of 1922, been in terms limited to inbound vessels; and no statute had purported to confer authority to seize foreign vessels beyond our territorial waters for violation of any of our laws, except in those few instances in which Congress acted pursuant to specific treaties.[5] But soon after the Eighteenth Amendment took effect (January 16, 1920), vessels of British registry were found to be engaged in smuggling intoxicating liquors into the United States in violation of our laws.[6] In the effort to prevent such violations British vessels were being boarded, searched and seized beyond the three-mile limit;[7] and by § 581 of the Tariff Act of 1922 Con-

[4] Re-enacted by Act of March 2, 1799, c. 22, § 71, 1 Stat. 627, 668; and see Rev. Stat. § 3067.

The model for the American statutes was the British Hovering Act of 1736, 9 Geo. II, c. 35, § 23, which provided for the forfeiture of vessels under 100 tons into which foreign goods were taken within four leagues of the coast. Compare the earlier British Hovering Acts of 1709 and 1718: 8 Anne, c. 7, § 17; 5 Geo. I, c. 11. In 1876 all existing hovering acts were repealed by the Customs Consolidation Act, 39 & 40 Vict., c. 36, which provides in § 159 for the forfeiture of vessels belonging in whole or in part to British subjects or having half the persons on board British subjects, where the vessel is found, or discovered to have been, within three leagues of the coast; and for the forfeiture of other vessels found, or discovered to have been, within one league of the coast. For the development of the British law, see William E. Masterson, Jurisdiction in Marginal Seas, pp. 1–173.

[5] For those acts, see *Maul* v. *United States*, 274 U. S. 501, 517, note 18.

[6] The note of the Secretary of State of June 26, 1922, to the British Ambassador, recites "that many of the ships engaged in the illegal smuggling of liquor into the United States are registered under the British flag and that large quantities of liquor are carried by such vessels" from British possessions. Dept. of State Press Release, February 16, 1927.

[7] The Henry L. Marshall (286 Fed. 260, 262) was seized August 12, 1921; the Grace and Ruby (283 Fed. 475) on February 23, 1922; the Marion L. Mosher on July 27, 1923 (*United States* v. *United States*

gress undertook to sanction such action through enlarging the authority to board, search and seize beyond the three-mile limit so as to include foreign vessels although not inbound.[8]

Both before and after the passage of the Tariff Act of 1922 it was the consistent policy of our Government to release, upon protest, all British vessels seized beyond the three-mile limit and not bound to the United States, unless it appeared that the hovering vessel had, by means of her own small boats and crew, assisted in landing there contraband goods.[9] Our Government deemed that ex-

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Fidelity & Surety Co., unreported, decided August 13, 1923, in the District Court for the Eastern District of New York); the Louise F. (293 Fed. 933), on November 5, 1923; the Island Home (13 F. (2d) 382), on November 24, 1923; the Muriel E. Winters (6 F. (2d) 466), on January 6, 1924. For notices of other seizures of this kind, not resulting in adjudication, see Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, pp. 254–256.

In reply to a question in the House of Commons on June 6, 1923, concerning the number of British vessels seized, the Undersecretary of State for Foreign Affairs replied: "Broadly speaking, some 20 or 25 cases are known to His Majesty's Government where vessels, mostly of Canadian registry, have been seized. The seizures have occurred at varying distances from the shore, some within and some without the three-mile limit. The crews have nearly always been detained for varying periods. His Majesty's Embassy at Washington have acted repeatedly, and in the strongest possible manner, to secure the release of vessels seized outside the three-mile limit, or inside it when a genuine case of distress seemed to be made out." 164 Parliamentary Debates (Commons), 5th series, col. 2212.

[8] See Congressional Record, Vol. 62, Part 11, 67th Cong., 2d Sess., p. 11,593. An amendment to § 581, as reported, was proposed and withdrawn; the amendment would have made the section applicable specifically to searches and seizures for violation of the laws prohibiting alcoholic liquors. As enacted, however, the section did not fall short of the powers which the amendment would have granted in more particular terms. See Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, p. 214.

[9] See Report of the Attorney General, 1923, pp. 89–90. The practice was adopted of requiring a bond, on release, conditioned on the

ception an essential to the enforcement of our laws and consistent with the principles of international law.[10] But the British Government declined to acquiesce in the propriety of the exception; declared that our practice of seizing vessels under those circumstances was not in harmony with the law of nations;[11] protested against the seizure of any British vessel outside of the three-mile limit;[12] and stated that insistence upon the practice would be regarded as creating "a very serious situation."[13]

With a view to removing the British objections, the Secretary of State proposed, on June 26, 1922, that a treaty be entered into "under which the authorities of each nation would be authorized to exercise beyond the

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delivery of the cargo to the ports named in the clearance papers. *Ibid.* The class of vessels not released was extended, in the case of the Henry L. Marshall, to include a vessel beyond the three-mile limit, where, although the small boats were not the vessel's own, there was unity of control over the vessel and boats. 286 Fed. 260, affirmed, 292 Fed. 486.

[10] A statement of the American position is contained in a communication from the Secretary of State to the American Chargé d'Affaires ad interim in London, dated August 25, 1923. MS. Records, Dept. of State. And see the communication of the Secretary of State to the British Ambassador, January 18, 1923, in which the American position is declared to be supported by the view of the British Government concerning the seizure by the Russian authorities in 1888 of the British schooner Araunah (82 British and Foreign State Papers, p. 1058). Dept. of State Press Release, February 16, 1927. See, also, the address of the Secretary of State before the Council of Foreign Relations, on January 23, 1924, printed in 18 American Journal of International Law, p. 229.

[11] The British Government stated that by the Customs Consolidation Act of 1876 "British municipal legislation is made to conform with international law." Note of July 14, 1923, MS. Records, Dept. of State. For the Act, see note 4, *supra.*

[12] The British Ambassador to the Secretary of State, December 30, 1922, Dept. of State Press Release, February 16, 1927.

[13] The British Chargé d'Affaires ad interim to the Secretary of State, July 10, 1923, Dept. of State Press Release, February 16, 1927.

three-mile limit of territorial waters a measure of control over vessels belonging to the other" and which would include specifically "reciprocal provisions authorizing the authorities of each Government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters to the extent of twelve miles from the shore." [14] The British Government declined definitely to entertain any such proposal.[15]

The decision rendered by this Court on April 30, 1923, in *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, led to the resumption of negotiations. It was there decided that the National Prohibition Act applied to all merchant vessels, foreign or domestic, within the territorial waters of the United States, and that the carrying of intoxicating liquors, either as cargo or as sea stores, through the territorial waters or into the ports and harbors of the United States is forbidden by that Act and the Eighteenth Amendment. The embarrassment to British vessels and trade threatened by this decision was serious.[16] Recognizing the urgent need of some arrangement between the

[14] Letter to the British Ambassador, June 26, 1922, Dept. of State Press Release, February 16, 1927.

[15] The British Ambassador to the Secretary of State, October 13, 1922, Dept. of State Press Release, February 16, 1927.

[16] On May 25, 1923, the British Ambassador addressed a note to the Secretary of State protesting against the application of the principle announced in this decision. A reply to this note was sent to the British Ambassador on June 6, 1923. MS. Records, Dept. of State. The British position was stated at length by Lord Curzon in the House of Lords on June 28, 1923. 54 Parl. Deb. (Lords), 5th series, cols. 721–729.

Protests were likewise sent by the Italian Government, on May 29, 1923; by the Belgian Government, on May 28, 1923; by the Netherlands Government, on June 1, 1923; by the Norwegian Government, on June 7, 1923; by the Portuguese Government, on July 25, 1923; by the Swedish Government, on May 31, 1923; and by the Danish Government, on June 1, 1923. Dept. of State Press Release, February 16, 1927.

two Governments which would permit the conduct by the British of legitimate trade and remove this obstacle to the operation of their vessels in the accustomed manner, the Secretary of State submitted to Great Britain, on June 11, 1923, the draft of a treaty designed to remove the friction between the two Governments. The draft did not refer specifically to intoxicating liquors. Article I provided, in general terms, that the authorities of each country should " within the distance of twelve geographical miles from its coasts " be permitted to board and search private vessels of the other to ascertain whether such vessels were engaged in an attempt to violate its laws " prohibiting or regulating the unloading near, or importation into its territories of any article; " and " if there is reasonable cause for belief " that the vessel is so engaged to seize it. Article II, likewise, in general terms, provided that articles on private vessels of either nation listed as sea stores, or as cargo destined to a foreign port, the importation of which is prohibited, might be brought within the territorial waters of the other on condition that they be sealed " upon arrival of the vessel so destined within twelve geographical miles of the coasts " and be kept sealed continuously thereafter while within the territorial waters.

This proposal of the Secretary of State also failed to meet with the approval of the British Government because it was regarded as involving an extension of the limits of the territorial waters.[17] The negotiations were, however, continued; and ultimately the British Government submitted a counter-proposal, which sought to achieve the same results by different means. The British draft provided that the high contracting parties should

[17] The British Chargé d'Affaires ad interim to the Acting Secretary of State, September 17, 1923, Dept. of State Press Release, February 16, 1927.

declare "their firm intention to uphold the principle that three marine miles measured from low water mark constitute the proper limits of territorial waters"; and avoiding all language which could possibly indicate a contrary purpose, it made no reference to the twelve-mile limit. Moreover, the arrangement, instead of applying generally to merchandise subject to prohibitory or regulatory laws, was to be limited specifically to intoxicating liquors; and no reciprocal rights were to be conferred. Each country was to secure the immunity required to satisfy its peculiar need. The need of the United States was to be met by providing that His Britannic Majesty "will raise no objection to the boarding," etc., outside the territorial waters at no "greater distance from the coast of the United States than can be traversed in one hour by the vessel suspected of" smuggling. The need of Great Britain was to be met by our allowing "British vessels voyaging to or from the ports or passing through the waters of the United States to have on board alcoholic liquors listed as sea stores or as cargo destined for a foreign port, provided that such liquor is kept under seal while within the jurisdiction of the United States." [18]

The draft of treaty submitted by the British Government was accepted with a few purely verbal changes. Thereby, as stated in *Ford* v. *United States,* 273 U. S. 593, 609-610, this country secured "a definite fixing of the zone of legitimate seizure of hovering British vessels seeking to defeat the laws against the importation of liquor into this country from the sea."

Second. The Treaty, being later in date than the Act of 1922, superseded, so far as inconsistent with the terms of the Act, the authority which had been conferred by § 581 upon officers of the Coast Guard to board, search

[18] Draft Treaty, left with the Secretary of State by the British Chargé d'Affaires, December 3, 1923.

and seize beyond our territorial waters. *Whitney* v. *Robertson,* 124 U. S. 190, 194. For in a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions.[19]

The purpose of the provisions for seizure in § 581, and their practical operation, as an aid in the enforcement of the laws prohibiting alcoholic liquors, leave no doubt that the territorial limitations there established were modified by the Treaty. This conclusion is supported by the course of administrative practice. Shortly after the Treaty took effect, the Treasury Department issued amended instructions for the Coast Guard which pointed out, after reciting the provisions of § 581, that " in cases of special treaties, the provisions of those treaties shall be complied with "; and called attention particularly to the recent treaties dealing with the smuggling of intoxicating liquors.[20] The Commandant of the Coast Guard, moreover, was informed in 1927, as the Solicitor General states, that all seizures of British vessels captured in the rum-smuggling trade should be within the terms of the Treaty and that seizing officers should be instructed to produce evidence, not that the vessel was found within the four-league limit, but that she was apprehended within one hour's sailing distance from the coast.

Third. The Treaty was not abrogated by re-enacting § 581 in the Tariff Act of 1930 in the identical terms of the

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[19] *Ford* v. *United States,* 273 U. S. 593. Such was the view of the Secretary of State, expressed in a letter of March 3, 1924, to the Chairman of the House Committee on Foreign Affairs. See Hearings Before the Committee on Foreign Affairs, House of Representatives, on H. Res. 174, 68th Cong., 1st Sess., p. 7. Compare, as to the meaning of " self-executing," Edwin D. Dickinson, Are the Liquor Treaties Self-Executing? 20 American Journal of International Law, p. 444.

[20] Amendments to Instructions, Customs, Navigation, and Motor-Boat Laws and Duties of Boarding Officers, 1923, No. 3, issued December 11, 1924.

Act of 1922. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. *Chew Heong* v. *United States,* 112 U. S. 536; *United States* v. *Payne,* 264 U. S. 446, 448. Here, the contrary appears. The committee reports and the debates upon the Act of 1930, like the re-enacted section itself, make no reference to the Treaty of 1924. Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its re-enactment. Compare *United States* v. *G. Falk & Brother,* 204 U. S. 143; *Nagle* v. *Loi Hoa,* 275 U. S. 475, 481; *Brewster* v. *Gage,* 280 U. S. 327, 337; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *United States* v. *Ryan,* 284 U. S. 167, 175. No change, in this respect, was made either by the Department of the Treasury or the Department of Justice after the Tariff Act of 1930.

Searches and seizures in the enforcement of the laws prohibiting alcoholic liquors are governed, since the 1930 Act, as they were before, by the provisions of the Treaty. Section 581, with its scope narrowed by the Treaty, remained in force after its re-enactment in the Act of 1930. The section continued to apply to the boarding, search and seizure of all vessels of all countries with which we had no relevant treaties. It continued also, in the enforcement of our customs laws not related to the prohibition of alcoholic liquors, to govern the boarding of vessels of those countries with which we had entered into treaties like that with Great Britain.

Fourth. As the Mazel Tov was seized without warrant of law, the libels were properly dismissed. The Government contends that the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel

for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the Port of Providence, the federal court for Rhode Island acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties. The argument rests upon misconceptions.

It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. *Dodge* v. *United States,* 272 U. S. 530, 532. Compare *Ker* v. *Illinois,* 119 U. S. 436, 444. The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the Government; and that proceedings by the Government to enforce a forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize. *Gelston* v. *Hoyt,* 3 Wheat. 246, 310; *Taylor* v. *United States,* 3 How. 197, 205–206. The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with" the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose

and effect of the Treaty. Compare *United States* v. *Rauscher,* 119 U. S. 407.

The case differs from *The Richmond,* 9 Cranch 102, and *The Merino,* 9 Wheat. 391, where forfeitures of vessels wrongfully seized by our Navy were upheld.[21] There, the vessels seized were of American registry; and the seizures did not violate any treaty, but were merely violations of the law of nations because made within the territory of another sovereign. In those cases it was held that the illegality of the seizures did not affect the venue of the action or the process of the court. Here, the objection is more fundamental. It is to the jurisdiction of the United States. The objection is not met by distinguishing between the custody of the Coast Guard and the subsequent custody of the marshal. Nor is it lost by the entry of an answer to the merits. The ordinary incidents of possession of the vessel and the cargo yield to the international agreement.

The decree of the Circuit Court of Appeals is

Reversed.

MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER are of opinion that in respect of British vessels engaged in smuggling intoxicating liquor into the United States the treaty of 1924 was not intended to cut down the rights claimed by the United States under the hovering statutes in force since the organization of our government, but that it was the purpose of both countries to extend and enlarge such rights to enable the United States more effectively to enforce its liquor laws and that therefore the decree of the Circuit Court of Appeals should be affirmed.

MR. JUSTICE VAN DEVANTER took no part in the consideration or decision of this case.

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[21] See, also, *The Homestead,* 7 F. (2d) 413, 415. Compare *United States* v. *Bowman,* 260 U. S. 94.

ROGERS *v.* GUARANTY TRUST COMPANY OF NEW YORK ET. AL.

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

No. 227. Argued December 15, 16, 1932.—Decided January 23, 1933.

1. A stockholder, by becoming such, impliedly agrees that in respect of its internal affairs the corporation is governed by the laws of the State of its organization. P. 130.
2. It is settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State, but will leave controversies as to such matters to the courts of the State of the domicile. P. 130.
3. Courts will exercise this discretion whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case. P. 131.
4. Stockholders of a New Jersey corporation brought suit in New York against the corporation, some of its directors and other persons to enjoin the issuing and selling of stock to the officers, directors and certain employees of the corporation, and to annul the shares issued. Only a few of the company's directors were residents of New York; and only a few of the stock-allottees were before the court, though the conditions entitling all to receive the stock had been complied with and presumably some of it had been delivered. The corporation had its principal business office in New York and had its registered office in New Jersey, where stockholders' meetings were held, and had property in New Jersey and did business there and in other States and countries. The controversy depended on a construction of statutes of New Jersey which had not been passed upon by New Jersey courts and involved grave doubts. The New Jersey law afforded a ready and complete remedy through an action *in rem* and service by publication. *Held:*

   (1) That the corporation could not be regarded as having been organized in New Jersey to do all of its business elsewhere, and could not be treated as a local concern in New York. P. 131.

(2) That the case was within the general rule (par. 2, *supra*), and the District Court did not abuse its discretion in dismissing it without prejudice. P. 132.

60 F. (2d) 114, reversed.

CERTIORARI [1] to review the reversal of a decree dismissing the bills in two stockholders suits, which were begun in the Supreme Court of New York and removed to the District Court and consolidated. The opinion here directs that the decree of the District Court, 60 F. (2d) 106, be reinstated.

Mr. Richard Reid Rogers pro se. *Mr. Evan Shelby* was on the brief.

Mr. John W. Davis, with whom *Mr. Nathan L. Miller* was on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner, plaintiff below, owns 200 shares of the common stock of The American Tobacco Company which he acquired prior to the passage of c. 175, New Jersey Laws, 1920, that is here involved. He also owns 400 shares of common stock B. He brought two suits in the supreme court of New York: one against the tobacco company and some of its directors, the other against the trust company, Junius Parker and others. On application of defendants both were removed to the federal court for the southern district of that State. The first was discontinued as to some defendants and the cases were consolidated. The defendants before the court are the two companies, Parker, and five of the 17 directors of the tobacco company including its president, one of its vice presidents and its secretary.

The tobacco company was organized under the laws of New Jersey, and in that State maintains its "principal

[1] 287 U. S. 586.

and registered office" as designated in its charter, holds the stockholders' meetings and does a substantial amount of business. It is authorized by the laws of New York to do business there and has in New York City its principal place of business where its directors usually meet, its executives have their offices and most of its records are kept. It carries on business in that and many other States and also in a number of foreign countries.

The grievances alleged by plaintiff concern the issue, allotment and sale of stock of the tobacco company. June 25, 1930, the board of directors adopted a resolution recommending the reduction by one-half of the par value and the doubling of the number of shares of its common stock and common stock B. It had outstanding 526,997 shares of preferred stock, and, as a result of action in accordance with that recommendation, 1,609,696 shares of common and 3,077,320 shares of common B. And by another resolution the board advised approval by the stockholders of a plan for the issue and sale of common stock B to employees pursuant to c. 175, New Jersey Laws, 1920.[1] The plan submitted accords to such em-

[1] Section 1 of that Act provides for the participation of employees in purchase of stock, profits, welfare work and management of any corporation organized under the laws of the State, and declares: "Any stock corporation . . . may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes: (a) The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in installments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise." And § 2 (b) provides: ". . . the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable, and shall call a meeting of the stockholders to take

ployees and others actively engaged in the conduct of the business as may be selected an opportunity to purchase stock "by way of additional compensation for services to be rendered," and allots for subscription shares of unissued stock. The board may offer stock to such persons in the service at prices not less than par and upon other terms and conditions determined by the president pursuant to authority granted him for that purpose by the board. No employee or person actively engaged in the conduct of the business of the corporation or its subsidiaries shall be deemed ineligible to its benefits by reason of being also a director of the corporation or of any of its subsidiaries or of holding any office therein.

On July 28, 1930, the stockholders adopted the plan. And January 28, 1931, the board authorized a sale of 56,712 shares of common stock B at par value of $25 per share. It directed that there be furnished to the president, to be considered in determining to whom the stock should be allotted for purchase, a list showing the services rendered and, having regard to the value of the same, the rating on a percentage basis given to each together with the total amount of his compensation for 1930. It recommended that the basis of distribution should be the number of shares having par value equal to one-third of that year's compensation to each allottee rated at 100 per cent. and correspondingly less to those having lower ratings. And there was accorded to each of 535 employees, including directors and others active in the business, the right to subscribe for the new stock on that basis. All

action thereon. . . . If two-thirds in interest of each class of stockholders present at said meeting and voting shall vote in favor of any such plan or any modification thereof, the said plan shall thereupon become operative." And that section gives to any dissenting stockholder the right upon surrender to receive from the company the appraised value of any stock that was acquired before the passage of the Act.

the shares allotted were sold at $25 for cash to the trust company. The trust company allowed each allottee to subscribe at the same price. At that time it was worth $112. The agreement stated that this was by way of additional compensation for service to be rendered between January 31 and December 31, 1931, that until the end of the year no allottee could take up his stock, that he was entitled to have dividends applied on the purchase price and that if he should terminate his employment before the end of the year the trustees were to decide whether he should have his allotment.

The complaint attacked the transaction upon the following grounds: The directors being disqualified by reason of their interest as allottees, the plan was not passed by a valid vote or adopted as required by c. 175. The subsequent vote of the stockholders required by the statute to be predicated upon action by the board, was likewise invalid. The plan was *ultra vires* in that the allotment "by way of additional compensation for services to be rendered" violated c. 195, New Jersey Laws, 1917. Under the company's charter and the statutes of New Jersey—§ 224, General Corporation Law as added by § 16 of c. 318, Laws 1926—every stockholder had the right according to the number of his shares to have pro rata distribution of the stock in question. And the complaint prayed decree that the defendants be enjoined from carrying out the plan, that the stock be declared void and canceled, and that the defendants, other than the tobacco company, be held for costs and damages sustained by that company.

Four defenses were set up: Plaintiff failed to comply with Equity Rule 27. The stockholders including plaintiff ratified the allotments to the directors. The suit is an attempt to regulate the internal affairs of a corporation foreign to New York, and the United States district court sitting therein should decline to take jurisdiction. The

allotments were fair and reasonable and were made in accordance with the company's by-laws and the statutes of New Jersey. Plaintiff moved for an order striking out the defenses as insufficient and for a decree in accordance with the prayer of the complaint or, in the alternative, for an injunction *pendente lite* preventing the carrying out of the plan.

The district court filed an opinion [60 F. (2d) 106] in which it said:

"In the present case, the validity of the shares sought to be cancelled depends primarily upon the interpretation and effect of the act of 1920. The directors cited this statute as their authority for the plan when they formulated it and have all along insisted that the plan is in conformity with the statute. The plaintiff takes the position that the statute is not applicable and has been used by the directors merely as a cover for a raid upon the corporate treasury for their own profit. In addition, plaintiff submits that two other statutes, that of 1917 and that of 1926, must be taken as limiting the operation of the 1920 act. It is obvious that the case presents not merely questions of fact but questions of some complexity under the New Jersey laws. There seem to be no decisions of the New Jersey courts to serve as a guide in the proper construction and possible interrelation of these statutes. The legality of the corporate proceedings which resulted in the issuance of this stock is peculiarly a matter for determination in the first instance by the New Jersey courts. It may be noted that the American Tobacco Company is not a local enterprise. While its chief office is said to be here and it unquestionably carries on business here, its activities are known to be world-wide. It has a New Jersey charter; it refers to the New Jersey office as its principal office; it holds its stockholders' meetings there. It is not a resident corporation in any sense of the word."

And it entered judgment denying the motion and that "in the exercise of this Court's discretion, each of the bills of complaint herein be and the same are hereby dismissed, without prejudice to the enforcement of the rights of plaintiff, if any, in the courts of New Jersey."

The Circuit Court of Appeals, 60 F. (2d) 114, dealing with plaintiff's contentions before it, held that the plan was authorized, that the stock was lawfully issued under New Jersey statutes, and that for the reasons given in the opinion the bill was properly dismissed. A dissenting opinion suggests that the plan was not sufficiently in detail to comply with the New Jersey statute. The court affirmed the judgment appealed from, and upon its mandate the district court entered a decree that the bills of complaint be dismissed with costs.

Among the points and contentions raised and pressed by plaintiff in his petition for certiorari and argument here are the following: The plan is not definite and formulated as required by c. 175. That chapter as construed below is repugnant to the contract clause of the federal Constitution. The decision that the plaintiff failed to comply with Equity Rule 27 is contrary to c. 175. Chapter 195, New Jersey Laws 1917, does not permit the issue of stock to employees for services to be rendered. The decree of the district court declining to exercise jurisdiction is contrary to decisions of this court and in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Williamson* v. *Missouri-Kansas Pipe Line Co.*, 56 F. (2d) 503.

The authorization, allotment and sale of the shares in question involved the proportionate ownership of stockholders and their rights *inter sese*. Unquestionably the steps taken and proposed to formulate and carry out the plan constitute the conduct and management of the internal affairs of the tobacco company. The controversy is solely between the plaintiff and other stockholders not

participating in the distribution on one side and the purchasers of the new stock, the corporation, its directors and officers on the other. When, by acquisition of his stock, plaintiff became a member of the corporation, he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the State in which it was organized. His rights, whatever the tribunal chosen for their vindication, are to be determined upon the ascertainment and proper application of New Jersey law.

It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile. *Wallace* v. *Motor Products Corp.*, 25 F. (2d) 655, 658. *Chicago Title & Trust Co.* v. *Newman*, 187 Fed. 573, 576. *Eberhard* v. *Northwestern Mutual Life Ins. Co.*, 210 Fed. 520, 522. *Powell* v. *United Association*, 240 N. Y. 616; 148 N. E. 728. *Sauerbrunn* v. *Hartford Life Ins. Co.*, 220 N. Y. 363, 371; 115 N. E. 1001. *Jackson* v. *Hooper*, 76 N. J. Eq. 592, 604; 75 Atl. 568. *Guilford* v. *Western Union Telegraph Co.*, 59 Minn. 332, 340; 61 N. W. 324. *Kimball* v. *St. Louis & S. F. Ry. Co.*, 157 Mass. 7; 31 N. E. 697. *Hogue* v. *American Steel Foundries*, 247 Pa. 12, 15; 92 Atl. 1073. *Babcock* v. *Farwell*, 245 Ill. 14, 33, *et seq.*; 91 N. E. 683. *Clark* v. *Life Association*, 14 App. D. C. 154, 179–180. *North State Copper & Gold Mining Co.* v. *Field*, 64 Md. 151; 20 Atl. 1039. Cf. *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 212–213. While the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 422, and authorities cited. It was free in the

exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum. *Langnes* v. *Green,* 282 U. S. 531, 535, 541. *Heine* v. *New York Life Ins. Co.,* 50 F. (2d) 382. Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case. *Cohn* v. *Mishkoff Costello Co.,* 256 N. Y. 102, 105; 175 N. E. 529. *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259, 263; 109 N. E. 250. *Kimball* v. *St. Louis & S. F. Ry. Co., supra.*

The complaint shows that as of its date seven directors of the tobacco company were not residents of New York. Only six allottees are before the court. The others, over 525, are not mentioned in the complaint. It appears from the answer that many of them are outside New York, and it may be inferred that a large number of them reside in the other States and countries in which the company does business. At the time, February 23, 1932, of the dismissal of the bill the services of the employees, for which the allotments constitute part compensation, had been fully performed and they were entitled to have and presumably they, or at least some of them, had secured the delivery of the shares so allotted to them. As the tobacco company, in addition to its registered office, has property, operates directly or through subsidiaries branch factories in New Jersey and carries on business there and in other States and countries, it may not be deemed to have been organized in that State as a mere matter of convenience for the purpose of carrying on all its business in another State

or be deemed in New York to be a local concern. This case is wholly unlike *Williamson* v. *Missouri-Kansas Pipe Line Co., supra,* relied on by plaintiff.

The determination of plaintiff's contentions requires not only the ascertainment of the true meaning and intent of c. 175 of New Jersey Laws, 1920, but also its constitutional validity. Its provisions have never been construed by the New Jersey courts and they or their like are not familiar in the statute law governing corporations organized in other States. And other New Jersey statutes among which are c. 195, Laws of 1917, and c. 318, § 16, Laws of 1926, are claimed by plaintiff to have an important bearing upon this case. But the courts of that State have had no occasion to consider the interrelation, if any, between them and c. 175 pursuant to which the stock in question purports to have been issued to employees. A mere inspection of the New Jersey statutes directly involved suggests grave doubts as to their proper application to the facts in this case and the difference of opinion expressed below confirms that impression.

So far as concerns the cancellation of the allotted shares, and other relief sought by plaintiff, the situs of the stock is in New Jersey and all questions relating to the validity of the plan, authorization, issue, allotment and sale of the same may be conveniently and effectively determined in New Jersey courts, the authoritative and final interpreters of the statutes of that State. A proceeding *in rem* is authorized, process therein may be served by publication and a decree, final and binding upon all, canceling or sustaining the stock may readily be enforced. New Jersey Practice Act of 1903, § 84. *Jellenik* v. *Huron Copper Co.,* 177 U. S. 1, 13. *Andrews* v. *Guayaquil & Quito Ry. Co.,* 69 N. J. Eq. 211; 60 Atl. 568. *Holmes* v. *Camp,* 219 N. Y. 359; 114 N. E. 841. The facts and circumstances disclosed by the record clearly bring this case within the general rule and abundantly justify the exer-

cise of discretion on the part of the district court in dismissing the bills of complaint without prejudice. As the Circuit Court of Appeals considered and decided the merits of the case, its judgment is reversed, the judgment of the district court entered upon its mandate is vacated and the case will be remanded to the district court with directions to reinstate the earlier judgment dismissing the bills of complaint without prejudice.

Reversed.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

MR. JUSTICE STONE, dissenting.

I think the Court should decide this case on its merits in favor of the petitioner.

Respondent, the American Tobacco Company, organized under the laws of New Jersey, is a large and prosperous corporation, engaged in the manufacture and distribution of cigarettes and other forms of tobacco. It has upwards of 40,000 stockholders. At the commencement of this suit it had a board of 16 directors, including a president, five vice presidents, a secretary and a treasurer, all actively engaged in its management. For many years these officers have received large annual fixed salaries, as well as large annual cash profit-sharing bonuses paid under a by-law of the company, adopted in 1912. See *Rogers* v. *Hill*, 60 F. (2d) 109. In the year 1930, the profit-sharing bonus of the president, added to his fixed salary of $168,000, gave him a total compensation of over $1,010,000, which was further augmented by a special "credit" of $273,470. In the same year, four of the five vice presidents received an aggregate annual salary and bonus of more than $2,077,000. In addition, a number of stock subscription plans have from time to time been put into operation by the directors, without authority of the charter or by-laws of the corporation, or the knowledge or ap-

proval of its stockholders, by which they largely benefited. In that of 1926, the respondent Hill, the president and also a director of the company, acquired 8,000 shares of common stock, and other directors, who are respondents here, received substantial amounts. In that of 1929, one year before the transactions now complained of, 46,500 of 51,750 shares of common stock, purchased by the corporation and set aside for the purpose, were sold to the corporate directors at $47 per share less than market value. Convenient arrangements were made for postponed payment of the purchase price. Respondents received 23,050 shares, of which the president received 15,050.

On January 28, 1931, a new allotment of stock was made, which is the subject of this litigation. On that day, the Board of Directors (the president and officers constituting a majority of those in attendance) considered and passed upon the adequacy of the compensation which its members were then receiving for their services to the corporation, and the necessity of conferring further benefits on themselves in order to insure the continuance of those services. Having resolved these questions in their own favor, they proceeded to award additional benefits in the form of the privilege to subscribe to unissued common stock B of the corporation, at a small fraction of its market value. By resolution of that date, they put into effect a stock subscription plan by which 56,712 shares of unissued common stock B of the corporation were distributed in accordance with recommendations made by the president. Of this number 32,370, more than half, were allotted to the directors, of which 13,440 were allotted to the president. The remaining 24,342 shares were allotted in relatively small amounts to 525 employees. None of the recipients was of lower rank than factory subassistant. Four hundred and seventy-three received allotments of less than 100 shares each, the great majority receiving from 15 to 50 shares. The stated consideration for issue

of the stock was a subscription price of $25 per share, the par value, and the services of the allottee, not specifically described, to be rendered to the American Tobacco Company for the remainder of the year.

The certificates of stock were to be delivered to the respondents, the Guaranty Trust Company of New York and an individual, as trustees. They were authorized to borrow money upon them to the extent of $25 per share, in order to effect immediate payment of the subscription price to the Tobacco Company, to apply dividends received on account of the purchase price to be paid by the allottees and to deliver the certificates to them after the close of the year, upon payment in full of their subscriptions. They were given discretion to waive performance of the stipulated service by any allottee and in the event that the subscriber was discharged or resigned from the employ of the company within the year, to cancel the subscription agreement or not, as they pleased.

On the day of the resolution allotting the stock, its market price was $112 per share, more than four times the subscription price. It was then paying, and has ever since paid, dividends at the rate of $5 per year, sufficient to pay the subscription price in five years. Valuing the subscription privilege by the difference between the subscription price and the market value of the shares, the president received by the allotment the equivalent of $1,169,280, in addition to his annual compensation of more than $1,000,000. The stock subscription rights awarded the five vice-presidents, similarly valued, amounted to $1,451,595. That the subscription privilege, accorded for the avowed purpose of assuring the continuance of these executives in the company's employ, was then and has been ever since of great value, upon any theory of valuation, is not questioned.

Conceiving himself aggrieved by this transaction, petitioner, a non-assenting stockholder, brought two suits in

the Supreme Court of New York, the state in which he resides, joining as defendants the American Tobacco Company, the trustees of the allotted stock, and certain of the directors, including the president, secretary, treasurer and five vice presidents, one of whom has since died and two of whom were not served with process. Included in the relief sought was a decree that the corporation, its officers and directors be enjoined from carrying out the stock allotments and that the stock allotted to the directors be surrendered to the Company. On motion of defendants, the Tobacco Company and a non-resident director, the causes were removed to the District Court for Southern New York, on grounds of diversity of citizenship of the parties to a separable controversy, and there consolidated.

Thus called upon in this suit to account for their stewardship and to justify their action, the defendants, the respondents here, place their whole reliance upon a statute of New Jersey in conformity with which, they contend, they secured, in advance, the authorization of the stockholders to make the challenged allotments of stock.

Section 1, c. 175, of the New Jersey Laws for 1920, authorizes any New Jersey corporation to provide and carry out a plan for "(a) the issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf . . . and for aiding any such employees or said other persons in paying for such stock by contribution, compensation for services or otherwise, . . ." Section 2 (b) provides that where, as in this case, the corporation has been formed without charter or by-law provisions authorizing the issuance or the purchase and sale of stock for such purposes, " the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable and shall call a meeting of the stockholders to

take action thereon . . ." It requires an affirmative vote of two-thirds in interest of each class of stockholders, present at the meeting, for the adoption of the plan.

In June, 1930, the directors, purporting to act under this statute, presented to the stockholders, by notice of a special meeting, a so-called "plan" under which the employees of the corporation and those actively engaged in its business were to be permitted to subscribe to unissued shares of its common stock B. The notice of the meeting was accompanied by a document designated "Employees' Stock Subscription Plan," and by a copy of resolutions of the board of directors authorizing the submission of the plan to the stockholders, proposing a reduction in the par value of the common stock and the non-voting common stock B from $50 to $25 per share, and an increase of the authorized common stock from 1,000,000 to 2,000,000 shares, and of the authorized common stock B from 2,000,000 to 4,000,000 shares, each stockholder to receive two shares of the new stock for one of the old. By thus increasing the authorized, unissued shares of common B, stock was to be made available for subscription by employees.

The Employees' Stock Subscription Plan proposed "to allot for subscription . . . by way of additional compensation for services to be rendered, shares of unissued common stock B . . . to such employees of the corporation and/or its subsidiaries and those actively engaged in the conduct of its or their business as may be selected . . ." The prescribed method of execution of the plan was that "the Board of Directors may, at such time or times as it may determine . . . offer and allot such stock for subscription . . . in such amounts and proportions, to such persons, at such prices, not less than the par value of the shares allotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of

stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose."

Accompanying the notice of the meeting was a circular letter by the president to stockholders, in which they were told of the prosperous condition of the company, that the purpose of the stock allotment plan was to encourage those who had made the company's success possible to continue in its employ, and that it was the expectation of the Board of Directors, if the program set forth in the notice of the meeting and accompanying documents should be approved by stockholders, to declare an extra dividend of $4 per share on the common stock and common stock B, and to initiate regular quarterly dividends on the newly authorized shares of common stock and common stock B at the increased annual rate of $5 per share. The letter closed with a request to sign and return the enclosed proxy, thereby indicating "your approval of the proposed steps and your support of your Company's management."

Moved, perhaps, by these inducements, the proposal was approved at the meeting by vote of the requisite number of shares of each class.

No disclosure was made to the stockholders by the officers and directors of the stock subscription plans previously put into operation by them, without authority of the charter or by-laws or the knowledge and approval of the stockholders. No disclosure was made of the number or amounts of the annual cash bonuses which had been paid to the president and vice presidents of the company, under the by-law adopted in 1912, and never, so far as appears, subsequently mentioned to the stockholders until after the stock allotments here involved. The only hint of the intention of the management to participate in the proposed Employees' Stock Subscription Plan was contained in a single sentence appearing in the Plan:

"No employee, or person actively engaged in the conduct of the business of the Corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of being also a director of the Corporation or of any of its subsidiaries or of holding any office therein."

With all these facts presented by the pleadings, the district court, acknowledging its jurisdiction both as a federal court and a court of equity to decide the cause on its merits, nevertheless, held that as the suit concerns the internal affairs of a New Jersey corporation, discretion should be exercised to dismiss it without prejudice to its maintenance in the courts of New Jersey. On appeal, the Circuit Court of Appeals for the Second Circuit, Judge Swan dissenting, considered the merits and upheld the legality of the stock allotments. The decree of dismissal was affirmed on the merits and the trial court has entered a final decree accordingly. This Court now reverses that judgment, reëstablishing the original decree of the trial Court, on the ground that a proper exercise of judicial discretion requires that the cause should not be heard. Thus after approximately two years of litigation in state and federal courts, all of which could, and I think should, have decided the case on the merits, the plaintiff must now start the litigation afresh in the courts of New Jersey.

In determining whether the federal courts should decline to exercise the jurisdiction conferred on them by removal, the nature of this controversy and its merits cannot be ignored. I do not stop to consider numerous objections to the stock allotments, urged by petitioner, which are not without weight. It suffices for present purposes that no plan of sufficient definiteness to comply with the New Jersey statute was ever submitted to the stockholders for their approval; and that even if it be conceded that a "plan" was approved, the action of the directors in alloting the stock to themselves, in violation of their duty as fiduciaries, exceeded the authority con-

ferred upon them by the stockholders, and was, therefore, *ultra vires.*

The statute directs that the board of directors shall "first formulate such plan," declare it "advisable," and call a meeting of stockholders to act on it. Without presenting for the consideration of the stockholders any workable plan of stock allotment, the directors, in effect, asked the stockholders to confer plenary authority on them to formulate a plan and to carry it into execution without any disclosure of its provisions. After the meeting, as before, no stockholder, not in the confidence of the directors, knew in what the plan consisted, who were the persons to participate in it, what principle was to control their selection or determine the amount of stock they were to receive, or the price they were to pay. It is a misuse of words of plain meaning to speak of such a proposal as a "plan," much less a formulated plan for stock allotment to employees, or as one which, in the form presented to the stockholders, the directors could have pronounced advisable or have carried into operation. It was no more than an invitation to stockholders to abrogate the discretion which the statute vested in them to approve a formulated plan, having at least some aspects of definiteness, and vest in the directors powers which could be conferred on them only by charter amendment in the manner prescribed by the statute. The invitation was accompanied by a skillfully phrased suggestion that it was necessary to accept it in order to hold the services of employees, and that, if accepted, the directors would cause new benefits to flow into the pockets of stockholders in the form of extra and increased dividends. Such a maneuver cannot rightly be regarded as a compliance with the plain language of the statute, which requires the directors first to formulate a plan for stock allotment and declare it advisable, and then to submit it to the stockholders for

their approval. If it were, it would be difficult to suggest any conceivable purpose of the statute which could not be thwarted by a similar procedure.

The respondents stand in no better position, even if we assume that the proposal submitted to the stockholders was a formulated plan, within the meaning of the New Jersey statute. For in that case, authority for the directors' action must be found in the stockholders' approval of the proposal which they submitted, and we must interpret the proposal and the action taken by the stockholders in terms of their legitimate expectation that the directors were complying with their duty as fiduciaries and not dealing with them at arm's length. They were entitled to read the proposal in the light of the fundamental duty of directors to derive no profit from their own official action, without the consent of the stockholders, obtained after full and fair revelation of every circumstance which might reasonably influence them to withhold their consent. *Wardell* v. *Railroad Co.,* 103 U. S. 651; *General Investment Co.* v. *American Hide & Leather Co.,* 97 N. J. Eq. 230, 233; 127 Atl. 659; see *United States Steel Corp.* v. *Hodge,* 64 N. J. Eq. 807, 813; 54 Atl. 1; *Globe Woolen Co.* v. *Utica Gas & Electric Co.,* 224 N. Y. 483, 489; 121 N. E. 378; compare *Meinhard* v. *Salmon,* 249 N. Y. 458; 164 N. E. 545; *Wendt* v. *Fischer,* 243 N. Y. 439; 154 N. E. 303. They were entitled to assume that the proposal involved nothing which did not fairly appear on its face and above all that it was not a cloak for a scheme by which the directors were to enrich themselves in great amounts at the expense of the corporation, of whose interests they were the legal guardians.

The respondents must, therefore, rest their case on the bare statement in their proposal to the stockholders that no employee or person actively engaged in the business of the company " shall be deemed ineligible to the bene-

fits of the plan," because a director or officer. But it would be extravagant to say that these words, addressed by men in the position of trustees to their beneficiaries, gave warning of the wholesale gratuities which the directors subsequently bestowed upon themselves. No more extensive authority could be derived from this language than the disclosure which it made. By consenting that the directors should be "eligible" to share in a plan avowedly for the benefit of employees, the stockholders did not consent that they should be the chief beneficiaries of their own unrestrained munificence, or that they should add any new bounties to the unrevealed stock allotments and bonuses which the directors had previously enjoyed in secrecy. Even if the stockholders consented that some of the directors should be eligible to benefit from action taken by other disinterested directors, they certainly did not consent that the allotments should be made by a group of directors who, because of the magnitude of the benefits they anticipated for themselves, were obviously incapable of passing an independent and unbiased judgment upon the propriety of the distribution which they coöperated in making to each other. Respondents' contention that if the directors were unable to vote on each other's participation no plan could be put into effect under which a majority of the directors were to participate, is without weight, for it obviously could be if the statute were followed and the plan revealed in its entirety to the stockholders.

To surmount these difficulties, respondents point to the fact that a representative of petitioner stated at the stockholders' meeting that favorable action on the proposal might result in the issuance of a large amount of stock to employees, including officers and directors, without adequate consideration, and that this did not induce the stockholders to express their disapproval. It is unnec-

essary to speculate whether this outcome is to be attributed to the fact that those present, being without the aid of prevision, regarded the prediction as too improbable to be credited, or to the fact that those who attended the meeting were not, for the most part, the stockholders, but the recipients of their proxies selected by the management of the corporation for the occasion. A statement made to them would, as a New Jersey court has said, fall "upon ears not allowed to hear and minds not permitted to judge; upon automatons, whose principals are uninformed of their own injury." See *Berendt* v. *Bethlehem Steel Corp.*, 108 N. J. Eq. 148, 151; 154 Atl. 321. In any event it is enough that neither in the notice of meeting and accompanying documents, which the stockholders saw and on which they relied, nor at the meeting itself, did the officers and directors disclose that such was their purpose.

We need not conjecture whether, if the directors had had the hardihood to disclose in advance the benefits which they were to award to themselves, the stockholders would nevertheless have given their approval. Nor is it important that these directors have successfully managed the corporation and that under their direction it has earned large profits for its stockholders. Their business competence did not confer on them the privilege of making concealed or unauthorized profits or relieve them of the elementary obligation which the law imposes on all corporate directors to deal frankly and openly with stockholders in seeking their consent to benefit personally by reason of their relationship to the corporation.

The directors, having failed to comply with petitioner's seasonable demand that they exercise their authority to bring this suit in the name of the corporation, petitioner was not required by general equitable principles or by Equity Rule 27 to appeal to the stockholders before bringing it, as the action complained of here was not one which

the stockholders could ratify. *Continental Securities Co.* v. *Belmont,* 206 N. Y. 7, 17; 99 N. E. 138; cf. *Delaware & Hudson Co.* v. *Albany & Susquehanna R. Co.,* 213 U. S. 435. Authority of the directors to bestow gratuities upon themselves in the form of subscription rights must be found in a plan approved in advance as the statute provides, by two-thirds of each class of stock. If no plan was presented to stockholders, as I think was the case, the entire stock issue was *ultra vires* and cannot be ratified any more than any other unauthorized disposition of corporate assets. If the proposal to the stockholders is regarded as a plan, so far as ordinary employees are concerned, as it plainly does not embrace authority to the directors to confer such extravagant benefits upon themselves, the result is the same, as to the stock allotted to the directors.

I cannot agree that a proper exercise of discretion requires us to deny to the petitioner the relief to which he is so clearly entitled. This is the first time that this Court has held that a federal court should decline to hear a case on the ground that it concerns the internal affairs of a corporation foreign to the state in which it sits. We may assume, without deciding, that neither a federal nor a state court of equity will, as a general rule, undertake to administer the internal affairs of a foreign corporation. But the case before us is, in this respect, unlike a suit to dissolve the corporation and wind up its affairs, *Wallace* v. *Motor Products Corp.,* 25 F. (2d) 655, 658; *Pearce* v. *Sutherland,* 164 Fed. 609; *Maguire* v. *Mortgage Co. of America,* 203 Fed. 858; cf. *Burnrite Coal Co.* v. *Riggs,* 274 U. S. 208, 212; or compel the declaration of a dividend, *Cohn* v. *Mishkoff Costello Co.,* 256 N. Y. 102; 175 N. E. 529, or interfere with the election of officers or the meetings of shareholders or directors. *Wason* v. *Buzzell,* 181 Mass. 338; 63 N. E. 909; *State*

ex rel. Lake Shore Tel. & Tel. Co. v. *De Groat,* 109 Minn. 168; 123 N. W. 417; see *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259, 263; 109 N. E. 250.

We are presented with no problem of administration. The only relief which the petitioner merits on the record before us or which he asks here is a decree that certain directors, now before the Court, restore to the treasury of the corporation, also before the Court, certain shares of stock alleged to have been illegally issued to them, and that certificates for the stock now in possession of the trustees, who are likewise before the Court, be surrendered. There are no more obstacles to the rendition of an effective decree than in any other case in which a stockholder seeks reparation for depredations upon the corporate property committed by directors, some of whom only are before the Court. Compare *Wineburgh* v. *U. S. Steam & Street Ry. Advertising Co.,* 173 Mass. 60; 53 N. E. 145; *Ernst* v. *Rutherford & B. S. Gas Co.,* 38 App. Div. 388; 56 N. Y. S. 403; *Corry* v. *Barre Granite & Quarry Co.,* 91 Vt. 413; 101 Atl. 38; *Ganzer* v. *Rosenfeld,* 153 Wis. 442; 141 N. W. 121. The decree will be completely satisfied by delivery of the certificates, properly endorsed, to the corporation. There is and can be no suggestion that such a decree cannot be pronounced and enforced as effectively by the courts in New York as it could be by those in New Jersey. Cf. *American Creosote Works* v. *Powell,* 298 Fed. 417, 419; see *Babcock* v. *Farwell,* 245 Ill. 14, 34; 91 N. E. 683.

The opinion of the Court concedes, as, indeed, the authorities which it cites show, that the decision does not rest upon any definite rule of general application. It is said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the state of the corporate domicile as appropriate tribunals for the determination of the particular

case. Such considerations are said to require that this suit be dismissed though the petitioner is thereby subjected to all the hazards of starting his action anew, in the courts of New Jersey.

To support this conclusion, only two objections to the maintenance of the suit are suggested in the opinion of this Court or in that of the district court below. One is that numerous beneficiaries of the stock allotment, most of whom are not officers or directors of the corporation, are not made parties to this suit and presumably can be reached as a group only by suit in New Jersey. Hence, the intimation is, if we decide this case and other suits should subsequently be brought in other jurisdictions, different results may be reached on the same questions, a possibility which can be avoided by forcing the petitioner to bring a single suit in New Jersey. The other objection is that the Court would be called upon to decide a novel question of New Jersey law.

As petitioner has chosen to assert demands necessarily restricted to the stock issued by the directors to themselves, he had no occasion to join as parties the several hundred lesser employees, the great preponderance of whom received allotments of less than fifty shares of stock. Indeed, as the unconscionable conduct of the participating directors, a major factor in this case, would afford no basis for proceeding against the other allottees, it is by no means certain that the suit would be cast in any different form if brought in New Jersey.

The somewhat speculative possibility that those of the participating directors who have not been served with process in this suit may be called to answer in some other court and exonerated is of slight importance compared to the considerations favoring the exercise of jurisdiction. Petitioner has chosen to bring his suit in New York. He and all but one of the individual defendants reside there.

The principal office of the American Tobacco Company is in New York City and it is there that its books and records are found, its board of directors meets and the acts complained of took place. There the respondent, Guaranty Trust Company, is located, and its co-trustee resides. Before the decree can be enforced it must be obtained and the litigation must be brought to a successful conclusion. That involves the production in court of the necessary evidence. Of the parties to this case none but the American Tobacco Company is amenable to process in New Jersey; all are amenable in the Southern District of New York. In New York, petitioner can compel them and others connected with the corporation to attend as witnesses; all can be ordered to make complete discovery; and petitioner can compel the production at the trial of the records of both corporate defendants. We cannot assume that compulsion will not be necessary. The Tobacco Company carried to the highest court of the state its resistance to petitioner's preliminary application to inspect its books, (*Matter of Rogers* v. *American Tobacco Co.*, 143 Misc. Rep. 306, 257 N. Y. S. 321; aff'd 233 App. Div. 708, 249 N. Y. S. 993, leave to appeal denied). In New York also the individual defendants and the trust company can be reached by injunction *pendente lite,* restraining the transfer to innocent purchasers of the stock, certificates for which are already issued and in the hands of the trust company. Under the circumstances of this case, only considerations of more compelling force than the possibility of inconsistent decrees should lead a forum, convenient in so many respects, to decline jurisdiction.

I come then to the only ground which can plausibly be urged for declining the jurisdiction—that in one, but not necessarily a conclusive aspect of the case, the Court may be called on to decide questions of New Jersey law which, although novel, can hardly be said to be complicated or

difficult. If there were any principle of federal jurisprudence, generally applicable, that in cases between private parties federal courts of equity may, in their discretion, decline jurisdiction because called upon to decide an unsettled question of state law, I would willingly acquiesce in declining it here. But this Court has not declared such a principle and does not recognize it now. On the contrary, whether jurisdiction rests on diversity of citizenship or on a substantial constitutional question, this Court has consistently ruled that it is the duty of a federal court of original jurisdiction, and of this Court on appeal from its decree, to pass on any state question necessarily involved, however novel, and that the decision may be rested on that ground alone. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175; *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378.

Unless we are now to abandon that long settled practice, I can see much more reason for passing on this question than upon many others which this Court has decided. Our judgment would conflict with no local decisions, compare *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518; *Burgess* v. *Seligman*, 107 U. S. 20; nor apply an alien policy to matters which are the subject of delicate feeling in the state. Compare *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Railroad Commission of California* v. *Los Angeles Ry. Corp.*, 280 U. S. 145. Indeed, we may not even avoid deciding the question of state law by sending the case to New Jersey, for it is not suggested that if petitioner should elect to sue in the federal court for New Jersey, or if the suit should be properly brought there by removal from the state court, either that court or this may decline jurisdiction. Thus we should do no more in deciding the question of New Jersey law now than if the case were brought to us from the federal courts in New Jersey.

Even if decision of the question of New Jersey law were more embarrassing than it appears to be here, a proper exercise of discretion would seem to require that the bill be retained, and that an interlocutory injunction restraining any disposition of the stock by respondents be granted as prayed, pending the diligent prosecution by petitioner of a suit in New Jersey. Compare *Mallow* v. *Hinde,* 12 Wheat. 193; *Dunn* v. *Clarke,* 8 Pet. 1; *Stover* v. *Wood,* 28 N. J. Eq. 253.

If federal courts are to continue the general practice of deciding novel questions of state law whenever they are necessary or convenient grounds for the disposition of cases pending before them, there are peculiarly cogent reasons why there should be no departure from the practice in cases like the present. While a corporation in legal theory has only one domicile, in practice its activities are often nationwide and the legal domicile of the corporation, as in this case, is neither the place of its real corporate life nor the home of its officers and directors. Hence, if stockholders' suits, such as the present, are to be maintained with any hope of success, the practical necessities of making parties, securing evidence, obtaining the production of documents and relief by injunction against individual wrongdoers, justify, if they do not compel, their prosecution in the particular jurisdiction where necessary parties and witnesses may be found, rather than in the place of the technical corporate domicile.

Extension of corporate activities, distribution of corporate personnel, stockholders and directors through many states, and the diffusion of corporate ownership, separated from corporate management, make the integrity of the conduct of large business corporations increasingly a matter of national rather than local concern (cf. A. A. Berle, Jr. and Gardiner C. Means, The Modern Corporation and Private Property, 1932), to which the fed-

eral courts should be quick to respond when their jurisdiction is rightly invoked. We should be slow, indeed, to make a reluctance to decide questions of state law, not exhibited in other classes of cases, the ground for declining to decide this one.

MR. JUSTICE BRANDEIS concurs in this opinion.

MR. JUSTICE CARDOZO, dissenting.

Viewing the suit as one to reclaim the shares received by the directors in breach of their fiduciary duties to the corporation and the shareholders, I find no adequate reason for the refusal to exercise jurisdiction, and this though a different conclusion might be thought to be necessary if relief were to be given upon grounds affecting the validity of the issue as a whole.

In the circumstances of this case, the certificates allotted to the directors may be charged with a constructive trust, and surrendered to the corporation to be held in its treasury, without impeaching a single certificate other than their own.

There is no need to consider whether the "plan" as proposed is insufficient on its face, with the result that the innocent employees as well as the culpable directors will be deprived of its benefits. If it be taken as sufficient, the shareholders who voted for it are not chargeable with notice that fiduciary powers would later be perverted by the award to the fiduciary of extraordinary benefits. Consent will not protect if reason and moderation are not made to mark the boundaries of what is done under its shelter.

I leave the question open whether in other circumstances or with other consequences there may be a cancellation of the shares of a foreign corporation in the absence of an adjudication by the courts of the domicile. Here the or-

ganic structure of the corporation, if affected by the decree at all, will not be changed in such a way as to work substantial detriment to any stranger to the suit, but the fruits of an unjust enrichment will be put back into the treasury. I think we are at liberty to do so much, if nothing more, without waiting upon the judgment of any other court.

The doctrine of *forum non conveniens* is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused. At least that must be so when the wrong is clearly proved. The overmastering necessity of rebuking fraud or breach of trust will outweigh competing policies and shift the balance of convenience. Equity, it is said, will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle, and inaction may confirm, the purpose of the wrongdoer. *Falk* v. *Hoffman,* 233 N. Y. 199, 203; 135 N. E. 243. Of the shares allotted to directors as contrasted with those allotted to other employees, most are owned by the defendants sued. Whatever shares belong to others will be untouched by the decree. With all the procedural complexities possible hereafter if jurisdiction be declined, the hazard of inconsistent judgments affecting the directors *inter se* will not avail without more to halt the processes of justice and the award of such relief as the court is competent to give against those subject to its power.

I agree with MR. JUSTICE STONE for the reasons stated in his opinion that a breach of the fiduciary duties of the directors is a legitimate inference from the allegations of the bill, and agree with his conclusion that the cause should be remanded to the District Court for a determination of the merits.

ATLANTIC CITY ELECTRIC CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 163. Argued December 13, 1932.—Decided February 6, 1933.

1. Where one corporation has legally enforceable control of substantially all of the stock of another, the two are "affiliated" and must make a consolidated return, under § 1331, Revenue Act of 1921, and § 240, Revenue Act of 1918. P. 153.
2. In determining whether the control is of substantially all of the stock, there is no ground for excluding preferred stock outstanding with voting rights, even though it be redeemable at any time and have a limited interest in dividends. P. 154.
3. Ownership by the one corporation of all the common stock and none of the preferred stock of the other, giving control of only 77% of all stock outstanding, *held* insufficient for affiliation. P. 156.

57 F. (2d) 186, affirmed.

CERTIORARI, 287 U. S. 582, to review a judgment reversing the Board of Tax Appeals, 15 B. T. A. 1084, and sustaining a ruling of the Commissioner of Internal Revenue.

Mr. Graham Sumner for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Sewall Key, J. P. Jackson,* and *Erwin N. Griswold* were on the brief, for respondent.

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

The question presented is whether the petitioner, Atlantic City Electric Company, was affiliated with the American Gas and Electric Company so that the federal taxes for 1917, 1918, and 1919 should be determined upon the basis of consolidated returns under § 1331 of the Reve-

nue Act of 1921 (42 Stat. 319), as applicable to the year 1917, and § 240 of the Revenue Act of 1918 (40 Stat. 1081, 1082). The Circuit Court of Appeals, reversing the order of the Board of Tax Appeals (15 B. T. A. 1084), upheld the ruling of the Commissioner that the corporations were not affiliated and must make separate returns. 57 F. (2d) 186. The case comes here on certiorari.

The following facts were found by the Board of Tax Appeals: The petitioner, Atlantic City Electric Company, is a public service corporation. During the years in question, it had outstanding 12,500 shares of common stock, of the par value of $100 per share, and 3702 shares of preferred stock. Holders of preferred stock were entitled to vote and that stock was preferred to the extent of an annual cumulative dividend of six per cent. and on final liquidation. The preferred stock was redeemable at any time and had no interest in dividends except as above stated. The American Gas and Electric Company was a holding company. It owned all the common stock of the Atlantic City Electric Company and none of its preferred stock. 655 to 761 shares of that preferred stock were owned by stockholders of the American Gas and Electric Company, but the finding is that the control exercised by that Company resulted "from its absolute ownership of the entire common stock of its subsidiaries and not from control or ownership of preferred stock by its stockholders." Of the total outstanding stock of the Atlantic City Electric Company, preferred and common, the American Gas and Electric Company owned approximately 77 per cent.

With respect to control of stock, as creating the affiliation which affords a basis for a consolidated return, § 1331 of the Revenue Act of 1921 is to the same effect as § 240 of the Revenue Act of 1918. The requirement of control, in the absence of legal title or beneficial ownership, is not satisfied by acquiescence or by business considera-

tions without binding force. There must be a control that is legally enforceable. *Handy & Harman* v. *Burnet,* 284 U. S. 136, 140, 141. And it must be control of "substantially all the stock." In *Handy & Harman* v. *Burnet, supra,* legally enforceable control of somewhat more than 75 per cent. of the stock was held to be insufficient. The question, then, is whether in the instant case the entire voting stock, preferred and common, should be considered in determining whether there was affiliation, or the common stock alone.

The purpose of the Congress was to secure substantial equality among stockholders who ultimately bear the burden of taxation and to prevent evasion through the manipulation of intercompany transactions. *Handy & Harman* v. *Burnet, supra.* See, also, *Burnet* v. *Aluminum Goods Mfg. Co.,* 287 U. S. 544. The requirement of consolidated returns was "based upon the principle of levying the tax according to the true net income and invested capital of a single business enterprise, even though the business is operated through more than one corporation." Treasury Regulations No. 45, Art. 631.[1]

[1] Article 631 of Regulations No. 45 is as follows:

"*Affiliated corporations.*—The provision of the statute requiring affiliated corporations to file consolidated returns is based upon the principle of levying the tax according to the true net income and invested capital of a single business enterprise, even though the business is operated through more than one corporation. Where one corporation owns the capital stock of another corporation or other corporations, or where the stock of two or more corporations is owned by the same interests, a situation results which is closely analogous to that of a business maintaining one or more branch establishments. In the latter case, because of the direct ownership of the property, the invested capital and net income of the branch form a part of the invested capital and net income of the entire organization. Where such branches or units of a business are owned and controlled through the medium of separate corporations, it is necessary to require a consolidated return in order that the invested capital and net income of the entire group may be accurately determined. Otherwise opportunity

In establishing ownership or control of substantially all the stock as the criterion of a business unit, the statute made no distinction between preferred and common stock. It referred simply to "stock" and we perceive no ground upon which stock with voting right can be treated as excepted. The Treasury Regulations under the Revenue Act of 1918 regarded the statutory requirement as relating to the "outstanding voting capital stock (not including stock in the treasury) at the beginning of and during the taxable year." Regulations No. 45, Art. 633. The same construction was given by the Department to the corresponding provision of the Revenue Act of 1921. Regulations No. 62, Art. 633. The Congress, in the Revenue Act of 1924, embodied this construction in the statute itself.[2] § 240 (c) (1), 43 Stat. 288. See, also, Revenue Act of 1926, § 240 (c) (d), 44 Stat. 46; Revenue Act of 1928, § 141 (d), 45 Stat. 831; Revenue Act of 1932, § 141 (d), 47 Stat. 213. Compare *Schlafly* v. *United States,* 4 F. (2d) 195, 200; *Ice Service Co.* v. *Commissioner,* 30 F. (2d) 230, 231; *United States* v. *Cleveland, P. & E. R. Co.,* 42 F. (2d) 413; *Commissioner* v. *City Button Works,* 49 F. (2d) 705.

Nor are we able to conclude that in the instant case the preferred stock with voting right should be excluded because it was redeemable at any time and had a limited interest in dividends. Compare *Commissioner* v. *Shillito*

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would be afforded for the evasion of taxation by the shifting of income through price fixing, charges for services and other means by which income could be arbitrarily assigned to one or another unit of the group. In other cases without a consolidated return excessive taxation might be imposed as a result of purely artificial conditions existing between corporations within a controlled group."

[2] With respect to this provision, the report of the Committee on Ways and Means of the House of Representatives said: "The requirement that the stock held must be 'voting' stock merely embodies in the law the present rule of the Treasury Department." House Rep. No. 179, 68th Cong., 1st sess., p. 24.

Realty Co., 39 F. (2d) 830; *United States* v. *Cleveland, P. & E. R. Co.*, 42 F. (2d) 413. Despite redeemability and the limitation of dividends, the owners of the preferred stock were not in the position of creditors, but were stockholders with a proprietary interest in the corporate undertaking and with a corresponding relation, through the voting right, to the direction of that undertaking. The voting right remained unimpaired until actual redemption. The statute is not concerned with a failure to exercise existing rights, but with what is deemed to be a more certain and adequate test of a unitary enterprise. According to this test, petitioner failed to show affiliation. *Burnet* v. *Howes Brothers Hide Co.*, 284 U. S. 583, 584.

Judgment affirmed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HUFF ET AL.

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

No. 58. Argued December 6, 1932.—Decided February 6, 1933.

1. Under the Revenue Act of 1918, to permit deduction of loss incurred "in trade or business" or "in any transaction entered into for profit," the loss must have been "sustained during the taxable year,"—it must be actual and present in that year; the mere existence of a liability, afterwards liquidated, is not enough. P. 159.
2. One of two partners, in 1920, embezzled money from a trust fund held by the firm, and paid it to the other (who was innocent) in discharge of the firm's indebtedness to him. The other discovered the theft that year; and in the year following, when the firm ceased business and was settled up, he restored to the fund the full amount, paying part with the firm's remaining assets and the rest from his own pocket. *Held:*

   (1) That, under the Revenue Act of 1918, the amount so repaid was not deductible as a loss incurred by him in 1920. P. 161.

(2) The amount due him from his firm was not deductible under § 214 (a) (7), Revenue Act of 1921, as a debt "ascertained to be worthless" during the year 1920, since the results of the firm's business were not known prior to 1921, and no portion of the debt was previously ascertained to be worthless. P. 162.

56 F. (2d) 788, reversed.

CERTIORARI, 286 U. S. 541, to review the reversal of a decision of the Board of Tax Appeals, 20 B. T. A. 516, which sustained the Commissioner's ruling against a deduction in an income tax return.

Mr. Paul D. Miller, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key* and *Andrew D. Sharpe* were on the brief, for petitioner.

Mr. Harry C. Weeks for respondents.

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

In computing net income for 1920, the respondents, R. E. Huff, and his wife, E. B. Huff (now deceased), sought deduction of a loss alleged to have been sustained in that year, in relation to community property, through the embezzlement of trust funds. The funds were held by a partnership of which R. E. Huff was a member and were embezzled by his copartner. The Commissioner disallowed the deduction, holding that as the funds were not the property of the petitioners, and they were not called upon to make good the amount embezzled until 1921, they sustained no loss in 1920. The Board of Tax Appeals, upon the authority of *Farish & Co.* v. *Commissioner* (C. C. A. 8th), 31 F. (2d) 79, upheld this ruling. An alternative claim, for the deduction of the amount in question as a worthless debt, was also disallowed. 20 B. T. A. 516. The Circuit Court of Appeals, declining to

follow the *Farish* case, reversed the decision of the Board, 56 F. (2d) 788, and this Court granted certiorari.

The pertinent facts as found by the Board of Tax Appeals are these: R. E. Huff, a lawyer and banker in Wichita Falls, Texas, and J. S. Mabry were copartners engaged in managing the business of a reciprocal fire insurance association known as Wichita Great Western Underwriters. Under the plan of organization, 25 per cent. of the gross premium income of the association was allotted to expenses and profits, and the remaining 75 per cent. was to be set apart as a reserve to pay fire losses. Any person might become an 'underwriter' by subscribing to the association such amount as he wished to invest, paying one-fourth in cash. Ten per cent. of the cash payment was allowed to the managing attorneys and the rest constituted a reserve or trust fund which was to remain the property of the underwriters and to be used only for the payment of fire losses in excess of the association's reserve. An advisory board was created for safeguarding the interests of the subscribers but undertook no active supervision until about the end of 1920. The board looked to Huff for the proper conduct of the affairs of the association, but the management was left almost entirely to Mabry. Early in 1920, on Mabry's representation that the sum of $25,000 was needed for working capital, Huff advanced this amount to the partnership upon partnership notes payable in six months. The entire amount was repaid to Huff in the autumn of 1920 by checks drawn by Mabry, the money being taken from the trust fund of the association held in reserve for the subscribing underwriters. Huff and Mabry were not the owners of that fund and neither of them had authority to use it for any purpose other than the payment of fire losses. To cover the checks, given to repay Huff, Mabry gave a demand note signed in the firm name in favor of the reserve fund. Mabry had no authority to execute the note and Huff did not know until near the end of 1920

that the note had been given or that the repayment to him had not been made from funds belonging to the firm. The unauthorized use of the trust fund was discovered, in the absence of Mabry, in December, 1920. On Mabry's return in January, 1921, he was removed as one of the managing attorneys and the firm then discontinued business. Mabry promised to pay back the money he had taken but did not do so, and a judgment against him would have been worthless. Huff was unable to determine the amount of the assets of the firm of Huff & Mabry before the close of 1920, and in February, 1921, these assets, amounting to $3,228.65, were turned over by Huff to the association, together with $21,771.35 which he paid personally. He has not been reimbursed. Huff kept no regular books of account and made up his income tax returns upon a cash receipts and disbursements basis.

First. The Revenue Act of 1918 (40 Stat. 1057, 1066, 1067) provided for the deduction of losses incurred "in trade or business" or "in any transaction entered into for profit," or arising from theft of property "not connected with the trade or business," when the losses were "sustained during the taxable year" and were "not compensated for by insurance or otherwise." § 214 (a) (4) (5) (6).

The Government concedes that if assets of the taxpayer used in trade or business, or "in any transaction entered into for profit," are stolen in any year, the taxpayer sustains the loss in that year and the deduction must then be taken even though the theft is not discovered or the amount ascertained until the following year. This is said to be the import of the regulation adopted by the Treasury Department under the Revenue Act of 1921. Regulations No. 45, Art. 111.[1] But the Government contends

[1] Article 111 of Regulations No. 45 provides: "A loss from theft or embezzlement occurring in one year and discovered in another is deductible only for the year of its occurrence. . . . If subsequently to its occurrence, however, a taxpayer first ascertains the amount of a loss sustained during a prior taxable year which has not been deducted

that a different rule applies (at least where the taxpayer is on a cash basis) when the property stolen is not that of the taxpayer but is held by him in trust, and the theft is not discovered until the following year, as in that case "the taxpayer, being nothing out of pocket, cannot be said to have 'sustained' the loss in the year of the theft." The Government also raises the question whether Huff, in the absence of a finding of negligence, or of improper delegation of the administration of the trust to Mabry, can be regarded as legally bound to make restitution. Respondents insist that Huff was "liable for the trust funds" from the moment they were received by his firm, and that the loss was sustained at the time of the embezblement because it deprived him of assets with which he could have discharged his obligation.

We find it unnecessary to discuss the question whether Huff was bound to make good the amount taken from the funds of the association by his copartner. We may assume that he was. But the mere existence of liability is not enough to establish a deductible loss. There is liability in the case of a breach of contract, but as the Court said in *Lucas* v. *American Code Co.*, 280 U. S. 445, 450, "even an unquestionable breach does not result in loss if the injured party forgives or refrains from prosecuting his claim." And whether a taxpayer will actually sustain a loss through embezzlement of trust funds of which he is trustee will depend upon a variety of circumstances. If there is liability on his part for the misappropriation, it does not create a certainty of loss, as the defalcation may be made good by the one who caused it,

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from gross income, he may render an amended return for such preceding taxable year, including such amount of loss in the deductions from gross income, and may file a claim for refund of the excess tax paid by reason of the failure to deduct such loss in the original return." See, also, Regulations No. 62, Art. 111; No. 65, Art. 112; No. 69, Art. 112; No. 74, Art. 342.

or the liability of the taxpayer may be enforced only to a limited extent or not at all. The requirement that losses be deducted in the year in which they are sustained calls for a practical test. The loss " must be actual and present." *Weiss* v. *Wiener,* 279 U. S. 333, 335; *Lucas* v. *American Code Co., supra; Eckert* v. *Burnet,* 283 U. S. 140, 141, 142.

The instant case aptly illustrates the importance of this principle and calls for its application. Huff himself received the entire amount embezzled. He received this amount in payment of notes given to him by his firm to cover his advances to the firm. If he was liable to restore the amount taken from the trust fund, he himself had the full sum that was to be restored. So far as his individual estate was concerned, he had lost nothing by the embezzlement. If Huff had learned of the embezzlement immediately upon the payment to him and had at once restored the entire amount to the trust fund, he would have been in the same position as that in which he was before he received the money; that is, he would have held the partnership notes, for his advances to the partnership, which had not been properly discharged. Huff's personal wealth would have remained the same as it was prior to the embezzlement, and his individual gains or losses would have turned not upon the embezzlement but upon the result of the partnership business. When, in 1921, on the liquidation of that business, Huff turned over to the association the sum of $21,771.35, he was merely restoring part of what he himself had received of the misappropriated fund, and whatever loss he sustained was upon his investment in, or his advances to, his firm. That loss was determinable only through the winding up of the partnership business.

The result of the partnership transactions was not known and could not be ascertained in 1920. The firm did not discontinue business until January, 1921. The

finding is explicit that "some collections from premiums were made in January and February, 1921" and "Huff was unable to determine the amount of Huff & Mabry's assets before the close of 1920." In February, 1921, the firm assets were found to amount to $3,228.65 and this sum was paid to the association, with the amount paid by Huff as above stated. Upon these facts we find no basis for the conclusion that Huff sustained a deductible loss in 1920.

Second. The respondents make an alternative claim upon the ground that the amount due Huff by his firm was a debt "ascertained to be worthless" and hence deductible under § 214 (a) (7) of the Revenue Act of 1921. This claim was not passed upon by the Circuit Court of Appeals, but it was considered and rejected, properly as we think, by the Board of Tax Appeals. The facts as found show that the results of the firm's business were not known prior to 1921 and that no portion of the debt was ascertained to be worthless within the preceding taxable year.

Judgment reversed.

VOEHL *v.* INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

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

No. 315. Argued January 13, 1933.—Decided February 6, 1933.

1. In a case under the Longshoremen's and Harbor Workers' Compensation Act, as applied to employment in the District of Columbia, the issue before the deputy commissioner was whether the injury arose out of and in the course of the employment. This turned on the general nature and scope of the employee's duties, the particular instructions he had received, the practice that obtained as to work in extra hours or on Sundays, and the purpose of a journey in which he was injured. *Held:*

(1) That Congress had power to invest the deputy commissioner with authority to determine these questions after proper hearing and upon proper evidence; and

(2) That the findings of fact made by the deputy commissioner in the course prescribed by the statute and upon sufficient evidence, are conclusive. *Crowell* v. *Benson,* 285 U. S. 22. P. 166.

2. When by agreement, either express or implied in the course of business, the service of an employee in extra hours or on special errands begins when he leaves his home on the duty assigned and continues until his return, the hazards of the journey may properly be regarded as hazards of the service and hence within the Compensation Act. P. 169.

61 App. D. C. 173; 58 F. (2d) 1074, reversed.
Supreme Court, D. C., affirmed.

CERTIORARI, 287 U. S. 592, to review the reversal of a decree dismissing the bill in a suit to enjoin a deputy commissioner of compensation from enforcing a compensation order. The suit was brought by the Insurance Company, and the employee, petitioner here, was permitted to intervene.

Mr. Israel J. Mendelson for petitioner.

Mr. G. Bowdoin Craighill, with whom *Messrs. Frederic D. McKenney* and *John S. Flannery* were on the brief, for respondent.

The evidence relating to the jurisdictional fact of employment, upon which was based the conclusion of law that the injury arose out of the employment, was reviewable. *Crowell* v. *Benson,* 285 U. S. 22.

If the allegation that the injury did not arise out of the employment was an allegation of fact, it was admitted by the motion to dismiss. If a conclusion of law, it was reviewable in court. *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, 91.

The injury did not arise out of the employment and the deputy commissioner had no jurisdiction. An employee going to and from work is not covered by the

compensation law. *Podgorski* v. *Kerwin,* 144 Minn. 313; *Nesbitt* v. *Twin City Forge Co.,* 145 Minn. 286.

An employee may be protected by compensation insurance while he is seeking ingress to or egress from his employer's premises, and while he is immediately adjacent thereto, even though he is injured a few minutes before his work is to begin. *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418; *Bountiful Brick Co.* v. *Giles,* 276 U. S. 154. But here the accident occurred several miles from the place of employment. See *Gilmour* v. *Dorman,* 105 L. T. (N. S.) 54.

The exception where the employer furnishes transportation to and from work does not apply where the employee is using his own automobile, even though he may be paid by his employer for its use. *Artmeyer* v. *Mason,* 220 App. Div. (N. Y.) 787; *Grathwohl* v. *Nassau Point Club Properties,* 216 App. Div. (N. Y.) 107, aff'd 243 N. Y. 567. Voehl was not a traveling employee or on a special errand. Cf. 36 A. L. R. 474.

The method by which the wages are paid does not determine whether the employee is acting within the scope of his employment. *Stimal* v. *Jewett & Co.,* 198 App. Div. (N. Y.) 427; *Artmeyer* v. *Mason,* 220 App. Div. (N. Y.) 787.

The injury must arise out of and in the course of the employment. *McNicol's Case,* 215 Mass. 497.

Voehl's injury was caused by an ordinary traffic hazard. *De Voe* v. *N. Y. State Rys.,* 218 N. Y. 318; *New Amsterdam Casualty Co.* v. *Hoage,* 60 App. D. C. 40. The main object of the trip was his private affair. Cf. *Marks* v. *Gray,* 251 N. Y. 90.

The presumption "that the claim comes within the Act," § 20, is not "a substitute for proof." The burden is always upon the claimant to produce substantial evidence that the injury arose out of and in the course of

his employment. *Collins* v. *Brooklyn Union Gas Co.*, 171 App. Div. (N. Y.) 381; *Eldridge* v. *Endicott*, 228 N. Y. 21.

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

By the Act of Congress of May 17, 1928 (45 Stat. 600, D. C. Code, Tit. 19, §§ 11, 12), the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., §§ 901–950) are made applicable to employees, as stated, in the District of Columbia. Petitioner, Karl F. Voehl, an employee of the National Electrical Supply Company, which was engaged in business in the District, filed a claim for compensation for an injury sustained through an automobile accident while he was on his way to his employer's place of business on Sunday, April 6, 1930, for the purpose, according to his contention, of performing the duties assigned to him. The employer was notified and hearing was had before the deputy commissioner. Respondent, the insurance carrier of the employer, contested the claim. Admitting that the relationship of employer and employee existed on the date of the injury and that the employer was subject to the Compensation Act, respondent defended upon the ground that the injury did not arise out of and in the course of the employment. The deputy commissioner received the evidence offered, which included the testimony of the employer's manager with respect to the petitioner's duties, and made a compensation order setting forth detailed findings of fact supporting the claim and awarding compensation.

Respondent then filed a bill of complaint in the Supreme Court of the District to obtain an injunction restraining the enforcement of the compensation order and annexed to the bill, as a part thereof, the full record of

the proceedings and evidence before the deputy commissioner. Respondent charged that the compensation order, findings and award, were not in accordance with law and were not supported by the evidence. Petitioner was permitted to intervene. Motion by the deputy commissioner to dismiss the bill of complaint was granted and decree was entered accordingly. On appeal, the Court of Appeals of the District, taking a different view of the evidence, reversed the decree, 58 F. (2d) 1074, and the case comes here on certiorari.

The relation of master and servant admittedly existed. The business of the employer, carried on within the District, and the nature of the petitioner's employment, were such that both were subject to the Compensation Act. D. C. Code, Tit. 19, §§ 11, 12. By the express provisions of the Act, the deputy commissioner was authorized to entertain the claim of the employee and "to hear and determine all questions in respect of such claim." 33 U. S. C., § 919 (a). The proceedings of the deputy commissioner conformed to the statute. The precise issue, whether the injury arose out of and in the course of the employment, turned on the general nature and scope of the employee's duties, the particular instructions he had received and the practice which obtained as to work in extra hours or on Sundays, and the purpose of the journey in which he was injured. We think that there can be no doubt of the power of the Congress to invest the deputy commissioner, as it has invested him, with authority to determine these questions after proper hearing and upon sufficient evidence. And when the deputy commissioner, following the course prescribed by the statute, makes such a determination, his findings of fact supported by evidence must be deemed to be conclusive. *Crowell* v. *Benson,* 285 U. S. 22, 46, 47; *L'Hote* v. *Crowell,* 286 U. S. 528.

The deputy commissioner found that petitioner was injured while on his way to the employer's warehouse for

the purpose of clearing it of debris in accordance with his duties, and that when so engaged on Sunday the terms of his employment covered the period of service from the time he left his home until his return, his compensation for this service being at an agreed rate per hour for the entire time with an allowance for his transportation. We think that these findings were supported by the proof. From the testimony of the employer's manager, who had supervision of petitioner's work, it appeared that petitioner, being employed in the 'refrigeration division' of the Supply Company, had charge of the maintenance and operation of the company's warehouse and of the maintenance of service on refrigerators in customers' homes. He was the "head of the products division." With other matters, it was his duty to see that the buildings and stock were kept in proper order and that there was compliance with the fire rules. He had strict instructions with respect to the disposition of debris and their prompt removal. Voehl was a trusted employee who had been with the company for sixteen years and the company relied upon him to attend to whatever was necessary in the line of his work without specific or detailed instructions. His regular hours at the company's building were from 7:30 A. M. to 5:30 P. M. The manager testified that, in addition to these hours, Voehl was "on duty all of the time, on our call. That is to say, he was a very willing employee and we kept him purposely for taking care of emergencies and seeing that all details were cleaned up properly." By reason of the 24-hour service which the company maintained, Voehl was always subject to the calls of customers, responding either personally or through one of the service men under his direction. He had access to the warehouse at all times. Voehl used his own automobile, and when he was at work for the company outside of "office hours" and on Sundays he was paid a mileage rate of five cents a mile for the use of his car and at the rate of 75 cents per

hour from the time he left his home until his return. As the one in charge of the warehouse and service, Voehl submitted weekly a memorandum of the overtime of the employees under him and his own. The company had found him to be honest in his statements and his overtime account was never questioned.

Respondent's contention was that Voehl was going to the warehouse for a purpose of his own,—to obtain ashes to place in front of his house, being accompanied by his brother-in-law to assist him in their removal. The evidence showed that the company did not object to the employees taking ashes but their removal was not part of Voehl's work. Voehl's statement was that the purpose of his Sunday trip was to remove an unusual accumulation of trash, which it was his duty to remove, and that under his orders it was necessary for him to do this on Sunday in order that the building might be in proper condition on the following morning. He said that he often had "to come down on Sundays to finish cleaning up"; that the manager inspected the warehouse "every Monday morning to see that it was free of all trash" and that he (Voehl) did his utmost "to have the building clean for inspection." While his brother-in-law testified as to the intention to take the ashes, he also said that Voehl "went there specifically to straighten up the warehouse and bring the ashes back home when he came back." Voehl's statement as to the necessity of his trip on the particular Sunday, in the course of his duties, finds corroboration in the testimony of the manager. The latter said that Voehl had authority to go to the plant on the Sunday in question and that he could have made a charge for his service on that day and for his mileage. While the manager did not himself know the condition of the plant on the day of the accident, or the day before, he did know that there had been an unusual amount of unpacking of refrigerators during the

three days before the accident and that such work was "always attended by a large accumulation of trash and litter which must be cleared up." He said that "two or three days prior to the accident" he had called Voehl's attention "to the necessity of keeping it better cleared up"; he knew that the warehouse at that time "was in a badly littered condition." The manager also had information as to Voehl's work on previous Sundays and, on respondent's request, furnished a statement of what the manager described as an "exactly parallel instance" for which Voehl had been paid, and he believed that if the records of the busy season from April to August were available, they would show other similar instances.

Upon this evidence and the findings of the deputy commissioner, the compensation order did not violate any principle of law. The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment.[1] Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment. "No exact formula can be laid down which will automatically solve every case." *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 424. See, also, *Bountiful Brick Co.* v. *Giles,* 276 U. S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special

[1] *Podgorski* v. *Kerwin,* 144 Minn. 313; 175 N. W. 694; *Nesbitt* v. *Twin City Co.,* 145 Minn. 286; 177 N. W. 131; *De Voe* v. *New York State Railways,* 218 N. Y. 318, 113 N. E. 256; *Grathwohl* v. *Nassau Point Club Properties,* 216 App. Div. (N. Y.) 107, 214 N. Y. S. 496; 243 N. Y. 567, 154 N. E. 608; *Gilmour* v. *Dorman, Long & Co.,* 105 L. T. (N. S.) 54.

errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act.[2]

The decree of the Court of Appeals is reversed and that of the Supreme Court of the District is affirmed.

Reversed.

GEORGE A. OHL & CO. *v.* A. L. SMITH IRON WORKS.

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

Nos. 228 and 229. Argued December 16, 1932.—Decided February 6, 1933.

1. Under R. S., § 953, which provides that a bill of exceptions shall be deemed sufficiently authenticated if "signed" by the judge,

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[2] *Jett* v. *Turner,* 215 Ala. 352; 110 So. 702; *State Compensation Insurance Fund* v. *Industrial Accident Commission,* 89 Cal. App. 197; 264 Pac. 514; *Swanson* v. *Latham,* 92 Conn. 87; 101 Atl. 492; *Ohmen* v. *Adams Brothers,* 109 Conn. 378; 146 Atl. 825; *Littlefield's Case,* 126 Me. 159; 136 Atl. 724; *Vogel's Case,* 257 Mass. 3; 153 N. E. 175; *State ex rel. McCarthy Bros. Co.* v. *District Court,* 141 Minn. 61; 169 N. W. 274; *Martin* v. *Card & Co.,* 193 App. Div. (N. Y.) 6; 183 N. Y. S. 88; *Gibbs* v. *R. H. Macy & Co.,* 214 App. Div. (N. Y.) 335, 212 N. Y. S. 428; 242 N. Y. 551, 152 N. E. 423; *McClelland* v. *Dodge Brothers,* 233 App. Div. (N. Y.) 504; 253 N. Y. S. 773; *Messer* v. *Mfrs. Light & Heat Co.,* 263 Pa. 5; 106 Atl. 85; *Cymbor* v. *Binder Coal Co.,* 285 Pa. 440; 132 Atl. 363; *Rock County* v. *Industrial Commission,* 185 Wis. 134; 200 N. W. 657; *Consolidated Underwriters* v. *Breedlove,* 114 Tex. 172; 265 S. W. 128. See, also, *McNicol's Case,* 215 Mass. 497; 102 N. E. 697; *Marks* v. *Gray,* 251 N. Y. 90; 167 N. E. 181.

signature by his initials only is not a nullity, and the irregularity may be disregarded or cured by amendment, under R. S., § 954, 28 U. S. C. 777 and 391, after expiration of the term. P. 174.

2. *Held* that there was no occasion in this case to send the bill back for amendment, there being no doubt that it was the judge who signed his initials, for the purpose of authentication, and no one having been misled or injured. P. 177.

57 F. (2d) 44, reversed.

CERTIORARI, 287 U. S. 586, to review judgments of the Circuit Court of Appeals which affirmed the judgments of the District Court solely upon the ground that the bills of exceptions had not been properly authenticated and that it was too late to send them back for amendment.

Mr. Lee M. Friedman, with whom *Mr. Louis B. King* was on the brief, for petitioner.

Mr. Martin Witte, with whom *Messrs. Lowell A. Mayberry* and *Robert Gallagher* were on the brief, for respondent.

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

In these actions at law, tried together before District Judge James A. Lowell and a jury, respondent obtained judgments and petitioner appealed to the Circuit Court of Appeals. The records on the appeals contained what purported to be bills of exceptions signed by the attorneys for the respective parties and initialed by the District Judge as follows: "Allowed August 20, 1930, J. A. L., D. J." The Circuit Court of Appeals affirmed the judgments upon the sole ground that the bills of exceptions were not sufficiently authenticated and that it was too late to send the cases back for amendment as the term for which the judgments were entered had expired and the District Court had lost jurisdiction. 57 F. (2d) 44. This Court granted certiorari.

There is no question that District Judge Lowell affixed his initials to the bills of exceptions and intended in this manner to authenticate them as allowed. Apparently in connection with petitioner's application for a rehearing in the Circuit Court of Appeals, Judge Lowell addressed a communication to the judges of that court stating that the bills had been seasonably presented to him and that he had signed them with his initials intending that they should have full legal effect; he requested that the bills should be returned to him for correction.[1] There was also submitted to the Circuit Court of Appeals a certificate by the clerk of the District Court in which it was stated: "It has been the practice in this district for a long time for judges, the clerk and deputy clerks and the bar to treat as sufficiently allowed for appellate purposes bills of exceptions signed by the trial judge with either his full name or his initials." The petition for rehearing was denied.

Under the statute of Westminster 2, 13 Edw. I, c. 31, it was essential that exceptions should be authenticated by the seal of the trial justice. *Enfield* v. *Hills,* 2 Lev. 236; 2 Inst. 427, 428; 2 Bac. Abr., 326, 327; 2 Tidd's Pr., 789; *Nalle* v. *Oyster,* 230 U. S. 165, 176; *Krauss Bros. Co.* v.

[1] District Judge Lowell's communication contained the following:

"It has been called to my attention that I signed the bills of exceptions in the above two cases with my initials only instead of with my full signature. They were seasonably presented to me for allowance and I told counsel for the Appellant presenting them, after examination of them, that I allowed them, did nothing more with respect to them in counsel's presence and counsel departed. I later signed them intending so to sign them that they should have their full intended legal effect but not knowing any better I signed them only with my initials; that was my personal mistake to which neither the Appellant nor its counsel in any way contributed. I desire if I have the power and your permission now to correct my personal inadvertence by completing my signature so that my allowance of each bill may have my full signature and as of August 20, 1930. I therefore request, so far as I properly may, that the record be returned to the District Court for such correction by me as now within my power to make."

Mellon, 276 U. S. 386, 389, 390. In the practice of the federal courts, however, it was held that a seal was unnecessary, the signature of the trial judge being sufficient. *Generes* v. *Campbell,* 11 Wall. 193, 198; *Herbert* v. *Butler,* 97 U. S. 319, 320. Compare *Mussina* v. *Cavazos,* 6 Wall. 355, 363; *Young* v. *Martin,* 8 Wall. 354, 357. The Act of June 1, 1872, c. 255, § 4 (17 Stat. 197, R. S., § 953) expressly dispensed with the necessity of a seal but retained the requirement of the signature of the judge of the court in which the cause was tried. *Herbert* v. *Butler, supra; Malony* v. *Adsit,* 175 U. S. 281, 286, 287; *Krauss Bros. Co.* v. *Mellon, supra.* As amended by the Act of June 5, 1900, c. 717 (31 Stat. 270, 28 U. S. C. 776), the statute provides for the signature of another judge of the court in certain contingencies.[2]

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[2] Section 953 of the Revised Statutes, as amended by the Act of June 5, 1900, c. 717, 31 Stat. 270, 28 U. S. C. 776, provides:

"A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he can not fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor."

The statute does not prescribe the form of signature. The manifest purpose is authentication by the proper judge. In the absence of such authentication there is no bill of exceptions which the appellate court may consider. *Malony* v. *Adsit, supra; Metropolitan Railroad Co.* v. *District of Columbia,* 195 U. S. 322, 330; *McCuing* v. *Bovay,* 60 F. (2d) 375, 376; compare *Christy* v. *Pridgeon,* 4 Wall. 196, 201, 202. Appropriate disapproval of the practice of signing by initials such important documents as bills of exceptions, and insistence upon a method of signature more in keeping with the formal character of the proceeding, do not reach the question now presented. That question is not whether the signature is informal but whether there is a signature. If the attempted authentication by Judge Lowell be deemed to be merely informal or irregular, but not a nullity, the defect could be disregarded or cured by amendment. R. S. § 954, 28 U. S. C. 777. See, also, 28 U. S. C. 391. Thus, in *Idaho & Oregon Land Co.* v. *Bradbury,* 132 U. S. 509, the clerk of the court below in attempting to authenticate the record had appended the seal of the court but had failed to comply with the rule of this Court in affixing his signature. The Court said (p. 513): "The question presented is not one of no authentication, but of irregular or imperfect authentication; not of jurisdiction, but of practice. It is therefore within the discretion of this court to allow the defect to be supplied." And as it appeared to be then "too late to take a new appeal or writ of error," the Court permitted the record to be withdrawn "for the purpose of having the certificate of authentication perfected by adding the signature of the clerk." A defect or inaccuracy in mere matters of form can be corrected notwithstanding the end of the term. *United States* v. *Mayer,* 235 U. S. 55, 67.

The Circuit Court of Appeals felt constrained to reach its conclusion, that the attempted authentication was a nullity, by reason of the decisions of this Court in *Origet*

v. *United States,* 125 U. S. 240, 243, 244 and *Kinney* v. *U. S. Fidelity Co.,* 222 U. S. 283, 284. Neither of these decisions is strictly in point. In the *Origet* case, at the foot of a paper entitled "Bill of Exceptions," appeared the following: "Allowed and ordered on file November 22, '83. A. B." Referring to the Act of 1872 (R. S., § 953) the Court said: "This provision merely dispensed with the seal. The necessity for the signature still remains. We can not regard the initials 'A. B.' as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore the questions purporting to be raised by the paper cannot be considered." In the *Kinney* case, the record did not contain any bill of exceptions. There was a paper styled "Exceptions to the charge to jury," which was initialed "J. B. McP. trial judge" and signed by the plaintiff. The Court said that this paper was "not a bill of exceptions," citing the *Origet* case, but the Court added that "if it were to be treated as a bill of exceptions" it could not avail, as all the matters in question "depended upon examination of the evidence which is not in the record" and hence the Court had "no means of determining whether reversible error arose from the action of the court on any of the subjects to which the paper refers." Thus, in the *Kinney* case the present question was not necessarily involved, and in the *Origet* case the Court was unable to regard the initials as the signature of the judge. In the instant case, it appears that the trial judge did affix his initials in order to authenticate the bills of exceptions and he added the initials "D. J." for the obvious purpose of referring to his office and characterizing his action as official. So far as the statements in the opinions of the *Origet* and *Kinney* cases may be taken to imply that such an authentication by the trial judge is void and that bills of exceptions so allowed cannot be consid-

ered, or the informality be corrected, the statements are not approved.

The statute contains no indication that the word "sign" is used in other than the ordinary sense. The statute gives neither definition nor qualification. Signature by initials has been held to be sufficient under the Statute of Frauds [3] and the Statute of Wills and in other transactions.[4] It has been held in some States [5] that a different rule obtains in the case of the official signature of certain judicial officers, but the Congress has not established such a rule for the judges of the federal courts. Nor, in the absence of special statutory requirement, is there a uniform custom in relation to official signatures. It may be assumed that a requirement of the officer's signature, without more, means that he shall write his name or his distinctive appellation, but the question remains as to what writing of that character is to be deemed sufficient for the purpose of authenticating his official act. There is no rule that he shall adhere to the precise form of his name as it appears in his commission. The full name of

[3] *Salmon Falls Mfg. Co.* v. *Goddard,* 14 How. 446, 454; *Phillimore* v. *Barry,* 1 Camp. 513; *Chichester* v. *Cobb,* 14 L. T. (N. S.) 433, 443; *Sanborn* v. *Flagler,* 9 Allen 474, 478; *Smith* v. *Howell,* 11 N. J. Eq. 349, 357, 358; *Burns* v. *Burrows,* 196 Iowa 1048, 1056; 196 N. W. 62; Browne on the Statute of Frauds, 5th ed., § 362.

[4] *Re Savory,* 15 Jur. 1042; *Knox's Estate,* 131 Pa. St. 220, 229–232; 18 Atl. 1021; *Estate of Kimmel,* 278 Pa. 435, 440, 441; 123 Atl. 405; 31 A. L. R. 688; *Pilcher* v. *Pilcher,* 117 Va. 356; 84 S. E. 667; *Merchants Bank* v. *Spicer,* 6 Wend. 443, 448; *Brown* v. *Butchers & Drovers Bank,* 6 Hill. 443, 444; *Palmer* v. *Stephens,* 1 Denio 471, 479; *Weston* v. *Myers,* 33 Ill. 424, 432; Jarman on Wills, 6th ed., pp. 107, 108.

[5] See *Fairbanks* v. *Beard,* 247 Mass. 8; 141 N. E. 590; *Smith* v. *Geiger,* 202 N. Y. 306; 95 N. E. 706; *Conery* v. *Creditors,* 115 La. 807; 40 So. 173. Compare *Blades* v. *Lawrence,* L. R. 9 Q. B. 374. See, also, 29 A. L. R. Ann. 919, *et seq.* 72 A. L. R. Ann. 1290, *et seq.*

the officer may or may not be used. Not infrequently Christian names are omitted, in part or altogether, or are abbreviated or indicated by initials. In some of the most important communications on behalf of the Federal Government, only the surname of the officer is used. When an officer authenticates his official act by affixing his initials he does not entirely omit to use his name; he simply abbreviates it, he uses a combination of letters which are part of it. Undoubtedly that method is informal, but we think that it is clearly a method of "signing." It cannot be said in such a case that he has utterly failed to "sign," so that his authentication of his official act, in the absence of further statutory requirement, is to be regarded as absolutely void.

We do not approve the signing of bills of exceptions merely by the initials of the judge, but we regard the question as one of practice,—of regularity, not of validity. In the instant cases, the District Judge authenticated his allowance of the bills of exceptions by a form of signature easily and actually identified as his. No one was misled or injured. We perceive no reason why petitioner should lose its right to have the rulings upon the trial appropriately reviewed by the appellate court, merely because the District Judge failed to sign his full name. This is precisely the sort of defect which the Congress has provided shall not impair the substantial rights of the parties. 28 U. S. C. 391. At most, in the interest of a better practice, the bills of exceptions could have been returned for a more formal signature, but even that course was not necessary.

The judgments are reversed and the causes are remanded to the Circuit Court of Appeals for hearing upon the merits.

Reversed.

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BROAD RIVER POWER CO. *v.* QUERY ET AL.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 390. Argued January 20, 1933.—Decided February 6, 1933.

1. A state tax on production and sale of electricity generated by water or steam power does not deny to those so producing it the equal protection of the laws because it does not extend to producers by internal combustion engines or to industrial plants generating electricity for their own use and that of their employees. P. 179.
2. A hydroelectric company which constructed and operates its plant by permission of the Federal Government, under the Federal Water Power Act, does not act as the agent of the Government in producing and selling electric power on its own account, and can not claim exemption from a state tax on the power produced and sold, upon the ground that the tax interferes with a federal function or burdens the Federal Government. P. 180.

60 F. (2d) 528, affirmed.

APPEALS from decrees of the District Court of three judges dismissing bills to restrain enforcement of a state statute taxing the production and sale of electric power. Orders denying interlocutory injunctions were affirmed, in 286 U. S. 525.

Mr. George M. LePine, with whom *Messrs. C. Edward Paxson* and *W. C. McLain* were on the brief, for appellants.

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

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* Together with No. 391, *Lexington Water Power Co.* v. *Query et al*

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

These suits were brought to restrain the enforcement of a statute of South Carolina (Act of May 9, 1931, 37 St. at Large, 357) imposing a tax on the production and sale of electric power. The District Court of three judges (28 U. S. C. 380) sustained the tax and the cases come here on appeal from final decrees dismissing the bills of complaint for want of equity. 52 F. (2d) 515; 286 U. S. 525; 60 F. (2d) 528.

The contention, pressed below, that the statute is repugnant to the commerce clause of the Federal Constitution is not presented here. The grounds of attack are (1) that the statute is a denial of the equal protection of the laws, contrary to the Fourteenth Amendment; and (2), in the case of the Lexington Water Power Company, that the tax is imposed upon an agency of the United States.

(1) The complaint, upon the first ground, is that the tax is laid upon the production of electricity by water power or steam power, while the production of electricity by the use of oil or internal combustion engines is not taxed, and that the statute also exempts from the tax industrial plants generating power for their own use or that of their employees.

The court below adequately answered this contention. The court found that there were at least two plants in the State producing electric current by the use of internal combustion engines and that these plants were small and their business was comparatively insignificant. The court pointed out that the purpose of the legislature was evidently "to tax the generation of electric current by the hydroelectric companies which utilize the water power in the rivers of South Carolina, one of the great natural resources of that State." And the generation of current

by the use of steam power was taxed "because it is a matter of common knowledge that the hydroelectric companies use steam power to supplement water power in the production of their current, and also because current produced by steam power is the great competing factor on the market with current produced by water power." 52 F. (2d) p. 519. This classification cannot be regarded as arbitrary. Nor can it be doubted that the State was entitled, in devising its fiscal system, to recognize the distinction between hydroelectric companies generating electric current for sale to the public and industrial plants which develop power for their own use and that of their employees. The principles involved have been so recently restated by this Court that elaboration is unnecessary. *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146; *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527.

(2) The separate complaint of the Lexington Water Power Company is that it is generating current at a water power plant, on the Saluda river, which was constructed and is operated pursuant to a license granted by the Federal Power Commission under the Federal Water Power Act (16 U. S. C., c. 12) and hence that the tax is an "excise, license or privilege tax" upon a Federal agency.

It is apparent, however, that the complainant in generating and selling power is not acting as an agent for the Government. It acts with the Government's permission, and while it may be said to have received a privilege from the Government, it is not a privilege to be exercised on behalf of the Government. The tax is not upon the exertion of, and cannot be said to burden, any governmental function. *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 130. The tax is not laid upon the license granted by the Federal Water Power Commission but upon the production and sale of power which the company generates at its own

pleasure and exclusively for its own profit. Notwithstanding the special characteristics of electrical energy, the company is engaged in producing and selling an article of trade. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 180, 181. The product is property. The fact that a privilege has been received from the Federal Government does not exempt that property or the local business in producing and selling it from the burdens of taxation otherwise valid. *Railroad Company* v. *Peniston,* 18 Wall. 5, 33; *Choctaw, O. & G. R. Co.* v. *Mackey,* 256 U. S. 531, 537; *Willcuts* v. *Bunn,* 282 U. S. 216, 226; *Fox Film Corp.* v. *Doyal, supra; Susquehanna Power Co.* v. *Tax Commission (No. 1),* 283 U. S. 291, 294. Thus, the " permissive grant " by the Federal Government to a telegraph company to use the military and post roads of the United States for its poles and wires " did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State." *Williams* v. *Talladega,* 226 U. S. 404, 416; *Western Union Telegraph Co.* v. *Massachusetts,* 125 U. S. 530, 549; *Western Union Telegraph Co.* v. *Gottlieb,* 190 U. S. 412, 423. The complainant is in no better position with respect to the tax here in question.

Decrees affirmed.

UNION BANK & TRUST CO. *v.* PHELPS.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 346. Argued January 17, 1933.—Decided February 6, 1933.

1. Discrimination in state *ad valorem* taxation between corporations receiving deposits and doing a commercial banking business, and their corporate and individual competitors in the business of lending money, by taxing the shares of the former and taxing the latter on a more favorable basis, or exempting them,—*held* consistent with the equal protection clause of the Fourteenth Amendment. P. 185.

2. Within the intendment of the Fourteenth Amendment, shares of national banks and shares of state banks are not essentially the same when considered from the standpoint of taxation; nor do they become so merely because the State has attempted to subject them to like treatment. P. 186.
3. Where a State's scheme of taxation includes taxes on shares of state and national banks and less onerous burdens on other competing moneyed capital, so that the tax as to national banks is invalid and not enforced, the resulting discrimination against the state banks does not violate the equal protection clause of the Fourteenth Amendment. P. 187.
4. The implied exemption from state taxation of federal instrumentalities, such as national banks, is not a source of congressional power to control state action in other matters. P. 188.

225 Ala. 238; 142 So. 552, affirmed.

CERTIORARI, 287 U. S. 588, to review the reversal of a judgment allowing recovery of money from a state tax collector.

Messrs. William B. White and *John S. Coleman* for petitioner.

I. Alabama has classified as a single class for the purposes of *ad valorem* taxation the shares of state and national banks. Gen. Acts, Ala., 1923, p. 152, § 6.

II. By reason of the existence of untaxed money capital and corporate shares in actual and substantial competition with the national banks, the tax levied upon the shares of the national banks became invalid. Op. Atty. Gen. of Ala., Jan. 29, 1932; *Ward* v. *First Nat. Bank,* 142 So. 93; *Mercantile Nat. Bank* v. *New York,* 121 U. S. 138; *Merchants Nat. Bank* v. *Richmond,* 256 U. S. 635; *First Nat. Bank* v. *Anderson,* 269 U. S. 341; *First Nat. Bank* v. *Hartford,* 273 U. S. 548; *Minnesota* v. *First Nat. Bank,* 273 U. S. 561; *Georgetown Nat. Bank* v. *McFarland,* 273 U. S. 568; *Iowa-Des Moines Nat. Bank* v. *Bennett,* 284 U. S. 239.

III. The Fourteenth Amendment requires equal treatment with regard to *ad valorem* taxation of all property and taxpayers classified as a single class for taxation pur-

poses. *Central State Bank* v. *Bennett,* 284 U. S. 239; *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 44; *Greene* v. *Louisville & I. R. Co.,* 244 U. S. 499; *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20; *Cummings* v. *Merchants Nat. Bank,* 101 U. S. 153; *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23; *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350; *Munn* v. *Des Moines Nat. Bank,* 18 F. (2d) 269; *Ashland County Bank* v. *Butternut,* 241 N. W. 638.

IV. This Court is not bound by the construction placed by a state court upon state statutes or the operation and effect thereof as applied and enforced by the State where rights secured by the Federal Constitution are involved.

V. Shares of national and state banks are the same species of property for *ad valorem* taxation, and no discrimination can be made in favor of one and against the other. See cases under III, *supra,* and also the following: *State Bank* v. *Board of Revenue,* 91 Ala. 217; *Commercial State Bank* v. *Wilson,* 53 S. D. 82; *Central Nat. Bank* v. *Sutherland,* 113 Neb. 126; *State Bank* v. *Endres,* 109 Neb. 753; *State* v. *Mady,* 83 Mont. 418; *Security Savings Bank* v. *Board of Review,* 189 Iowa 463.

VI. In view of the untaxed competitive national banks and other moneyed capital and corporations, the *ad valorem* tax denies to petitioner and its shareholders the equal protection of the laws contrary to the Fourteenth Amendment. Cases under III, *supra,* and also the following: *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32; *Airway Elec. App. Corp.* v. *Day,* 266 U. S. 71; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Quaker City Cab. Co.* v. *Pennsylvania,* 277 U. S. 389; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400.

Messrs. Thomas E. Knight, Jr., Attorney General of Alabama, and *Frontis H. Moore,* Assistant Attorney General, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Union Bank & Trust Company, the petitioner, organized under the laws of Alabama and located in Montgomery County, receives deposits and carries on a general commercial and savings bank business. It sued respondent in a state court to recover $2521.69, alleged to have been illegally exacted as taxes assessed for the year ending September 30, 1931. The assessment followed § 6, Revenue Act of Alabama, 1923 (General Acts, 1923, 152), which directs—"Every share of any incorporated bank or banking association incorporated under the laws of this State, or any other state, or of the United States, shall be assessed for taxation in the county, and in the city or town where such bank is located at sixty per cent of its fair and reasonable market value."

During 1930, 1931 and 1932 there were building and loan associations, industrial loan companies and corporations, and industrial banks in Montgomery County, which loaned money in substantial competition with petitioner to the extent of hundreds of thousands of dollars, the shares and the capital of which were exempted from ad valorem taxes. Also, there were mortgage companies and corporations and individuals, persons, firms and associations engaged in like business and employing moneyed capital to the extent of many thousands of dollars in substantial competition with petitioner, which were either untaxed or definitely exempted.

The federal court had ruled that shares of National Banks in Alabama could not be subjected to taxation under § 6, Act of 1923, since the tax was not laid in conformity with § 5219, U. S. Rev. Stats., as amended by the Acts of March 4, 1923, c. 267, 42 Stat. 1499, and March 25, 1926, c. 88, 44 Stat. 223, which only permits taxation of shares of national banking associations at a rate no

greater than the one required of other moneyed capital in the hands of individual citizens coming into competition with the business of such associations. The state officers had accepted these decisions as correct declarations of the law.

Petitioner based its claim to recover upon the theory that the tax assessed against its shares had been exacted in violation of the equal protection clause of the XIV Amendment; also in violation of §§ 211 and 217, Constitution of Alabama, which provide that all taxes shall be assessed in exact proportion to value and the property of private corporations, associations, and individuals shall be taxed at the same rate.

The trial court gave judgment for petitioner. The Supreme Court reversed this action and denied any recovery, holding that the legislature had not exceeded its powers in making classifications and exemptions; and, specifically, that there was no violation of the Federal Constitution.

Only the federal question is before us. Was the petitioner denied equal protection of the laws?

Because of existence within the State of untaxed moneyed capital and shares of corporations in actual competition with National Banks, the shares of the latter during the years in question were not subject to ad valorem taxation under § 6, Revenue Act of 1923, or otherwise. And the State Supreme Court so held.

We cannot say that the State Legislature exceeded its power to make reasonable classification when it directed that moneyed capital or the property and shares of building and loan associations, industrial loan corporations, industrial banks, mortgage companies, etc., should be exempt from ad valorem taxation, or taxed on a different basis from the one prescribed for banks accepting deposits and doing a general commercial business, notwithstanding actual competition between them.

Mere competition between them is not enough to show two concerns must be burdened alike. The State Legislature reasonably might have determined that there was fair ground for distinction; and upon the record we may not hold that its action was arbitrary, capricious or wholly unreasonable.

There was sharp disagreement in the court below, but none of the judges suggested disapproval of the view just stated. The minority did not discuss the federal question, but found violation of the uniformity clause of the State Constitution.

The doctrine applicable here was recently expounded in *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159, and need not be restated.

Counsel for petitioner stoutly maintain: Shares of State and National banks belong to the same species of property. Not only are they essentially similar, but for many years the Revenue Statutes of Alabama have put them in the same category. Under the scheme of taxation presently existing in the State, National bank shares escape assessment while shares of State banks are subject thereto. Consequently, the latter are deprived of the equal protection of the laws guaranteed by the XIV Amendment.

A sufficient answer is that within the intendment of the XIV Amendment shares of National and State banks are not essentially the same when considered in connection with taxation. Nor do they become so merely because the State has attempted to subject them to like treatment.

The several States lack power to tax National bank shares except as expressly permitted by Congress. *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 668; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 106; *First National Bank* v. *Anderson,* 269 U. S. 341, 347. This is enough to negative the idea that shares of

National and State banks are essentially the same for purposes of taxation. And the Alabama Supreme Court has held that under her Constitution, although the legislature may have included them in the same class of taxable objects, there is permissible distinction between them.

To accept the doctrine that as the States can only tax a federal instrumentality when permitted by Congress, therefore they can not tax competitors of such instrumentalities within their general jurisdiction in some other fashion without violating the XIV Amendment would be both illogical and destructive of their proper independence.

Such instrumentalities are exempted from state taxation without the express consent of Congress, by the Federal Constitution. They are of a class wholly distinct from the property of ordinary corporations or individuals, and this fact cannot be disregarded by the State. If the State sees fit to tax unrestricted property within her jurisdiction and to omit National Bank shares, the classification cannot be said to be arbitrary and wholly unreasonable—the basis of it is plain enough. It may be vastly more important for the State to omit National Bank shares and tax ordinary moneyed capital according to a plan not permissible in respect of National Bank shares rather than conform to the standard prescribed by Congress. There is nothing to indicate that Congress ever supposed that mere establishment of a National Bank within a State could upset the scheme for taxation, theretofore entirely proper, by producing conflict with the XIV Amendment. This view would subject the taxing power of the State to the will of Congress far beyond what is necessary for the protection of federal agencies. The constitutional inhibition against taxing these agencies does not abridge the taxing power of the several States in respect of other property. The implied exemption is a shield for federal

agencies—not the source of congressional power to control State action in respect of other matters.

Iowa-Des Moines National Bank v. *Bennett*, 284 U. S. 239, much relied upon by petitioner, is not controlling—the circumstances and issues there involved were wholly different from those here presented. The Iowa Supreme Court found, or assumed, and this was accepted here, that through the wrongful action of state taxing officials the complaining banks had been subjected to intentional, arbitrary and systematic discrimination through assessments greatly in excess of those imposed upon competing moneyed capital; and the unequal exactions complained of were in violation of the Iowa laws. The points for decision in this Court concerned the effect of unauthorized action by state officers (Could such action be attributed to the State?) and the proper remedy. Unlawful inequality of treatment as between the banks and competing capital was not controverted. There was no occasion to consider whether failure by a State to tax National banks while subjecting her own banks to taxation would occasion discrimination against the latter forbidden by the XIV Amendment.

The judgment of the court below is

Affirmed.

DICKSON ET AL. *v.* UHLMANN GRAIN CO.

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

No. 63. Argued November 16, 17, 1932.—Decided February 6, 1933.

1. Contracts between broker and customer for pretended purchases and sales of grain for future delivery, which do not contemplate that any grain shall be actually bought, sold, or delivered on behalf of the customer, violate the Missouri Bucket Shop Law, when made and executed in that State. Pp. 192, 194.
2. To an action by the broker for commissions and advances, it is a bar that the contracts are thus invalid P. 196.

3. Such contracts do not lose their local character merely because with the knowledge of the customer the broker makes actual corresponding purchases and offsetting sales on exchanges in other States; and the illegality of the contracts with the customer is not affected by the fact that the exchange transactions are executed on federal "contract markets," are conducted in form as if based on genuine orders from the customer, are in conformity with the federal regulations, and may be valid as between the brokers on the exchanges. P. 193.
4. The Federal Grain Futures Act forbids "future" trading not carried on in compliance with its regulations, but evinces no intention to authorize all such trading if there is compliance, and it does not supersede state laws that make gambling in grain futures illegal. P. 198.
5. The Missouri Bucket Shop Law, as here involved, is not in conflict with the Grain Futures Act. P. 200.

56 F. (2d) 525, reversed.

CERTIORARI, 287 U. S. 581, to review the reversal of a judgment for the present petitioners in an action by the Grain Company to recover amounts claimed to be due to it from them for its services and advances as broker, in purchases and sales of grain for future delivery. The trial was to the District Court without a jury.

Mr. S. J. Jones for petitioners.

Mr. Paul R. Stinson, with whom *Messrs. Arthur Mag* and *Roy B. Thomson* were on the brief, for respondent.

Respondent contends that (1) each contract, having been executed in Chicago, Minneapolis or Winnipeg, its validity is not determinable by the law or statutes of Missouri, but is determinable by the rules and principles of the common law; (2) the contracts were presumably lawful and the burden was upon defendants to prove that they were wagering or fictitious transactions; (3) there was no substantial evidence that any of the transactions were mere fictions or wagers; (4) each transaction consummated in the United States, having been executed between plaintiff and another clearing member of a Grain

Exchange designated by the Secretary of Agriculture as a "contract market," and in full compliance with the Federal Grain Futures Act, was valid under the provisions of that statute, which superseded all state legislation covering the same field.

Since neither the Missouri law nor its statutes govern these transactions, it is unnecessary for this Court to decide whether the Grain Futures Act has superseded those statutes.

The contracts in question, executed by plaintiff as broker for and in behalf of defendants upon officially designated contract markets, are valid and enforceable under the Federal Grain Futures Act.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Uhlmann Grain Company, an Illinois corporation, brought this action of contract in the federal court for western Missouri against A. P. Dickson, a citizen and resident of Carrollton in that State. Four other cases of like character were, by agreement, consolidated with this one; and the five cases were tried below and are brought here as a consolidated suit. The pleadings, facts and proceedings stated in respect to the Dickson suit are applicable to all. The petition alleged that Dickson employed the company as a broker to purchase and sell for him grain on the Chicago, Minneapolis and Winnipeg exchanges; that he agreed to pay it commissions for such service and to reimburse it for any advances made; and that upon an account stated there is due a balance of $3,714.06, after crediting amounts received from the proceeds of purchases and sales and as margins.

Dickson denied the indebtedness and pleaded further in bar that the transactions out of which the indebtedness is alleged to have arisen were conducted wholly within the State of Missouri and were gambling, illegal under its

laws; that no purchase or sale of grain was made for him and that none for him was contemplated by either party; that the intention of both was merely that the defendant should settle for differences in the market prices; that the transactions were not actual dealings by him in grain futures but dealings which as to him were wholly fictitious or pretended, and in fact merely gambling on the rise and fall of the market prices of grain.

The company replied that the obligation sued on arose from transactions in the purchase and sale of grain for future delivery as commonly conducted on boards of trade; that these transactions were carried out on the boards of trade of Chicago and Minneapolis which had been designated by the Secretary of Agriculture under The [Federal] Grain Futures Act, September 21, 1922, c. 369, 42 Stat. 998, as "contract markets"; that the company was a member of each of said boards; and that each of the transactions of purchase and sale made by the company on behalf of Dickson was made by it with another member of the board and in compliance with the provisions of that Act.

The case was tried by the District Judge without a jury. Dickson contended that none of the alleged contracts made on the boards of trade was entered into on his behalf; that they were devices employed by the company on its own behalf in conducting at Carrollton what was actually a bucket shop in which to gamble in violation of the laws of the State; that he did not employ the company to make any contract for future delivery; that it was understood by him and the plaintiff, in each transaction, that receipt and delivery of the grain would not be required. On evidence which in abbreviated form occupies, besides the exhibits, 125 pages of the printed record, the judge found the facts as alleged in the plea in bar. He found specifically, among other things, that the transactions were wagering contracts "cloaked in the forms of

law"; and that the company's transactions with or for the customers occurred wholly in Missouri. He declined to make any of the findings requested by the company, denied recovery and entered judgment for the defendant. A motion for a new trial was overruled.

The company appealed to the Circuit Court of Appeals and contended, among other things, (1) That there was no substantial evidence to support the finding that the transactions were fictitious or gambling transactions and hence invalid under the law of Missouri; and (2) That The Grain Futures Act superseded all relevant state laws relating to the subject of dealings in futures on "contract markets," and that the transactions in question, being valid under the federal Act, were necessarily valid under the laws of Missouri. The Circuit Court of Appeals, one judge dissenting, reversed the judgment of the District Court; and remanded the cause for further proceedings. 56 F. (2d) 525. This Court granted a writ of certiorari.

First. The defense of illegality is predicated not on things done, or to be done, in Chicago or Minneapolis or Winnipeg, but wholly upon things done in Missouri. Uhlmann Grain Company, a member of the boards of trade of Chicago, Minneapolis, Kansas City, Missouri, and Winnipeg, Canada, was engaged in the grain brokerage business. In 1924 it established a branch office at Carrollton, then a town of about 3200 inhabitants. It is not disputed that, upon receiving at Carrollton a purported order from Dickson, the Carrollton branch of the Grain Company communicated with its Kansas City office, and that the company thereupon entered into contracts on some other board of trade for future purchase or sale of grain. The contracts, so far as made within the United States, were entered into on either the Chicago or the Minneapolis board. Each of these boards had been designated by the Secretary of Agriculture a "contract market." The company was a member in good standing

of each of the boards. Each contract was made in the name of the company as principal with another member of the board as principal. Each contract was evidenced by a record in writing as prescribed by the Grain Futures Act. And after each such contract was entered into by the company, it mailed, from its office in Kansas City to its customer at Carrollton, a written confirmation of his alleged order and of its execution, which recited the date of the contract, the quantity and kind of grain bought and sold, the contract price per bushel of the commodity, the delivery month, and the place where the contract of purchase or sale was executed.[1] The requirements of the federal act appear to have been complied with. There is no suggestion that these contracts violated the law of the place where the exchange was situated. It may be assumed that they were valid as between the Uhlmann Grain Company and its fellow members of the exchanges.

But there were two distinct agreements: that between customer and company, in which both parties acted as principals; and that between the company and brokers on the exchange, in which both of the parties there likewise acted as principals. It does not follow that because the contracts between the members of the exchanges were

[1] The alleged confirmation stated also: "All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. We reserve the right to close these transactions when deposits are running out, without giving further notice. We also reserve the privilege of clearing all transactions through Clearing Associations, if there be any, from day to day in accordance with the usage, rules and regulations of the Exchange where the trade is made, prevailing at the time. All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Chamber of Commerce or Board of Trade where the trades are made and the rules, regulations and requirements of its Board of Directors, and all amendments that may be made thereto. This contract is made under authority of the Act of Congress known as 'The Future Trading Act.'"

valid, those entered into by the company at Carrollton with Dickson and its other customers were valid also. Compare *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 249–250. See, also, *Harvey* v. *Merrill*, 150 Mass. 1; 22 N. E. 49; *Riordon* v. *McCabe*, 341 Ill. 506, 512–515; 173 N. E. 660. Whether the customer, in his agreement with the company, ordered that contracts be entered into in his behalf on the exchange, is the serious issue of fact in the case at bar. If the customer did so order by his agreement, we should have to determine by the law of which state the defense of illegality is governed. If, as Dickson contends, and the trial court found, Dickson's agreement did not contemplate the execution of transactions on the exchange in his behalf, clearly the defense of illegality is governed by the law of Missouri, unless that law has been superseded by The Grain Futures Act.

Second. There was evidence that the transactions out of which the indebtedness is alleged to have arisen were not in fact orders to enter into contracts on behalf of the defendants to purchase or sell for future delivery but were devices knowingly employed by the company solely to enable them to gamble. They testified that they were assured by the local manager that they would never have to receive or deliver any grain as a result of their speculations. And there is no lack of evidence to support a finding that in doing so the manager acted within the scope of his authority. It is admitted that no grain was actually delivered by or to the plaintiff's customers. The accounts of the defendants were carried on margin; and the extent of their purported obligations exceeded their financial capacity. It is clear that their purpose was solely to make a profit by reason of the fluctuations in the market price of grain; and that the plaintiff knew this. The Carrollton office was equipped in a manner common to bucket shops; its furnishings consisted of a desk, chairs,

a typewriter, blackboard, and telegraph instrument. The branch manager testified, as did the defendants, that he was active in soliciting business among the townspeople. Between 40 and 50 local residents from widely divergent walks of life in no way connected with purchasing or selling grain became customers of the branch. Of the five defendants in the cases consolidated for trial, who were the plaintiff's largest customers at Carrollton, two were farmers, two were clothing merchants, and one was an ice dealer. These defendants, who were not in the grain business, who had never traded on a grain exchange, and who had no facilities for handling grain, purported to buy and sell in amounts up to 50,000 bushels in a single transaction. In a period of nine months the total number of bushels involved in the transactions of four of the defendants, according to one of the plaintiff's witnesses, was 2,360,000. The defendants undoubtedly knew that the company regularly entered into contracts on the exchanges corresponding to the transactions at Carrollton. But the evidence warrants the conclusion that the contracts on the exchange were entered into by the company to enable it to secure the data for the defendants' wagers and to provide the means for determining the defendants' gains and losses; and that both the plaintiff and the defendants so regarded the contracts on the exchanges. So far as concerned the obligations which they undertook, the customers were in the same position as if they had simply wagered against the company on the fluctuations in the prices of grain. Thus, the evidence supports the conclusion that the transactions between the defendants and the company were executed and performed wholly in Missouri; and the law of Missouri accordingly governs, unless prevented by the federal act.

The burden was on the defendants to establish the defense of illegality under the law of Missouri, *Crawford* v. *Spencer,* 92 Mo. 498, 506; 4 S. W. 713; and the evidence

was ample to support the conclusion of the trial court that the defense had been sustained. The Missouri Bucket Shop Law, Rev. Stat. (1929), §§ 4316–4323, defines transactions in grain declared to constitute gambling and makes it punishable either to enter into the prohibited transactions or to keep a place where they are entered into. Section 4317 declares that a bucket shop is a place wherein the person carrying on the shop goes through the form of buying and selling certain commodities for other persons " at prices fixed or pretended to be fixed by trades or transactions made or offered to be made in same on boards of exchange or otherwise, but wherein there is in fact no actual purchase and sale, or sale and purchase of such commodity for or on account of the party or parties thereto." The statute further provides in § 4318 that all such " pretended " sales or agreements, " wherein there is, in fact, no actual purchase and sale or sale and purchase of such commodities for or on account of the party or parties thereto, are hereby declared gambling and criminal acts, whether the order or contract for the pretended purchase or sale of such property purports to be offered, accepted, executed, or consummated in this state or in any other state or country: *Provided,* the offer to make such pretended purchase or sale of said property is placed or given or communicated from this state; and any person violating the provisions of this section shall be guilty of a felony." [2]

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[2] The defense rests solely on Mo. Rev. Stat. (1929), §§ 4316 to 4323; not on §§ 4324–4326, 4329. The former sections derive from Mo. Laws 1887, p. 171; the latter, from Mo. Rev. Stat. (1889) §§ 3931-3936; see *State* v. *Long,* 261 Mo. 314, 316; 169 S. W. 11. The latter sections prohibit the purchase or sale of grain on margin where there is an intention not to make or receive delivery, and declare contracts made in violation of this prohibition void, even if only one of the parties to the contract has an intention not to deliver. Under the latter sections it has been held that such an intention on the part of a customer for whom a broker has executed future contracts is

The state statute imposed a criminal penalty for the negotiation of what was at common law an illegal contract. Compare *Irwin* v. *Williar,* 110 U. S. 499, 508–510; *Embrey* v. *Jemison,* 131 U. S. 336, 345. Under the Missouri statutes it is no defense to a criminal prosecution that the company entered into transactions for future purchases and sales on a contract market, even where the illegality consists in dealing in futures on margin. *State* v. *Christopher,* 318 Mo. 225; 2 S. W. (2d) 621.[3] In the case at bar the company was a party to the illegal con-

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sufficient to defeat the broker's claim for commissions, even though he was unaware of that intention, *Price* v. *Barnes,* 300 Mo. 216, 229, 231; 254 S. W. 33; but that the provisions do not apply where the execution of the contracts occurred in another state pursuant to orders given to the broker in Missouri. *Edwards Brokerage Co.* v. *Stevenson,* 160 Mo. 516, 527-528; 61 S. W. 617; see *Connor* v. *Black,* 119 Mo. 126, 141; 24 S. W. 184; *Price* v. *Barnes, supra,* at p. 232; also, *Elmore-Schultz Grain Co.* v. *Stonebraker,* 202 Mo. App. 81; 214 S. W. 216; *Claiborne Commission Co.* v. *Stirlen,* 262 S. W. 387. These cases have no application in the case at bar.

[3] Compare the statutes enacted in recent years in several states, declaring that contracts for future delivery of grain and other commodities are valid and enforceable if made according to the rules of an exchange, actually executed on the exchange and performed or discharged according to its rules, and made with or through a member in good standing. Ark. Acts 1929, No. 208, Ark. Dig. Stat. (1931 Supp.) §§ 2661a-2661k; Ga. Acts 1929, p. 245, Ga. Code (1930 Supp.) §§ 4264(1)–4264(8); Miss. Acts 1928, c. 304, Miss. Code (1930) §§ 1827-1837; Okla. Laws 1917, c. 97, Okla. Stat. (1931), c. 15, art. 24; S. Car. Acts 1928, No. 711, S. Car. Code (1932), §§ 6313–6321; Tex. Acts 1925, c. 15, Tex. Rev. Pen. Code (1925), arts. 656-664. The South Carolina and Texas statutes contain a proviso declaring that such contracts shall be unlawful where it is not "contemplated" by the parties that there be actual delivery; and the Georgia statute contains a proviso declaring such contracts unlawful where it is not "stipulated" by the parties thereto that there shall be actual delivery. For an analysis of the state statutes concerning dealings in futures, see 45 Harv. L. Rev. 912-925. Compare E. W. Patterson, Hedging and Wagering on Produce Exchanges, 40 Yale L. J. 843.

tracts with its customers; and hence it cannot recover for commissions or for advances. The trial court accordingly was right in entering judgment for the defendants, unless the Missouri law has been superseded by the federal act.

Third. The Grain Futures Act did not supersede any applicable provisions of the Missouri law making gambling in grain futures illegal. The Grain Futures Act recites in § 3 that transactions in grain involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; that they "are susceptible to speculation, manipulation and control"; and that the resulting obstruction to and burden upon interstate commerce in grain and the products and by-products thereof "render regulation imperative for the protection of such commerce." Section 4 declares that "it shall be unlawful" to engage in such transactions except, among other things: "(b) Where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market,' . . . and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery."

The federal act declares that contracts for the future delivery of grain shall be unlawful unless the prescribed conditions are complied with. It does not provide that if these conditions have been complied with the contracts, or the transactions out of which they arose, shall be valid. It does not purport to validate any dealings. Nor is there any basis for the contention that Congress occupied the field in respect to contracts for future delivery; and that necessarily all state legislation in any way dealing with that subject is superseded. The purpose of the Grain Futures Act was to control the evils of manipulation of

prices in grain.[4] Such manipulation, Congress found, was effected through dealings in grain futures. See *Board of Trade* v. *Olsen,* 262 U. S. 1, 32. Many persons had advocated, as a remedy, that all future trading be abolished.[5] Congress took a less extreme position. It set up a system of regulation and prohibited all future trading which did not comply with the regulations prescribed. But it evinced no intention to authorize all future trading if its regulations were complied with. Both the language of the act and its purpose are clear; and they indicate the contrary. The Missouri law is in no way inconsistent with the provision of the federal act. It does not purport to legalize transactions which the federal act has made illegal. It does not prescribe regulations for exchanges. Obviously, manipulation of prices will not be made easier, or the prevention of such manipulation be made more difficult, because the State has declared that certain dealings in futures are illegal and has forbidden the mainte-

[4] See the remarks of Mr. Tincher, chairman of the committee reporting the bill, before the House. 62 Cong. Rec., 67th Cong., 2d Sess., p. 9434. The title of the Act is "An Act for the prevention and removal of obstructions and burdens upon interstate commerce in grain by regulating transactions on grain futures exchanges, and for other purposes." A cardinal argument for the passage of the Grain Futures Act was the severe decline in prices on the Chicago board of trade subsequent to the decision in *Hill* v. *Wallace,* 259 U. S. 44, holding sections of the Future Trading Act unconstitutional. See H. R. No. 1095, 67th Cong., 2d Sess., p. 2; Sen. No. 871, 67th Cong., 2d Sess., p. 7; 62 Cong. Rec., p. 12733; compare, *id.,* p. 9429.

See, also, the statements of the purpose of the Future Trading Act, H. R. No. 44, 67th Cong., 1st Sess., p. 2; Sen. No. 212, 67th Cong., 1st Sess., p. 4; and the disavowal of an intention to "legalize" gambling, 61 Cong. Rec., 67th Cong., 1st Sess., pp. 1313, 1339–1340, 1370, 1374.

[5] See *id.,* p. 9428. For a summary of prior bills introduced in Congress for the control of future trading, some of them providing for its prohibition, see G. W. Hoffman, Future Trading Upon Organized Commodity Markets, pp. 364–367.

nance within its borders of places where they are carried on. Since there is nothing in the state law which is inconsistent with, or could conceivably interfere with the operation or enforcement of, the federal law, the statute of Missouri was not superseded. Compare *Savage* v. *Jones,* 225 U. S. 501, 533.[6]

Reversed.

MR. JUSTICE BUTLER, dissenting.

I am unable to join in the decision just announced. My understanding of the evidence constrains me to dissent.

Sections 4316–4323, Mo. R. S., 1929, prohibit bucket-shop transactions in Missouri. Section 4318 denounces as gambling pretended purchases and sales "wherein there is, in fact, no actual purchase and sale or sale and purchase of such commodities for or on account of the party or parties thereto." This Court rests its decision solely on that provision.

Section 4324 denounces as gambling all purchases and sales "without any intention of receiving and paying for the property so bought, or of delivering the property so sold." The judgment of the district court appears to be based upon the conclusion that the transactions between plaintiff and defendants violated that section. But the contracts here involved were executed outside Missouri and, as shown by the opinion of this Court, are not governed by § 4324. It is not involved. *Edwards Brokerage Co.* v. *Stevenson,* 160 Mo. 516, 527–528; 61 S. W. 617. *Atwater* v. *Edwards Brokerage Co.,* 147 Mo. App. 436, 448; 126 S. W. 823. *Hood Co.* v. *McCune,* 235 S. W. 158.

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[6] Compare, also, *Sligh* v. *Kirkwood,* 237 U. S. 52, 62; *Asbell* v. *Kansas,* 209 U. S. 251, 257; *Crossman* v. *Lurman,* 192 U. S. 189, 199; *Reid* v. *Colorado,* 187 U. S. 137, 149; *Missouri, Kansas & Texas Ry. Co.* v. *Haber,* 169 U. S. 613, 623; *Sherlock* v. *Alling,* 93 U. S. 99.

Claiborne Commission Co. v. *Stirlen,* 262 S. W. 387, 388. Cf. *State* v. *Gritzner,* 134 Mo. 512, 526–527; 36 S. W. 39. *State* v. *Christopher,* 318 Mo. 225, 237; 2 S. W. (2d) 621.

The evidence shows affirmatively and without contradiction that plaintiff and defendants did not intend to and did not violate § 4318.

Plaintiff is not a bucket shop proprietor. It has been engaged for many years in operating grain elevators including a terminal one of great capacity and in dealing on its own account in cash grain. It long has been a member of the Chicago, Minneapolis, Kansas City and Winnipeg exchanges and a broker executing customers' orders for the purchase and sale of grain for future as well as for immediate delivery.

In 1924, from April to late November, it had a branch at Carrollton, Missouri, in charge of one McDonough. This branch was connected by private telegraph wire with its Kansas City office and regularly posted prices at which purchases and sales of grain were being contemporaneously made on the exchanges. McDonough solicited from defendants and others in and about Carrollton orders for the purchase and sale of grain for future delivery to be executed by plaintiff upon the exchanges and, upon information obtained from plaintiff, gave advice to those desiring to speculate in contracts for the buying and selling of grain on the exchanges.

He had no authority to bind plaintiff to execute orders and transmitted any obtained by him to the Kansas City office. If plaintiff rejected the order, it notified him at once. An accepted order was sent to plaintiff's office in Chicago and, if for purchase or sale in that city, was executed by its representative in the grain pit on the exchange there. An order for execution at Winnipeg was sent by wire to plaintiff's broker there. Each order forwarded was identified by the customer's name which for brevity in transmission was usually indicated by the num-

ber given to his account. Unless the customer stipulated otherwise, it had to be executed on the day it was given.

In making the purchases and sales on the exchanges, members dealt with each other as principals, but each was required separately to execute each order and, when called on, to furnish the name of his customer to the broker with whom he dealt. The rules of such exchanges required a member to furnish to his customer desiring the information the name of the other broker. And plaintiff made available to defendants' counsel its records disclosing the names of the other parties to the purchases and sales in question.

Upon the execution of an order, plaintiff promptly wired McDonough the result and on the same day sent by mail directly to the customer a confirmation showing the kind and quantity of grain, the time specified for delivery, and the price at which it was bought or sold. Each confirmation contained the statement that " all transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor." The customer was bound within the specified future month to receive or deliver the grain he had contracted to buy or sell unless prior to that time he had sold or otherwise closed his contract.

All the contracts here involved were, when made, intended by the parties to be and in fact were closed by such counter transactions prior to the time fixed for delivery. In accordance with usage prevailing on all contract market exchanges, defendants' contracts of purchase were closed by corresponding sales and vice versa. And in each instance plaintiff sent a statement to the defendant showing the respective dates of purchase and sale, the quantity and kind of grain, the specified time for delivery, the amounts of plaintiff's commission and of federal taxes, together with the net gain or loss.

Defendants admit that they intended the orders to be executed on the exchanges, that they were so executed,

and that the accounts are correct. The advances sued on were made and the commissions claimed were earned. Plaintiff did not sell what defendants bought, or buy what they sold. It did not gain when they sustained losses on their contracts to purchase or sell or lose when they made gains thereon. There was no betting between plaintiff and defendants.

The trial judge, taking plaintiff's requests for findings as a basis, characterized the transactions as "purported," "pretended" and "fictitious." It quite clearly appears, from the form and language as well as from the substance of the findings [1] and from his filed opinion, that he held

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[1] The findings followed the form of plaintiff's requests and employed the same language, except as indicated below. The words italicized were added by the court; those within brackets were deleted from plaintiff's requests.

1. In all of the transactions involved in these suits the plaintiff *purported to act* [acted] as broker for defendants in the purchase and sale of grain for future delivery, and in no case did plaintiff *pretend to* enter into any other than a brokerage contract with any defendant.

2. Every *pretended* purchase and *pretended* sale was executed by plaintiff for defendant on the Grain Exchange in Chicago, Illinois, Minneapolis, Minnesota, or Winnipeg, Manitoba. None of the contracts of purchase or sale involved in these suits *purported to have been* [was] executed in Missouri.

3. Every transaction was a *pretended* contract of purchase or sale of grain for future delivery, *purported to have been* executed on grain exchanges by plaintiff in behalf of defendants on the one side, in which the plaintiff was a clearing member of the exchange where executed and in which the *purported* other party to the transaction, either acting for himself or a *pretended* undisclosed principal, was also a clearing member.

4. Every *pretended* contract of purchase or sale executed by plaintiff for defendants was *purported to have been* carried out in conformity with and in compliance with the rules of the particular grain exchange on which it was *pretended to have been* closed.

5. Every contract *purported to have been* executed by plaintiff on behalf of defendants *pretended to call* [actually called] for the purchase or sale of grain for future delivery and was evidenced by a memorandum in writing under which, and under the customs and

that, as actual deliveries were not intended or made, the contracts creating the right to make or call for delivery on specified terms violated § 4324. The characterizations,

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rules of the exchanges were executed, the parties were obligated *in form and pretense* to take or make delivery, or to respond in damages for failure to do so. That under the custom and practice existing and under the rules of the exchanges, off-setting or ringing purchases or sales *under proper circumstances, in good faith,* were permitted in lieu of the actual delivery of grain contracted for.

6. Every transaction involved in these suits initiated by a *purported* purchase or sale was offset by a *pretended* sale or *pretended* purchase executed in the same manner as the initiating *purported* purchase or sale. Every *pretended* purchase or sale was closed out by a *purported* offsetting transaction before the delivery time arrived and was *purported to have been* executed by plaintiff on the orders and at the instruction of defendants, save and except as to some of the last transactions, which were closed out by plaintiff without instruction from such defendant at a time when defendant had no cash margin to protect his transactions.

7. At all the times in question plaintiff was a member in good standing of the grain exchanges on which the *pretended* contracts of purchase and sale were executed, and plaintiff constantly maintained a margin with the Clearing House of each Grain Exchange as security for the performance of its *bona fide* contracts. All transactions of *pretended* purchase and *pretended* sale executed by plaintiff for defendants were *purported to have been* contracted for on the Exchanges in the name of plaintiff [plaintiff was responsible for their performance, and in each instance where the sale price was for an amount less than the purchase price, plaintiff acting as defendants' broker paid the difference to the Clearing House of the Exchange upon which the transactions were carried out. In none of the transactions did plaintiff profit or lose by a loss or profit to defendants. In all of them it acted only as a broker for defendants.]

8. None of the *pretended* purchases or sales were *purported to have been* executed at Carrollton, Missouri. Orders were *pretended to have been* given by defendants from time to time at Carrollton to plaintiff's local office for *purported* execution on the Grain Exchanges at Chicago, Minneapolis and Winnipeg; but none of these orders were *purported to have been* accepted by plaintiff at Carrollton. All of them were telegraphed to Kansas City for acceptance or rejection, and if accepted, were *purported to have been* carried out by plaintiff

like the statement in the opinion that the transactions were " wagering contracts . . . cloaked with the forms of law," may not be deemed to be findings of fact. They are

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by telegraphic instructions emanating from Kansas City and by *pretended* written confirmation of the execution of the order, which *pretended* written confirmations would be mailed from Kansas City to the customer.

9. That no records of the accounts of plaintiff with the defendants were kept at Carrollton; that no moneys were paid out to customers in Carrollton, but remittances were mailed direct by check from Kansas City. All statements, all *pretended* " P. & S's," all *pretended* confirmations of the *purported* execution of purchases and sales, were mailed to defendants from Kansas City. The Carrollton office merely *pretended to* receive[d] and transmit[ted] *purported* orders to its customers to Kansas City for *pretended* execution on the Grain Exchange designated in the customer's *pretended* order.

10. *All* [none] of the transactions of purchase and sale executed by plaintiff for defendants were fictitious transactions. *None* [all] of them were actually executed between clearing members of the Exchange where *pretended to have been* consummated. [one of whom would be plaintiff acting for defendant]

11. In *all* [none] of the transactions [did] plaintiff bet with its customers *and took* [or take] the other side of the deal.

[In no transaction did plaintiff and defendant settle the gain or loss of defendant other than by ascertaining the actual difference between the price at which the commodity was bought and that at which it was sold. In no transaction of purchase or sale did plaintiff and defendant fix a fictitious profit or loss to defendant by an ascertainment of the difference between the contract price and the market price on the day fixed for delivery.]

12. In each transaction, after a *pretended* order to sell or purchase was *purported to have been* executed by plaintiff in behalf of defendant, written confirmation thereof was immediately mailed by plaintiff to defendant. Every written confirmation recited that—

"All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor."

The court's findings did not cover other matters included in plaintiff's requests: the scope of its local agent's authority, whether the orders were made and recorded in accordance with the rules and regulations of the contract markets in which they were executed, and the intent of the parties as to receipt and delivery of wheat bought.

mere assertions in the nature of conclusions of law. The effect or weight to be given them necessarily depends upon the details and circumstances shown by the evidence. Made as they were through a mistaken view of the applicable law, these declarations may not reasonably be adopted here as findings that no such contracts were made and that plaintiff and defendants indulged in the make-believe denounced by § 4318.

There is no evidence of any violation of the bucketshop laws, nor is there any suggestion that the transactions shown can be held illegal except by force of the Missouri statute. I do not disagree with the majority that the Federal Grain Futures Act has not superseded the statutes of Missouri applicable to these transactions.

I am of opinion that the judgment of the district court should stand reversed and that the judgment of the circuit court of appeals should be affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO join in this dissent.

MILLER *v.* ADERHOLD, WARDEN.

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

No. 138. Argued January 9, 1933.—Decided February 6, 1933.

1. One upon whom sentence in a criminal case has been suspended may at any time request the court to pronounce judgment, and in the absence of such request must be deemed to have consented to the indefinite delay. P. 210.
2. In a criminal case in the federal district court an order for a permanent suspension of sentence is void. *Ex parte United States*, 242 U. S. 27. P. 209.
3. Final judgment in a criminal case means sentence; and a void order purporting permanently to suspend sentence is neither a final nor a valid judgment. P. 210.

4. Where judgment has not been pronounced upon a verdict during the term at which it was rendered, the cause continues on the docket and necessarily passes over to a succeeding term for final judgment or other appropriate action. P. 211.
5. Where the district court, in a criminal case in which a verdict has been duly returned, orders sentence suspended, it is not without jurisdiction thereafter, either at the same or a subsequent term, to impose sentence,—even though the intent of the order of suspension was to suspend sentence permanently. P. 211.

56 F. (2d) 152, affirmed.

CERTIORARI, 287 U.S. 592, to review a judgment affirming a judgment dismissing a writ of habeas corpus.

Mr. Dean G. Acheson for petitioner.

The order of the District Court was clearly an indefinite or permanent suspension of sentence. Petitioner was not placed on probation. This order, under *Ex parte United States,* 242 U. S. 27, was beyond the power of the court. *Ex parte Singer,* 284 Fed. 60; *United States* v. *Wilson,* 46 Fed. 748.

Where the record shows a suspension of sentence and release of the prisoner, the suspension is permanent and indefinite. *Mintie* v. *Biddle,* 15 F. (2d) 931; *People* v. *Barrett,* 202 Ill. 287; *Grundel* v. *People,* 33 Colo. 191; *Collins* v. *State,* 217 Pac. 896; *Smith* v. *State,* 188 Ind. 64; *In re Flint,* 25 Utah 338; *Commonwealth* v. *Maloney,* 145 Mass. 205; *Weaver* v. *People,* 33 Mich. 296; *Warner* v. *State,* 194 Ind. 426. The cases of *Miner* v. *United States,* 244 Fed. 422, and *Musick* v. *United States,* 2 F. (2d) 711, are in no sense to the contrary.

With the passing of the trial term in which the invalid order was entered, the trial court, according to the uniform holdings of the federal and many state courts, lost jurisdiction thereafter to impose sentence. *Ex parte United States,* 242 U. S. 27; *United States* v. *Wilson,* 46 Fed. 748; *Ex parte Singer,* 284 Fed. 60; *Mintie* v. *Biddle,* 15 F. (2d) 931.

The following cases hold that, when the imposition of sentence has been indefinitely suspended or postponed and the trial term has expired, the trial court has no jurisdiction thereafter to impose sentence: *Grundel* v. *People,* 33 Colo. 191; *Hawaii* v. *Pedro,* 11 Hawaii 287; *People* v. *Allen,* 155 Ill. 61; *People* v. *Barrett,* 202 Ill. 287; *Smith* v. *State,* 188 Ind. 64; *Warner* v. *State,* 194 Ind. 426; *In re Beck,* 63 Kan. 57; *State* v. *Sapp,* 87 Kan. 740; *Weaver* v. *People,* 33 Mich. 296; *State* v. *Hockett,* 129 Mo. App. 639; *Collins* v. *State,* 217 Pac. 896; *In re Flint,* 25 Utah 338; *People* v. *Kennedy,* 58 Mich. 372; *Hitchcock* v. *State,* 145 Tenn. 626.

The following cases hold that, the suspension being invalid and the sentence valid, the prisoner may be lawfully held: *Tanner* v. *Wiggins,* 54 Fla. 203; *Neal* v. *State,* 104 Ga. 509; *Miller* v. *Evans,* 115 Ia. 101; *Brabandt* v. *Commonwealth,* 157 Ky. 130; *Fuller* v. *State,* 100 Miss. 811; *State* v. *Abbott,* 87 S. C. 466; *Spencer* v. *State,* 125 Tenn. 64; *Reese* v. *Olsen,* 44 Utah 318.

The following cases hold that subsequent imprisonment is unlawful: *State* v. *Voss,* 80 Ia. 467; *In re Peterson,* 19 Idaho 433; *In re Strickler,* 51 Kan. 700; *Ex parte Cornwall,* 223 Mo. 259; *State* v. *Murphy,* 23 Nev. 390; *In re Markuson,* 5 N. D. 180; *Ex parte Clendenning,* 22 Okla. 108; *In re Webb,* 89 Wis. 354. Cf. *Ex parte Bugg,* 163 Mo. App. 44.

Compare, as to indefinite suspension of imposition: *Ex parte Williams,* 26 Fla. 310; *Ex parte St. Hilaire,* 101 Me. 522; *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133; *Philpot* v. *State,* 65 N. H. 250; *People* v. *Court,* 141 N. Y. 288; *Commonwealth* v. *Dunleavy,* 16 Pa. Sup. Ct. 380.

Compare, as to indefinite suspension of execution: *Sylvester* v. *State,* 65 N. H. 193; *State* v. *Drew,* 75 N. H. 402; *State* v. *Hilton,* 151 N. C. 687.

The Federal Probation Act is inapplicable to the present case, because that Act does not confer the power to

suspend the imposition of sentence except as a necessary incident to subjecting a defendant to the discipline of probation. This was not done or attempted.

Mr. Paul D. Miller, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. John J. Byrne* and *W. Marvin Smith* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.*

December 10, 1930, in the federal district court for the southern district of New York, petitioner was convicted on his plea of guilty of the crime of stealing from the United States mails. By order of the court, sentence was suspended and he was discharged from the custody of the marshal.

At a subsequent term of court, on June 17, 1931, petitioner was sentenced by another judge to four years imprisonment. A motion to vacate the sentence was denied; and a petition for a writ of *habeas corpus* was filed in the federal district court for the northern district of Georgia, praying the discharge of petitioner on the ground that the court imposing the sentence was without jurisdiction to do so. After a hearing the writ was dismissed and petitioner remanded to custody. The circuit court of appeals affirmed the judgment. 56 F. (2d) 152.

Petitioner seeks a reversal here on the ground that the order of December 10 constitutes a permanent suspension of sentence, void under the decision of this court in *Ex parte United States,* 242 U. S. 27; and that with the expiration of the term the trial court was without power to sentence petitioner. The Solicitor General vigorously opposes the contention that the effect of the order was

* The opinion was announced by the Chief Justice, Mr. Justice Sutherland being absent from the Bench.

to suspend sentence permanently; but, without determining that question, we are of opinion that if such was the effect, nevertheless, the court was not deprived of power to impose sentence at a subsequent term.

The decisions on the point are in conflict. The greater number support the view of petitioner; but we are of opinion that the weight of reason is the other way. Several of the cases holding with petitioner are set forth in *Mintie* v. *Biddle,* 15 F. (2d) 931. While these cases and others are emphatically to the effect that a permanent suspension of sentence is void, and that the court thereby, with the passing of the term, loses jurisdiction, we find no convincing reason in any of them for the latter conclusion. The decision in the *Mintie* case rests primarily upon considerations affecting the accused. Support for its conclusion is found by the court in the supposition that during the suspension the accused can "make no plans, enter into no contracts, engage in no permanent occupation, and bind himself to no obligations, or create any permanent ties, business or domestic." But it is hard to see the relevancy of these difficulties to the question of jurisdiction. They equally would be present if sentence were definitely postponed from term to term; and power to that extent is not doubted. Moreover, since the suspension order is void, the accused is not bound to rest under the supposed hardship. He may at any time put an end to it by requesting the court to pronounce judgment, which the court no doubt would do unless good cause to the contrary were made to appear. In the absence of such request he must be held to have consented to the indefinite delay and cannot complain. *Hoggett* v. *State,* 101 Miss. 269, 271; 57 So. 811. Compare *United States* v. *Mulligan,* 48 F. (2d) 93; *United States* v. *Lecato,* 29 F. (2d) 694, 695.

In a criminal case final judgment means sentence; and a void order purporting permanently to suspend sentence

is neither a final nor a valid judgment. *United States* v. *Lecato, supra,* at p. 695; *State* v. *Bongiorno,* 96 N. J. L. 318; 115 Atl. 665; *People* v. *Bork,* 78 N. Y. 346, 350; *State* v. *Vaughan,* 71 Conn. 457, 458; 42 Atl. 640; *Symington* v. *State,* 133 Md. 452, 454; 105 Atl. 541. If the suspension be for a fixed time, the case undoubtedly remains on the docket of the court until disposed of by final judgment. There is no good reason, in our opinion, why a different rule should obtain where the order of suspension, though expressly made permanent, is void. Such an order is a mere nullity without force or effect, as though no order at all had been made; and the case necessarily remains pending until lawfully disposed of by sentence. Compare *In re Bonner,* 151 U. S. 242, 259–262; *G. Amsinck & Co.* v. *Springfield Grocer Co.,* 7 F. (2d) 855, 858; *Hammers* v. *United States,* 279 Fed. 265, 266; *Biddle* v. *Thiele,* 11 F. (2d) 235, 236–237; *Bryant* v. *United States,* 214 Fed. 51.

The order here under review being ineffectual to confer immunity from punishment, the conclusion that such immunity existed must rest upon the bare fact that, without any saving provision, the term at which the accused was convicted but not sentenced had passed. But that foundation for the conclusion at once vanishes in the face of the rule that where judgment has not been pronounced upon a verdict during the term at which it was rendered, the cause continues on the docket and necessarily passes over to a succeeding term for final judgment or other appropriate action. *Walker* v. *Moser,* 117 Fed. 230, 232. We conclude, in accordance with what we regard as the better view, that in a criminal case, where verdict has been duly returned, the jurisdiction of the trial court, under circumstances such as are here disclosed, is not exhausted until sentence is pronounced, either at the same or a succeeding term. *Rachmil* v. *United States,* 288 Fed. 782, 785; *Ex parte Dunn,* 50 S. D. 48, 52–54; 208

N. W. 224; *Hoggett* v. *State, supra,* at p. 271; *Hancock* v. *Rogers,* 140 Ga. 688; 79 S. E. 558; *Dilley* v. *Commonwealth,* 243 Ky. 464, 468; 48 S. W. (2d) 1070; *Neace* v. *Commonwealth,* 165 Ky. 739, 742–743; 178 S. W. 1062.

Judgment affirmed.

FEDERAL TRADE COMMISSION v. ROYAL MILLING CO. ET AL.

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

No. 393. Argued January 20, 1933.—Decided February 6, 1933.

1. Respondents were engaged in the business of preparing, by a process of mixing and blending, plain and self-raising flour. Although not themselves grinders of the wheat from which their product was made, they were doing business under trade names which included the words "milling company," or words of like import, and made representations to the trade calculated to convey the impression that they were grinders. Their product was sold in interstate commerce in competition with a similar article marketed by concerns which were in fact grinders and also by other "blenders," although the latter did not hold themselves out in any way as grinders. A large number of buyers preferred to purchase the product prepared by grinders, in the belief that the quality or price or both were better. Respondents' representations and trade names induced many buyers to believe that they were grinders. Proceeding under § 5 of the Federal Trade Commission Act, and upon findings supported by evidence, the Commission ordered respondents to cease and desist from the use of such trade names and from making such representations. *Held:*

(1) The methods of respondents were unfair and were methods of competition within the meaning of § 5 of the Act. P. 216.

(2) It sufficiently appeared that the proceeding was in the interest of the public. P. 216.

(3) While the findings and conclusions of the Commission are sustained, its orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and, in respect of the use of the trade names, which con-

stitute valuable assets in the nature of good will, this can be done by requiring proper qualifying words to be used in immediate connection with the names. P. 217.

2. The purchasing public is entitled to protection against a species of deception whereby they are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin; and its interest in such protection is specific and substantial. P. 217.

58 F. (2d) 581, reversed.

CERTIORARI, 287 U. S. 590, to review a judgment setting aside certain cease-and-desist orders issued against respondents by the Federal Trade Commission.

Assistant to the Attorney General John Lord O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston, William G. Davis, Hammond E. Chaffetz,* and *Robert E. Healy* were on the brief, for petitioner.

Mr. Thomas H. Malone for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.*

This writ brings here for consideration six orders made by the Federal Trade Commission under § 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 717, 719, Title 15, U. S. C., § 45, which declares that unfair methods of competition in interstate commerce are unlawful. Proceeding under the act[1] the commission filed separate com-

* The opinion was announced by the Chief Justice, Mr. Justice Sutherland being absent from the Bench.

[1] "Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said com-

plaints against respondents, each of whom operates a business, either as a corporation, partnership or an individual, in the City of Nashville, Tennessee. All are engaged in preparing for the market self-rising flour and plain flour and selling the same in interstate commerce. None of them grind from the wheat the flour which they thus prepare and sell, but only mix and blend different kinds of flour purchased from others engaged in grinding. After being mixed and sifted, the flour, either plain or made self-rising, is packed into bags for the market. Most of the concerns grinding wheat into flour and selling in the same market also make self-rising flour and blended plain flour, ground from different sorts of wheat.

One of the respondents does business under the names, "Royal Milling Company," "Richland Milling Company," and "Empire Milling Company." The others use trade names of similar import, all containing the words "milling company," or "mill," or "manufacturer of flour"—words which are commonly understood by dealers and the purchasing public to indicate concerns which grind wheat into flour.

There are other concerns engaged in the business of producing plain and self-rising flour, by a process of mixing and blending, and selling the product in the same market in competition with respondents and with the grinders; but these do not name themselves millers, mills,

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plaint. . . . If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition.

. . . . . .

"The findings of the commission as to the facts, if supported by testimony, shall be conclusive."

or milling companies, or hold themselves out in any way as grinders of grain. The business involved is large and the competition among the several concerns substantial; and the use of the enumerated trade names by the respondents tends to divert and does divert business from both the grinders and those blenders who do not use such trade names or an equivalent therefor. Respondents have circulated written and printed circulars among the trade which either directly assert, or are calculated to convey the impression, that their product is composed of flour manufactured by themselves from the wheat. These statements and the use of the trade names under which respondents do business have induced many consumers and dealers to believe that respondents are engaged in grinding from the wheat the product which they put out. The respondents, early in the proceeding before the commission, offered "to place on their letterheads, bags, invoices, etc., in conspicuous lettering the words: 'Not Grinders of Wheat.'" This offer the commission evidently thought it unnecessary to consider, in view of the more comprehensive conclusion which it reached as to the remedy.

The findings of the commission, supported by evidence, in substance embody the foregoing facts, and much else which for present purposes it is unnecessary to repeat. From these findings the commission concluded that the practices of respondents were to the prejudice of their competitors and of the public and constituted unfair methods of competition within the meaning of § 5 of the Federal Trade Commission Act. Thereupon, the commission issued its orders against respondents to cease and desist from carrying on the business of selling flour in interstate commerce under a trade name or any other name which included the words "milling company," or words of like import, and from making representations, designed to affect interstate commerce, that they or either of them

manufacture flour or that the flour sold by them comes direct from manufacturer to purchaser, etc.

Upon review the circuit court of appeals set aside all orders of the commission, upon the ground that the proceeding by the commission did not appear to be in the interest of the public. 58 F. (2d) 581.

To sustain the orders of the commission, three requisites must exist: (1) that the methods used are unfair; (2) that they are methods of competition in interstate commerce; and (3) that a proceeding by the commission to prevent the use of the methods appears to be in the interest of the public. *Federal Trade Comm'n* v. *Raladam Co.,* 283 U. S. 643, 646–647. Upon the first two of these we need take no time, for clearly the methods used were unfair and were methods of competition. *Federal Trade Comm'n* v. *Winsted Co.,* 258 U. S. 483, 492–494; *Federal Trade Comm'n* v. *Raladam Co., supra,* at pp. 651–652.

We also are of opinion that it sufficiently appears that the proceeding was in the interest of the public. It is true, as this court held in *Federal Trade Comm'n* v. *Klesner,* 280 U. S 19, that mere misrepresentation and confusion on the part of purchasers or even that they have been deceived is not enough. The public interest must be specific and substantial. In that case (p. 28) various ways in which the public interest may be thus involved were pointed out; but the list is not exclusive. If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. Here the findings of the commission, supported by evidence, amply disclose that a large number of buyers, comprising consumers and dealers, believe that the price or quality or both are affected to their advantage by the fact

that the article is prepared by the original grinder of the grain. The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial. *Federal Trade Comm'n* v. *Balme,* 23 F. (2d) 615, 620. Compare *Federal Trade Comm'n* v. *Winsted Co., supra; Ohio Leather Co.* v. *Federal Trade Comm'n,* 45 F. (2d) 39, 41. There is nothing in the *Klesner* case to the contrary.

Although we sustain the commission in its findings and conclusions to the effect that the use of the trade names in question and the misstatements referred to constituted unfair methods of competition within the meaning of the act, and that its proceeding was in the interest of the public, we think under the circumstances the commission went too far in ordering what amounts to a suppression of the trade names. These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names. See *N. Fluegelman & Co.* v. *Federal Trade Comm'n,* 37 F. (2d) 59, 61; *Federal Trade Comm'n* v. *Cassoff,* 38 F. (2d) 790, 791; *Federal Trade Comm'n* v. *Good-Grape Co.,* 45 F. (2d) 70, 72. Compare *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.,* 208 U. S. 554, 559; *Warner & Co.* v. *Lilly & Co.,*

265 U. S. 526, 532; *R. Guastavino Co.* v. *Comerma,* 184 Fed. 549; *Warshawsky & Co.* v. *A. Warshawsky & Co.,* 257 Ill. App. 571, 584 *et seq.* This is a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine. And in doing so it will be enough if each respondent be required by modified order to accompany each use of the name or names with an explicit representation that respondent is not a grinder of the grain from which the flour prepared and put out is made, such representation to be fixed as to form and manner by the commission, upon consideration of the present record and any further evidence which it may conclude to take. In respect of other particulars, the orders of the commission are sustained.

The decree below, therefore, will be reversed, and the proceeding remanded to the circuit court of appeals to be disposed of in conformity with this opinion.

Decree reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS are of opinion that the decree below should be affirmed.

ANGLO-CHILEAN NITRATE SALES CORP. *v.* ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 377. Argued January 19, 1933.—Decided February 6, 1933.

1. A foreign corporation whose sole business in a State consists in landing, storing and selling in the original packages goods imported by it from abroad, can not constitutionally be subjected by the State to an annual "franchise" tax on the doing of such business, measured by the value of the goods on hand. Pp. 221, 229.
2. The tax is repugnant to both the imports clause and the commerce clause of the Constitution. P. 225.

3. The tax under Alabama Gen. Laws, 1917, No. 163, § 54, as construed by the supreme court of the State, is a tax on the doing of business, as distinguished from a tax on the authorization, right or privilege to do business, and is invalid, under the above-stated principle, as applied to the facts of this case. P. 223.
4. The fact that the foreign corporation qualified to do business in Alabama does not sustain the tax. P. 224.
5. The power of a State to withhold from a foreign corporation permission to exercise its franchise to do business therein does not enable it, when granting the privilege, to burden by taxation the foreign commerce carried on by the corporation within the State. P. 228.

225 Ala. 141; 142 So. 87, reversed.

APPEAL from a judgment sustaining a tax assessment, and reversing a judgment to the contrary, in a suit by the Nitrate Company to set the tax aside.

Mr. R. Worth Vaughan, with whom *Mr. Elihu Root, Jr.,* was on the brief, for appellant.

Messrs. Thomas E. Knight, Jr., Attorney General of Alabama, and *Frontis H. Moore,* Assistant Attorney General, for appellee.

The appellant was engaged in business in Alabama as a corporation, and as such was liable for the corporate franchise tax levied on all foreign corporations doing local business. Ala. Const., 1901, § 232; Ala. Acts, 1927, p. 176, § 54; *Southern Ry. Co.* v. *Greene,* 160 Ala. 396; 216 U. S. 400; *Louisville & N. R. Co.* v. *State,* 201 Ala. 317; 248 U. S. 533; *Kansas City, M. & B. R. Co.* v. *Stiles,* 182 Ala. 138; 242 U. S. 111.

Whether the capital be invested in property otherwise exempt from taxation is immaterial, for the reason that the tax is not imposed upon property, but for the privilege of exercising the franchise granted by the State. *Home Insurance Co.* v. *New York,* 134 U. S. 594; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *People ex rel. Commercial Cable Co.* v. *Morgan,* 67 L. R. A.

962; *New York* v. *Roberts,* 171 U. S. 658; *Educational Films Co.* v. *Ward,* 282 U. S. 379; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

Alpha Portland Cement Co. v. *Massachusetts,* 268 U. S. 203, is distinguishable because the tax was measured by and dependent on the operations of the company, all of which were admittedly interstate, while in the present case only the property in the State is used as a measurement, and the tax is not affected by the amount or character of appellant's operations.

Ozark Pipe Line v. *Monier,* 266 U. S. 555, presents the extreme position taken by this Court. In that case the privilege taxed was the right to do business. The holding of the Supreme Court of Missouri (282 Mo. 213) appears to have been of influence with this Court in determining the nature of the tax; and that together with the fact that the license or permit issued was to engage "exclusively in the business of transporting crude petroleum by pipe line," indicates at least that the Court considered this tax as a business tax rather than one purely on the corporate franchise. We submit that the dissent in the *Monier* case, expresses the correct rule applicable in the present case.

The decision in the *Roberts* case, 171 U. S. 658, where the facts and the statute are almost identical with those now presented, should not be overturned. The principle there declared and reaffirmed in *Armour & Co.* v. *Virginia,* 246 U. S. 1, supported by the *Educational Films Co.* case, and enunciated by Mr. Justice Brandeis's dissent in the *Monier* case, control the present one.

Mr. Justice Butler delivered the opinion of the Court.

Appellant is a New York corporation having its principal office in that State. October 10, 1927, it qualified to do business in Alabama, and March 14, 1930, made and sent to the state tax commission a return showing that its

only property in Alabama on December 31, 1929, the date as of which the statute required the statement to be made, was 33,455,763 pounds of nitrate of soda which had been imported by it from Chile into Alabama and stored in the original packages, the book value of which was $712,846.72. March 31, 1930, the commission under § 54 of No. 163, General Acts, 1927,[1] assessed against appellant for that year a franchise tax of $1,425.69, being at the rate of two dollars on each one thousand dollars of the value so reported.

Conformably to state practice appellant appealed to the circuit court of Montgomery county. The case was submitted on an agreed statement of facts the abridged substance of which follows:

From the date of its qualification in Alabama to the time of the assessment, appellant was engaged in the business of importing nitrate through the port of Mobile and other ports. The nitrate, in bags containing about 100 pounds each, was brought into Mobile and there stored

[1] Section 54 of Act No. 163, Alabama General Acts, 1927, p. 176, provides:

"That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State. In ascertaining the annual franchise tax which shall be paid by any foreign corporation doing business in this State under this section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of loans of money made by such corporation in this State, and which shall be secured by existing mortgage or mortgages to it on real estate in this State, and upon which mortgages there shall have been paid the recording privilege tax provided by law."

For the derivation of this section see: § 16 of Act No. 464, General Acts, 1915, p. 397. § 16 of Act No. 328, General Acts, 1919, p. 291. § 11 of Act No. 172, General Acts, 1923, p. 164, as amended by Act No. 263, General Acts, 1923, p. 267.

by appellant in a public warehouse and kept in the original packages until sold and delivered to the ultimate consumers. All was sold upon orders through a salesman who, paying his own expenses, was compensated by commissions on his sales. The orders were taken subject to approval and were not effective until approved by appellant in its New York office. When so accepted, directions were given that the nitrate be forwarded to the customers. These directions were given to and carried out by the Walsh Stevedoring Company at Mobile, an independent contractor, having an arrangement with appellant to handle its importations of nitrate, store it in a public warehouse and forward it as directed.

All transactions were for cash. The customers received the nitrate only upon payment of the purchase price when they took up the shipping documents through a bank of collection by paying the drafts attached. Such payments were sent to the Merchants National Bank at Mobile and by it immediately transferred to appellant in New York. Appellant had no bank account in Alabama and paid all expenses there by remittances from New York. On the date as of which appellant's return was made it had no accounts or bills receivable in Alabama and had no money there at any time except during the brief intervals that the funds were being so transmitted. It did not have or employ any capital in that State unless the importation through the port of Mobile, the storage and sale, of nitrate in the manner above described, constitutes capital and its employment there.

Section 54, under which the assessment was made, declares that every corporation organized under the laws of any other State and doing business in Alabama shall pay to the State an annual franchise tax of two dollars on each thousand dollars of the actual amount of capital employed therein. Appellant maintained below and here insists that the section, construed to impose the tax in question,

is repugnant to the declarations of the federal Constitution: " No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws," Art. I, § 10, cl. 2, and " The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . " Art. I, § 8.

The Alabama statute in question was enacted in pursuance of § 232 of the state constitution which declares: No foreign corporation shall do any business in the State without having a place of business and an authorized agent therein and without filing with the secretary of state a certified copy of its articles of incorporation. " The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State." As to the meaning and purpose of the statute, we are governed by the construction put upon it by the state supreme court.

Its decisions clearly show that the exaction is laid, not upon the authorization, right or privilege to do business in Alabama, but upon the actual doing of business. While the case at bar was pending on appeal there, the state supreme court in *State* v. *National Cash Credit Assn.*, 224 Ala. 629, 632; 141 So. 541, held that the mere investment in or ownership of property in the State by a foreign corporation does not subject it to the franchise tax. Adverting to the language of the statute, it declared that the " property must be employed in a corporate business done in this state." On rehearing, May 19, 1932, and after its decision in the case before us, that court said: " We merely hold a franchise tax to be what it purports to be, a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that,

if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax."

And in the case at bar the court said: "The defendant duly qualified as a foreign corporation to do business in this state, appointed a resident agent, and that it actually engaged in business in Alabama by selling its nitrate through a salesman both within and without the state appears as an uncontroverted fact. It seeks to be relieved from this franchise tax solely upon the theory the imported nitrate, the sale of which constituted its business, was immune from state taxation. . . . The statute here under review has no reference to imports, but is merely of a general character relating to the fixation of the amount of a franchise tax upon foreign corporations doing business in this state." And, after referring to the manner of appellant's acceptance of orders and the collections and remittances, the court said: "These details go to show the corporation was actually engaged in business in this state . . . " As appellant did no local business in the State, that decision plainly rests upon the assumption that Alabama had power to tax appellant's sales in original packages of the nitrate it imported into that State only for sale and that such sales constituted a business that is taxable under § 54. The Alabama statute is unlike that of Michigan examined here in *Detroit International Bridge Co.* v. *Michigan,* 287 U. S. 295, and *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, 342. There the tax upon a domestic corporation was imposed for the mere right to transact business.

The fact that appellant qualified to do business in Alabama was not, and rightly cannot be, held to sustain the tax. In *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555, we condemned as repugnant to the commerce clause a Missouri statute that required every foreign corporation engaged in business in that State to pay an annual franchise tax upon the privilege or right to do business.

The company's business there consisted in the operation of a pipe line for interstate transportation of oil and in the ownership of property, the keeping of its principal office, purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines all in furtherance of such interstate commerce and constituting the means and instruments by which it was conducted. We held that the tax could not be constitutionally exacted, and that the facts that the foreign corporation was organized for local business and had applied for and received a local license conferring the power of eminent domain did not enable the State to tax its right to carry on interstate commerce. We said (p. 567): "The state has no such power even in the case of domestic corporations. See *Philadelphia S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 342."

The question whether, consistently with the imports and commerce clauses, the Alabama statute may be construed to require appellant to pay the specified franchise tax is dual in form but single in substance, for, upon the facts of this case, it is clear that if the exaction is a tax on imports it necessarily burdens foreign commerce. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 295.

The stipulation of the parties shows that the only transactions in Alabama in which appellant is concerned are the landing, storage and sale of the nitrate in the form and packages in which it was put up abroad and transported into the United States. The bags were kept intact, no nitrate was removed therefrom and, prior to the delivery of the same to those who bought from appellant, it was not in any manner commingled with, and did not become a part of, the general mass of property within the State. The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive character as an import. State prohibition of such sales

would take from appellant the very rights in respect of importation that are conferred by the Constitution and laws of the United States. Alabama was powerless, without the consent of Congress, to tax the nitrate before such sales or to require appellant by the payment of occupation or franchise tax or otherwise to purchase from it the privilege of selling goods so imported and handled. *Brown* v. *Maryland,* 12 Wheat. 419, 436, 442–444. In that case a state license fee imposed on an importer selling imported goods in the original bales or packages was condemned as repugnant to the imports and commerce clauses. Chief Justice Marshall said (p. 444): "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . A tax on the occupation of an importer is . . . a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution."

In *Cook* v. *Pennsylvania,* 97 U. S. 566, the court held offensive to the same provisions a tax on the amount of the sales of imported goods in the original packages made by an auctioneer for the importer. In *May* v. *New Orleans,* 178 U. S. 496, the court (p. 507) formally reaffirmed and succinctly stated the propositions established in *Brown* v. *Maryland,* but held that the city tax there involved did not violate the imports or commerce clause because the imported goods were not sold in the original package.[2] And recently in *Willcuts* v. *Bunn,* 282 U. S. 216, we said (p. 228): "When the Constitution prohibits States from laying duties on imports, the prohibition not

[2] Cf. *Austin* v. *Tennessee,* 179 U. S. 343, 359. *Cook* v. *Marshall County,* 196 U. S. 261, 270. *Kirmeyer* v. *Kansas,* 236 U. S. 568, 573. *Price* v. *Illinois,* 238 U. S. 446, 454. *Hebe Co.* v. *Shaw,* 248 U. S. 297, 304.

only extends to a tax upon the act of importing, but also to one upon the occupation of the importer or upon the articles imported. A tax on the sale of an article, imported only for sale, is a tax on the article itself. *Brown* v. *Maryland,* 12 Wheat. 419, 444." And see *Almy* v. *California,* 24 How. 169. *Fairbank* v. *United States,* 181 U. S. 283. *Selliger* v. *Kentucky,* 213 U. S. 200. *United States* v. *Hvoslef,* 237 U. S. 1. *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19. *Crew Levick Co.* v. *Pennsylvania, supra. Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 509. The constitutional protection extends to corporations as well as to individuals. *Crutcher* v. *Kentucky,* 141 U. S. 47, 57. *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 108.

In support of its conclusion the state court cited and appellee relies upon *New York* v. *Roberts,* 171 U. S. 658. The question for decision in the case now before us was not involved, presented or decided there. The statute of New York considered there imposed a tax on the business or franchise of domestic and foreign corporations except, among others, those wholly engaged in carrying on manufacture in the State. The taxpayer, Parke, Davis & Company, was a Michigan corporation. It had its factory in Detroit and a warehouse and depot in New York. It had a manager and over 50 employees there. It did local business and also sold in original packages goods received from its factory and goods imported for it from foreign countries. The tax rate was graded by the statute according to dividends (presumably paid out of net earnings). Cf. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321. The tax base was the amount of capital employed within the State and the comptroller fixed that amount at $90,000. The corporation, seeking to have the assessment set aside, took the case to the state supreme court. It sustained the assessment against the contention that the statute as construed by the comptroller was repugnant to

the privileges and immunities clause, Art. IV, § 2, and held that the business was "not interstate commerce, which will prevent the corporation carrying it on from being taxed, . . ." 91 Hun 158, 162; 36 N. Y. S. 368. No other federal question was considered. The court of appeals affirmed without opinion. In this court the corporation's principal insistence was that the statute was repugnant to the equal protection clause of the Fourteenth Amendment in that it exempted domestic corporations manufacturing and selling in New York while imposing upon the Michigan corporation a discriminatory tax for selling in New York in original packages products manufactured in its Detroit factory. The court overruled that contention. The opinion shows that as to the amount of its capital employed in New York no federal question was presented. And, as admittedly the corporation did a local business in that State, i. e., business not included in interstate or foreign commerce (171 U. S. 659; 91 Hun 160; 36 N. Y. S. 368), that case is essentially different from this one.

The decisions here since *New York* v. *Roberts, supra,* definitely show that the power of the State to withhold from a foreign corporation permission to exercise its franchise to do business therein does not enable it, when granting the privilege, to burden by taxation interstate commerce carried on by such corporation within the State. And quite recently in *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, we said (p. 434): "Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, *Terral* v. *Burke Construction Co.,* 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203; *Looney*

v. *Crane Co.*, 245 U. S. 178, 188. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114." See *Ozark Pipe Line* v. *Monier, supra. Alpha Cement Co.* v. *Massachusetts*, 268 U. S. 203. *Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583, 593, *et seq. Sprout* v. *South Bend*, 277 U. S. 163, 170–171. *New Jersey Tel. Co.* v. *Tax Board*, 280 U. S. 338, 346. *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U. S. 465, 470.

It follows that the Alabama statute, construed to impose a tax upon appellant for selling in that State in the original packages the nitrate imported by it from Chile, is repugnant to the imports and commerce clauses above quoted. And, as it did no other business in that State, it is not liable for any part of the tax that the state commission assessed against it.

Judgment reversed.

MR. JUSTICE CARDOZO, dissenting.

This case does not present the question that would be here if the appellant had not sought for and obtained a privilege or franchise to do a local business in the state of Alabama. There is nothing in the Alabama decisions, and little in her statutes, to indicate that the tax would have been sustained in the absence of such a grant, or that there would have been even an attempt to levy it. *Ewart Lumber Co.* v. *American Cement Co.*, 9 Ala. App. 152, 156; 62 So. 560; *Citizens National Bank* v. *Buckheit*, 14 Ala. App. 511, 517, 519; 71 So. 82; *Tyson* v. *Jennings Produce Co.*, 16 Ala. App. 374, 375; 77 So. 986; *Ware* v. *Hamilton Brown Shoe Co.*, 92 Ala. 145, 149; 9 So. 136; *Cook* v. *Rome Brick Co.*, 98 Ala. 409, 413; 12 So. 918; *Stratford* v. *City Council of Montgomery*, 110 Ala. 619; 20 So. 127; Alabama Code of 1928, § 7217, limiting the application of §§ 7209 to 7220. Indeed the Attorney General informed us on the argument that this would have been the position of his department of the Govern-

ment, charged, as it is, with the collection of the revenues of the state. Alabama has said by her courts that it is beyond the power of the legislature to restrict by conditions the exercise or enjoyment of a privilege that has its origin and sanction in the constitution of the nation. See cases *supra.* Alabama has said by her statutes (Code, § 7217), that the permits and franchise taxes exacted of foreign corporations by article 26 of the Alabama Code do not apply to corporations "engaging in or transacting business of interstate commerce only," if the privilege they ask for is that and nothing more. The act now in question (§ 54 of Act No. 163, approved July 22, 1927, Alabama General Acts, 1927, p. 176) was passed in fulfilment of a mandate laid upon the legislature by § 232 of the Alabama Constitution. By that section it is provided that no foreign corporation shall do business in that state "without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association." By the same section: "the legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based upon the actual amount of capital employed in this state." It is this section that the courts of Alabama have adjudged to be inapplicable to interstate business. See cases *supra.* If that is the construction to be given to the command whereby the legislature was to establish a franchise tax and measure it in a certain way, there can be no doubt that the same construction must be given to the statute passed thereafter to give effect to the command. The power abjured in one breath was not exerted in the next.

With this approach to the problem, the pathway is made open. When the legislature of Alabama said in 1927 that an annual tax was imposed upon the fran-

chise of every foreign corporation, it meant to lay the burden upon those franchises and those only which there was power in Alabama to grant or to withhold. If the corporation was there by virtue of a dual right, the one created by the state, and no other, was to be subjected to the charge. The presumption of that intention is hardly to be escaped in view of past disclaimers of a purpose more pretentious. True there is another section of the same act whereby a written permit is exacted for "the purpose of registration and to prevent the duplication of names and in order to secure for the public record, for taxation, and for other purposes, the names and addresses of the corporation," and its officers (Act. No. 163, § 42). True also that for such a permit there is to be paid an annual tax varying from $5, the minimum, to $100, the maximum. The statute provides, however, that the tax imposed by that section shall be "in addition to other license or privilege taxes required to be paid by law." There is thus a tax in the nature of a fee to be paid in instalments as compensation for the permit, and another tax, measured by the capital in use within the state, upon the underlying franchise. The fee for the permit does not rebut the inference that there is not to be a tax upon the franchise unless user is a privilege that issues from the state. Doubt, if there is any, will be resolved in favor of the construction that keeps the act alive.

The appellant was not satisfied to stand upon its federal right, though the state had made it plain that the claim of right would be respected. It was seeking something more, the privilege of going over the line that marks the federal immunity; and to that end it asked for and obtained a license or franchise, the name is unimportant, to do a local business as well as one related to interstate or foreign commerce. By the grant thus pro-

cured, it became free, at its unfettered will, to sell at wholesale or at retail, in the original packages or in others, unhampered by the restrictions that would have limited its capacity if it had been there as an importer and with the powers of an importer only. This franchise or privilege, this grant of benefits beyond any conferred by the federal constitution, the state of Alabama was competent to tax. *Home Ins. Co.* v. *New York,* 134 U. S. 594; *Ashley* v. *Ryan,* 153 U. S. 436, 440; *Kansas City, F. S. & M. Ry. Co.* v. *Botkin,* 240 U. S. 227; *Lusk* v. *Botkin,* 240 U. S. 236; *St.Louis, S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111, 117; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 489; *Detroit International Bridge Co.* v. *Corp. Tax Appeal Board,* 287 U. S. 295. There being competence to tax, there was competence to measure the burden of the payment by capital employed, irrespective of the use to which employment is directed. *Educational Films Corp.* v. *Ward, supra; Pacific Co.* v. *Johnson, supra; Flint* v. *Stone Tracy Co., supra; Home Ins. Co.* v. *New York, supra.* There may be a wrong to the taxpayer if the standard of measurement is oppressive and unreasonable. *Western Union* v. *Kansas,* 216 U. S. 1. There is none where the standard bears a fair and natural relation, in its normal or average workings, to the privilege conferred.

The argument is made, however, that the tax though declared by the express terms of the statute to be a tax upon the "franchise," is confined to corporations "doing business" in Alabama, and hence is to be viewed as a tax upon the kind of business actually conducted, and not upon the franchise to conduct it in that or other ways. More than once a like argument directed to statutes phrased in the same way has been urged upon this court, only to be rejected as unsound. *Home Life Ins. Co.* v. *New York, supra; St. Louis, S. W. Ry. Co.* v. *Arkansas,*

supra; Louisville & N. R. Co. v. *Alabama,* 248 U. S. 533; 201 Ala. 317; 78 So. 93 (involving a statute of Alabama similar to this one); *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111, affirming 182 Ala. 138; 62 So. 734; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 145, 146. Thus, in *Home Life Ins. Co.* v. *N. Y., supra,* a statute provided that every corporation then or thereafter incorporated under any law of the state or of any other state or country, " and doing business in the state," should be subject to a tax " upon its corporate franchise or business," measured by its dividends. The court held that the tax was one upon the privilege " of doing business in a corporate capacity," and not upon the business or activities that were the outcome of the privilege. Cf. *Flint* v. *Stone Tracy Co., supra,* pp. 145, 146; *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, *Detroit International Bridge Co.* v. *Corp. Tax Appeal Board, supra.* There would be greater force in the appellant's argument if its construction of the tax as one upon the activity or the business had support in anything decided by the courts of Alabama. To the contrary, the highest court of the state has put that meaning aside by its opinion in this very case. Adopting the reasoning of this court in *Flint* v. *Stone Tracy Co., supra,* it has said that " the tax is an excise upon the particular privilege of doing business in a corporate capacity, and with the advantages derived therefrom. *State* v. *Anglo-Chilean Nitrate Sales Corp.,* 142 So. 87, 91; cf. *Louisville & N. R. Co.* v. *State,* 201 Ala. 317, 318; 78 So. 93; *Ellis* v. *Handley Mfg. Co.,* 214 Ala. 539; 108 So. 343; *Kansas City, M. & B. R. Co.* v. *Stiles,* 182 Ala. 138; 62 So. 734. True indeed it is that the corporation will be relieved of the burden if no business is transacted and no capital employed (*State* v. *National Cash Credit Ass'n,* 224 Ala. 629; 141 So. 541), but so was the corporation in the *Home Life Insurance* case, and so also were the corporations in many other cases. *Flint* v. *Stone Tracy Co., St. Louis, S. W.*

Ry. Co. v. *Arkansas, Louisville & N. R. Co.* v. *Alabama, Kansas City, M. & B. R. R. Co.* v. *Stiles, supra.* If the state has conferred a privilege which it is competent to tax, the competence is not lost, and the validity of the tax destroyed, because the privilege is to be free when the corporation is inactive. There is a requirement in the Alabama constitution, repeated in the statute, that the tax upon the franchise shall be measured by the capital employed within the state, a measure obviously inapplicable to dormant corporations. In such circumstances, activity is an event that conditions liability, but the privilege, not the event, is still the subject of the burden. To resume the matter in a few words: the tax is not imposed upon those capacities and privileges that emanate by implication from the power of the nation. The tax is laid upon those privileges, and those only, that emanate either expressly or by implication from the power of the state. Business, it is true, must have been done, for without the doing of business there can be no capital employed. Even so, capital and business are by-products and incidents, like dividends or income. *Flint* v. *Stone Tracy Co.* They are the yardstick by which the state measures the value of the privilege. They are not the privilege itself.

The argument is made that "capital employed" is an illegal and arbitrary measure because the appellant has made no use of the taxable franchise emanating from the state, but has confined its activities to interstate or foreign commerce. What has been said in recent cases (*Educational Films Corp.* v. *Ward, supra,* and *Pacific Co.* v. *Johnson, supra*), goes far to give the answer. There was no attempt here as there was in *Western Union Telegraph Co.* v. *Kansas, supra,* or in *Looney* v. *Crane Co.,* 245 U. S. 178, or in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, or in other cases of that type, to burden a local privilege in close association with one not local by a levy upon values beyond the confines of the state.

Cf. *Kansas City M. & B. R. Co.* v. *Stiles,* 242 U. S. 111, 119; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *Wallace* v. *Hines,* 253 U. S. 66; *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460; *Educational Films Corp.* v. *Ward, supra,* at p. 391. The measure here was capital employed in Alabama (*St. Louis, S. W. Ry.* v. *Arkansas, supra; Louisville & N. R. Co.* v. *Alabama, supra*); and it was a mere fortuity that in this instance the capital was made up of imports still intact. Moreover, what was done under the franchise one day might not be done under it the next. Another franchise tax would not be owing for a year. In the meantime the appellant might transact its business as it pleased. If some of its sales, however few and trifling, had been made in broken packages, there would be no denial by any one that the privilege of making them would be subject to taxation by one measure or another. This court has never held that the measure in such circumstances would be arbitrary and unlawful because determined by the value of all the local capital, and not merely the proportion necessary for sales in broken lots. In principle the situation would then be governed by the ruling in *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290, and *Western Cartridge Co.* v. *Emmerson,* 281 U. S. 511, where an apportionment very similar had the approval of this court. Especially must the standard hold when the statute is directed against foreign corporations generally, and not particularly against such of them as are engaged in interstate or foreign commerce. If the standard is a valid one when the privilege is used, it does not cease to be valid because user is abandoned or postponed. Very likely the statute might have been read in a different way. It might have been read as imposing two conditions, first that business should have been done, and second that what was done could be attributed, at least in part, to the actual exercise of the privileges granted by the state. As to such matters of construction the

courts of the state may speak the final word. All that concerns us here is capacity or power. Here was no covert effort by the state to extend its taxing jurisdiction into an area denied to it. The burden upon interstate business in *Western Union* v. *Kansas* and the other cases cited, was an outcome inherent in the statutory scheme; it was the very event intended. The burden here, if there was any, was unforeseen and adventitious. Cf. *Plummer* v. *Coler,* 178 U. S. 115; *Kansas City, M. & B. R. Co.* v. *Stiles, supra.*

None of the decisions cited by the appellant controls the case at hand.

Ozark Pipe Line Corp. v. *Monier,* 266 U. S. 555, is invoked with special confidence. There are obvious distinctions. The statute of Missouri there held to be invalid in its application to a corporation engaged in interstate commerce was very similar in form to the statute of Alabama in controversy here. The conduct of the aggrieved corporation was, however, very different. Its business was the operation of a pipe line from oil wells in Oklahoma passing through Missouri to a destination in Illinois. Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation. Oil was neither received nor delivered in that state. In these circumstances the corporation asked for and obtained from Missouri a license to " engage *exclusively* in the business of transporting crude petroleum by pipe line." 266 U. S. at pp. 561, 567. This, however, was the very business that was incidental to the federal right. The privilege to transport upon the interstate journey was an essential incident of commerce, and so an emanation from the federal power. The court did not hold that the tax would have been unlawful if laid upon a franchise emanating from the power of the state. The court condemned the

tax for the reason that it read the statute as designed to lay a burden on the franchise to do business as an interstate carrier. The imputation of that design was borne out in a measure by the remedy, for the state had brought a suit not only to impress a lien upon the property, but to revoke the license altogether (p. 561), limited though it was. Cf. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 530. If there had been decisions in Missouri, as there are in Alabama, disclaiming a purpose to affect the federal privilege, and if the state and federal privileges had varied substantially from each other in meaning and in function, the parallel would be closer between the *Ozark* case and this. But if those conditions had been present, the result must have been changed.

Other cases, emphasized in the briefs, are still more faintly applicable.

Crew-Levick Co. v. *Pennsylvania,* 245 U. S. 292, brought before us a tax upon the business of foreign commerce, whether conducted by natural persons or by corporations. Its measure was the gross receipts. "It bears no semblance of a property tax or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise." 245 U. S. 297. Cf. *Phila. & Sou. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326. The conclusion would have been different if net income, and not gross, had been adopted as the measure. *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328; *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Shaffer* v. *Carter,* 252 U. S. 37, 52. The case has no relation to the validity of a tax to be measured by local capital and imposed upon a privilege.

Alpha Portland Cement Co. v. *Massachusetts,* 268 U. S. 203, dealt with a statute of Massachusetts, different in

form from this, and interpreted as one laid directly upon the operations of the business. Cf. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196. No license or franchise to engage in a local business had been granted by the state.

Brown v. *Maryland,* 12 Wheat. 419, was a case of a discriminatory tax upon the business of importers, and *Cook* v. *Pennsylvania,* 97 U. S. 566, a case of a discriminatory tax upon an auctioneer selling for importers. In neither was there a franchise, or a tax upon a franchise, or a reference to capital as a standard of measurement. In each the presence of imported packages to be subjected to a burden was an event considered and intended, not an adventitious circumstance developing unexpectedly in the application of the tax to one taxpayer out of many.

The tax imposed by this statute does not discriminate between domestic and foreign corporations to the prejudice of the latter. Domestic corporations pay a franchise tax that is measured by their whole capital; foreign corporations one that is measured by " the actual amount of capital employed " within the state. It does not discriminate between foreign corporations engaged in interstate or foreign commerce and other foreign corporations. It lays a burden on all impartially. Finally, it is not oppressive in amount, nor framed in such a form as to suggest a furtive purpose to stifle activities not covered by its terms. The tax is $2 per thousand dollars until 1932, and $1 per thousand afterwards. General Acts of Alabama, 1927, § 56, p. 177.

The appellant is in the enjoyment of a privilege of value which it solicited and received from the state of Alabama, and for that privilege it should pay.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this dissent.

Counsel for Parties.

NEW YORK CENTRAL RAILROAD CO. *v.* THE TALISMAN, LONG ISLAND R. CO., CLAIMANT.

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

No. 286. Argued January 11, 12, 1933.—Decided February 6, 1933.

1. At a water-front terminal maintained by an interstate rail carrier for freight interchanges, the carrier is bound by § 3 (3) of the Interstate Commerce Act to afford reasonable and proper facilities to other carriers for that purpose, and, when towing car-floats, must exercise reasonable care to avoid damage by collision to car-floats of another carrier engaged in receiving and delivering traffic. P. 241.
2. This duty of reasonable care being one imposed by law in respect of a service such as common carriers are bound to render in the public interest, the carrier owing it can not escape it by notifying other carriers that it will not be responsible for future damage to their floating equipment while lying at its terminal, whether caused by negligence or otherwise. P. 242.
3. A carrier receiving such a notice need not answer, and its silence will not imply a contract. P. 243.
4. Facilities furnished at a water-terminal merely for interchange of traffic from tracks to car-floats and *vice versa, held* not "terminal facilities" within the meaning of § 3 (4) of the Interstate Commerce Act. P. 242

57 F. (2d) 144, reversed.

CERTIORARI, 287 U. S. 587, to review the reversal of a decree in admiralty holding a tug liable for damage to a car-float by collision.

Mr. Leonard J. Matteson, with whom *Messrs. D. Roger Englar* and *Clive C. Handy* were on the brief, for petitioner.

Mr. Chauncey I. Clark for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit in admiralty brought by petitioner in the southern district of New York against the tug Talisman, of which respondent is the owner and claimant, to recover damages to carfloat No. 37 belonging to petitioner. The case was submitted on an agreed statement of facts.

Petitioner and respondent were common carriers engaged in interstate commerce. The damages resulted from a collision October 29, 1926, between petitioner's carfloat No. 58, while in tow of the Talisman, and carfloat No. 37, which was moored in a carfloat bridge of respondent's terminal at Long Island City. The collision was occasioned solely by the negligence of the Talisman and those in charge of her. Respondent received No. 37 at the terminal named in connection with the transportation in interstate commerce of freight cars and freight. Petitioner had received by registered mail from respondent a notice dated July 31, 1920.

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn. On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn: All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float or craft. This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes. This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long

Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn."

Petitioner had made no reply to the notice.

The district court held respondent liable. 52 F. (2d) 691. The Circuit Court of Appeals reversed. 57 F. (2d) 144.

Petitioner and respondent were connecting carriers. As such, each, in the discharge of its duties to the public, owed to shippers of freight in its possession destined to points on or routed over the railway of the other the duty to deliver to the connecting line for further transportation; and each was correspondingly bound to receive and carry. *Railroad Co.* v. *Manufacturing Co.,* 16 Wall. 318, 324. *Myrick* v. *Michigan Central R. Co.,* 107 U. S. 102, 106. *Dunham* v. *Boston & Maine R. Co.,* 70 Me. 164, 170. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.,* 110 U. S. 667, 683. *Andrus* v. *Columbia & Okanogan Steamboat Co.,* 47 Wash. 333, 338; 92 Pac. 128. Such carriers were not bound under the common law to make track connections. *Wisconsin, M. & P. R. Co.* v. *Jacobson,* 179 U. S. 287, 296. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co., supra.* The Interstate Commerce Act empowered the commission to require such connections. *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.,* 271 U. S. 244.

And § 3 (3) provides that all carriers shall, according to their respective powers, " afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines." Respondent's terminal and carfloat bridge constituted the place and means long used for such interchange. It is not suggested that, at the time of the collision, petitioner's carfloat was not where respondent intended to have it brought or that petitioner could have selected any other place or means. It was not free elsewhere to tender the traffic. In view of the

duty put upon respondent by the policy of the law, it was bound to exercise reasonable care for the safety of petitioner's carfloat while engaged in delivering and receiving traffic. *Bennett* v. *Railroad Co.*, 102 U. S. 577. *Woodruff* v. *Painter & Eldridge,* 150 Pa. 91, 96; 24 Atl. 621.

But respondent insists that, if dissatisfied with the terms of the notice it sent, petitioner's remedy was to appeal to the Interstate Commerce Commission for relief under par. (4) of § 3. That position is not tenable. The place and bridge furnished by respondent for interchange are not terminal facilities within the intention of that paragraph. The expression " terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier " does not include mere interchange facilities. Petitioner's use of respondent's property involved no taking requiring the ascertainment of just compensation as provided in that paragraph. *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 368. Moreover, the requirement in par. (3) that carriers shall furnish " equal " facilities for interchange negatives the suggestion that par. (4) applies.

For the better discharge of their duties, these public servants were required by the Act to coöperate in effecting interchange of traffic. Respondent could not by its own act relieve itself of any duty imposed upon it by law or arising out of the nature of its undertaking in respect of the required interchange. It was powerless by mere announcement to fix the terms on which it would participate with petitioner and other connecting carriers in effecting such interchange. It cites *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291. But the towage company was not bound to render the service there involved and was not a common carrier or liable as such. That case, and the cases cited which arose under contracts for towage, plainly have no application to the question under consideration. Here

the respondent's duty to petitioner arose out of the law governing its occupation. Petitioner made no reply to the notice sent it by respondent. In view of the character of respondent's duties, no contract can be implied from petitioner's silence. That quite as reasonably may be deemed to imply, if any implication is to be drawn, that petitioner intended to stand on its rights and not to surrender them. And, as respondent was not in position to dictate terms, petitioner was under no obligation to repudiate those proposed or to reply in any manner to the notice. *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344, 383. *Hollister* v. *Nowlen,* 19 Wend. 234, 242, 246. *York Company* v. *Central Railroad,* 3 Wall. 107, 113. *Railroad Co.* v. *Manufacturing Co., supra,* 329. *Judson* v. *Western Railroad Corp.,* 6 Allen 487, 490–491. *Gott* v. *Dinsmore,* 111 Mass. 45, 52.

Reversed.

UNITED STATES *v.* ACME OPERATING CORP. ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 319. Argued January 16, 1933.—Decided February 6, 1933.

1. Claim of the mortgagee of vessels requisitioned by the Government, for amounts expended to repair them after their return, *held* without basis in view (1) of an agreement, joined in by the Government, the owners and the mortgagee, by which the expense to the Government of transporting to destination the cargoes aboard when the use was taken should be charged against the amount of just compensation, and any balance in the Government's favor be payable upon return of the ships and be secured by prior liens upon them; and (2) in view of the fact that the amount found to be due the Government upon the final accounting exceeded the amount found to have been expended for the repairs. P. 247.
2. The claim against the United States, by the holder of mortgages on ships that were requisitioned by the Government, for the expense of repairs to put them in condition after their return, gains no

support in this case from the fact that the claimant also holds by assignment construction liens that attached before the requisition, the status of which is not revealed by the findings. P. 248.

74 Ct. Cls. 82, reversed.

CERTIORARI, 287 U. S. 588, to review a judgment allowing a claim for "just compensation" presented by the holder of mortgage liens on vessels that were requisitioned for use by the Government and afterwards repaired at the expense of the mortgagee.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Mr. Erwin N. Griswold* were on the brief, for the United States.

Mr. Addison C. Burnham, with whom *Messrs. Albert T. Gould, Alfred P. Lowell, Charles H. Bradley,* and *Walter B. Howe* were on the briefs, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, granted on petition of the government, to review a judgment of the Court of Claims in favor of the intervenor, the Liberty Trust Company, respondent here. 74 Ct. Cls. 82. The suit was brought by Acme Operating Corporaton, as plaintiff, to recover just compensation alleged to be due to it as the charterer of two steamships, the "James S. Whitney" and the "H. M. Whitney," the use of which was requisitioned in behalf of the government by the Shipping Board, under the Act of June 15, 1917, c. 29, 40 Stat. 182. The Court of Claims dismissed the petition of the plaintiff, but gave judgment for the intervenor, which claimed as the assignee and successor in interest of the Fidelity Trust Company, mortgagee of the two vessels. The sole question presented by the petition is whether the court was right in giving judgment for the intervenor.

The vessels were each subject to a mortgage of the Fidelity Trust Company, later assigned to the intervenor.

The owners chartered them to the Acme Corporation, plaintiff below, and, at about the same time, they were placed in repair yards for alteration and repairs, the cost of which for each ship was paid only in part. On April 27, 1918, shortly before the maturity of the mortgages, the use of the vessels was requisitioned by the Shipping Board. Having been arrested under libels in admiralty by the construction companies for the balance due for the repairs, they were released to the government by court orders.

August 12, 1918, the United States, through the Shipping Board, entered into a contract with the owners of the ships and the mortgagee, predecessor in interest of the intervenor, by which it was provided that the government should retain from the amounts which would otherwise be due as just compensation for the use of the vessels, its expenditures in behalf of the owners, for transporting to their destinations the cargoes which were in the ships at the time of requisition. If just compensation due " for the requisitioning " of the vessels exceeded the debt to the government, the government was authorized to apply the excess to the payment of the mortgages and liens on the vessels. It was also provided that if the ships should be released from the requisition or returned to the owners before the government should be fully reimbursed for carrying the cargoes forward to destination, the government should have liens upon them for the amount of the unpaid balance, which the owners and the mortgagee agreed should be superior to the mortgage liens.

In December, 1918, requisition charter parties between the government and the owners of the ships were executed as of the date of the requisitions. The charter parties are not set forth in the findings, but they provided that " the owner accepts this requisition charter in full satisfaction of . . . all claims . . . against the United States arising out of the requisition " and accepts

the compensation provided by the charter parties " as the just compensation required by law."

The ships were subsequently released by the government and returned by the Board to the owners, the " H. M. Whitney " on July 8, 1919 and the " James S. Whitney " on July 10, 1919. They were placed in dock for repairs and reconditioning, upon completion of which they were removed by the agent of the owners and Fidelity Trust Co., the mortgagee. The court below found that the Fidelity " advanced and paid," for the account of the owners of the two vessels, a total of $129,299.76 " for sundry services and materials in connection with " the repairs, and gave judgment for the intervenor for that amount.

A final accounting was had between the owners and the government which the court below found to be correct. The account, after crediting to the owners $87,706.84, the estimated cost of reconditioning the ships as fixed by a survey, showed a balance of $77,068.54 still owing to the government for delivering the cargoes which were in the ships at the time of requisition. The total amount due the government at the time the vessels were returned thus exceeded the claim of the intervenor. In September, 1920, the Fidelity Trust Company became financially embarrassed, was taken over by the Massachusetts Commissioner of Banks, and, in April, 1921, its assets were transferred to the intervenor which, for purposes of the present litigation, may be regarded as standing in its stead.

The court below held that the requisition of the use of the ships when they were in the custody of the admiralty court and when the mortgagee was neither in possession nor entitled to possession, did not entitle the mortgagee to compensation; but it nevertheless held that the intervenor was entitled to recover the $129,297.66, which it

expended to repair the vessels after their return by the government, on the ground that "the injury to the vessels themselves was an injury to the *res*" on which the intervenor held a mortgage. In this we think it was in error.

The intervenor endeavors to support the judgment below on the grounds that the injury or depreciation of the vessels while in use by the government under the requisition charters was, in effect, a destruction of them *pro tanto,* which in itself operated as a requisition of the mortgagee's interest, for which just compensation must be paid (see *United States* v. *Welch,* 217 U. S. 333, 339; *A. W. Duckett & Co.* v. *United States,* 266 U. S. 149, 151) and that in any case, the mortgagee's security was impaired to the full extent of the damage done, and it is entitled to recover the cost to it of rehabilitating its security by reconditioning the vessels.

It is unnecessary to consider in detail numerous objections raised by the government to the soundness of these contentions and to the sufficiency of the findings to support them, if sound. It is enough that the agreement of August 12, 1918, between the United States, the owners of the vessels and the mortgagee, which is binding on the intervenor, contemplated that the government should be reimbursed in full for its transportation charges from "the compensation due for requisitioning" the vessels, before any payments of compensation should be made to the mortgagee. To this end, the agreement provided that in the event that the steamers were returned before the government was fully paid for carrying the cargoes, the government should have "and there are hereby created liens upon said steamers and both of them, for the amount of the unpaid balance . . . which amount shall be forthwith due and payable on the release of said steamers or either of them, and which liens the parties . . . agree shall be superior to the mortgage liens." We think the effect of

this agreement was to confer upon the claim of the government priority over that of the mortgagee. The superiority of the government's claim to that of the mortgagee is certainly not affected by the fact that the vessels have been returned and the mortgagee seeks not the full amount of its mortgages, but the amount in which it contends its interest has been destroyed or its security impaired.

When the vessels were returned, $164,775.38 was due the government for unpaid transportation charges. The government has credited upon its claim the cost of repairs found reasonable by the survey, $87,706.84. But even if the full amount of $129,297.66, claimed by the intervenor to represent the damage to the vessels while in the service, be regarded as due to the owners and mortgagee as their interests may appear, the most that the mortgagee can ask is that the government's prior claim be reduced by that amount. Even if that is done, the government's claim is not satisfied, or its lien discharged. Hence, there is no foundation upon any theory for the recovery of a money judgment against the government by the intervenor, as mortgagee.

The intervenor seeks also to sustain its recovery upon the ground that it owns the construction liens for repairs and alterations of the vessels before they were requisitioned. The findings show that the claims of the construction companies were acquired by the Fidelity Trust Company and, in 1921, transferred to the intervenor along with the other assets of that company. But no claim founded upon these construction liens was asserted by the intervenor's petition or considered by the court below. The case was decided, as it was evidently tried, on the basis of intervenor's claim upon its mortgages. The status of the liens at the time of the trial is neither revealed by the findings nor mentioned in the opinion; the findings do not admit of a determination of their validity.

The vessels were placed in full repair by the mortgagee; to the extent that they were repaired before the liens were assigned, the lienors could have had no rights against the government for the impairment of their security and they transferred none by the assignments. There is no finding which shows to what extent the repairs had been made at the time of the assignments, although it appears that some of them, at least, were then completed. The intervenor does not say and cannot, on these findings, that it made the repairs to protect the security of the liens rather than that of its own mortgages, which are subordinate to the claims of the government. Accordingly, there is no basis in the findings for contending that the intervenor stands in any better position as the holder of the construction liens than it does as mortgagee.

Reversed.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY CO. *v.* WALLACE, COMPTROLLER OF THE TREASURY OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 176. Argued December 12, 1932.—Decided February 6, 1933.

1. Whether an appeal to this Court from a judgment of a state court in a proceeding under a state "declaratory judgments" law, presents a "case or controversy" within the jurisdiction of this Court, depends not upon the name or the form, but upon the nature and substance, of the proceeding and the effect of the judgment upon the rights asserted by the appellant. P. 260.
2. The Tennessee Declaratory Judgments Act, as construed by the Supreme Court of the State, may be invoked only when the complainant asserts rights which are challenged by the defendant, and presents for decision an actual controversy, to which he is a party, capable of final adjudication by the judgment to be rendered; and no judgment will be rendered when all the parties who will be adversely affected by it are not before the court. In a suit under the Act to secure a judicial determination that a tax levied against

the complainant, and about to be enforced by defendant state officers, was invalid under the Federal Constitution; which, in substance, differed from the ordinary injunction suit only in the absence of a prayer for an injunction and of an allegation of irreparable injury,—*Held* that a judgment upholding the tax and affirming dismissal of the bill on the merits, was reviewable by this Court. Pp. 260–264.

3. While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. P. 263.
4. The Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies; the judiciary clause defined and limited judicial power, not the particular method by which that power might be invoked. P. 264.
5. When the judicial power is invoked to review judgments of state courts, the ultimate constitutional purpose is protection of rights arising under the Constitution and laws of the United States; changes by the States in the form or method by which federal rights are brought to final adjudication in their courts do not preclude review by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below. P. 264.
6. As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury, which are material only if an injunction is asked, may likewise be dispensed with, if in other respects the controversy is real and substantial. P. 264.
7. A railroad company brings gasoline into Tennessee, stores it in its tanks, and withdraws and uses it as required as a source of motive power for moving its interstate trains in that State and in others. No ascertainable part of the gasoline when imported has a destination beyond the local storage tanks. *Held:*

   (1) That, upon being unloaded and stored, the gasoline ceases to be a subject of interstate commerce, and loses its immunity as such from state taxation. P. 265.

   (2) A Tennessee "privilege tax" on the storage of gasoline within the State and its withdrawal from storage for sale or use, when applied to petitioner's gasoline, is not a tax on the use of the gasoline as an instrument of commerce, and burdens the func-

tion of interstate commerce too indirectly and remotely to transgress constitutional limitations. P. 267.

8. The power to tax property—the sum of all the rights and powers incident to ownership—necessarily includes the power to tax its constituent parts. As the gasoline in storage could be taxed by the State, as property, notwithstanding its prospective use as an instrument of interstate commerce, the State can likewise tax the successive exercise of two of the powers incident to its ownership, storage and withdrawal from storage, both completed before interstate commerce begins. P. 268.
9. The constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by taxation. P. 268.
10. The allegations of the bill showing a heavier state tax burden upon railroads than upon common carriers by motor bus, fall short of alleging a discrimination forbidden by the commerce clause or by the Fourteenth Amendment. P. 268.

Affirmed.

APPEAL from the affirmance of a decree dismissing a bill challenging a Tennessee excise tax.

Mr. Fitzgerald Hall, with whom *Mr. Frank Slemons* was on the brief, for appellant.

In this case a citizen and a taxpayer has been formally called on by the proper public officials to pay taxes alleged to be due now. The taxpayer denies liability. Suit is brought to determine that liability. The question is not an academic one; the amount involved is fixed and certain; the demand to pay has been made; and the question at issue is whether payment is legally due. The taxpayer filed a bill, and the public officials obliged by law to collect are made respondents. Process is served in the ordinary way. The court is asked to determine whether the railway owes the tax actually claimed or not. And the Tennessee Supreme Court decided that question.

The Tennessee Declaratory Judgments Act by its own words provides for the determination of rights, and that this may be done by a declaration either in the affirmative

or negative. Further, that the judgment or decree will terminate the controversy. Trials by jury may be had under the Act, and issues of law and fact both are thus finally determined.

The Tennessee Supreme Court has powers under the Tennessee constitution fairly comparable in this respect to the powers of this Court under the Federal Constitution. *Muskrat* v. *United States,* 219 U. S. 346; *In re Cumberland Power Co.,* 147 Tenn. 504; *Miller* v. *Miller,* 149 Tenn. 463.

In construing this Declaratory Judgments Act, the Tennessee Supreme Court declines to merely give advice. It will not take jurisdiction unless actual parties—and all of them—are before the court, representing direct and adverse interests on actual, as distinguished from academic, issues. There is no federal case like the one now presented of which this Court has declined to take jurisdiction. Here is an actual and acute controversy.

Decisions of the Tennessee Supreme Court show the diligence of that court in avoiding giving mere advisory opinions. It requires, always, as in the instant case, an actually present controversy, with all the proper adverse parties before the court; and when decision is made it is final and further proceedings are not necessary.

The railway's obligation to pay a specific sum, to-wit, $13,381.23, as taxes, has been finally determined, unless this Court gives it relief.

The Tennessee legislature, apparently thinking only of filling stations, undertook to make those actually in the gasoline business collect from the road-users and pay such collections over to a special fund "to be used solely in the construction and maintenance of a highway system in the State," as privilege taxes. The road-user actually pays, and knows and understands that he is so paying.

The trouble arose when it was found that some non-road-users consumed large quantities of gasoline. Un-

fortunately the test case of *Foster & Creighton* v. *Graham*, 154 Tenn. 412, involved a road-user; and the statutory charge was properly sustained, but on the wrong grounds.

Appellant railway has automobiles using the public highways and pays, and should pay, compensation for such use, as these statutes provide. But the railway uses other gasoline on its own private property in railroad operation. This was a contingency which obviously the legislative mind did not anticipate.

If these statutes are taken literally and construed to mean exactly what they say, namely, that they impose privilege taxes for the doing of a gasoline business, then appellant railway may not consistently with the due process and commerce clauses of the Federal Constitution be taxed thereunder, as it is not engaged in the gasoline business and can, under its charter and the laws of Tennessee, engage in no business except that of operating a railroad.

The operation of a railroad involves the doing of many different things, all tending to the same end, namely, the transportation of persons and property. A State can not, under the due process and commerce clauses, reduce "railroading" to its basic elements and claim that, because a railroad uses steel, water, lumber, gasoline and coal, it is engaged in the steel business, the water business, the lumber business, the gasoline business, and the coal business; and, having made this artificial separation by legislative fiat, it can not then impose a separate privilege tax—wholly distinct from the privilege of doing an intrastate railroad business—on the doing of each of these various things.

There is no sale in Tennessee of the gasoline here involved, and none of it is consumed on public property; but all of it is used on privately owned railroad property in railroad operation. While the railway does both an interstate and intrastate business, there is no practicable

way so to separate the gasoline thus used. It is consumed in the same way as coal in the fire box of a locomotive or water in its boiler. As there are no local sales, as the gasoline is not used in a local business, as it is not consumed on the public highways, to impose a tax on the use of this gasoline—the amount of the so-called tax increasing as interstate business increases—results, practically, in a direct burden on interstate commerce.

Forty per cent. of the gasoline stops only a few days at the Nashville shops in Tennessee for inspection—then moves out in interstate commerce for consumption in Alabama, Georgia, and Kentucky. This gasoline never comes to rest, in the technical sense, in Tennessee.

The charges imposed by these statutes are not general property taxes, nor taxes on local sales, nor on the doing of a local business. They are nothing more or less than compensation for the use of "special facilities" furnished at great expense by the State. It is not due process of law to force a citizen to pay compensation (as distinguished from a tax) for something it does not use.

To make a railroad (wholly separate from taxes proper) thus help construct and maintain highways for its competitors by motor vehicle—making those using and those not using the highways pay on exactly the same basis—is so palpably arbitrary as to lack due process of law, and so viciously discriminatory as to deny it the equal protection of the laws; and is a burden on interstate commerce.

Common carriers by railroad in Tennessee are subject to various taxes which together constitute one system. Common carriers by motor vehicle are subject to various taxes; and these jointly constitute another system. It is entirely proper for the State thus to classify; and it is not indispensable that the ultimate burden or "economic weight" on common carriers by railroad and common carriers by motor vehicle be exactly the same.

But it is indispensable that the tax burden on these two competing businesses be in their ultimate effect relatively the same. Yet, the system in Tennessee as applicable to railroads imposes a burden, everything considered, over four hundred per cent. greater than the system applicable to common carriers by motor vehicle. This is arbitrary action and indefensible discrimination under the Fourteenth Amendment.

Messrs. W. F. Barry, Jr., and *Edwin F. Hunt,* Assistant Attorneys General of Tennessee, with whom *Mr. R. H. Beeler,* Attorney General, was on the brief, for appellees.

The opinion of the Supreme Court of Tennessee recognized and treated the suit merely as one in which a declaratory judgment was sought and obtained. The only relief sought from the Supreme Court of the United States in this proceeding is a reversal of a declaratory judgment rendered by the state courts. The effect of a consideration by this Court of the present case upon its merits will be the rendition by it of a declaratory judgment.

This Court has declared that the federal judiciary has no power to render a declaratory judgment. It has denied that the federal district courts have the power to proceed under a state declaratory judgment statute. It has said that the fact that a case is not a moot one, the fact that a final judgment might be given, the fact that there are adverse parties in interest, and the fact that the plaintiff in error has a real and substantial interest in the question, do not constitute a case or controversy within the meaning of Art. III of the Constitution. All of these elements the Supreme Court of Tennessee has said are required before a suit brought under the state Declaratory Judgment Law will be entertained; but the presence of these elements does not prevent the suit from being simply a declaratory proceeding. Indeed, the Supreme Court of Tennessee, in sustaining the validity of the Declaratory Judgment Law, recognized that its state con-

stitution did not impose the same limitations upon the jurisdiction of its courts as was imposed by the Federal Constitution upon the federal judiciary. *Miller* v. *Miller,* 149 Tenn. 484.

It is true that the declaratory judgment of the state courts in this proceeding involved a federal question, but this is merely another manner of saying that the proceeding presents a case of which this Court would take jurisdiction "if it were the subject of judicial cognizance" by the federal courts. As this Court said in *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 673, even if the effect of this conclusion were to leave the plaintiff in error without any other remedy, "as to which we express no opinion, it can not furnish a reason for exceeding the constitutional powers of this Court."

For the foregoing reasons, it is respectfully insisted that the present proceeding is not a case or controversy within the meaning of Art. III of the Federal Constitution, and that this Court is without jurisdiction.

The statutes in question impose a privilege tax upon all persons storing gasoline in Tennessee and thereafter withdrawing it from storage whether for sale or other use. *Foster & Creighton Co.* v. *Graham,* 154 Tenn. 412, 420; *Quick Service Tire Co.* v. *Smith,* 156 Tenn. 96, 102.

The construction of a state statute by the highest court of the State is binding upon this court.

Under the constitution of Tennessee the Legislature has unlimited power to tax privileges, which power may be exercised in any manner, at its discretion.

A State has the power, unfettered by the commerce clause, to impose a privilege tax upon the sale or storage of gasoline which has reached its destination, has ceased to move in interstate commerce and has been transferred from the tank cars in which transported into a storage warehouse. Of course, the tax imposed is valid only if it does not discriminate against the gasoline as an article

coming from interstate commerce. *Woodruff* v. *Parham,* 8 Wall. 123; *Hinson* v. *Lott,* 8 Wall. 148; *Brown* v. *Houston,* 114 U. S. 622; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 522; *Sonneborn Bros.* v. *Keeling,* 262 U. S. 506; *Hart Refineries* v. *Harmon,* 278 U. S. 499.

The fact that, at the time of the storage of the gasoline and at the time of its withdrawal from storage, the owner intends that the gasoline, or a portion of it, shall be used in carrying on interstate commerce, does not affect the right of the State to tax the storage and withdrawal. *Coe* v. *Erroll,* 116 U. S. 517; *Heisler* v. *Thomas Collieries Co.,* 260 U. S. 245; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129; *Texas Co.* v. *Brown,* 258 U. S. 466; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Hope Gas Co.* v. *Hall,* 274 U. S. 284; *N. J. Bell Tel. Co.* v. *State Board,* 280 U. S. 338; *Eastern Air Transport* v. *Tax Comm'n,* 285 U. S. 147; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472.

The statutes in question impose a privilege tax upon the sale or storage of gasoline in Tennessee, and not a charge for the use of the state highways. Pub. Acts, Tenn., 1927, c. 54; *id.,* 1931, c. 45; *id.,* 2d Ex. Sess., 1931, c. 11; *Kane* v. *New Jersey,* 242 U. S. 160; *Clark* v. *Poor,* 274 U. S. 554; *Sprout* v. *South Bend,* 277 U. S. 169; *Interstate Transit Co.* v. *Lindsey,* 283 U. S. 183; *Foster & Creighton Co.* v. *Graham,* 154 Tenn. 412.

Common carriers by railroad and common carriers by motor vehicle constitute different classes of taxpayers, which the State is not required to tax in the same manner or equally. The fact that the tax burden imposed upon carriers by railroad may be greater than that imposed upon carriers by motor vehicle does not constitute a violation of the due process clause or the equal protection clause of the Fourteenth Amendment. *Dane* v. *Jackson,* 256 U. S. 289; *Kelly* v. *Pittsburgh,* 104 U. S. 78; *Green* v. *Frazier,* 253 U. S. 233; *Shaffer* v. *Carter,* 252 U. S. 37; *Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S.

132; *Michigan Central R. Co.* v. *Powers,* 201 U. S. 245; *Citizens Tel. Co.* v. *Fuller,* 229 U. S. 322; *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *St. Louis S. W. R. Co.* v. *Arkansas,* 235 U. S. 350; *Atchison, T. & S. F. Ry. Co.* v. *Matthews,* 174 U. S. 96; *Lake Superior Lines* v. *Lord,* 271 U. S. 575; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172.

By leave of Court, *Messrs. Edwin M. Borchard* and *Charles E. Clark,* professors in the Yale Law School, filed as *amici curiae,* an elaborate brief dealing with the nature and history of declaratory judgments, and sustaining the jurisdiction to review the judgment in this case.

Mr. Justice Stone delivered the opinion of the Court.

Appellant brought suit in the Chancery Court of Davidson County, Tennessee, under the Uniform Declaratory Judgments Act of that state,[1] c. 29, Tennessee Public Acts, 1923, to secure a judicial declaration that a state excise tax levied on the storage of gasoline, c. 58, Tennessee Public Acts, 1923, as amended by c. 67, Tennessee Public Acts, 1925, is, as applied to appellant, invalid under the commerce clause and the Fourteenth Amendment of the Federal Constitution. A decree for appellees was affirmed by the Supreme Court of the State, and the case comes here on appeal under § 237 (a) of the Judicial Code.

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[1] The procedure authorized by this statute has been extensively adopted both in this country and abroad. It is said that the Uniform Act is in force in 16 of the States and Porto Rico and that similar statutes have been enacted in 13 States, Hawaii and the Philippines. For a discussion of the history of this procedural device in France, Germany, Spain, Spanish America, Scotland, England and India, as well as in the United States, and the types of controversies in which it has been invoked, see Edwin M. Borchard, The Declaratory Judgment—A Needed Procedural Reform, 28 Yale L. J. 1, 105; Judicial Relief from Peril and Insecurity, 45 Harv. L. Rev. 793, 806; The Constitutionality of Declaratory Judgments, 31 Columbia L. Rev. 561.

After the jurisdictional statement required by Rule 12 was submitted, this Court, in ordering the cause set down for argument, invited the attention of counsel to the question " whether a case or controversy is presented in view of the nature of the proceedings in the state court." This preliminary question, which has been elaborately briefed and argued, must first be considered, for the judicial power with which this Court is invested by Art. 3, § 1 of the Constitution, extends by Art. 3, § 2, only to " cases " and " controversies "; if no " case " or " controversy " is presented for decision, we are without power to review the decree of the court below. *Muskrat* v. *United States,* 219 U. S. 346.

In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance. See *Fidelity National Bank* v. *Swope,* 274 U. S. 123; compare *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U. S. 494, 498. Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance, as " declaratory," but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts.

Section 1 of the Tennessee Declaratory Judgments Act confers jurisdiction on courts of record " to declare rights . . . whether or not further relief is or could be claimed " and provides that " no action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and such declaration shall have the force and effect of a final judgment or decree." By § 2 it is provided that " any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of

construction or validity arising under the . . . statute . . . and obtain a declaration of rights . . . thereunder."

Under § 6, the Court may refuse to render a declaratory judgment where, if rendered, it "would not terminate the uncertainty or controversy giving rise to the proceeding." Declaratory judgments may, in accordance with § 7, be reviewed as are other orders, judgments or decrees, and under § 8 "further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Section 11 requires that "when declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

This statute has often been considered by the highest court of Tennessee, which has consistently held that its provisions may only be invoked when the complainant asserts rights which are challenged by the defendant, and presents for decision an actual controversy to which he is a party, capable of final adjudication by the judgment or decree to be rendered. *Miller* v. *Miller,* 149 Tenn. 463; 261 S. W. 965; *Goetz* v. *Smith,* 152 Tenn. 451, 465; 278 S. W. 417; *Hodges* v. *Hamblen County,* 152 Tenn. 395; 277 S. W. 901; *Cummings* v. *Shipp,* 156 Tenn. 595; 3 S. W. (2d) 1062; *Tennessee Eastern Electric Co.* v. *Hannah,* 157 Tenn. 582, 587; 12 S. W. (2d) 372; *Perry* v. *Elizabethton,* 160 Tenn. 102, 106; 22 S. W. (2d) 359; *Nashville Trust Co.* v. *Dake,* 162 Tenn. 356, 359; 36 S. W. (2d) 905. It has also held that no judgment or decree will be rendered when all the parties who will be adversely affected by it are not before the Court. *Harrell* v. *American Home Mortgage Co.,* 161 Tenn. 646; 32 S. W. (2d) 1023; *Sadler* v. *Mitchell,* 162 Tenn. 363, 367; 36 S. W. (2d) 891.

Proceeding in accordance with this statute, appellant filed its bill of complaint in the state Chancery Court,

joining as defendants the appellees, the Attorney General and the state officials charged with the duty of collecting the gasoline privilege tax imposed by the Tennessee statute. The complaint alleged that appellant is engaged in purchasing gasoline outside the state, which it stores within the state pending its use within and without the state in the conduct of appellant's business as an interstate rail carrier; that appellees assert that the statute taxes the privilege of storing gasoline within the state and is applicable to appellant; that they have demanded payment of the tax in a specified amount and have determined to enforce their demand and that, under the circumstances alleged, the statute as applied to appellant is invalid under the commerce clause and the Fourteenth Amendment. The relief prayed was that the taxing act be declared unconstitutional as applied to appellant. The Chancery Court sustained the appellees' demurrer to the sufficiency in law of the allegations relied on to establish the unconstitutionality of the tax. Its final decree dismissing the bill on the merits has been affirmed by the highest court of the state.

That the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned. See *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378; compare *Terrace* v. *Thompson,* 263 U. S. 197; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365. The proceeding terminating in the decree below, unlike that in *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.,* 145 U. S. 300; *Muskrat* v. *United States,* 219 U. S. 346, was between adverse parties, seeking a determination of their legal rights upon the facts alleged in the bill and admitted by the demurrer. Unlike *Fairchild* v. *Hughes,* 258 U. S. 126; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158; *Massachusetts* v.

Mellon, 262 U. S. 447; *New Jersey* v. *Sargent,* 269 U. S. 328, valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree by the decision of the question of law; and unlike *Luther* v. *Borden,* 7 How. 1; *Field* v. *Clark,* 143 U. S. 649; *Pacific States Telephone & Telegraph Co.* v. *Oregon,* 223 U. S. 118; *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428; *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464, the question lends itself to judicial determination and is of the kind which this Court traditionally decides. The relief sought is a definitive adjudication of the disputed constitutional right of the appellant, in the circumstances alleged, to be free from the tax, see *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 724; and that adjudication is not, as in *Gordon* v. *United States,* 2 Wall. 561, and *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693, subject to revision by some other and more authoritative agency. Obviously the appellant, whose duty to pay the tax will be determined by the decision of this case, is not attempting to secure an abstract determination by the Court of the validity of a statute, compare *Muskrat* v. *United States, supra,* 361; *Texas* v. *Interstate Commerce Commission, supra,* 162; or a decision advising what the law would be on an uncertain or hypothetical state of facts, as was thought to be the case in *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, and *Willing* v. *Chicago Auditorium Assn.,* 277 U. S. 274; see also *Warehouse Co.* v. *Tobacco Growers Assn.,* 276 U. S. 71, 88; compare *Arizona* v. *California,* 283 U. S. 423, 463. Thus the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunc-

tion or alleging that irreparable injury will result from the collection of the tax.

While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. *Fidelity National Bank* v. *Swope, supra,* 1932. This Court has often exerted its judicial power to adjudicate boundaries between states, although it gave no injunction or other relief beyond the determination of the legal rights which were the subject of controversy between the parties, *Louisiana* v. *Mississippi,* 202 U. S. 1; *Arkansas* v. *Tennessee,* 246 U. S. 158; *Georgia* v. *South Carolina,* 257 U. S. 516; *Oklahoma* v. *Texas,* 272 U. S. 21; *Michigan* v. *Wisconsin,* 272 U. S. 398, and to review judgments of the Court of Claims, although no process issues against the Government. *United States* v. *Jones,* 119 U. S. 477; compare *District of Columbia* v. *Eslin,* 183 U. S. 62; *Ex parte Pocono Pines Hotels Co.,* 285 U. S. 526, reported below in 73 Ct. Cls. 447. As we said in *Fidelity National Bank* v. *Swope, supra,* 132, " Naturalization proceedings, *Tutun* v. *United States,* 270 U. S. 568; suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will; *Traphagen* v. *Levy,* 45 N. J. Eq. 448; 18 Atl. 222; bills of interpleader so far as the stakeholder is concerned, *Wakeman* v. *Kingsland,* 46 N. J. Eq. 113; 18 Atl. 680; bills to quiet title where the plaintiff rests his claim on adverse possession, *Sharon* v. *Tucker,* 144 U. S. 533; are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that damages are required to be paid or acts to be performed by the parties." See also *Old Colony Trust Co.* v. *Commissioner, supra,* 725; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423.

The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below. See *Old Colony Trust Co.* v. *Commissioner, supra,* 724. As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial. Such was the purport and effect of our decision in *Fidelity National Bank* v. *Swope, supra,* where it was held that a final judgment rendered by a state court in an adversary proceeding brought under a state statute to determine the validity of liens about to be imposed for benefits assessed under a city improvement ordinance, presented a case

within the appellate jurisdiction of this Court. Accordingly, we must consider the constitutional questions raised by the appeal.

Chapter 58, Tennessee Public Acts, 1923, as amended by Chapter 67, Tennessee Public Acts, 1925, is said, by its caption, to impose a privilege tax "on persons . . . and corporations engaged in or carrying on the business . . . of selling or storing or distributing gasoline . . ." within the state at the rate of 2¢ per gallon on the gasoline sold or stored, the tax "to be used solely in the construction and maintenance of a highway system in the state." But § 3 provides: "The tax imposed by this Act shall apply to persons, firms or corporations, dealers or distributors storing any of the products mentioned in this Act and distributing the same or allowing the same to be withdrawn from storage whether such withdrawal be for sale or other use. . . ." Storage of the gasoline and withdrawal of it from storage within the state for use or sale, are, as the state Supreme Court has held, the events which, by the very terms of the statute, call it into operation. *Foster & Creighton Co.* v. *Graham,* 154 Tenn. 412, 420; 285 S. W. 570; *Quick Service Tire Co.* v. *Smith,* 156 Tenn. 96, 102; 299 S. W. 807.

Appellant, an interstate rail carrier, purchases large quantities of gasoline outside the state of Tennessee and brings it into the state in tank cars, from which it is unloaded and placed in its own storage tanks. None of it is sold by appellant, but all is withdrawn and used by it as a source of motive power in interstate railway operation in Tennessee, Kentucky, Alabama and Georgia. Storage of the gasoline is a preliminary step to such use in interstate commerce. The tax is assailed both on the ground that it is imposed on the gasoline while still a subject of interstate commerce in the course of transportation from points of origin to points outside the state of Tennessee; and on the ground that it is in effect a tax upon

the use of the gasoline in appellant's business as an interstate carrier, and is thus an unconstitutional burden on interstate commerce.

The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. *General Oil Co.* v. *Crain,* 209 U. S. 211; *Bacon* v. *Illinois,* 227 U. S. 504; *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665, 669; *Hart Refineries* v. *Harmon,* 278 U. S. 499; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472. The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced. Neither the appellant, the shippers, nor the carrier, at the time of the shipment of the gasoline from points of origin, arranged a destination for any part of the oil other than the appellant's storage tanks in Tennessee. Although in the usual course of business a variable and undefined part of it, when segregated for that purpose, would again be transported across state boundaries, appellant was free to distribute the oil either within or without the state for use in its business or for any other purpose. As nothing in the transaction before the withdrawal from storage in Tennessee can be said to have given any ascertainable part of the gasoline a destination to points beyond the state, the case is distinguishable from *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95, and *Texas & New Orleans R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111. The oil in storage was not a subject of interstate commerce and so was a part of the common mass of goods within the state, subject to local taxation. *General Oil Co.* v. *Crain, supra; Susquehanna Coal Co.* v. *South Amboy, supra; Bacon* v. *Illinois, supra;* compare *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U. S. 257.

We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power, *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470; *Sprout* v. *South Bend,* 277 U. S. 163, 170, 171; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 297, and a tax levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce has been held to be so direct and immediate a burden on the commerce itself as to be invalid. *Helson* v. *Kentucky,* 279 U. S. 245.

But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock or other instruments of interstate commerce, which are subject to local property taxes. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Western Union Telegraph Co.* v. *Gottlieb,* 190 U. S. 412; *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 220; see *General American Tank Car Corp.* v. *Day,* 270 U. S. 367; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, compare *St. Louis-San Francisco Ry. Co.* v. *Middlekamp,* 256 U. S. 226, 231; *St. Louis, Southwestern Ry.* v. *Arkansas,* 235 U. S. 350; *Kansas City, F. S. & M. Ry. Co.* v. *Botkin,* 240 U. S. 227; *Kansas City, M. & B. R. Co.* v. *Stiles,* 242 U. S. 111; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519. The power to

tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. See *Bromley* v. *McCaughn,* 280 U. S. 124, 136–138. Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky, supra.* Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. See *Eastern Air Transport* v. *Tax Commission,* 285 U. S. 147.

Appellant objects that the tax violates the Fourteenth Amendment in that it is levied as a charge for the use of the highways which appellant does not use. But the levy is a tax, not a toll or charge for use of the highways, see *Carley & Hamilton* v. *Snook,* 281 U. S. 66, and the constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by taxation. *Carley & Hamilton* v. *Snook, supra; St. Louis & Southwestern Ry. Co.* v. *Nattin,* 277 U. S. 157, 159. The allegations of the bill showing that a heavier burden of taxation is imposed upon railroads than upon common carriers by motor bus, examined in the light of the applicable statutes of the State, fall short of alleging a discrimination forbidden by either the commerce clause or the Fourteenth Amendment.

Affirmed.

MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 322. Argued January 16, 17, 1933.—Decided February 6, 1933.

1. Reënactment of a provision of a revenue act *held* a legislative adoption of the construction that had been placed upon it in administration by the Treasury Department. P. 273.
2. Section 245 (8) of the Revenue Act of 1926, applicable to Life Insurance Companies (which make their returns only on the cash basis) permits deduction from gross income of "All interest paid or accrued within the taxable year" on a company's indebtedness, with a certain exception. *Held* that interest accrued on dividends held for policyholders, but unpaid, is not deductible. Pp. 271, 275.
3. The general rule against accounting for and reporting income partly on the accrual and partly on the cash basis should apply to insurance companies; being required to treat interest received on the cash basis, they ought not to have the privilege of treating on the other basis the interest that they owe. P. 273.

75 Ct. Cls. 117; 59 F. (2d) 116, affirmed.

CERTIORARI, 287 U. S. 591, to review a judgment rejecting a claim to recover money paid as income taxes.

Mr. Guy Patten, with whom *Mr. A. R. Serven* was on the brief, for petitioner.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher* and *Assistant Attorney General Rugg* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question in this case is whether the petitioner, a Massachusetts life insurance company operating on the mutual level premium plan, is entitled, under § 245 of

the Revenue Act of 1926,[1] to deduct from its gross income, as interest paid, the amount of interest credited to its policyholders during the taxable year, but not withdrawn by them.

Petitioner agrees to repay a portion of its receipts to policyholders in the form of dividends. The policies provide that these dividends, when declared, may at the option of the insured be withdrawn in cash, applied as premium payments, or allowed to remain on deposit with the company at interest. If the last alternative be chosen the dividends and interest accumulate; interest being added to the accumulated sum at the end of each policy year. The dividends and all accrued interest thereon may be withdrawn at any time on demand. Of the total which became due policyholders in 1926 as interest on sums so left with the company, $544,964.40, the portion not withdrawn, was credited in appropriate amounts to the individual accounts of the policyholders during that year. In its tax return the petitioner deducted as interest paid the amount so credited. Interest actually withdrawn during 1926 totaled $248,405.97, some of which was credited to the policyholders in that year, but the greater portion of which had accrued prior to 1926, and had been credited in the respective years of accrual. No deduction was taken for this sum. The Commissioner disallowed the claimed deduction, and allowed in lieu thereof the amount of interest actually withdrawn in 1926. The resulting additional tax was paid under protest, a claim for refund filed, and, the Commissioner having failed to act upon the claim, suit was brought in the Court of Claims to recover the amount. That court dismissed the petition[2] and we brought the case here by certiorari.

The earlier Revenue Acts made no distinction, in the method of computing the tax, between insurance com-

[1] 44 Stat. 9, 47.

[2] 75 Ct. Cls. 117; 59 F. (2d) 116.

panies and other corporations. The Act of 1921 and those subsequently adopted embodied special and separate provisions respecting such companies.[3] In the Act of 1926, with which we are here concerned, the applicable sections are 242 to 247, inclusive, the first four dealing with life companies. Section 244 defines gross income as the amount received during the taxable year from interest, dividends and rents. Section 245 defines net income as the gross income, less certain enumerated deductions. Paragraph (8) permits deduction of: "All interest paid or accrued within the taxable year on its indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities . . . the interest upon which is wholly exempt from taxation under this title."

The language of paragraph (8) with respect to interest paid or accrued on indebtedness is precisely the same as that employed with respect to deductions allowed to individuals by § 214 (a) (2)[4] and to corporations by § 234 (a) (2).[5] Section 200 (d)[6] enacts that " The terms 'paid or incurred' and 'paid or accrued' shall be construed according to the method of accounting upon the basis of which the net income is computed under § 212 or 232 . . ." The sections mentioned are those applicable to individuals and to corporations generally; neither deals with insurance companies, which, as above said, are treated exclusively in §§ 242 to 247, inclusive.

In the light of these provisions the petitioner insists that insurance companies are forbidden by the terms of the statute to keep their accounts and make their returns by the accrual method, but must report on the cash basis.

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[3] Rev. Act 1921, §§ 242–247, 42 Stat. 261; Rev. Act 1924, §§ 242–247, 43 Stat. 288; Rev. Act 1926, §§ 242–247, 44 Stat. 47; Rev. Act 1928, §§ 201–205, 45 Stat. 842; Rev. Act. 1932, §§ 201–205, 47 Stat. 223.

[4] 44 Stat. 26.

[5] *Ibid.*, 41.

[6] *Ibid.*, 10.

Hence it is claimed the words " paid or accrued," as applied to interest, cannot grant an option in the matter of returns, depending upon whether the insurance company keeps its accounts on a cash basis or on an accrual basis, as in the case of other taxpayers, since the company has no choice in this respect; that the word " accrued " cannot be read out of the statute or left without meaning or effect; and that the phrase is employed to describe and allow deduction of interest accrued on dividends left with the company.

The Government replies that prior to 1921 there was no statutory direction as to how insurance companies' returns should be made; a regulation required them to be upon the cash basis; when new sections were inserted in the Act of 1921 as to insurance companies the phraseology with respect to interest deductions of individuals and corporations generally was lifted bodily out of the sections applicable to individuals and corporations and inserted in these new sections; as the act does not permit insurance companies to account on the accrual basis, only interest paid is deductible, and the term " accrued " has no application. It further points to a regulation adopted immediately upon the passage of the Act of 1921 and carried forward in the regulations under the Acts of 1924 and 1926. This regulation is: [7]

" The deduction allowed by section 245 (a) (8) for interest on indebtedness is the same as that allowed corporations by section 234 (a) (2) (see Arts. 561, 121, and 122), but this deduction includes item 18 of the disbursement page of the annual statement of life companies to the extent that interest on dividends held on deposit and surrendered during the taxable year is included therein."

Item 18 of the disbursement page of the annual statement of insurance companies includes the amount of in-

[7] Treasury Regulations 62, Art. 685 (3). See Regulations 65, Art. 685(3); Regulations 69, Art. 685(3).

terest actually paid policyholders, whereas accrued interest credited and not withdrawn is shown in item 22 on page 5 of the standard form of report. Insurance companies have without exception complied with the regulation and taken a deduction only for interest paid. The right to deduct interest credited to policyholders but not withdrawn is now asserted for the first time.

The Congress in the Revenue Acts of 1928 and 1932 reënacted § 245 without alteration.[8] This action was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute (*National Lead Co.* v. *United States,* 252 U. S. 140, 146; *Poe* v. *Seaborn,* 282 U. S. 101, 116; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *Costanzo* v. *Tillinghast,* 287 U. S. 341) unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it. Compare *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 757–8. The petitioner insists that the statute needs no interpretation and its plain mandate should be enforced. But on examination the proper application of the section is not so clear as is claimed.

The regulations of the Treasury under all the Revenue Acts since 1916 have required taxpayers to report on the cash or accrual basis, depending on which method was pursued in their accounting.[9] Since the adoption of the Revenue Act of 1921 the requirement has been statutory. It is settled beyond cavil that taxpayers other than insurance companies may not accrue receipts and treat

[8] See note 3, *supra.*

[9] Regulations 33 (1918 ed.), Arts. 126, 180; Regulations 45, Arts. 23, 1533.

expenditures on a cash basis, or vice versa. Nor may they accrue a portion of income and deal with the remainder on a cash basis, nor take deductions partly on one and partly on the other basis. Congress we think did not intend to make an exception of insurance companies. If they are not allowed to account on an accrual basis for interest owed them there is no reason for permitting them to treat interest owed by them on any different basis. The very paragraph (8) on which petitioner relies as defining interest credited but not paid, by the use of the word "accrued," recognizes that insurance companies may have indebtedness of other sorts, such as that arising from borrowings to carry securities. Since the company is required to treat interest received on a cash basis, it ought not have the privilege of accruing interest owed. That privilege must be accorded, if petitioner is right. We think the result would be unreasonable and is not intended by the act.

We are referred to a regulation which provides: "Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession."[10] It is argued that the regulation requires the policyholder to report interest credited to him as received in the year of credit. The conclusion drawn is that if the credit is income to the insured it must constitute a "constructive payment" by the company. In this view the transaction is said to come within the term "paid" and we may disregard the word "accrued." This regulation has, however, not been applied in any case where income has been credited to another by a taxpayer employing the cash receipts and disbursements method of accounting; and specifically it has not been invoked to require policyholders to report as income the dividends or interest credited to them in cases such as this. No tax is de-

[10] Regulations 69, Art. 51.

manded of them until actual receipt of the money. The constructive payment theory is, we think, untenable.

We conclude Congress did not intend by the use of the word "accrued" in § 245 (a) (8) to permit the deduction of interest on policy dividends credited but not paid during the taxable year.

The judgment of the Court of Claims is

Affirmed.

ROCCO, EXECUTRIX, *v.* LEHIGH VALLEY RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 359. Argued January 18, 1933.—Decided February 6, 1933.

1. When because of washouts the presence of employees on the tracks may be anticipated, the railroad company should exercise reasonable care to have trains under control and to sound warnings and to keep lookout at places such as blind curves where the view is obstructed; and in such situations the rule that the employee on the track assumes the risk does not apply. *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218, distinguished. P. 277.
2. A track-inspector, riding a railway tricycle, set out on an inspection trip, as required by his duty, and was run down on a blind curve by a delayed train, which he must have known was somewhere on the line before him. In an action under the Federal Employers' Liability Act, *held* that his failure to obey a rule requiring him before leaving to ascertain from the railway office the whereabouts of trains, was not to be taken as the primary and efficient cause of the accident, precluding recovery, but was to be considered by the jury with the other evidence in determining the question of his negligence. *Davis* v. *Kennedy*, 266 U. S. 147; *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, distinguished. P. 279.
3. The Employers' Liability Act imposes liability on the carrier if the injury or death results "in whole or in part" from its negligence. In this case the questions of negligence and contributory negligence were for the jury. P. 278.

259 N. Y. 51; 181 N. E. 11, reversed.

CERTIORARI, 287 U. S. 589, to review the reversal of a judgment, 231 App. Div. 323, recovered by the executrix

of a deceased railway employee, in an action under the Federal Employers' Liability Act for death by negligence. The judgment under review was entered in the trial court pursuant to a remittitur.

Mr. Abraham W. Feinberg for petitioner.

Mr. Harold E. Simpson, with whom *Mr. Howard Cobb* was on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner's husband, while riding a track inspection tricycle, was killed in a head-on collision with an electrically operated passenger train on a single track branch of the respondent's railroad connecting Ithaca and Auburn, New York. The line, which skirted the eastern shore of Cayuga Lake, was subject to washouts in stormy weather. Primarily to protect four daily passenger trains, the decedent, Rocco, an experienced employee, was assigned to inspect a section extending from Ithaca to a point about 7½ miles north of that city. His schedule required him to leave Ithaca at 6:30 A. M., preceding the morning northbound train, and to return in advance of the southbound train, which arrived at Ithaca at noon; to go out again at 3:30 P. M., about an hour and a half before the afternoon train left Ithaca, and to return ahead of the train from Auburn, which was due at Ithaca at 8:30 P. M.

On December 8, 1927, there was a high west wind blowing across Lake Cayuga, which had driven the waters over the track at various points and been the cause of washouts and delays. The southbound train due at Ithaca at 12:23 P. M. was over three hours late. At 3:30 in the afternoon Rocco left to cover his inspection beat, and was struck by the train about a mile from Ithaca, on a blind

curve, where he could not see the approaching train nor the motorman see him.

A rule with which Rocco was familiar forbade track-walkers to occupy the main track without first ascertaining from the operator the whereabouts of approaching trains in both directions. Rocco's practice had been to comply with this rule. On one or more occasions when he failed to do so he had been reprimanded for the omission. He must have known on the day of the accident that heavy washouts had occurred and that the train which should have arrived at 12.23 was somewhere on the line. It reached Ludlowville, eight miles north of Ithaca, the last reporting station prior to reaching Ithaca, at 3.14 P. M. This fact Rocco could have ascertained if, in compliance with the rule, he had inquired of the operator.

Suit was brought in the Supreme Court of New York, under the Federal Employers' Liability Act, by Rocco's executrix, who averred that his death resulted from negligent failure to operate the train at proper speed, omission to warn him of its approach by whistle or bell, and breach of the duty to provide him with a safe place to work. The defenses were that decedent assumed the risk and that his negligence barred a recovery. Upon the trial a verdict of $12,096 was rendered, which the jury reduced forty per cent. on account of Rocco's contributory negligence. 135 Misc. 639; 239 N. Y. S. 157. The Appellate Division affirmed judgment for the petitioner (231 App. Div. 323; 248 N. Y. S. 15). The Court of Appeals ordered that the complaint be dismissed (259 N. Y. 51; 181 N. E. 11). The case is here on certiorari from the judgment of dismissal entered by the trial court pursuant to mandate.

The questions presented are whether under the circumstances the respondent owed the decedent any duty to warn him of the approach of the train, or to keep a lookout for him; and whether Rocco's disobedience of the rule

was in such sense the primary cause of his death as to render immaterial any neglect on the part of the motorman. The Court of Appeals decided both questions against the petitioner.

Respondent relies on the duty of a person employed on the tracks of a railroad to exercise vigilance for his own safety, and to keep out of the way of moving trains, and asserts that the chance of a collision was a risk assumed by an employee assigned to work on the roadbed. *Aerkfetz* v. *Humphreys,* 145 U. S. 418; *Chesapeake & Ohio Ry. Co.* v. *Nixon,* 271 U. S. 218. Those cases applied the principle to accidents on a stretch of track where the workman's view was unobscured. Here, according to the proof, the curve on which the collision occurred, and obstructions at the side of the roadway, prevented any but a very short view of the track ahead. We think these facts required that the jury should determine whether the motorman exercised reasonable care to have his train under control, to sound a warning before entering the curve, and to be on the lookout for workmen whose presence might be expected on the day in question, when the waters of the lake were washing over the tracks at this point and inspection and repair might be required. Under the authorities cited the decedent assumed the risks ordinarily incident to his employment as a track inspector, but in the circumstances shown we do not think they included a failure on the part of the motorman to keep a lookout and to give warning in places where the view of one who might be expected to be on the track or approaching in the opposite direction was shut off and the probability of accident was therefore much greater than where the track is straight and the view unobstructed. The issues of negligence of the motorman and contributory negligence of the decedent were for the jury.

The Court of Appeals held, as a matter of law, that Rocco's negligence was the primary cause of the accident, and therefore the petitioner could not maintain the action.

This ruling was made in reliance upon the authorities of which *Davis* v. *Kennedy,* 266 U. S. 147, *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, and *Southern Ry. Co.* v. *Youngblood,* 286 U. S. 313, are typical. These were cases where a member of a train crew was killed as a result of disregarding orders to wait at a given point until a train moving in the opposite direction had passed. In each of them the decedent's negligence was the proximate and efficient cause of the accident; in each it was sought to show that the fatality was in part due to alleged negligence of some other employee in omitting to give the decedent an order which would have reminded him of the orders previously given and by which he was bound. In none was there any negligence on the part of employees operating the train moving in the opposite direction with which the collision took place.

These decisions are not controlling in the present case. There is no suggestion that the rule upon which the respondent relies forbade Rocco to start on his inspection trip if he ascertained that the approaching train was within seven or eight miles of Ithaca. It was his duty to make his afternoon trip. The rule required no more than that before leaving he should acquaint himself with the whereabouts of trains on the branch and guide himself accordingly. If he had made inquiry, whether he should await the arrival of the train, or attempt to meet it at some point a short distance from that city, was a matter for his decision. If the rule had forbidden him to leave under circumstances such as inquiry by him would have disclosed, this case would be parallel with those cited. His disregard of the rule was none the less an element in the case. Whether he was guilty of negligence was to be determined in the light of all facts he knew, or ought in the exercise of reasonable care to have known. How he would have conducted himself, and what precautions he would have taken had he ascertained the exact whereabouts of the train, is a matter of speculation. The jury

adjudged him guilty of contributory negligence and moulded its verdict accordingly. But it was open to the jury, as above shown, to find that the motorman of the train was also guilty of negligence which contributed to the collision. Rocco's infraction of the rule was a concurrent cause, but may not in any proper sense be held the primary cause of the accident. His negligence did not preclude a finding by the jury that his death was in part due to the negligence of the respondent's servants. The Act imposes liability upon the carrier for injury or death resulting "in whole or in part" from the negligence of any of its officers, agents or employees (U. S. C. Tit. 45, § 51).

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

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the judgment should be affirmed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* GUGGENHEIM.

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

No. 283. Argued January 11, 1933.—Decided February 6, 1933.

1. Under the Revenue Act of 1924, §§ 319, 320, taxing transfers by gift, a transfer of title by deed of trust reserving power of revocation in the grantor was not taxable while that power existed but became so when it was surrendered. P. 283.
2. The provision was not aimed at every transfer of the legal title without consideration, but at transfers of title that have the quality of a gift; and a gift is not consummate until put beyond recall. P. 286.
3. Uncertainties in statutes should be so resolved as to avoid unnecessary hardships. P. 285.

4. In applying the rule that doubt in a taxing act shall be resolved in favor of the taxpayer, the court must consider the effect of a proposed liberal construction not only upon the taxpayer in the case before it, but also upon others, differently circumstanced, upon whom it would operate illiberally, and must endeavor to strike a balance of advantage. P. 286.
5. The statutory concept of a transfer by gift is illuminated by the other provisions taxing transfers by death, as to which the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title. P. 286.

58 F. (2d) 188, reversed.

CERTIORARI, 287 U. S. 587, to review the reversal of a decision of the Board of Tax Appeals, 24 B. T. A. 1181, affirming the assessment of a gift tax.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell* and *Messrs. Sewall Key, Hayner N. Larson,* and *Erwin N. Griswold* were on the brief, for petitioner.

Mr. Elihu Root, Jr., with whom *Messrs. George E. Cleary, Elihu Root,* and *J. Harry Covington* were on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question to be decided is whether deeds of trust made in 1917, with a reservation to the grantor of a power of revocation, became taxable as gifts under the Revenue Act of 1924 when in 1925 there was a change of the deeds by the cancellation of the power.

On June 28, 1917, the respondent, a resident of New York, executed in New Jersey two deeds of trust, one for the benefit of his son, and one for the benefit of his daughter. The trusts were to continue for ten years, during which period part of the income was to be paid to the

beneficiary and part accumulated. At the end of the ten year period the principal and the accumulated income were to go to the beneficiary, if living; if not living, then to his or her children; and if no children survived, then to the settlor in the case of the son's trust, and in the case of the daughter's trust to the trustees of the son's trust as an increment to the fund. The settlor reserved to himself broad powers of control in respect of the trust property and its investment and administration. In particular, there was an unrestricted power to modify, alter or revoke the trusts except as to income, received or accrued. The power of investment and administration was transferred by the settlor from himself to others in May, 1921. The power to modify, alter or revoke was eliminated from the deeds, and thereby canceled and surrendered, in July, 1925.

In the meanwhile Congress had passed the Revenue Act of 1924 which included among its provisions a tax upon gifts. "For the calendar year 1924 and each calendar year thereafter . . . a tax . . . is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly," the tax to be assessed in accordance with a schedule of percentages upon the value of the property. 43 Stat. 253, 313, c. 234, §§ 319, 320; 26 U. S. Code, §§ 1131, 1132.

At the date of the cancellation of the power of revocation, the value of the securities constituting the corpus of the two trusts was nearly $13,000,000. Upon this value the Commissioner assessed against the donor a tax of $2,465,681, which the Board of Tax Appeals confirmed with a slight modification due to a mistake in computation. The taxpayer appealed to the Court of Appeals for the second circuit, which reversed the decision of the Board and held the gift exempt. 58 F. (2d) 188. The case is here on certiorari.

On November 8, 1924, more than eight months before the cancellation of the power of revocation, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, adopted and promulgated the following regulation: "The creation of a trust, where the grantor retains the power to revest in himself title to the corpus of the trust, does not constitute a gift subject to tax, but the annual income of the trust which is paid over to the beneficiaries shall be treated as a taxable gift for the year in which so paid. Where the power retained by the grantor to revest in himself title to the corpus is not exercised, a taxable transfer will be treated as taking place in the year in which such power is terminated." Regulations 67, Article I.

The substance of this regulation has now been carried forward into the Revenue Act of 1932, which will give the rule for later transfers. Revenue Act of 1932, c. 209; 47 Stat. 169, 245; § 501 (c).[1]

We think the regulation, and the later statute continuing it, are declaratory of the law which Congress meant to establish in 1924.

"Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid." *Corliss* v. *Bowers,* 281 U. S. 376, 378. Cf. *Chase National Bank* v. *United States,* 278 U. S. 327; *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Tyler* v. *United States,*

[1] Sec. 501(c): "The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift."

281 U. S. 497, 503; *Burnet* v. *Harmel,* 287 U. S. 103; *Palmer* v. *Bender,* 287 U. S. 551. While the powers of revocation stood uncanceled in the deeds, the gifts, from the point of view of substance, were inchoate and imperfect. By concession there would have been no gift in any aspect if the donor had attempted to attain the same result by the mere delivery of the securities into the hands of the donees. A power of revocation accompanying delivery would have made the gift a nullity. *Basket* v. *Hassell,* 107 U. S. 602. By the execution of deeds and the creation of trusts, the settlor did indeed succeed in divesting himself of title and transferring it to others (*Stone* v. *Hackett,* 12 Gray [Mass.] 227; *Van Cott* v. *Prentice,* 104 N. Y. 45; 10 N. E. 257; *National Newark & Essex Banking Co.* v. *Rosahl,* 97 N. J. Eq. 74; 128 Atl. 586; *Jones* v. *Clifton,* 101 U. S. 225), but the substance of his dominion was the same as if these forms had been omitted. *Corliss* v. *Bowers, supra.* He was free at any moment, with reason or without, to revest title in himself, except as to any income then collected or accrued. As to the principal of the trusts and as to income to accrue thereafter, the gifts were formal and unreal. They acquired substance and reality for the first time in July, 1925, when the deeds became absolute through the cancellation of the power.

The argument for the respondent is that Congress in laying a tax upon transfers by gift made in 1924 or in any year thereafter had in mind the passing of title, not the extinguishment of dominion. In that view the transfer had been made in 1917 when the deeds of trust were executed. The argument for the Government is that what was done in 1917 was preliminary and tentative, and that not till 1925 was there a transfer in the sense that must have been present in the mind of Congress when laying a burden upon gifts. Petitioner and respondent are at one in the view that from the extinguishment of the power there came about a change of legal rights and a shifting

of economic benefits which Congress was at liberty, under the Constitution, to tax as a transfer effected at that time. *Chase National Bank* v. *United States, supra; Saltonstall* v. *Saltonstall, supra; Tyler* v. *United States, supra; Corliss* v. *Bowers, supra.* The question is not one of legislative power. It is one of legislative intention.

With the controversy thus narrowed, doubt is narrowed too. Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice, between the one date and the other. To arrive at a decision, we have therefore to put to ourselves the question, which choice is it the more likely that Congress would have made? Let us suppose a revocable transfer made on June 3, 1924, the day after the adoption of the Revenue Act of that year. Let us suppose a power of revocation still uncanceled, or extinguished years afterwards, say in 1931. Did Congress have in view the present payment of a tax upon the full value of the subject matter of this imperfect and inchoate gift? The statute provides that upon a transfer by gift the tax upon the value shall be paid by the donor (43 Stat. 316, c. 234, § 324), and shall constitute a lien upon the property transferred. 43 Stat. c. 234, §§ 324, 315. By the act now in force, the personal liability for payment extends to the donee. Act of June 6, 1932, c. 209, § 510; 47 Stat. 249; 26 U. S. Code, § 1136 (j). A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain. *Hawaii* v. *Mankichi,* 190 U. S. 197, 214; *Sorrells* v. *United States,* 287 U. S. 435. Hardship there plainly is in exacting the immediate payment of a tax upon the value of the principal when nothing has been

done to give assurance that any part of the principal will ever go to the donee. The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall.

The respondent invokes the rule that in the construction of a taxing act doubt is to be resolved in favor of the taxpayer. *United States* v. *Merriam,* 263 U. S. 179; *Gould* v. *Gould,* 245 U. S. 151. There are many facets to such a maxim. One must view them all, if one would apply it wisely. The construction that is liberal to one taxpayer may be illiberal to others. One must strike a balance of advantage. It happens that the taxpayer before us made his deeds in 1917, before a transfer by gift was subject to a tax. We shall alleviate his burden if we say that the gift was then complete. On the other hand, we shall be heightening the burdens of taxpayers who made deeds of gift after the Act of 1924. In making them, they had the assurance of a treasury regulation that the tax would not be laid, while the power of revocation was uncanceled, except upon the income paid from year to year. They had good reason to suppose that the tax upon the principal would not be due until the power was extinguished or until the principal was paid. If we disappoint their expectations, we shall be illiberal to them.

The tax upon gifts is closely related both in structure and in purpose to the tax upon those transfers that take effect at death. What is paid upon the one is in certain circumstances a credit to be applied in reduction of what will be due upon the other, 43 Stat. 315, § 322, 26 U. S. C., § 1134. The gift tax is Part II of Title III of the Revenue Act of 1924; the Estate Tax is Part I of the same title. The two statutes are plainly *in pari materia.* There has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of Part I.

Tyler v. *United States, supra; Chase National Bank* v. *United States, supra; Saltonstall* v. *Saltonstall, supra;* cf. *Bullen* v. *Wisconsin,* 240 U. S. 625. There is little likelihood that the lawmakers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of Part II. We do not ignore differences in precision of definition between the one part and the other. They cannot obscure identities more fundamental and important. The tax upon estates, as it stood in 1924, was the outcome of a long process of evolution; it had been refined and perfected by decisions and amendments almost without number. The tax on gifts was something new. Even so, the concept of a transfer, so painfully developed in respect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title. The word had gained a new color, the result, no doubt in part, of repeated changes of the statutes, but a new color none the less. Cf. *Towne* v. *Eisner,* 245 U. S. 418, 425; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Gooch* v. *Oregon Short Line R. Co.,* 258 U. S. 22, 24; *Hawks* v. *Hamill, ante,* 52, 57.

The respondent finds comfort in the provisions of § 302 (d) of the Act of 1924, governing taxes on estates.[2]

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[2] By section 302 (d), the gross estate of a decedent is to be taken as including the subject of any trust which he has created during life " where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

By section 302 (h), the foregoing subdivision (d), as well as many others, is declared to " apply to the transfers, trusts, estates, interests,

He asks why such a provision should have been placed in Part I and nothing equivalent inserted in Part II, if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. Section 302 (d) of the Act of 1924 is in part a reënactment of a section of the Revenue Acts of 1918 and 1921, though it has been changed in particulars. 40 Stat. 1097, c. 18, § 402 (c); 42 Stat. 227, c. 136, § 402 (c). Cf. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. It is an outcome of that process of development which has given us a rule for almost every imaginable contingency in the assessment of a tax under the provisions of Part I. No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of Part II. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer. Here as so often there is a choice between uncertainties. We must be content to choose the lesser. To lay the tax at once, while the deed is subject to the power, is to lay it on a gift that may never become consummate in any real or beneficial sense. To lay it later on is to unite benefit with burden. We think the voice of Congress has ordained that this be done.

Precedents are cited as opposed to our conclusion. We find none of them decisive.

United States v. *Field*, 255 U. S. 257, holds that under the Revenue Act of 1916 (39 Stat. 777, c. 463), the subject of a power created by another is not a part of the estate of the decedent to whom the power was committed. It does not hold that a revocable conveyance *inter vivos* is a perfected transfer by gift that will justify the immediate imposition of a tax upon the value. There was no such question in the case.

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rights, powers, and relinquishments of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this act."

Jones v. *Clifton,* 101 U. S. 225, holds that a power of revocation in a deed of conveyance from a husband to his wife does not avail without more to invalidate the transaction as one in fraud of creditors. A transfer within the meaning of a taxing act may or may not be one within the statute of Elizabeth.

We are referred to cases in the state courts, from Pennsylvania and New Jersey. *In re Dolan's Estate,* 279 Pa. St. 582; 124 Atl. 176; *In re Hall's Estate,* 99 N. J. Law 1; 125 Atl. 246. In neither did the court decide that a conveyance *inter vivos* was taxable as a present gift when the conveyance was subject to revocation at the pleasure of the grantor. No such statute was involved. In each the ruling was that upon the death of the grantor the subject of the conveyance was not taxable as part of his estate, and hence not taxable at all. The ruling might have been different if a choice had been necessary between taxing the conveyance, or its subject, while the power was outstanding, and taxing it later on. New channels of thought cut themselves under the drive of a dilemma.

A decision of the Court of Claims, *Means* v. *United States,* 69 Ct. Cls. 539; 39 F. (2d) 748, upholds the contention of the Government that within the meaning of the act of Congress the termination by a settlor of the power to revoke a trust is a transfer of the property and as such subject to taxation.

The argument for the respondent, if pressed to the limit of its logic would carry him even farther than he has claimed the right to go. If his position is sound that a power to revoke does not postpone for the purpose of taxation the consummation of the gift, then the income of these trusts is exempt from the tax as fully as the principal. What passed to the beneficiaries was the same in either case, an interest inchoate and contingent till rendered absolute and consummate through receipt or accrual before the act of revocation. Congress did not mean that

recurring instalments of the income, payable under a revocable conveyance which had been made by a settlor before the passage of this statute, should be exempt, when collected, from the burden of the tax.

The judgment is

Reversed.

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

MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER are of opinion that the termination of the donor's power of revocation was not a transfer by gift of any property within the meaning of the statute, and that the judgment of the Circuit Court of Appeals should be affirmed.

NEW YORK *v.* MACLAY ET AL., RECEIVERS, ET AL.

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

No. 374. Argued January 18, 19, 1933.—Decided February 6, 1933.

Under R. S. § 3466, debts due by an insolvent corporation to the United States have priority over claims of a State for franchise taxes due but not liquidated, although by the state law such taxes are a lien in the sense that, when liquidated, they take precedence, by relation, over other intervening claims. Pp. 289–294.

59 F. (2d) 979, affirmed.

CERTIORARI, 287 U. S. 590, to review the affirmance of an order granting priority to the United States in the payment of income taxes and of a claim for damages, over the claim of the State of New York for franchise and gross earnings taxes, in the liquidation through a receivership of the assets of an insolvent corporation.

Mr. Charles A. Schneider, with whom *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Robert P. Beyer* were on the brief, for petitioner.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Whitney North Seymour, Sewall Key, Hayner N. Larson,* and *Wm. H. Riley, Jr.,* were on the brief, for the United States, respondent.

No appearance for Maclay et al., Receivers, respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy is one between the United States and a state as to priority of payment out of the assets of an insolvent corporation.

Receivers of the corporation were appointed by a consent decree in January, 1927, and creditors were directed to file their claims. The decree had the effect of a general assignment. *Price* v. *United States,* 269 U. S. 492, 502. The United States filed with the receivers a claim for additional taxes in the sum of $33,663.97 due from the insolvent for the years 1917 and 1918, and also a claim for $516.46 expenses incurred in the replacement of a buoy run into by the insolvent's tug. The State of New York filed a claim for franchise taxes due for the years 1921 to 1925, but not assessed or liquidated till after the receivership. It filed another claim afterwards for taxes due for later years. The District Court held that under § 3466 of the Revised Statutes (31 U. S. Code, § 191), the debt owing to the United States had a preference over the debt owing to the state in the distribution of the fund. Upon appeal to the Circuit Court of Appeals for the second circuit, the decree was affirmed. 59 F. (2d) 979. The case is here on certiorari.

The decision of this court in *County of Spokane* v. *United States,* 279 U. S. 80, upheld the power of Congress to give priority to debts due to the People of the United States, though the debts thereby subordinated were due to the People of a State, or its political subdivisions. To

that decision we adhere. The hardship to the state, if there is any, "is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends." Marshall, C. J., in *United States* v. *Fisher,* 2 Cranch 358, 396. Cf. *Florida* v. *Mellon,* 273 U. S. 12, 17.

The tax held to have been subordinated in the Spokane County suit was not a perfected lien upon the property of the insolvent at the date of the receivership. 279 U. S. 80, 93, 94. The question was reserved whether a different conclusion would have been necessary if such a lien had been proved. 279 U. S. 95. Certiorari was granted in this case because of the claim of the petitioner that by the statutes of New York franchise taxes become liens in advance for the years in which they are due, though the amount is not fixed and must be liquidated thereafter.

Liens in a sense they unquestionably are, but, we think, not so perfected or specific as to change the rule of distribution. The receivers were appointed, as we have seen, in January, 1927; and the petitioner, if not preferred at the time of the appointment, did not win itself a preference by anything done thereafter. *United States* v. *Oklahoma,* 261 U. S. 253, 260. By the statutes of New York, "every such tax or fee [including the annual franchise tax to be paid by corporations] shall be a lien and binding upon the real and personal property of the corporation . . . liable to pay the same until the same is paid in full." N. Y. Tax Law, Consolidated Laws, c. 60, § 197. The lien thus created is effective for many purposes though its amount is undetermined. It is notice to mortgagees or purchasers, who are held to loan or purchase at their own risk if they take their mortgages or deeds before the tax has been assessed or paid. *Carey* v. *Keith, Inc.,* 250 N. Y. 216; 164 N. E. 912; *Engelhardt* v. *Alvino Realty Co., Inc.,* 248 N. Y. 374; 162 N. E. 287. In that respect it is similar to the lien of a transfer tax or

duty upon the estate of a decedent. *Midurban Realty Co.* v. *F. Dee & L. Realty Corp.*, 247 N. Y. 307; 160 N. E. 380; *Stock* v. *Mann*, 255 N. Y. 100, 104; 174 N. E. 76. It will even be superior, at all events after assessment (*N. Y. Terminal Co.* v. *Gaus*, 204 N. Y. 512, 514; 98 N. E. 11) to mortgages already made, and will thus prevail against a purchaser who buys at a foreclosure sale. *N. Y. Terminal Co.* v. *Gaus, supra.* Cf. *Marshall* v. *New York*, 254 U. S. 380, 384. All this is settled in New York by reiterated judgments.

The problem here is different. To hold that a lien has progressed to such a point as to be a warning to mortgagees and purchasers of a contingent liability, like a notice of *lis pendens*, is far from holding that while the liability is unliquidated and unknown the lien thus created is perfect and specific. By the terms of the hypothesis it is nothing of the kind. If the state were to stand upon the warning and omit to ascertain the debt, it would never be able to sell anything, for it would not know how much to sell. Against mortgagees and purchasers a lien perfected afterwards may take effect by relation as of the date of the inchoate lien through which mortgagees and purchasers became chargeable with notice. The doctrine of relation will not divest the United States of the preference that accrued when receivers were appointed.

In what has been written there has been an assumption in favor of the petitioner that the tax would have priority if its amount had been liquidated before rights and interests became static through insolvency proceedings. The assumption is hardly to be reconciled with a judgment of this court pronounced a century and more ago. *Thelusson* v. *Smith*, 2 Wheat. 396, 426. The ruling there was that the general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought

about a change of title or possession. Later cases have drawn a distinction between the liens of judgments and of mortgages. These last have been thought to have the effect of a conveyance, divesting the debtor of his title and leaving nothing but an equity to which a preference can attach. *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386; *Brent* v. *Bank of Washington,* 10 Pet. 596, 611, 612; *Savings Society* v. *Multnomah County,* 169 U. S. 421, 428. We do not now determine whether the holding in the mortgage cases is to be applied in jurisdictions where a mortgage upon real estate is a lien and nothing more (*Trimm* v. *Marsh,* 54 N. Y. 599), nor whether, if so applied, it imports a modification of the holding in the *Thelusson* case as to the lien of a judgment. Cf. *United States* v. *Canal Bank,* 3 Story 79, 81; *United States* v. *Duncan,* 4 McLean 607, 630. A mortgage, even though a lien, is one much more specific than a judgment or a tax, much closer to ownership. *Conard* v. *Atlantic Insurance Co., supra,* p. 443; *In re Boyd,* 4 Sawyer 262, 264. Into these refinements and their consequences, there is no need to enter now. Enough for present purposes that the statutory preference must prevail against the lien of a tax not presently enforcible, but serving merely as a *caveat* of a more perfect lien to come.

The judgment is

Affirmed.

NORWEGIAN NITROGEN PRODUCTS CO. v. UNITED STATES.

CERTIORARI TO THE COURT OF CUSTOMS & PATENT APPEALS.

No. 272. Argued January 10, 11, 1933.—Decided February 6, 1933.

The Tariff Act of 1922 empowers the President to change rates of duty in order to equalize differences in costs of production in this country and abroad, but provides—§ 315 (c)—that before he acts there shall have been an investigation of such differences by the

Tariff Commission, in the making of which the Commission shall give reasonable public notice of its hearings, and shall give "reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." The Commission is authorized "to adopt such reasonable procedure, rules and regulations as it may deem necessary." *Held:*

1. The right of hearing, in the case of a foreign producer which refused to reveal its cost of production although its domestic competitor offered to reveal its own costs if the disclosure were mutual, did not include the right to examine the statement of costs which the domestic producer furnished the Commission in confidence; or the right to inspect data gathered confidentially by the Commission, upon which it was obliged to base its estimate of the foreign costs; or the right to elicit such information by examination of the domestic producer's officers and the Commission's agents,—such confidential information being withheld in accordance with the practice of the Commission in like cases. Pp. 303 *et seq.*

2. Generally speaking, the kind of hearing assured by the statute to parties interested is one of the same order as has customarily, but optionally, been allowed by congressional committees, in the tariff-making process. Pp. 305, 319.

3. That the "hearing" assured does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination of all that they have learned, is demonstrated by the tariff-making practice of Congress; the history of the passing of this statute; the history of the Commission's predecessors, and of the Commission itself, and its practice under the statute with the implied approval of both the President and Congress; and also by the contrast between the generality of § 315 (c), and the explicit provision for cross-examination and for inspection of papers found in § 381, relating to matters of appraisal before the Board of General Appraisers. Pp. 303–319.

4. The word "hearing," applied to administrative proceedings, may have one meaning or another according to the context and subject matter. An administrative hearing that may result in an order impinging on legal rights, such as those affecting the rates and conduct of public service corporations, is very different from a hearing before the Tariff Commission, which merely reports and recommends. P. 317.

5. No one has a legal right to the maintenance of an existing tariff rate. P. 318.

6. An applicant for increase of duty is not required by the statute or by the Commission's rules to include a statement of his costs of production in his application. P. 320.

7. The Commission in conducting an investigation is free to act on its own motion; and the function of an application when filed is not that of a pleading in a lawsuit. P. 319.

8. The function of the Commission is that of an adviser of the President or Congress; not that of an arbiter between adverse litigants. P. 321.

9. If the Commission is under any duty to make disclosure of costs, the origin and measure of the duty are to be found in the implied duty to do whatever may be necessary to make the hearing fair. P. 321.

10. Refusal to make such disclosure, is an exercise of discretionary power and could not be impeached if not shown to be arbitrary. P. 321.

11. Such a refusal was not arbitrary when actuated by the Commission's settled policy of withholding the confidential information when its publication might work hardship or injustice or hamper the work of the Commission; in the case of an importer who insisted that all the confidential data be disclosed without defining or seeking anything less, and who was unwilling to use reasonable effort to make disclosure of the costs of his principal abroad. Pp. 321–323.

12. The Commission has power to interpret its own rules, by administrative practice. P. 325.

13. That part of its rules which excepts from examination by the parties before it such portions of its records as relate to "trade secrets and processes," has been interpreted by the Commission as keeping costs secret for the protection of producers, both foreign and domestic, unless disclosure is so cloaked that the identity of the producers will be effectively disguised. P. 324.

20 C.C.P.A. (Cust.) 27; T.D. 45,674, affirmed.

CERTIORARI, 287 U. S. 586, to review the affirmance of a judgment of the United States Customs Court sustaining certain duties over the protests of the importer. For earlier phases of the same dispute, see 274 U. S. 106.

Mr. Marion De Vries, with whom *Messrs. Jesse P. Crawford* and *H. Kennedy McCook* were on the brief, for petitioner.

Solicitor General Thacher, with whom *Assistant Attorney General Lawrence* and *Mr. Robert P. Reeder* were on the brief, for the United States.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

On May 6, 1924, the President of the United States determined and proclaimed that an increase in the rate of duty on sodium nitrite was necessary to equalize the differences in the cost of production in the United States and the principal competing country, Norway, and that to that end the duty should be increased from 3 cents per pound to 4½ cents per pound. The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions of the Tariff Act of 1922. Tariff Act of September 21, 1922, c. 356, § 315, 42 Stat. 858, 941–943. After the new rate of duty had thus gone into effect, there were new importations of sodium nitrite at the port of New York. The duty was assessed by the customs officers in accordance with the proclamation; and protests were filed by the petitioner, which is the exclusive agent within the United States of the leading exporter to this country of the commodity affected. The protests were made upon the ground that the Tariff Commission in investigating the costs of production in the United States and Norway had not given the petitioner the hearing prescribed by the statute, and that all that followed was of no validity. A judgment of the Customs Court overruling the protests (T. D. 44,824, 59 Treas. Dec. 921) was affirmed by the Court of Customs and Patent Appeals. 20 C. C. P. A. (Customs) 27; T. D. 45,674. A writ of certiorari brings the case here.

In October, 1922, the American Nitrogen Products Company submitted to the Tariff Commission a request for a report and recommendation to the President that the duty on sodium nitrite be increased fifty per cent. It

stated in this request that with every reasonable effort to economize it had been unable to compete with the foreign manufacturers and had been forced to close its plant. In response to this request, the Commission on March 27, 1923, ordered that an investigation be made, declared that a public hearing would be held on a date thereafter to be fixed, and gave public notice of its order. The Commission then proceeded to the business of investigation. From the chief producers of sodium nitrite in the United States (the American Nitrogen Products Company and another) the agents of the Commission received the fullest measure of disclosure as to the costs of production and other details of the business. The information as to costs was subject to a pledge of secrecy, the manufacturers taking the position, to which the Commission acceded, that costs were trade secrets, to be withheld from competitors. The chief foreign producers were two, the Norsk-Hydro, a Norwegian company, represented by the petitioner, and the Badische-Anilin of Germany. Both foreign producers refused to supply the investigators for the Commission with any statement of costs, or to permit access to their records. The Norwegian company wrote afterwards in a cablegram to the petitioner: "On principle we always refuse publish cost price, consequently did not furnish investigators any information enabling them calculate cost price." The Commission was hindered, but not baffled. Its investigators went to Norway and consulting other sources of information made an estimate of cost as best they could. By July 20, 1923, the preliminary investigation was over, and the Commission was ready for a public hearing. It gave public notice on that date that on September 10, 1923, all parties interested would be given an opportunity to appear before the Commission, to produce evidence and to be heard with regard to differences in the cost of sodium nitrite and any other facts and conditions affecting the inquiry.

At the time thus appointed, the petitioner appeared, represented by its counsel. It made a motion at the beginning that it receive a complete copy of the request or application for an increase of rates. The copy already furnished to it was not complete, in that the details of the costs of production at the applicant's factory had been left out. The president of the applicant protested that the information as to costs had been given under a promise to hold it confidential, and the chairman of the Commission thereupon assured him that the promise would be kept. The request of the importer was accordingly refused. The hearing then proceeded, the president of the American Nitrogen Products Company appearing as a witness. He gave general information as to the state of the industry, showing by his testimony that the foreign producers were selling their product in this country at a lower price than they were selling it in their home markets, and showing also that by reason of a difference in the manufacturing process in this country and abroad the foreign producers were able to manufacture sodium nitrite as a by-product, and thus to dispose of it far more cheaply than was possible here. A change of the domestic plant in adaptation to the foreign process would involve prohibitory expense. Counsel for the importer was allowed to cross-examine as to everything brought out at the public hearing. He was not allowed, however, to extract from the witness a statement of the costs of production, the witness again protesting that disclosure of these costs, though it had been made to the Commission in the preliminary investigation, ought not to be made in public for the use of a competitor. At the end of the examination, there was an adjournment of the hearing until September 26.

In the interval, there were other happenings that bear on the merits of the controversy. On September 15, 1923, the Commission made public a report or summary of its

information, still omitting, however, any statement as to the costs of production at the applicant's domestic plant. On September 11, it received a letter from the importer's counsel renewing his demand for a complete copy of the application and demanding at the same time that "every particle of evidence gathered by the Commission or its representatives" be submitted to his inspection, and that he be accorded the privilege of examining any and all witnesses, including the field agents of the Commission, with reference thereto. On September 24, the Commission wrote to counsel refusing his request for a disclosure of "every particle of evidence," but stating that the American Nitrogen Products Company had agreed to disclose its cost of production data if the opposition, the Norwegian Nitrogen Products Company, would furnish cost data for the Norwegian product. The importer did not accept this offer. It did not present any excuse for failing to accept it. It did not even state that it had made any effort to induce its principal abroad to supply it with the necessary data. It paid no attention to the suggestion that disclosure should be mutual, and stood upon its rights, whatever they might be.

On September 26, the hearing went on again. Counsel for the importers submitted copies of cablegrams exchanged between his client and its Norwegian principal. The cablegram from the client informed the principal of the estimate of costs of production in Norway contained in the summary prepared by the Commission. The answering cablegram stated that the estimate was far too low, but confirmed the report of the investigators that information had been refused on the ground that the costs were confidential. That part of the cablegram has been quoted already. The chairman, responding to a request for an adjournment of thirty days, made inquiry of counsel whether definite figures would be obtained from Nor-

way in return for the extension. To this counsel retorted that he was not offering any consideration, nor joining in any barter, but "relying strictly upon the statute." The outcome of the colloquy was an order for an adjournment until October 6. Before this adjournment was taken, counsel submitted five separate requests. Request number one was that his client "have reasonable opportunity to inspect and to be heard upon all evidence which has been offered in this case, not deemed by the Commission trade secrets, or not, in fact, trade secrets." Request number two was to inspect and to be fully heard upon "all the evidence in the possession of the Commission as to the cost of power in the United States in the production of nitrite." Number three was a like request with reference to the number of laborers employed by the American Nitrogen Products Company and the wages paid. Number four was a like request with reference to the capital invested in its plant. Number five was a request that the experts of the Commission be produced for cross-examination with reference to the information collected by them in the course of the inquiry, and that the importer be permitted to offer testimony and to be heard in opposition thereto.

At the adjourned hearing on October 6, the Commission announced its ruling with reference to these requests, notice of the ruling having been previously conveyed to counsel for the importer. The decision was in substance that data gathered by the Commission with the understanding that they were to be treated as confidential would be withheld; that the investigators working for the Commission would not be required to produce such data or to be cross-examined about them; but that as to all these subjects of inquiry the importer would be permitted to offer any evidence that it was able to present, and to be heard in oral and written argument with reference thereto.

Upon the announcement of this ruling, counsel for the importer stated that he would offer no testimony on behalf of his client but would thereafter file a brief.

On December 12, 1923, before the Commission had reported to the President, the petitioner applied to the Supreme Court of the District of Columbia for a writ of mandamus directing the Commission to disclose the information sought. The petition was dismissed, the court ruling that the action of the Commission had been in conformity with law. An appeal to the Court of Appeals followed, but while it was pending the Commission made a report to the President, and upon the basis of that report the President issued his proclamation for an increase of the duty. The Court of Appeals expressed an opinion, not called for by its judgment, that the information should have been given. It decided, however, that the petition had become moot by force of the action of the President, 6 F. (2d) 491, and so did this court. *U. S. ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission,* 274 U. S. 106. The stages through which the controversy has come to us again have already been described.

The Tariff Act of 1922 (c. 356, § 315; 42 Stat. 858, 941) gives authority to the President to increase or decrease the rates of duty specified in the act if he finds upon investigation that increase or decrease is necessary in order to equalize the differences in the cost of production in the United States and elsewhere. It provides, § 315 (c), that in ascertaining these differences, " the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3)

advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition." This provision is followed by others designed to give protection against hasty or ill-considered changes. There shall be no proclamation under the authority of the statute until an investigation to assist the President has been made by the United States Tariff Commission, which is "authorized to adopt such reasonable procedure, rules and regulations as it may deem necessary." Coupled with these general directions is a mandate more particular which is the petitioner's chief reliance. "The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." § 315 (c).

The decision of this case hinges upon our answer to the question whether the petitioner has been "heard" in accordance with the statute. Does the requirement of a hearing mean that every producer or importer affected by a tariff may explore at will the data collected by the Commission as to the capital, the wages, the cost of material and manufacture, in the business of any other person similarly affected, and may cross-examine investigators and competitors upon the data thus laid bare? If something less than this is exacted, is there still a minimum of disclosure without which the purpose of the hearing will be thwarted altogether, and was this minimum attained by what was done by the Commission here?

1. History, analogy and administrative practice point with sureness to the conclusion that letters of marque have not been issued to every producer or importer affected by a tariff to capture knowledge of the business of every rival so affected in all the intimate details uncovered to the investigating officers.

The appeal to history is a threefold one: to the history of the process of tariff-making by Congress and congres-

sional committees; to the history of this statute in its progress through the Houses; and to the history of this investigating commission and of others that came before.

The process of tariff-making by Congress and congressional committees is not different in essentials from that for legislation generally. If the bill has gone to a committee, the practice has been general to give the privilege of a hearing to business men and others affected by its provisions. The hearing is not one that may be demanded as of right. A change of the tariff laws like a change of any other statute is not subject to impeachment on the score of invalidity though notice to those affected has been omitted altogether. Luce, Legislative Procedure, p. 143, cf. *Buttfield* v. *Stranahan,* 192 U. S. 470. Even so, the privilege is now so fortified by practice that it may fairly be taken for granted. But the hearing when given is not similar to a trial as conducted in a court. The proponents of a bill and the contestants make their statements for and against, bringing forward such confirmatory documents, trade journals, letters, governmental reports, and what not, as they believe to be important. The kind of information thus supplied can be gathered from the proceedings of the committees that reported the tariff act in question, the Act of 1922, as well as from those leading up to the tariff acts of other years. In none of these congressional hearings has the practice ever prevailed of permitting the advocates of a measure to cross-examine the opponents, or the opponents the advocates, or of compelling the committee itself to submit to an inquisition as to data collected by its members through independent investigation. The committee determines for itself whether its sessions shall be public or private. "Investigations [in Congress] often proceed behind closed doors, for the manifest reason that otherwise some witnesses would not be frank, perhaps would not attend, putting themselves if

possible beyond the reach of the committee." Luce, Legislative Procedure, p. 144. It is all a matter of discretion. What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process. *Hampton & Co.* v. *United States,* 276 U. S. 394; *Buttfield* v. *Stranahan, supra; Field* v. *Clark,* 143 U. S. 649. The inference is, therefore, a strong one that the kind of hearing assured by the statute to those affected by the change is a hearing of the same order as had been given by congressional committees when the legislative process was in the hands of Congress and no one else. To be sure there has been a change of sanction. What was once a mere practice has been converted into a legal privilege. But the limits of the privilege were not meant to be greatly different from those of the ancient practice that had shaped the course of legislation.

We have said that the inference is a strong one, yet, of course, it is far from conclusive and might even be inadequate if it were considered by itself. The history of the statute as it passed through the two Houses of the Congress supplies confirmatory evidence. The bill in its early stages empowered the President to change tariff rates, but said nothing whatever as to the manner in which the preliminary investigation should be made. 62 Cong. Rec., pt. 7, p. 7108, pt. 11, pp. 11,155, 11,156, 11,193. A letter from President Harding to the chairman of the Finance Committee of the Senate recommended that Congress name the Tariff Commission as the source of information and recommendation upon which the President might proclaim a change. 62 Cong. Rec., pt. 11, p. 11,211. Several amendments embodying this recommendation were proposed in each chamber of the Congress. Nowhere in the long debates that followed is there a suggestion by any one that witnesses or others appearing in the

inquiry should be heard in any other way than according to the customary procedure for investigating bodies. The first amendment named the Tariff Commission as the investigator, but gave no directions as to the mode of action. 62 Cong. Rec., pt. 11, pp. 11,229, 11,232. A second provided that the Commission "shall give such opportunity as it deems proper for the presentation of material facts in each case and arguments thereon." 62 Cong. Rec., pt. 11, p. 11,229. These provisions aroused the fear that at times there might be no hearing, or hearings at which only one side would be permitted to appear. 62 Cong. Rec., pt. 11, p. 11,231. A third amendment, proposed in the Senate, recast the statute by providing that "the Commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard," which is in the statute as enacted, and by providing also "said hearings shall be public" and the President shall publish with his findings "the hearings and testimony." 62 Cong. Rec., pt. 11, pp. 11,231, 11,232. These last provisions were omitted in conference, and the section was thus amended to read as it stands today. 62 Cong. Rec., pt. 12, p. 12,627. The omission may have been unwise, but it certainly was not inadvertent. The managers on the part of the House reported (62 Cong. Rec., pt. 12, p. 12,660): "The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings and testimony in all proceedings public as soon as practicable after the issuance of a proclamation." The change was criticized in the Senate (62 Cong. Rec., pt. 12, p. 12,888) but in the face of the criticism it was written into the law.

If Congress was unwilling to prescribe a requirement that the "hearings shall be public," or that the President shall publish the testimony when announcing his decision,

it is hard to believe that it intended every member of the public affected by an increase or decrease of the duty to inspect and copy all the records and data collected by the Commission, and to cross-examine the investigators as well as the producers or importers appearing at the hearing. If a privilege so far-reaching was to be accorded as a matter of right, there would be a publicity far greater than any that would result from throwing the doors of the hearings open to all who wished to enter. By the Revenue Act of 1916 (c. 463, § 706, 39 Stat. 756, 797), the Commission and its agents are given access to any document pertinent to the subject matter under investigation in the possession of any one engaged in the production, importation or distribution of the commodity affected, with power to inspect and copy, to summon witnesses and to administer oaths. If the hearings are to have the scope for which the petitioner contends, all this information is subject to the call of every business rival, unless it comes within the description of "trade secrets or processes." Revenue Act of 1916, § 708. It happens in this case that the number of competitors is small. Cases may arise in which it will mount into the hundreds. Any one of these competitors will be free, in the view of the petitioner, to pry without hindrance into the business of the others, for everything collected by the Commission will have the quality of a public record. Not only will there be a privilege to inspect whatever is of record, but the process, it is said, may be carried even farther, by examination and cross-examination as to whatever is thus discovered. The statute does not say that the parties affected by the duty may be present during the preliminary investigation by the agents of the Commission. They are to be present at a hearing, which may be public or private as the Commission shall determine. The statute does not say that they are to have an opportunity to produce evidence and to be heard to whatever extent they may desire. It says

that they are to have a reasonable opportunity, and this subject to the power of the Commission to adopt such reasonable procedure, rules and regulations as it may deem necessary. Nothing in the statute suggests a belief of the lawmakers that every producer or importer is to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series. "There must be a limit to individual argument in such matters if government is to go on." Holmes, J., in *Bi-Metallic Co.* v. *Colorado,* 239 U. S. 441, 445.

Our discussion of the significance of history as an aid to the construction of the statute will be inadequate if it is confined to the history of hearings by congressional committees and to the amendments of the bill in its progress through the Houses. There is need to consider also the history of this Commission before the Act of 1922, and that of earlier commissions organized for kindred purposes.

The powers of the President under the flexible tariff provisions of the Act of 1922 differ in degree rather than in kind from powers that have long been his. By an act of March 3, 1815 (3 Stat. 224), the President was empowered to give effect to a repeal of duties upon imports whenever he was "satisfied that the discriminating or countervailing duties" of the foreign nation affected, "so far as they operate to the disadvantage of the United States" had been abolished. See *Field* v. *Clark,* 143 U. S. 649, 685. Powers very similar were conferred in later years. See, e. g., Act of March 3, 1817, c. 39, 3 Stat. 361; Act of January 7, 1824, c. 4, 4 Stat. 3; Act of May 31, 1830, c. 219, 4 Stat. 425; Act of June 26, 1884, c. 121, 23 Stat. 57; *Field* v. *Clark, supra,* pp. 686, 689.[1] The Tar-

[1] For other instances see Comer, Legislative Functions of National Administrative Authorities, pp. 64, *et seq.*

iff Act of 1890 went farther than those before it. Whenever the President became satisfied that the government of any country producing and exporting certain enumerated articles had imposed duties upon the agricultural or other products of the United States which he found to be reciprocally unequal and unreasonable, he was to have power to suspend the provisions of the tariff law whereby importation of the enumerated articles had previously been free. 26 Stat. 567, 612, c. 1244. Broader still was the delegation of power under the Tariff Act of 1909, which set up a system of maximum and minimum rates with permission to the President to adopt the one set or the other. 36 Stat. 11, 82, c. 6. Under none of these statutes was executive action conditioned upon an inquiry and report by any officer or department. In the fulfilment of his duties, the President consulted whatever sources of information appeared to be appropriate, and when satisfied as to the facts, made proclamation of his action.

The first statute for the appointment of a commission to deal with the problem of the tariff was enacted in 1882. 22 Stat. 64, c. 145. See F. W. Taussig, Tariff History of the United States, 8th edition, p. 231. The Commission, which was to be an investigating body merely, was established as an aid to Congress rather than the President. It was to report at the next session of Congress what changes it thought desirable. After the expiration of its life neither President nor Congress received official aid that was more than desultory or occasional till a body styled the Tariff Board was organized by President Taft in 1909. Taussig, *supra,* pp. 405, 481. This board was established under a provision of the Tariff Act of that year, which by § 2 gave the President a choice between two sets of duties, a maximum and a minimum. "To secure information to assist the President in the discharge of the duties imposed upon him by this section, and the

officers of the government in the administration of the customs laws, the President is hereby authorized to employ such persons as may be required." 36 Stat. 83, c. 6. The function of the new board was to investigate and advise. See Taussig, *supra,* p. 424.

The Tariff Board went down at the end of 1912 through the failure of the Congress to provide the ways and means. Taussig, *supra,* 424, n. 1. No similar body was created till the organization of the present Tariff Commission in 1916. Act of September 8, 1916, c. 463, §§ 700, 702, 703, 706, 707; 39 Stat. 756, 795, 796, 797; 19 U. S. Code, §§ 91, 96, 97, 100, 101. Cf. Taussig, *supra,* p. 481. The function of the Commission as first organized was to investigate the administration and fiscal and industrial effects of the customs laws of this country and other kindred problems, to put at the disposal of the President, the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate, whenever requested, all information, at its command, and to make such investigations and reports as might be requested by the President or by either of the committees or by either branch of Congress. In aid of these purposes and duties, it was empowered to subpoena witnesses and conduct hearings. The result of an investigation might be a recommendation to Congress that would lead to the increase or decrease of existing duties. There is nothing to show that in conducting these investigations it permitted any interested person to inspect its collected data, or to cross-examine others. On the other hand, it does affirmatively appear, set forth at large in its reports to Congress, that it withheld even from that body disclosure of the costs of production of individual producers, confining its reports to averages and symbols that gave no token of identity. Census of Dyes and Coal Tar Chem-

icals for 1917, p. 11; Ninth Annual Report, U. S. Tariff Commission, p. 17; Sixteenth Annual Report, p. 19.[2] From the beginning there has been an administrative policy to treat the costs or investments of identified producers as akin to a trade secret, with the result that disclosure, even if not strictly within the prohibition of the statute (Revenue Act of 1916, § 708), was forbidden in the view of the Commission by persuasive considerations of fair dealing and expediency. Congress did not then protest and indeed never has protested, though Congress was the very body for whose benefit the investigation had been made and the reports transmitted. In providing, as it did, in 1922, that a reasonable opportunity for a hearing should be given to any one affected by a change, it had no thought, we may well believe, to prohibit reservations and confidences that would be allowed against itself.

The administrative practice before the Act of 1922 might be too desultory and brief to fix the meaning of the statute if it did not find support, and that unmistakable and ample, in administrative practice afterwards. Consistently through all its hearings the Commission has acted upon the principle that the cost of production will not be made known to competitors if the producers are so few that there can be no disclosure of the cost without disclosing the identity of those producing at that cost. A report by the Commission, submitted by the Government in connection with the briefs, explains the practice that has been followed and the reasons supporting it. At times the reports by the Commission have shown costs identified by number or by letter. This has been done

[2] In the investigations by the Tariff Board of 1909, the practice apparently was the same. H. C. Emery, The Tariff Board and Its Work, p. 14, Government Printing Office, 1910.

in those instances and those only where producers were so many that identity was cloaked. Even then, it was often necessary to combine the costs in one country, for example, in Eastern Venezuela, with those in other countries, or to combine items of one class, for example, advertising expenses, with items of another class, such as administrative expenses. At times the Commission has resorted to the expedient of showing costs in the form of averages. It has applied the same methods impartially to residents and to foreigners. In one of its reports the foreign costs of Danish and Dutch producers were published in combined form in order to avoid disclosure of the costs in Denmark, the principal competing country. Finally a third group of reports exists where the cost data are not given at all, either directly or indirectly. This has been the form where there were fewer than three companies, or where the number was very small and one predominated in the industry. The reports taken collectively show variations in degree as to the kind and fulness of the information imparted to the public, the variations depending in every instance upon the estimate by the Commission of the effect of the disclosure.[3] What is more significant than any variations in the reports is a strain of uniformity that runs through all alike. Not in one of them is there a disclosure of the individual data brought together by the Commission through the work of its investigators. Not in one is there the suggestion that the reasonable opportunity for a hearing conceded by the statute carries with it the opportunity to inspect "every particle of evidence" collected by the Commission, and to examine and cross-examine the men who have collected it.

[3] The Government has exhibited to the court the original reports as well as a summary of their contents.

Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years. In this instance the inference is strengthened when it is recalled that during some of those years the Commission was under fire. In 1926, there was a resolution by the Senate for the appointment of a committee to investigate the workings of the flexible tariff. S. Res. 162, 69th Congress. The inquiry was to have "particular reference to the regulations and procedure of the Tariff Commission, the powers exercised and the functions performed by said Commission, and to the institution, investigation, hearing, and decision of cases" arising under § 315 of the Act of 1922. United States Senate Hearings, Investigation of Tariff Commission, 1926, 1927. In the investigation that followed, the procedure and methods of the Commission were thoroughly explored. One of its members, Mr. Glassie, in his statement to the Committee, explained that it was impossible for the hearing to be "so conducted as to permit of the open disclosure of the individual evidence of costs." United States Senate Hearings, *supra,* p. 529. Indeed, without such explanation, the reservation of these and kindred confidences was made abundantly apparent by records and reports. At the close of the inquiry, the Committee reported to the Senate. Senate Report No. 1325, 70th Congress, First Session, May 28, 1928. A majority of the Committee advised that the flexible provisions of the tariff act be repealed for the reason chiefly that the President was already overburdened with executive duties, and that the Commission be reorganized as a congressional agency. There was no criticism of the practice whereby the costs of individual producers were treated as confidential. A minority report advised that the Commission be continued and with it the provision for a flexible tariff. Such it seems was also the judgment of Congress as a whole, for despite the majority report of the

Committee, the Commission exists today. Tariff Act of 1930, c. 497; 46 Stat. 590, 696, §§ 330–336.[4]

The administrative practice developed before the Act of 1922 has thus been continued and confirmed with the

[4] There is instruction in the experience of England and Australia.

The English Import Duties Act of 1932 imposed upon an "Import Duties Advisory Committee" as well as upon an existing Board of Trade duties of investigation and advice akin to the respondent's. 28 Chitty's Annual Statutes, pt. I, pp. 93, 94, 99, 100.

Confidential information is protected as follows (§ 10):

"(1) No information relating to any individual business, being information which has been obtained by the Committee or the Board of Trade by virtue of the provisions of this Act, shall, without the previous consent in writing of the owner for the time being of that business, be published or disclosed except to members of the Committee or to a Government Department requiring that information for the purposes of this Act, or to a person authorised by the Committee or by a Government Department and requiring that information for those purposes, or except for the purposes of a prosecution under this Act."

Australia also has a Tariff Board. At first, there was no requirement of public hearings. Tariff Board Act of 1921. The Board states in its report for the year 1923: "It will readily be understood when representatives of industries or manufacturers are called upon to give definite details of their costs and manufacture such information must be given confidentially." Third Annual Report of Australian Tariff Board, June, 1923, p. 23. A requirement of public hearings was imposed by an amendment of the statute. Tariff Board Act of 1924, § 3. It then became necessary that applicants for increases or decreases "present their cases publicly and on oath." Seventh Annual Report of Australian Tariff Board, June, 1928, p. 14. This does not mean, however, that there is no restraint upon publicity. The same statute provides that upon the objection of a witness, evidence which the Board is satisfied is of a confidential nature may be presented in private if the Board considers it desirable in the public interest to do so. Annals of the American Academy of Political and Social Science, vol. CXLI, January, 1929, Tariff Problems of the United States, pp. 83, 84. The Board evidently considers cost figures to be confidential. Third Annual Report, *supra*. They were so considered, it seems, in the debates in Parliament. 108 Parl. Debates, 3968, 4003 (1924).

tacit approval of the President and the acquiescence of the Congress. As late as January 28, 1933, after this cause had been submitted to the court, the signs of acquiescence and approval were strikingly renewed. On that day there was a resolution by the Senate directing a report by the Commission in respect of problems of the tariff. 76 Cong. Rec., pp. 2877, 2878. One of the subjects to be reported was the "range and variety of costs of production related to the quantities produced in each cost range in the United States and in competing foreign countries for each industry investigated by the Tariff Commission since 1920 (so far as can be given without disclosing the costs of individual concerns)." The history of the methods of this investigating body is thus carried down to date. True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore,* 95 U. S. 760, 763; *Logan* v. *Davis,* 233 U. S. 613, 627; *Brewster* v. *Gage,* 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375; *Interstate Commerce Commn.* v. *N. Y., N. H. & H. R. Co.,* 287 U. S. 178. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co.* v. *United States, supra.*

To the external aids that are drawn from history and analogy and administrative practice there is to be added another that may be said to be internal, the aid to be derived from the wording of related sections. In the same tariff act that makes provision in these general words for a hearing by the Commission as a step in the develop-

ment of the process of legislation, there is another section prescribing the remedy available to an importer after the legislative process has been completed, and the question is whether the merchandise has been properly appraised. Act of September 21, 1922, c. 356, § 501, 42 Stat. 966; 19 U. S. Code, § 381. The remedy in such circumstances is an appeal from the decision of the appraiser to the Board of General Appraisers. The Board shall assign the appeal to one of its members, who shall give reasonable notice of the time and place of the hearing, " at which the parties and their attorneys shall have an opportunity to introduce evidence and to hear and cross-examine the witnesses of the other party and to inspect all samples and all papers admitted or offered as evidence." This is the way that Congress spoke when it wished to attach to an administrative proceeding the incidents of a trial in court. There are times when the obscurity of one section as contrasted with the clearness of another may be ascribed to inattention. The need is not perceived of filling up the outlines because what is within them is assumed or carelessly overlooked. Not so in this case where Congress had its attention sharply directed to the fact that plain speech was needed if a hearing was to mean so much. Until it spoke thus plainly, the importer was denied the right to cross-examine and inspect, and this though the privilege of a hearing had been his for many years. It took an explicit statute to overcome the long established policy of the government whereby witnesses testifying to values were to be protected from publicity.[5] If the dis-

[5] " It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would be of value to the appraisers in determining market values are deterred from appearing or testifying by the publicity given to reappraisement proceedings." See the Treasury Instructions of June 9, 1885, set forth in full in *Auffmordt* v. *Hedden, infra.*

satisfied importer " is afforded such notice and hearing as enables him to give his views and make his contention in respect to the value of his goods, he cannot complain." *Origet* v. *Hedden,* 155 U. S. 228, 238; *Auffmordt* v. *Hedden,* 137 U. S. 310.[6] For years this opportunity for a statement was his only legal privilege, though the effect of the appraisal had a direct relation to his own interests and burdens as contrasted with the interests and burdens that concern the public generally,—though the controversy, in brief, was closer to the field of judicature than to that of legislation. *A fortiori* the privilege is no greater in such a controversy as this where legislation rather than judicature supplies the paramount analogy.

We are not unmindful of cases in which the word " hearing " as applied to administrative proceedings has been thought to have a broader meaning. All depends upon the context. There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far. The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideraton of the ends to be achieved in the particular conditions that were expected or foreseen. To know what they are, there must be recourse to all the aids available in the process of construction, to history and analogy and practice as well as to the dictionary. Much is made by the petitioner of the procedure of the Interstate Commerce Commission when regulating the conduct or the charges of interstate carriers, and that of the Public Service Commissions of the states when regulating the

[6] See Freund, Administrative Powers over Persons and Property, p. 162, and compare pp. 158, 160.

conduct or the charges of public service corporations. The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial. *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210, 226; *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 440. Cf. *People ex rel. C. P. R. Co.* v. *Willcox,* 194 N. Y. 383, 386; 87 N. E. 517. Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. *Smyth* v. *Ames,* 169 U. S. 466. They may be challenged for other reasons when they are without evidence supporting them and are merely arbitrary edicts. *Interstate Commerce Comm'n* v. *Union Pac. R. Co.,* 222 U. S. 541, 547; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481; *Northern Pac. Ry. Co.* v. *Dep't Public Works,* 268 U. S. 39, 44; *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Comm'n,* 274 U. S. 344, 351. Cf. Sharfman, The

Interstate Commerce Commission, vol. II, p. 424. The "hearing" that such commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject. *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93; *St. Louis-S. W. Ry. Co.* v. *Interstate Commerce Comm'n*, 264 U. S. 64; *Atchison, T. & S. F. R. Co.* v. *United States*, 284 U. S. 248. The Commerce Act, as it stands today, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a Commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision. No such inference is to be drawn from the act before us now.

The tokens of intention set down in this opinion have a force in combination that is denied to any one of them alone. They impel us to the holding that within the meaning of this act the "hearing" assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. There was no thought to revolutionize the practice of investigating bodies generally and of this one in particular. Hearings had once been optional. By the new statute they became mandatory. The form remained the same.

2. Our second question must now be answered: If something less is due than inspection without limit, is there a minimum of disclosure without which the purpose of a hearing will be thwarted altogether, and was this minimum attained by what was done by the Commission here?

The argument for the petitioner portrays the American producer in the position of a plaintiff tendering an issue to others which they are called upon to meet like defendants in a lawsuit. The picture is misleading, for in truth

there is no lawsuit nor anything akin to it. See the testimony of Mr. Glassie in the investigation by the Senate (U. S. Senate Hearings, p. 516). The Commission, in conducting an investigation, is free to act on its own motion. Indeed it often does so. If it is moved by some one else, the investigation is still its own, the request amounting to a mere suggestion which it is free, in its discretion, to accept or to reject. There is nothing in its rules whereby applicants are placed under a duty to state the figures of their costs, still less to divide the total into items. On the contrary, the rules provide that "an application is not required to be in any special form." It "must state the name, legal residence, business address, occupation and business connection of the applicant, and contain a short and simple statement of the relief sought and the grounds therefor." If it is deemed to be insufficient, "the Commission may permit the applicant to amend the same or to submit evidence orally or in writing." A statement by an applicant that it has been compelled to close its plant because it has been unable to hold its own against foreign competition by reason of disparity of costs in this country and abroad will present a hardship to be investigated if the Commission believes that investigation will be helpful. Certainly there is nothing in any provision of the statute whereby the opponents of an increase may insist that something more than this be shown before they may be called upon to come forward and oppose.

The difficulty is not fully met, however, when we hold that a statement of the costs is not required at the beginning to set the process of investigation going. The question remains whether a statement in some form, even though fragmentary and stripped of detail, may be necessary later on. The persons affected by the change of duty are entitled to a hearing, and this involves, so it is said, such a modicum of information, such a disclosure of the costs in the form of percentages of the market price or

otherwise, as to give notice of the ultimate facts to be contested and overcome. What is required in that view is not a bill of particulars, nor a disclosure of the evidence, but a definition of the issue which is to be the theme of the debate.

The argument thus stated ignores the historic function of the Commission as the adviser of the President or Congress in the business of legislation, and views it as an arbiter between adverse parties litigant. This is to subject its action to the test of an unreal analogy. If the Commission is under a duty to make disclosure of the costs at all, the origin of the duty and its measure are to be found, we think, in this, that since a hearing is required, there is a command by implication to do whatever may be necessary to make the hearing fair. A duty so indeterminate must vary in form and shape with all the changing circumstances whereby fairness is conditioned. The appeal is to the sense of justice of administrative officers, clothed by the statute with discretionary powers. Their resolve is not subject to impeachment for unwisdom without more. It must be shown to be arbitrary.

Arbitrary in this instance it certainly was not, and that for several reasons.

(a) The Commission did not withhold disclosure from the petitioner with any sinister purpose to make the hearing ineffective. It was moved by the belief that a way could not be found of stating the costs without identifying them with the business of a particular producer. In so acting it conformed to its own precedents and practice, and to those of such commissions generally. If it was under a duty to give a hearing similar to one in court, it was bound to expose everything, details as well as summaries. There was then no middle ground. If it was under a duty to give the kind of hearing that was fair in all the circumstances, it was free to shape its course within reasonable limits by its own conception of the promptings

of policy and fairness. It would have kept within the statute even though it had made the hearings private and had refrained from the publication of anything, either the records of its agents or the testimony of witnesses. 62 Cong. Rec., pt. 11, p. 11,232. Instead, it made the hearings public, and exposed everything to view except only when publication was likely in its judgment to result in hardship or injustice. Ninth Annual Report, United States Tariff Commission, p. 13; see the Rules of the Commission quoted *infra* in this opinion. There is indeed a possibility that the work of such a body would be seriously hampered if producers were not made to feel that information which in the thought of many is ranked as confidential would be withheld from prying eyes.[7] Particularly might that be so when inquiry would have to be made of manufacturers abroad, not subject to compulsion.[8] Business men may exaggerate the importance of secrecy in matters of this kind. Their sensitiveness is to be reckoned with, whether it be reasonable or not.

(b) The attack upon the ruling of the Commission as a denial of a fair hearing in a primary and basic sense is weakened even more when consideration is directed to what the petitioner then asked for.

There was no appropriate motion or objection that brought to the notice of the Commission a claim that apart from any details there was a certain minimum of information due to the petitioner which the Commission was withholding. There is no reason to believe that this minimum was then an object of desire, or that it would have been helpful if conceded. The only statement by the petitioner approaching such a notice was a request that it be furnished with a complete, and not a deleted, copy of

[7] See the Reports of the Australian Tariff Board, *supra*.

[8] See the minority report of the Investigating Committee of the Senate under the 1926 resolutions, Senate Report No. 1325, *supra*, at p. 7. See also Senate Hearings, p. 1086.

the application for relief. The record makes it plain, however, that included in the application were supporting facts and figures giving the costs in fullest detail. The petitioner did not suggest at any time that it would be satisfied with less. On the contrary, its request for a copy of the application was accompanied or quickly followed by a motion setting forth in five subdivisions the particulars exacted, and culminating in a demand that "every particle of evidence" collected by the Commission be held subject to inspection. That was its attitude, made manifest in many ways to the members of the board. That was again its attitude on the petition to the court for a writ of mandamus to hold the Commission to its duty. There would be no justice at this late day in invalidating the proceedings for the failure to supply the petitioner with some average or aggregate which it did not state that it cared for, which even now is not explained, and which, in all likelihood, if given, would have added little to its knowledge.[9] Business men as a rule are not wholly in the dark as to the ways of their competitors.

(c) For still another reason the ruling made by the Commission was not an arbitrary refusal to give the kind of hearing that in the circumstances of this particular inquiry was reasonable and fair.

The unwillingness of the petitioner to submit the costs of its Norwegian principal, or to make any effort to submit them, has closed its mouth to the complaint that the refusal to disclose the costs of its American competitor has nullified the report and the proclamation based upon it.

The Norwegian principal, as we have seen, declined to give any information to the agents of the Commission and left them to make up their estimate of the foreign

[9] As to other methods available of ascertaining the cost of production with approximate accuracy, see the testimony before the Senate Investigating Committee, p. 1086.

costs from indirect and imperfect sources. The petitioner, to be sure, was an agent, not a principal, yet it was the exclusive agent in the United States, and plainly in a relation that gave it influence, if not authority. Not once during the hearing did it offer to make an effort to obtain the foreign costs and submit them to the Commission under a pledge of confidence or otherwise. Its attitude was one of indifference so complete as to vary hardly at all, or so at least the Commission might reasonably infer, from one of purposeful obstruction.

This attitude of obstruction is not to be ignored in determining whether the information to be imparted to the petitioner was curtailed by the Commission in any arbitrary way. One who seeks equity must do it.

The question in that aspect becomes this: Does justice require that the costs of a domestic producer shall be made known to an importer who is unwilling to use reasonable effort to make disclosure of the costs of his principal abroad? A mind neither perverse nor arbitrary in its judgments might think the answer should be "no."

There is left a final question. The petitioner makes the point that the Commission by its own rules has spread its records open to the inspection of interested parties, and that there was a violation of those rules by denying an inspection here. The argument may not prevail. A rule of the Commission does indeed provide as follows: "Parties who have entered appearances shall, prior to the filing of briefs, have opportunity to examine the report of the Commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes." The evidence leaves no room for doubt that the exception stated in this rule has been construed by the Commission as keeping costs secret for the protection of producers, both foreign and domestic, unless disclosure is so cloaked that the identity of the producers will be effectively disguised.

Disguise has been found to be impossible when the producers are but two or three. The phrase "trade secrets and processes" is not a new one in the law. It occurs in statutes and judicial decisions as well as in the rule. The Commission was without competence by any decision it might make to fix the meaning of the phrase as used by Congress or the courts. It had power, however, to interpret its own rules and any phrase contained in them. *Evans* v. *Backer,* 101 N. Y. 289, 292; 4 N. E. 516; *Duncan's Heirs* v. *United States,* 7 Pet. 435, 451, 452. This it has done by an administrative practice too clear to be misread.

The judgment is *Affirmed.*

MR. JUSTICE MCREYNOLDS is of the opinion that the judgment should be reversed.

INDIAN TERRITORY ILLUMINATING OIL CO. *v.* BOARD OF EQUALIZATION OF TULSA COUNTY.*

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 356. Argued January 17, 18, 1933.—Decided February 13, 1933.

1. The owner of oil extracted by him from restricted Indian lands under leases approved by the Secretary of the Interior, is not immune from taxation of it under the general laws of the State for *ad valorem* taxation, when it has been removed from the restricted lands and stored in the owner's tanks and the Indians have no further interest in it. P. 326.
2. There is a recognized distinction between a non-discriminatory tax upon the property of an agent of government, albeit the property is used in, or has relation to, the business of the agency—where there is only a remote, if any, influence upon the exercise of the functions of government—and a tax which is deemed to impose a direct burden upon the exertion of governmental powers. P. 327.

159 Okla. 15, 13 P. (2d) 585; 159 Okla. 6, 14 P. (2d) 929, affirmed.

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* Together with No. 357, *Indian Territory Illuminating Oil Co.* v. *Board of County Commissioners of Payne County.*

CERTIORARI, 287 U. S. 594, to review judgments sustaining state taxes on stored oil which had been extracted under leases from restricted Indian allotments.

Mr. John H. Miley, with whom *Mr. Wm. P. McGinnis* was on the brief, for petitioner.

Mr. Hugh Webster, with whom *Mr. H. L. Anderson* was on the brief, for respondent in No. 356.

Mr. Ernest F. Jenkins, with whom *Mr. Guy L. Horton* was on the brief, for respondent in No. 357.

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

These cases present the question of the validity of *ad valorem* taxes upon crude oil belonging to petitioner, Indian Territory Illuminating Oil Company, and held by it in its storage tanks in Tulsa County and Payne County, Oklahoma. In each case, the tax was challenged upon the ground that the oil was exempt because in its production petitioner was operating as an instrumentality of the United States. The Supreme Court of Oklahoma sustained the taxes, 159 Okla. 15, 13 P. (2d) 585; 159 Okla. 6, 14 P. (2d) 929, and the cases come here on writs of certiorari.

The facts are shown by agreed statements. The oil in question was assessed under the general laws of the State for annual *ad valorem* taxes as a part of the personal property of petitioner within the respective counties. It constituted petitioner's share of oil which petitioner had produced from restricted Indian lands in Seminole County, Oklahoma, under leases which had been approved by the Secretary of the Interior pursuant to the Act of Congress of May 27, 1908, 35 Stat. 312. In the *Tulsa County* case (No. 356) the assessment was for the year

1929 and included 51,630 barrels of crude oil which had been produced from the restricted lands above mentioned during the period from March 31, 1927, to June 16, 1927. This oil on production had been commingled with oil from petitioner's " commercial " or unrestricted leasehold properties in Seminole County and had been immediately piped into petitioner's storage tanks in Tulsa County where it had remained. At the time of the removal of the oil, petitioner paid to the Superintendent of the Five Civilized Tribes for the lessors the agreed royalty of 12½ per cent. of the gross proceeds, and the Indians owned no part of the oil in storage on January 1, 1929, the date of assessment, nor will they receive any part of the proceeds when the oil is sold by petitioner. In the *Payne County* case (No. 357) the question concerns 383,307 barrels of crude oil produced from the restricted lands prior to January 1, 1928 (the assessment date) and piped, with other oil, into petitioner's storage tanks in Payne County and there held.

In *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, an *ad valorem* tax upon ores mined under a lease of restricted Indian land and in the bins on that land on the assessment date was held to be invalid. The tax "was assessed on the ores in mass; and the royalties or equitable interests of the Indians had not been paid or segregated." *Id.* p. 612. In these circumstances the tax was regarded as an attempt to tax an agency of the federal government. That decision is not controlling in the instant case. Here, payment had been made for the share of the Indian lessors and they had no further interest in the oil. It had been commingled with other oil, had been transported from the restricted lands to petitioner's storage tanks in the taxing counties, and was there held exclusively in the interest and for the convenience of petitioner.

There is a recognized distinction between a non-discriminatory tax upon the property of an agent of govern-

ment, albeit the property is used in, or has relation to, the business of the agency—where there is only a remote, if any, influence upon the exercise of the functions of government—and a tax which is deemed to impose a direct burden upon the exertion of governmental powers. *McCulloch* v. *Maryland,* 4 Wheat. 316, 436; *Thomson* v. *Pacific Railroad,* 9 Wall. 579, 590; *Railroad Co.* v. *Peniston,* 18 Wall. 5, 33, 36; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, 382; *Choctaw, O. & G. R. Co.* v. *Mackey,* 256 U. S. 531, 536; *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 226; *Susquehanna Power Co.* v. *Tax Commission (No. 1),* 283 U. S. 291, 294; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 130; *Broad River Power Co.* v. *Query, ante,* p. 178. In this instance, the tax is not on the oil leases (*Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 530), or upon the privilege of extracting the oil or upon the income derived therefrom. *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292, 298, 299; *Gillespie* v. *Oklahoma,* 257 U. S. 501, 506. See *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 399. Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operations as such, and being for the protection of the Government in its function extended no farther than was necessary for that purpose. The holding of the oil in question, which had been segregated and withdrawn from the restricted lands as petitioner's exclusive property, awaiting disposition at petitioner's pleasure, was for its sole advantage and cannot be said to be so identified with its operations as a governmental instrumentality as to entitle it to exemption from the general property taxes imposed by the State in return for the protection the State afforded. With respect to these taxes, this oil was in no different case from that of the other oil of petitioner with which it was commingled.

Judgments affirmed.

NEW YORK *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY.

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

No. 304. Argued January 13, 1933.—Decided February 13, 1933.

1. The provision of the Bankruptcy Act (§ 57) that claims shall not be proved after six months from adjudication, does not apply to the United States or the States, since they are not mentioned. P. 331.
2. The Federal Government possesses supreme power in respect of bankruptcies. If a State desires to participate in the assets of a bankrupt, she must submit to appropriate limitations on the time for presenting claims. P. 333.
3. The court of bankruptcy made an order that claims not filed within sixty days after service of the order should be barred. The State, after service, allowed the time to expire and then filed notice of a possible demand for taxes, stating that a definite claim would be presented when necessary reports, etc., could be obtained. *Held* that the District Court had power to expunge the notice. 58 F. (2d) 980, 981, affirmed.

CERTIORARI, 287 U. S. 587, to review a judgment affirming, with modification, an order expunging a notice of future claim, filed out of time by the State, in a bankruptcy proceeding.

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

Mr. S. John Block for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Experimenter Publishing Company was adjudged bankrupt March 6, 1929. The Irving Trust Company be-

came trustee. Upon its petition the referee, July 1, 1929, directed that "proof of any and all claims which the State of New York may have against the estate of the above named bankrupt," shall be filed within sixty days after service of this order; otherwise, they shall be forever barred. Proper service was had July 18, 1929.

October 20, 1929, the State filed notice of a possible demand for additional franchise taxes for 1917 to 1928 and stated that definite claim therefor would be presented when necessary reports, etc., could be obtained. No further proof has followed.

March 30, 1931, the trustee asked and obtained a referee order striking from his files the notice of October 20th. He held that the claim for taxes "cannot be filed after the expiration of the bar order date" and declared "The State has only itself to blame for the situation it finds itself in as the record indicates that facts were within its knowledge upon which it could have filed this claim prior to September 16, 1929." The District Court approved this action and the Circuit Court of Appeals affirmed its judgment, "but without prejudice to an application by the people of the State of New York presenting an actual claim which can be audited and showing lawful reasons why it should be paid, at which time the trustee may contest the right of payment." 58 F. (2d) 980, 981.

The only question properly presented by the application for certiorari is whether the District Court had power to grant the motion to expunge. Petitioners claim that such power is incompatible with state sovereignty as defined in *Marshall* v. *New York,* 254 U. S. 380.

Nothing adjudged below conflicts with anything said in *Marshall* v. *New York.* There we recognized the prior right of the State to be paid license taxes, unsecured by specific lien, from the assets of an insolvent estate. Here, no such question is presented.

The bar order against the State, as finally modified, may be revoked upon proper showing until termination of the cause—it remains within control of the court. See *United States* v. *Elliott,* 57 F. (2d) 843. And if the District Court has power to make any such order against a State, this one seems appropriate to the circumstances.

An ill-digested brief for the State beclouds its present position. But we consider only the point relied upon in the petition for certiorari, and that is without merit.

The Federal Constitution clothes the Congress with power to establish uniform laws on the subject of bankruptcies.

The extant Bankruptcy Act—§ 2—declares the United States District Courts shall be courts of bankruptcy and undertakes to give them jurisdiction to adjudge persons bankrupt; to allow or disallow claims; to take charge of the property of bankrupts; to cause their estates to be collected, reduced to money and distributed; to determine controversies in relation thereto; to close estates when fully administered; and make such general orders as may be necessary for enforcement of the Act. Section 64 requires payment of taxes due to the United States, state, county, district or municipality in advance of dividends to creditors. Section 57, (n), provides that claims shall not be proved after six months subsequent to adjudication. Act May 27, 1926, c. 406, § 13, 44 Stat. 666.

It is admitted here, that as the United States and the States are not mentioned in the limitation of § 57, they are not bound thereby. The consequent necessity for bar orders is apparent. Otherwise, estates could not be promptly closed. *Lewis* v. *United States,* 92 U. S. 618; *United States* v. *Thompson,* 98 U. S. 486, 490; *New Jersey* v. *Anderson,* 203 U. S. 483; *Guarantee Title Co.* v. *Title Guaranty Co.,* 224 U. S. 152; *United States* v. *Birmingham Trust & Savings Bank,* 258 Fed. 562; *Villere* v. *United States,* 18 F. (2d) 409; *Wechsler* v. *United States,* 27 F. (2d) 850.

In re Wood & Henderson, 210 U. S. 246, 254—"Congress has the right to establish a uniform system of bankruptcy throughout the United States and, having given jurisdiction to a particular District Court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights."

United States Fidelity & Guaranty Co. v. *Bray,* 225 U. S. 205, 217,—

"We think it is a necessary conclusion from these and other provisions of the Act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the Trustees and others who are employed to assist them. . . . A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way as are the courts of bankruptcy."

William Filene's Sons Co. v. *Weed,* 245 U. S. 597, 601, 602,—receivership in a court of equity which had possession of the corporate assets—

"When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation under a bill like the present and so make it impossible to collect debts except from the court's hands, . . . [then] In order to make a distribu-

tion possible, they must of necessity limit the time for the proof of claims."

Van Huffel v. *Harkelrode,* 284 U. S. 225, 228—

"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. . . . Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration."

The federal government possesses supreme power in respect of bankruptcies. *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 265. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

Affirmed.

PENNSYLVANIA RAILROAD CO. *v.* CHAMBERLAIN, ADMINISTRATRIX.

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

No. 379. Argued January 19, 1933.—Decided February 13, 1933.

1. A plaintiff in an action for wrongful death can not recover by proof of facts from which it may be inferred that the injury resulted from an event attributable to the defendant's negligence, if the same facts give equal support to an inference that it resulted from another and different event not so attributable. P. 339.
2. When the plaintiff has failed to sustain his burden of proof, because, as to the existence of a vital fact, two equally justifiable inferences may be drawn from the facts proven, one for and the other against him, the mere conclusion of a witness as to which

inference should be drawn can not resolve the doubt in his favor. P. 340.

3. Where the plaintiff's right of recovery depends upon the existence of a particular fact being inferred from proven facts, such inference is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses, consistent with the facts actually proved, showing affirmatively that the fact sought to be inferred did not exist. P. 340.
4. A brakeman who was riding a cut of cars moving on a distributing track of a large freight yard, in a switching operation, fell and was killed; and the case against the company depended on whether the accident resulted from a collision by a second cut from behind. Three employees who were on the second cut testified positively that there was no collision or contact between it and the first one; and in this they were corroborated by every other employee who was in a position to see. One witness alone, who was standing fifty feet from the track and nine hundred feet from the spot where the body was found, testified that he heard a crash—a thing not unusual in the yard, only "extra loud"—which was not sufficient to attract his attention and did not cause him to turn at once, but that shortly thereafter he did turn and saw the two strings of cars moving together, with the deceased, who had been visible before, no longer in sight. *Held* that the witness's further statement that the crash was caused by a collision of the two strings in question, was not testimony to a fact but merely an inference or conclusion of his own, and that the manifest impossibility of telling by sight, from the place where he was, whether the cars were moving in contact, made his testimony on that point incredible. P. 342.
5. In a personal injury case, verdict should be directed for the defendant if the evidence for the plaintiff is so insufficient that a verdict in his favor would be improper and must be set aside on motion for a new trial. P. 343.
6. The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned; the verdict can not rest on mere speculation and conjecture. P. 343.

59 F. (2d) 986, reversed.
District Court affirmed.

CERTIORARI, 287 U. S. 589, to review the reversal of a judgment on a verdict directed in favor of the rail-

road company in an action for wrongful death, under the Employers' Liability Act.

Mr. Morton L. Fearey, with whom *Messrs. Frederic D. McKenney* and *Roscoe H. Hupper* were on the brief, for petitioner.

Mr. Sol Gelb for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought by respondent against petitioner to recover for the death of a brakeman, alleged to have been caused by petitioner's negligence. The complaint alleges that the deceased, at the time of the accident resulting in his death, was assisting in the yard work of breaking up and making up trains and in the classifying and assorting of cars operating in interstate commerce; that in pursuance of such work, while riding a cut of cars, other cars ridden by fellow employees were negligently caused to be brought into violent contact with those upon which deceased was riding, with the result that he was thrown therefrom to the railroad track and run over by a car or cars, inflicting injuries from which he died.

At the conclusion of the evidence, the trial court directed the jury to find a verdict in favor of petitioner. Judgment upon a verdict so found was reversed by the court of appeals, Judge Swan dissenting. 59 F. (2d) 986.

That part of the yard in which the accident occurred contained a lead track and a large number of switching tracks branching therefrom. The lead track crossed a "hump," and the work of car distribution consisted of pushing a train of cars by means of a locomotive to the top of the "hump," and then allowing the cars, in separate strings, to descend by gravity, under the control of

hand brakes, to their respective destinations in the various branch tracks. Deceased had charge of a string of two gondola cars, which he was piloting to track 14. Immediately ahead of him was a string of seven cars, and behind him a string of nine cars, both also destined for track 14. Soon after the cars ridden by deceased had passed to track 14, his body was found on that track some distance beyond the switch. He had evidently fallen onto the track and been run over by a car or cars.

The case for respondent rests wholly upon the claim that the fall of deceased was caused by a violent collision of the string of nine cars with the string ridden by deceased. Three employees, riding the nine-car string, testified positively that no such collision occurred. They were corroborated by every other employee in a position to see, all testifying that there was no contact between the nine-car string and that of the deceased. The testimony of these witnesses, if believed, establishes beyond doubt that there was no collision between these two strings of cars, and that the nine-car string contributed in no way to the accident. The only witness who testified for the respondent was one Bainbridge; and it is upon his testimony alone that respondent's right to recover is sought to be upheld. His testimony is concisely stated, in its most favorable light for respondent, in the prevailing opinion below by Judge Learned Hand, as follows [p. 986]:

"The plaintiff's only witness to the event, one Bainbridge, then employed by the road, stood close to the yardmaster's office, near the 'hump.' He professed to have paid little attention to what went on, but he did see the deceased riding at the rear of his cars, whose speed when they passed him he took to be about eight or ten miles. Shortly thereafter a second string passed which was shunted into another track and this was followed by the nine, which, according to the plaintiff's theory, col-

lided with the deceased's. After the nine cars had passed at a somewhat greater speed than the deceased's, Bainbridge paid no more attention to either string for a while, but looked again when the deceased, who was still standing in his place, had passed the switch and onto the assorting track where he was bound. At that time his speed had been checked to about three miles, but the speed of the following nine cars had increased. They were just passing the switch, about four or five cars behind the deceased. Bainbridge looked away again and soon heard what he described as a 'loud crash,' not however an unusual event in a switching yard. Apparently this did not cause him at once to turn, but he did so shortly thereafter, and saw the two strings together, still moving, and the deceased no longer in sight. Later still his attention was attracted by shouts and he went to the spot and saw the deceased between the rails. Until he left to go to the accident, he had stood fifty feet to the north of the track where the accident happened, and about nine hundred feet from where the body was found."

The court, although regarding Bainbridge's testimony as not only "somewhat suspicious in itself, but it's contradiction . . . so manifold as to leave little doubt," held, nevertheless, that the question was one of fact depending upon the credibility of the witnesses, and that it was for the jury to determine, as between the one witness and the many, where the truth lay. The dissenting opinion of Judge Swan proceeds upon the theory that Bainbridge did not testify that in fact a collision had taken place, but inferred it because he heard a crash, and because thereafter the two strings of cars appeared to him to be moving together. It is correctly pointed out in that opinion, however, that the crash might have come from elsewhere in the busy yard and that Bainbridge was in no position to see whether the two strings of cars were actually together; that Bainbridge repeatedly said he was

paying no particular attention; and that his position was such, being 900 feet from the place where the body was found and less than 50 feet from the side of the track in question, that he necessarily saw the strings of cars at such an acute angle that it would be physically impossible even for an attentive observer to tell whether the forward end of the nine-car cut was actually in contact with the rear end of the two-car cut. The dissenting opinion further points out that all the witnesses who were in a position to see testified that there was no collision; that respondent's evidence was wholly circumstantial, and the inferences which might otherwise be drawn from it were shown to be utterly erroneous unless all of petitioner's witnesses were willful perjurers. "This is not a case," the opinion proceeds, "where direct testimony to an essential fact is contradicted by direct testimony of other witnesses, though even there it is conceded a directed verdict might be proper in some circumstances. Here, when all the testimony was in, the circumstantial evidence in support of negligence was thought by the trial judge to be so insubstantial and insufficient that it did not justify submission to the jury."

We thus summarize and quote from the prevailing and dissenting opinions, because they present the divergent views to be considered in reaching a correct determination of the question involved. It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side. But here there really is no conflict in the testimony as to the *facts*. The witnesses for petitioner flatly testified that there was no collision between the nine-car and the two-car strings. Bainbridge did not say there was such a collision. What he said was that he heard a "loud crash," which did not cause him at once to turn,

but that shortly thereafter he did turn and saw the two strings of cars moving together with the deceased no longer in sight; that there was nothing unusual about the crash of cars—it happened every day; that there was nothing about this crash to attract his attention except that it was extra loud; that he paid no attention to it; that it was not sufficient to attract his attention. The record shows that there was a continuous movement of cars over and down the "hump," which were distributed among a large number of branch tracks within the yard, and that any two strings of these cars moving upon the same track might have come together and caused the crash which Bainbridge heard. There is no direct evidence that *in fact* the crash was occasioned by a collision of the two strings in question; and it is perfectly clear that no such fact was brought to Bainbridge's attention as a perception of the physical sense of sight or of hearing. At most there was an inference to that effect drawn from observed facts which gave equal support to the opposite inference that the crash was occasioned by the coming together of other strings of cars entirely away from the scene of the accident, or of the two-car string ridden by deceased and the seven-car string immediately ahead of it.

We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. *United States F. & G. Co.* v. *Des Moines Nat. Bank,* 145 Fed. 273, 279–280, and cases cited; *Ewing* v. *Goode,* 78 Fed. 442, 444; *Louisville & N. R. Co.* v. *East Tennessee, V. & G. Ry. Co.,* 60 Fed. 993, 999; *Tucker Stevedoring Co.* v. *Gahagan,* 6 F. (2d) 407, 410; *Blid* v. *Chicago & N. W. R. Co.,* 89 Neb. 689, 691, *et*

seq.; 131 N. W. 1027; *White* v. *Lehigh Valley R. Co.,* 220 N. Y. 131, 135; 115 N. E. 439; *McGrath* v. *St. Louis Transit Co.,* 197 Mo. 97, 104; 94 S. W. 872; *Quisenberry* v. *Metropolitan Street Ry. Co.,* 142 Mo. App. 275, 281; 126 S. W. 182; *Glancy* v. *McKees Rocks Borough,* 243 Pa. 216, 219; 89 Atl. 972. Compare *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486, 489–490; *Stevens* v. *The White City,* 285 U. S. 195, 203–204; *Southern Ry. Co.* v. *Walters,* 284 U. S. 190, 194.

The rule is succinctly stated in *Smith* v. *First National Bank in Westfield,* 99 Mass. 605, 611–612, quoted in the *Des Moines National Bank* case, *supra:*

"There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong."

That Bainbridge concluded from what he himself observed that the crash was due to a collision between the two strings of cars in question is sufficiently indicated by his statements. But this, of course, proves nothing, since it is not allowable for a witness to resolve the doubt as to which of two equally justifiable inferences shall be adopted by drawing a conclusion, which, if accepted, will result in a purely gratuitous award in favor of the party who has failed to sustain the burden of proof cast upon him by the law.

And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred

from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples: *Wabash R. Co.* v. *De Tar,* 141 Fed. 932, 935; *Ragsdale* v. *Southern Ry. Co.,* 121 Fed. 924, 926; *Cunard S. S. Co.* v. *Kelley,* 126 Fed. 610, 617; *Frazier* v. *Georgia Railroad & Banking Co.,* 108 Ga. 807; 33 S. E. 996; *Bowsher* v. *Grand Rapids & I. Ry. Co.,* 174 Mich. 339, 344; 140 N. W. 524; *Rashall* v. *Railroad,* 249 Mo. 509, 522; 155 S. W. 426; *George* v. *Missouri Pac. R. Co.,* 213 Mo. App. 668, 674; 251 S. W. 729; *Stines* v. *Dillman* (Mo. App.) 4 S. W. (2d) 477, 478; *Akerson* v. *Great Northern Ry. Co.,* 158 Minn. 369, 374; 197 N. W. 842; *Butterfield* v. *Trittipo,* 67 Ind. 338, 343, 344; *Blid* v. *Chicago & N. W. R. Co., supra,* at pp. 691–693. A rebuttable inference of fact, as said by the court in the *Wabash Railroad* case, " must necessarily yield to credible evidence of the actual occurrence." And, as stated by the court in *George* v. *Missouri Pac. R. Co., supra,* " It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences." Compare *Fresh* v. *Gilson,* 16 Pet. 327, 330–331. In *Southern Ry. Co.* v. *Walters, supra,* the negligence charged was failure to stop a train and flag a crossing before proceeding over it. The court concluded that the only support for the charge was an inference sought to be drawn from certain facts proved. In rejecting the inference, this court said [p. 194]:

" 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 [employees] 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."

Not only is Bainbridge's testimony considered as a whole suspicious, insubstantial and insufficient, but his statement that when he turned shortly after hearing the crash the two strings were moving together is simply incredible, if he meant thereby to be understood as saying that he saw the two in contact; and if he meant by the words " moving together " simply that they were moving at the same time in the same direction but not in contact, the statement becomes immaterial. As we have already seen he was paying slight and only occasional attention to what was going on. The cars were eight or nine hundred feet from where he stood and moving almost directly away from him, his angle of vision being only 3° 33′ from a straight line. At that sharp angle and from that distance, near dusk of a misty evening (as the proof shows), the practical impossibility of the witness being able to see whether the front of the nine-car string was in contact with the back of the two-car string is apparent. And, certainly, in the light of these conditions, no verdict based upon a statement so unbelievable reasonably could be sustained as against the positive testimony to the contrary of unimpeached witnesses, all in a position to see,

as this witness was not, the precise relation of the cars to one another. The fact that these witnesses were employees of the petitioner, under the circumstances here disclosed, does not impair this conclusion. *Chesapeake & Ohio Ry.* v. *Martin,* 283 U. S. 209, 216–220.

We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, " there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Pleasants* v. *Fant,* 22 Wall. 116, 120–121. And where the evidence is " so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury." *Gunning* v. *Cooley,* 281 U. S. 90, 94; *Patton* v. *Texas & Pacific Ry. Co.,* 179 U. S. 658, 660. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but " gives scientific certainty to the law in its application to the facts and promotes the ends of justice." *Bowditch* v. *Boston,* 101 U. S. 16, 18; *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476, and cases cited; *Herbert* v. *Butler,* 97 U. S. 319, 320. The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned. *Improvement Co.* v. *Munson,* 14 Wall. 442, 448; *Commissioners* v. *Clark,* 94 U. S. 278, 284; *Small Co.* v. *Lamborn & Co.,* 267 U. S. 248, 254; *Gunning* v. *Cooley, supra; Ewing* v. *Goode, supra,* at pp. 443–444.

Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible. *Chicago, M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 478; *Gulf, M. & N. R. Co.* v. *Wells*, 275 U. S. 455, 459; *New York Central R. Co.* v. *Ambrose, supra; Stevens* v. *The White City, supra.*

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concur in the result.

APPALACHIAN COALS, INC., ET AL. v. UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

No. 504. Argued January 9, 10, 1933.—Decided March 13, 1933.

1. Competing producers of bituminous coal formed a corporation to act as their selling agent, with authority to set the prices. The industry was in grave distress, because of overexpansion, relatively diminishing consumption, organized buying, and injurious marketing practices within itself; and the members of the combination sought, through the agent, to escape those practices, promote the sale of their coal in fair competition, and sell as much of it as possible. Although they controlled a large proportion (73%) of the commercial production in the immediate region where they mined, the great bulk of their output was marketed in another and highly competitive region; and in view of the vast volume of other coal actually and potentially available, the conditions of production, and transportation facilities, there was no basis for concluding that competition anywhere could be injuriously affected by the operation of their plan. *Held* that there is no present reason for an injunction under the Sherman Act.

2. The purpose of the Sherman Act is to maintain the freedom of interstate commerce in the public interest; its restrictions are not mechanical or artificial but are to be construed by the essential standard of reasonableness. P. 359.
3. The Act does not seek to establish a delusive liberty of interstate commerce by making normal and fair expansion impossible; it does not prevent those engaged in that commerce from adopting reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. P. 360.
4. The mere fact that the parties to a combination eliminate competition among themselves is not enough to condemn it. The question is one of intent and effect, not to be determined by arbitrary assumptions, but by close and objective scrutiny of the particular conditions and purposes in each case. Pp. 360, 375.
5. Good intentions will not save a plan otherwise objectionable under the Sherman Act; but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. P. 372.
6. A coöperative enterprise is not to be condemned as an undue restraint because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather would foster, fair competitive opportunities. P. 373.
7. A coöperative plan of competing producers can not be held illegal merely because they do not integrate their properties in a single corporation but keep their plants independent. In either case the test is the same: Is there an unreasonable restraint of trade or an attempt to monopolize? P. 374.
8. A suit under the Sherman Act to enjoin a combination is governed by the principles of equitable relief; and to warrant an injunction there must be a definite factual showing of illegality. P. 377.
9. Where a trade agreement was attacked and sustained under the Sherman Act before it was put in operation, the case being decided upon the purposes of the participants and the probable consequences of their plan, the decree directed the District Court to dismiss the bill without prejudice, but to retain jurisdiction, to the end that, should results of the plan in actual operation prove contrary to the Act, the case might be reopened by that court for further proceedings by the Government and the voluminous testimony already taken remain available in that event. P. 378.

1 F. Supp. 339, reversed.

APPEAL from a decree of the District Court composed of three circuit judges granting an injunction against a combination of producers of bituminous coal, in a suit by the Government under the Sherman Antitrust Act.

Messrs. Wm. J. Donovan and *Edgar L. Greever,* with whom *Mr. Horace R. Lamb* was on the brief, for appellants.

An agreement among competitors for the purpose of promoting efficiency and economy, even though it restricts the competition formerly existing between the parties, is not prohibited by the Sherman Act, unless either (a) an intent unreasonably to restrain or to monopolize interstate commerce is implied in the acts or the circumstances, or (b), by reason of its inherent nature, the combination will have the direct and necessary effect of restraining or monopolizing interstate commerce. *Nash* v. *United States,* 229 U. S. 373, 376; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *United States* v. *U. S. Steel Corp.,* 251 U. S. 417.

The appellants contend that, like the combination upheld in the *Steel* case, Appalachian Coals, Inc., represents a combination for the purpose of achieving economies and promoting efficiency in the sale of bituminous coal. It may be pointed out that in the *Steel* case the Court found that any intent and purpose to restrain or monopolize commerce had been abandoned, and that the sole question to be determined by the Court was whether the size attained and the power acquired were sufficient to make the combination illegal. In this case there is no illegal purpose to be abandoned, but, on the contrary, the testimony affirmatively establishes a lawful purpose. It may be pointed out that Appalachian Coals, Inc., is not an attempt at the same kind of integration as the Court considered in the *Steel* case. It is obvious that integration is

not in itself a test of legality, but is merely evidence of a lawful purpose. Integration as it existed in the steel industry had no place in the production and sale of coal. Each of the purposes for which Appalachian Coals, Inc., was organized was directly related to the peculiar conditions existing in the bituminous coal industry and was calculated to promote efficiency and achieve economies in the coal industry just as integration was intended to achieve economies in the production of steel. Accordingly, the District Court found that Appalachian Coals, Inc., was intended to supplement orders for one grade of coal with orders for the other grades which were necessarily produced as an incident to the first grade. This distribution of orders is necessary to prevent the further breakdown of the industry resulting from the forced sale of coal of all grades for which there are no orders but which are necessarily produced in complying with contracts of sale for a particular grade. This is the type of integration best adapted to the coal industry. Such integration not only is desirable but it is essential if the price of coal is to be determined in a normal competitive market.

The District Court distinguished the *Steel* case on the ground that the combination was corporate in form and apparently from this fact alone it concluded that the Steel Corporation had resulted "from normal growth and development." The U. S. Steel Corporation was a holding company. While such a holding company may have been a normal and usual method of conducting business at that time, it may be doubted whether it is still a normal method in view of the provisions of § 7 of the Clayton Act. But there can be no doubt that exclusive common selling agencies are usual and normal methods of combining selling facilities in the coal industry, composed of thousands of small and independent producers of coal who can operate only if their product is distributed over a widely scattered market.

The District Court recognized the practical necessity of selling agents when it stated in its opinion that common exclusive selling agents "would not be condemned in the absence of an actual intent to eliminate competition and affect prices." In the case at bar there is affirmative evidence of a lawful purpose and this evidence is supported by the findings of the court below. The inference to be drawn from the court's statement that an actual intent to eliminate competition is present in this case, is directly contrary to all the evidence and to the findings of fact. Obviously, the *Steel* case could not have held that a combination large enough to "affect" prices was illegal, for every transaction in the market, whether large or small, "affects" prices; and the Steel Corporation controlled the production of approximately fifty per cent. of the entire steel industry.

The rule of law applied in the *Steel* case was not new. The controlling principle finds its roots in the English common law. *Mogul S. S. Co.* v. *McGregor,* (1892) A. C. 25.

It is not disputed that certain kinds of conduct not criminal in any one individual may become criminal if done by several. But that doctrine has no application to an agreement or a combination of capital for a lawful purpose, namely to achieve economies in trade, where, as here, the activities of the combination are reasonably confined to the accomplishment of that purpose.

If the distinction drawn by the District Court between open coöperation between small competitive units to accomplish economies in industry, and corporate consolidations or corporate holding companies, is to be sustained, the effect will be to retard the normal growth of the small, poorly financed business unit and to subsidize corporations of sufficient size and financial strength to effect corporate consolidations or mergers. The effect of the application of this principle was pointed out by Mr.

Justice Brandeis in his dissenting opinion in *American Column & Lumber Co.* v. *United States,* 257 U. S. 377, 418.

The following decisions indicate that combinations for the purpose of promoting trade by achieving economies and by the introduction of more effective sales methods, are not forbidden by the Sherman Act, even though they incidentally eliminate competition formerly existing between the parties. *Whitewell* v. *Continental Tobacco Co.,* 125 Fed. 454, 458; *Chicago Board of Trade* v. *United States,* 246 U. S. 231; *United States* v. *Terminal R. R. Assn.,* 224 U. S. 383, 404; *American Press Assn.* v. *United States,* 245 Fed. 91; *National Assn. of Window Glass Mfrs.* v. *United States,* 263 U. S. 403; *United States* v. *International Harvester Co.,* 274 U. S. 693; *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U. S. 291; *Robinson* v. *Suburban Brick Co.,* 127 Fed. 804; *Arkansas Brokerage Co.* v. *Dunn,* 173 Fed. 899; *Nordenfelt* v. *Nordenfelt Co.,* (1894) A. C. 535.

A. As to intent. The agency was formed pursuant to a controlling and lawful purpose; and the restraint upon interstate shipments, if any, is incidental to the accomplishment of that lawful end, and therefore not unreasonable within the meaning of the Sherman Act. See *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 282; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 177.

The primary purpose being to sell more coal and to develop an efficient, economical and effective marketing organization and to eliminate so far as possible the destructive trade practices growing out of the sale of "distress" coal and the "pyramiding" of orders, it is obvious that these purposes could only be achieved by joint action.

The evidence shows that a selling organization of the size and financial strength of Appalachian Coals, Inc., was essential if the widespread consuming markets were to be effectively reached by all the producers and if the destructive trade practices were to be materially lessened. More-

over, if the destructive practice of "pyramiding" coal was to be eliminated as far as the defendants were concerned, it was necessary that Appalachian Coals, Inc., be made an exclusive selling agent.

The further question is presented whether an illegal intent is to be implied from the fact that Appalachian Coals, Inc., will be a large competitive unit. The size of Appalachian Coals, Inc., and its power over the market are in no sense comparable to that which the Supreme Court was considering in the *Standard Oil* case. In that case it appeared that the combination had the power to control and in fact did control the price of crude petroleum. The evidence in this case shows that Appalachian Coals, Inc., will not have the power to set the market price for coal in any market in which it will sell, and the District Court so found.

No intent to restrain or monopolize interstate commerce is to be inferred from the form of organization adopted.

The Sherman Act permits the making of normal and usual contracts to further trade by normal methods, *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179; *Moore* v. *New York Cotton Exchange*, 296 Fed. 61.

B. As for the direct and necessary effect of the organization. It will not have the power to dominate or set the price of coal in any consuming market.

A practical consideration is that Appalachian Coals, Inc., could be dissolved with the greatest ease. A mere cancellation of the agency contracts would restore the defendants to their present competitive positions. There is, therefore, not the same degree of danger to the public as in the case of a consolidation or merger, for in that case any abuse of power can be effectively dealt with only by dissolution.

The true test of monopoly of a market or restraint of trade is not whether in some mysterious way the sales

of the combination may affect prices, or even whether it will be an important and influential factor in the industry. The true test is not the size of the combined companies, but the competitive strength of the companies that are not acquired. *United States* v. *U. S. Steel Corp.*, 223 Fed. 55, 68; *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, 449; *United States* v. *International Harvester Co.*, 274 U. S. 693.

The strength of the principle embodied in the Sherman Act is found in its flexibility in meeting changing conditions. What is restraint of trade and what is the public interest, are currently determined by the changing conditions of a growing and progressive civilization. No rule of thumb defining these terms has ever been formulated, nor is it possible to do so. *Maple Flooring Assn.* v. *United States*, 268 U. S. 563, 579.

The decision of the trial court appears to be based upon the idea that the contracts between Appalachian Coals, Inc., and the producer defendants constitute a price-fixing agreement, and that any price-fixing agreement is, *per se*, unlawful. The language of the contracts expressly negatives that theory. The selling agent must sell all the coal it can and sell it at the market price. There is only one thing that can prevent it from selling all such coal, namely, that the demand is not sufficient to " absorb " it.

The fact is that the selling agent has the power to name an asking price, but it is its duty to accept some offer that is made it, namely, the one that it believes to be the best " obtainable under existing competitive conditions." Distinguishing: *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. 610.

The effect on the market price of offering coal for sale in any market depends upon many things, among them the demand and the total amount of coal offered. These factors make the market price. Other things being equal, the more coal offered, the less the market price. If all

agreements are to be condemned which "affect" prices, there must be an end of all trade.

It is true that they have heretofore sold a substantial part of the coal sold in some of the markets where they sell, but they have no control over any of these markets, or over any trade therein, but must meet the keenest kind of competition everywhere.

The testimony also indicates that the effect of these contracts will not be to destroy competition between these defendant producers in any market, except to a certain extent where the coals are identical in quality. Even then, there will remain competition between identical coals for the reason that the coals of certain producers being sold under trade names will move more freely than the coal of other producers.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston* and *Hammond E. Chaffetz* were on the brief, for the United States.

The evidence fully supports the finding of the District Court that the effect of appellants' combination is to eliminate all competition among themselves and to fix uniform prices at which their product will be offered for sale. It also supports the court's conclusion that the elimination of competition and the consequent effect on prices are "the very crux of the plan." From the inception of the regional sales agency plan it was contemplated that its adoption in any district should be contingent upon securing control of a certain percentage of the production. The agreement among the defendant producers that their agency contracts with Appalachian Coals should not become effective until the latter controlled 70% of the commercial production in Appalachian territory, shows the same purpose even more directly.

Appellants have enumerated economies, increased sales, joint research, advertising and credit information,

and the partial elimination of "pyramiding" and distress coal as among the primary purposes of their combination. It is pertinent to inquire whether it was necessary to set up an exclusive sales agency, with power to fix uniform prices, in order to achieve these ends, and whether this agency plan will materially change marketing methods, apart from restraint of trade. The plan will not bring economies in the marketing of coal or increase sales. Joint research, advertising, and credit information can be undertaken without adopting this exclusive sales agency plan. "Pyramiding" appears to be only a minor incident in the sale of bituminous coal. Appellants' combination will bring little relief in the matter of distress coal.

In appraising these alleged purposes, the Court must consider whether appellants' unwillingness to effect an organization to achieve them alone does not indicate that they are not the primary purpose of this combination. The Court must determine whether appellants surrendered a large measure of individual freedom, and assumed substantial financial obligations, chiefly to secure such intangible benefits as may result from joint advertising and research, or a decrease in "pyramiding" and distress coal. We maintain that the real purpose of the combination is parallel with its outstanding effect, namely, the suppression of competition.

The District Court found that concerted action and elimination of competition, through the combination, will affect market conditions and tend to raise prices to a higher level than would prevail under conditions of free competition. It found that appellants will not have monopoly control of any market or power to fix monopoly prices.

These findings of the District Court must be read in the light of its other findings and of the evidence. The power of Appalachian Coals to control price will not be

seriously affected by the competition of independent producers in Appalachian territory. Generally speaking, it is the large producers which have joined the combination and the small producers which thus far have stayed out. Both self-interest and business prudence will dictate a policy of accepting the price leadership of Appalachian Coals and endeavoring, upon this basis, to obtain a fair share of the market. The organization of regional sales agencies in other districts, which is already far advanced and only awaits the favorable outcome of this litigation to be completed, will increase the power of Appalachian Coals to affect and control price. Changes in conditions, such as widespread strikes, or a production tax, would greatly increase this power, any sudden change in supply or demand being sharply reflected in price. Another important factor in the competitive situation is that certain producing districts have an advantage in certain markets which these producers can translate into higher prices if they are permitted to eliminate competition among themselves.

A review of the competitive situation in North Carolina, South Carolina, Georgia, Ohio, Michigan, Tennessee, and Kentucky shows that Appalachian Coals will control more than 50% of the business in bituminous coal in important interstate markets in each of these States.

The Sherman Act must be interpreted so as to effectuate its policy and purpose. Congress, in prohibiting restraints of trade and monopolies, adopted the view that the public interest was best served by the maintenance of free competition; and the courts, in construing the Act, may not adopt other criteria of the public interest. If there are conflicting considerations which render it doubtful whether the policy of the Sherman Act is working to the best social advantage in a particular industry, it is for Congress, not the courts, to grant relief. *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 388; *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 43;

United States v. *Trenton Potteries Co.*, 273 U. S. 392, 397; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. Furthermore, it does not appear that appellants' sales agency plan will remedy the basic problem of the bituminous coal industry, and it is probably economically unsound.

Appellants' principal defense seems to be that there is no difference in legal or economic effect between their combination and a union of competitors under single ownership. They assert that a merger is not illegal unless it attains or exercises monopolistic power, and that their combination will not give them such power.

Appellants recognize that a combination formed for the purpose of suppressing competition, whether in the form of a merger or otherwise, is illegal. Therefore, if we have correctly analyzed the primary purposes of appellants' combination, it is illegal upon appellants' view of the law. Moreover, the *Steel* and *Harvester* cases, upon which appellants rely, do not establish any legal principle of general application, except that the size of a corporation or its unexerted power is not in itself an offense under the Sherman Act. In addition, appellants' premise is not correct. Although mergers necessarily result in the elimination of the competition previously existing between the merged units, this consequential elimination of competition is usually merely incidental to a normal, legitimate business undertaking.

On the other hand, the abnormality of appellants' arrangement is shown by the fact that Appalachian Coals was created, not to displace sales agencies now operating, but to provide a medium for exercising price control. The abnormality of the plan is further shown by the fact that 137 different producers have given to a common agent the power to fix the price at which their product shall be sold. The provisions for allocating business create a definitely static condition among members of the group and likewise stamp the combination with abnormality. It does

not represent a normal trade development, but is essentially a "plan" imposed from above to bring about a change in competitive conditions.

While the analogy between this combination and a merger of competing units is remote, cases dealing with agreements not to compete or to sell at uniform prices are directly in point. A review of the decisions of this Court shows that it has always held or assumed that agreements of this character among a group large enough to affect the market are illegal under the Sherman Act. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417; *United States* v. *International Harvester Co.*, 274 U. S. 693; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *American Column & Lumber Co.* v. *United States*, 257 U. S. 377.

Messrs. Walker D. Hines, Goldthwaite H. Dorr and *Wilson Compton*, by leave of Court, filed a brief as *amici curiae*.

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

This suit was brought to enjoin a combination alleged to be in restraint of interstate commerce in bituminous coal and in attempted monopolization of part of that commerce, in violation of §§ 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209. The District Court, composed of three Circuit Judges, made detailed findings of fact and entered final decree granting the injunction. 1 F. Supp. 339. The case comes here on appeal. 28 U. S. C., 380.

Defendants, other than Appalachian Coals, Inc., are 137 producers of bituminous coal in eight districts (called for

convenience Appalachian territory) lying in Virginia, West Virginia, Kentucky and Tennessee. These districts, described as the Southern High Volatile Field, form part of the coal-bearing area stretching from central and western Pennsylvania through eastern Ohio, western Maryland, West Virginia, southwestern Virginia, eastern Kentucky, eastern Tennessee, and northeastern Alabama. In 1929 (the last year for which complete statistics were available) the total production of bituminous coal east of the Mississippi river was 484,786,000 tons, of which defendants mined 58,011,367 tons, or 11.96 per cent. In the so-called Appalachian territory and the immediately surrounding area, the total production was 107,008,209 tons, of which defendants' production was 54.21 per cent, or 64 per cent if the output of 'captive' mines (16,455,001 tons) be deducted.[1] With a further deduction of 12,000,000 tons of coal produced in the immediately surrounding territory, which, however, is not essentially different from the particular area described in these proceedings as Appalachian territory, defendants' production in the latter region was found to amount to 74.4 per cent.[2]

The challenged combination lies in the creation by the defendant producers of an exclusive selling agency. This agency is the defendant Appalachian Coals, Inc., which may be designated as the Company. Defendant producers own all its capital stock, their holdings being in

[1] "Captive" mines are thus designated as they produce chiefly for the consumption of the owners.

[2] Defendants contend that, in calculating their position upon a percentage basis, surrounding territory should be included and that their percentage thus lies "somewhere between 54–21 and 64 per cent." The District Court found: "The coal produced in the surrounding territory is the same kind of coal as that produced in the Appalachian territory and is suitable for the same purposes and available to the same markets, generally on the same freight rates, and for all practical purposes might have been included in the territory described as Appalachian territory."

proportion to their production. The majority of the common stock, which has exclusive voting right, is held by seventeen defendants. By uniform contracts, separately made, each defendant producer constitutes the Company an exclusive agent for the sale of all coal (with certain exceptions) which the producer mines in Appalachian territory.[3] The Company agrees to establish standard classifications, to sell all the coal of all its principals at the best prices obtainable and, if all cannot be sold, to apportion orders upon a stated basis. The plan contemplates that prices are to be fixed by the officers of the Company at its central office, save that, upon contracts calling for future deliveries after sixty days, the Company must obtain the producer's consent. The Company is to be paid a commission of ten per cent of the gross selling prices f. o. b. at the mines, and guarantees accounts. In order to preserve their existing sales' outlets, the producers may designate sub-agents, according to an agreed form of contract, who are to sell upon the terms and prices established by the Company and are to be allowed by the Company commissions of eight per cent. The Company has not yet begun to operate as selling agent; the contracts with it run to April 1, 1935, and from year to year thereafter unless terminated by either party on six months' notice.

The Government's contention, which the District Court sustained, is that the plan violates the Sherman Anti-Trust Act,—in the view that it eliminates competition among the defendants themselves and also gives the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets. On the latter point the District Court made the general finding that "this elimination of competition and con-

[3] Exception is made of deliveries on contracts then outstanding and of coal used in the operations of defendant's mines or sold to its employees.

certed action will affect market conditions, and have a tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition." The court added that the selling agency " will not have monopoly control of any market nor the power to fix monopoly prices."

Defendants insist that the primary purpose of the formation of the selling agency was to increase the sale, and thus the production, of Appalachian coal through better methods of distribution, intensive advertising and research; to achieve economies in marketing, and to eliminate abnormal, deceptive and destructive trade practices. They disclaim any intent to restrain or monopolize interstate commerce; and in justification of their design they point to the statement of the District Court that " it is but due to defendants to say that the evidence in the case clearly shows that they have been acting fairly and openly, in an attempt to organize the coal industry and to relieve the deplorable conditions resulting from overexpansion, destructive competition, wasteful trade practices, and the inroads of competing industries." 1 F. Supp., p. 341. Defendants contend that the evidence establishes that the selling agency will not have the power to dominate or fix the price of coal in any consuming market; that the price of coal will continue to be set in an open competitive market; and that their plan by increasing the sale of bituminous coal from Appalachian territory will promote, rather than restrain, interstate commerce.

First. There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act

has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. The decisions establish, said this Court in *Nash* v. *United States,* 229 U. S. 373, 376, "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade." See *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Window Glass Manufacturers* v. *United States,* 263 U. S. 403, 412; *Maple Flooring Association* v. *United States,* 268 U. S. 563, 583, 584; *Paramount Famous Corp.* v. *United States,* 282 U. S. 30, 43; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 169.

In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. "The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains

competition. Every agreement concerning trade, every regulation of trade, restrains." *Chicago Board of Trade* v. *United States, supra.* The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal.

Second. The findings of the District Court, upon abundant evidence, leave no room for doubt as to the economic condition of the coal industry. That condition, as the District Court states, " for many years has been indeed deplorable." Due largely to the expansion under the stimulus of the Great War, " the bituminous mines of the country have a developed capacity exceeding 700,000,000 tons " to meet a demand " of less than 500,000,000 tons." In connection with this increase in surplus production, the consumption of coal in all the industries which are its largest users has shown a substantial relative decline. The actual decrease is partly due to the industrial condition but the relative decrease is progressing, due entirely to other causes. Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal. The change has been more rapid during the last few years by reason of the developments of both oil and gas fields. The court below found that " Based upon the assumption that bituminous coal would have maintained the upward trend prevailing between 1900 and 1915 in percentage of total

energy supply in the United States, the total substitution between 1915 and 1930 has been equal to more than 200,000,000 tons per year." [4] While proper allowance must be made for differences in consumption in different parts of the country,[5] the adverse influence upon the coal industry, including the branch of it under review, of the use of substitute fuels and of improved methods is apparent.

This unfavorable condition has been aggravated by particular practices. One of these relates to what is called "distress coal." The greater part of the demand is for particular sizes of coal such as nut and slack, stove coal, egg coal, and lump coal. Any one size cannot be prepared without making several sizes. According to the finding of the court below, one of the chief problems of

[4] The findings show that "The number of domestic oil burners in use has increased more than sixty fold . . . from 1921 to 1931. . . . About fifty per cent of all oil burners, both domestic and commercial, are in the markets in which Appalachian coals are sold. The railroads have improved combustion methods and reduced their fuel consumption from 1916 to 1929 by 32,000,000 tons. In freight service, their consumption of coal per thousand freight ton miles dropped from 164 pounds in 1919 to 125 pounds in 1929. The electric industries decreased consumption of coal per kilowatt hour from approximately 3.2 pounds to 1.6 pounds and thereby reduced their requirements for coal in excess of 47,000,000 tons. Efficiency in the smelting of pig iron decreased the consumption of coal in relation to the pig iron made by 10,000,000 tons. The saving in by-product coke manufactures over the bee hive system amounted to 12,000,000 tons."

[5] The court below points out that "the use of natural gas and fuel oil is limited to certain areas. Gas is not available to all sections of the country and the great centers of fuel oil consumption are California, the southwest, the midcontinent field and the Atlantic seaboard. Moreover, in the States in which Appalachian coal is chiefly marketed, the substitute fuels combined supply only about ten per cent of the total energy consumption. In the year 1929 about fifty per cent of defendants' coal, other than railroad fuel, went into the States of Ohio, Michigan, Indiana and Illinois." In these States the percentage of total energy consumption derived from bituminous coal in 1929 ranged from 88.7 per cent to 92.7 per cent.

the industry is thus involved in the practice "of producing different sizes of coal even though orders are on hand for only one size, and the necessity of marketing all sizes." Usually there are no storage facilities at the mines and the different sizes produced are placed in cars on the producer's tracks, which may become so congested that either production must be stopped or the cars must be moved regardless of demand. This leads to the practice of shipping unsold coal to billing points or on consignment to the producer or his agent in the consuming territory. If the coal is not sold by the time it reaches its destination, and is not unloaded promptly, it becomes subject to demurrage charges which may exceed the amount obtainable for the coal unless it is sold quickly. The court found that this type of "distress coal" presses on the market at all times, includes all sizes and grades, and the total amount from all causes is of substantial quantity.

"Pyramiding" of coal is another "destructive practice." It occurs when a producer authorizes several persons to sell the same coal, and they may in turn offer it for sale to other dealers. In consequence "the coal competes with itself, thereby resulting in abnormal and destructive competition which depresses the price for all coals in the market." Again, there is misrepresentation by some producers in selling one size of coal and shipping another size which they happen to have on hand. "The lack of standardization of sizes and the misrepresentation as to sizes" are found to have been injurious to the coal industry as a whole. The court added, however, that the evidence did not show the existence of any trade war or widespread fraudulent conduct. The industry also suffers through "credit losses," which are due to the lack of agencies for the collection of comprehensive data with respect to the credits that can safely be extended.

In addition to these factors, the District Court found that organized buying agencies, and large consumers

purchasing substantial tonnages, " constitute unfavorable forces." " The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past."

It also appears that the " unprofitable condition " of the industry has existed particularly in the Appalachian territory where there is little local consumption, as the region is not industrialized. " The great bulk of the coal there produced is sold in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate which imposes an unfavorable differential from 35 cents to 50 cents per ton." [6] And in a graphic summary of the economic situation, the court found that " numerous producing companies have gone into bankruptcy or into the hands of receivers, many mines have been shut down, the number of days of operation per week have been greatly curtailed, wages to labor have been substantially lessened, and the States in which coal producing companies are located have found it increasingly difficult to collect taxes."

Third. The findings also fully disclose the proceedings of the defendants in formulating their plan and the reasons for its adoption. The serious economic conditions had led to discussions among coal operators and state and national officials, seeking improvement of the industry. Governors of States had held meetings with coal producers. The limits of official authority were apparent. A general meeting of producers, sales agents and attorneys was held in New York in October, 1931, a committee was appointed and various suggestions were considered. At a second general meeting in December, 1931, there was further discussion and a report which recommended

[6] Defendants insist that " the real spread is from 25 cents to $1.84 per ton."

the organization of regional sales agencies, and was supported by the opinion of counsel as to the legality of proposed forms of contract, was approved. Committees to present the plan to producers were constituted for eighteen producing districts including the eight districts in Appalachian territory. Meetings of the representatives of the latter districts resulted in the organization of defendant Appalachian Coals, Inc. It was agreed that a minimum of 70 per cent and a maximum of 80 per cent of the commercial tonnage of the territory should be secured before the plan should become effective. Approximately 73 per cent was obtained. A resolution to fix the maximum at 90 per cent was defeated. The maximum of 80 per cent was adopted because a majority of the producers felt that an organization with a greater degree of control might unduly restrict competition in local markets. The minimum of 70 per cent was fixed because it was agreed that the organization would not be effective without this degree of control. The court below also found that it was the expectation that similar agencies would be organized in other producing districts including those which were competitive with Appalachian coal, and that it was "the particular purpose of the defendants in the Appalachian territory to secure such degree of control therein as would eliminate competition among the 73 per cent of the commercial production." But the court added: "However, the formation of Appalachian Coals was not made dependent upon the formation of other regional selling agencies and there is no evidence of a purpose, understanding or agreement among the defendants that in the event of the formation of other similar regional sales agencies there would be any understanding or agreement, direct or indirect, to divide the market territory between them or to limit production or to fix the price of coal in any market or to coöperate in any way." When, in January, 1932, the Department of Jus-

tice announced its adverse opinion, the producers outside Appalachian territory decided to hold their plans in abeyance pending the determination of the question by the courts. The District Court found that "the evidence tended to show that other selling agencies with a control of at least 70 per cent of the production in their respective districts will be organized if the petition in this case is dismissed"; that in that event "there will result an organization in most of the districts whose coal is or may be competitive with Appalachian coal; but the testimony tends to show that there will still be substantial, active competition in the sale of coal in all markets in which Appalachian coal is sold."

Defendants refer to the statement of purposes in their published plan of organization,—that it was intended to bring about "a better and more orderly marketing of the coals from the region to be served by this company (the selling agency) and better to enable the producers in this region, through the larger and more economic facilities of such selling agency, more equally to compete in the general markets for a fair share of the available coal business." The District Court found that among their purposes, defendants sought to remedy "the destructive practice of shipping coal on consignment without prior orders for the sale thereof, which results in the dumping of coal on the market irrespective of the demand"; "to eliminate the pyramiding of offers for the sale of coal"; to promote "the systematic study of the marketing and distribution of coal, the demand and the consumption and the kinds and grades of coal made and available for shipment by each producer in order to improve conditions"; to maintain an inspection and engineering department which would keep in constant contact with customers "in order to demonstrate the advantages and suitability of Appalachian coal in comparison with other competitive coals"; to promote an extensive advertising

campaign which would show "the advantages of using coal as a fuel and the advantages of Appalachian coal particularly"; to provide a research department employing combustion engineers which would demonstrate "proper and efficient methods of burning coal in factories and in homes" and thus aid producers in their competition with substitute fuels; and to operate a credit department which would build up a record with respect to the "reliability of purchasers." The court also found that "Defendants believe that the result of all these activities would be the more economical sale of coal, and the economies would be more fully realized as the organization of the selling agent is perfected and developed." But in view of the designation of sub-agents, economies in selling expenses would be attained "only after a year or so of operation."

No attempt was made to limit production. The producers decided that it could not legally be limited and, in any event, it could not be limited practically. The finding is that "it was designed that the producer should produce and the selling agent should sell as much coal as possible." The importance of increasing sales is said to lie in the fact that the cost of production is directly related to the actual running time of the mines.

Fourth. Voluminous evidence was received with respect to the effect of defendants' plan upon market prices. As the plan has not gone into operation, there are no actual results upon which to base conclusions. The question is necessarily one of prediction. The court below found that, as between defendants themselves, competition would be eliminated. This was deemed to be the necessary consequence of a common selling agency with power to fix the prices at which it would make sales for its principals. Defendants insist that the finding is too broad and that the differences in grades of coal of the same sizes, and the market demands at different times,

would induce competition between the coals sold by the agency "depending upon the use and the quality of the coals."

The more serious question relates to the effect of the plan upon competition between defendants and other producers. As already noted, the District Court found that "the great bulk" of the coal produced in Appalachian territory is sold "in the highly competitive region east of the Mississippi river and north of the Ohio river under an adverse freight rate." Elaborate statistics were introduced with respect to the production and distribution of bituminous coal and the transportation rates from the different producing sections to the consuming markets, as bearing upon defendants' competitive position, together with evidence as to the requirements of various sections and consumers and the relative advantages possessed by reason of the different qualities and uses of the coals produced. It would be impossible to make even a condensed statement of this evidence, (which has been carefully analyzed by both parties,) but an examination of it fails to disclose an adequate basis for the conclusion that the operation of the defendants' plan would produce an injurious effect upon competitive conditions, in view of the vast volume of coal available, the conditions of production, and the network of transportation facilities at immediate command. While strikes and interruptions of transportation may create temporary and abnormal dislocations, the bituminous coal industry under normal conditions affords most exceptional competitive opportunities. Figures as to developed and potential productive capacity are impressive. The court below found upon this point that the capacity of the mines in the Appalachian region operated by others than defendants is 82,660,760 tons, as against the capacity of defendants' mines of 86,628,880 tons, while the present yearly capacity of all mines in southern West Virginia, Virginia, eastern Kentucky and Tennessee is 245,233,560 tons, based upon an eight-hour working day.

"This excess capacity over actual production," the court said, "could be brought into production at moderate expense and with reasonable promptness." As to potential, undeveloped capacity in Appalachian territory, the court found that in the eight districts in this region not held by any operating, or by any captive, company, there are approximately 760,000 acres containing more than 4,300,000,000 tons of recoverable coal. In addition, in the same territory "owned by captive companies and not being operated, or owned by operating companies who are using only a very small proportion of their holdings," there is an additional 860,000 acres, containing more than 4,600,000,000 tons of coal. Within the twenty-four counties in which defendants' mines are located, and immediately adjacent to them, on railroads already operating, "with the exception of short, feeder extensions," there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recoverable coal "comparable both in quality and mining conditions with the coal now being mined in that region." "The opening up of this acreage would involve only the extension of short branch lines from the railroads and the building of mining plants. The price of these lands at the present time would be less than half of the value of two or three years ago, and considerably less on a royalty basis. Coal produced from these districts is available for any market in which Appalachian coal is sold. Conditions in the coal industry are such that new companies are free to enter the business of producing and marketing coal in competition with existing companies." In connection with this proof of developed and potential capacity, the "highly organized and concentrated buying power" that can be exerted must also have appropriate consideration.[7]

[7] J. M. Dewberry, general coal and coke agent of the Louisville & Nashville Railroad, a large consumer of Appalachian coal, testified: "It is a well known fact today that the buying power of these large consumers of coal is more intelligent, more forceful, more far-reaching

Consumers testified that defendants' plan will be a benefit to the coal industry and will not restrain competition. Testimony to that effect was given by representatives of the Louisville & Nashville Railroad, the Norfolk & Western Railroad, and the Chesapeake & Ohio Railroad, "the largest railroad users of coal operating in the Appalachian region," and by representatives of large utility companies and manufacturing concerns.[8] There

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than ever before in the history of the industry. And it just sounds to me like a joke for somebody to talk about Appalachian Coals or somebody else dictating the price that they are going to pay. They dictate their own price. The purchaser makes it. And he makes it because of the tremendous force and influence of his buying power. Why, it is nothing these days for one interest or one concern to buy several million tons of coal."

[8] The District Court in its findings, after referring to the railroads above mentioned, continues: "A representative of a large public utility company" (with extensive power lines in the middle west and on the Atlantic seaboard) "consuming annually approximately 2,485,000 tons of coal has stated that the organization and operation of Appalachian Coals, Inc. will not affect competition in the markets in which his company buys coal, and that it will have a beneficial effect on the coal industry. A representative of a power company operating throughout the State of Georgia . . . using from 30,000 to 125,000 tons of coal annually, has stated that the organization and operation of Appalachian Coals, Inc. will not restrain competition in the markets in which his company buys coal. A representative of the Carbide and Carbon Corporation which uses annually about 250,000 tons of bituminous coal, 100,000 tons of coke made from bituminous coal, and 40,000 to 50,000 tons of petroleum coke, and operating plants that consume coal at South Charleston, West Virginia; Niagara Falls, New York; Cleveland, Ohio; Sault Ste. Marie, Michigan; Indianapolis, Indiana, and Fremont and Fostoria, Ohio, has stated that the organization of Appalachian Coals, Inc., will have a beneficial effect in the coal industry and will not restrain competition in the markets in which his company buys coal. The largest purchaser of coal in the States of North Carolina, South Carolina, Georgia and eastern Tennessee who purchases approximately 600,000 tons of coal annually under normal conditions for use by textile mills, located in those States, has stated that the organization and operation of Appalachian

was similar testimony by wholesale and retail dealers in coal. There are 130 producers of coal other than defendants in Appalachian territory who sell coal commercially. There are also " a large number of mines that have been shut down and could be opened up by the owners on short notice." Competing producers testified that the operation of the selling agency, as proposed by defendants, would not restrain competition and would not hurt their business. Producers in western Pennsylvania, Alabama, Ohio and Illinois testified to like effect. Referring to this testimony, the court below added, " The small coal producer can, to some extent, and for the purpose of producing and marketing coal, produce coal more cheaply than many of the larger companies, and is not prevented by higher cost of operation from being a competitor in the market."

The Government criticises the " opinion testimony " introduced by defendants as relating to a competitive situation not within the experience of the witnesses, and also animadverts upon their connections and interests, but the Government did not offer testimony of opposing opinions as to the effect upon prices of the operation of the selling agency. Consumers who testified for the Government explained their dependence upon coal from Appalachian territory.

The District Court commented upon the testimony of officers of the selling agency to the effect " that the organization would not be able to fix prices in an arbitrary way but, by the elimination of certain abuses, and by better advertising and sale organization, the producers would get more in the aggregate for their coal." " Other witnesses for the defendants " said the court, " indicated that there would be some tendency to raise the price but

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Coals, Inc. will not control or dominate the price in the markets in which he purchases coal, and that he will be able to purchase coal in an open and competitive market."

that the degree of increase would be affected by other competitors in the coal industry and by producers of coal substitutes."

Fifth. We think that the evidence requires the following conclusions:

(1). With respect to defendant's purposes, we find no warrant for determining that they were other than those they declared. Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences. *Chicago Board of Trade* v. *United States, supra.* The evidence leaves no doubt of the existence of the evils at which defendants' plan was aimed. The industry was in distress. It suffered from over-expansion and from a serious relative decline through the growing use of substitute fuels. It was afflicted by injurious practices within itself,—practices which demanded correction. If evil conditions could not be entirely cured, they at least might be alleviated. The unfortunate state of the industry would not justify any attempt unduly to restrain competition or to monopolize, but the existing situation prompted defendants to make, and the statute did not preclude them from making, an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce. The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight. The inquiry then, must be whether despite this objective the inherent nature of their plan was such as to create an undue restraint upon interstate commerce.

(2). The question thus presented chiefly concerns the effect upon prices. The evidence as to the conditions of the production and distribution of bituminous coal, the available facilities for its transportation, the extent of developed mining capacity, and the vast potential undeveloped capacity, makes it impossible to conclude that defendants through the operation of their plan will be able to fix the price of coal in the consuming markets. The ultimate finding of the District Court is that the defendants " will not have monopoly control of any market, nor the power to fix monopoly prices "; and in its opinion the court stated that " the selling agency will not be able, we think, to fix the market price of coal." Defendants' coal will continue to be subject to active competition. In addition to the coal actually produced and seeking markets in competition with defendants' coal, enormous additional quantities will be within reach and can readily be turned into the channels of trade if an advance of price invites that course. While conditions are more favorable to the position of defendants' group in some markets than in others, we think that the proof clearly shows that, wherever their selling agency operates, it will find itself confronted by effective competition backed by virtually inexhaustible sources of supply, and will also be compelled to cope with the organized buying power of large consumers. The plan cannot be said either to contemplate or to involve the fixing of market prices.

The contention is, and the court below found, that while defendants could not fix market prices, the concerted action would " affect " them, that is, that it would have a tendency to stabilize market prices and to raise them to a higher level than would otherwise obtain. But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition. A coöperative enterprise, otherwise free

from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that coöperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the coöperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result. *Maple Flooring Association* v. *United States, supra; Cement Manufacturers Association* v. *United States,* 268 U. S. 588, 604. Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers, is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices.

Decisions cited in support of a contrary view were addressed to very different circumstances from those presented here. They dealt with combinations which on the particular facts were found to impose unreasonable restraints through the suppression of competition, and in actual operation had that effect. *American Column & Lumber Co.* v. *United States,* 257 U. S. 377; *United States*

v. *American Linseed Oil Co.*, 262 U. S. 371. Compare *Maple Flooring Association* v. *United States, supra,* at pp. 579–582. In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, the combination was effected by those who were in a position to deprive, and who sought to deprive, the public in a large territory of the advantages of fair competition, and was for the actual purpose, and had the result, of enhancing prices,—which in fact had been unreasonably increased. *Id.,* pp. 237, 238. In *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, defendants, who controlled 82 per cent of the business of manufacturing and distributing vitreous pottery in the United States, had combined to fix prices. It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that the power to fix prices involved "power to control the market and to fix arbitrary and unreasonable prices," and that in such a case the difference between legal and illegal conduct could not "depend upon so uncertain a test" as whether the prices actually fixed were reasonable,—a determination which could "be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." See *United States* v. *Cohen Grocery Co.,* 255 U. S. 81. In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets.

(3). The question remains whether, despite the foregoing conclusions, the fact that the defendants' plan eliminates competition between themselves is alone sufficient to condemn it. Emphasis is placed upon defendants' control of about 73 per cent of the commercial produc-

tion in Appalachian territory. But only a small percentage of that production is sold in that territory. The finding of the court below is that " these coals are mined in a region where there is very little consumption." Defendants must go elsewhere to dispose of their products, and the extent of their production is to be considered in the light of the market conditions already described. Even in Appalachian territory it appears that the developed and potential capacity of other producers will afford effective competition.[9] Defendants insist that on the evidence adduced as to their competitive position in the consuming markets, and in the absence of proof of actual operations showing an injurious effect upon competition, either through possession or abuse of power, no valid objection could have been interposed under the Sherman Act if the defendants had eliminated competition between themselves by a complete integration of their mining properties in a single ownership. *United States* v. *U. S. Steel Corp.*, 251 U. S. 417; *United States* v. *International Harvester Co.*, 274 U. S. 693. We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that, in order to comply with the law, those engaged in industry should be driven to unify their properties and businesses, in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a coöperative endeavor to

[9] *Supra*, pp. 10, 11.

remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies, and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint. *Chicago Board of Trade* v. *United States, supra; United States* v. *Terminal Association,* 224 U. S. 383; *Window Glass Manufacturers* v. *United States, supra; Standard Oil Co.* v. *United States,* 283 U. S. 163, 169, 179.

The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief. There must be "a definite factual showing of illegality." *Standard Oil Co.* v. *United States,* 283 U. S. p. 179. We think that the Government has failed to show adequate grounds for an injunction in this case. We recognize, however, that the case has been tried in advance of the operation of defendants' plan, and that it has been necessary to test that plan with

reference to purposes and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities, the decision upon the present record should not preclude the Government from seeking the remedy which would be suited to such a state of facts. We think also that, in the event of future controversy arising from the actual operation of the plan, the results of the labor of both parties in this litigation in presenting the voluminous evidence as to the industry, market conditions and transportation facilities and rates, should continue to be available, without the necessity of reproducing that evidence.

The decree will be reversed and the cause will be remanded to the District Court with instructions to enter a decree dismissing the bill of complaint without prejudice and with the provision that the court shall retain jurisdiction of the cause and may set aside the decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

Reversed and remanded.

MR. JUSTICE MCREYNOLDS thinks that the court below reached the proper conclusion and that its decree should be affirmed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, v. BROOKS ET AL., EXECUTORS.

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

No. 496. Argued February 9, 1933.—Decided March 13, 1933.

1. In computing the tax on the transfer of the estate of a nonresident decedent under the Revenue Act of 1924, §§ 301–304, that part of the gross estate was to be returned and valued "which at the time of his death is situated in the United States." *Held:*

(1) That bonds of foreign governments and of foreign and domestic corporations and stock of foreign corporations, belonging to a nonresident alien but kept in this country at the time of his death, should be included in the computation. Pp. 386, 406.

(2) A local cash deposit belonging to the decedent should likewise be included if not "deposited with any person carrying on the banking business" and therefore specifically excepted by § 303 (e). Pp. 395, 406.

(3) It is to be presumed that Congress, by the phrase "situated in the United States," meant to embrace all property, tangible or intangible, having a situs subjecting it to the federal taxing power, in accordance with principles declared by this Court before the statute was passed; and it is inadmissible to restrict the intention because of limitations on state taxing power which were determined later. P. 388.

(4) This construction is confirmed by administrative practice and legislative history, and is not inconsistent with special qualifying provisions found in § 303 (d) and (e) of the Act. Pp. 389–394.

2. Substantial reënactment in later Acts of a provision theretofore construed in regulations of the department charged with its administration, is persuasive evidence of legislative approval of the regulations. P. 393.
3. As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations. P. 396.
4. Taxation by one nation of securities belonging to a nonresident alien which are physically within its jurisdiction violates no principle of international law. P. 396.
5. The remedy for multiple taxation resulting from several nations having jurisdiction to tax the same interest on distinct grounds,—citizenship, domicile, source of income, situs,—is by international negotiation and convention. P. 399.
6. The United States is as competent as other nations to enter into such negotiations and become a party to such conventions, unless a limitation upon its sovereign power in that regard is necessarily found to be imposed by its own Constitution. P. 400.
7. A tax by the United States on securities and bank accounts owned by a nonresident alien but kept in this country, being within the federal taxing power and not being arbitrary or confiscatory, is consistent with the due process clause of the Fifth Amendment. P. 400.

8. The principle that one State of the Union may not tax securities kept in the State but owned by a resident of another State, is a limitation due to the relations of the States to each other in our constitutional system, and has no application to the power of the Federal Government to tax the property of a nonresident alien. Pp. 400, 403.

60 F. (2d) 890, reversed.

CERTIORARI, 287 U. S. 594, to review the affirmance of a judgment sustaining a ruling of the Board of Tax Appeals, 22 B. T. A. 71, which set aside a deficiency assessment.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for petitioner.

The recent decisions of this Court dealing with the power of the States to tax intangibles of nonresidents have no bearing upon the question of the intent of Congress as expressed in the Revenue Act of 1924.

In 1924, the power of the Federal Government to tax the transfer of intangibles at the place where the physical evidence was kept, was clearly recognized. The Treasury Regulations dealing with prior Revenue Acts, which were in effect when the Revenue Act of 1924 was adopted, treated intangibles as having a situs of their own. Under familiar rules, the executive interpretation of the earlier statutes should be carried into the reënacted statute.

Moreover, the statute indicates on its face that Congress intended to reach the transfer of intangibles if they were physically located in the United States. Two classes of intangibles were expressly excluded from the gross estate; which indicates that all other intangibles similarly situated and not so excepted shall be deemed property within the United States.

The section dealing with domestic stocks was designed to insure their inclusion, whether the certificates were within or without the United States. This express pro-

vision for the inclusion of domestic stock, regardless of the situs of the certificates, can not operate to exclude from the gross estate other intangibles "situated in the United States," as that phrase was understood when the statute was enacted.

The recent decisions of this Court dealing with the power of States to tax intangibles are not applicable here, because the rule applied as between the States was adopted to avoid double taxation and to secure parity between tangibles and intangibles, neither of which considerations is important here. The rule applied to the States is based upon the maxim *mobilia sequuntur personam;* but that is only a fiction of the law which is not of universal application. It is intended for convenience and is not controlling where justice does not demand it. It was invented to prevent escape from taxation and should not be employed otherwise. To apply it here would place intangibles upon a different basis from tangibles. The reason for the rule applied to the States must mark the extent of its application; and since the reasoning is not applicable here, the rule itself may be disregarded.

Moreover, the Federal Government is not limited in the same way as the States in selecting subjects for taxation; and the implication from the cases is that where the Federal Government affords a benefit there is power to tax. The property here involved enjoyed the protection of this Government. Unless the security and protection of the United States are to be made available to aliens on better terms than to citizens, the Government must have the power to tax.

The securities were all held as investments. There is sufficient basis for the contention that the property had acquired a business situs in this country. Its complete enjoyment could be secured by merely keeping it safe and

collecting the income. The absence of other activities, which the character of the property did not demand, is not important.

Mr. Francis B. Hamlin, with whom *Mr. Richard T. Greene* was on the brief, for respondents.

Prior to 1924 this Court had consistently recognized the common law doctrine of *mobilia sequuntur personam* as fixing the situs of intangible property at the domicile of the owner, but had conceded to taxing authorities the power, (since denied them, except possibly where the intangibles have acquired a " business situs " elsewhere,) of fixing an additional situs by express statutory provision. *Railroad Co.* v. *Pennsylvania* (*State Tax on Foreign-Held Bonds*), 15 Wall. 300; *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *New Orleans* v. *Stempel,* 175 U. S. 309; *Eidman* v. *Martinez,* 184 U. S. 578; *Blackstone* v. *Miller,* 188 U. S. 189; *Buck* v. *Beach,* 206 U. S. 392; *Wheeler* v. *Sohmer,* 233 U. S. 434.

DeGanay v. *Lederer,* 250 U. S. 376, does not reject the maxim *mobilia sequuntur personam.* In applying the income tax provisions of the 1913 Act, this Court did, as petitioner points out, hold that the maxim did not apply to the situation there presented, but the reason was that the property from which the income was derived had acquired a business situs in the United States, because that property was a fund which had been invested and reinvested since 1885 in the United States by the owner's agent domiciled here. The distinction between this sort of situation and the situation in the case at bar is well illustrated in *Ewa Plantation Co.* v. *Wilder,* 289 Fed. 664, and *Hill* v. *Carter,* 47 F. (2d) 869; cert. den. 284 U. S. 625.

What this Court had held prior to 1924 was not that intangibles had a general situs for taxation where the evidences thereof were found, but that they might be given such a situs by a statute so providing.

In this state of the declared law it is very clear that, if Congress had intended to attempt to fix a situs for intangibles for purposes of the estate-tax provisions of the Revenue Act of 1924 at the place where the physical evidences of the intangible property were found, it would have recognized the necessity of plainly so declaring.

We find no definition in the Act of the phrase " situated in the United States." We find it provided in § 303 (d) that stock in a domestic corporation shall be deemed property within the United States. No similar provision is made as to stock in foreign corporations or bonds. We find it provided in § 303 (e) that the amount receivable as insurance upon the life of a nonresident decedent shall not be deemed property within the United States. In the light of the history of this provision it is evident that Congress regarded a tax upon insurance upon the life of a nonresident decedent as an exception to the general rule. See Sen. Rep. 275, 67th Cong., 1st Sess.

The general rule is that the situs of a debt is at the domicile of the creditor. The provision of § 303 (e) as to bank deposits is merely an express application of the rule. It is well known that this provision, first inserted in the Revenue Act of 1921, was a response to expressed desires on the part of the banking interests of the country to make it the financial center of the world by giving nonresidents an express assurance that the maintenance of bank balances here would not involve a tax. And there is ground for the belief that the Congress thought of such money as tangible rather than intangible property. A depositor is sometimes deemed to be the owner of the tangible property, i. e., the specie in the bank. *See New Orleans* v. *Stempel,* 175 U. S. 309, 316; *Blackstone* v. *Miller,* 188 U. S. 189, 205.

All the cases which have passed upon the construction of the statute are in harmony with the views expressed.

Estate of Garvan v. Commissioner, 25 B. T. A. 612; *Shenton* v. *United States,* 53 F. (2d) 249; *Sanchez* v. *Bowers,* 57 F. (2d) 324.

In so far as the bonds are concerned, the prior regulations proceeded upon a theory contrary to the common law rule (Art. 53, Regulations 63, Revenue Act of 1921), while, by their silence as to stock of foreign corporations, they adopted the common law rule. There is certainly no warrant in the statutes preceding the 1924 Act for any such distinction. It is, therefore, impossible to place any reliance upon the theory of a legislative adoption of the prior regulations by the 1924 Act. See *Shenton* v. *United States,* 53 F. (2d) 249, 250, 251.

The Act of 1924, if given the construction for which the petitioner contends, would be repugnant to the Fifth Amendment. *State Tax on Foreign-Held Bonds,* 15 Wall. 300; *Heiner* v. *Donnan,* 285 U. S. 312. The protection of the Fifth Amendment extends to the alien friend. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489.

Since the respondents' decedent was a nonresident alien, the United States did not have that power over him and his property which the relations of citizenship and domicile, or of either of them, might have given, and the United States could therefore tax the transfer of only such of his property as had a situs within its jurisdiction.

Whatever doubts may have existed prior to 1930 as to the situs of such intangibles for purposes of taxation have been resolved by the recent decisions of this Court; and it is now established that the maxim *mobilia sequuntur personam* applies and their only situs for taxation is the domicile of their owner, except possibly in the case where they have become integral parts of a business localized in another jurisdiction. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312.

These cases deal with the state power, but they are made applicable to the United States by *Heiner* v. *Donnan,* 285 U. S. 312.

"The transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which can not take place in two or more States at one and the same time." *First National Bank* v. *Maine,* 284 U. S. 312, 326. Since "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" (*id.,* pp. 326, 327), and since in a case arising from an attempt by New York to tax the transmission of this decedent's stocks, bonds and moneys on deposit, this Court would hold that their transmission did not occur in New York (*vide* the *Missouri* case, *supra*), but did take place in Cuba, it is inconceivable that in the case at bar the Court could hold the contrary.

In *United States* v. *Bennett,* 232 U. S. 299, the situs of property had nothing to do with the decision; the basis of the power to tax was the citizenship of the taxpayer. See *United States* v. *Goelet,* 232 U. S. 293; *Cook* v. *Tait,* 265 U. S. 47.

Situs within the taxing jurisdiction is necessary to the imposition of a tax upon the transmission of property at death. *Frick* v. *Pennsylvania,* 268 U. S. 473.

Obviously, in the present state of civilization and under our form of government, the tax sought by the Treasury in this case can not be exacted merely because the Government has the physical power to collect it. Might does not make right in this country.

Petitioner's *quid pro quo* argument is baseless for at least two reasons. In the first place, the tax is not a tax levied in exchange for protection of property, but solely

upon the privilege of transmission of property. That privilege in the case at bar was not granted by the United States or any State of the Union. In the second place, whatever protection was afforded the property was furnished not alone by the United States, but to an equal or greater degree by the State of New York.

Whether or not other countries do not permit the maxim *mobilia sequuntur personam* to be invoked in favor of nonresidents is entirely immaterial. *Russian Volunteer Fleet* v. *United States, supra,* at pages 491–492.

By leave of Court, briefs of *amici curiae* were filed by *Mr. Selden Bacon;* by *Mr. Edward N. Perkins;* and by *Messrs. Charles Angulo* and *Russell L. Bradford.*

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

Respondents contested the determination of the Commissioner of Internal Revenue in including in the gross estate of decedent certain intangible property. Decedent, who died in October, 1924, was a subject of Great Britain and a resident of Cuba. He was not engaged in business in the United States. The property in question consisted of securities, viz., bonds of foreign corporations, bonds of foreign governments, bonds of domestic corporations and of a domestic municipality, and stock in a foreign corporation, and also of a balance of a cash deposit.[1] Some of the securities, consisting of a stock certificate and bonds, were in the possession of decedent's son in New York City, who

[1] The property was scheduled as follows:

(a) Bonds of foreign corporations and accrued interest..	$24,384.97
(b) Bonds of foreign governments and accrued interest..	55,610.49
(c) Bonds of domestic corporations and accrued interest.	460,315.32
(d) Bonds of a domestic municipality and accrued interest.....	15,073.57
(e) Stock in a foreign corporation (Cuba).....	50,000.00
(f) Cash on deposit with Lawrence Turnure & Company..	14,517.98

collected the income and placed it to the credit of decedent in a New York bank. Other securities were in the possession of Lawrence Turnure & Company in New York City, who collected the income and credited it to decedent's checking account, which showed the above mentioned balance in his favor. None of the securities was pledged or held for any indebtedness. Finding these facts, the Board of Tax Appeals decided that the property should not be included in the decedent's gross estate for the purpose of the Federal Estate Tax (22 B. T. A. 71), and the decision was affirmed by the Circuit Court of Appeals. 60 F. (2d) 890. This Court granted certiorari, 287 U. S. 594.

The provisions governing the imposition of the tax are found in the Revenue Act of 1924, c. 234, 43 Stat. 253, 303–307, and are set forth in the margin.[2] Two questions

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[2] "Sec. 301. (a) In lieu of the tax imposed by Title IV of the Revenue Act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this Act, whether a resident or nonresident of the United States:" (rates follow) . . .

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

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

"Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate— . . .

"(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

"(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value

are presented,—(1) whether the property in question is covered by these provisions, and (2) whether, if construed to be applicable, they are valid under the Fifth Amendment of the Federal Constitution. The decisions below answered the first question in the negative.

First. The first question is one of legislative intention. In the case of a nonresident of the United States, that part of the gross estate was to be returned and valued "which at the time of his death is situated in the United States." In interpreting this clause, regard must be had to the purpose in view. The Congress was exercising its taxing power. Defining the subject of its exercise, the Congress resorted to a general description referring to the situs of the property. The statute made no distinction between tangible and intangible property. It did not except intangibles. It did not except securities. Save as stated, it did not except debts due to a nonresident from

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of that part of his gross estate which at the time of his death is situated in the United States; . . .

"(c) No deduction shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section 304 the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

"(d) For the purpose of Part I of this title, stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, . . .

"(e) The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of Part I of this title, be deemed property within the United States. . . .

"Sec. 304. (a) . . . The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (1) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; . . ."

resident debtors. As to tangibles and intangibles alike, it made the test one of situs, and we think it is clear that the reference is to property which, according to accepted principles, could be deemed to have a situs in this country for the purpose of the exertion of the Federal power of taxation. Again, so far as the intention of the Congress is concerned, we think that the principles thus impliedly invoked by the statute were the principles theretofore declared and then held. It is quite inadmissible to assume that the Congress exerting Federal power was legislating in disregard of existing doctrine, or to view its intention in the light of decisions as to State power which were not rendered until several years later.[3] The argument is pressed that the reference to situs must, as to intangibles, be taken to incorporate the principle of *mobilia sequuntur personam* and thus, for example, that the bonds here in question though physically in New York should be regarded as situated in Cuba where decedent resided. But the Congress did not enact a maxim. When the statute was passed it was well established that the taxing power could reach such securities in the view that they had a situs where they were physically located. As securities thus actually present in this country were regarded as having a situs here for the purpose of taxation, we are unable to say that the Congress in its broad description, embracing all property "situated in the United States," intended to exclude such securities from the gross estate to be returned and valued.

The general clause with respect to the property of nonresidents "situated in the United States" is found in the provisions for an Estate Tax of the Revenue Act of 1916, § 203 (b), 39 Stat. 778, and was continued in the Revenue

[3] The case of *Blackstone* v. *Miller,* 188 U. S. 189, was not overruled until 1930. See *Farmers' Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 209.

Acts of 1918, § 403 (b), 40 Stat. 1098; of 1921, § 403 (b), 42 Stat. 280; and of 1924, § 303 (b), the provision now under consideration. Before the phrase was used in the Act of 1916, this Court, in passing upon questions arising under the inheritance tax law of June 13, 1898, § 29, 30 Stat. 464 (in a case where the decedent had left "certain federal, municipal and corporate bonds" in the custody of his agents in New York), recognized that the property would not have escaped the tax, had it been imposed in apt terms, in the view that the property was intangible and belonged to a nonresident. *Eidman* v. *Martinez,* 184 U. S. 578, 582. While that statute was found to be inapplicable, as the property had not passed, within the limitations of the statute, "by will or by the intestate laws of any State or Territory," the opinion conceded the power of Congress "to impose an inheritance tax upon property in this country, no matter where owned or transmitted." *Id.,* p. 592. We see no reason to doubt that it was with this conception of its power that the Congress enacted the later provisions for an estate tax in the case of nonresidents. And before the Revenue Act of 1921 was passed, we had stated the principles deemed controlling, in *DeGanay* v. *Lederer,* 250 U. S. 376, in construing the provision of the Income Tax Law of 1913, 38 Stat. 166, imposing a tax upon the net income "from all property owned . . . in the United States by persons residing elsewhere." The decision was upon a certified question with respect to the income of a citizen and resident of France from stocks, bonds, and mortgages secured upon property in the United States, where the owner's agent in the United States collected and remitted the income and had "physical possession of the certificates of stock, the bonds and the mortgages." The Court said,—"The question submitted comes to this: Is the income from the stock, bonds and mortgages, held by

the Pennsylvania Company [the agent], derived from property owned in the United States? A learned argument is made to the effect that the stock certificates, bonds and mortgages, are not property; that they are but evidences of the ownership of interests which are property; that the property, in a legal sense, represented by the securities, would exist if the physical evidences thereof were destroyed. But we are of opinion that these refinements are not decisive of the congressional intent in using the term 'property' in this statute. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with a meaning commonly attributable to them. To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages and certificates of stock are regarded as property. By state and federal statutes they are often treated as property, not as mere evidences of the interests which they represent." Having no doubt "that the securities, herein involved, are property," the Court proceeded to the question,—"Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam* applies in this instance and that the situs of the property was at the domicile of the owner in France. But this Court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority." Then, describing the location of the certificates of stock, bonds and mortgages in question in the possession of the agent in Philadelphia, the Court concluded that the securities constituted "property within the United States within the meaning of Congress as expressed in the statute under consideration." The reference in the state-

ment of this conclusion to the authority of the agent to sell, invest and reinvest was by way of emphasis, and is not to be taken as importing a necessary qualification. The Court answered the certified question in the affirmative. *Id.*, pp. 380–383.

Under the Revenue Act of 1916, the Commissioner of Internal Revenue ruled " that Congress has the power and evidenced an intention " in that act " to impose a tax upon bonds, both foreign and domestic, owned by a non-resident decedent, which bonds are physically situate in the United States " and that " such bonds must be returned as a portion of his gross estate." T. D. 2530. The regulations promulgated by the Treasury Department under the Revenue Act of 1918, interpreting the words " situated in the United States," contained the following: " The situs of property, both real and personal, for the purpose of the tax is its actual situs. Stock in a domestic corporation, and insurance payable by a domestic insurance company, constitute property situated in the United States, although owned by, or payable to, a nonresident. A domestic corporation or insurance company is one created or organized in the United States. Bonds actually situated in the United States, moneys on deposit with domestic banks and moneys due on open accounts by domestic debtors constitute property subject to tax." Regulations No. 37, Art. 60, T. D. 2378, 2910, 3145. This provision, in substance, as to bonds and moneys due (other than insurance moneys and bank deposits, which were made the subject of a special statutory provision), was repeated in the regulations under the Revenue Act of 1921, as follows: " Bonds actually within the United States, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having its situs in the United States." Regulations No. 63, Art. 53, T. D. 3384. We find no ground for questioning the inten-

tion of the Congress, when in the Revenue Act of 1924 it reënacted the provision as to the property of nonresidents "situated in the United States," to impose the tax with respect to bonds physically within the United States and stock in domestic corporations. *Brewster* v. *Gage,* 280 U. S. 327, 337.

The argument is pressed that the regulations above quoted are silent as to stock owned by nonresidents in foreign corporations when the certificates of stock are held within the United States. We think that the omission is inconclusive. It may be more fairly said that the express terms of these regulations did not go far enough, rather than that, so far as they did go, they failed to express the legislative intent. In the view which identifies the property interest with its physical representative, no sufficient reason appears for holding that bonds were intended to be included, and not certificates of stock, if these were physically in the United States at the time of death. See *DeGanay* v. *Lederer, supra; Disconto-Gesellschaft* v. *U. S. Steel Corp.,* 267 U. S. 22, 28, 29. The regulations adopted under the Revenue Act of 1924 expanded the provision as to the "situs of property of nonresident decedents" so as to include stock in foreign corporations when the certificates were held here, by providing: "Real estate within the United States, stocks and bonds physically in the United States at date of death, moneys due on open accounts by domestic debtors, and stock of a corporation or association created or organized in the United States, constitute property having a situs in the United States." Regulations No. 68, Art. 50, T. D. 3683. The Revenue Act of 1926, § 303 (b), 44 Stat. 73, reënacted the provision as to property of nonresidents "situated in the United States," and the regulation under that Act expressly embraces "certificates of stock, bonds, bills, notes, and mortgages, physically in the United States at date of death" as property "having a situs in the United States,"

in addition to the clause relating to stock of domestic corporations. Regulations No. 70, Art. 50. And these provisions have been continued. *Id.* 1929 edition.

We do not find that the qualifying provisions of §§ 303 (d) and (e) of the Revenue Act of 1924 are inconsistent with the departmental construction. Section 303 (d) provided that "stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States." Respondents point to the absence of a similar provision as to bonds and as to stock in foreign corporations, and invoke the maxim *expressio unius est exclusio alterius.* But the argument seems to prove too much. It is not to be supposed that the Congress intended that stock owned by a nonresident in a domestic corporation, where the certificates of stock were held in the United States, were to be subject to the tax, and that bonds of the same corporation similarly owned and physically in the United States, were to be excepted. See T. D. 2530. We think that the Government's construction of the provision is the more reasonable one; that the place where the stock was held was not an element in the application of § 303 (d), and that this provision was designed to insure the inclusion of the stock of a domestic corporation in all cases, whether the certificates were physically present in the United States or not. Compare *Corry* v. *Baltimore,* 196 U. S. 466, 473, 474.

Section 303 (e) provided: "The amount receivable as insurance upon the life of a nonresident decedent, and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death," are not to be deemed "property within the United States." The Revenue Act of 1918, § 403 (b) (3), had provided that the amount receivable as insurance, where the insurer is a domestic corporation, should be regarded

as property within the United States, and this was repealed by the substituted provision of the Revenue Act of 1921, § 403 (b) (3), to the contrary effect, the latter being carried forward in the Revenue Act of 1924. It is a matter of common knowledge that American life insurance companies were engaged in business abroad, and no clear inference with respect to the question now under consideration may be drawn either from the original provision or from its repeal.[4] But the significance of the remaining clause of the Act of 1921, reënacted in 1924, is apparent. This provided for the exclusion from the gross estate of bank deposits in this country, in the circumstances stated, of deposits which, as constituting property of nonresidents situated in the United States, had theretofore been subject to the estate tax.[5] The Congress evidently thought it necessary to make this express exception, in order to exclude such deposits from the tax, but did not provide any exception with respect to bonds and certificates of stock physically here.

As to decedent's deposit balance in the instant case, the Board of Tax Appeals did not make an explicit finding that Lawrence Turnure & Company, with whom the decedent had a checking account, was "carrying on the banking business." The Board thought that the point was not material. 22 B. T. A. p. 87. If that firm was engaged in the banking business, the statute required the exclusion of the deposit balance from the gross estate. As to the securities, in view of the legislative history and departmental construction, we find no basis for holding that the statute, if valid in this application, did not require their inclusion.

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[4] See House Rep. No. 767, 65th Cong., 2d Sess., p. 22; Sen. Rep. No. 275, 67th Cong., 1st sess., p. 25; House Rep. No. 350, 67th Cong., 1st sess., p. 15.

[5] See Sen. Rep. No. 275, 67th Cong., 1st sess., p. 25.

Second. The question of power to lay the tax. As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711; *Knox* v. *Lee,* 12 Wall. 457, 555, 556. "We should hesitate long," we said in *Mackenzie* v. *Hare,* 239 U. S. 299, 311, "before limiting or embarrassing such powers." So far as our relation to other nations is concerned, and apart from any self-imposed constitutional restriction, we cannot fail to regard the property in question as being within the jurisdiction of the United States,—that is, it was property within the reach of the power which the United States by virtue of its sovereignty could exercise as against other nations and their subjects without violating any established principle of international law. This view of the scope of the sovereign power in the matter of the taxation of securities physically within the territorial limits of the sovereign is sustained by high authority and is a postulate of legislative action in other countries. The subject was considered by the House of Lords in *Winans* v. *Attorney-General,* [1910] A. C. 27. The question was as to the liability to estate duty, under the British Finance Act, 1894, of bonds and certificates when these were physically situated in the United Kingdom at the death of the owner, who was a citizen of the United States and domiciled here. The securities were payable to bearer, marketable on the London Stock Exchange, and passed by delivery. The executors insisted that "the property did not pass by the law of the United Kingdom but by the law of the deceased's domicile"; that "the presence in the United Kingdom of the documents of title to the property did not create a liability to estate duty"; that "all the debtors on the bonds and certificates were at the time of the death and all material times outside the

United Kingdom and beyond its jurisdiction"; that "the marketability of a piece of paper in the United Kingdom was not sufficient to make the debt of which it was evidence liable to estate duty"; and that "the property was not situate in the United Kingdom." The House of Lords was not convinced by these contentions. The Lord Chancellor observed that "the property received the full protection of British laws—which is a constant basis of taxation—and can only be transferred from the deceased to other persons by the authority of a British Court." *Id.*, p. 30. Lord Atkinson referred to the status of the securities under international law. "Being physically situated in England at the time of their owner's death," said his Lordship, "they were subject to English law and the jurisdiction of English Courts, and taxes might therefore *prima facie* be leviable upon them. . . . There does not appear, a priori, to be anything contrary to the principles of international law, or hurtful to the polity of nations, in a State's taxing property physically situated within its borders, wherever its owner may have been domiciled at the time of his death." *Id.*, p. 31. And Lord Shaw of Dunfermline summed up the application of the British acts as follows: "In the case of an English citizen all his property 'wheresoever situate,' subject to the exception in the Act, is aggregated, and into that aggregation—to confine oneself to the matter in hand—all personal property situate out of the United Kingdom must come, unless legacy or succession duty would not have been payable in respect thereof. In the case of the foreign citizen no taxation, of course, falls, except upon property situate within the United Kingdom, and I know no reason either under the law of nations, by the custom of nations, or in the nature of things why property within the jurisdiction of this country, possessed and held under the protection of its laws, should not, upon transfer from

the dead to the living, pay the same toll which would have been paid by property enjoying the same protection but owned by a deceased British subject." *Id.*, pp. 47, 48. In this view, the securities were held to be subject to the estate duty.[6]

In *Disconto-Gesellschaft* v. *U. S. Steel Corp.*, 267 U. S. 22, a somewhat analogous question of jurisdiction arose in relation to the title to shares of stock of an American corporation, which were owned by German corporations, and the certificates of which had been seized in London by the British Public Trustee appointed to be custodian of enemy property during the late war. As was found to be usual with shares which it was desired to deal in abroad, the shares had been registered on the books of the American corporation in the name of an English broker or dealer who had endorsed the certificates in blank. The German corporations had bought the shares and held the certificates in London. Their suit here was to establish title, to cancel outstanding certificates and to have new certificates issued to them. They based their claim on the proposition that seizure of the certificates in Great Britain did not constitute a seizure of the shares; that the presence of the certificates did not bring the shares within the territorial jurisdiction of Great Britain. This Court took a different view and sustained the title of the British Public Trustee. The Court thus stated the basis of its ruling: "New Jersey having authorized this corporation like others to issue certificates that so far represent the stock that ordinarily at least no one can get the benefits of ownership except through and by means of the paper, it recognizes as owner anyone to whom the person declared

[6] See, also, as to taxation in Italy, U. S. Department of Commerce's pamphlet entitled "Taxation of Business in Italy," Trade Promotion Series—No. 82 (1929); sub tit. "Tax on Successions," p. 105; as to taxation in France, see "French Fiscal Legislation," Neurrisse and Bezoz (1928), pp. 151–153.

by the paper to be owner has transferred it by the indorsement provided for, wherever it takes place. It allows an indorsement in blank, and by its law as well as by the law of England an indorsement in blank authorizes anyone who is the lawful owner of the paper to write in a name, and thereby entitle the person so named to demand registration as owner in his turn upon the corporation's books. But the question who is the owner of the paper depends upon the law of the place where the paper is. It does not depend upon the holder's having given value or taking without notice of outstanding claims but upon the things done being sufficient by the law of the place to transfer the title. An execution locally valid is as effectual as an ordinary purchase. *Yazoo & Mississippi Valley R. Co.* v. *Clarksdale,* 257 U. S. 10. The things done in England transferred the title to the Public Trustee by English law." The Court thought it "so plain that the Public Trustee got a title good as against the plaintiffs by the original seizure" that it was deemed unnecessary to advert to the treaties upon which the Public Trustee also relied or upon the subsequent dealings between England and Germany. *Id.,* pp. 28, 29.

As jurisdiction may exist in more than one government, that is, jurisdiction based on distinct grounds—the citizenship of the owner, his domicile, the source of income, the situs of the property—efforts have been made to preclude multiple taxation through the negotiation of appropriate international conventions. These endeavors, however, have proceeded upon express or implied recognition, and not in denial, of the sovereign taxing power as exerted by governments in the exercise of jurisdiction upon any one of these grounds. For many years this subject has been under consideration by international committees of experts, and drafts of conventions have been proposed, the advantages of which lie in the mutual concessions or reciprocal restrictions to be voluntarily made or accepted

by Powers freely negotiating on the basis of recognized principles of jurisdiction.[7] In its international relations, the United States is as competent as other nations to enter into such negotiations, and to become a party to such conventions, without any disadvantage due to limitation of its sovereign power, unless that limitation is necessarily found to be imposed by its own Constitution.

Respondents urge that constitutional restriction precluding the federal estate tax in question is found in the due process clause of the Fifth Amendment. The point, being solely one of jurisdiction to tax, involves none of the other considerations raised by confiscatory or arbitrary legislation inconsistent with the fundamental conceptions of justice which are embodied in the due process clause for the protection of life, liberty and property of all persons—citizens and friendly aliens alike. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489; *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Heiner* v. *Donnan,* 285 U. S. 312, 326. If in the instant case the Federal Government had jurisdiction to impose the tax, there is manifestly no ground for assailing it. *Knowlton* v. *Moore,* 178 U. S. 41, 109; *McCray* v. *United States,* 195 U. S. 27, 61; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 153, 154; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 24; *United States* v. *Doremus,* 249 U. S. 86, 93. Respondents' reliance is upon the decisions of this Court with respect to the limitation of the taxing power of the States under the due process

[7] Publication entitled "*Double Taxation Relief,*" Bureau of Foreign and Domestic Commerce, Department of Commerce (January, 1928), pp. 20, 21; "*Double Taxation and Tax Evasion,*" Report of the General Meeting of Government Experts to League of Nations, Document C. 562, M. 178, 1928, II, 49, pp. 22–24; Fifth General Congress, International Chamber of Commerce, Amsterdam, 1929, Resolution No. 1, Annex, p. 11; Washington Congress, 1931, International Chamber of Commerce, Resolution No. 10, pp. 20–22. See also, "*Taxation of Foreign and National Enterprises,*" (League of Nations, Geneva, 1932).

clause of the Fourteenth Amendment. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312. They insist that the like clause of the Fifth Amendment imposes a corresponding restriction upon the taxing power of the Federal Government.

The argument is specious, but it ignores an established distinction. Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. In *Farmers Loan & Trust Co.* v. *Minnesota, supra,* the Court applied the principle to intangibles, and referring to the contrary view which had prevailed, said (p. 209): "The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resorting to reciprocal exemption laws." It was this "rule of immunity from taxation by more than one State," deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank* v. *Maine, supra,* p. 326.

As pointed out in the opinion in the *First National Bank* case, the principle has had a progressive application.

In *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, the question related to a ferry franchise granted by Indiana to a Kentucky corporation, which Kentucky attempted to tax. Despite the fact that the tax was laid upon a property right belonging to a domestic corporation, the Court held that the Fourteenth Amendment precluded the imposition. *Id.,* p. 398. In *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, the principle was applied to the attempted taxation by Kentucky of tangible personal property which was owned by a domestic corporation but had a permanent situs in another State. The Court decided that where tangible personal property had an actual situs in a particular State, the power to subject it to state taxation rested exclusively in that State regardless of the domicile of the owner. By *Frick* v. *Pennsylvania,* 268 U. S. 473, the rule became definitely fixed that as to tangible personal property the power to impose a death transfer tax was solely in the State where the property had an actual situs, and could not be exercised by another State where the decedent was domiciled. See *First National Bank* v. *Maine, supra,* p. 322. The decision in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* overruling *Blackstone* v. *Miller,* 188 U. S. 189, carried forward the principle by applying it to intangibles. The Court was of the opinion that "the general reasons declared sufficient to inhibit taxation of them [tangibles] by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation is matter of the greatest moment." 280 U. S. pp. 211, 212.

But it has been as decisively maintained that this principle, thus progressively applied in limiting the jurisdiction of the States to tax, does not restrict the taxing power of the Federal Government. The distinction was clearly and definitely made in *United States* v. *Bennett,* 232 U. S. 299. The question arose under § 37 of the Tariff Act of August 5, 1909, 36 Stat. 112, imposing a tax upon the use of foreign-built yachts, owned or chartered by citizens of the United States. The levy of the tax with respect to a yacht owned by a citizen of the United States, domiciled here, but which was not used within the jurisdiction of the United States and had its permanent situs in a foreign country, was resisted under the due process clause of the Fifth Amendment. The objector invoked the doctrine, already established, which denied to a State, under the Fourteenth Amendment, jurisdiction to tax personal property which had a permanent situs in another State. *Union Refrigerator Transit Co.* v. *Kentucky, supra.* Under that doctrine, as we have seen, it made no difference that the owner of the property was a citizen of, or domiciled in, the State which attempted to lay the tax. The argument was pressed that the Federal statute should not be so construed as to apply to the use of a yacht wholly beyond the territorial limits of the United States, since if so interpreted it would be repugnant to the Constitution. But the Court thought that to apply that rule of interpretation would be to cause " an imaginary doubt " as to the constitutionality of the statute, and would render it necessary to give the statute " a wholly fictitious and unauthorized meaning." We found nothing " of such gravity in the asserted constitutional question " as to justify departing from the evident legislative intention. Speaking through Chief Justice White, and fully recognizing the principle applicable to the taxing power of the States, the Court observed

that the argument involved a misapprehension, not as to what had actually been decided, but "in taking for granted that because the doctrine stated has been applied and enforced in many decisions with respect to the taxing power of the States, that the same principle is applicable to and controlling as to the United States in the exercise of its powers." "The confusion results"—the Court continued—"from not observing that the rule applied in the cases relied upon to many forms of exertion of state taxing power is based on the limitations on state authority to tax resulting from the distribution of powers ordained by the Constitution. In other words, the whole argument proceeds upon the mistaken supposition, which is sometimes indulged in, that the calling into being of the government under the Constitution, had the effect of destroying obvious powers of government instead of preserving and distributing such powers. The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins." "But this," the Court added, "has no application to the Government of the United States so far as its admitted taxing power is concerned," for that power "embraces all the attributes which appertain to sovereignty in the fullest sense. . . . Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier

around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty." *Id.*, pp. 305, 306.

This distinction between the limitations of state jurisdiction to tax and the broad authority of the Federal Government, was restated and applied in *Cook* v. *Tait*, 265 U. S. 47, 55, 56, and was again explicitly recognized in *Frick* v. *Pennsylvania, supra,* p. 491.

The distinction cannot be regarded as limited to tangible property. It has equal application to intangibles. It does not rest upon the question whether the property is of the one sort or the other, but upon the fact that the limitation of state jurisdiction to tax does not establish the limitation of federal jurisdiction to tax. If the Federal Government may rest its jurisdiction to lay its tax upon the fact of the citizenship and domicile in this country of the owner of tangible property, wherever that property may be situated, although the State may not impose a like tax with respect to property having a permanent location outside the State, the Federal Government cannot be regarded as restrained in its power to tax securities owned by a nonresident, but physically in this country, merely because the State is debarred from laying such a tax with respect to a nonresident of the State. The decisive point is that the criterion of state taxing power by virtue of the relation of the States to each other under the Constitution is not the criterion of the taxing power of the United States by virtue of its sovereignty in relation to the property of nonresidents. The Constitution creates no such relation between the United States and foreign countries as it creates between the States themselves.

Accordingly, in what has been said, we in no way limit the authority of our decisions as to state power. We

determine national power in relation to other countries and their subjects by applying the principles of jurisdiction recognized in international relations. Applying those principles we cannot doubt that the Congress had the power to enact the statute, as we have construed and applied it to the property in question. The securities should be included in the gross estate of the decedent; the inclusion of the balance of the cash deposit will depend, under the statute, upon the finding to be made with respect to the nature of the business of the concern with which the deposit was made.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BUTLER is of opinion that the statute does not extend to the transfer of the foreign or other securities effected by the death of decedent, Ernest Augustus Brooks, a British subject resident of and dying in Cuba, and that the conclusions of the Board of Tax Appeals and Circuit Court of Appeals are right and should be affirmed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, v. S. & L. BUILDING CORP.

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

No. 475. Argued February 10, 1933.—Decided March 13, 1933.

Under § 212 (d) of the Revenue Act of 1924, where real estate is sold on the instalment plan and the initial payments do not exceed one-fourth of the purchase price, the vendor is permitted, under regulations to be prescribed by the Commissioner with the approval of the Secretary, to return as income in any taxable year that proportion of the instalment payments "actually received" in that year which the total profit realized, or to be realized when the payment is completed, bears to the total "contract price." *Held:*

1. That a Treasury regulation providing that, as to property sold subject to an existing mortgage payable in instalments which the purchaser assumes, the amount of such mortgage, " to the extent that it does not exceed the basis to the vendor of the property sold," shall be included as part of the purchase price in finding the vendor's profit, but shall not be considered as part of the initial payments or of the total " contract price," is a valid application of the statute. P. 412.

2. An excess of the assumed mortgage over the base or depreciated cost of the property to the vendor was properly treated as if received in money by the vendor in the year of sale. P. 414.

60 F. (2d) 719, reversed.

CERTIORARI, 287 U. S. 593, to review the reversal of a ruling of the Board of Tax Appeals, 19 B. T. A. 788, sustaining deficiency income tax assessments.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key* and *John MacC. Hudson* were on the brief, for petitioner.

Mr. Leo H. Hoffman, with whom *Mr. George W. Perper* was on the brief, for respondent.

Section 212 (d) provides a new method for taxing gross profits realized from instalment sales of property. It was designed to allow a taxpayer to spread the profit over the whole period during which payments were made, so as to avoid loading all of it upon those years which followed the amortization of the original cost. The formula determining the profit reportable on the instalment sales is found in the statute itself. In this formula the term " total contract price " is used. This term, if to be applied at all to the sales of real property, includes the mortgages assumed by the purchaser.

The regulations adopted by the Commissioner are not consistent in the interpretation of the statute, for the reason that the words of the statute are read in one sense in one connection and differently in another. The Com-

missioner includes all assumed mortgages in the "purchase price," but excludes them to the extent they exceed the "basis" from the "initial payments" and the "total contract price." The effect of this is to treat as "instalments actually received" in the year of sale that portion of the mortgages assumed by the vendee which exceeds the "base." Again, this excess of mortgages assumed over the base is excluded from the denominator of the fraction to be applied to each "instalment actually received" to determine the taxable profit included in that instalment; while the minuend for determining the total taxable profit includes all of the mortgages assumed.

To be consistent, the regulations should include the payments made by the purchasers to the mortgagees on the mortgages assumed as part of the "initial payments" and as part of "instalment payments actually received," as those terms are used in § 212 (d). The application of this method would result in there being no excess of the mortgages assumed over the basis of property in calculating profits on the instalment plan.

The decision below is consistent with the general scheme of the Revenue Acts and recognized accounting principles, and gives effect to the purpose of the statute.

Mr. Justice McReynolds delivered the opinion of the Court.

The respondent, Building Corporation, sought redetermination of deficiency income taxes for 1924 and 1925. The Board of Tax Appeals sustained the Commissioner's final action of June 17, 1930; the court below reversed its judgment. The point now in controversy has relation to the distribution for taxation of income derived from sales on the installment plan of two pieces of real estate on 82nd and 83rd Streets, New York City. Each was covered by one or more mortgages which the purchaser assumed.

The Revenue Act 1926, c. 27, 44 Stat. 9, 23, 39, 41, § 230, lays a tax upon the net income of corporations. Section 232 provides—" In the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by sections 234 and 206, and the net income shall be computed on the same basis as is provided in subdivisions (b) and (d) of section 212 or in section 226."

" Sec. 212 (b) The net income shall be computed . . . in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but . . . if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. . . .

"(d) Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the payment is completed, bears to the total contract price. In the case (1) of a casual sale or other casual disposition of personal property for a price exceeding $1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed one-fourth of the purchase price, the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this subdivision. As used in this subdivision the term 'initial payments' means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made."

"Sec. 1208. The provisions of subdivision (d) of section 212 shall be retroactively applied in computing income under the provisions of . . . the Revenue Act of 1924, . . ."

Treasury Regulations 69, Article 44, promulgated August 28, 1926—as amended in 1929:—

"Art. 44. Sale of real property involving deferred payments.—Under section 212 (d) deferred-payment sales of real property fall into two classes when considered with respect to the terms of sale, as follows:

"(1) Sales of property on the installment plan, that is, sales in which the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale is made do not exceed one-fourth of the purchase price.

"(2) Deferred-payment sales not on the installment plan, that is, sales in which the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale is made exceed one-fourth of the purchase price.

"Sales falling within class (1) and class (2) alike include (a) agreements of purchase and sale which contemplate that a conveyance is not to be made at the outset, but only after all or a substantial portion of the purchase price has been paid, and (b) sales where there is an immediate transfer of title, the vendor being protected by a mortgage or other lien as to deferred payments.

"In the sale of mortgaged property the amount of the mortgage, whether the property is merely taken subject to the mortgage or whether the mortgage is assumed by the purchaser, shall be included as a part of the 'purchase price,' but the amount of the mortgage, to the extent it does not exceed the basis to the vendor of the property sold, shall not be considered as a part of the 'initial payments' or of the 'total contract price,' as those terms are used in section 212 (d), in articles 42 and

45, and in this article. Commissions and other selling expenses paid or incurred by the vendor are not to be deducted or taken into account in determining the amount of the 'initial payments,' the 'total contract price,' or the 'purchase price.'

"Art. 45. Sale of real property on installment plan.—In transactions included in class (1) in article 44, the vendor may return as income from such transactions in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the property is paid for bears to the total contract price."

In 1924 respondent sold the 82nd Street property, then under mortgage which it had executed to secure a loan of $1,100,000, payable in semi-annual installments of $22,000 until 1933, when the balance would become due. The purchaser assumed the mortgage; paid $300,000 in cash; agreed to pay $700,000, and secured this by a purchase-money mortgage. Upon the latter mortgage $30,000 was paid in 1924 and $36,250 in 1925. In 1924 and 1925, respectively, the purchaser paid upon the assumed mortgage $22,000 and $24,000.

The Commissioner estimated the depreciated cost of the property at $1,541,323.48. Subtracting this from the total sale price, $2,100,000, he ascertained realized profit—$558,676.52.

He ruled that for 1924 the taxable sum was the same proportion of the amount actually received during the year ($330,000) as the entire profit ($558,676.52) was of the total ($1,000,000) payable directly to the taxpayer—55% plus. He excluded the assumed mortgage from the total used for determining the applicable percentage, and held "total contract price" was what the purchaser agreed to pay directly to the vendor—the whole amount which the taxpayer expected to receive in money.

Payments received by respondent during 1925 were likewise assessed.

In 1925 respondent sold the 83rd Street property, then subject to two mortgages which it had executed to secure loans of $1,100,000 and $500,000 respectively, payable in installments—six and three months—until 1933 and 1934, when the balance would become due. The purchaser assumed both mortgages; paid $300,000 in cash; and agreed to pay $265,000, and secured this by a purchase-money mortgage. On the latter obligation $2,000 was paid in 1925. During 1925 the purchaser paid on the assumed second mortgage $22,500.

The Commissioner fixed the depreciated cost of the property at $1,522,035. Subtracting this from the total sale price, $2,165,000, he found the realized profit—$642,967. He ruled that the difference ($77,967) between the base, or depreciated cost ($1,522,033) and the total of the assumed mortgages ($1,600,000) should be treated as if received in money by the taxpayer during 1925; also, that the sum subject to taxation in 1925 was the same proportion of what the taxpayer received, actually and constructively, during the year ($302,000 plus $77,967) as the realized profit ($642,967) was of the total amount ($565,000) which the purchaser agreed to pay directly to the taxpayer—100% plus.

He excluded the amount of the assumed mortgages from the totals used to determine the applicable percentage, and payments on them were not regarded as received by the vendor. He also treated as if cash received by the vendor in 1925, the difference between the depreciated cost and the total of the assumed mortgages. "Total contract price" was held to be the total amount payable directly to the vendor.

The respondent maintains that the assumed mortgages should be regarded as part of the contract price, and payments upon them by the purchaser should be treated as money received by the vendor. In this way, it is said,

the tax would be spread over the entire life of the assumed mortgage. And it further insists that the excess of the assumed mortgages over the depreciated value of the 83rd Street property should not be regarded as if money actually received by the vendor during 1925.

Respondent's books were kept upon the accrual basis; but all agree that in the circumstances the Revenue Act of 1926 permitted assessments upon the installment basis. The Commissioner undertook to act according to his prescribed regulations.

Prior to the Act of 1926, the Revenue Acts definitely recognized only two bases for tax returns—cash and accrual. Where sales were upon the installment plan, application of either of these bases led to hardship; payment of the total tax on ascertained profit was often required in a single year. By regulations the Commissioner offered some alleviation; the vendor was allowed to distribute the profit through the years during which purchase-money was actually received. The general principle underlying these regulations was to make division of partial payments and apply part as return of capital and part to profit. In 1926 the Board of Tax Appeals disapproved of the earlier regulations and pointed out that the statutes permitted returns only upon the cash or accrual basis. Thereupon, Congress enacted § 212 (d), above quoted. The end in view was to permit the Commissioner to make assessments according to the general principle theretofore followed under regulations deemed appropriate to the varying situations. The new plan was optional; taxpayers were allowed to elect whether to make returns under the regulations upon the new basis or upon one of the old bases.

The Conference Report to the House, on Revenue Act of 1926, p. 32, H. R., Vol. I, 69th Cong., 1st Sess., 1925–1926, declares concerning § 212 (d): "This amendment

writes into the bill the basic principles of the installment method authorized by prior regulations." See Report Senate Committee on Finance, No. 52, 69th Congress.

Installment sales of real estate encumbered by liens give rise to many complications which Congress could not readily foresee. Accordingly, it entrusted to the Commissioner wide discretion in respect of details. And considering the practical requirements of the taxing system, we think the regulations now challenged constitute a fair attempt to effectuate the legislative intent. They are within the broad discretion granted to the Commissioner and violate no definite provision of the statute.

The amounts which respondent realized as profits are not in question. These were subject to taxation either upon the accrual basis or, at the taxpayer's option, on the installment basis. Generally, the Commissioner's regulations permitted the tax payments to be spread over the period during which the taxpayer would receive funds, and divided these partly into return of capital and partly into profits actually collected. The method suggested by the respondent would inevitably lead to many practical difficulties; might postpone collection far beyond the time when the vendor would receive any direct payments; and probably would render impossible determination from the taxpayer's books of what he should account for.

The Commissioner's treatment of the excess of the mortgages on the 83rd Street property over the base cost followed the general purpose to place reasonable limitation upon the spread of the tax. It was appropriate in the unusual circumstances presented—certainly not prohibited. It was a practical way to accomplish the end. Some possible departure from the method prescribed for ordinary circumstances is not enough to destroy what he deemed necessary to meet unusual conditions.

The excess of $77,967 under the sale agreement would never actually come into the vendor's hands, but it rep-

resented part of the admitted profits and was subject to taxation. No positive provision in the statute required that it be spread over subsequent years, and we think there was nothing illegal or oppressive in treating this as if an actual payment. The taxpayer has been treated more leniently than if required to report upon the accrual basis. The Regulations were not contrary to any positive provisions of the statute and, as said by the Board of Tax Appeals, were "both equitably and legally sound."

Since 1926, the Board has consistently upheld the Commissioner's regulations as to profits on installment sales. Frank J. Bosshardt, 4 B. T. A. 1262; Dalriada Realty Co., Inc., 5 B. T. A. 905; Pacheco Creek Orchard Co., 12 B. T. A. 1358; Katherine H. Watson, 20 B. T. A. 270; Fifty-three West Seventy-second Street, Inc., 23 B. T. A. 164; Metropolitan Properties Corp., 24 B. T. A. 220. And the Revenue Acts of 1928 and 1932 substantially reënacted the pertinent provision of the Act of 1926.

The Commissioner and Board of Tax Appeals have practical knowledge of the intricate details incident to tax problems, and their determination in circumstances like those under consideration here should be given effect when not clearly contrary to the will of Congress.

Reversed.

ARTHUR C. HARVEY CO. v. MALLEY ET AL., FORMER COLLECTORS.

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

No. 537. Argued February 16, 17, 1933.—Decided March 13, 1933.

1. Judgment in a law case tried without a jury pursuant to Rev. Stats. §§ 649 and 700 (28 U. S. C. §§ 773, 875), is not reviewable where no special findings of fact were made, where no rulings in the progress of the trial were excepted to at the time and duly presented by bill of exceptions, and where the assignments of error

present no substantial question on the pleadings but are directed to the reasons set forth in an opinion of the judge for ordering the judgment. *Fleischmann Co.* v. *United States,* 270 U. S. 349. P. 418.

2. Affirmance by this Court of a judgment of the Circuit Court of Appeals upon the ground that no substantial question was presented to that court by the assignments of error, does not imply approval of that court's decision of other questions, not properly before it. P. 419.

60 F. (2d) 97; 61 *id.* 365, affirmed.

CERTIORARI, 287 U. S. 596, to review the affirmance of a judgment against the present petitioner in an action to recover from two former collectors of internal revenue an alleged overpayment of income taxes.

Mr. O. Walker Taylor for petitioner.

Mr. Paul D. Miller, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Francis H. Horan,* and *Henry C. Clark* were on the brief, for respondents.

Mr. Daniel Austin Shirk, by leave of Court, filed a brief as *amicus curiae.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioner sued respondents in the United States District Court for Massachusetts to recover alleged overpayment of taxes. After waiver of trial by jury, the judge heard the cause upon the pleadings and evidence and gave judgment for the respondents. The reasons therefor were stated in an opinion dealing generally with the issues of law and fact. The Circuit Court of Appeals affirmed this judgment and undertook to support its action by an opinion. 60 F. (2d) 97. A duly authenticated bill of exceptions setting forth the evidence and the proceedings at the trial is in the record; also, appropriate assignments of

error. No assignment makes substantial claim of error based upon the pleadings alone.

The Circuit Court of Appeals rightly found—

"There was a waiver of a jury trial and the case was heard by the judge without a jury. A request for findings of fact and rulings of law was made by the plaintiff, but no special findings were made nor were the requested rulings of law either made or refused, nor were any exceptions to a refusal to rule as requested 'taken in the course of the trial.' So far as any rulings of law were made 'in the course of the trial,' with one exception they were in favor of the plaintiff, and though an exception was allowed in this instance, it is not relied upon in the assignments of error. . . . The findings of fact are general, and no rulings of the court were excepted to 'during the course of the trial,' which are relied on. Exceptions, following an order of judgment, to alleged rulings in a written opinion of the judge assigning reasons for ordering a judgment for either party, are not rulings in the course of the trial. . . . Each of the assignments of error in this case relates either to matters of fact or to conclusions of law embodied in the opinion. These are not open to review, as there were no special findings of fact and no exceptions to rulings on matters of law were taken during the course of the trial and duly preserved by a bill of exceptions, and no questions of law favorable to the plaintiff are raised on the pleadings."

Notwithstanding the condition of the record, the appellate court proceeded to discuss sundry questions beyond the pleadings, not pertinent because not properly raised, and decided them against the petitioner. The challenged judgment was rightly affirmed; but this should have been done upon the ground that the assignments of error presented for consideration no substantial question of law or fact.

The Revised Statutes, as amended, provide—

"Sec. 649. Issues of fact in civil cases in any circuit [district] court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (U. S. C., Title 28, § 773.)

"Sec. 700. When an issue of fact in any civil cause in a circuit [district] court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court [Circuit Court of Appeals] upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." (U. S. C., Title 28, § 875.)

In *Fleischmann Co.* v. *United States*, 270 U. S. 349, 355, 356, 357, this Court construed and applied the above sections, and the doctrine there approved is decisive of the present cause. Through Mr. Justice Sanford, we said—

"The opinion of the trial judge, dealing generally with the issues of law and fact and giving the reasons for his conclusion, is not a special finding of facts within the meaning of the statute. . . . And it is settled by repeated decisions, that in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute. . . . To obtain a review by an appellate court of the conclusions of law a party must either obtain from the

trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. . . .

"These rules necessarily exclude from our consideration all the questions presented by the assignment of errors except those arising on the pleadings. All the others relate either to matters of fact or to conclusions of law embodied in the general finding. These are not open to review, as there were no special findings of fact and no exceptions to the rulings on matters of law were taken during the progress of the trial or duly preserved by a bill of exceptions. The defendants offered no exceptions to the rulings of the court until after the writ of error had issued, transferring jurisdiction of the case to the Court of Appeals. And the recitals in the subsequent 'bills of exceptions' that the exceptions, then for the first time presented, were to be taken as made before the entry of the judgment are nugatory. A bill of exceptions is not valid as to any matter which was not excepted to at the trial. . . . And it cannot incorporate into the record *nunc pro tunc* as of the time when an exception should have been taken, one which in fact was not then taken.

"The statute, however, relates only to those rulings of law which are made in the course of the trial, and by its terms has no application to the preliminary rulings of the District Judge made, in the exercise of his general authority, before the issues are submitted to him for hearing under the statutory stipulation. Such rulings on the pleadings and the sufficiency of the complaint are therefore subject to review as in any other case, independently of the statute."

And see *Wilson* v. *Merchants' Loan & Trust Co.*, 183 U. S. 121, 127; *Martinton* v. *Fairbanks*, 112 U. S. 670.

As the assignments of error presented no substantial point based upon the pleadings, and the discussion of the court related to points not properly before it, affirmance

of the judgment by us does not indicate approval of what was said in respect of those points.

Affirmed.

McDONNELL v. UNITED STATES.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 330. Argued January 17, 1933.—Decided March 13, 1933.

1. Paragraph (e) of § 278 of the Revenue Act of June 2, 1924, providing: "This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made or distraint or proceeding in court begun, before the enactment of this Act," does not render invalid waivers executed after the date of the Act, with respect to income taxes, the assessment and collection of which had become barred before that date. P. 422.
2. The purpose of paragraph (d) of § 250 of the Revenue Act of 1921, and paragraph (c) of § 278 of the Revenue Act of 1924, was not to grant authority for waivers or to limit their effect, but to remove doubt of their validity by expressly recognizing them. P. 423.
3. Paragraph (e) of § 278 of the 1924 Act does not qualify paragraph (c). P. 424.

75 Ct. Cls. 155; *id.* 186; 59 F. (2d) 290, affirmed.

CERTIORARI, 287 U. S. 589, to review a judgment rejecting claims for the recovery of money paid under income tax assessments.

Mr. Robert Ash for petitioners.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Whitney North Seymour, H. Brian Holland,* and *Erwin N. Griswold* were on the brief, for the United States.

Messrs. Fred A. Woodis and *Francis R. Lash,* by leave of Court, filed a brief as *amici curiae.*

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* Together with No. 331, *Truda* v. *United States.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases arose out of the same transaction and present, on substantially the same facts, the same question of law. Reference will be made in the opinion only to the McDonnell case.

The action was brought by McDonnell in the Court of Claims on November 4, 1929 to recover $4,549.03 with interest from the date of payment, October 23, 1926. McDonnell filed his individual income-tax return for 1917 on April 1, 1918, and paid the amount shown thereon to be due. The sum now sought to be recovered was paid to the collector of internal revenue for the Second District of New York pursuant to an assessment of an additional income tax for the year 1917, which was made by the Commissioner of Internal Revenue on October 9, 1926. There had been a waiver on February 23, 1926 of the statutory limitation upon the time for making the assessment. Claims for refund were made on December 27, 1928 and May 31, 1929, alleging that the waiver was invalid and that the amount claimed was collected after the running of the statute. The claims for refund were rejected on March 6, 1929 and July 25, 1929. The Court of Claims entered judgment for the defendant. 75 Ct. Cls. 155, 186; 59 F. (2d) 290. Because of conflict of the decision with that in *Uncasville Manufacturing Co.* v. *Commissioner,* 55 F. (2d) 893, certiorari was granted, limited to the question of the validity of the waiver under § 278 (e) of the Revenue Act of 1924. 287 U. S. 589.

The waiver was given under the following circumstances. McDonnell was in 1917 a member of the firm of McDonnell & Truda, which in that year filed its income tax return and paid the taxes therein shown to be due. On March 18, 1923, that is, within five years after the filing of the return and before the expiration of the period allowed by § 250 (d) of the Revenue Act of 1921 for

assessment and collection of an additional tax, the Commissioner made a jeopardy assessment against the firm of $100,005.14. On November 30, 1925, that is, after the expiration of the statutory period for making an additional assessment against the plaintiff, the Commissioner notified the plaintiff that the amount payable by the firm for additional tax should, because of errors, be reduced to $24,863.28; but that a reduction of the liability of the partnership necessitated additional taxes to the individual members of the firm; and that he would not make the reduction to the firm unless plaintiff and his partner would waive the statute of limitations so as to permit additional individual taxes and would pay the amounts assessed against them. Each gave the waiver requested and paid the amount now sought to be recovered.

It is conceded by McDonnell that the tax was payable, unless it was barred by the period of limitations prescribed in § 250 (d) of the Revenue Act of 1921 or § 277 (a) (2) of the Revenue Act of 1924. It is conceded by the Government that it was so barred, unless the limitation was removed by the waiver signed by McDonnell on February 23, 1926, which, by its terms, purported to extend to December 31, 1926 the time within which the Commissioner could assess additional taxes for the year 1917.

McDonnell claims that the Revenue Act of June 2, 1924 renders the waiver ineffective, because the assessment of the tax had been barred on April 1, 1923. The contention is that, since the period of limitation had expired before the passage of the 1924 Act, the waiver was inoperative under the express terms of paragraph (e) of § 278 of that Act, which declares:

" This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the

period of limitation then in existence, or (2) affect any assessment made or distraint or proceeding in court begun, before the enactment of this Act." [1]

The contention of the petitioner, expressed in different terms, is that waivers executed subsequent to June 2, 1924 are invalid where the date of filing the return was such that the five-year period for assessment elapsed before June 2, 1924. Obviously, the waiver would have been good if executed before June 2, 1924, the period of limitation expiring when it did; for in that event the assessment would not have been " barred by the period of limitation " at the time of the enactment of the 1924 Act. The fact that the waiver was executed after the running of the statute of limitations does not render it invalid. *Burnet* v. *Chicago Railway Equipment Co.*, 282 U. S.

[1] Act of June 2, 1924, c. 234, § 278 (e), 43 Stat. 253, 299, 300. The preceding paragraphs of the section are as follows:

"(a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

"(b) Any deficiency attributable to a change in a deduction tentatively allowed under paragraph (9) of subdivision (a) of section 214, or paragraph (8) of subdivision (a) of section 234, of the Revenue Act of 1918 or the Revenue Act of 1921, may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

"(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

"(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

295, 298–299; *Stange* v. *United States,* 282 U. S. 270, 273–275. And confessedly, the waiver would have been good, executed when it was, if the period of limitation had expired after June 2, 1924.

Nothing in the legislative history of § 278 indicates an intention to exclude cases like that at bar from the generality of those in which waivers may be given. The purpose of Congress in enacting paragraph (c) of § 278 indicates the contrary. Prior to the 1921 Act there was no statutory provision expressly authorizing waivers; but their execution had grown out of administrative practice. Doubt as to their validity in the absence of statute, however, had been raised; and the doubt in that situation was not removed until the decision in *Aiken* v. *Burnet,* 282 U. S. 277. The purpose of Congress in enacting paragraph (d) of § 250 of the Revenue Act of 1921 and paragraph (c) of § 278 of the Revenue Act of 1924 was not to grant authority for waivers or to limit their effect, but to remove that doubt by expressly recognizing them. The latter paragraph substantially reënacted paragraph (d) of § 250 of the Revenue Act of 1921.[2]

Both the language and the purpose of paragraph (e) are consistent with this view. It was pointed out in *Burnet* v. *Chicago Railway Equipment Co.,* 282 U. S. 295, 300, note 5, that paragraph (e) cannot have been intended to qualify every other subdivision in § 278. The petitioner assumes, in fact, that it does not qualify subdivisions (a) and (b), which provide, respectively, for assessment at any time in the case of false or fraudulent returns or failure to file returns, and in the case of deficiencies attributable to a change in deductions taken in amortization of war investments. That paragraph (e) does qualify paragraph (d), which extends the period in

[2] See H. Rep. No. 179, 68th Cong., 1st Sess., p. 26; S. Rep. No. 398, 68th Cong., 1st Sess., p. 32.

which collection may be made to six years after assessment, was decided in *Russell* v. *United States,* 278 U. S. 181. The petitioner argues that since paragraph (d) relates only to collection, and since the qualifications of paragraph (e) apply in terms to assessments as well, the latter paragraph must limit paragraph (c), the only remaining subdivision. But this conclusion does not necessarily follow. Congress may have inserted the reference to "assessments" in paragraph (e) in order to make it clear that the extension of time for collections should in no event be regarded as authorizing an assessment already barred by the applicable statute of limitations. Moreover, paragraph (d) alone marked a change in the policy of Congress.[3] Paragraph (e) was inserted to prevent the section from being given a "retroactive effect."[4] To apply it to paragraph (c) would not serve that function. On the contrary, it would serve to cause a break in the policy of giving effect to waivers,—a policy expressly adopted in the Act of 1921 and avowedly continued by the Act of 1924. The disclaimer of an intention to "authorize an assessment" where "such assessment" was already barred cannot be taken to refer to assessments

[3] See the committee reports, *loc. cit. supra,* note 2; also Hearings on H. R. 6715 before Senate Committee on Finance, 68th Cong., 1st Sess., pp. 36, 39. As originally drafted, paragraph (d) authorized collection without limitation of time. See Hearings, *supra,* p. 39; Statement of Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, Senate Committee on Finance, 68th Cong., 1st Sess., p. 27. The limitation on collections of six years from the date of assessment was proposed by the Senate and agreed to by the House. See Conference Report, H. R. No. 844, 68th Cong., 1st Sess., p. 24. The 1921 Act, § 250 (d), had imposed a limit on collections of five years from the date of return. See *Russell* v. *United States,* 278 U. S. 181, 185.

[4] See Hearings on H. R. 6715 before the Senate Committee on Finance, 68th Cong., 1st Sess., p. 41 (Statement of A. W. Gregg, Treasury draftsman).

which were authorized by § 278 only in the sense that they were made pursuant to an agreement by the taxpayer of the kind which the Act continued to recognize and sanction. *Affirmed.*

PACIFIC COAST STEEL CO. v. McLAUGHLIN.

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

No. 518. Argued February 15, 1933.—Decided March 13, 1933.

1. Clause (2) of paragraph (e) of § 278 of the Revenue Act of 1924, which declares that that section shall not "affect any assessment made . . . before the enactment of this Act," does not render inoperative the provisions of paragraph (c) of the same section authorizing waivers, with respect to taxes of which the assessment had been made but the collection had become barred prior to the date of the Act. P. 428.
2. Waivers given after the date of the Revenue Act of 1924 with respect to the collection of taxes barred before that date, are not invalid under clause (1), paragraph (e) of § 278 of that Act. See *McDonnell* v. *United States, ante,* p. 420. P. 429.

61 F. (2d) 73, affirmed.

CERTIORARI, 287 U. S. 595, to review a judgment rejecting a claim for money collected as income and excess profits taxes.

Mr. George H. Koster, with whom *Mr. Ralph W. Smith* was on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key, J. P. Jackson,* and *Wm. H. Riley, Jr.,* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

McDonnell v. *United States,* decided this day, *ante,* p. 420, involved the question of the effect of § 278 (e) on

assessment waivers where the period for assessment had expired before the effective date of the Act of 1924. This case involves the effect of that section on collection waivers where the period for collection had expired before the effective date of the Act of 1924, but where the assessment had been timely and before the Act.

On May 13, 1929, Pacific Coast Steel Company brought this action in the federal court for northern California, to recover the amount paid as additional income and excess profits taxes for the year 1917. The return for that year was made, and the tax thereby shown to be due was paid, on March 30, 1918. On December 9, 1922, the Commissioner of Internal Revenue determined a deficiency of $257,443.30; and on February 9, 1923, he assessed that amount against the plaintiff. Thus the assessment was made within five years from the date of the filing of the return and before expiration of the period allowed therefor by § 250 (d) of the Revenue Act of 1921. Thereafter, by proceedings in the Bureau, the amount of the claimed deficiency was reduced to $129,-920.06 through credits of overpayments of other years. For that amount the Commissioner made demand on July 16, 1927; that is, more than five years after the date of the taxpayer's return, in 1918. The Government relied, as extending the period for collection, upon a waiver given on December 7, 1925; that is, more than five years after the return.

The District Court, without opinion, entered judgment for the defendant. The Circuit Court of Appeals held that the waiver, though in terms extending the time for assessment, was effective to extend that for collection; and that the waiver was valid under § 278 of the Revenue Act of 1924. The judgment of the District Court was accordingly affirmed. 61 F. (2d) 73. This Court granted certiorari, "limited to the question of the effect of section 278 (e) of the Revenue Act of 1924." 287 U. S. 595.

The petitioner contends that clause (2) of paragraph (e) of § 278, which states that the section shall not "affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act," renders paragraph (c) inoperative in the case at bar; that the waiver therefore had no statutory authority and was of no effect. The Government insists, in answer to this contention, that even if clause (2) thus qualifies paragraph (c),[1] the waiver is nevertheless valid either without express statutory authority or under the authority of the Revenue Act of 1921, § 250 (d),[2] which, it is argued, remained in force by virtue of § 1100 (d) of the Act of 1924.[3] We do not pass upon this contention of the Government; for we are of opinion that paragraph (c) is not rendered inoperative by clause (2) of paragraph (e).

The meaning of clause (2) was considered in *Russell* v. *United States,* 278 U. S. 181. It was there pointed out

[1] "(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon." Act of June 2, 1924, c. 234, § 278 (c), 43 Stat. 253, 300.

[2] "(d) . . . the amount of any such taxes due under any return made under this act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, . . . shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; . . ." Act of November 23, 1921, c. 136, § 250 (d), 42 Stat. 227, 265.

[3] "(b) The parts of the Revenue Act of 1921 which are repealed by this Act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this Act) remain in force for . . . the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. . . ." Act of June 2, 1924, c. 234, § 1100 (b), 43 Stat. 253, 352.

that the distinction in the Act of 1924 between existing and subsequent assessments derived significance from the contemporaneous creation of the Board of Tax Appeals. Assessments made after June 2, 1924, "generally at least, if objected to, could not be made without assent of the Board. To secure proper action by the Board might require considerable time, and this was provided for by extending the limitation to six years after assessment." 278 U. S. at 186. Where an assessment was made before the Act, the reason for the extension did not exist. In the case of waivers, no such considerations exist to indicate that Congress intended to distinguish between assessments made before and those made after the Act. It was held in the *Russell* case that to apply paragraph (d), extending the period for collection to six years after assessment, to an assessment made before the Act, would "affect" that assessment, and hence was forbidden by clause (2) of paragraph (e). Such an application, it was said, "would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had almost expired." 278 U. S. at 187. In the case at bar no such effect follows upon a recognition of the waiver. The claim against the petitioners was barred, it is true, at the time of the enactment of the 1924 Act; but even before the Act the claim was subject to revival by waiver of the statute of limitations. We are of opinion, therefore, that paragraph (c) does not "affect" the assessment in the case at bar so as to be rendered inoperative by clause (2) of paragraph (e).

There remains the question of the effect of clause (1) of paragraph (e), which provides that § 278 shall not authorize an assessment or collection already barred at the effective date of the 1924 Act. This is the same question considered in the *McDonnell* case, *ante,* p. 420, with respect to assessment waivers, and for the reasons there

stated we hold that the clause does not impair the validity of the waiver here involved.

Affirmed.

SPICER v. SMITH, SPECIAL DEPUTY BANKING COMMISSIONER.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

No. 388. Argued January 19, 20, 1933.—Decided March 13, 1933.

1. When instalments of war-risk insurance and disability compensation are paid to the guardian appointed under the state law, the money ceases to be money of the United States; and if it be deposited by the guardian in a bank that becomes insolvent, R. S. 3466, giving priority of payment to debts due the United States, does not apply. P. 433.
2. In respect of such moneys so paid and deposited, the guardian is not an agency or instrumentality of the United States. P. 436.

244 Ky. 68; 50 S. W. (2d) 64, affirmed.

CERTIORARI, 287 U. S. 590, to review the reversal of a judgment recovered by the present petitioner for the full amount of his account as guardian, etc., in an insolvent bank.

Messrs. William Marshall Bullitt and *Leo T. Wolford,* with whom *Mr. O. H. Pollard* was on the brief, for petitioner.

Money paid to the guardian of an incompetent veteran under the War Risk Insurance and the World War Veterans' Acts remains the money of the United States. *United States* v. *Hall,* 98 U. S. 343; *Eckert & Co.* v. *McKee,* 9 Bush 355; *Kellogg* v. *Waite,* 12 Allen 529; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180; *Bramwell* v. *U. S. Fidelity Co.,* 269 U. S. 483; 295 Fed. 331; 299 Fed. 705; *U. S. Veterans' Bureau* v. *Thomas,* 156 Va. 902.

See *State* v. *Security Bank,* 121 Neb. 515; *State* v. *First State Bank,* 121 Neb. 521; *Butler* v. *Cantley,* 47

S. W. (2d) 258; *Anderson* v. *Olivia State Bank,* 186 Minn. 396; *Nelson* v. *Colgrove & Co.,* 267 Ill. App. 317.

The bank was "insolvent" and committed an act of bankruptcy, within the meaning of R. S. § 3466. *United States* v. *Oklahoma,* 261 U. S. 253, 260; *Standard Acc. Ins. Co.* v. *Sheftall & Co.,* 53 F. (2d) 40, 41; 16 Am. & Eng. Enc. of Law, 2d ed., p. 672.

Money paid to the guardian of an incompetent veteran under the War Risk Insurance and World War Veterans' Acts, is impressed with an equitable lien in favor of the United States for the benefit of the veteran. *Ramisch* v. *Fulton,* 180 N. E. 135; *In re Fisher's Estate,* 302 Pa. 516; *Tama County* v. *Kepler,* 187 Ia. 34; *Payne* v. *Jordan,* 36 Ga. App. 787; *Payne* v. *Jordan,* 152 Ga. 367; *In re Murphy's Committee,* 134 Misc. 683.

Mr. Jesse I. Miller for respondent.

Messrs. Wm. H. Oppenheimer, Frank C. Hodgson, and *Montreville J. Brown,* by leave of Court, filed a brief on behalf of *J. N. Peyton,* Commissioner of Banks of Minnesota, as *amicus curiae.*

Mr. Justice Butler delivered the opinion of the Court.

Petitioner was a United States soldier in the World War and while in the service suffered permanent mental incompetency. He became entitled to receive from the United States war risk insurance and disability compensation.[1] September 19, 1919, the county court of Breathitt county, Kentucky, appointed for him the guardian above named who qualified and has ever since acted as such. The United States paid to the guardian

[1] See Arts. III and IV, War Risk Insurance Act of October 6, 1917, 40 Stat. 405, 409. Titles II and III, World War Veterans' Act, 1924, approved June 7, 1924, 43 Stat. 615, 624; 38 U. S. C., §§ 471–502, 511–518.

the installments due his ward. The guardian deposited them in the Hargis Bank and Trust Company. It became insolvent and February 5, 1930, conformably to the laws of the State, all its assets were taken over by respondent acting as special deputy banking commissioner and liquidating agent. At that time the guardian had on deposit $6,070.80 derived from such payments. The assets of the bank were not sufficient to pay more than one-half the total owing to depositors. Claiming priority under R. S. § 3466,[2] the guardian demanded payment of his deposit in full. Respondent held that petitioner was only entitled to share ratably with other creditors and refused to pay.

Petitioner brought this suit in the circuit court of Breathitt county to enforce the asserted priority. That court gave him judgment as prayed. The court of appeals reversed on the ground that the bank was not indebted to the United States on account of the deposit made by the guardian. 244 Ky. 68; 50 S. W. (2d) 64. The question has not been considered here and, decisions upon it in the state courts being in conflict,[3] we granted a writ of certiorari. 287 U. S. 590.

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[2] "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." 31 U. S. C., § 191.

[3] The decisions supporting petitioner's contention are: *State ex rel. Spillman* v. *First State Bank,* 121 Neb. 515; 237 N. W. 623. *Anderson* v. *Olivia State Bank,* 186 Minn. 396; 243 N. W. 398. Those opposed are: *Shippee* v. *Commercial Trust Co.,* 115 Conn. 326, 161 Atl. 775. *Puffenbarger* v. *Charter,* 112 W. Va. 488; 165 S. E. 541.

Petitioner relies upon the clause of § 3466 declaring that whenever any person indebted to the United States is insolvent the debts due to the United States shall first be satisfied. He asserts that, under Acts of Congress later to be considered, the war risk insurance and disability compensation paid to a guardian of an incompetent veteran remains the money of the United States so long as it is subject to his control and suggests that the guardian is a mere instrumentality of the United States for the disbursement of such money for the benefit of the veteran. And he maintains that the deposit here involved is money of the United States and that the bank is indebted to it therefor.

The pertinent substance of the provisions invoked by petitioner follows. Section 21 (1) and (2) of the World War Veterans' Act, 1924, provides that where any payment under the Act is to be made to a person mentally incompetent, it may be made to the person who is constituted guardian by the laws of the State or is otherwise legally vested with responsibility or care of the claimant or his estate. It authorizes the director to suspend payments to a guardian who shall neglect or refuse to render to the director from time to time an account showing the application of such payments for the benefit of the incompetent.[4] Section 22 declares that such payments shall not be assignable or subject to the claims of creditors and that they shall be exempt from taxation, but makes them subject to claims of the United States under the Act against the veteran.[5] Sections 21 (3) and 26 provide that in specified cases insurance and disability com-

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Cf. *State ex rel. Sorenson* v. *Security Bank,* 121 Neb. 521; 237 N. W. 620. *Butler* v. *Cantley* (Mo.), 47 S. W. (2d) 258. *Manning* v. *Spry,* 121 Iowa 191; 96 N. W. 873.

[4] 43 Stat. 613, as amended by § 2, Act of July 2, 1926, 44 Stat. 791; § 2, Act of May 29, 1928, 45 Stat. 964. 38 U. S. C., § 450.

[5] 43 Stat. 613. 38 U. S. C., § 454.

pensation remaining unpaid or in the hands of a guardian at the death of the veteran shall escheat to the United States.[6] Section 214 provides that where an incompetent veteran receiving disability compensation disappears, the director may make payments to his dependents.[7] Section 505 provides for punishment of guardians who shall embezzle such funds.[8]

The guardian, appointed by the county court, was by the laws of the State given the custody and control of the personal estate of his ward and was authorized to collect and receive the money in question. Ky. Stats., § 2030. And unquestionably payment to the guardian vested title in the ward and operated to discharge the obligation of the United States in respect of such installments. *Taylor* v. *Bemiss,* 110 U. S. 42, 45. *Lamar* v. *Micou,* 112 U. S. 452, 472. *Maclay* v. *Equitable Life Assurance Society,* 152 U. S. 499, 503. *Martin* v. *First Nat. Bank,* 51 F. (2d) 840, 844. *In re Estate of Stude,* 179 Iowa 785, 788; 162 N. W. 10. *State ex rel. Smith* v. *Shawnee County Comm'rs,* 132 Kan. 233, 243; 294 Pac. 915; certiorari denied 283 U. S. 855. Schouler, Dom. Rel., 6th ed., § 892.

The provisions for exemption, non-assignability and suspension of payments plainly imply the passage of title from the United States to the veteran. The denunciation of embezzlement by guardians is not inconsistent with that intention. These regulations, like many to be found in pension laws, disclose a purpose to safeguard to bene-

[6] Section 21 (3) added by § 5, Act of July 3, 1930, 46 Stat. 993. 38 U. S. C. § 450. Section 26, World War Veterans' Act, 1924, 43 Stat. 614, as amended by § 3, Act of July 2, 1926, 44 Stat. 792. 38 U. S. C., § 451.

[7] Added by § 21, Act of July 3, 1930, 46 Stat. 1000. 38 U. S. C., § 501a.

[8] Added by § 20, Act of March 4, 1925, 43 Stat. 1312. 38 U. S. C., § 556.

ficiaries the appropriations and payments made for their benefit (*United States* v. *Hall,* 98 U. S. 343, 353. *Westfall* v. *United States,* 274 U. S. 256) and evince special solicitude for the protection of veterans who by reason of mental incompetency are unable to protect themselves. The clauses subjecting such payments to claims of the United States against the veteran and providing for escheat to the United States make against petitioner's claim. Neither would be appropriate or necessary if the money paid to such guardian continued to belong to the United States until actually disbursed by him for the veteran's benefit.

Petitioner cites *United States* v. *Hall, supra.* The question there was whether Congress has power to prescribe punishment for the embezzlement by guardians of pension money paid them in behalf of their wards. The indictment showed that the money alleged to have been embezzled was the property of the accused guardian's ward. The court held that to insure transmission unimpaired to the beneficiary the United States might annex such conditions to the donation as it deemed appropriate and that the guardian was bound to accept the payment subject to the terms of the grant and that Congress had power to protect its gift until it passed into the hands of the beneficiary. There is no suggestion in the opinion that the United States had any interest as owner in the money embezzled. The power of Congress to punish such misappropriation is not limited to acts causing loss to the United States. *Westfall* v. *United States, supra,* 258–259. Petitioner also cites *Bramwell* v. *U. S. Fidelity & G. Co.,* 269 U. S. 483. But in that case the United States itself was the guardian and through its officer, the superintendent of an Indian reservation, made the deposit which upon insolvency of the bank was held a preferred claim under § 3466. The case is not in point, as here the guardian was appointed pursuant to state law

to act for and on behalf of his ward. He was not an agent or instrumentality of the United States. *Shippee* v. *Commercial Trust Co.*, 115 Conn. 326, 161 Atl. 775. *Puffenbarger* v. *Charter*, 112 W. Va. 488; 165 S. E. 541. *State ex rel. Smith* v. *Shawnee County Comm'rs, supra.* It results that the deposit in question does not belong to the United States and, as indebtedness to it is essential to priority, the guardian's claim under that section is without merit. Other contentions made by petitioner are so plainly inapplicable here as not to require discussion.

Judgment affirmed.

PORTER, EXECUTRIX, ET AL. v. COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 466. Argued February 9, 1933.—Decided March 13, 1933.

1. Section 301 (a) of the Revenue Act of 1926 imposes a tax "upon the transfer of the net estate of every decedent" and § 302 requires that in computing the tax there shall be included in the gross estate the value at the time of death of all property,

"(a) To the extent of the interest therein of the decedent at the time of his death," and

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke. . . ." *Held:*

(1) Subdivision (d) is not limited by (a) to interests of decedent at time of his death. P. 442.

(2) Under subdivision (d), where the decedent had transferred property by deeds of trust reserving power in himself to make a complete revision of the trusts, even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others, although the

reservation expressly excluded the making of any change in favor of himself or of his estate,—the value of such property at the time of his death was properly included in the gross estate. Pp. 440, 443.

2. Where a gift has been made in trust subject to a power in the donor to change the terms and beneficiaries, although the power does not extend to any changes in favor of the donor or his estate, his death, by ending his control in other respects, serves to pass to the donees a valuable assurance of title. Therefore Congress constitutionally may provide for including the property so transferred in the computation of the federal "estate tax," by a law passed after the trusts were established and before the death of the donor. P. 443.

60 F. (2d) 673, affirmed.

CERTIORARI, 287 U. S. 591, to review the affirmance of an order of the Board of Tax Appeals, 23 B. T. A. 1016, including in the gross estate of a decedent, in measuring the federal transfer tax, property which had been conveyed by him in trust before his death.

Mr. Walter E. Hope, with whom *Mr. Edward N. Perkins* was on the brief, for petitioners.

The tax is laid upon the transfer of the net estate of the decedent at death. It is not laid upon the extinguishment of a limited power. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Chase National Bank* v. *United States,* 278 U. S. 327; *Tyler* v. *United States,* 281 U. S. 497; *Nichols* v. *Coolidge,* 274 U. S. 531; *Heiner* v. *Donnan,* 285 U. S. 312.

Section 302 (d) should not be construed as including the value of the property previously transferred in the net estate at death.

Sections 302 (c) and (d) perform the same function and serve as measuring rods of what is to be included in the net estate, which is taxed under § 301. The construction applied to § 302 (c) in *Reinecke* v. *Northern Trust Co., supra,* should be applied to § 302 (d) in this case.

The wording of § 302 (d) is peculiarly susceptible of the construction applied to § 302 (c) in the *Reinecke*

case. Such a construction avoids arbitrary and unreasonable results, which are the inevitable consequence of the contention of the Government.

Section 302 (d) refers to a power so unlimited that the donor might have taken advantage of it for his own benefit. This was the construction uniformly adopted by the appellate courts. *Brady* v. *Ham,* 45 F. (2d) 454; *Erskine* v. *White,* 47 F. (2d) 1014; *Cover* v. *Burnet,* 53 F. (2d) 915. The contrary construction would make the tax depend on trivial considerations and lead to arbitrary and unreasonable results.

As applied to the transfers in this case, § 302 (d) would be confiscatory and unconstitutional, if construed as the Government contends.

Taxation of one person's property by reference to the property of another is unconstitutional. *Hoeper* v. *Tax Comm'r,* 284 U. S. 206; *Heiner* v. *Donnan,* 285 U. S. 312. Measuring the estate of a decedent for purposes of taxation by the value of property of which he had wholly divested himself, is taxation of one by reference to the property of another.

All attempts to relate the trust property to the estate, therefore, must be based on past ownership; and the real aim of the Government is to tax past gifts *inter vivos. Nichols* v. *Coolidge,* 274 U. S. 531; *Heiner* v. *Donnan, supra.* The inequitable character of the tax stands out in this case, where the trusts were executed long before the enactment of the statute.

Each of the original trusts was irrevocable as and when made. The attempt to revoke Trusts 1 and 2 was ineffectual. The indenture of November 27, 1926, therefore accomplished no transfer. Section 302 (c) of the Act has no application.

Mr. Erwin N. Griswold, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Mr. Sewall Key* were on the brief, for respondent.

By leave of Court, *Mr. Merrill S. June,* and *Mr. J. DuPratt White* filed briefs as *amici curiae.*

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question presented is whether, for the purpose of determining the tax liability of the estate of the deceased, § 302 (d) of the Revenue Act of 1926 [1] requires that there shall be included in the value of the gross estate certain bonds that he had transferred in trust.

October 18, 1918, and again on February 1, 1919, decedent transferred to the Bankers Trust Company certain bonds for the benefit of his daughter and her son. Contemporaneously he made similar transfers of bonds to the same trustee for the benefit of his son and his son's daughter. November 27, 1926, in order to make provision for two children of his daughter born after the creation of these trusts, he sent the trust company letters purporting to revoke the trusts of which she was a beneficiary, to terminate the interest of all persons therein and to direct it to deliver the principal and income to itself as trustee according to a new deed then delivered. Each of the five trust agreements included provisions governing the management, investment, and disposition of principal and income, and contained a paragraph reserving to the donor power at any time to alter or modify the indenture and any or all of the trusts in any manner but expressly excepting any change in favor of himself or his estate.[2]

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[1] 44 Stat. 71. 26 U. S. C., § 1094 (d).

[2] Paragraph tenth in each of the transfers is as follows:

" Notwithstanding anything to the contrary herein contained, the Donor at any time during the continuance of the trust herein provided for may, by instrument in writing executed and acknowledged or proved by him in the manner required for a deed of real estate (so as to enable such deed to be recorded in the State of New York) delivered to the trustee, or its successor, modify or alter in any

Deceased died November 30, 1926. The Commissioner of Internal Revenue included in the gross estate the value of the property described in the last deed and petitioners sought redetermination. The Board of Tax Appeals, because of the reserved power to alter and amend, held § 302 (d) applied, and included the corpus of all the trusts in the gross estate. 23 B. T. A. 1016. The Circuit Court of Appeals affirmed that ruling. 60 F. (2d) 673. Its decision being in conflict with that of the Circuit Court of Appeals for the First Circuit in *Brady* v. *Ham,* 45 F. (2d) 454, and that of the Court of Appeals of the District of Columbia in *Cover* v. *Burnet,* 60 App. D. C. 303; 53 F. (2d) 915, we granted a writ of certiorari. 287 U. S. 591.

By the trust agreements, decedent divested himself of all interest in the bonds and, subject only to the reserved power, transferred full title to the trustee and beneficiaries. The reservation is broad; evidently he intended to be free at any time and from time to time to alter or modify the disposition of the property as he might see fit, subject to the restriction above mentioned. The power

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manner this indenture, and any or all of the trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; and in case of such modification or alteration said instrument shall direct the revised disposition to be made of the trust fund or the income thereof, or that part of the trust fund or the income thereof affected by such modification or alteration, and upon the delivery of such instrument to the Trustee or its successor said instrument shall take effect according to its provisions, and the Trustee or its successors shall make and execute all such instruments, if any, and make such conveyance, transfers or deliveries of property as may be necessary or proper in order to carry the same into effect, and no one, born or unborn, shall have any right, interest, or estate under this indenture except subject to the proper modification or alteration thereof; but this power to modify or alter is not intended and shall not be construed to include the right to the Donor to make such modification or alteration in his own favor or in favor of his estate, but shall apply only so far as the interest of third parties may be concerned."

did not amount to an estate or interest in the property. It was much like, and for the purposes of this case may be deemed the substantial equivalent of, a general power of appointment by will. Cf. *United States* v. *Field,* 255 U. S. 257, 263. *Patterson & Co.* v. *Lawrence,* 83 Ga. 703, 707; 10 S. E. 355. *Clapp* v. *Ingraham,* 126 Mass. 200.

The Act, § 301 (a), imposes a tax " upon the transfer of the net estate of every decedent." The net estate as there used does not mean an amount to be ascertained as such under any general rule of law or under statutes governing the administration of estates, but is the gross estate as specifically defined in § 302 less deductions permitted by § 303. The former section declares that " the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— (a) To the extent of the interest therein of the decedent at the time of his death."

(b) To the extent of any interest therein of the surviving spouse as or in lieu of dower or curtesy. (c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise in contemplation of or intended to take effect in possession or enjoyment at or after his death.

(d) " To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke. . . ."

(e) To the extent of the interest therein held by decedent as a joint tenant or as a tenant by the entirety. (f) To the extent of any property passing under a general power of appointment exercised by the decedent by will or by deed in contemplation of or intended to take effect in possession or enjoyment at or after death. (g)

To the extent of the amount of life insurance receivable as specified. Subdivision (h) requires the interests defined in (b) to (g) inclusive to be included whether transfer was made before or after the passage of the Act.

Petitioners contend that the only thing taxed is the transfer of the net estate at death, and that property in which the decedent then held no interest or power of enjoyment must be excluded. They rely on *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. But that case is not in point. It involved seven trusts created by the decedent. Two were held taxable because subject to a power of revocation in him alone. In each of the others he reserved power to alter, change or modify, to be exercised in four by joint action of himself and a single beneficiary and in the remaining one by himself and a majority of the beneficiaries acting jointly. As the title was put beyond his control, we held these transfers not taxable. And petitioners assume, as held in *White* v. *Erskine,* 47 F. (2d) 1014, that (a) is a limitation upon (d) and argue that the gross estate includes property only to the extent of the " interest therein of the decedent at the time of his death " and that, as before his death he had divested himself of all title, the property so transferred is not to be included in the gross estate. But the construction thus taken for granted cannot be sustained. Subdivision (a) does not in any way refer to or purport to modify (d) and, in view of the familiar rule that tax laws are to be construed liberally in favor of taxpayers, it cannot be said that, if it stood alone, (a) would extend to the transfers brought into the gross estate by (d). *United States* v. *Field, supra,* 264. Moreover, Congress has progressively expanded the bases for such taxation. Comparison of § 302 with corresponding provisions of earlier Acts warrants the conclusion that (d) is not a mere specification of something covered by (a) but that it covers something not included therein. Cf. *Chase National Bank* v.

United States, 278 U. S. 327. *Tyler* v. *United States,* 281 U. S. 497. *Gwinn* v. *Commissioner,* 287 U. S. 224. *Burnet* v. *Guggenheim, ante,* p. 280.

The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death. Subdivision (d) requires to be included in the calculation all property previously transferred by decedent, the enjoyment of which remains at the time of his death subject to any change by the exertion of a power by himself alone or in conjunction with another. Petitioner argues that, as decedent was without power to revoke the transfers or to alter or modify the trusts in favor of himself or his estate, the property is not covered by subdivision (d). But the disjunctive use of the words "alter," "modify" and "amend" negatives that contention. We find nothing in the context or in the policy evidenced by this and prior estate tax laws or in the legislative history of subdivision (d) to suggest that conjunctive use of these words was intended, or that "alter" and "modify" were used as equivalents of "revoke" or are to be understood in other than their usual meanings. We need not consider whether every change, however slight or trivial, would be within the meaning of the clause. Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. The transfers under consideration are undoubtedly covered by subdivision (d).

Petitioners contend that so construed § 302 (d) is repugnant to the due process clause of the Fifth Amendment. They insist, and we assume, that the measures

taken by means of decedent's letter to the trustee and the new deed of November 27, 1926, operated merely to alter and modify but did not supersede the earlier trusts made for the benefit of his daughter and her son. They maintain that inclusion of the transfers in question would be to measure decedent's tax by property belonging to others, a thing condemned in *Heiner* v. *Donnan,* 285 U. S. 312, and *Hoeper* v. *Tax Commission,* 284 U. S. 206, and would be to tax gifts *inter vivos* that were fully consummated prior to the enactment of subdivision (d) and therefore would be confiscatory under *Nichols* v. *Coolidge,* 274 U. S. 531, and *Heiner* v. *Donnan, supra.*

They treat as without significance the power the donor reserved unto himself alone and ground all their arguments upon the fact that deceased, prior to such enactment, completely divested himself of title without power of revocation. It is true that the power reserved was not absolute as in the transfer considered in *Burnet* v. *Guggenheim, supra,* in which this court, in the absence of any provision corresponding to subdivision (d), held that the donor's termination of the power amounted to a transfer by gift within the meaning of § 319 of the Revenue Act of 1924, 43 Stat. 313. But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition. *United States* v. *Wells,* 283 U. S. 102, 116. There is no doubt as to the power of Congress so to do.

Reinecke v. *Northern Trust Co., supra. Chase National Bank* v. *United States, supra. Tyler* v. *United States, supra,* 502. *Klein* v. *United States,* 283 U. S. 231. *Gwinn* v. *Commissioner,* 287 U. S. 224.

Judgment affirmed.

MR. JUSTICE CARDOZO concurs in the result.

VANCOUVER STEAMSHIP CO., LTD., v. RICE, ADMINISTRATRIX.

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

No. 469. Argued February 9, 1933.—Decided March 13, 1933.

A stevedore, at work on a vessel in navigable waters in Oregon, received injuries through the vessel's negligence from which he afterwards died ashore. The Oregon law gave the administrator an action at law for the damages resulting from the death, and a lien on the vessel.

Held that the cause of action was enforceable in admiralty *in rem* against the vessel. P. 447.

60 F. (2d) 793, affirmed.

CERTIORARI, 287 U. S. 593, to review the reversal of a decree dismissing a libel in admiralty.

Mr. Erskine Wood for petitioner.

The Oregon "death statute," under which the suit was brought, is not a "survival act," and no right of action arises under it until death actually occurs. Death occurring, the right which the injured man had dies with him, and a new, distinct and different cause of action arises in the person of his administrator for the benefit of his estate. Since in this case that new cause of action arose on land (death occurring ashore), and the tort and damages were thus consummated there, the admiralty court was without jurisdiction. Hughes, Admiralty, 2d

ed., pp. 234–236; *The Kaian Maru,* 2 F. (2d) 121; *Ryley* v. *Philadelphia R. Co.,* 173 Fed. 839; *Rundell* v. *LaCampagnie Generale Transatlantique,* 100 Fed. 655; *Pickles* v. *Leyland,* 10 F. (2d) 371; *The City of Lincoln,* 25 Fed. 835; *The Maud Webster,* 8 Benedict 547; *The Mary Garrett,* 63 Fed. 1009; *Herman* v. *Port Blakeley Mill Co.,* 69 Fed. 646; *Milwaukee* v. *The Curtis,* 37 Fed. 705; *The Plymouth,* 3 Wall. 20. Distinguishing: *The Anglo-Patagonian,* 235 Fed. 92; *The Chiswick,* 231 Fed. 452.

The proceeding, being *in rem,* must rest upon a maritime lien or hypothecation. A maritime lien is "*stricti juris* and can not be extended by construction, analogy or inference." *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.,* 260 U. S. 490.

Mr. Arthur I. Moulton submitted for respondent.

Mr. Justice Butler delivered the opinion of the Court.

Petitioner is the owner of the steamship City of Vancouver. December 1, 1929, she was at Westport, Oregon, in navigable waters of the Columbia taking on a cargo of lumber. Respondent's intestate was employed by contracting stevedores who were loading her. While upon the deck of the ship helping in that work he was struck by a falling sling-load of lumber and mortally injured. He was taken ashore where he died an hour later. Respondent was appointed his administratrix and, electing under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C., § 933) to assert her claim against a third party, filed a libel in admiralty in the district court of Oregon against the ship, claiming on behalf of his estate damages in the sum of $10,000. The libel alleged in substance that intestate's death was caused by reason of petitioner's negligence in respect of the ship's winch which was being used to hoist the lumber.

Petitioner excepted to the libel, asserting that the cause of action arose on land and not upon the water and that therefore the case is not within the admiralty jurisdiction. The district court so held and dismissed the libel. The Circuit Court of Appeals reversed. 60 F. (2d) 793.

The Oregon statute creating a cause of action for death by wrongful act provides: "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission." Oregon Code (1930), § 5–703. And the Oregon Boat Lien Law declares that every boat or vessel shall be subject to a lien "for damages or injuries [done] by such boat or vessel resulting in the death of any person." § 51–601. Admiralty courts have jurisdiction to enforce such liens. *The Corsair,* 145 U. S. 335, 347. *The Anglo-Patagonian,* 235 Fed. 92, 94.

The libel alleges no cause of action that accrued to the deceased. The only cause of action here involved is that created by the Oregon statute and it did not arise until the intestate died. The sole question is whether the happening of the fatal event upon navigable waters gave the admiralty court jurisdiction notwithstanding death occurred on land. The right to recover for death depends upon the law of the place of the act or omission that caused it and not upon that of the place where death occurred. *Van Doren* v. *Pennsylvania R. Co.,* 93 Fed. 260, 264. *De Harn* v. *Mexican National Ry. Co.,* 86 Tex. 68; 23 S. W. 381. *Rudiger* v. *Chicago, St. P., M. & O. Ry. Co.,* 94 Wis. 191, 194; 68 N. W. 661. *Needham* v. *Grand Trunk Ry. Co.,* 38 Vt. 294, 311. *Louisville & Nashville R. Co.* v. *Williams,* 113 Ala. 402, 405; 21 So. 938. Where a longshoreman working upon the land assisting in the unloading of a ship was struck by a sling

of cargo and knocked into the water where he died, this court held that the state compensation act and not the maritime law governed. *Smith & Son* v. *Taylor,* 276 U. S. 179. Defendant conceded that the state law would apply if the deceased had been killed on the land. But it argued that as no claim was made for injuries there sustained and as the suit was solely for death, the case was exclusively within the admiralty jurisdiction. We said (p. 182): "But this is a partial view that cannot be sustained. The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death." *Mutatis mutandis,* what was there said is applicable here.

The substance and consummation of the occurrence which resulted in intestate's death and so gave rise to respondent's cause of action took place on the deck of the ship lying in navigable waters. The damages allowed by the Oregon statute are those resulting solely from the death. The foundation of the right to recover is a wrongful act or omission taking effect aboard the ship and resulting in death upon the land. This is a maritime tort, and upon it the respondent's claim rests. The admiralty court has jurisdiction. *The Chiswick,* 231 Fed. 452. *The Anglo-Patagonian, supra,* 94. *The Samnanger,* 298 Fed. 620, 624. *Shipping Board* v. *Greenwald,* 16 F. (2d) 948, 951. *Decree affirmed.*

BALTIMORE & OHIO RAILROAD CO. ET AL. v. BRADY.

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

No. 526. Argued February 14, 15, 1933.—Decided March 13, 1933.

1. A suit by a shipper for damages resulting from discrimination practiced by a carrier in violation of its rule for coal-car distribu-

tion in time of shortage, which does not challenge the reasonableness or validity of the rule itself, may be maintained under § 9 of the Interstate Commerce Act without action or finding by the Commission. P. 455.

2. But if the shipper elects, under § 9, to proceed first before the Commission and secures an order for reparation which he sues to enforce under § 16 (2), he is bound by the Commission's award and can not claim more upon the ground that the Commission erred as a matter of law in reducing damages. P. 456.
3. The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence, and so preserves the defendant's right to contest the award, gives no support to the contention that the award does not bind the plaintiff. P. 458.
4. Facts alleged *held* sufficient to show unlawful discrimination in distribution of coal cars and sufficient to sustain judgment for the amount of the award together with interest, costs and a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. P. 459.

61 F. (2d) 242, reversed.

CERTIORARI, 287 U. S. 596, to review the affirmance of a judgment in a suit to enforce an award by the Interstate Commerce Commission.

Messrs. George M. Hoffheimer and *Eugene S. Williams,* with whom *Messrs. Charles R. Webber, E. A. Bowers,* and *Wm. C. Purnell* were on the brief, for petitioners.

Mr. George T. Bell, with whom *Mr. Samuel T. Spears* was on the brief, for respondent.

Once the Commission finds acts or practices of carriers in violation of the statute and fixes the lawful standard, that standard is conclusive whether it relates to the past, present or future. *Mitchell Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247, 258; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.,* 284 U. S. 370, 389.

Here, acting in its administrative capacity, the Commission found that petitioners' acts and practices were unlawful. It also laid down the standard of service that should have prevailed. But pursuant to the further hear-

ing granted for the sole purpose of determining the amount of respondent's damages on the basis of this standard, the Commission proceeded to treat as lawful the very "offer" which, in its administrative capacity, it had found unlawful because it was arbitrary and made without regard to the requirements of respondent's business.

A finding made by the Commission without evidence, or contrary to the indisputable character of the evidence, is void. *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91–2; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541, 547–8.

The claim is not for a penalty but for compensation, — "a property right." *Spiller* v. *Atchison, T. & S. F. R. Co.*, 252 U. S. 117, 135. By requiring the injured shipper to elect between two remedies, Congress clearly intended that each of the two was to comprehend whatever measures are necessary to secure recovery of the statutory standard of full compensation. Each was to be as adequate and complete as the other, and its equal in final results. This is so because the fundamental principles of equality (the "primary purpose of the Act," *Atchison, T. & S. F. R. Co.* v. *Robinson*, 233 U. S. 173, 181) and uniformity (the "paramount purpose of the Commerce Act," *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 290) permeate § 9 no less than the other provisions. Pursuant to this view, this Court has held that whether complaint is filed with the Commission or suit is brought in court, the same period of limitation applies (*Phillips Co.* v. *Grand Trunk R. Co.*, 236 U. S. 662, 667); the cause of action accrues at the same time (*U. S. ex rel. Louisville C. Co.* v. *Interstate Commerce Comm'n*, 246 U. S. 638, 644); the same starting basis, a finding by the Commission on the administrative question, is required (*Texas & Pac. R. Co.* v. *Abilene Cotton*

Oil Co., 204 U. S. 426, 436–7, 441–2, 446); and the same rules of law prevail,—" the rule of damages in one hardly can be different from that proper for the other." *Louisville & N. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288, 291.

But to make certain that both methods of procedure will be controlled by the same rules of law and hence culminate in like final results, they must be construed as subject also to the same judicial machinery for correcting errors and mistakes.

The suit under § 16 (2) is an adjunct of the " method of procedure " before the Commission referred to in § 9, and part and parcel of that particular " remedy." It is a trial *de novo* of the action with the same corrective function, scope and power as the new trial in the alternative method of procedure in a District Court.

The suit is not on the award, as such. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 661. It is for damages actually incurred by the plaintiff. The Commission's findings and order are available as evidence. If they were regularly and properly promulgated (and it is so presumed until the contrary appears), they are conclusive so far as they determine the administrative questions, if any, in the case, but only *prima facie* correct so far as they determine the fact and amount of damages. *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 257–8. The plaintiff may show that the Commission erred in its mathematical calculations, in the formula used in arriving at the amount, and in the application of rules of law. *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430.

In the § 16 (2) phase of the alternative method of procedure, which " suit shall proceed in all respects like other civil suits," the Commission's report and order on amount of damages is like an auditor's report. Cf. *Matter of Walter Peterson*, 253 U. S. 300, 311.

The § 16 (2) right of further procedure in a federal or state court is not the § 9 right of initial procedure in a federal court. The § 16 (2) suit *per se* is not either of the § 9 methods of procedure; it is merely supplemental to one of them and that one the method initiated by complaint to the Commission. Each method is the equal of the other in final results. *Pennsylvania R. Co.* v. *Clark Bros. Co.*, 238 U. S. 456, 472; *Standard Oil Co.* v. *United States*, 283 U. S. 236, 241.

While this Court has never directly and specifically decided the precise question here involved, it has sustained in one case a greater recovery than the Commission's award correctly computed, and has clearly intimated in other cases that the shipper's right of action and the District Court's jurisdiction are not limited in maximum amount to the Commission's award. *Pennsylvania R. Co.* v. *Jacoby Co.*, 242 U. S. 89, 99; *Pennsylvania R. Co.* v. *Weber*, 257 U. S. 85, 90–1. See *Pennsylvania R. Co.* v. *Clark Bros. Co.*, 238 U. S. 456, 472–3; *Pennsylvania R. Co.* v. *Minds*, 250 U. S. 368, 371–5; *Louisville & N. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288, 291.

If the administrative determination is delayed beyond the two-year period for bringing suit, the shipper must recover his damages before the Commission or not at all. A construction of § 16 (2) that in such cases the shipper is limited to the award, even though the amount was arrived at by error of law or mathematical computations, would be manifestly unjust.

Respondent was deprived of his right to a voluntary election of § 9 remedies in this case. He was compelled to proceed for damages before the Commission or not at all.

There is no implication in the decisions of this Court that a reparation order less in amount than the sum claimed is, as to the diminution, an unreviewable nega-

tive order. Discussing: *Standard Oil Co.* v. *United States,* 283 U. S. 235, 239; *Alton R. Co.* v. *United States,* 58 F. (2d) 399; 287 U. S. 229; *United States* v. *Interstate Commerce Comm'n,* 63 F. (2d) 358; *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 290.

Section 16 (3f) merely limits the time within which the "petition" referred to may be filed. Its ultimate purpose and effect are to extend the § 16 (3b) period of limitation in order to insure equality of treatment.

The questions whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award, are *res judicata,* having been determined by the decree in *Brady* v. *Interstate Commerce Comm'n,* 43 F. (2d) 847, aff'd, 283 U. S. 804.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is an action brought by respondent in the federal district court for northern West Virginia against petitioners in consequence of their failure to comply with a reparation order of the Interstate Commerce Commission. It directed them to pay to plaintiff $12,838.31 damages found to have been sustained by reason of undue prejudice to which they had subjected him in respect of furnishing cars for the transportation of coal from his mine. He sought judgment for $57,735.11 together with interest, costs and an attorney's fee. Defendants demurred to the complaint generally and also specifically upon the ground that plaintiff was not entitled to recover more than the award. The demurrers were overruled and, issue having been joined, there was a trial by jury which resulted in a verdict and judgment in favor of plaintiff for $63,048.60, not including attorney's fee, as to which all questions were reserved. The Circuit Court of Appeals affirmed. 61 F. (2d) 242.

There is no bill of exceptions,[1] and we are called on to decide whether the facts alleged in the complaint, of which the reports and order of the Commission are a part, are sufficient to sustain the judgment. The substance of plaintiff's claim as thus shown is as follows:

Between October 14, 1922, and April 1, 1923, he operated a coal mine on a branch of the Baltimore & Ohio railroad over which the Western Maryland had trackage rights. His mine was located between two mines operated by a competitor and served by both defendants. During that period there was a shortage of coal cars.

For the rating of, and the distribution of coal cars among, mines on their respective lines, each of the defendants established and maintained in force certain rules and regulations. These required that during periods of coal-car shortage the cars available for loading should be distributed pro rata among the mines in accordance with their ratings. They also permitted the operator of "any mine reached by two railroads to order 100 per cent or less of its rating from either of the said railroads, or to divide the orders between the two railroads in any way which the judgment of the operator dictated, provided the combined orders did not exceed 100 per cent of the rating of the mine; and the mine was entitled to receive its pro rata share of the available cars on the basis of such orders and to ship the coal loaded therein via the railroad which furnished the cars."

The Baltimore & Ohio furnished a smaller percentage of cars ordered than did the Western Maryland. Plaintiff's mine was being served exclusively by the former. Desiring to be served by the latter, he regularly ordered

[1] The district court found the proposed bill was presented out of time and refused to sign it. 56 F. (2d) 231. The Circuit Court of Appeals denied mandamus. 58 F. (2d) 627. This Court denied certiorari, *Baltimore & Ohio R. Co.* v. *Baker,* 287 U. S. 610.

from it 100 per cent. of his rating but with a single exception was furnished no cars. He complained to the defendants and was informed that his competitor was ordering 20 per cent. from the Baltimore & Ohio and 80 per cent. from the Western Maryland and that such a division of his orders would be acceptable to them. He rejected the offer, claiming the right to order from either or both as from time to time he might see fit. But he was denied the right so given his competitor.

He complained to the Commission that defendants thus subjected him to undue prejudice. The Commission so found.[2] And it held the case open to permit him to file a petition for further hearing as to the amount of damages, if any, sustained by him. 112 I. C. C. 244. And see 102 I. C. C. 19. Plaintiff upon such hearing claimed that the cost of mining the coal that he shipped had been increased $9,283.14 and that his loss of profits was $48,451.97, making a total of $57,735.11. Defendants while denying liability did not controvert these figures. The Commission found that if plaintiff had accepted defendant's offer his increased mining costs would have been only $2,225.49 and his loss of profits but $10,612.82, making in all $12,838.31, and that he was entitled to reparation in that amount together with interest. It directed that, within 60 days, defendants pay that sum. 152 I. C. C. 327. They refused to do so.

The complaint attacks the award on the ground that as a matter of law the Commission erred in ruling that in order to lessen his loss plaintiff was bound to accept de-

[2] "The acts and practices of defendants whereby they accorded Maryland service to the mines of the West Virginia Coal & Coke Company located on the Coalton branch of the B. & O. Railroad Company during the period from October 14, 1922, to April 1, 1923, while failing to accord similar service to complainant's mine located intermediate thereto resulted in undue prejudice to complainant in the matter of car supply." 112 I. C. C. 251.

fendants' offer. It asserts that the reduction of his claim upon that ground was beyond the power of the Commission and therefore null and void.[3]

The Interstate Commerce Act declares it unlawful for a carrier to subject any person or traffic to any undue or unreasonable prejudice or disadvantage (§ 3) and imposes upon carriers liability for the full amount of damages sustained by any person in consequence of any such violation of the Act. § 8. A person so injured may either make complaint to the Commission or bring suit for damages in a district court; but he shall not have the right to pursue both remedies, and must elect which method he will adopt. § 9. If the Commission shall determine that complainant is entitled to an award of damages it shall make an order directing the carrier to pay to him the sum to which he is entitled on or before a day named. § 16 (1). If the carrier does not comply with such order, the complainant may file in the United States district court or in any state court a petition "setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated." § 16 (2).

Questions as to the reasonableness of rules and regulations governing the distribution of coal cars in periods of shortage are for the Commission. And until found unreasonable by it, a shipper may not maintain an action in any court against a carrier upon the claim that any such rule or regulation was unreasonable and that through

[3] Plaintiff brought suit against the United States and the Commission to secure a decree directing the Commission to correct its findings in respect of damages. The district court dismissed the bill, 43 F. (2d) 847, and this Court affirmed. 283 U. S. 804.

its enforcement he sustained loss or damage. *Morrisdale Coal Co.* v. *Penna. R. Co.,* 230 U. S. 304, 313. But if the rule, regulation or practice of the carrier is not attacked and the shipper's claim is grounded upon its violation or discriminatory enforcement, there is no administrative question involved. In such cases the court is required merely to decide whether the carrier has departed from its established standard. The decision does not concern the reasonableness or validity of the rule itself and it has no tendency against uniformity or other purpose of the Act. Suits for damages upon such grounds may be prosecuted without action or finding by the Commission. *Penna. R. Co.* v. *Puritan Coal Co.,* 237 U. S. 121, 131–134. *Ill. Cent. R. Co.* v. *Mulberry Coal Co.,* 238 U. S. 275, 282–283. *Penna. R. Co.* v. *Sonman Coal Co.,* 242 U. S. 120, 124.

The facts stated in the complaint clearly show that there was no question in this case requiring the exercise of the Commission's administrative powers. Plaintiff's mine was in the same class as the mines of its competitor. It was entitled to have a supply of cars from either or both defendants as it saw fit. Cf. *United States* v. *New River Co.,* 265 U. S. 533, 542. His claim for damages does not rest upon defendants' adherence to or enforcement of their rule but upon their refusal to furnish him cars in accordance with the rule. Therefore, without any prior action on the part of the Commission, plaintiff was entitled under §§ 8 and 9 to maintain an action at law for the full amount of damages sustained by him on account of the undue prejudice to which he claims to have been subjected by defendants.

But having elected to seek relief through the Commission, plaintiff is not entitled to recover more than the amount of the award.

This is not a suit authorized by § 9 but one brought under § 16 (2) because of defendants' refusal to comply with the Commission's order. Subject to the right of

contestation preserved by the Act (*Meeker* v. *Lehigh Valley R. Co.,* 236 U. S. 412, 430) it is a suit for the enforcement of the award. § 16 (3) (f). *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U. S. 654, 661. Section 16 (2) does not permit suit in the absence of an award, and if the Commission denies him relief, a claimant is remediless. *Standard Oil Co.* v. *United States,* 283 U. S. 235. *Brady* v. *United States,* 283 U. S. 804. *Bartlesville Zinc Co.* v. *Mellon,* 56 F. (2d) 154. No suit is permitted if the carrier pays the award. *Louisville & N. R. Co.* v. *Ohio Valley Tie Co.,* 242 U. S. 288. Cf. *Penna. R. Co.* v. *Clark Coal Co.,* 238 U. S. 456. Plaintiff may not adopt the award as the basis of his suit and then attack it. Cf. *Mitchell Coal Co.* v. *Penna. R. Co.,* 230 U. S. 247, 258.

The fact that the Act merely makes the findings and report of the Commission *prima facie* evidence and so preserves the defendant's right to contest the award gives no support to plaintiff's contention that it does not bind him. It is to be remembered that, by electing to call on the Commission for the determination of his damages, plaintiff waived his right to maintain an action at law upon his claim. But the carriers made no such election. Undoubtedly it was to the end that they be not denied the right of trial by jury that Congress saved their right to be heard in court upon the merits of claims asserted against them. The right of election given to a claimant reasonably may have been deemed an adequate ground for making the Commission's award final as to him. Confessedly, it is final save when carriers refuse to pay within the time allowed. If by such a suit plaintiff may obtain a trial *de novo* or a revision of the award, the provisions of § 9 requiring election and prohibiting pursuit of both remedies would be set at naught in cases in which carriers refuse to pay and would be given effect in all other cases. There is no support for such a distinction. The

construction for which plaintiff contends cannot be sustained. He is bound by the award.

Defendants insist that plaintiff not only was limited in recovery by the amount of the award but that he suffered no discrimination. The latter contention is without merit. The allegations of the complaint comply with the requirements of § 16 (2) and are clearly sufficient to sustain a judgment against the defendants for the amount of the award together with interest, costs and a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

The judgment of the Circuit Court of Appeals is reversed. The case is remanded to the district court for proceedings in accordance with this opinion.

Reversed.

UNITED STATES v. DAKOTA-MONTANA OIL CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 434. Argued February 8, 1933.—Decided March 13, 1933.

Section 234 (a) (8) of the Revenue Act of 1926, provides that, in the case of oil wells, the taxpayer shall have, as a deduction from gross income, "a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions of each case," to be made under departmental rules and regulations. Section 204 permits the taxpayer to calculate depletion on the basis of cost alone, or else to deduct an arbitrary allowance, fixed by the statute, without reference to cost or discovery value, at 27½% of gross income from the well. *Held*, construing these in the light of earlier provisions and administrative construction, that the capitalized cost of drilling, as distinguished from cost of physical property such as machinery, tools, equipment, pipes, etc., is subject to depletion allowance and not to depreciation allowance. Pp. 460, 466.

59 F. (2d) 853, reversed.

CERTIORARI, 287 U. S. 591, to review a judgment against the United States on a claim for money collected as income taxes.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour* and *Andrew D. Sharpe* were on the brief, for the United States.

Mr. Herman J. Galloway, with whom *Mr. Louis P. Donovan* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent, a North Dakota corporation, in making its tax return of income derived from its operation of oil wells in 1926, claimed a deduction from gross income of a depreciation allowance on account of the capitalized costs of preliminary development and drilling. The Commissioner refused to allow the deduction claimed, ruling that it was for depletion, not depreciation, and was therefore included in the statutory depletion allowance of 27½% of the gross income, which the respondent had also deducted. §§ 204 (c), 234 (a) (8), Revenue Act of 1926, c. 27, 44 Stat. 9, 16, 41. Having paid the correspondingly increased tax, respondent brought this suit in the Court of Claims to recover the excess. The court gave judgment for respondent, holding that the development and drilling costs were the proper subjects of a depreciation allowance which should have been made in addition to that for depletion. 59 F. (2d) 853. This Court granted certiorari to resolve a conflict of the decision below with that of the Circuit Court of Appeals for the Fourth Circuit in *Burnet* v. *Petroleum Exploration,* 61 F. (2d) 273.

The Revenue Act of 1926, like earlier acts,[1] provided generally that "in the case of . . . oil and gas wells," taxpayers should be allowed, as a deduction from gross income, "a reasonable allowance for depletion and for

[1] § 234 (a) (9), Revenue Act of 1918; § 234 (a) (9), Revenue Act of 1921; § 234 (a) (8), Revenue Act of 1924.

depreciation of improvements, according to the peculiar conditions in each case"; such allowance "in all cases to be made under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary." § 234 (a) (8). The earlier acts provided that depletion should be allowed on the basis of cost unless the taxpayer was the discoverer of the well upon an unproven tract, in which case the basis was the "value of the property" at the time of the discovery or within 30 days thereafter.[2] See *Palmer* v. *Bender*, 287 U. S. 551. But the "discovery value" provision was eliminated from the act of 1926, which is applicable here, and the taxpayer was permitted to calculate depletion on the basis of cost alone, § 204 (c), or else to deduct an arbitrary allowance, fixed by the statute, without reference to cost or discovery value, at 27½% of gross income from the well.[3]

Articles 223 and 225 of Treasury Regulations 69, under the Revenue Act of 1926, were followed by the Commissioner in assessing the present tax. Article 223 purports to permit the taxpayer to choose whether to deduct costs of development and drilling as a development expense in the year in which they occur or else to charge them "to capital account returnable through depletion." In the

[2] § 234 (a) (9), Revenue Act of 1918; § 234 (a) (9), Revenue Act of 1921; § 204 (c), Revenue Act of 1924.

[3] "Sec. 204. (c) The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, except that—

"(2) In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

latter event, which is the case here, " in so far as such expense is represented by physical property, it may be taken into account in determining a reasonable allowance for depreciation " which, if the arbitrary deduction for depletion were claimed, would constitute an additional allowance. Article 225 limits the depreciation for which an allowance may be made to that of " physical property, such as machinery, tools, equipment, pipes, etc." We do not doubt that the effect of this language is to require the taxpayer to look to the depletion allowance, in this case 27½% of gross income, for a return of the costs of developing and drilling the well, which are involved here.

Respondent challenges the validity of the regulations thus applied as in conflict with § 234 (a) (8), which allows the deduction of a reasonable allowance " for depreciation of improvements " in addition to the deduction for depletion. It is urged that the drill hole is an " improvement " of the taxpayer's oil land and that no logical distinction in accounting practice can be made between the cost of this improvement and the cost of buildings and machinery placed on the property for the operation of the well, for which depreciation should admittedly be allowed.

The government argues that the well itself is not tangible physical property which wears out with use so as properly to be the subject of depreciation, and that in any event the regulations are based upon the practices of the oil industry and are within the requirements of § 234 (a) (8) that a reasonable allowance for depletion and depreciation of improvements be made in all cases under rules and regulations to be prescribed by the Treasury Department.

We do not stop to inquire whether, under correct accounting practice, an anticipated loss of a part of the capitalized cost of developing and drilling an oil well because of decreased utility of the well would be described or treated differently than wear and tear of the machinery

used in production, or whether an allowance for the former serves a purpose logically distinguishable from one for the latter. For the issue before us, whether the statute requires the former to be treated as depletion, is resolved by the history of the legislation and the administrative practice under it.

The Revenue Act of 1916 permitted the deduction of a reasonable allowance for the "exhaustion, wear and tear of property" used in a business or trade and in the case of oil and gas wells "a reasonable allowance for actual reduction in flow and production." § 12 (b) Second. The regulations authorized the deduction of an annual allowance for "depreciation" and, in the case of oil and gas wells, for "depletion" (Treasury Regulations 33, Arts. 159, 160, 162, 170), but ruled that no annual deduction for "obsolescence" was authorized by the statute in any case; such a loss it was provided, might only be deducted in the year when it became complete by abandonment of the property as no longer useful. (See Arts. 162, 178, 179 of Treasury Regulations 33; *Gambrinus Brewery Co.* v. *Anderson,* 282 U. S. 638, 643.) In defining these terms, therefore, the Department was apparently faced with the practical consequence that no annual deduction could be made in anticipation of those losses which it regarded as attributable to obsolescence, while such a deduction might be made for those which it attributed to depreciation or depletion. Depreciation was defined generally to include the wear and tear and exhaustion of property by use; and obsolescence, the loss in value of property due to the fact that because of changing conditions it has ceased to be useful.

Plainly, under these definitions the loss in value of the drill hole for an oil well, because of the approaching exhaustion of the oil in the ground, was not to be treated as depreciation. Article 170 of Regulations 33 neces-

sarily ruled that it was not to be treated as obsolescence by declaring that the purpose of the statutory provision relative to oil wells was to return, through the aggregate of annual depletion deductions, the taxpayer's capital investment in the oil, including "the cost of development (other than the cost of physical property incident to such development)." Article 170 thus contemplated that an annual deduction should be made for costs of development by including them in the cost of the oil in the ground for which a depletion allowance was authorized by § 12 (b), Second "for actual reduction in flow and production."

While the Revenue Acts which followed that of 1916 provided that taxpayers generally might deduct "a reasonable allowance for obsolescence" in addition to that "for the exhaustion, wear and tear of property used in the trade or business," [4] in each of them the section expressly applicable to oil and gas wells,[5] omitted the word obsolescence and provided, in terms, only for the deduction of an allowance for depletion and for depreciation of improvements. Whatever doubts this omission may have suggested as to the propriety of an allowance for obsolescence in the case of oil and gas wells, raising the same problem as that under the Act of 1916, the question whether an allowance should be made for development and drilling costs was set at rest, where cost was the basis of depletion and depreciation of improvements, by the express language of the Acts of 1918 and 1921, that the cost basis should include "costs of development not otherwise deducted." But the questions remained whether the allowance was to be treated as for depreciation or depletion, and more important, whether any allowance could be made for development costs when the basis of depletion

[4] § 234 (a) (7) of the Revenue Acts of 1918, 1921, 1924 and 1926.
[5] See note 1, *supra*.

was discovery value rather than cost.[6] In answering these questions the Department adhered to and made explicit the position taken by it under the 1916 Act that development costs other than the cost of physical property incident to the development must be returned through the depletion allowance, but the regulations also provided expressly that the cost of "physical property such as machinery, tools, equipment, pipes, etc.," should be returned by an annual allowance for depreciation. (Arts. 223, 225 of Treasury Regulations 45 under the Revenue Act of 1918.) The distinction thus taken was continued in the regulations under the Acts of 1921, 1924 and 1926,[7] although beginning with that of 1924 the express declaration of the statute, already noted, that the cost basis for depletion and depreciation of improvements should include costs of development was eliminated, leaving the broad provision that a reasonable allowance should in all cases be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary.

Doubts arising because of the silence of the Revenue Acts of 1918 and later years as to whether costs of development and drilling were to be included in depletion when based on discovery value, were resolved by the regulations already noted and by the addition of another. Article 220 (a) (3) of Treasury Regulations 45 provided that "the 'property' which may be valued after discovery is the 'well.' For the purposes of these sections the 'well' is the drill hole, the surface necessary for the

[6] The discoverer of an oil well upon an unproven tract was permitted, for the first time by § 234 (a) (9) of the Revenue Act of 1918, to calculate the allowance for depletion upon the basis of the value of the "property" at the time of the discovery or within thirty days thereafter. See note 2, *supra*. The statute was silent as to the inclusion of development costs.

[7] Arts. 223, 225, of Treasury Regulations 62, 69; Arts. 225, 227, of Treasury Regulations 65.

drilling and operation of the well, the oil or gas content of the particular sand, zone or reservoir . . . in which the discovery was made by the drilling, and from which the production is drawn." By including the drill hole in the property to be valued for depletion under § 234 (a) (9), this article necessarily carried forward the distinction taken under the 1916 Act between drilling costs, subject to depletion allowance, and costs of machinery, tools and equipment, subject to allowance for depreciation. Sections 234 (a) (9) of the Revenue Act of 1921 and § 204 (c) of the Act of 1924 continued the provisions of the 1918 Act, and this regulation remained unchanged.[8] It was eliminated under the 1926 Act, being no longer necessary, as the statute omitted the "discovery value" provision and substituted the arbitrary percentage allowance for depletion.[9]

Thus the Acts of 1918, 1921 and 1924 were consistently construed by the regulations to permit a depletion, but not a depreciation, allowance for the costs of development work and drilling, which were treated for this purpose either as a part of the cost or an addition to the discovery value of the oil in the ground. The administrative construction must be deemed to have received legislative approval by the reënactment of the statutory provision, without material change. *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299; *Brewster* v. *Gage,* 280 U. S. 327, 337.

Respondent argues that whatever effect may be attributed to earlier reënactments, that of 1926, which is applicable here, is without force because § 204 of that Act abandoned discovery value as the basis of depletion and permitted the taxpayer to abandon cost and substitute a fixed allowance of 27½% of gross income from the well. We think the contention unfounded and that, on

[8] Arts. 220 (a) (3) of Treasury Regulations 62 and 222 (3) of Treasury Regulations 65.

[9] See Senate Report No. 52, 69th Congress, 1st Session, pp. 17, 18.

the contrary, what was included in the reasonable allowance for depletion by the established construction of the earlier acts gave significant content to the word as used in the Act of 1926. There is no ground for supposing that Congress, by providing a new method for computing the allowance for depletion intended to break with the past and narrow the function of that allowance. The reasonable inference is that it did not and that depletion includes under the 1926 Act precisely what it included under the earlier acts. The regulations under the 1926 Act so ruled, as has been shown, by continuing the provisions of earlier regulations under which costs of development and drilling were returnable by the depletion allowance and not by an additional allowance for depreciation.[10]

It is true that the Board of Tax Appeals in construing the 1924 and 1926 Acts has held that capitalized drilling costs are subject to a depreciation rather than a depletion allowance. Jergins Trust Co. *v.* Commissioner, 22 B. T. A. 551; Ziegler *v.* Commissioner, 23 B. T. A. 1091; P. M. K. Petroleum Co. *v.* Commissioner, 24 B. T. A. 360. But these cases were all decided after the enactment of the 1926 Act and did not consider the administrative and legislative history, which we think decisive.

Reversed.

PETROLEUM EXPLORATION v. BURNET, COMMISSIONER OF INTERNAL REVENUE.

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

No. 448. Argued February 8, 1933.—Decided March 13, 1933.

Decided on the authority of *United States* v. *Dakota-Montana Oil Co.*, *ante*, p. 459.

61 F. (2d) 273, affirmed.

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[10] Compare also Treasury Decision 4333, Internal Revenue Bulletin XI, April 11, 1932, No. 15, pp. 2, 3.

CERTIORARI, 287 U. S. 592, to review the reversal of an order of the Board of Tax Appeals, 23 B. T. A. 890, overruling a deficiency assessment of income tax.

Mr. Robert Ash for petitioner.

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

By leave of Court, briefs of *amici curiae* were filed as follows: by *Messrs. Thomas R. Dempsey* and *A. Calder Mackay;* by *Mr. R. B. Goodell,* on behalf of Petroleum Reclamation Corp.; and by *Messrs. George W. Wickersham* and *Clarence Castimore,* on behalf of Amerada Corporation.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner, a Maine corporation, in making its tax returns of income derived from the operation of oil wells in the years 1925, 1926, and 1927, claimed a deduction from gross income of a depreciation allowance on account of the capitalized costs of drilling the oil wells. The Commissioner refused to allow the deductions and assessed a corresponding deficiency against the taxpayer. On appeal the Board of Tax Appeals held that the deductions should have been allowed. 23 B. T. A. 890. On petition for review the Court of Appeals for the Fourth Circuit reversed the order of the Board. 61 F. (2d) 273. The court held that the deductions claimed were included in the depletion allowance fixed by § 234 (a) (8) of the Revenue Act of 1926 at 27½% of petitioner's gross income for the years in question, and could not be allowed as depreciation of improvements. This Court granted certiorari to resolve a conflict of the decision below with that of the

Court of Claims in *Dakota-Montana Oil Co.* v. *United States,* 59 F. (2d) 853. For reasons stated in *United States* v. *Dakota-Montana Oil Co.,* decided this day, *ante,* p. 459, the Commissioner rightly refused to allow the deductions claimed and the judgment below is

Affirmed.

CENTRAL TRANSFER CO. *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS ET AL.

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

No. 523. Argued February 14, 1933.—Decided March 13, 1933.

Several rail carriers agreed with a single transfer company that only its places of business should be designated as their "off track" stations in a certain city; that it should have the exclusive right to transfer less-than-carload freight between their "on track" stations and between them and the "off track" stations in the city; and that they would file the necessary amended tariffs with the Interstate Commerce Commission to carry out the agreement, and would pay for the transfer services at prescribed rates, absorbed in their line-haul rates. Tariffs were filed accordingly and approved by the Commission. *Held* that a rival transfer company, which was excluded by this arrangement from business that it previously had enjoyed, had no standing under § 16 of the Clayton Act to enjoin performance of the agreement as contrary to the Sherman Act, since it is provided by the Clayton Act that no one, except the United States, shall be thereby entitled to sue for injunctive relief against any common carrier subject to the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission." P. 473.

61 F. (2d) 546, affirmed.

CERTIORARI, 287 U. S. 595, to review the affirmance of a decree dismissing a suit by a transfer company against numerous interstate carriers and another transfer company to restrain an alleged violation of the Sherman Antitrust Act.

Mr. Glendy B. Arnold for petitioner.

Messrs. C. S. Burg and *H. H. Larimore,* with whom *Messrs. W. N. Davis, A. H. Kiskaddon, M. G. Roberts, Harold R. Small, L. H. Strasser, Guy A. Thompson, Thomas W. White, Edward J. White, J. M. Bryson, E. T. Miller,* and *T. M. Pierce* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner, a Delaware corporation engaged in the transportation of interstate freight in St. Louis, brought suit in the District Court for Eastern Missouri against respondent, Terminal Railroad Association of St. Louis, and its sixteen constituent members, interstate rail carriers having terminals in St. Louis or East St. Louis, to restrain an alleged violation of the Sherman Anti-Trust Act. The District Court dismissed the suit after a trial on the merits, on the ground that as the acts complained of involved matters within the jurisdiction of the Interstate Commerce Commission a suit to enjoin them was unauthorized under § 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. A., § 26, unless brought by the United States. The Court of Appeals for the Eighth Circuit affirmed. 61 F. (2d) 546. This Court granted certiorari. 287 U. S. 595.

For many years before the present suit the respondent rail carriers had maintained in St. Louis and East St. Louis certain "off track" stations for receipt and delivery of less-than-carload freight and by the employment of transfer companies, including petitioner, had provided for the transportation of such freight by truck between such stations and their " on track " stations, and between each of the latter in St. Louis and East St. Louis. Tariffs filed with the Interstate Commerce Commission designated all such " off track " stations and fixed line-haul rates for the

transportation of freight in less-than-carload lots between such stations and points on their lines. The " off track " stations were generally places of business of local transfer companies, including petitioner, and the Columbia Terminals Company, also named as a defendant.

The several carriers, having proposed, in the interest of economy and efficiency, to reduce the number of " off track " stations and to employ a single transfer company in interchanging freight, the Interstate Commerce Commission, on May 2, 1927, in response to numerous petitions, ordered a general investigation of the lawfulness of this proposal and of the methods and practices of the respondents in handling less-than-carload freight in St. Louis and East St. Louis. On May 25, 1927, the rail carriers filed with the Interstate Commerce Commission a proposed tariff under which the number of designated " off track " stations was to be reduced from twelve to seven in St. Louis and from two to one in East St. Louis; new schedules of line-haul rates, absorbing the allowances paid by the carrier for the inter-station haul, were applied between all stations in St. Louis and East St. Louis and points on the lines of the carriers. The only " off track " stations retained belonged to the Columbia Terminals Company. Those to be abandoned included three operated by petitioner and two operated and one controlled by the Columbia Terminals Company.

Thereupon, the Interstate Commerce Commission instituted a proceeding for an investigation of the lawfulness of the proposed tariffs and consolidated it with the proceeding for a general investigation already pending. In the course of the consolidated proceeding the Commission made two reports. The first, of May 13, 1929, 155 I. C. C. 129, upheld as reasonable and lawful the proposed reduction in number of " off track " stations and the employment by the several rail carriers of a single transfer company to do the inter-station hauling. The Commis-

sion found that these changes in method of handling freight under the proposed rate schedules would effect large savings in transportation costs and that the arrangement entered into to effect them was not a violation of the anti-trust laws of the United States. The proposed rate schedule was suspended, pending a cost study, at the conclusion of which the Commission, by a second report and order of July 27, 1931, 177 I. C. C. 316, approved the rate schedule as filed.

Pending the proceedings before the Commission, respondent, the Terminal Railroad Association, acting on behalf of the respondent carriers, on June 1, 1931, entered into a contract with Columbia Terminals Company, embodying the arrangement between the carriers and the Columbia Terminals Company, which is the subject of complaint in this suit. By this contract it was agreed that the reduced number of " off track " stations named in the filed tariffs, which were places of business of the Columbia Terminals Company, should be designated and maintained as the only " off track " stations of the carriers; that the Columbia Terminals Company should have the exclusive right to transport less-than-carload freight between the " on track " stations and between them and the " off track " stations; that the carriers should file the necessary amended tariffs with the Interstate Commerce Commission to carry out the agreement and pay for the services rendered at prescribed rates, which were absorbed in the line-haul rates ultimately approved by the Commission. The practical effect of the contract was to give the Columbia Terminals Company the exclusive right to operate the " off track " stations, to haul the interchanged freight, and thus to preclude the employment of petitioner and others in that service.

Petitioner assails the contract and the consequent refusal of the carriers to employ it and to use its places of business as stations, as creating a forbidden monopoly in

restraint of interstate commerce. To this the respondents answer that the contract is concerned with matters within the jurisdiction of the Interstate Commerce Commission in respect to which the Clayton Act provides that no one except the United States may maintain a suit for an injunction. The question which we must decide is whether the petitioner is thus precluded from prosecuting the present suit.

By the Sherman Anti-Trust Act, the Government alone was authorized to maintain a suit to restrain violations of its provisions, *Paine Lumber Co.* v. *Neal,* 244 U. S. 459. Private persons were first authorized to bring suits for that purpose by § 16 of the Clayton Act, 15 U. S. C. A., § 26, but with the proviso " that nothing herein contained shall be construed to entitle any person, firm, corporation or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions " of the Interstate Commerce Act " in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission."

It is not denied that the respondents are common carriers subject to the provisions of the Interstate Commerce Act. 49 U. S. C. A., c. 1. Nor is it denied that by the applicable provisions of the Act the maintenance by the carriers of the " off track " stations, the transportation service rendered in connection with them and between the " on track " stations, through the exclusive agency of a single transfer company, the restriction of the number of " off track " stations designated by filed tariffs establishing line-haul rates to and from those stations, are all within the jurisdiction of the Commission.[1]

[1] Section 12 of the Interstate Commerce Act, § 12, Tit. 49, U. S. C. A., invests the Commission with broad powers to conduct proceedings to inquire into the management of the business of all carriers subject to the Act and to execute and enforce the provisions of the

The petitioner, conceding that the Commission has jurisdiction of the service of the transfer companies in interchanging freight between the stations, insists that the Commission has no jurisdiction or control over the carrier's discretion in selecting their agents to perform that service, and consequently no jurisdiction over a contract by which that discretion is exercised or of a cause of action arising out of its unlawful exercise; that jurisdiction is therefore in the federal court to grant the relief prayed.

This argument misconceives both the effect and the purpose of § 16 of the Clayton Act. Under that section jurisdiction of the Commission does not delimit the jurisdiction of the federal courts to restrain violations of the

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Act. See *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33, 43. By paragraph 3 of § 3 of the Act; § 3, ¶ (3), Tit. 49, U. S. C., rail carriers subject to it are required to afford all " reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers or property to and from their several lines, and those connecting therewith." " Reasonable, proper and equal facilities " include not only trackage, but all other terminal facilities, all of which are brought under jurisdiction of the Commission. See *Pennsylvania Co.* v. *United States,* 236 U. S. 351. They include privately owned warehouses designated as such by the owner, acting as the carrier's agent, *United States* v. *Baltimore & Ohio R. Co.,* 231 U. S. 274; see *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 506, 513; cf. *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, and motor truck transfer in connection with transportation by rail. In the Matter of Legality of Tariffs Purporting to Embrace Motor Truck Transfer Service, 91 I. C. C. 539; Motor Bus and Motor Truck Operation, 140 I. C. C. 685, 729; Discontinuance of Inland or Off-Track Stations in New York City, 173 I. C. C. 727; Coördination of Motor Transportation, 182 I. C. C. 263, 367; Trucking less than Carload Freight, 185 I. C. C. 71.

By § 1, par. 6; § 1, ¶ (6), Tit. 49, U. S. C., it is made the duty of rail carriers to establish and observe just and reasonable regulations and practices affecting the " facilities for transportation " and " all other matters relating to or connected with the receiving, han-

Sherman Anti-Trust Act. Compare *United States* v. *Trans-Missouri Freight Ass'n,* 166 U. S. 290; *United States* v. *Joint Traffic Ass'n,* 171 U. S. 505. It affects only the capacity of a private party to maintain a suit to restrain violations. See *General Investment Co.* v. *New York Central R. Co.,* 271 U. S. 228. Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself. Here the relief prayed is that performance of the contract be enjoined. Performance necessarily involves the continued designation in the filed tariffs of the Columbia Terminal Company's

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dling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property . . . upon just and reasonable terms, and every unjust and unreasonable classification, regulation and practice, is prohibited and declared to be unlawful." See *Director General of Railroads* v. *Viscose Co.,* 254 U. S. 498.

Section 6 (1); § 6 (1), Tit. 49, U. S. C., requires every rail carrier to file schedules of rates applicable between different points on its own route and between points on its own route and on that of any other carrier when a through route has been established. They "shall plainly state the places between which property and passengers will be carried . . . and shall also state separately all terminal charges . . . and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which . . . affect . . . any part . . . of such aforesaid rates . . . or the value of the service rendered to the . . . shipper . . ." Tariffs changing the published rates are also required to be filed, § 6 (3), and by § 15 (7); § 15 (7), Tit. 49, U. S. C., the Commission is authorized on its own motion to enter upon a hearing concerning the lawfulness of the rate and of any classification, regulation or practice specified in the tariff. See *Director General of Railroads* v. *Viscose Co., supra; Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 437; *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.,* 215 U. S. 481, 494.

places of business as the "off track" stations specified in the contract, and the continued exclusive employment of that company to render the stipulated service, both matters within the jurisdiction of the Commission. True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission. See *Wheeling & Lake Erie Ry. Co.* v. *Pittsburgh & West Virginia Ry.*, 33 F. (2d) 390, 392; *General Investment Co.* v. *New York Central R. Co.*, 23 F. (2d) 822.

Affirmed.

PUERTO RICO *v.* RUSSELL & CO. ET AL.

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

No. 492. Argued February 10, 13, 1933.—Decided March 13, 1933.

1. A *sociedad en comandita* under the laws of Puerto Rico is not a limited partnership in the common-law sense, but is a juridical person with a personality like that of a corporation. P. 478.
2. A suit against a *sociedad en comandita* of Puerto Rico can not be removed by its members from the Insular Court to the United States District Court for Puerto Rico, under §§ 41 and 42 of the Organic Act, upon the ground that the members are not citizens of or domiciled in Puerto Rico. P. 482.
3. A suit by the People of Puerto Rico to recover insular taxes is not to be classed as a suit arising under the laws of the United

States, within the meaning of the jurisdictional statutes governing removal of causes, either (a) because authority to bring it comes from an Act of Congress, or (b) because the plaintiff is recognized as a political entity by the Act of Congress under which its government is organized. Pp. 482, 484.

4. The doctrine that a suit by a corporation organized under an Act of Congress is within the jurisdiction of the federal courts as a suit arising under the laws of the United States, has been limited by precedent and by Acts of Congress, and is not to be extended. P. 485.

60 F. (2d) 10, reversed.

CERTIORARI, 287 U. S. 593, to review the affirmance of a decree of the United States District Court for Puerto Rico, dismissing on the merits a suit removed from the Insular District Court.

Messrs. William Cattron Rigby and *Fred W. Llewellyn,* with whom *Messrs. Charles E. Winter,* Attorney General of Puerto Rico, and *Blanton Winship* were on the brief, for petitioner.

Mr. Francis E. Neagle for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

The people of Puerto Rico, the petitioner, brought this suit in the Insular District Court of San Juan, Puerto Rico, against the respondent, Russell & Co., a *sociedad en comandita* organized under the laws of Puerto Rico, to recover certain assessments levied on lands of Russell & Co., under an act of the legislature of Puerto Rico. The individual respondents, members of the *sociedad,* none of whom are citizens of Puerto Rico or domiciled there, were not named as defendants. They appeared specially in the Insular Court and removed the cause to the United States District Court for Puerto Rico. That court denied a motion to remand and gave its decree for respondents on the ground, first raised by the answer, that the assess-

ments sued for were levied in violation of § 2 of the Organic Act of Puerto Rico, March 2, 1917, c. 145, 39 Stat. 951, forbidding the enactment of any law impairing the obligation of contract. On appeal the Court of Appeals for the First Circuit affirmed, 60 F. (2d) 10; this Court granted certiorari. 287 U. S. 593.

Section 41 of the Organic Act confers on the United States District Court for Puerto Rico "jurisdiction of all cases cognizable in the district courts of the United States," and also "jurisdiction of all controversies where all of the parties on either side of the controversy are citizens of a foreign State or States, or citizens of a State, Territory or District of the United States not domiciled in Puerto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000." By § 42 "the laws of the United States relating to . . . removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico . . ." Thus suits arising under the Constitution or laws of the United States are within the jurisdiction of the District Court for Puerto Rico (§ 24, Judicial Code; 28 U. S. C., § 41), and civil suits begun in the Insular Court over which the federal court has original jurisdiction may be removed in accordance with the provisions of § 28 of the Judicial Code (28 U. S. C., § 71).

Admittedly, if the individual members of the *sociedad* are "parties" within the meaning of the Organic Act, § 41, *supra,* the suit is one within the jurisdiction of the District Court because of their nonresidence, diversity of citizenship being unnecessary. See *Porto Rico Ry. Light & Power Co.* v. *Mor,* 253 U. S. 345. And if the nonresidence of the individual members would confer jurisdiction upon the federal court in a suit against the *sociedad*

originally instituted there, we will assume, for present purposes, that it would also suffice to justify removal by the individuals, even though the Insular Court refuses to recognize them as parties. Compare *McLaughlin Bros.* v. *Hallowell,* 228 U. S. 278, 290. The petitioner argues, nevertheless, that the suit was not removable because of citizenship for the reason that the *sociedad* is a juridical entity under Puerto Rican law and, as in the case of a corporation, its domicil rather than that of its members determines citizenship for purposes of federal jurisdiction. If the petitioner's contention is sound, the District Court was without jurisdiction unless the suit was, as the respondents argue, one arising under the laws of the United States. The questions raised by these contentions must therefore first be answered.

For almost a century, in ascertaining whether there is the requisite diversity of citizenship to confer jurisdiction on the federal courts, we have looked to the domicil of a corporation, not that of its individual stockholders, as controlling. *Louisville, C. & C. R. Co.* v. *Letson,* 2 How. 497; *Rundle* v. *Delaware & Raritan Canal Co.,* 14 How. 80; *Marshall* v. *Baltimore & Ohio R. Co.,* 16 How. 314; *Lafayette Insurance Co.* v. *French,* 18 How. 404; *Covington Drawbridge Co.* v. *Shepherd,* 20 How, 227; *St. Louis & San Francisco Ry. Co.* v. *James,* 161 U. S. 545; *Patch* v. *Wabash R. Co.,* 207 U. S. 277. In its final form this rule of jurisdiction was stated in terms of a "conclusive presumption" that the stockholders are citizens of the state of the corporate domicil, see *Marshall* v. *Baltimore & Ohio R. Co., supra,* 328; *Covington Drawbridge Co.* v. *Shepherd, supra,* 233; *St. Louis & San Francisco Ry. Co.,* v. *James, supra,* 554, but even those who formulated the rule found its theoretical justification only in the complete legal personality with which corporations are endowed. Fictitious that personality may be, in the sense that the fact that the corporation is composed of a plu-

rality of individuals, themselves legal persons, is disregarded, but "it is a fiction created by law with intent that it should be acted on as if true." *Klein* v. *Board of Supervisors,* 282 U. S. 19, 24. This treatment of the aggregate for other purposes as a person distinct from its members, with capacity to perform all legal acts, made it possible and convenient to treat it so for purposes of federal jurisdiction as well. But status as a unit for purposes of suit alone, as in the case of a joint stock company, see *Chapman* v. *Barney,* 129 U. S. 677, 682; *Levering & Garrigues Co.* v. *Morrin,* 61 F. (2d) 115, 117, or a limited partnership, not shown to have the other attributes of a corporation, *Great Southern Fireproof Hotel Co.* v. *Jones,* 177 U. S. 449 (compare *Thomas* v. *Board of Trustees,* 195 U. S. 207) has been deemed a legal personality too incomplete; what was but an association of individuals for so many ends and a juridical entity for only a few, was not easily to be treated as if it were a single citizen.

The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. *Chapman* v. *Barney, supra; Great Southern Fireproof Hotel Co.* v. *Jones, supra.* The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise.[1] Therefore to call the *sociedad en*

[1] Compare the decision of the United States and Chilean Claims Commission, established by virtue of the Convention of May 24, 1897, in Chauncey *v.* The Republic of Chile, No. 3, that a claim by a society *en comandita,* organized by citizens of the United States under Chilean law was not a claim by "corporations, companies or private individuals, citizens of the United States." And see Pic, Sociétés Commerciales (2d ed. 1925), v. 1, pp. 107, 118, 137, 194, 216; Lastig, Die Accomendatio (1907), viii, xi, xviii, 165; Goldschmidt, Universalgeschichte des Handelsrechts (1891), 257 ff.; Gierke, Die Genossenschaftstheorie (1887), 51; Young, Foreign Companies and other Corporations (1912), 114; compare Saleilles, *Etude sur l'histoire des Sociétés en Commandite,* Annales de Droit Commercial, v. 9 (1895), pp. 10, 49.

comandita a limited partnership in the common law sense, as the respondents and others have done, is to invoke a false analogy. In the law of its creation the *sociedad* is consistently regarded as a juridical person. It may contract, own property and transact business, sue and be sued in its own name and right. Civil Code (1930), §§ 27 to 30; Code of Commerce (1930), §§ 95, 97, 123, 124. Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant. See *People* v. *Rivera Zayas,* 29 P. R. 423, 430. It is created by articles of association filed as public records. Code of Commerce, §§ 95, 98; compare Civil Code, §§ 1558, 1560. Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. Civil Code, §§ 1591, 1596, 1598; Code of Commerce, § 141. Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad.* Civil Code, §§ 1583, 1589; Code of Commerce, §§ 102, 106, 125. Its members are not primarily liable for its acts and debts (Code of Commerce, § 156), and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital. Civil Code, § 1590; see *Quintana Bros. & Co.* v. *S. Ramírez & Co.,* 22 P. R. 707, 716. Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them (Code of Commerce, §§ 125, 156; see *Successors of M. Lamadrid & Co.* v. *Torrens, Martorell & Co.,* 28 P. R. 824), this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states. Compare *Louis-*

ville, C. & C. R. Co. v. *Letson, supra,* 557, 558; *Liverpool Insurance Co.* v. *Massachusetts,* 10 Wall. 566, 575. These characteristics under the Codes of Puerto Rico give content to their declaration that the *sociedad* is a juridical person. That personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law. In neither case may non-residents of Puerto Rico, who have taken advantage of its laws to organize a juridical entity for the purpose of carrying on business there, remove from the Insular Courts controversies arising under local law.

Respondents' contention that the suit is one arising under the laws of the United States, and therefore removable, irrespective of the citizenship of the defendant, rests upon two grounds: first, that the suit was brought pursuant to an Act of Congress of April 23, 1928, 45 Stat. 447, and, second, that the plaintiff in the District Court, The People of Puerto Rico, derives its power as a sovereign political entity from the Organic Act, under which the Insular government was organized.

The Act of Congress first mentioned was adopted as a result of earlier litigation with respect to the present tax. Respondent and others originally brought suits in the Federal District Court of Puerto Rico to enjoin collection of the tax, pending which, Congress, by Act of March 4, 1927, 44 Stat. 1421, forbade the maintenance of any suit in the United States District Court for Puerto Rico to restrain the collection of any tax imposed by the laws of Puerto Rico. Following that prohibition, this Court, in *Smallwood* v. *Gallardo,* 275 U. S. 56, held that all such injunction cases then pending in the federal courts, were abated by the statute and the suit brought by respondents was accordingly dismissed. *Gallardo* v. *Havemeyer,* 21 F. (2d) 1012. Subsequently, Congress passed the law of

April 23, 1928, by which it was provided that in cases where the taxpayer had by such suits obtained an injunction restraining collection of the tax, the Treasurer of Puerto Rico should "enforce the collection of the tax so enjoined . . . by a suit at law instead of by attachment, embargo, distraint or any other form of summary administrative proceeding . . ." Respondents argue that as the authority to recover the tax by suit rather than by attachment or other summary method was conferred by act of Congress, the suit is one arising under the laws of the United States.

We do not stop to examine the answering contention of petitioner that the Act of Congress was not an enabling act, but operated only to preclude resort by the Insular government to the summary remedies otherwise available for the collection of the tax. For we think that even though petitioner derived its authority to maintain the suit from the Act of Congress, it did not arise under the laws of the United States within the meaning of the jurisdictional statutes.

The suit was brought to recover assessments levied under the Act of the Puerto Rican legislature, but not to enforce a right created by a law of the United States. No question of interpretation or enforcement of the federal statute appears upon the face of the complaint. Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute. The federal nature of the right to be established is decisive—not the source of the authority to establish it. *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505; *Blackburn* v. *Portland Gold Mining Co.,* 175 U. S. 571; *Gold-Washing & Water Co.* v. *Keyes,* 96 U. S. 199, 203; see *McGoon* v. *Northern Pacific Ry. Co.,* 204 Fed.

998, 1001; compare *Swafford* v. *Templeton,* 185 U. S. 487. The case is analogous to those involving rights to land granted under laws or treaties of the United States. Where the complaint shows only that such was the source of the plaintiff's title, the case is not one within the jurisdiction of the federal courts. *Barnett* v. *Kunkel,* 264 U. S. 16, 20; *Shulthis* v. *McDougal,* 225 U. S. 561; *Devine* v. *Los Angeles,* 202 U. S. 313, 337; compare *Hopkins* v. *Walker,* 244 U. S. 486, 489; *Lancaster* v. *Kathleen Oil Co.,* 241 U. S. 551; *Wilson Cypress Co.* v. *Del Pozo,* 236 U. S. 635, 643; *Northern Pacific Ry. Co.* v. *Soderberg,* 188 U. S. 526.

For similar reasons the case stands in no different aspect because The People of Puerto Rico is a political entity, recognized as such by the Act of Congress under which its government is organized. A state brought into the federal Union by act of Congress is likewise a political entity, and although not a citizen of the United States within the meaning of the statutes conferring jurisdiction on federal courts, *Stone* v. *South Carolina,* 117 U. S. 430; *Postal Telegraph Cable Co.* v. *Alabama,* 155 U. S. 482; see *Arkansas* v. *Kansas & Texas Coal Co.,* 183 U. S. 185, a suit brought by it presenting a federal question is within the jurisdiction of the district courts. *Railroad Co.* v. *Mississippi,* 102 U. S. 135, 140; *Ames* v. *Kansas,* 111 U. S. 449; *Southern Pacific R. Co.* v. *California,* 118 U. S. 109. But, a suit does not arise under the Constitution or laws of the United States merely because a state is the plaintiff, though the state derives its authority to maintain the suit from the Federal Constitution and laws. *Postal Telegraph Cable Co.* v. *Alabama, supra,* 487; *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48; *Germania Insurance Co.* v. *Wisconsin,* 119 U. S. 473, 475; *Arkansas* v. *Kansas & Texas Coal Co., supra;* see *Missouri, Kansas & Texas Ry. Co.* v. *Commissioners,* 183 U. S. 53, 58; *Stone* v. *South Carolina, supra,* 433.

We do not overlook the point that a suit by a corporation organized under an act of Congress has been held to be within the jurisdiction of the federal courts as one arising under the laws of the United States. *Osborn* v. *Bank of United States,* 9 Wheat. 738; *Pacific Railroad Removal Cases,* 115 U. S. 1. Whether or not these cases are distinguishable from others on the ground, usually urged in their support, that a corporation has no powers and can incur no obligations except as authorized by federal law, *Osborn* v. *The Bank, supra,* 823; see *Pacific Railroad Removal Cases, supra,* 13, their doctrine has not been extended to other classes of cases and has been restricted by successive statutes (Act of July 12, 1882, c. 290, § 4, 22 Stat. 162, 163, 28 U. S. C. A., § 41 (16); Act of January 28, 1915, c. 22, § 5, 38 Stat. 803, 804; Act of February 13, 1925, c. 229, § 12, 43 Stat. 936, 941, 28 U. S. C. A., § 42), the last of which limits it to cases of government owned corporations alone. We should fly in the face of this legislative policy and disregard precedents which we think controlling were we to extend the doctrine now.

The judgment below will be reversed and the cause remanded with instructions to remand it to the Insular Court from which it was removed.

Reversed.

MUNROE, RECEIVER, *v.* RAPHAEL.

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

No. 407. Argued February 7, 1933.—Decided March 13, 1933.

In a suit in the District Court to turn assets to account of all creditors ratably, the receiver, by leave of court, sold all the assets, taking in lieu the purchaser's agreement to pay a specified per cent. of all proved claims, secured by his bond running to the United States. The purchaser having defaulted, one of the cred-

itors, who had proved his claim, obtained leave of the federal court to sue the obligors on the bond for the agreed percentage of his claim, in a state court, and brought suit accordingly in the name of the United States and obtained an attachment of the obligors' property, and ultimately a judgment. The receiver meanwhile, by an ancillary bill in the federal court, sought to collect the entire amount of the bond for the benefit of all the creditors. *Held:*

1. That the bond took the place of and represented the estate for distribution by the federal court. P. 488.

2. By granting the single creditor leave to sue on the bond in the state court the federal court did not part with its jurisdiction over him or the subject matter. P. 489.

3. An order of the federal court restraining further prosecution of the suit in the state court was a lawful exercise of its jurisdiction. P. 489.

60 F. (2d) 16, reversed.

CERTIORARI, 287 U. S. 591, to review the reversal of an order of the federal court in a receivership proceeding, which rescinded permission previously granted a creditor to sue in a state court and enjoined further prosecution of the suit.

Mr. Carl F. Schipper, Jr., with whom *Mr. William P. Everts* was on the brief, for petitioner.

Mr. Mark M. Horblit for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In an equity suit in the United States District Court against The Monroe Stores, Inc., the petitioner, Munroe, was appointed receiver. One Dempsey made a written offer to purchase the entire property, stipulating that he would pay the expenses of the receivership and thirty per cent. of all claims which might be filed by a certain date and allowed by the court, and, upon acceptance, give a bond in the penal sum of $100,000, with sureties, con-

ditioned that he should perform the contract. The District Court authorized a sale to Dempsey on the terms set forth in his offer; the receiver conveyed all of the property in his possession and took a bond which bound Dempsey as principal and two sureties to the United States of America. It recited:

"The conditions of this obligation are such, that whereas, in Equity Case #3293, now pending in this District Court of the United States, District of Massachusetts, entitled J. B. Hirschfeld & Co. Inc. et als. *vs.* The Monroe Stores, Inc. Harold A. Dempsey made an offer in writing to purchase all of the assets of every name, nature, character, and kind and wheresoever situated, of George B. Munroe, Receiver of said The Monroe Stores Inc. as more fully set forth in said offer, and

"Whereas, in connection with said offer a bond guaranteeing the performance of the conditions and terms of said offer is required.

"Now, therefore, if the said Harold A. Dempsey shall comply with all the conditions and items of said offer then this obligation to be void, otherwise to be and remain in full force and effect."

Raphael, within the time limited by order of the District Court, proved his claim and the court allowed it for $35,000. After he had been paid $1200, Dempsey defaulted and Raphael applied for and obtained leave of the District Court to sue Dempsey and his sureties on the bond in the state court. An attachment suit was brought in the name of the United States of America on the relation of respondent and property of the defendants seized which is still bound by the attachment. Shortly after this action was brought the petitioner, as receiver, instituted a suit on the bond by a supplementary bill in the District Court in the name of the United States and a final decree was entered therein against Dempsey and his sureties for $33,026, which was the amount due all credi-

tors, including the respondent. An execution was returned unsatisfied. The petitioner then instituted proceedings in contempt against Dempsey and his sureties, and procured an order requiring them to pay $1,000 a month until the amount awarded should be paid in full. Thereafter the petitioner moved the District Court to rescind its prior order granting respondent leave to sue in the state court, and to enjoin further proceedings therein, except the entry of judgment. At the time of this motion the suit in the state court was ripe for judgment. The District Court allowed the motion and granted the injunction. The Circuit Court of Appeals reversed the order. 60 F. (2d) 16. The case is here on certiorari.

The primary purpose of the receivership was to turn the Stores Company's assets to account for the equal benefit of all creditors. If the sale had been for cash, the consideration, after payment of necessary expenses, would have been ratably distributed. In parting with the property the receiver, as the court's representative, took a bond, running not to the creditors, but to the United States. Certainly no creditor could bring a suit in his own name on the bond, for his share of the purchase money. Nor could he institute such an action without leave of the District Court. The course the respondent pursued evidences his recognition of these limitations. Nevertheless the Circuit Court of Appeals held that the interest of the United States was merely nominal; that the cause of action on the bond belonged to the creditors as individuals; that by granting the respondent leave to sue in the state court the District Court lost jurisdiction; that its order permitting such suit was final and could not be revoked after the expiration of the term; and that the order of rescission and injunction violated § 265 of the Judicial Code (28 U. S. C., § 379) which forbids federal courts to enjoin prosecution of suits in state courts.

The petitioner supports the action of the District Court on the ground that the bond was to stand in place of

the property conveyed, and was taken to enable the court through its receiver to insure the receipt and distribution of the purchase money amongst the creditors without preference or priority. He urges that when leave to sue was given the respondent the court evidently considered that such a suit would not interfere with ratable payment of all entitled to share in the assets, but that the grant was discretionary and subject to revocation if the interests of the creditors should so require. He says that the court never lost its jurisdiction over the estate, and the bond represented the estate for distribution.

We think this is the correct view of the matter. The District Court's order granting leave to respondent, a party in interest in the receivership, to sue upon the bond in the name of the United States, was not a relinquishment of its jurisdiction over him or the subject matter. The bond was given to an officer of the court for faithful performance of a contract with that officer. If at any time it was made to appear that the permitted suit by a single creditor might work an injustice to the others it was within the court's power to revoke the permission.

The parties refer us to decisions as to the right of action on statutory bonds given to the United States by contractors, providing, *inter alia,* for the payment of subcontractors and materialmen (*U. S. Fidelity & G. Co.* v. *Kenyon,* 204 U. S. 349; *Illinois Surety Co.* v. *Peeler,* 240 U. S. 214, 223), or official bonds required by law (*Howard* v. *United States,* 184 U. S. 676). But these are not helpful in the present case. Here the outstanding fact is that the bond was taken by the court to protect all creditors. Any suit upon it must be in furtherance and not in contravention of that purpose.

Holding, as we do, that the manner of the enforcement of Dempsey's obligation remained within the control of the District Court, we conclude that the order which is the subject of the controversy was neither beyond its jurisdiction (compare *Dietzsch* v. *Huidekoper,* 103 U. S.

494, 497; *Julian* v. *Central Trust Co.*, 193 U. S. 93, 112; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229) nor an unlawful interference with the prosecution of a suit in a state court (compare *Riehle* v. *Margolies*, 279 U. S. 218, 223).

The judgment must be

Reversed.

UNITED STATES ET AL. *v.* NORTHERN PACIFIC RAILWAY CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 470. Argued February 9, 10, 1933.—Decided March 13, 1933.

1. The rule announced in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, does not mean that a rehearing on an order of the Interstate Commerce Commission fixing rates may be required whenever a carrier's revenues are adversely affected by change of economic conditions, nor will it be so applied as to disable the Commission to protect the interests of the public. P. 492.
2. A carrier is estopped to complain of the refusal of the Commission to grant a rehearing because of changed economic conditions, where the evidence of such change and of its effect on the carrier's revenues could readily have been produced before the Commission long before it made the order complained of. P. 494.
3. In the absence of the evidence taken before the Commission, the Court can not say that there was no adequate and sufficient proof on which to base a finding of the reasonableness of the rates prescribed in this case. P. 499.
4. Existing rates for similar service to other destinations may be used by the Commission as one test, though not controlling, of the reasonableness of the rates in issue. P. 500.
5. In this case, the Commission's reports of its investigations of the rates immediately in question and of other related rates, do not sustain the averments of the petition that the question of reasonableness was disregarded and the order based solely upon a comparison with rates which were unduly and unreasonably low. P. 500.

6. Carriers desiring a reopening by the Commission of a particular rate case for the purpose of showing that the rates fixed therein and which were used as a basis of comparison in fixing other rates, were too low, should specify their purpose and the case, and not address their petition to the reopening of a whole group of related cases. P. 501.
7. Refusal of the Commission to consolidate one rate proceeding with another *held* not to have been a denial of a fair hearing on the question of the relationship between scales of rates involved, that question having been raised and considered in both of the cases separately. P. 501.

60 F. (2d) 302, reversed.

APPEAL from a decree of the District Court of three judges, which set aside an order of the Interstate Commerce Commission establishing certain rates on petroleum.

Mr. Edward M. Reidy, with whom *Solicitor General Thacher* and *Messrs. Daniel W. Knowlton* and *Elmer B. Collins* were on the brief, for the United States and the Interstate Commerce Commission, appellants.

Mr. Karl Knox Gartner, with whom *Mr. Elwin E. Hadlick* was on the brief, for the Northwestern Petroleum Association et al., appellants.

Mr. M. L. Countryman, Jr., with whom *Messrs. D. F. Lyons, F. G. Dorety, P. F. Gault, A. H. Lossow, R. J. Hagman,* and *J. P. Plunkett* were on the brief, for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This appeal brings here for review a decree of a district court of three judges, 60 F. (2d) 302, setting aside and enjoining the enforcement of an order of the Interstate Commerce Commission establishing rates on petroleum from the midcontinent field to destinations in western Minnesota and North Dakota.

The appellees' petition charged that the Commission exceeded its powers, denied a fair hearing, and abused its discretion in refusing to reopen the case and to receive proof of changes in economic conditions arising after the closing of the evidence. The District Court held against the appellees as respects the first two charges, but found that the third was sustained and therefore set aside the order. This the appellants say was error. The appellees, however, assert that the allegations and proofs as to changed conditions support the decree; and urge, in the alternative, that if this position be untenable, the action of the court was required for the other reasons recited in the petition.

The complaint, filed July 15, 1925, alleged the existing rates were unreasonable. A hearing was held in October, 1925, and a report and order entered March 5, 1928, fixing rates effective June 14, 1928. A rehearing was granted June 10, 1929, the case was reheard, and the record closed on January 15, 1930. A petition of the carriers that the case be reopened and consolidated with certain others was denied April 14, 1930. The final report and order were entered December 1, 1931, prescribing rates to become effective March 15, 1932. On February 3, 1932, the appellees presented a petition praying that the Commission vacate the order or postpone its effective date, grant a rehearing, and reopen the case for the admission of further evidence to show a change in economic conditions since the record had been closed. This was dismissed, and the present suit was then instituted.

The appellees urge that the decision in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, requires us to hold that the Commission's refusal to reopen the proceeding was an abuse of discretion. That case, however, exhibited a substantially different state of facts. There the Commission conducted an investigation, pursuant to the Hoch-Smith Resolution, touching the

entire structure of rates on export grain from the territory west of the Mississippi River and from Illinois. Here the inquiry embraced rates from origin points to a relatively small destination area. The diminution of carrier revenue consequent upon the new rates, while substantial, is far less than that effected by the order in the *Santa Fe* proceeding. In that case the record was closed in September, 1928, the matter submitted on argument July 1, 1929, and a report and order entered July 1, 1930, establishing rates to be charged on and after October 1, 1930. The effective date was postponed from time to time on account of the difficulty of adjusting the tariffs in accordance with the order. In September, 1930, the carriers requested a rehearing. Prior to action thereon the railroads brought to the Commission's attention their changed financial condition due to the economic depression. In November, 1930, a rehearing was denied. On February 18, 1931, a second petition for rehearing was presented, which was in effect a bill of review. It averred that due to the nation-wide depression which had its inception in November, 1929, the facts exhibited by the record as closed in September, 1928, were utterly unrepresentative of conditions existing at the effective date of the order some two and one-half years later.

In the proceedings under review the record was closed January 15, 1930. The economic depression, then begun, grew in intensity throughout that and the following year. During the pendency of the case appellees filed several petitions for rehearing, that of May 4, 1928 reciting that the carriers were unable under existing rates to earn the fair return contemplated by § 15a of the Act. Between January 15, 1930 and February 3, 1932 no application based on changed economic conditions was made to the Commission, and that body was allowed to consider the record and prepare a report without notice of any claim in that behalf.

The Commission is not bound to allow existing unreasonable rates to stand solely because revision will in some degree adversely affect carriers suffering from economic depression. The decision in the *Santa Fe* case is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public.

Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

This conclusion requires the reversal of the decree, unless, as the appellees contend, it may be sustained upon the other grounds presented to the District Court. We turn then to these aspects of the controversy.

The complaint attacked the existing rates as unreasonable, and did not charge undue preference or prejudice; but, it is said, the Commission based its order solely upon prejudice due to the relation of these rates with others in force in adjacent territory. The argument is that the relief granted was different from that invoked and so beyond the Commission's power. The appellees also claim that when they discovered that the Commission

was proceeding upon the basis of relationship, rather than reasonableness, they vainly sought an opportunity to show that the rates used as comparatives were unreasonably low, and therefore of no probative value. The Commission's dismissal of certain petitions for further hearing upon consolidated records, presently to be described, is represented as a denial of a fair hearing, in that the carriers were prevented from showing the impropriety of the comparisons used. The examination of these contentions requires a detailed statement with respect to this and other proceedings before the Commission.

Prior to the filing of the complaint in this case (No. 17304) the Commission was engaged in an investigation (No. 15584) of rates on petroleum from midcontinent territory to western trunk line destinations and Indiana, Illinois, and northern Michigan. Midcontinent origins had been grouped for rate making purposes, and the principal contention in No. 15584 was that the rates from the different blanket origins were not properly related. In that proceeding, however, intervenors residing in North and South Dakota alleged that the rates from the midcontinent field as a whole to destinations in those states were unreasonably high and prejudicial when compared with the tariffs in force to other territory. Certain related complaints were consolidated with No. 15584 and all were heard on a single record. While the investigation was under way the complaint in the present case, No. 17304, was filed by North Dakota and western Minnesota complainants, and was heard on a separate record. There had also been filed a complaint known as No. 16309, by South Dakota consignees, attacking the rates to that territory as unreasonable and also as unduly prejudicial in their relation to rates to Iowa and southern Minnesota. In May, 1926, a report was filed in No. 15584 (112 I. C. C. 421) readjusting the rates from various origin blankets in

the midcontinent field to western trunk line destinations and declaring the new rates to be just, reasonable and non-preferential. Referring to the interventions of consignees in North and South Dakota and to case No. 16309, affecting South Dakota, the Commission stated that the record was not adequate for a finding with respect to the rates to those destinations, and announced that No. 15584 would be held open for further consideration in connection with No. 16309. It subsequently consolidated No. 16309 and the present case, No. 17304, with No. 15584, and on March 5, 1928, filed a supplemental report establishing rates to the territory here in question, effective June 14, 1928, adjudging them reasonable and properly related to the rates to western trunk line territory theretofore prescribed (139 I. C. C. 605).

May 4, 1928 the appellees asked the Commission to postpone the effective date of this order, and to vacate its outstanding orders "in No. 15584 and associated cases, in so far as said orders related to rates to Lincoln and Omaha, Nebraska, Sioux City, Fort Dodge, and Mason City, Iowa, Duluth and St. Paul, Minnesota, and Sioux Falls, South Dakota, and to grant them a further hearing upon a single record with respect to the level of the rates from the midcontinent field to destinations in Nebraska, Iowa, South Dakota, North Dakota, and Minnesota." It will be observed the rehearing requested would affect all rates established in No. 15584 and related cases in the original and supplemental reports. The petition was denied February 11, 1929.

The required schedules having been put into effect, the carriers filed tariffs reducing the rates on petroleum from origins in Wyoming to points in North Dakota, South Dakota, and certain cities in Iowa, Nebraska and Montana—this upon the theory that these should be reduced to bring them into proper relationship with the new charges on petroleum from the midcontinent field. After

hearing the Commission suspended the rates so promulgated (153 I. C. C. 363).

In November, 1928, Dacotah Oil Company, et al. filed a complaint, No. 21737, alleging that the rates fixed by the order of March 5, 1928, to certain North Dakota points, were unjust and unreasonable, and praying the establishment of just and reasonable rates for the future. This was heard in March, 1929, and the record then closed. April 19, 1929, the complainants in this cause, No. 17304, filed a petition alleging that the rates prescribed March 5, 1928, were unjustifiably high as compared with those to the Minnesota gateways adjoining the destination territory in western Minnesota and North Dakota. On June 10, 1929, the Commission reopened the case. Three months later the Standard Oil Company of Indiana, operating refineries at Casper, Wyoming, filed its complaint alleging that rates on petroleum from Casper to North Dakota, South Dakota, Iowa and Minnesota were unreasonable and unduly prejudicial to the complainant, and unduly preferential of producers in the midcontinent field. This complaint was docketed as No. 22714. At about the same time the Public Service Commission of Wyoming filed a similar complaint (No. 22733) with respect to rates from Wyoming origins to the same destinations. The Commission thereupon assigned the present case, No. 17304, for further hearing on January 13, 1930. Just prior to that date the appellees petitioned the Commission asking that this complaint and the two just mentioned, concerning rates from Wyoming, should be consolidated for hearing and decision upon a common record, alleging that if any change were made in No. 17304 in the rates prescribed by the Commission March 5, 1928, from the midcontinent field, such readjustment would directly and necessarily disturb the relationship between midcontinent and Wyoming rates, which relationship was brought into issue by the complaints in No. 22714 and 22733.

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On January 14, 1930, the appellees filed with the Commission a petition in No. 15584 and associated cases, requesting that they be reopened for further hearing with respect to rates therein prescribed from the midcontinent field to the key or gateway points such as Lincoln and Omaha, Nebraska; Des Moines, Fort Dodge, Sioux City, and Mason City, Iowa; Sioux Falls, South Dakota; and St. Paul and Duluth, Minnesota, and to the territory beyond such gateway points, and that the above-mentioned cases be consolidated with the two complaints respecting rates from Wyoming; this on the ground that the whole structure of rates ought not to be dealt with and adjusted piecemeal, since to do so would inevitably result in unnecessary dissipation of carrier revenue and create inconsistencies and dissatisfaction; and that the only way in which the complaints of discrimination, preference and prejudice in the rate structure could be satisfied would be by proceeding upon one record, with all interested parties before it, to work out a harmonious, consistent and otherwise lawful adjustment which would protect rather than unnecessarily sacrifice the revenues of the carriers. April 14, 1930, the petition was denied.

On December 1, 1931, the Commission made and filed its report and order in this cause and No. 21737, whereby the rates established by the order of March 5, 1928 were revised (179 I. C. C. 435).

The petition in the District Court sets forth the matters above outlined and summarizes the action of the Commission in the various proceedings. The answers of the United States and the Commission admit the filing of the several complaints and the making of the reports and orders thereon; deny that the description of the Commission's action set out in the petition is accurate or complete; and refer to the reports and orders for a correct statement of what the Commission did. At the

trial none of the records in any of the complaints was put in evidence. The several petitions for rehearing and for consolidation are recounted and summarized in the petition, but are not set forth, nor included in the record. In considering the questions presented we are thus confined to the Commission's reports supplemented by the averments of the pleadings as to the substance of the applications for reopening, consolidation and rehearing.

It should be noted that appellees were parties respondent in each of the proceedings above-mentioned. In some the rates under attack in the present cause, No. 17304, were alleged to be unreasonable under § 1 of the Act, and also unduly prejudicial within the intent of § 3, and the carriers had full opportunity to be heard on both issues. In No. 15584, the *Midcontinent* case, the Commission expressly held open the question of the rates to North Dakota and western Minnesota for further consideration in connection with No. 16309, which charged that existing rates to South Dakota were unreasonable and unduly prejudicial as compared with the rates fixed in the *Midcontinent* case to the gateways and to western trunk line territory. In the supplemental report in the latter the Commission dealt with the South Dakota rates and those here involved. In the order of March 5, 1928, and in the final order of December 1, 1931, the Commission found that the rates prescribed were just and reasonable, and were properly related to those established in No. 15584. Note was taken of the fact that the rates to certain of the gateways were unduly depressed, and it was said that those established to South Dakota points, than which the rates prescribed herein are higher, had for that reason been raised above the depressed level of rates to the gateways.

In the absence of the evidence before the Commission we cannot say that there was no adequate and sufficient

proof on which to base a finding of the reasonableness of the rates prescribed.* It is true that in both reports touching the rates here in controversy the Commission used as comparatives rates from the midcontinent field to South Dakota points and those from Wyoming origins to South Dakota and North Dakota destinations. But it appears from the reports that the carriers themselves presented comparisons of these very rates in support of their contentions. Thus both the appellees and the Commission recognized what has long been settled—that existing rates for similar service to other destinations may be used for comparison as one test, though not a controlling one, upon the question of the reasonableness of the rates in issue. The Commission's reports do not sustain the averments of the petition that the question of reasonableness was disregarded and the order based solely upon a comparison with rates which were unduly and unreasonably low.

But the appellees say that if the Commission intended to give weight to the relationship of the rates established in No. 16309, to South Dakota, it should, in fairness, have permitted that case to be reopened and should have afforded opportunity for proof that the South Dakota rates were fixed in relation to the western trunk line tariff, which was unreasonably low due to competitive conditions. The record in the District Court fails to support this argument. As above noted, the carriers had been parties to the record in No. 16309, and confessedly the

* The principal reliance of the appellees is a statement by a dissenting Commissioner that "the adjustment here required is based very largely upon our previous findings in the Midcontinent Cases, which we have repeatedly stated required rates below reasonable maxima." The Commission's report is at variance with the stated conclusion, and in the absence of the record on which the report and order were based, we cannot infer that, in the determination of reasonableness, undue weight was given to relationship.

rates there established for South Dakota destinations were made relatively higher than those to trunk line territory. Moreover the petition of January 14, 1930 did not specifically request the Commission to reopen No. 16309 for the purposes of proof as to the South Dakota rates.

The appellees now insist that what they desired was an opportunity to show that the South Dakota tariffs were worthless as a guide to the proper charges to North Dakota destinations. But their petition disclosed no such purpose. It requested the reopening of the records "in No. 15584 and associated cases, including the Wyoming complaints." The granting of a rehearing upon this petition might have involved the retrial of all the midcontinent cases and the Commission was warranted in understanding that this was the scope of the application. The relief asked was much broader than was necessary to the purpose appellees now avow, and we think they cannot successfully challenge the Commission's refusal to consider all midcontinent petroleum rates established after full hearings to which the carriers had been parties. We are not referred to any request for the reopening of the South Dakota complaint, No. 16309, which appellees say was the specific proceeding they desired consolidated with this case, No. 17304.

It is further asserted that the failure to consolidate the present proceeding with the two complaints as to rates from Wyoming to North Dakota points deprived the appellees of a fair hearing because the scale of rates from the midcontinent field ought to bear a just relation to those from Wyoming origins. The answer to this contention is found in the Commission's reports. All of the parties complainant and defendant in this case and in No. 15584 introduced evidence as to the existing rates from Wyoming origins and compared them with those from the midcontinent field to North and South Dakota and western Minnesota, the complainants in order to sustain their

position that the latter were unreasonable, the respondents to support the view that they bore a proper relation to the Wyoming rates and ought not to be reduced. It cannot therefore be said that by the refusal to consolidate the Wyoming complaints with the present proceeding the carriers were denied a fair hearing on the question of relationship between the two rate structures.

The District Court was right in holding that the appellees did not make out the claims that the Commission exceeded its statutory authority or denied a fair hearing. But as we think the District Court erred in holding that the Commission improperly refused the petition of February 3, 1932, for a rehearing based upon changed conditions, the judgment must be

Reversed.

HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* DIAMOND ALKALI CO.*

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

Nos. 476 and 477. Argued February 10, 1933.—Decided March 13, 1933.

1. Allowance by the Commissioner of Internal Revenue of special assessment of profits taxes under § 328 of the Revenue Act of 1918, and his selection, for comparison, of representative corporations engaged in a like or similar trade or business to that of the taxpayer, are matters of administrative discretion which are not reviewable by the courts. *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551. P. 507.
2. Where a taxpayer's profits taxes have been determined by the Commissioner by special assessments under §§ 327 and 328 of the Revenue Act of 1918, the District Court and the Circuit Court of Appeals are without jurisdiction, in a suit for refund, to recalculate the

* Together with No. 478, *Lewellyn, Formerly Collector of Internal Revenue,* v. *Diamond Alkali Co.*

taxpayer's net income and recompute the tax by applying to the new figure found as the net income the ratios of tax used by the Commissioner. P. 507.

60 F. (2d) 505, reversed.

CERTIORARI, 287 U. S. 593, to review judgments of the Circuit Court of Appeals in three cases involving alleged overpayment of profits taxes. For findings of fact and conclusions of law of the District Court in Nos. 476 and 477, see 39 F. (2d) 645.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Sewall Key, Norman D. Keller, Paul D. Miller,* and *Eldon O. Hanson* were on the brief, for petitioners.

Mr. John W. Davis, with whom *Messrs. William A. Siefert, Maynard Teall,* and *Marion N. Fisher* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases present the question whether, where the Commissioner of Internal Revenue has granted special assessments of profits taxes pursuant to § 328 of the Revenue Act of 1918 (40 Stat. 1093), a court, in an action for a refund, may recalculate the taxpayer's net income and recompute the tax by applying to the corrected net income the rate per cent. used by the Commissioner in his computation of the tax.

The Alkali Company filed returns for income and profits taxes for 1918 and 1919 and paid the tax shown to be due. The Commissioner proposed certain changes in income and capital as reported, principally due to decreases in amortization and depreciation allowances. At some date not disclosed by the record the company asked that its profits taxes be computed pursuant to §§ 327 and

328 of the act. The request was denied and correspondence and conferences ensued between the Commissioner and the taxpayer in an effort to settle the disputed items. The demand for computation of the taxes pursuant to the special assessment sections was pressed by the company. Twice during the period of negotiation the Commissioner advised that until the true net income was ascertained the propriety of special assessment could not be determined. Finally, in July, 1927, as a result of audits and investigations, he found the company's net income, and decided that, owing to abnormal conditions affecting its capital or income, assessment according to the usual method under § 301 would work an exceptional hardship, and relief should be granted pursuant to §§ 327 and 328. He so notified the respondent, enclosing a calculation of the taxes made by him pursuant to § 328. The taxpayer protested on several grounds, amongst others, that the net income as determined under § 301 was excessive, and that the ratio of tax to net income obtained by the Commissioner by comparison with the taxes of other representative corporations, as provided in § 328, was too high. It did not, however, as was its right, appeal to the Board of Tax Appeals from the determination of net income.

In November, 1927, the Commissioner made an assessment in accordance with his findings and demanded payment of a deficiency thereby disclosed. The respondent paid under protest and filed claims for refund, asserting the same objections it had previously urged. The claims were rejected and the respondent brought suits to recover the alleged overpayments. The District Court found that additional amounts should have been allowed for amortization, reduced the net income as determined, thereupon recomputed the taxes on the reduced income by applying the rate per cent. used by the Commissioner in his com-

putation, and rendered judgment in favor of the respondent. Both parties appealed. The Circuit Court of Appeals increased the amortization allowance, made additional deductions from gross income for depreciation, found a net income much less than that fixed by the District Court, and held that the tax should be recomputed by applying the rate used by the Commissioner to the new figure found as the net income. 60 F. (2d) 505.

Section 327 (d), so far as here material, enacts that "Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328," the tax shall be computed as provided in the latter section. Section 328 declares that the tax shall be "the amount which bears the same ratio to the net income of the taxpayer" as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income, and directs that in computing the tax the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined in accordance with § 326, which are as nearly as may be "similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances."

In *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, it was decided that the allowance of special assessment is a matter of administrative discretion; and it

was further said that the selection for comparison of representative corporations engaged in a like or similar trade or business is also a question of discretion. The Commissioner cannot make an administrative finding upon the question for decision under § 327 (d) or that under 328 until he has determined the net income of the taxpayer. See *United States* v. *Henry Prentiss & Co., ante,* p. 73. He must compare the income of the taxpayer with that of corporations he deems representative in order to determine abnormality or gross disproportion between capital and income. When he comes to compute the ratio or rate of tax to be applied to the taxpayer's net income, as prescribed in § 328, he obviously will consider as a factor the ratio of tax to net income of the same representative corporations he examined for the purpose of deciding whether he should grant special assessment under § 327 (d).

The parties are in agreement that the *Williamsport Wire Rope Co.* case, *supra,* precludes revision, correction, or abrogation of the Commissioner's administrative discretionary findings, where, as here, there is no allegation of fraud. On the one hand the petitioners claim that the decisions below amount to such abrogation and the making of a new finding as to the right of special assessment and a fresh computation of the tax upon revised net income; on the other, the respondent says that the courts recognized the binding character of the Commissioner's findings, enforced rather than set aside his allowance of relief, and adopting the rate found by him, applied it to the true statutory net income as judicially determined in accordance with law.

We think the petitioners' position is correct. The taxpayer's true net income was an essential factor in the problem. Until that was known the Commissioner could make no proper or satisfactory comparison with conditions prevailing in other corporations similarly circum-

stanced. We cannot say that if the income had been substantially less than the figure he used he would have granted special assessment under § 327 (d). Moreover, with a different net income, he might well have had to compare the relevant conditions in respondent's business with the operating results of corporations other than those he selected on the basis of respondent's net income as found, and might have concluded that a different ratio of tax to net income was applicable in respondent's case.

The grant of special assessment and the ascertainment of the rate or ratio of tax to be applied to the net income of the taxpayer are indissolubly connected by the terms of the statute. The exercise of the discretion in both aspects is committed to the Commissioner and to the Board of Tax Appeals upon review of his action. That discretion cannot be reviewed by the courts, nor exercised by them in place of the administrative officer designated by law. It is beyond the power of a court to usurp the Commissioner's function of finding that special assessment should be accorded, and equally so to substitute its discretion for his as to the factors to be used in computing the tax. The courts below were in error in adopting the rate chosen by the Commissioner and applying it to a net income other than that which he used in making his comparisons and arriving at the rate. The respondent's tax could only be computed in accordance with § 301 or under § 328. The former prescribes the elements to be considered, and error in the computation remains subject to judicial correction; the latter grants the taxpayer the benefit of discretionary action by the Commissioner, and precludes judicial revision or alteration of the computation of the tax.

The judgments must be reversed and the cases remanded for further proceedings in conformity with this opinion.

Reversed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* A. T. JERGINS TRUST.

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

No. 541. Argued February 15, 16, 1933.—Decided March 13, 1933.

1. A city made an oil and gas lease to a private party, covering part of a tract owned by the city and used by it for water supply and other purposes. Under the lease the oil and gas recovered were sold by the parties jointly and the proceeds were divided in stated proportions between them. *Held* that a federal tax on the receipts of the lessee was not invalid, since the subject taxed was so remote from any governmental function that the effect of the exaction on the city's activities was inconsiderable, and its collection was consistent with, and did not trench upon, the immunity of the State as a sovereign. P. 514.
2. In determining net income under the Revenue Act of 1921, capitalized expenses for drilling and developing oil wells may not be deducted from gross income as depreciation allowance. *United States* v. *Dakota-Montana Oil Co., ante,* p. 459; *Petroleum Exploration* v. *Burnet, ante,* p. 467. P. 516.

61 F. (2d) 92, reversed.

CERTIORARI * to review a judgment reversing a decision of the Board of Tax Appeals, 22 B. T. A. 551.

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

A tax offends against the implied limitation only if it is imposed directly upon the governmental instrumentality of the State, or if, though not so imposed, its effect is to place a substantial burden upon the exercise of a governmental function. *Willcuts* v. *Bunn,* 282 U. S. 216; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 525; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 576.

* See Table of Cases Reported in this Volume.

Much of the land acquired was not presently required in connection with the business of water-supply that the city took over from public service corporations. It was therefore available, as property owned by the city but not presently needed, for such nongovernmental uses as might be most profitable; and leases to various tenants were made for various strictly private uses. The situation is the reverse of that presented in *Trinidad* v. *Sagrada Orden,* 263 U. S. 578, 582, in that the city instead of adhering to and advancing the purpose for which the lands were originally acquired, stepped aside from that purpose and devoted them to general business pursuits. The mere fact that the lessor was a municipality does not render the tenant immune from taxation, for it is a matter of common knowledge that municipalities exercise functions which are purely proprietary as well as those which are strictly governmental. See *Vilas* v. *Manila,* 220 U. S. 345, 356. The lessee must show that imposition of the tax upon its income will result in substantial interference with the performance by the city of some strictly governmental function. The record does not disclose the use to which the royalties paid the city were put; but assuming that they were devoted to governmental purposes, such use would not be sufficient basis for exemption of such receipts. *South Carolina* v. *United States,* 199 U. S. 437; *Olson* v. *North Dakota,* 33 F. (2d) 848, appeal dismissed for lack of jurisdiction, 280 U. S. 528.

The situation at bar is not different from a case where a city leases vacant land to one who erects an office building thereon, or to a farmer for agricultural purposes. Certainly the income of the lessee would not be exempt from tax. In such cases the city is a mere proprietor engaged in business for profit.

The fact that the city originally acquired the lands in connection with other lands acquired for water purposes

does not require a different conclusion. The oil lease to the respondent had nothing to do with the supply of water. The land was, in effect, segregated from the rest of the tract and devoted to other and wholly different purposes.

The tax has no economic effect upon the performance of any governmental function of the city. The supplying of water, while undoubtedly a "public" or "municipal" purpose, is not a strictly governmental function. *Davoust* v. *Alameda,* 149 Cal. 69, 72–73; *South Pasadena* v. *Pasadena Land Co.,* 152 Cal. 579, 593; *Morrison* v. *Smith Bros.,* 211 Cal. 36, 45; *Chafor* v. *Long Beach,* 174 Cal. 478, 483; *Marin Water Co.* v. *Sausalito,* 168 Cal. 587, 594–595; *Sincerney* v. *Los Angeles,* 53 Cal. App. 440, 447. This view of the California courts is supported by the weight of authority elsewhere. Cf. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 172; *South Carolina* v. *United States,* 199 U. S. 437, 462.

In the *Coronado* case, 285 U. S. 393, there was the combination of circumstances that the land leased had been dedicated by the grant from the United States and the organic law of Oklahoma to the furtherance of a governmental function, and that the proceeds of the leases were required to be paid into the school fund. The lands in the *Gillespie* case, 257 U. S. 501, were held in trust for the Indians by the United States. The Court therefore concluded that the leases were governmental instrumentalities. In the case at bar, the city was free to devote its profits from the lease to any purpose, whether proprietary or governmental. So far as appears from the record, the functions of the city were not in any way affected by the tax on respondent's income.

The exemption of an instrumentality of one government from taxation by the other must be given a practical application, without an undue impairment either of the taxing power of the one or of the appropriate exer-

cise of its functions by the other. *Susquehanna Co.* v. *Tax Comm'n,* 283 U. S. 291, 294; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523, 524.

One who seeks to escape the burden of a tax must show the facts which entitle him to relief. See *Willcuts* v. *Bunn,* 282 U. S. 216, 230, 231. See also *Phillips* v. *Dime Trust & Savings Bank,* 284 U. S. 160, 167; *Burnet* v. *Houston,* 283 U. S. 223, 227; *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 361; *Reinecke* v. *Spalding,* 280 U. S. 227, 232.

The decision of the Board of Tax Appeals as to depletion was erroneous.

Messrs. Marc F. Mitchell and *A. Calder Mackay,* with whom *Mr. Thomas R. Dempsey* was on the brief, for respondent.

It is well settled that under the Federal Constitution, the Federal Government and the States may not tax each other's property. *Lee* v. *Osceola Improvement Dist.,* 268 U. S. 643, 645.

If the land can not be taxed, revenue derived therefrom can not be taxed. Neither government may tax the instrumentalities of the other. *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 158 U. S. 601; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Union Pacific R. Co.* v. *Peniston,* 18 Wall. 5; *United States* v. *Baltimore & Ohio R. Co.,* 17 Wall. 322; *Collector* v. *Day,* 11 Wall. 113; *McCulloch* v. *Maryland,* 4 Wheat. 316; *Gillespie* v. *Oklahoma* 257 U. S. 501; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393.

The principle applies whether the land is held by the sovereign in a proprietary or in a so-called governmental capacity. *Woodruff* v. *North Bloomfield Gravel Co.,* 18 Fed. 754–772; *Irwin* v. *Wright,* 258 U. S. 219; *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *Wisconsin Central R. Co.* v. *Price County,* 133 U. S. 496; *Lee* v. *Osceola Improvement Dist.,* 268 U. S. 643.

The land was part of a tract acquired and used by the city in its governmental capacity in order to: (1) improve its streets; (2) eliminate unsanitary conditions; (3) protect the health of the community; (4) provide adequate water and pressure for fighting fires, and (5) to assure a clean and wholesome supply of water for its inhabitants.

The same considerations that invalidate a tax on the city's lease invalidate a tax upon the profits derived by the lessee. That the city's profit from the lease will be diminished to some extent by the requirement that the lessee pay a tax upon its income derived from the city's property is as clear in the case at bar as in those cases wherein the right of the federal or state government to tax proceeds from publicly owned lands has been denied.

No higher police duty can rest upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. *Columbus* v. *Mercantile Trust & Deposit Co.,* 218 U. S. 645.

Protection against fire and the maintenance of public streets and roads are governmental functions. *Denning* v. *State,* 123 Cal. 316; *Davoust* v. *Alameda,* 149 Cal. 69. See also *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Grimwood,* 200 U. S. 561. Cf. *McCulloch* v. *Maryland,* 4 Wheat. 316, 330, 409, 410, 411.

Messrs. Charles D. Hamel and *John Enrietto,* by leave of Court, filed a brief on behalf of the Public Ownership League of America, as *amicus curiae,* to maintain that a city's function in supplying water to its inhabitants is governmental.

Mr. Justice Roberts delivered the opinion of the Court.

Prior to 1911 the city of Long Beach, California, procured water from companies owning and operating

artesian wells on lands lying outside the city. The service proving inadequate and unsatisfactory, the municipality in 1911 acquired these lands, comprising about 600 acres, and the appurtenant systems, and has since used the tract for water supply and other purposes. In 1922 oil was discovered in the vicinity, and the respondent was organized under the law of California with the intention of obtaining an oil and gas lease on the lands in question. The city leased to the respondent 140 acres, the agreement stipulating that the lessee should receive sixty per cent. of the proceeds of oil and gas recovered and the city forty per cent. As permitted by the lease the oil and gas produced have been sold under a contract made by the city and the respondent as joint vendors. The trust has derived substantial income from the lease.

Upon audit of the taxpayer's returns for the years 1922, 1923 and 1924, the Commissioner, by formal written notification, proposed a deficiency in income taxes for those years. The respondent appealed to the United States Board of Tax Appeals raising two issues, (1) Whether its income derived from the lease was immune from taxation, and, if not, (2) Whether capitalized expenses for drilling and developing its oil wells were to be returned through depletion allowance, as ruled by the Commissioner, or by way of depreciation. The Board held the income taxable and the intangible development costs recoverable through depreciation charges. The Circuit Court of Appeals upon cross-petitions for review decided that the income from the lease was immune from federal income tax, and therefore found it unnecessary to pass upon the matter of depreciation allowance presented by the Commissioner's petition. 61 F. (2d) 92. Both questions are raised by the petition for certiorari.

The respondent, in support of its claim of immunity, relies upon the principle that a tax upon instrumentalities of the states is forbidden by the Federal Constitution;

that by clear implication the means employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, as are those employed by the states exempt from taxation by the general government. The principle is settled by a wealth of authority and has been applied in varying circumstances; has been recently fully discussed and the authorities collected and commented upon in decisions of this court (*Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Willcuts* v. *Bunn,* 282 U. S. 216; *Indian Territory Illuminating Oil Co.* v. *Board of Equalization,* and *Indian Territory Illuminating Oil Co.* v. *Board of County Commissioners, ante,* p. 325); and no purpose would be served by a repetition of what was there said.

The Revenue Acts do not discriminate between the respondent and others similarly situated, in the imposition of the income tax. If the respondent is exempt from the exaction the conclusion must follow because the tax directly burdens the functions of the state acting through the city of Long Beach. Considerations which have led to the condemnation of taxes in other circumstances are here absent. The levy is not upon the property of the municipality, nor upon the income it derives from its property, is not upon the city's share of the oil recovered, the lease, or the gross income therefrom. The law measures the assessment by the net income of the respondent, whose operations are carried on in a private and not in a public capacity for the personal gain of its *cestuis que trustent.* The government asserts that the incidence of the tax is so remote from the activities of the municipality as to have no substantial adverse effect upon them. The respondent insists that as lessee of the lands in question it is a governmental agency and any tax laid upon its income directly burdens governmental functions.

In *Metcalf & Eddy* v. *Mitchell, supra,* this court said [p. 522]:

"Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application."

And further [p. 523]:

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. . . ."

It was there pointed out that while in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected, still the nature of the governmental agencies and the mode of their constitution may not be disregarded in passing upon the question of tax exemption. An agency may be so intimately connected with the exercise of a power or the performance of a duty by the government that any taxation of it would be a direct interference with the functions of government itself. In *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, it was said [p. 382]:

". . . it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

The statement holds true as well when the positions of the sovereigns are reversed.

The application of the doctrine of implied immunity must be practical (*Railroad Co.* v. *Peniston,* 18 Wall. 5, 31, 36) and should have regard to the circumstances disclosed. We think that in the present instance the subject of the tax is so remote from any governmental function as to render the effect of the exaction inconsiderable as respects the activities of the city. Compare *Alward* v. *Johnson,* 282 U. S. 509, 514. Its collection is not inconsistent with and does not trench upon the immunity of the state as a sovereign. The income of the respondent from the lease is not immune from federal income tax.

The respondent relies upon *Gillespie* v. *Oklahoma,* 257 U. S. 501, and *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, as authorities binding upon us and requiring a decision in its favor. In both of those cases the sovereign was acting as the trustee of an express trust with regard to the lands leased. In both the burden upon the public use was more definite and direct than in the present case. As said in the *Coronado* case, the doctrine of *Gillespie* v. *Oklahoma* is to be applied strictly and only in circumstances closely analogous to those which it disclosed. The decisions relied on cannot be held to be authority upon the facts presented by this record.

The petitioner also asserts that the Board of Tax Appeals was in error in holding that the cost of drilling should be amortized by way of depreciation charges, and not through the statutory allowance for depletion. The identical issue is involved and settled in favor of petitioner by *United States* v. *Dakota-Montana Oil Co., ante,* p. 459, and *Petroleum Exploration* v. *Burnet, ante,* p. 467, decided this day.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

Syllabus.

LOUIS K. LIGGETT CO. ET AL. *v.* LEE, COMPTROLLER, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 301. Argued January 12, 13, 1933.—Decided March 13, 1933.

1. A state tax (Florida Laws 1931, c. 15624) on the privilege of opening and maintaining stores, fixed at so much per store without regard to value or volume of business, and increasing progressively with the number of stores maintained by the owners taxed, is not in violation of the equal protection clause of the Fourteenth Amendment because of the resulting discrimination against them and in favor of owners of single and department stores or the owners of distinct stores in voluntary coöperation. *State Board of Tax Comm'rs* v. *Jackson*, 283 U. S. 527. P. 532.
2. A state statutory provision laying a heavier privilege tax per store on the owner whose stores are in different counties than on the owner whose stores are all in the same county, is arbitrary and void. P. 533.
3. The county line furnishes no rational basis for such a classification. *Id.*
4. There is nothing in the Florida statute here in question indicating that the discrimination based on counties was directed against so-called "national chains" of stores in contrast with "local chains," or against corporate owners, distinguished from individuals, or large owners distinguished from small. P. 534.
5. Assuming the State had power to suppress by taxation a form of organization deemed inimical to the public interest, no such motive can be attributed to the present statute in the absence of legislative declaration or record proof. P. 535.
6. Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. P. 536.
7. Unequal treatment and arbitrary discrimination as between corporations and natural persons, or between different corporations, inconsistent with the declared object of the legislation, can not be justified by the assumption that a different classification for a wholly different purpose might be valid. P. 536.
8. The provision authorizing counties and municipalities to levy license taxes on stores, to be graduated only on the number of stores situated within their respective limits, is constitutional. P. 537.

9. A higher state tax on the goods held in storage by chain stores for retail sale in their own shops than on the goods stored by wholesalers, to be sold to retailers, is consistent with the equal protection clause. P. 537.
10. Taxing chain stores generally by graduated license taxes but excepting filling stations engaged exclusively in the sale of gasoline or other petroleum products, that business being otherwise taxed by license and by a tax per gallon of products sold—*held* consistent with the equal protection clause. P. 538.
11. The Fourteenth Amendment does not prevent a State from imposing differing taxes upon different trades and professions or varying the rates of excise upon various products. P. 538.
12. State taxes for the privilege of operating stores within the State and on the value of the goods warehoused in the State for sale in such stores, *held* consistent with the commerce clause. P. 538.
13. A person is not exempted by the equal protection clause from paying a state tax because the tax is not collected by the state officials from others who are equally liable. *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23; *Iowa-Des Moines Nat. Bank* v. *Bennett,* 284 U. S. 239, distinguished. P. 539.
14. The remedy in such cases for taxpayers in Florida is by writ of mandamus commanding the tax officers to collect the omitted taxes. P. 540.
15. When, in a case from a state court, this Court finds that a part of a state statute is unconstitutional, it has jurisdiction to decide the question of state law whether the remainder is preserved by a saving clause, but may leave that determination to the courts of the State. P. 541.

104 Fla. 609; 141 So. 153, reversed.

APPEAL from a decree affirming the dismissal of the bill in a suit to enjoin state taxing officers from enforcing an Act laying a discriminatory tax on chain stores.

Mr. Thomas B. Adams for appellants.

As applied to the factual situation presented, the Supreme Court of Florida erred:

(1) In sustaining the validity of subsections (1), (3), (5), (7), (9), and (11), of § 5 of the Act, creating arbitrary and unreasonable state license discriminations be-

tween appellants, severally doing business in different counties, and other merchants, single store or chain store, confining their businesses to single counties.

(2) In sustaining the discrimination created by §§ 8, 5, and 2 of the Act, imposing a license tax of $3.00 per $1,000.00 of value on goods carried in the warehouses of some of the appellants, while wholesale merchants, though affiliated as parts of "voluntary chains," remain subject to the old law, requiring the payment of only $1.50 per $1,000.00 of value on their stocks.

(3) In sustaining § 11 of the Act imposing cumulative, discriminatory county license taxes, and authorizing discriminatory municipal license taxes.

(4) In sustaining the State Comptroller's arbitrary and discriminatory administration of the Act, whereby he undertook to exempt furniture dealers, filling stations that sell tires and tubes, automobile dealers, cigar stores, restaurants, and other classes of store operators, regardless of whether single store operators or chain store operators.

(5) In sustaining the Act in its entirety.

(6) In sustaining the Act as against the objections that it operates to burden interstate commerce and to deprive appellants of the privileges and immunities enjoyed by citizens of the State of Florida—contrary to the commerce clause and the equal privileges and immunities clause of the Fourteenth Amendment.

(7) In sustaining subsections (1), (2), (4), (6), (8), and (10) of § 5 of the Act creating arbitrary and unreasonable license discriminations in favor of single store retail merchants, and against chain or multiple store retail merchants, all doing business in one county.

By basing its judgment upon "judicial notice" in disregard of the sworn facts set up in the amended bill and petitions of intervention, admitted by motion to dismiss, the court below deprived appellants of their day in court.

Mr. Roy M. Sterne filed a separate brief on behalf of Louis K. Liggett Co., appellant.

An Act which imposes a greater privilege tax per store on several stores located in two or more counties than on the same number of stores located in one county,—there being no basis for the discrimination or classification, and no distinction between the stores other than that in one case all the stores are in the same county and in the other case one or more of the stores may be located in a different county from the remaining stores,—is arbitrary and unreasonable.

Where a bill of complaint sets up facts affirmatively showing that no basis exists for discrimination or for classifying complainants' several stores for occupational license taxes differently from unit stores, and particularly denies the existence of any facts or grounds warranting discrimination or different classification as between multiple stores and unit stores, the complainants have a right to show by their evidence that discriminations in a state occupational license statute are arbitrary and unreasonable; and the granting of a motion to dismiss, which motion admits complainants' averments, is error.

The action of the Florida courts, in sustaining a motion to dismiss complainants' bill charging arbitrary discrimination in taxation, and denying the complainants the right to be heard on the facts pleaded in their bill and admitted by the motion, denies to complainants their day in court, and deprives them of their property without due process of law.

The Florida courts did not have the right to substitute assumed judicial notice for the sworn facts pleaded in complainants' bill and admitted by the motion to dismiss, but should have allowed the complainants the opportunity to be heard on their evidence, instead of dismissing the bill on motion.

In the *Indiana Chain Store Tax Case,* 283 U. S. 527, as we understand it, this Court was careful to hold that the mere possession of a number of stores was not sufficient foundation for a discrimination between unit store merchants and multiple store merchants; and that the discrimination must rest upon other factors and elements sufficient to set apart and distinguish the multiple or chain store merchant from the unit store merchant. Indeed the simplest illustration is sufficient to show that mere number of stores can not possibly be used as a distinguishing characteristic.

The term " chain store operator " is a loose one, and for occupational purposes means very little. A merchant is in the furniture business, drug business, clothing business, etc., and his experience in a drug chain would not be of any value to the furniture business. About the only patent distinction between a merchant who operates one store and the one in the same line of business who operates several stores (aside from the fact that the first has one and the second more than one store) is that all except the first store must be handled through agents; and this would be true even of the one-store merchant if the business is owned by a corporation.

To support the discrimination as we understand the Indiana decision, it is not sufficient that a mere number of stores be owned, but the separately classified taxpayer must in actuality have differences and distinctions, if he is to be discriminated against and the discrimination upheld. It would not matter how many stores a merchant owned if he did not have the asserted advantages or differences. If multiple store owners do not have such advantages, or unit store owners do have them, it would be, as we understand, arbitrary classification to say that a merchant may be taxed at a higher rate because he owns two or more stores, without regard to the amount of his

business, size of his stocks, profits earned, or some essential distinction. Present conditions in the field of merchandising are, it may be noted, in many respects different from those existing at the time the Indiana case was tried.

In the bill filed in this case, it is alleged that regardless of the conditions existing in Indiana at the time of the trial of that case, the differences on which the classification was upheld do not exist in Florida, and did not exist at the time of the filing of the amended bill.

As to quantity buying, it is alleged that in Florida the amount of merchandise which can be bought by a merchant is not dependent upon the number of stores he operates, but upon the size of the business conducted, and that many merchants owning one store can and do buy their merchandise in the same or larger quantities than chain stores or merchants owning more than one store. It is obvious that a merchant owning two, three or four small stores does not have any advantage with respect to quantity purchasing over many merchants who own one store doing a business equal to or greater than the chain, or sufficient to carry the quantity discount. Of course, mere quantity purchasing is in itself no advantage unless the merchant is thereby enabled to buy at a lower price.

If, as alleged, hundreds and thousands, even, of single store merchants are purchasing their merchandise on terms as favorable as chain stores, they are at no disadvantage in this respect.

"Mass distribution" comparable to the mass method in production is referred to, but unfortunately this very desirable end has not been attained, as is shown by the bill. Articles may be made in mass but they can not be so distributed.

With reference to "buying for cash and obtaining the advantage of a cash discount," it is shown that this is not a characteristic of chain stores alone, or generally.

As to " skill in buying so as not to overbuy and at the same time keep the store stocked with merchandise suitable in style, size, quality and quantity for the neighborhood customers who patronize it," it is alleged in the bill that in Florida there are many unit merchants who are shrewd and skillful buyers, and multiple-store merchants who are not; and that skillfulness in buying is a personal attribute, regardless of whether the merchants own one or more stores. It is further alleged that the single store merchant has at least the same, or even a better, opportunity to keep his store stocked with merchandise suitable for a particular neighborhood than the chain store manager.

As to warehousing of goods and distributing from a single warehouse to various stores, it is alleged that in Florida this is not an advantage, but is in the nature of a convenience and expense.

As to " abundant supply of capital whereby advantage may be taken of opportunity for establishment of new units,"—such an advantage is not a characteristic of chain stores. It is averred that many single-store merchants have abundant capital for supplying their needs or enlarging their business, and many multiple-store owners do not have sufficient capital even to keep their businesses going, much less to open additional stores.

As to " pricing " at lower prices, it is averred that many multiple store merchants do not have any pricing or sales policy different from that of individual stores.

As to " a greater turnover and constant analysis of the turnover to ascertain relative profits on varying items," it is alleged with respect to this that turnover is a matter of volume of business done, and is related to the class of merchandise sold, not to the question of whether the ownership is of one or more stores.

As to " standard forms of display for the promotion of sales,"—nearly all stores are trying to get away from

standard forms, and to use such display as the store owner or manager thinks will attract customers in his locality. Many individual store owners use the same display methods as multiple owners, and standard forms are available to them if they desire to use them.

As to "superior management and method,"—this is a characteristic of the individual merchant or concern, not of the ownership of one or several stores.

As to "concentration of management in the special line of goods handled by the chains." This seems to assume a situation (namely, that chain stores are necessarily specialty shops) which is denied in the amended bill of complaint. Chain stores are not specialty shops, but handle various and varied lines of goods; there are department store chains handling thousands and thousands of items; general merchandise chains, selling diversified lines; men's clothing chains, selling clothes, haberdashery, shoes and other articles. Certainly the individual merchant can and does concentrate on his particular line to the same extent as the multiple owner.

As to "special accounting methods." This is another matter of individual judgment and involves factors not connected with whether one or more stores are owned.

As to "standardization of store management, sales policies and goods sold." Every store must be operated to suit the needs of its neighborhood.

As to "differences or advantages" shown by "numbers of chains established or their growth." Following the war, large capital became available for business expansion. Since 1929 the reverse has set in. Chain stores have fallen away with great rapidity, and large numbers have failed, gone out of business or reorganized with less units. Lack of capital, lack of many of the so-called advantages listed in the Indiana case, fall in real estate values, fall in commodity prices, and many other factors

have been responsible for the fading away of these multiple unit outfits.

We respectfully submit that if this Court's opinion in the Indiana case was not based on the right of the legislature to tax on an ascending scale because of mere number of stores owned, but was based on differences and advantages alleged to exist, and if these alleged differences do not now actually exist in Florida (as was admitted by the motion to dismiss), the Florida courts should have allowed appellants to go to proof on the facts set up in the bill of complaint.

This Court will test the constitutionality of the statute by the factual situation brought to its attention in a particular case. *Weaver* v. *Palmer Bros.,* 270 U. S. 402; *German Alliance Ins. Co.* v. *Home Water Co.,* 226 U. S. 220; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282; *Poindexter* v. *Greenhow,* 114 U. S. 270; *Quong Wing* v. *Kirkendall,* 223 U. S. 59.

Mr. W. H. Dannat Pell filed a separate brief on behalf of J. C. Penney Co., appellant.

Inasmuch as for the purposes of this appeal it is admitted that in Florida there are no such differences between single store owners and multiple store owners as were found by this Court to exist in Indiana, the sole question before this Court is whether number of stores operated constitutes a basis for a valid classification. Such classification in the absence of other factors being obviously arbitrary, the appellants should be permitted to prove on a trial the truth of the allegations of the amended bill of complaint.

Unless this Court will make it clear that the alleged facts derived from the testimony of the professor were material in the decision of the Indiana case, there never can be a thoroughgoing presentation of the actual facts in this political legislative fight. While such legislation

is intended ostensibly to protect the small independent merchants, we submit that it actually destroys their right to unite with other small town and neighborhood merchants in order to live in competition with the large individual stores in the cities.

There has been a wholly inadequate presentation of the facts affecting a chaotic distributive system, a system that has fallen far behind the system of production.

Apparently, from the briefs submitted in the Indiana case, the attorneys representing the taxpayer rested their case largely on the proposition of law that a classification based on the number of stores owned must be arbitrary and invalid. If the decision of the Supreme Court of Florida is upheld, the appellants will have no opportunity through competent testimony to prove the erroneous assumptions of an inexperienced witness on retailing, which must have affected the result in the Indiana case.

In the Indiana case the attorneys for the chains assumed that no facts were necessary to defeat a bad law. In this case, the Attorney General of Florida assumes that no facts are material in sustaining what he assumes to be a good law.

It is said in the majority opinion of this Court in the Indiana case that chains are different because they have the advantages of warehousing. A very natural assumption is that warehousing is a sign of power and advantage which chains must enjoy because of their supposed volume of business. Warehouses are really the costly tools of the middleman, made more generally necessary years ago for the assemblage of merchandise from many small factories. Many chains do not use them. It is obvious that before the concentration of production in big factories, merchandise had to be shipped to warehouses from small factories so as to be stored and sorted and assembled as to size, color, quality and quantity before distribution to the stores.

Obviously, since the great majority of all chains have ten stores or less per chain, they do not have sufficient volume to maintain their own warehouses.

The tendency of the modern factory and modern store is to eliminate the warehouse entirely by the use of quick motor trucks, express, parcel post and fast freights which provide for weekly and even daily shipments direct from factory or farm to the store.

What is a chain? Merely a single Main Street store duplicated in neighboring towns or trading areas. Here and there in almost every town, an outstanding individual merchant feels the urge to expand. The only way open to him is to start another store in an adjoining small town. To that store he can take no so-called " chain " characteristics. If he is to be successful, he will merely repeat in the neighboring town the same character of merchandising operation which he carried on in his first store. Reason rejects any other explanation of growth and success beyond the performance just stated. This simple explanation remains true whether the growth has been to six stores or to six hundred stores.

There is no chain store entity that is a creature apart from a local store. Any so-called " chain " is merely the sum total of a number of little stores. Some are successful. Some are not. The " chain " feature consists of the aggregate capital and surplus and net profits of a number of individual stores, less the individual losses of those stores. Each store, of course, has its own ledger accounts, as if it were a single store.

It is true that chain groups of merchants having intelligent management have shown remarkable stability and ability to lower costs of merchandise to the consumer, in the same way that many individual merchants with similar intelligent management show stability and lower costs to the public. It is equally true that when there is a deviation from principles of sound merchandising, the

result is disastrous, whether it be a chain or an individual merchant. It is common knowledge that during the past years many chains of this character have failed or discontinued doing business.

Many erroneous impressions regarding chain retailing will be corrected by the reports of "Census of Distribution," now being published by the United States Department of Commerce for the first time.

It being admitted for the purpose of this appeal that there are no factual differences between a single store merchant and a multiple store merchant, we submit that a classification based upon the number of roofs under which a merchant does business is arbitrary and invalid. *People ex rel. Farrington* v. *Mensching,* 187 N. Y. 8, 19.

The effect of validating a classification based upon one method of retail distribution as against all other methods is to hamper and possibly to destroy a method made necessary by present day conditions in order to stabilize industry and help cure overproduction.

Mr. H. E. Carter, Assistant Attorney General of Florida, with whom *Mr. Cary D. Landis,* Attorney General, was on the brief, for appellees.

Mr. Justice Roberts delivered the opinion of the Court.

Chapter 15624 of the laws of Florida, 1931, declares it unlawful for any person, firm, corporation, association, or copartnership, foreign or domestic, to operate any store within the State without first having obtained a license, designates the officer to whom application shall be made, regulates the procedure for issuance of licenses, and provides for annual renewal. The act requires the payment of a filing fee, and by § 5, which is copied in the margin,*

* "Section 5. Every person, firm, corporation, association or copartnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the

fixes the amount of the license fee. A tax greater than that exacted for a single store is fixed for each store in excess of one, but not exceeding fifteen, owned or operated by the same person or corporation. The fee for each store is stepped up in amount as the number constituting the chain reaches certain specified limits. This graduated scale applies to stores all of which are within a single county; but if the same number of stores is located in more than one county the license fee for each is materially increased.

The act imposes the tax only on retail stores and excludes from the definition of a store filling stations engaged exclusively in the sale of gasoline and other petroleum products. It provides for a separate county license tax equal to twenty-five per cent. of the state license fee, and authorizes a municipal tax of the same amount, measuring the graduated tax in the case of counties and municipalities by the number of stores situate

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same general management, supervision or ownership, shall pay the license fee hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually, and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act.

"The license fees herein prescribed shall be as follows:

"(1) Upon one store, the annual license fee shall be Five Dollars for each such store.

"(2) Upon two stores or more, but not exceeding fifteen stores, where the same are located in any one county, the annual license fee shall be Ten Dollars for each such additional store.

"(3) Upon two stores or more, but not to exceed fifteen stores, where the same are located in different counties, the annual license fee shall be Fifteen Dollars for each such additional store.

"(4) Upon each store in excess of fifteen, but not to exceed thirty, when all are located in any one county, the annual license fee shall be Fifteen Dollars for each such additional store.

"(5) Upon each store in excess of fifteen, but not to exceed thirty, where the same are located in different counties, the annual license fee shall be Twenty Dollars for each such additional store.

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in the county or municipality, notwithstanding the applicant may own other stores beyond the limits of the governmental subdivision.

In addition to the described license taxes the act imposes a levy of $3.00 for each $1,000 of value of stock carried in each store, or for sale in such store, and this is defined to include merchandise owned by the taxpayer and held in storage to be sold in or through such store.

Three chain store owners filed in the Circuit Court of Leon County, Florida, a class bill, in which twelve others intervened and became co-plaintiffs, praying that the tax officials be enjoined from enforcing the act. The complainants are corporations of Florida and other states. They challenge the statute as violative of various provisions of the constitution of Florida, of the due process and equal protection clauses of the Fourteenth Amendment, and of the commerce clause of the Federal Constitution.

"(6) Upon each store in excess of thirty, but not to exceed fifty, where all are located in any one county, the annual license fee shall be Twenty Dollars for each such additional store.

"(7) Upon each store in excess of thirty, but not to exceed fifty, where the same are located in different counties, the annual license fee shall be Thirty Dollars for each such additional store.

"(8) Upon each store in excess of fifty, but not to exceed seventy-five stores, where all are located in any one county, the annual license fee shall be Thirty Dollars for each such additional store.

"(9) Upon each store in excess of fifty, but not to exceed seventy-five, where the same are located in different counties, the annual license fee shall be Forty Dollars for each such additional store.

"(10) Upon each store in excess of seventy-five, where all are located in any one county, the annual license fee shall be Forty Dollars for each such additional store.

"(11) Upon each store in excess of seventy-five, where the same are located in different counties, the annual license fee shall be Fifty Dollars for each such additional store.

"In addition to the above amounts, Three Dollars for each and every One Thousand Dollars of value of stock carried in each store or for sale in such store."

The bill sets forth in great detail facts claimed to assimilate the operation of chain stores to that of stores individually owned and operated in the state of Florida. So-called voluntary chains of retail stores are described at length and their methods of operation compared with those of chain stores, the purpose being to demonstrate that there is no essential difference between the two methods of conducting business. On the basis of the facts recited the bill charges that to tax a store operated in the one manner and exempt an establishment conducted in the other is arbitrary and unreasonable. The difference in the amount of tax laid upon the operator of a given number of stores in a single county and another conducting the same number in two or more counties is challenged as an unconstitutional discrimination. The imposition of a tax of $3.00 per $1,000 on retail merchants not only as respects the stock actually contained in their stores, but also on goods in warehouse intended for sale in such stores, is attacked as discriminatory, for the reason that under another statute wholesale merchants are taxed only $1.50 per $1,000 of merchandise carried in their stores or warehouses. The exemption of filling stations is alleged to discriminate against the appellants in violation of the Fourteenth Amendment. The bill further avers that certain of the plaintiffs receive their goods from warehouses maintained outside the state of Florida, or order shipments to their stores from wholesale houses situate without the State, whereas many operators of single stores who are members of voluntary chains obtain their supplies from wholesalers in Florida, or from a warehouse in the State conducted by a voluntary chain corporation. The unequal effect of the act on these transactions is charged to be an unconstitutional burden upon interstate commerce.

The defendants moved to dismiss. The cause was heard upon this motion and a decree entered dismissing the bill at complainants' costs. The Supreme Court of

Florida affirmed the decree. The present appeal presents only the questions arising under the Federal Constitution.

1. In support of the allegation of arbitrary and unreasonable discrimination the bill recites facts from which appellants claim the conclusion is inevitable that there is no difference between the method of conducting chain stores and those employed in department stores, so-called voluntary chains, and singly operated units. This is but a reiteration of the contention made and overruled in *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527. It was there held that whatever may be said of individual similarities and differences between chain store operation and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting business, and the legislature may make the difference in method and character of the business the basis of classification for taxation. In their bill the complainants aver that the fact situation in Florida at the date of suit differed materially from that set forth in the *Jackson* case. Each of the features of chain store operation enumerated in this court's opinion is singled out, and as respects each the averment is that as to some chain store operators, or some operators of individual stores, the present case differs from the *Jackson* case.

In their endeavor thus to distinguish the earlier case, the appellants stress mere details, but ignore the underlying reason for sustaining the classification there attacked. The decision in the *Jackson* case was based not upon any single feature of chain store management, but upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store; and that the difference between an integrated and a voluntary chain is fundamental. While

incidents of the operation of the one may be quite similar to those found in the other, there is a clear distinction between one owner operating many stores and many owners each operating his own store with a greater or less measure of coöperation voluntarily undertaken. The legislature may make the distinction the occasion of classification for purposes of taxation. Neither similarity of opportunities and advantages in some aspects, nor the fact that the one kind of store competes with the other, is enough to condemn the discrimination in the taxes imposed. It is needless to repeat what was said in the *Jackson* case to the effect that the difference between the subjects taxed need not be great, and that if any reasonable distinction can be found the duty of the court is to sustain the classification embodied in the law.

2. The statute lays a tax of a stated sum per store on any given number of stores in the same ownership located within the same county; but if one happens to be in a county other than that in which the remainder are situate, imposes an increased tax not only on the single one lying in the second county, but on all. Thus if an owner has fourteen stores he may add a fifteenth in the same county and the only additional tax will be in the amount of $10 attributable to the privilege of conducting the new store. But if the new store happens to be in another county the license fee for it will be increased to $15, and that for each of the other fourteen, which have long since been opened and operated in the original county, will be increased from $10 to $15.

We are unable to discover any reasonable basis for this classification. As we have held, gradation of the tax according to the number of units operated cannot be said to be so unreasonable as to transcend the constitutional powers of the legislature. The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain can-

not be condemned as arbitrary; but an increase in the levy not only on a new store but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line, finds no foundation in reason or in any fact of business experience. There is no more reason for adopting the county line as the measure of the tax than there would be for taking ward lines in cities, or arbitrary lines drawn through the state regardless of county boundaries. It is suggested that the license fee for extending operations into a great and populous city, or for doing business upon crowded business streets, should be greater than for the same privilege in a village or a sparsely settled suburb. But the adoption of a county line can have no reference either to density of population, congregation of the buying public, or any other factor bearing upon the choice of a business site.

The appellees suggest that an owner reaps greater advantage by the establishment of a new store in a county not previously occupied. This may be conceded. It is evident, however, that the mere spatial relation between the store and a county line, cannot, in and of itself, affect the value of the privilege enjoyed. The appellees fail to show how the fact that the new place of business lies in another county increases the advantage over that to accrue from a location within the same county. The classification is solely of different chains, and the difference between them consists neither in number, size, surrounding population, nor in any factor having a conceivable relation to the privilege enjoyed.

It cannot justifiably be said that the section draws a distinction between national and local chains. The operation of the statute forbids any such assumption; for if a national chain keeps multiple units within a single county the tax on each is at the lower rate, while if a so-called local chain has one store in a given county and another just over the county line both places of business

take the higher rate. This difference in treatment has no discernible relation to the sort of chain which establishes a store across a county line. The Act is not a rough and ready but honest effort to differentiate what the Federal Census Bureau for its purposes denominates local chains on the one hand and what the Bureau terms sectional or national chains on the other. Neither the phraseology nor the method of operation of the Act is consistent with an attempt at any such classification.

The suggestion is made that the statute is in reality aimed solely at large corporate chains; and that as none other are parties to this suit, we may ignore any discriminatory features as respects individual owners of multiple units. But this is to construe the act by pure speculation and not by what it says, nor by any declared purpose, nor by anything contained in the record. Conceding for the purpose of the argument that in levying the tax the legislature might have drawn a distinction between corporate owners and individuals, and again between small owners, whether corporate or individual, and large owners, we are not permitted to guess at any such undisclosed purpose in the minds of those who adopted the statute. Assuming power to suppress by taxation a form of organization deemed inimical to the public interest, we can attribute no such motive to the present statute in the absence of legislative declaration or record proof. The Act taxes ownership and operation of stores, not corporate nor large corporate operation. The exaction is based on the doing of a business, not on the personality of the merchant.

The title declares it "An act requiring licenses for the operation, maintenance, opening or establishment of stores in this State" . . . Section 1 enacts "That from and after the first day of October, A. D. 1931, it shall be unlawful for any person, firm, corporation, association or co-partnership, whether foreign or domestic, to operate,

maintain, open or establish any store in this State without first having obtained a license . . ."

It would violate every principle of statutory construction to hold that this plain language really means that individuals and small local corporations are not within the intendment of the Act, but that it in fact applies only to so-called giant corporations. To attribute such a covert, hidden, and indirect purpose to those who passed the statute is, in effect, to charge the lawmakers with saying one thing and meaning another. Nothing said in *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, or any other decision of this court, justifies such a pronouncement. The legislature of Florida has declared the purpose and object of the statute to be to tax every store owner and operator, and we should not go behind that declaration and attribute to the lawmakers some other ulterior design. Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400; *Kentucky Finance Corp.* v. *Paramount Exchange,* 262 U. S. 544; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490; *Liggett Co.* v. *Baldridge,* 278 U. S. 105; *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239. Unequal treatment and arbitrary discrimination as between corporations and natural persons, or between different corporations, inconsistent with the declared object of the legislation, cannot be justified by the assumption that a different classification for a wholly different purpose might be valid.

Those provisions of § 5 which increase the tax if the owner's stores are located in more than one county are unreasonable and arbitrary, and violate the guaranties of the Fourteenth Amendment.

3. Section 11 of the act provides:

"A County license tax of twenty-five per cent of the State license tax shall be levied and imposed upon each

store as herein defined and each incorporated municipality of the State of Florida is authorized to levy a municipal license tax of twenty-five per cent of the State tax imposed by this Act, provided that the tax levied by or for the several counties and municipalities shall be graduated only on the number of stores situate in such county or municipality, respectively, notwithstanding the applicant may own other stores beyond the limits of such county or municipality, as the case may be. . . ."

The attack upon this section is the same as that leveled against § 5, which ordains the license tax for state purposes. If, as we have held, it is permissible for the state for its own purposes to impose a tax on a graduated scale depending upon the number of units operated by the chain, it is equally so for a municipality to grade its taxation by the same method, when duly authorized by state authority.

4. Section 5, in addition to the graduated license fee, lays a tax of $3.00 on each $1,000 value of stock carried in each store, or for sale in such store, and § 2 includes within the goods, wares and merchandise from which sales are to be made those owned by the taxpayer and held in storage to be sold in or through such store. The appellants insist that this requirement deprives them of the equal protection of the law for the reason that wholesale merchants not taxed by the act in question are assessed under § 926 of the Revised General Statutes of Florida a tax of only $1.50 per $1,000 of value on stock carried in their stores or warehouses. The result is said to be that a chain store operator must pay double the amount paid by the wholesaler who supplies individual stores competing with the chain.

Chain stores do not sell at wholesale. What they store, if they warehouse any goods in the state of Florida, is for the purpose of retail sale at their shops. On the other hand, goods held by a wholesaler are stored for sale to

retail establishments, to be resold by the latter. What has been said with respect to difference in methods and operation of the two kinds of warehouses applies in this instance. The diverse purposes of the storage and the difference in the nature of the business conducted are sufficient to justify a different classification of the two sorts of warehouses for taxation.

5. Section 8, which defines a store, contains a proviso to the effect that the term shall not include "filling stations engaged exclusively in the sale of gasoline or other petroleum products." The appellants assert the exemption deprives them of equal protection, since it is arbitrary and unreasonable. It appears, however, that all dealers in gasoline, including those conducting filling stations, are required by statute to pay a license tax of $5 per annum and in addition a tax of seven cents per gallon for every gallon of gasoline or other like products of petroleum sold (chaps. 15659 and 15788, Laws of Florida, Acts of 1931). It has long been settled that the Fourteenth Amendment does not prevent a state from imposing differing taxes upon different trades and professions or varying the rates of excise upon various products. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121–122. Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, may be obnoxious to the Constitution, but in view of the imposition of taxes on the operation of filling stations by other acts, pursuant to the legislature's power of classification, we cannot declare their exemption from the tax laid by the chain store act offensive to the guaranties of the Fourteenth Amendment.

6. It is asserted that the act bears unevenly upon those who purchase directly from a wholesale house or manufacturer whose plant is outside the State, some of whom

also store the goods in Florida preparatory to retail sale, and those who purchase from a wholesaler within the State; that the former are engaged in interstate commerce, and the tax is as to them a burden upon that commerce. The claim merits no serious discussion. The tax is obviously laid for the privilege of operating stores in Florida, and attempts no discrimination between merchandise imported from another state and that produced in Florida. Compare *Emert* v. *Missouri,* 156 U. S. 296; *Armour & Co.* v. *Virginia,* 246 U. S. 1; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506. It levies no tax and lays no burden on the purchase in interstate commerce of articles for sale in Florida. *Kehrer* v. *Stewart,* 197 U. S. 60, 65; *East Ohio Gas. Co.* v. *Tax Commission,* 283 U. S. 465, 471. The tax on the value of merchandise in a retail store, or warehoused in Florida for sale in that store, even though incident on articles which have moved in interstate commerce, is laid after interstate commerce has ceased. Compare *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500; *Bacon* v. *Illinois,* 227 U. S. 504; *Texas Co.* v. *Brown,* 258 U. S. 466, 475; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 478.

7. The bill avers that the state officials charged with the administration of the act have failed to demand the tax and do not intend to collect it from the owners of stores in certain lines of business, such as furniture dealers. This alleged official dereliction is claimed to be an unconstitutional discrimination in the enforcement of the act. For this proposition appellants rely upon decisions such as *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23, and *Iowa-Des Moines Nat. Bank* v. *Bennett,* 284 U. S. 239, holding a failure to assess all property taxed *ad valorem* at the same proportion of its value to be a denial of equal protection. The principle upon which those cases rest is that where a statute lays a tax upon property *ad valorem* at an even and equal rate, discrimi-

nation may result from the fact that the assessing officials systematically and intentionally value some property subject to the tax at a proportion of its true value different from that fixed with respect to other like property. They do not support the appellants' contention that where the taxing officials fail and neglect to exact the tax from some persons alleged to owe it, all others who are subject to the levy are in virtue of such omission exempt. This court has said that in the case of unequal and discriminatory assessment, to hold that the complaining taxpayer's only remedy is to have the assessments on all the other property raised to a level equal with that of his own is in effect to deny any remedy whatever. As a consequence redress is afforded by requiring the assessing body to revise the complainant's assessment to the level of those upon other like property. Appellants insist that by analogy they are entitled to be exempt, if others are improperly relieved from taxation.

Under the law of Florida every unit of the taxpaying public has an interest in having all property subject to taxation legally assessed, and may in behalf of himself and others in like situation require that all property subject to taxation be placed on the tax books and bear its proportionate part of the expense of government. The appellants, if they deem the tax illegally omitted in certain cases, may apply for a writ of mandamus to compel the taxing officials to do their duty. *State ex rel. Dofnos Corp.* v. *Lehman,* 100 Fla. 1401; 131 So. 333. Failure to collect the tax from some whose occupations fall within the provisions of the act, cannot excuse the appellants from paying what they owe. And certainly the remedy afforded by state law assures them equal treatment along with all others similarly situated.

8. We are told that the legislature of Florida would not have passed the act if any of its provisions were for

any reason to be inoperative, and we are asked, therefore, to declare the entire statute void.

Section 15 provides:

"If any section, provision or clause of this Act shall be declared invalid or unconstitutional, or if this Act as applied to any circumstances shall be declared invalid or unconstitutional, such invalidity shall not be construed to affect the portions of this Act not so held to be invalid or the application of this Act to other circumstances not so held to be invalid."

The operation of this section consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the state court. See *King* v. *West Virginia,* 216 U. S. 92; *Schneider Granite Co.* v. *Gast Realty Co.,* 245 U. S. 288, 290; *Dorchy* v. *Kansas,* 264 U. S. 286, 291.

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

Reversed and remanded.

MR. JUSTICE BRANDEIS, dissenting in part.

In my opinion, the judgment of the Supreme Court of Florida should be affirmed.

Florida Laws, 1931, Chapter 15,624 is legislation of the type popularly called Anti-Chain Store Laws. The statute provides for the licensing of retail stores by the State, the counties and the municipalities—a system under which large revenues may be raised. But the raising of revenue is obviously not the main purpose of the legislation. Its chief aim is to protect the individual, independently-owned, retail stores from the competition of chain stores. The statute seeks to do this, by subjecting the latter to financial handicaps which may conceivably compel their withdrawal from the State. An injunction

against its enforcement is sought on the ground that the law violates rights guaranteed by the Federal Constitution.

The Florida law is general in its terms. It prohibits the operation, after September 30, 1931, of any retail store without securing annually a license; and provides, among other things, for annual fees which are in part graduated. If the owner operates only one store the state fee is $5; if more than one, the fee for the additional stores rises by step increases, dependent upon both the number operated and whether all operated are located in a single county. The highest fee is for a store in excess of 75. If all of the stores are located in a single county, the fee for each store in excess of 75 is $40; if all are not located in the same county the fee is $50. Under this law, the owner of 100 stores not located in a single county pays for each store operated, on the average, $33.65; and if they were located in a single county the owner would pay for each store, on the average, $25.20. If the 100 stores were independently owned (although operated coöperatively as a so-called " voluntary chain ") the annual fee for each would be only $5. The statute provides that the licenses shall issue to expire on September 30th of each calendar year. This suit was begun September 30th, 1931. The first license year had expired before the case was heard in this Court.

In its main features, this statute resembles the Indiana law discussed in *Tax Commissioners* v. *Jackson,* 283 U. S. 527. For the reasons there stated, the Court sustains like provisions in the Florida statute. But it declares arbitrary, and hence invalid, the novel provision imposing heavier license fees where the multiple stores of a single owner are located in more than one county, because it is " unable to discover any reasonable basis for this classification." There is nothing in the record to show affirmatively that the provision may not be a reasonable one in

view of conditions prevailing in Florida. Since the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute, its validity should, in my opinion, be sustained. *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251, 257–8; *Railway Express Agency* v. *Virginia*, 282 U. S. 440, 444; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158; *Boston & Maine R. Co.* v. *Armburg*, 285 U. S. 234, 240; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 283.

There is, however, another ground on which this provision should be, and the whole statute could be, sustained—a ground not considered in the *Jackson* case and not pertinent there. Jackson was an individual. The plaintiffs here are all corporations. Though the provisions of the statutes in the two States are similar, certain rules of law applicable to the parties to the litigation are different.

The plaintiffs are thirteen corporations which engage in Florida exclusively in intrastate commerce. Each (except one) owns and operates a chain of retail stores within the State and some operate stores in more than one county. Several of the plaintiffs are organized under the laws of Florida; the rest under the laws of other States. No claim of discrimination as between the foreign and domestic corporations is made, compare *Southern Ry. Co.* v. *Greene*, 216 U. S. 400; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494; nor could it be, since the statute affects both classes of corporations alike. The suit is brought as a class suit, for the benefit of all merchants similarly situated who may desire to avail themselves thereof. From certain allegations in the bill it may be inferred that there are at least two natural persons within the State who own and operate more than one store. But as no such person has intervened in the cause, we have no occasion to enquire whether the discrimination com-

plained of would be fatal as applied to natural persons. The plaintiffs can succeed only if the discrimination is unconstitutional as applied to them; that is, as applied to corporations. One who would strike down a statute must show not only that he is affected by it, but that as applied to him it exceeds the power of the State. This rule, acted upon as early as *Austin* v. *The Aldermen,* 7 Wall. 694, and definitely stated in *Supervisors* v. *Stanley,* 105 U. S. 305, 314, has been consistently followed since that time. Compare *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550; *Darnell* v. *Indiana,* 226 U. S. 390, 398; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54–55; *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Assn.,* 276 U. S. 71, 88. For the reasons to be stated, the discrimination complained of, and held arbitrary by the court is, in my opinion, valid as applied to corporations.

First. The Federal Constitution does not confer upon either domestic or foreign corporations the right to engage in intrastate commerce in Florida. The privilege of engaging in such commerce in corporate form is one which the State may confer or may withhold as it sees fit. Compare *Railway Express Agency* v. *Virginia,* 282 U. S. 440. See *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S. 181, 184–5, 186; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 314; *Hemphill* v. *Orloff,* 277 U. S. 537, 548. Florida might grant the privilege to one set of persons and deny it to others; might grant it for some kinds of business and deny it for others; might grant the privilege to corporations with a small capital while denying it for those whose capital or resources are large. Or, it might grant the privilege to private corporations whose shares are owned mainly by those who manage them and to corporations engaged in coöperative undertakings, while denying the privilege to other concerns called private, but whose shares are listed on a stock exchange—corpora-

tions financed by the public, largely through the aid of investment bankers. It may grant the privilege broadly, or restrict its exercise to a single county, city or town, and to a single place of business within any such subdivision of the State.

Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the State deems desirable. It may be granted as a means of raising revenue; or in order to procure for the community a public utility, a bank or a desired industry not otherwise obtainable; or the reason for granting it may be to promote more generally the public welfare by providing an instrumentality of business which will facilitate the establishment and conduct of new and large enterprises deemed of public benefit. Similarly, if the privilege is denied, it is denied because incidents of like corporate enterprise are deemed inimical to the public welfare and it is desired to protect the community from apprehended harm.

Here we are dealing only with intrastate commerce. Compare *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 71. Since a State may fix the price for the privilege of doing intrastate commerce in corporate form, and the corporation is free to accept or reject the offer, the State may make the price higher for the privilege of locating stores in two counties than in one. Can it be doubted that a State, being free to permit or to prohibit branch banking, would be at liberty to exact a higher license fee from banks with branches than from those with only a single place of business; that it might exact a higher fee from those banks which have branches in several counties than it does from those whose branches are all within a single county; and that it might do so without obligation to justify, before some court, the reasonableness of the dif-

ference in the license fees?[1] The difference made by Florida in exacting a higher license fee for those concerns which do business in more than one county is similar in character to that suggested.

If the Florida statute had stated in terms that the license fee was exacted as compensation for the privilege of conducting multiple stores in corporate form, it seems clear that no corporation could successfully challenge its validity. Compare *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *Kansas City, F. S. & M. Ry. Co.* v. *Botkin,* 240 U. S. 227; *Nebraska ex rel. Beatrice Creamery Co.* v. *Marsh,* 282 U. S. 799. And since the State had the power so to do, the mere failure to state that such was the nature of the exaction does not render it invalid. Compare *Castillo v. McConnico,* 168 U. S. 674, 683. Nor does the fact that the plaintiffs had been admitted to the State prior to enactment of the statute. A State which freely granted the corporate privilege for intrastate commerce may change its policy. It may conclude, in the light of experience, that the grant of the privilege for intrastate commerce is harmful to the community and may decide not to grant the privilege in the future. It may go further in the process of exclusion. It may revoke privileges theretofore granted, compare *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 343; *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129, since, in the absence of contract, there is no vested interest which requires the con-

[1] In only 9 states is state-wide branch banking permitted: Arizona, California, Delaware, Maryland, North Carolina, Rhode Island, South Carolina, Vermont, and Virginia. Of these, all except South Carolina and Maryland require the authorization of the appropriate state officer. See Federal Reserve Bulletin, April, 1930, pp. 258–266; *id.,* July, 1932, pp. 455–458. Congress prohibited the establishment of any branch national bank from 1863 to 1927; see *First National Bank* v. *Missouri,* 263 U. S. 640, 656–659. The law of that year authorized branches only within the same city; and only if the state laws so permitted. Act of February 25, 1927, 44 Stat. 1224, 1228, c. 191, § 7. Compare Act of February 25, 1933, 47 Stat. 907.

tinuance of a legislative policy however expressed—whether embodied in a charter or in a system of taxation. *Citizens' Savings Bank* v. *Owensboro,* 172 U. S. 636, 644; *Texas & N. O. R. Co.* v. *Miller,* 221 U. S. 408, 414–415; *Erie R. Co.* v. *Williams,* 233 U. S. 685, 701; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, 157. Compare *Louisville Bridge Co.* v. *United States,* 242 U. S. 409.

If a State believes that adequate protection against harm apprehended or experienced can be secured, without revoking the corporate privilege, by imposing thereafter upon corporations the handicap of higher, discriminatory license fees as compensation for the privilege, I know of nothing in the Fourteenth Amendment to prevent it from making the experiment. The case at bar is not like those where a restriction upon the liberty of the individual may be attacked by showing that no evil exists, or is apprehended, or that the remedy provided cannot be regarded as appropriate to its removal. Nor is the case like those where a state regulation or state taxes burden interstate commerce. Compare *Welton* v. *Missouri,* 91 U. S. 275; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489; *Caldwell* v. *North Carolina,* 187 U. S. 622, 626; *Davis* v. *Farmers Co-operative Equity Co.,* 262 U. S. 312; *Buck* v. *Kuykendall,* 267 U. S. 307. Cases like *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Looney* v. *Crane Co.,* 245 U. S. 178; *Terral* v. *Burke Construction Co.,* 257 U. S. 529, have no application to the situation here discussed.

Whether the citizens of Florida are wise in seeking to discourage the operation of chain stores is, obviously, a matter with which this Court has no concern. Nor need it, in my opinion, consider whether the differences in license fees employed to effect such discouragement are inherently reasonable, since the plaintiffs are at liberty to refuse to pay the compensation demanded for the corporate privilege and withdraw from the State, if they consider the price more than the privilege is worth. But a review of the legislation of the several States by which

all restraints on corporate size and activity were removed, and a consideration of the economic and social effects of such removal, will help to an understanding of Anti-Chain Store Laws; and will show that the discriminatory license fees prescribed by Florida, even if treated merely as a form of taxation, were laid for a purpose which may be appropriately served by taxation, and that the specific means employed to favor the individual retailer are not constitutionally objectionable.

Second. The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed. Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational and charitable purposes.[2] It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain.[3]

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[2] See Joseph S. Davis, Essays in the Earlier History of American Corporations, Vol. II, pp. 16–18, 308–309. New York permitted incorporation under a general law for some business purposes in 1811. By 1850 a general law permitting incorporation for a limited business purpose had become common; and after 1875 extension of the privilege to every lawful business became so.

[3] It was doubtless because of this, that the earlier statutes limited the life of corporations to fixed terms of 20, 30 or 50 years. See the statutes cited in subsequent notes.

There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So, at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable. The later enactment of general incorporation laws does not signify that the apprehension of corporate domination had been overcome. The desire for business expansion created an irresistible demand for more charters; and it was believed that under general laws embodying safeguards of universal application the scandals and favoritism incident to special incorporation could be avoided. The general laws, which long embodied severe restrictions upon size and upon the scope of corporate activity, were, in part, an expression of the desire for equality of opportunity.[4]

The power of legislatures to grant special charters was sometimes strictly limited, even before the adoption of constitutional amendments withdrawing that power entirely. Thus the New York Constitution adopted in convention in November, 1821, and by popular vote in January, 1822, required the assent of two-thirds of each house for any act "creating, continuing, altering or renewing any body politic or corporate"—Art. 7, § 9; L. 1822–24, p. x. Similar provisions were included in the Delaware Constitution of 1831, Art. 2, § 17; in the Florida Constitution of 1838, Art. 13, § 2 (with an additional requirement of three months' public notice); and in the Michigan Constitution of 1835, Art. 12, § 2. The Rhode Island Constitution of 1842, Art. 4, § 17, required a bill for a corporate charter to be continued to the next legislature. The Constitution of Illinois, adopted in 1848, provided that no act authorizing the formation of a corporation with banking powers should be effective unless ratified by popular vote—Art. X, § 5; and a similar provision was included in the Constitution of Wisconsin, 1848, Art. II, §§ 4, 5.

[4] That the desire for equality and the dread of special privilege were largely responsible for the general incorporation laws is indicated by the fact that many States included in their constitutions a prohibition of the grant of special charters. The first constitutional provision requiring incorporation under general laws seems to be that in the New

(a) Limitation upon the amount of the authorized capital of business corporations was long universal.[5] The maximum limit frequently varied with the kinds of business to be carried on, being dependent apparently upon the supposed requirements of the efficient unit. Although the statutory limits were changed from time to time this principle of limitation was long retained. Thus

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York constitution of 1846—Art. 8, § 1 (except where objects of incorporation were not thus attainable). Other States followed in later years. Ala. 1867, Art. 13; Ark. 1874, Art. 12; Calif. 1849, Art. 4, § 31; Colo. 1876, Art. 15. § 2; Del. 1897, Art. 9, § 1; Ga. 1868, Art. 3, § 6 (amended by Laws 1890–1891, p. 55); Idaho 1889, Art. 11, § 2; Ill. 1848, Art. 10, § 1; Ind. 1851, Art. 11, § 13; Iowa 1846, Art. 8, § 2; Kans. 1855, Art. 13, § 1; La. 1864, Art. 121; Me. 1875, Art. 4, § 14 (except where objects could not thus be attained); Md. 1851, Art. 3, § 47 (except where objects could not thus be attained); Mich. 1850, Art. 15, § 1; Minn. 1857, Art. 10, § 2; Miss. 1890, Art. 7, § 178; Mo. 1865, Art. 8, § 4; Mont. 1889, Art. 15, § 2; Neb. 1866, Tit. Corporations, § 1; Nev. 1864, Art. 8, § 1; N. J. 1875, Art. 4, § 7; N. Car. 1868, Art. 8, § 1 (except where objects could not thus be attained); N. Dak. 1889, Art. 7, § 131; Ohio 1851, Art. 13, § 1; Ore. 1857, Art. 11, § 2; Penna. 1874, Art. 3, § 7; S. Dak. 1889, Art. 17, § 1; Tenn. 1870. Art. 11, § 8; Texas 1876, Art. 12, § 1; Utah 1895, Art. 12, § 1; Va. 1902, Art. 12, § 154; Wash. 1889, Art. 12, § 1; W. Va. 1872, Art. 11, § 1; Wis. 1848, Art. 11, § 1 (except where objects could not thus be attained).

[5] *Alabama*—until 1876, the limit was $200,000. Rev. Code 1867 (Walker), part 2, c. 3, § 1759; Act No. 282, March 3, 1870, § 3, L. 1869–70, p. 320. Under the Code of 1876 (Wood & Roquemore), § 1811, p. 509 (Act of February 28, 1876, § 9, L. 1875–76, p. 244), the limit was $1,000,000. Under the Code of 1896 (Civil, c. 28, § 1259, p. 429), it was $10,000,000. *Arizona*—Comp. L. 1864–71, c. 51, § 19, p. 486—$5,000,000. *Illinois*—$300,000, Act of June 22, 1852, L. p. 135; $1,000,000, Act of February 17, 1857, L. p. 110; $500,000, Act of February 18, 1857, L. p. 161. *Maine*—$50,000, Act of March 19, 1862, c. 152, § 3; $200,000, Act of February 28, 1867, c. 125, § 7; February 26, 1870, c. 93, § 1; $500,000, Act of February 3, 1876, c. 65, § 2; $2,000,000, Act of February 14, 1883, c. 116, § 1; $10,000,000, Act of March 25, 1891, c. 99, § 1. The Act of March 21, 1901, c. 229, was the first to prescribe no limit. *Wisconsin*—Until 1879, $250,000, Rev. Stat. 1878, c. 86, § 1772, p. 516; Act of February 7, 1879, c. 7,

in New York the limit was at first $100,000 for some businesses and as little as $50,000 for others.[6] Until 1881 the maximum for business corporations in New York was $2,000,000; and until 1890, $5,000,000.[7] In Massachusetts the limit was at first $200,000 for some businesses and as little as $5,000 for others.[8] Until 1871 the maximum for mechanical and manufacturing corporations was

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L. 1879, p. 10. Limits were imposed in some cases even by *Delaware* (March 21, 1871, c. 152, 14 Del. L. 299) and *New Jersey* (March 30, 1865, c. 379, L. 1865, p. 707; March 31, 1869, c. 374. L. 1869, p. 1001). And see the notes following.

[6] The Act of March 22, 1811, c. 67, limited the capital stock to $100,000. The purposes for which corporations might be formed under this law were limited to the following: manufacturing woolen, cotton or linen goods; making glass; making, from ore, bar-iron, anchors, mill-irons, steel, nail rods, hoop iron, ironmongery, sheet lead, shot, white lead and red lead. The Act of April 14, 1817, c. 223, extended the purposes to include the manufacture of morocco and other leather; but for such objects the capital stock was not to exceed $60,000. Further limitations were added from time to time, with the general limitation of $100,000, or a lower limitation; as, for example, $50,000 for corporations manufacturing salt. L. 1821, c. 231, § 19. The Act of 1852, c. 228, provided for the incorporation of companies for ocean navigation, and limited the authorized capital to $2,000,000; this was increased to $4,000,000 by Act of 1853, c. 124; to $8,000,000 by Act of 1866, c. 322; to $20,000,000 by Act of 1867, c. 419; and this was decreased to $4,000,000 by Act of 1875, c. 445. The Act of 1853, c. 117, provided for the incorporation of building companies, and set a maximum of $500,000; this was increased to $1,000,000 by Act of 1870, c. 773. The Act of 1854, c. 232, provided for the incorporation of companies to navigate lakes and rivers, and set a maximum of $1,000,000; this was increased to $2,000,000 by Act of 1865, c. 691. The Act of 1874, c. 143, provided for the incorporation of hotel companies, and set a maximum of $1,000,000.

[7] The General Business Corporation Act of 1875, c. 611, § 11, set a maximum of $2,000,000. This was increased to $5,000,000 by Act of 1881, c. 295.

[8] The first general act, May 15, 1851, c. 133, permitted incorporation for "any kind of manufacturing, mechanical, mining or quarrying business." It limited the maximum to $200,000. Act of March 19, 1855, c. 68, § 1, increased the maximum to $500,000. The act of

$500,000; and until 1899, $1,000,000.[9] The limit of $100,000 was retained for some businesses until 1903.[10]

In many other states, including the leading ones in some industries, the removal of the limitations upon size was more recent. Pennsylvania did not remove the limits

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May 9, 1870, c. 224 (Acts & Res. 1870, p. 154) repealed previous acts (§ 69) and made more comprehensive provisions; cutting, storing and selling ice, or carrying on any agricultural, horticultural, mechanical, mining, quarrying or manufacturing business, printing and publishing—a maximum of $500,000 (§ 2); coöperation in any of the above businesses and coöperative trade—$50,000 (§ 3); opening outlets, canals or ditches, propagation of herrings and alewives—$5,000 (§ 4); making and selling gas for light in cities or towns—$500,000 (§ 5); common carriage of goods—$1,000,000 (§ 6). Later acts provided for the manufacture and distribution of gas for steam, heat, power, and cooking; and for the furnishing of hydrostatic and pneumatic pressure. A maximum of $500,000 was prescribed. Acts of April 9, 1879, c. 202; May 15, 1885, c. 240; April 11, 1891, c. 189; May 27, 1893, c. 397. The same limit was prescribed for corporations to erect and maintain hotels, public halls, and buildings for manufacturing purposes. Acts of April 24, 1872, c. 244; March 9, 1888, c. 116.

[9] The maximum limit was raised to $1,000,000 for manufacturing and mechanical business by Act of March 22, 1871, c. 110, § 1; and for mining corporations by Act of May 3, 1875, c. 177, § 3; and to $100,000 for coöperative trade by Act of April 11, 1879, c. 210. By Act of April 14, 1873, c. 179, the general act was extended to the common carriage of persons—except by railroad—and the limit of $1,000,000 was retained. The Act of April 14, 1874, c. 165, authorized incorporation for " any lawful business," not specifically provided for, and limited the amount of stock to $1,000,000. The maximum limit for manufacturing and mechanical corporations was removed by Act of March 28, 1899, c. 199. For all the other corporate purposes, the limitations above-named remained until the passage of the Business Corporation Law, June 17, 1903, c. 437. By that time commissions with power to supervise the issues of public service corporations had long been established. Act of June 11, 1885, c. 314; Act of June 5, 1894, c. 450; Act of June 5, 1894, c. 452; Act of June 9, 1894, c. 462.

[10] For all except mechanical and manufacturing corporations, the limitations set out in notes 8 and 9, *supra*, remained until the passage of the Business Corporation Law, June 17, 1903, c. 437.

until 1905.[11] Its first general act not having contained a maximum limit, that of $500,000 was soon imposed.[12] Later, it was raised to $1,000,000; and, for iron and steel companies, to $5,000,000.[13] Vermont limited the maximum to $1,000,000 until 1911[14] when no amount over $10,000,000 was authorized if, in the opinion of a judge of the supreme court, such a capitalization would tend "to create a monopoly or result in restraining competition in trade."[15] Maryland limited until 1918 the capital of mining companies to $3,000,000; and prohibited them from holding more than 500 acres of land (except in Allegany County, where 1,000 acres was allowed).[16] New Hampshire did not remove the maximum limit until 1919.[17] It had been $1,000,000 until 1907,[18] when it was increased to $5,000,000.[19] Michigan did not remove the maximum limit until 1921.[20] The maximum, at first

[11] Act of April 22, 1905, No. 190, amending Act of February 9, 1901, No. 1; 5 Purdon's Digest, 1905–09 Supp. (13th ed.), p. 5340.

[12] The first Act passed in 1849, L. 1849, No. 368, p. 563, contained no limit. But a limit of $500,000 was imposed by Act of July 18, 1863, No. 949, L. 1864, p. 1102.

[13] The limit was raised to $1,000,000 for iron and steel corporations by Act of March 25, 1873, No. 4, L. 1873, p. 28, and it was extended to other corporations by Act of April 29, 1874, L. 1874, p. 73, which also increased the limit for the former to $5,000,000. The Act of April 18, 1873, No. 54, L. 1873, p. 76, had required that the Attorney General be satisfied of the reasonableness of so large a capitalization.

[14] Pub. Stat. (1906), Tit. 25, c. 187, § 4311, p. 830.

[15] Act of January 28, 1911, No. 143, L. 1910, pp. 140, 141–142. This provision was repealed by General Corporation Act, April 1, 1915, No. 141, L. 1915, p. 222.

[16] Bagby's Code (1911), Art. 23, § 245, p. 648; repealed by Act of April 10, 1918, c. 417, L. 1918, p. 884.

[17] Business Corporation Law, March 28, 1919, c. 92, L. 1919, p. 113.

[18] Pub. Stat. (1901), c. 147, § 6, p. 470.

[19] Act of April 5, 1907, c. 129, L. 1907, p. 131.

[20] General Corporation Act, No. 84, April 26, 1921, L. 1921, p. 125, contains no limit on the amount of stock. Corporate life is limited to 30 years, § 5(b).

$100,000,[21] had been gradually increased until in 1903 it became $10,000,000 for some corporations and $25,000,000 for others;[22] and in 1917 became $50,000,000.[23] Indiana did not remove until 1921 the maximum limit of $2,000,000 for petroleum and natural gas corporations.[24] Missouri did not remove its maximum limit until 1927.[25] Texas still has such a limit for certain corporations.[26]

(b) Limitations upon the scope of a business corporation's powers and activity were also long universal. At first, corporations could be formed under the general laws only for a limited number of purposes—usually those which required a relatively large fixed capital, like transportation, banking, and insurance, and mechanical, min-

[21] Act 148, May 18, 1846, § 6, L. 1846, pp. 265, 267—corporation for mining or manufacturing iron, copper, etc.

[22] Act 232, June 18, 1903, 3 Howell's Mich. Stat. (1914), § 9533, p. 3815. The $25,000,000 maximum was for mercantile and manufacturing corporations. It had previously been raised to $5,000,000 by Act 232, September 19, 1885, § 2, L. 1885, p. 343. For mining corporations, a different maximum was fixed: $500,000 by Act 41, February 5, 1853, L. 1853, p. 53; $2,500,000 by Act 113, May 11, 1877, § 4, L. 1877, p. 87; and $10,000,000 by Act 233, September 17, 1903, Howell's Mich. Stat. (1914), § 7783, p. 3158, § 7804, p. 3165.

[23] Act 254, May 10, 1917, § 2, L. 1917, pp. 529, 530. See *Dodge* v. *Ford Motor Co.*, 204 Mich. 459, 494; 170 N. W. 668.

[24] Until 1921, corporations for various objects were formed under various acts. For mining corporations, a limit of $2,000,000 was prescribed. 2 Burns' Ind. Stat. (1914), § 5137; 2 *id.* (1926), § 5547. In 1921, a general act, applicable to corporations for any lawful business, was passed, without limitation on the amount of stock. Act of February 28, 1921, c. 35, L. 1921, p. 93.

[25] By Act of March 30, 1907, L. 1907, p. 166, the maximum was increased to $50,000,000 from the $10,000,000 limit previously in force; Rev. Stat. 1899, c. 12, Art. 9, § 1320, p. 429; Rev. Stat. 1919, c. 90, Art. 7, § 10152. The act was repealed and no maximum provided in Act of April 8, 1927, L. 1927, p. 395; 1927 Supp. to Rev. Stat. § 10152.

[26] I Rev. Stat. (1925), Tit. 32, Art. 1302, ¶¶ 15, 16, 27. See Act of March 9, 1925, c. 51, L. 1925, p. 188.

ing, and manufacturing enterprises.[27] Permission to incorporate for "any lawful purpose"[28] was not common until 1875; and until that time the duration of corporate franchises was generally limited to a period of 20, 30, or 50 years.[29] All, or a majority, of the incorporators or directors, or both, were required to be residents of the incorporating state.[30] The powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed. Severe limitations were imposed on the amount of indebtedness, bonded or other-

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[27] See notes 6 and 8, *supra*. The first general act in New Jersey was that of February 25, 1846, L. 1846, p. 64. In Michigan—May 18, 1846, Act 148, L. 1846, p. 265. In Illinois—February 10, 1849, L. 1849, p. 87. In Pennsylvania—April 7, 1849, No. 368, L. 1849, p. 563. In Massachusetts—May 15, 1851, c. 133, Gen. Stat. 1860 (2 ed.), p. 341. In Maine—March 19, 1862, c. 152, L. 1862, p. 118. In Delaware—March 21, 1871, c. 152, 14 Del. L. 229. In general, the objects of incorporation under these acts were limited to mining, manufacturing, mechanical or chemical business; separate acts governed the formation of banking, insurance, and transportation companies. Authority to incorporate for mercantile business, where specifically provided, was given relatively late. *E. g.*, Md. Laws 1894, c. 599; Tenn. Acts 1887, c. 139; Vt. Laws 1884, No. 105; compare Ind. Laws 1889, c. 81, § 1. And see Cook on Corporations (1889), p. 91: "The general corporation laws [of Pennsylvania] do not provide for mercantile corporations, but these are practically incorporated by means of 'partnership associations.' . . ."

[28] New York—L. 1866, c. 838, p. 1896; L. 1875, c. 611, p. 755. Illinois—July 1, 1872, L. 1872, p. 296. Massachusetts—Act of April 14, 1874, c. 165, § 1. Maine—February 3, 1876, c. 65, L. 1876, p. 51. Other States followed shortly.

[29] In 1903, almost half the states limited the duration of corporate existence to periods of from 20 to 50 years. See Report of the Committee on Corporation Laws of Massachusetts (1903), pp. 162–164.

[30] *E. g.*, Calif. Civ. Code (1885), § 285; Conn. Gen. Stat. (1888), § 1944; Ill. Rev. Stat. (1891), c. 114, § 11; Me. Rev. Stat. (1883), pp. 412, 467; Md. Gen. L. (1888), p. 299; Ohio Rev. Stat. (1886), § 3236; Pa. Dig. (Purdon's 1905), Tit. Corporations, § 63. Compare Wis. Stat. (1908), c. 85, § 1750 (chief managing officer or superintendent must reside in state, except in case of interstate railroad).

wise.[31] The power to hold stock in other corporations was not conferred or implied.[32] The holding company was impossible.

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[31] See, *e. g.*, N. Y. Laws 1825, p. 448, § 3, 1 Rev. Stat. (1852), c. 18, Tit. 4, § 3, p. 1175; N. Y. Laws 1875, c. 611, § 22; Ill. Laws 1849, p. 87, § 22, p. 92; Ill. Laws 1872, p. 296, § 16, p. 300; Pa. Laws 1874, p. 73, § 13, p. 80; Maine Laws 1867, p. 72, § 24, p. 75; N. J. Laws 1846, p. 64, § 28, p. 69; N. J. Laws 1874, p. 124, § 16, p. 129. In 1903, almost half the states retained limitations on corporate indebtedness. See Report of the Committee on Corporation Laws of Massachusetts (1903), pp. 165–166.

[32] See Noyes, Intercorporate Relations (2d ed., 1909), pp. 473–498; Morawetz, Private Corporations (2d ed., 1886), § 431. New Jersey was the first state to confer the general power of intercorporate stockholding. N. J. Laws 1888, pp. 385, 445, cc. 269, 295; N. J. Laws 1893, c. 171, p. 301. See Gilbert H. Montague, Trusts of Today (1904), pp. 20–21; C. R. Van Hise, Concentration and Control (rev. ed., 1914), p. 70; W. Z. Ripley, Trusts, Pools and Corporations (rev. ed., 1916), pp. xix–xx; Eliot Jones, The Trust Problem in the United States (1921), p. 30; Maurice H. Robinson, The Holding Corporation, 18 Yale Review, pp 390, 406–407. Although unconditional power was not conferred until the Act of 1893, *supra*, it had been the practice of corporations formed in New Jersey to purchase the shares of other corporations. See Edward S. Keasbey, New Jersey and the Great Corporations, 13 Harvard Law Review, pp. 198, 207, 208. In no other state had there been a provision permitting the formation of holding companies, although by special act, notably in Pennsylvania, a few such companies had been formed. See James C. Bonbright and Gardiner C. Means, The Holding Company (1932), pp. 58–64. The scandal to which the series of Pennsylvania holding-company charters gave rise led to a constitutional amendment in that state forbidding the grant of special charters. Pa. Laws 1874, p. 8; Pa. Const., Art. III, § 7. See Bonbright and Means, *supra*, at p. 60. New York, like other states, had specifically prohibited intercorporate stockholding, except where the stock held was that of a corporation supplying necessary materials to the purchasing corporation, or where it was taken as security for, or in satisfaction of, an antecedent debt. N. Y. Laws 1848, c. 40, § 8; 1876, c. 358; 1890, c. 564, § 40; 1890, c. 567, § 12. See *De La Vergne Co.* v. *German Savings Institution*, 175 U. S. 40, 54–58.

(c) The removal by the leading industrial States of the limitations upon the size and powers of business corporations appears to have been due, not to their conviction that maintenance of the restrictions was undesirable in itself, but to the conviction that it was futile to insist upon them; because local restriction would be circumvented by foreign incorporation. Indeed, local restriction seemed worse than futile. Lesser States, eager for the revenue [33] derived from the traffic in charters, had removed safeguards from their own incorporation laws.[34]

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[33] The filing fees and franchise taxes are commonly measured by the authorized or issued stock. See National Industrial Conference Board, State and Local Taxation of Business Corporations (1931), Appendix B, pp. 138–159. And for the earlier laws, utilizing the same basis, see Report of the Massachusetts Committee on Corporation Laws (1903), pp. 265–288; House Committee on the District of Columbia, Report of Hearings of January 16, 1905, on H. R. 11811 and 12303 (Gov't Ptg. Office 1905) pp. 24–28.

[34] The traffic in charters quickly became widespread. In 1894 Cook on Stock and Stockholders (3d ed.) Vol. II, pp. 1604–1605 thus described the situation: "New Jersey is a favorite state for incorporations. Her laws seem to be framed with a special view to attracting incorporation fees and business fees from her sister states and especially from New York, across the river. She has largely succeeded in doing so, and now runs the state government very largely on revenues derived from New York enterprises. . . .

"Maine formerly was a resort for incorporators, but a recent decision of its highest court holding stockholders liable on stock which has been issued for property, where the court thought the property was not worth the par value of the stock, makes Maine too dangerous a state to incorporate in, especially where millions of dollars of stock are to be issued for mines, patents and other choice assortments of property. . . .

"West Virginia for the past ten years has been the Snug Harbor for roaming and piratical corporations. . . . The manufacture of corporations for the purpose of enabling them to do all their business elsewhere seems to be the policy of this young but enterprising state. Its statutes seem to be expressly framed for that purpose. . . ."

Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive.[35] The states joined in advertising

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In 1906 John S. Parker thus described the practice, in his volume Where and How—A Corporation Handbook (2d ed.), p. 4: "Many years ago the corporation laws of New Jersey were so framed as to invite the incorporation of companies by persons residing in other states and countries. The liberality and facility with which corporations could there be formed were extensively advertised, and a great volume of incorporation swept into that state. . . .

"The policy of New Jersey proved profitable to the state, and soon legislatures of other states began active competition. . . .

"Delaware and Maine also revised their laws, taking the New Jersey act as a model, but with lower organization fees and annual taxes. Arizona and South Dakota also adopted liberal corporation laws, and contenting themselves with the incorporation fees, require no annual state taxes whatever.

"West Virginia for many years has been popular with incorporators, but in 1901, in the face of the growing competition of other states, the legislature increased the rate of annual taxes." And West Virginia thus lost her popularity. See Conyngton and Bennett, Corporation Procedure (rev. ed. 1927), p. 712. On the other hand, too drastic price cutting was also unprofitable. The bargain prices in Arizona and South Dakota attracted wildcat corporations. Investors became wary of corporations organized under the laws of Arizona or South Dakota and both states fell in disrepute among them and consequently among incorporators. See Conyngton on Corporate Organizations (1913), ch. 5.

[35] Thus, in its pamphlet, "Business Corporations Under the Laws of Maine" (1903), the Corporation Trust Co. enumerated among the advantages of the Maine laws: the comparatively low organization fees and annual taxes; the absence of restrictions upon capital stock or corporate indebtedness; the authority to issue stock for services as well as property, with the judgment of the directors as to their value conclusive; and, significantly enough, "the method of taxation, which bases the annual tax upon the stock issued, does not necessitate inquiry into or report upon the intimate affairs of the corporation." See also its pamphlet "Business Corporations Under the Laws of Delaware" (1907). See also the Red Book on Arizona Corporation Laws (1908), published by the Incorporating Company of Arizona, especially p. 5: "The remoteness of Arizona from the Eastern and

their wares.[36] The race was one not of diligence but of laxity.[37] Incorporation under such laws was possible; and the great industrial States yielded in order not to

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Southern States has in a measure delayed the promulgation of the generousness of its laws. New Jersey, Delaware and West Virginia have become widely known as incorporating states. More recently Arizona, Dakota, New Mexico and Nevada have come into more or less prominence by the passage of laws with liberal features."

[36] Thus, in an official pamphlet containing the corporation laws of Delaware (1901), the Secretary of State wrote in the preface: "It is believed that no state has on its statute books more complete and liberal laws than these;" and the outstanding advantages were then enumerated. See also a pamphlet "Organization of Corporations," issued by the Secretary of State of Maine in 1904. See also "The General Corporation Act of New Jersey" (1898), edited by J. B. Dill, issued by the Secretary of State: "Since 1875 it has been the announced and settled policy of New Jersey to attract incorporated capital to the State. . . ." P. xvii. And "The General Corporation Laws of West Virginia" (1905), published by the Secretary of State, containing, at pp. 209–210, a summary of the advantages of incorporating in West Virginia. For other examples, see Henry R. Seager and Charles A. Gulick, Jr., Trust and Corporation Problems (1929), c. 4.

[37] A change in the policy of New Jersey was urged by Woodrow Wilson in his inaugural address as Governor. "If I may speak very plainly, we are much too free with grants of charters to corporations in New Jersey. A corporation exists, not of natural right, but only by license of law, and the law, if we look at the matter in good conscience, is responsible for what it creates. . . . I would urge, therefore, the imperative obligation of public policy and of public honesty we are under to effect such changes in the law of the State as will henceforth effectually prevent the abuse of the privilege of incorporation which has in recent years brought so much discredit upon our State. . . . If law is at liberty to adjust the general conditions of society itself, it is at liberty to control these great instrumentalities which nowadays, in so large part, determine the character of society." Minutes of Assembly of New Jersey, January 17, 1911, pp. 65, 69; reprinted in Public Papers of Woodrow Wilson (ed. by Baker and Dodd), Vol. II, pp. 273, 274, 275. In 1913 the so-called "Seven-Sisters" Acts were passed by New Jersey, forbidding, among other things, intercorporate stockholding. Laws 1913, c. 18. These, in turn, were repealed in 1917. Laws 1917, c. 195. The report recom-

lose wholly the prospect of the revenue and the control incident to domestic incorporation.

The history of the changes made by New York is illustrative. The New York revision of 1890, which eliminated the maximum limitation on authorized capital, and

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mending the repeal stated: "Those laws now sought to be repealed are harmful to the State because there is much uncertainty as to their meaning, with the result that those who would have otherwise incorporated here or remained here are going to other States. There is no gain to the people of the country, but this State loses a revenue which is perfectly legitimate. We doubt not that much of the adverse criticism outside of the State which was directed against New Jersey and its corporation laws prior to 1913 was due as much to the desire to divert the organization of corporations to other States as it was to prevent evils which might have arisen, and New Jersey fell for the criticism. To whatever cause may be attributed the loss of revenue to the State, it is plain that it is a condition and not a theory which confronts the State, as the following figures will show: . . . Such losses mean a serious depletion of the revenues of the State, and, unless a different policy is pursued, it will not be long before the corporation business of the State will have been reduced to a minimum. We believe such conditions justify the appointment of the Commission and will also justify the Legislature in adopting the result of our investigation and embodied in the proposed revision." Report of the Commission to Revise the Corporation Laws of New Jersey, 1917, pp. 7–8.

For more recent movements, see A. A. Berle and Gardiner C. Means, The Modern Corporation and Private Property (1932), p. 206, n. 18: "As significant of the trend towards that corporate mechanism with the broadest powers to the management, it is interesting to note the steady trend towards the states having a loose incorporation law. Of the 92 holding corporations mentioned above [those whose securities were listed on the New York Stock Exchange and were active in 1928] 44 were organized in Delaware, all of them being formed since 1910. Indeed, of the 44 holding corporations now chartered in that state, 25 were incorporated there between the years 1925 and 1928. In the less liberal New York State 13 of the above holding companies were formed, 6 of them having been chartered between 1910 and 1920, while only 4 were formed since 1920. Ten of the holding companies were chartered in Maryland, one in 1920 and the remaining 9 between 1923 and 1928, presumably in large measure as a result of the looseness of

permitted intercorporate stockholding in a limited class of cases,[38] was passed after a migration of incorporation from New York, attracted by the more liberal incorporation laws of New Jersey.[39] But the changes made by New York in 1890 were not sufficient to stem the tide.[40] In

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the Maryland corporation law of 1923. New Jersey, a relatively popular state at the turn of the century shows only two of the holding company charters granted there since 1910; while Virginia shows 7 such charters.

"Combined holding and operating corporations likewise show a steady trend towards Delaware. Of the whole list, 148 of the 573 corporations hold Delaware charters, most of them relatively recent; New York is second with 121, most of them relatively old; New Jersey third with 87, most of which grow out of the great merger period from 1898–1910."

Corporations formed in one state by citizens of another state, to do business in the state of their residence, were frequently subjected to collateral attack. Generally the courts felt bound to uphold the corporate status. See the cases in J. H. Sears, The New Place of the Stockholder (1929), Appendix G. Occasionally, however, states legislated against the practice. Thus California enacted that the statutory liability of stockholders should apply to those in foreign as well as in domestic corporations. In two cases where the foreign corporation was organized specifically to do business in California this provision was held applicable. *Pinney* v. *Nelson,* 183 U. S. 144; *Thomas* v. *Matthiessen,* 232 U. S. 221. And more recently this Court has sustained a constitutional provision of Virginia which prohibits foreign public service companies from doing an intrastate business in the state. *Railway Express Agency* v. *Virginia,* 282 U. S. 440. The provision was adopted in the light of widespread incorporation of such companies in West Virginia and New Jersey. See Debates of Constitutional Convention of Virginia, 1901–1902, Vol. II, p. 2811.

[38] One corporation was allowed to hold stock in others so long as the latter were engaged in manufacturing materials, etc., necessary for the former; and in others, which used products of the former. Business Corporation Law, 1890, c. 567, § 12.

[39] See note 34, *supra.*

[40] See Report of N. Y. Joint Committee on Trusts, March 9, 1897, 120th Sess., Sen. Doc. No. 30, pp. 3–4: "When in 1890 the Court of Appeals in this State pronounced its final judgment against the system of trust organization then in vogue [*New York* v. *North River*

1892, the Governor of New York approved a special charter for the General Electric Company, modelled upon the New Jersey Act, on the ground that otherwise the enterprise would secure a New Jersey charter.[41] Later in the same year the New York corporation law was again revised, allowing the holding of stock in other corporations.[42] But the New Jersey law still continued to be more attractive to incorporators.[43] By specifically providing that corpora-

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Sugar Refining Co., 121 N. Y. 582; 24 N. E. 834], the 'trust' became a thing of the past, existing trust agreements were dissolved and under the permission of existing laws the constituent elements held together under such agreements, became incorporated in the State of New Jersey and in other jurisdictions, where, either by accident or by design, the law of incorporation was so adjusted that by the simplest formality a trust declared unlawful and a conspiracy against public welfare might continue its career. . . .

"The corporation laws of the State of New York at that time differed essentially from the laws of the State of New Jersey in that they did not, as did the latter, permit the acquisition by one corporation of the capital stock of another, and consequently there followed an immediate migration of trusts to the State of New Jersey to secure corporate charters there and thus avoid complications in which the decision of the Court of Appeals threatened to involve them."

[41] N. Y. Laws 1892, c. 323. "The measure is approved because it is claimed that its objects cannot well be secured under general laws, and because its approval will keep within the State a corporation which professes to be ready to invest a large amount of capital, and which, without the concessions allowed by its proposed charter, would be incorporated under the laws of New Jersey." Public Papers of Governor Flower, 1892, p. 104. Quoted in James B. Dill, "Some Aspects of New Jersey's Corporate Policy," Address before the Pennsylvania Bar Association, June 29, 1903, Rep. Pa. Bar Assn., 1903, pp. 265, 267.

[42] N. Y. Laws 1892, c. 688, § 40.

[43] The New York Evening Post, March 23, 1896, said: "The *Evening Post* has frequently pointed out that New York capital is driven to shelter in New Jersey by reason of the more liberal laws of that State governing the incorporation of companies as compared with the laws of New York. Nearly all large corporations doing business in this City and State are incorporated under the laws of New Jersey or some other State, where more liberal laws prevail and in

tions might be formed in New Jersey to do all their business elsewhere,[44] the state made its policy unmistakably clear. Of the seven largest trusts existing in 1904, with an aggregate capitalization of over two and a half billion dollars, all were organized under New Jersey law; and three of these were formed in 1899.[45] During the first seven months of that year, 1336 corporations were organized under the laws of New Jersey, with an aggregate authorized capital of over two billion dollars.[46] The Comptroller of New York, in his annual report for 1899, complained that "our tax list reflects little of the great wave of organization that has swept over the country during the past year and to which this state contributed more capital than any other state in the Union." "It is time," he declared, "that great corporations having their actual headquarters in this State and a nominal office elsewhere, doing nearly all of their business within our borders, should be brought within the jurisdiction of this State not only as to matters of taxation but in respect to other and equally important affairs."[47] In 1901 the New York corporation law was again revised.[48]

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which inducements are thereby held out to attract capital thither and make it their legal home."

[44] N. J. Laws 1892, p. 90. In 1894, New Jersey provided by statute that corporations of another state should be subjected to the same taxes, license and other requirements in New Jersey as are imposed on New Jersey corporations by such other state. Laws 1894, c. 228, § 3. The statute was "in retaliation for the hostile legislation of some of the other States regarding foreign corporations." J. B. Dill, The General Incorporation Act of New Jersey (1898), p. 100.

[45] See Moody, The Truth About the Trusts, p. 453. Of the 298 corporations listed as "lesser industrial trusts," 150 had New Jersey charters. *Id.*, pp. 454–467.

[46] Edward K. Keasbey, "New Jersey and the Great Corporations," Address before the American Bar Association, August 28, 1899, reprinted in 13 Harvard L. Rev., p. 198.

[47] Report of Comptroller of New York, 1890, p. xxvii.

[48] N. Y. Laws 1901, cc. 355, 520.

The history in other states was similar. Thus, the Massachusetts revision of 1903 was precipitated by the fact that "the possibilities of incorporation in other states have become well known, and have been availed of to the detriment of this Commonwealth." [49]

Third. Able, discerning scholars [50] have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations

[49] Report of Committee on Corporation Laws, Massachusetts (1903), p. 19. The Governor of Michigan, in his Message to the Legislature in 1921, said of the corporation laws of that state: "Because of their inadequacy to meet modern needs and requirements, and the failure to accord domestic corporations the same rights granted to those organized outside of the state, most of our business corporations are being organized in other states, only to return here as foreign corporations." Journal of House of Representatives of Michigan, 1921, pp. 31, 37; reprinted in Messages of the Governors of Michigan (Michigan Historical Commission, 1927), Vol. 4, pp. 775, 784. In 1921 the corporation laws of Michigan were revised, eliminating, among other things, the maximum limitation on capital stock. See note 20, *supra*.

The effect of the policy of West Virginia was described by President Henry M. Russell in an address before the West Virginia Bar Association in 1891. In the six years ending January 1, 1889, he stated, 330 charters were issued by the state to corporations having their principal places of business elsewhere. Of these, 101 were to be in the District of Columbia, and 65 in New York. "The neighboring State of Pennsylvania has adopted very stringent laws for the government of its corporations. . . . So our Pennsylvania friends who have patent rights or gold mines, come to West Virginia. . . . Of our 330 corporations, 80 were to have their principal offices in Pennsylvania. Our other neighbor, the State of Ohio, carries upon its statute book a law imposing a double liability on the stockholders for the debts of the corporation . . . and 30 out of the 330 have their principal offices in Ohio. Thus 284 of the 330 are found in the cities of Washington and New York and the States of Pennsylvania and Ohio. . . . It is unjust to our sister States." 27 American L. Rev., p. 105.

[50] Adolf A. Berle, Jr. and Gardiner C. Means, The Modern Corporation and Private Property (1932). Compare William Z. Ripley, Main Street and Wall Street (1927).

and of vesting in their managers vast powers once exercised by stockholders—results not designed by the States and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State. The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public, are so fundamental and far-reaching as to lead these scholars to compare the evolving "corporate system" with the feudal system; and to lead other men of insight and experience to assert that this "master institution of civilised life" is committing it to the rule of a plutocracy.[51]

The data submitted in support of these conclusions indicate that in the United States the process of absorp-

[51] Thorstein Veblen, Absentee Ownership and Business Enterprise (1923), p. 86; Walther Rathenau, Die Neue Wirstchaft (1918), pp. 78–81.

tion has already advanced so far that perhaps two-thirds of our industrial wealth has passed from individual possession to the ownership of large corporations whose shares are dealt in on the stock exchange;[52] that 200 non-banking corporations, each with assets in excess of $90,000,000, control directly about one-fourth of all our national wealth, and that their influence extends far beyond the assets under their direct control; [53] that these 200 corporations, while nominally controlled by about 2,000 directors, are actually dominated by a few hundred persons[54]—the negation of industrial democracy. Other writers have shown that, coincident with the growth of these giant corporations, there has occurred a marked concentration of individual wealth;[55] and that the resulting disparity in

[52] Berle and Means, The Modern Corporation and Private Property, Preface, p. vii.

[53] *Id.*, pp. 31–32. Compare H. W. Laidler, Concentration of Control in American Industry (1931).

[54] Berle and Means, p. 46, n. 34. Compare James C. Bonbright and Gardiner C. Means, The Holding Company (1932); Regulation of Stock Ownership in Railroads, H. R. No. 2789, 71st Cong., 3d Sess. (Dr. W. M. W. Splawn); Hearings before Senate Judiciary Committee, 72d Cong., 2d Sess., on S. 5267, February 14, 1933 (John Frey); Stanley Edwin Howard, Business, Incorporated, in Facing the Facts (J. G. Smith, ed., 1932), p. 124 *et seq.;* Lewis Corey, The House of Morgan, pp. 354–356, 441–448; George W. Norris, The Spider Web of Wall Street, Cong. Rec., 72d Cong., 2d Sess., pp. 4917–4928 (February 23, 1933).

[55] Federal Trade Commission, National Wealth and Income (1926); S. Howard Patterson and Karl W. H. Scholz, Economic Problems of Modern Life (1927), c. 22; Lewis Corey, The New Capitalism, in American Labor Dynamics (J. B. S. Hardman, ed., 1928), c. 3; Stuart Chase, Prosperity—Fact or Myth (1929), c. 9; H. Gordon Hayes, Our Economic System (1929), Vol. II, c. 56; Willard E. Atkins et al., Economic Behavior (1931), Vol. II, c. 34; Harold Brayman, Wealth Rises to the Top, in Outlook and Independent, Vol. 158, No. 3 (May 20, 1931), p. 78; Buel W. Patch, Death Taxes and The Concentration of Wealth, in Editorial Research, Reports, Vol. II, 1931, No. 11 (September 18, 1931), pp. 635–637; Frederick C. Mills, Economic Tendencies in the United States (National Bureau of

incomes is a major cause of the existing depression.[56] Such is the Frankenstein monster which States have created by their corporation laws.[57]

Economic Research, in Co-operation with the Committee on Recent Economic Changes, 1932), pp. 476–528, 549–558; Paul H. Douglas, Dividends Soar, Wages Drop, in World Tomorrow, December 28, 1932, p. 610; reprinted in Congressional Record, 72nd Cong., 2d Sess., Vol. 76, p. 2291 (January 20, 1933). Compare Morris A. Copeland, The National Income and its Distribution, in Recent Economic Changes in the United States (Report of President's Conference on Unemployment, Committee on Recent Economic Changes, 1929), Vol. II, c. 12; Willford I. King, The National Income and Its Purchasing Power (1930). George L. Knapp pointed out that in 1929, 504 persons had $1,185,135,300 taxable net income, whereas the aggregate gross market value of all the cotton and all the wheat grown in the United States in 1930 by the 2,332,000 cotton and wheat farmers was only $1,191,451,000 (see Labor, March 31, 1931, p. 4; *id.*, May 19, 1931, p. 4; *id.*, November 29, 1932 p. 4); and that the estimate of the aggregate dividends and interest paid in the United States in 1932 was $1,642,000,000, whereas that of factory wages was $903,000,000. See Labor, February 14, 1933, p. 4. (Compare the final figures in Bureau of Internal Revenue, Statistics of Income for 1929, pp. 5, 61, showing that 513 persons had taxable net income of $1,212,098,784.)

[56] Compare J. A. Hobson, Poverty in Plenty (1931), chs. 2, 4; Arthur B. Adams, The Business Depression of 1930, in American Economic Review, Vol. 21 (March, 1931, supplement), p. 183; John A. Ryan, The Industrial Depression of 1929–1931, in Questions of The Day (1931), pp. 209–217; Philip F. LaFollette, Message to the Legislature of Wisconsin, November 24, 1931, pp. 6–8; Fred Henderson, Economic Consequences of Power Production (1931), c. 1; Paul Blanshard, Socialist and Capitalist Planning, in Annals of The American Academy of Political and Social Science, Vol. 162 (July, 1932), pp. 6–8; Arthur Dahlberg, Jobs, Machines, and Capitalism (1932), pp. 205–208; Scott Nearing, Must We Starve? (1932), p. 119; George Soule, The Maintenance of Wages, in Proceedings of The Academy of Political Science, Vol. 14, No. 4 (January, 1932), pp. 87, 91; Christ Christensen, Major Problems of Readjustment, in *id.*, Vol. 15, No. 2 (January, 1933), p. 235; Taylor Society Bulletin, Vol. 17, No. 5 (October, 1932), pp. 165–193.

[57] Compare I. Maurice Wormser, Frankenstein, Incorporated (1931).

Fourth. Among these 200 corporations, each with assets in excess of $90,000,000, are five of the plaintiffs. These five have in the aggregate, $820,000,000 of assets;[58] and they operate, in the several States, an aggregate of 19,718 stores.[59] A single one of these giants operates nearly 16,000.[60] Against these plaintiffs, and other owners of multiple stores, the individual retailers of Florida are engaged in a struggle to preserve their independence—perhaps a struggle for existence. The citizens of the State, considering themselves vitally interested in this seemingly unequal struggle, have undertaken to aid the individual retailers by subjecting the owners of multiple stores to the handicap of higher license fees. They may have done so merely in order to preserve competition. But their purpose may have been a broader and deeper one. They may have believed that the chain store, by furthering the concentration of wealth and of power and by promoting absentee ownership, is thwarting American ideals; that it is making impossible equality of opportunity; that it is converting independent tradesmen into clerks; and that

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[58] See Berle and Means, The Modern Corporation and Private Property, p. 21. This figure includes the assets of Drug, Inc., which in 1928 acquired the stock of United Drug Co., which in turn controls through stock ownership the Louis K. Liggett Co. See Moody's Industrial Securities (1932), pp. 1215, 1217, 1219.

[59] The total is compiled from figures, as of December 31, 1930, in Report of Federal Trade Commission on Growth and Development of Chain Stores, Sen. Doc. No. 100, 72d Cong., 1st Sess. (1932), pp. 76–77. Compare English Co-operative Wholesale Society, Limited, [U. S.] Commerce Reports, February 18, 1933, p. 104.

[60] The Report of the Federal Trade Commission, *supra,* note 59, at p. 76, gives 15,738 as the number of stores operated by the Great Atlantic and Pacific Tea Co. The number operated by the other four plaintiffs is as follows: Louis K. Liggett Co., 549; Montgomery Ward & Co., 556; United Cigar Stores Co., 994; F. W. Woolworth Co., 1,881. *Ibid.*

it is sapping the resources, the vigor and the hope of the smaller cities and towns.[61]

The plaintiffs insist that no taxable difference exists between the owner of multiple stores and the owner of an individual store. A short answer to the contention has already been given, so far as required for the decision of this case. It is that the license fee is not merely taxation. The fee is the compensation exacted for the privilege of carrying on intrastate business in corporate form. As this privilege is one which a State may withhold or grant, it may charge such compensation as it pleases. Nothing in the Federal Constitution requires that the compensation demanded for the privilege should be reasonable. Moreover, since the authority to operate many stores, or to operate in two or more counties, is certainly a broader privilege than to operate only one store, or in only one county, there is in this record no basis for a finding that it is unreasonable to make the charge higher for the greater privilege.

A more comprehensive answer should, however, be given. The purpose of the Florida statute is not, like ordinary taxation, merely to raise revenue. Its main purpose is social and economic. The chain store is treated as a thing menacing the public welfare. The aim of the statute, at the lowest, is to preserve the competition of the

[61] Compare Montaville Flowers, America Chained (1931); H. E. Fryberger, The Abolition of Poverty (1931); W. H. Cameron, Our Juggernaut (1932); M. M. Zimmerman, The Challenge of Chain Store Distribution (1931), pp. 2–4; Godfrey M. Lebhar, The Chain Store—Boon or Bane? (1932), p. 59; James L. Palmer, Are These Twelve Charges Against the Chains True? in Retail Ledger, July, 1929, reprinted in E. C. Buehler, Debate Handbook on the Chain Store Question (1930), p. 102; Edward G. Ernst and Emil M. Hartl, The Chain Store and the Community, in Nation, November 19, 1930, p. 545; John P. Nichols, Chain Store Manual (1932), c. 5.

independent stores with the chain stores; at the highest, its aim is to eliminate altogether the corporate chain stores from retail distribution. The legislation reminds of that by which Florida and other States, in order to eliminate the "premium system" in merchandising, exacted high license fees of merchants who offered trading stamps with their goods. *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342; *Tanner* v. *Little*, 240 U. S. 369. Compare *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157; *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304.

The plaintiffs discuss the broad question whether the power to tax may be used for the purpose of curbing, or of exterminating, the chain stores by whomsoever owned. It is settled that a State "may carry out a policy" by "adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry." *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322, 329.[62] And since the Fourteenth Amendment "was not intended to compel the State to adopt an iron rule of equal taxation," *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237, it may exempt from taxation kinds of business which it wishes to promote; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; and may burden more heavily kinds of business which it wishes to discourage. *Williams* v. *Fears*, 179 U. S. 271; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563; compare *Alaska Fish Co.* v. *Smith*, 255 U. S. 44. To do that has been the practice also of the Federal Government. It protects, by customs duties, our manufacturers and producers from the competition of foreigners. Compare *Hampton & Co.*

[62] Indeed, it has been urged that the taxation of the States and the Nation should be framed not with a view solely to the raising of revenue, but always for the purpose of promoting that social policy which the people deem wise.

v. *United States,* 276 U. S. 394, 411–413; also, *Billings* v. *United States,* 232 U. S. 261. It protects, by the oleomargarine laws, our farmers and dairymen from the competition of other Americans. Compare *McCray* v. *United States,* 195 U. S. 27. It eliminated, by a prohibitive tax, the issue of state bank notes in competition with those of national banks. Compare *Veazie Bank* v. *Fenno,* 8 Wall. 533. Such is the constitutional power of Congress and of the state legislatures. The wisdom of its exercise is not the concern of this Court.

Whether chain stores owned by individuals may be subjected to the discrimination here challenged need not, however, be decided. This case requires decision only of the narrower question—whether the State may freely apply discrimination in license fees against corporate chain stores. The essential difference between corporations and natural persons has been recognized by the Federal Government in taxing the income of businesses when conducted by corporations, while exempting a similar business when carried on by an individual or partnership. *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 158. It has, at other times, imposed upon businesses conducted by corporations heavier taxes than upon those conducted by individuals.[63] The equality clause of the Fourteenth Amendment presents no obstacle to a State, likewise, taxing businesses engaged in intrastate commerce differently according to the instruments by which they are carried on; provided the purpose of the discrimination is a permissible one, the discrimination employed a means appropriate to achieving the end sought, and the difference in the instruments so employed vital. Compare *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532. *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373; *Singer Sewing Machine Co.* v.

[63] See the statutes cited in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 407–409, notes 5 and 6.

Brickell, 233 U. S. 304. The corporate mechanism is obviously a vital element in the conduct of business. The encouragement or discouragement of competition is an end for which the power of taxation may be exerted. And discrimination in the rate of taxation is an effective means to that end.

The requirement of the equality clause that classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation," *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 37, is here satisfied. Mere difference in degree has been widely applied as a difference justifying different taxation or regulation.[64] The difference in power between corporations and natural persons is ample basis for placing them in different classes. Even as between natural persons, where the equality clause applies rigidly, differences in size furnish an adequate basis for discrimination in a tax rate. The size of estates, or of bequests, is the difference on which rest all the progressive inheritance taxes of the States and of the Nation. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293; *Knowlton* v. *Moore,* 178 U. S. 41, 109; *Keeney* v. *New York,* 222 U. S. 525, 536; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Salomon* v. *State Tax Commission,* 278 U. S. 484. Differences in the size of incomes is the basis on which rest all progressive income taxes. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 25. Differences in the size of businesses present, likewise, an adequate basis for different rates of taxation. Compare *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322, 331; *Pacific American Fisheries Co.* v. *Alaska,* 269 U. S. 269. And so do differences in the extent or field of operation.

The State might justify progressively higher license fees for corporations of larger size, or a more extended

[64] See *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 42–46, notes 1–6.

field of operation, on the oft-asserted ground that such concerns are more efficient than smaller units and, hence, that they can, and should, contribute more to the public revenues. But the State need not rest the difference in tax rates on a ground so debatable as the assertion that efficiency increases with size.[65] The Federal Constitution does not require that taxes (as distinguished from assessments for betterments) be proportionate to the differences in benefits received by the taxpayers, compare *Illinois Central R. Co.* v. *Decatur,* 147 U. S. 190, 197; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 203; *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 76; *St. Louis & Southwestern Ry.* v. *Nattin,* 277 U. S. 157, 159; or that taxes be proportionate to the taxpayer's ability to bear the burden.

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[65] Compare Hearings before Senate Committee on Interstate Commerce, pursuant to S. Res. 98, Sen. Doc. 62d Cong., 2d Sess., Vol. 1, p. 1147 *et seq.* (1912); Report of Federal Trade Commission on The Meat Packing Industry (1919), Pt. III, p. 118 *et seq.;* A. M. Kales, Contracts and Combinations in Restraint of Trade (1918), §§ 74–90; F. A. Fetter, Big Business and the Nation, in Facing the Facts (J. G. Smith, ed., 1932), pp. 186–213; F. A. Fetter, The Masquerade of Monopoly (1931), pp. 367–380; Myron W. Watkins, Large-Scale Production, in Encyclopaedia of The Social Sciences, vol. 9, p. 170; A. S. Dewing, A Statistical Test of the Success of Consolidations, Quarterly Journal of Economics, vol. 36, p. 84; Virgil Jordan, The Flight from the Centre, in Scribner's, Vol. 91, p. 262 (May, 1932); W. L. Thorp, The Changing Structure of Industry, in Recent Economic Changes (1929), pp. 167, 179–206; Glenn Frank, Big Men and Big Enterprise, Albany Evening News, December 7, 1931; December 18, 1931; Glenn Frank, Thunder and Dawn (1932), pp. 106–110; Julius Klein, Assistant Secretary of Commerce, United States Daily, April 11, 1932, p. 1; Frederick M. Feiker, Director, Bureau of Foreign and Domestic Commerce, U. S. Daily, February 27, 1932, p. 3; Carter D. Poland, Small Business Has Its Day, Nation's Business, March, 1933, p. 51; also, Camera dei Deputati, N. 1209–A, Relazione della Giunta Generale del Bilancio (April 29, 1932), pp. 45–47.

Since business must yield to the paramount interests of the community in times of peace as well as in times of war, a State may prohibit a business found to be noxious and, likewise, may prohibit incidents or excrescences of a business otherwise beneficent. *Mugler* v. *Kansas,* 123 U. S. 623; *Ozan Lumber Co.* v. *Union County Bank,* 207 U. S. 251; *Williams* v. *Arkansas,* 217 U. S. 79; *Engel* v. *O'Malley,* 219 U. S. 128; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157. Businesses may become as harmful to the community by excessive size, as by monopoly or the commonly recognized restraints of trade. If the State should conclude that bigness in retail merchandising as manifested in corporate chain stores menaces the public welfare, it might prohibit the excessive size or extent of that business as it prohibits excessive size or weight in motor trucks or excessive height in the buildings of a city. Compare *Morris* v. *Duby,* 274 U. S. 135; *Welch* v. *Swasey,* 214 U. S. 91; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388. It was said in *United States* v. *U. S. Steel Corp.,* 251 U. S. 417, 451, that the Sherman Anti-Trust Act did not forbid large aggregations; but the power of Congress to prohibit corporations of a size deemed excessive from engaging in interstate commerce was not questioned.

The elimination of chain stores, deemed harmful or menacing because of their bigness, may be achieved by levelling the prohibition against the corporate mechanism—the instrument by means of which excessive size is commonly made possible. Or, instead of absolutely prohibiting the corporate chain store, the State might conclude that it should first try the more temperate remedy of curbing the chain by imposing the handicap of discriminatory license fees. Compare *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269, 274; *Hammond Packing Co.* v. *Montana,* 233 U. S. 331, 333–334; *Bradley* v. *Richmond,* 227 U. S. 477, 480. "Taxation is regulation just as prohibition is." *Compañia General de Ta-*

bacos v. *Collector,* 275 U. S. 87, 96. And the State's power to make social and economic experiments is a broad one.

Fifth. The mere fact that the taxpayer is a corporation does not, of course, exclude it from the protection afforded by the equality clause. Corporations and individuals, aliens and citizens, are for most purposes in the same class. Ordinarily, they have the same civil rights; are entitled to the same remedies; are subject to the same police regulations; and are also subject to the same tax laws. Where such is the case, the corporation taxpayer is entitled, like the individual, to the protection of the equality clause against discrimination, however effected. Compare *Iowa-Des Moines National Bank* v. *Bennett,* 284 U. S. 239. But the chief aim of the Florida statute is apparently to handicap corporate chain stores—that is, to place them at a disadvantage, to make their success less probable. No other justification of the discrimination in license fees need be shown; since the very purpose of the legislation is to create inequality and thereby to discourage the establishment, or the maintenance, of corporate chain stores; since that purpose is one for which the power of taxation may be exerted; since higher license fees is an appropriate means of discouragement; and corporations have not the inherent right to engage in intrastate commerce. The clear distinction between the equality clause and the due process clause of the Fourteenth Amendment should not be overlooked in this connection. The mandate of the due process clause is absolute. That clause is of universal application. It knows not classes. It applies alike to corporations and to individuals, to citizens and to aliens, *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 411; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489. The equality clause, on the other hand, is limited in its operation to members of a class.

It is true that the Florida Anti-Chain Store Law, like others, is not drawn so as to apply only to giant corporate chains. In terms, it applies to the small corporations as well as to the large; and also to natural persons. But the history of such legislation indicates that these laws were aimed at the huge, publicly-financed corporations; and that the statutes were couched in comprehensive terms in the hope of thereby avoiding constitutional doubts raised by judicial statements that the equality clause applies alike to natural persons and corporations. It was said in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 402, that the equality clause precludes making the character of the owner the sole fact on which a discrimination in taxation shall depend. And in *Frost* v. *Corporation Commission,* 278 U. S. 515, 522, it was said (citing the *Quaker City Cab* case; *Kentucky Finance Corp.* v. *Paramount Exchange,* 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 154) "that a corporation is as much entitled to the equal protection of the laws as an individual." These statements require, in my opinion, this qualification. Whenever the discrimination is for a permitted purpose—as when a State, having concluded that activity by corporations should be curbed, seeks to favor businesses conducted by individuals—the corporate character of the owner presents a difference in ownership which may be made the sole basis of classification in taxation, as in regulation.[66] The discrimination cannot, in such a case,

[66] Compare Ernst Freund, Standards of American Legislation (1917), pp. 40–41: "So far as the businesses of banking and insurance have been carried on under corporate charters they have been the subject of thorough and detailed regulation, while private banking and the unincorporated forms of fraternal insurance remain to this day in the main unregulated and uncontrolled. Railroads have been built and operated from the beginning by corporate enterprise; thus legislation was called for and was made the instrument of exercising

be held arbitrary, since it is made in order to effect the permitted hostile purpose and is appropriate to that end. Compare *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 283–285; *New York ex rel. N. Y. & Albany Lighterage Co.* v. *Lynch, post,* p. 590.

Sixth. The plaintiffs contend, for a further reason, that there is no taxable difference justifying the discrimination in license fees. They assert that the struggle between them and the independently owned stores is, in fact, not an unequal one; and in support of this assertion, they call attention to those paragraphs in the bill which describe the coöperative chains of individual stores and their rapid growth. These paragraphs allege that by "affiliations and coöperative organizations single grocery [and other] store owners have adopted the best features of chain store merchandising and have secured substantially all the benefits derived therefrom, while at the same time they have avoided burdens of capital investment, insurance, etc., incident to the carrying of a large stock in a central warehouse." The bill sets forth how this has been achieved, describing in detail the recent advances in efficiency of such coöperative merchandising. It alleges, moreover, that the members of a coöperative chain have the superior advantage of the good will and personal interest of the individual owners, as compared with the hired managers of the regular chains; and that all these facts were known to the Legislature when it enacted the statute here challenged.

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public power over operation, service and in some cases over rates; the express business, on the other hand, which happened to be carried on chiefly by unincorporated concerns, or at least did not seek special charters, practically escaped regulation and was not placed under administrative jurisdiction until the Rate Act of 1906; this tends to show that it was not merely the fact of being a common carrier subject to special power, but more particularly the fact of being a corporation asking for powers, which subjected the railroad company to the extensive and intensive legislative régime which it has experienced."

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These allegations are admitted by the motion to dismiss; and they are supported by recent experience of which we may take notice.[67] But it does not follow that because the independently owned stores are overcoming through coöperation the advantages once possessed by chain stores, there is no taxable difference between the corporate chain and the single store. The State's power to apply discriminatory taxation as a means of preventing domination of intrastate commerce by capitalistic corporations is not conditioned upon the existence of economic need. It flows from the broader right of Americans to preserve, and to establish from time to time, such institutions, social and economic, as seem to them desirable; and, likewise, to end those which they deem undesirable.

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[67] Federal Trade Commission, Report on Coöperative Grocery Chains, Sen. Doc. No. 12, 72nd Cong., 1st Sess.; Report on Coöperative Drug and Hardware Chains, Sen. Doc. No. 82, 72nd Cong., 1st Sess. See, also, A. E. Haase and V. H. Pelz, The Voluntary Chain, in Printer's Ink Monthly, February 1929, p. 29, *id.*, March 1929, p. 31, *id.*, April 1929, p. 52, *id.*, May 1929, p. 52; Paul H. Nystrom, Chain Stores (U. S. Chamber of Commerce, 1930), pp. 17, 21; Nystrom, Economics of Retailing (3rd ed., 1932), c. 13; Craig Davidson, Voluntary Chain Stores (1930); Marvin M. Black, Jr., Troubled Waters of Distribution, Outlook and Independent, May 15, 1929, p. 90; The Voluntary Chains (American Institute of Food Distribution, Inc., 1930); M. E. Bridston, Voluntary Chain Flourishes in Difficult Field, in Chain Store Review, April 1929, p. 12; "The Challenge of the Chains" Accepted by 500 Pacific Coast Grocers, Magazine of Business, July, 1928, p. 28. Compare Federal Trade Commission, Report on Coöperation in Foreign Countries, Sen. Doc. No. 171, 68th Cong., 2d Sess.; Huston Thompson, The Coöperative Movement in Foreign Countries, Congressional Digest, October 1925, p. 256; C. R. Fay, Co-operation at Home and Abroad (rev. ed. 1925); A. H. Enfield, Co-operation (1927); J. P. Warbasse, Co-operative Democracy (1923); Cedric Long, Consumers Co-operation, in A New Economic Order (Kirby Page, ed., 1930), p. 213; Charles R. Tuttle, The New Co-operative Order (1918); Charles T. Sprading, Mutual Service and Co-operation (1930), pp. 44–127; Henry Clay, Co-operation and Private Enterprise (1928).

The State might, if conditions warranted, subject giant corporations to a control similar to that now exerted over public utility companies.[68] Or, the citizens of Florida might conceivably escape from the domination of giant corporations by having the State engage in business. Compare *Jones* v. *Portland,* 245 U. S. 217; *Green* v. *Frazier,* 253 U. S. 233; *Standard Oil Co.* v. *Lincoln,* 275 U. S. 504. But Americans seeking escape from corporate domination have open to them under the Constitution another form of social and economic control—one more in keeping with our traditions and aspirations. They may prefer the way of coöperation, which leads directly to the freedom and the equality of opportunity which the Fourteenth Amendment aims to secure.[69] That way is clearly open. For the fundamental difference between capitalistic enterprise and the coöperative—between economic absolutism and industrial democracy—is one which has been commonly accepted by legislatures and the courts as justifying discrimination in both regulation and taxation.[70] *Liberty Warehouse Co.* v. *Burley Tobacco Growers Assn.,* 276 U. S. 71. Compare *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322.

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[68] The general apprehension of corporations with huge capital was not allayed until after the introduction of two governmental devices designed to protect the rights and opportunities of the individual. Commissions to regulate public utilities—to curb the exaction of sanctioned monopolies. Anti-trust laws—to prevent monopolies in industry and commerce. When the Act to Regulate Commerce was passed in 1887, there were commissions in 25 States. Vanderblue and Burgess, Railroads (1923), p. 15. See M. H. Hunter, The Early Regulation of Public Service Corporations, 7 American Economic Review, p. 569, reprinted in Dorau, Materials for the Study of Public Utility Economics (1930), pp. 283–294.

[69] Compare Harold J. Laski, The Recovery of Citizenship (1928); Horace M. Kallen, Individualism (1933), pp. 235–241.

[70] See *Frost* v. *Corporation Commission,* 278 U. S. 515, 539, notes 8–16, 23.

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty. If the citizens of Florida share that belief, I know of nothing in the Federal Constitution which precludes the State from endeavoring to give it effect and prevent domination in intrastate commerce by subjecting corporate chains to discriminatory license fees. To that extent, the citizens of each State are still masters of their destiny.

MR. JUSTICE CARDOZO, dissenting in part.

The graduation of a tax upon the business of a chain store may be regulated by the test of territorial expansion, and territorial expansion may be determined by the spread of business from one county into another.

Students of the chains have accepted the classification of the Census Bureau, which divides them into three groups: local, sectional and national. Census of 1930, Report on Retail Distribution by Chains; Lebhar, "The Chain Store," p. 20. Chains are local "if substantially all their stores are located in and around some one city."

In 1930, the number of these was 5589. They are sectional if their "stores are located in some one section of the country, such as the New England states or the Pacific Coast states or in the Gulf Southwest or any other geographic division." Of these there were 1136. They are national if their "interests are broader than those of any one section of the country." Of these there were 321.

Statistics thus indicate that there is a definite line of cleavage between chains that serve consumers within a single territorial unit and those framed for larger ends. The business that keeps at home affects the social organism in ways that differ widely from those typical of a business that goes out into the world. It affects the social organism, but also it affects itself. With the lengthening of the chain there are new fields to be exploited. The door is opened to opportunities that have hitherto been closed. Where does the local have an end and the non-local a beginning? The legislature had to draw the line somewhere, and it drew it with the county. Within the range of reasonable discretion its judgment must prevail. There is need to remember the varying significance of county lines for varying communities. From the beginnings of our history, the town has been the distinctive unit of government in the New England states and in many others of the North. In the South from the beginning the distinctive unit has been the county. Bryce, The American Commonwealth, (2nd edition, revised) vol. 1, part II, chap. 48, pp. 570, 571; K. H. Porter, County and Township Government in the United States, p. 60. Florida is largely an agricultural state. The census of 1930 shows three cities of over 100,000 (Jacksonville, 129,549, Miami, 110,637, and Tampa, 101,161); four between 20,000 and 40,000 (Orlando, West Palm Beach, Pensacola, and St. Petersburg); and seven between 10,000 and 20,000. Of these fourteen cities, all are in different counties. In a state with a population thus distributed,

the boundaries of the county will have an approximate correspondence with the area of local business. When a chain goes beyond the county, beyond the traditional boundaries of local government, it puts the locality behind it, and elects to play for larger stakes.

Every new community is potentially a new centre of economic opportunity. There is then a hazard of new adventures, a tapping of new sources of dominance and profit. At once with this advance, the tax mounts into higher brackets, but does not mount again. There are not progressive increases when a business, after moving into one county, moves on again to others. The second county once attained, the rate is not affected though many more are added. The chain has made its choice, and for this it pays but once. It has put its local character away, and found alignment in another class. It is on the way to becoming an organization of another order, to becoming sectional or national. There is confirmation of this tendency in the facts stated in the bill as to the stores operated by the complainants and by those allowed to intervene. All who have gone beyond a single county do business in many more, or else in many states. One can imagine extreme cases, to be sure, where county lines may be crossed and the business remain local in substance, if not in form. The store in the new county may be next to the boundary line that separates from the old. So too the chain that is national in scope may have its Florida stores in one county and one only, in which event it is local *quoad* its activities in Florida, whatever it may be beyond. Lawmakers are not required to legislate with an eye to exceptional conditions. Their search is for probabilities and tendencies of general validity, and these being ascertained, they may frame their rule accordingly. They are not required to legislate with an eye to forms of growth beyond the limits of their own state. In laying a tax upon a Florida chain their concern is with those

activities that have social and economic consequences for Florida and her people. The question for them, and so for us, is not how a business might be expected to develop if its forms and lines of growth were to be predicted in the abstract without reference to experience. The question is how it *does* develop in normal or average conditions, and the answer to that question is to be found in life and history. When the problem is thus approached, the movement from one county to another becomes in a very definite sense the crossing of a frontier, a change as marked as the difference between wholesale trade and retail. *Cook* v. *Marshall County,* 196 U. S. 261. So at least the legislature might not unreasonably believe, and act on that belief in the formulation of the law. *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, 257.

Corresponding to the change of opportunity—to the change at the periphery—that accompanies the expansion of the area of action are changes at the centre. The chain that is merely local is likely to be organized more simply than the one that spreads itself afar. Methods at the point of origin must be adapted to expanding needs. Other things being equal, there will be a new concentration of control, a new unity of administration, a new emphasis of the very features that distinguish chain stores from others and supply an important reason for taxing the two differently, whether within the county or without. *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 534. Movement from the locality to other fields of activity is thus a symptom of an inner change. This, at least, is its normal meaning, its meaning, or so the legislature might fairly say, in the common run of cases. If so, the scale of payment may be graduated in correspondence with the changing facts.

There is a distinction not to be ignored between the facts that determine subjection to a tax and those that measure its amount. "Classification good for one pur-

pose may be bad for another." *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 38. The case cited drew a distinction between graduation of the burden and unconditional exemption. The business conducted by these appellants is not subjected to a tax *because* it is in several counties. It is taxed because it is the business of operating chain stores, and its spread over counties is only one circumstance, along with others, to be considered by the Collector in determining how much it has to pay. The factor may be inconclusive if our search is for mathematical exactness. This is far from saying that it is to be rejected as irrelevant. None of the factors measuring this tax will answer to a test of certainty. Even where the business is kept within a single county, there is no certainty that a chain of thirty stores will so differ from one of fifty either in its method of organization or in the proportionate returns that the first should pay a tax at one rate for every store, and the second at another. The like is true where organization is affected by territorial expansion. There is a relation surpassing mere irrelevance between the essential character of the business and its territorial spread beyond the unit of its origin. Even if this is doubtful *a priori,* it is made apparent or probable by statistics and experience. A court will go no farther.

What has been written has discovered differences between local chains and others, differences in organization at the centre and in opportunity at the outer rim. The differences need not be great. *Tax Commissioners* v. *Jackson, supra,* at p. 538. This is true even of the classes that may be described as primary, those accompanied by a division between a tax and no tax. It is true even more plainly of subclasses, the secondary divisions corresponding to graduations of the scale. How slight may be the variance that will mark a permissible classification between a tax and none at all has illustration in the case at hand. The prevailing opinion upholds the power of the state to discriminate between integrated and volun-

tary chains, though the difference of organization is slender and the inequality of economic benefit uncertain and disputed. Slender though the difference of organization is, it is real enough to rescue classification from the reproach of an arbitrary preference. It will not do to shut one's eyes to the motive that has led so many legislatures to lay hold of this difference and turn it into a basis for a new system of taxation. The system has had its origin in the belief that the social utility or inutility of one group is less or greater than that of others, and that the choice of subjects to be taxed should be adjusted to social gains and losses. Courts would be lacking in candor if they were not to concede the presence of such a motive behind this chain store legislation. But a purpose to bear more heavily on one class than another will not avail without more to condemn a tax as void. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 95; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 126; *Sproles* v. *Binford,* 286 U. S. 374, 394; *Stephenson* v. *Binford,* 287 U. S. 251. We must know why the discrimination is desired, to what end it is directed and the relation between end and means. If the motive is vindictiveness, ensuing in mere oppression, the result may be one thing. If the motive and the end attained are the advancement of the public good, the result may be quite another, unless preference and repression go so far as to outrun the bounds of reason. The legislature has determined with the approval of the court that an integrated chain is a taxable class separable from independent dealers and even from chains that are merely coöperative leagues. If these differences suffice to establish a basis for distinction between a tax and none at all, smaller differences may suffice for the graduation of the scale. The legislature has found them in those variations of degree that separate a chain within the territorial unit of the locality from chains that are reaching out for wider fields of power. There is no need to approve or disapprove the concept of utility or inutility reflected in such laws. *State Board of Tax Commissioners* v. *Jackson,*

supra, at p. 537. The concept may be right or wrong. At least it corresponds to an intelligible belief, and one widely prevalent today among honest men and women. Cf. *Otis* v. *Parker,* 187 U. S. 606. With that our function ends.

Systems of taxation are not framed, nor is it possible to frame them, with perfect distribution of benefit and burden. Their authors must be satisfied with a rough and ready form of justice. This is true in special measure while the workings of a novel method are untested by a rich experience. There must be advance by trial and error. Taxes upon chain stores are not exempt from these infirmities. To what extent there is a change of form and spirit when a business ceases to be local is not a question of law. *O'Gorman & Young* v. *Hartford Fire Ins. Co., supra.* In essence it is one of fact. There is a presumption that the legislature did not classify along the lines of counties without study of the relevant data or without an informed and considered judgment. Its findings are not subject to annulment by a court unless facts within the range of judicial notice point to them as wrong. In discarding as arbitrary symbols the lines that it has chosen, there is danger of forgetting that in social and economic life the grooves of thought and action are not always those of logic, and that symbols may mean as much as conduct has put into them.

Holding these views, I find it unnecessary to consider whether the statute may be upheld for the additional reasons that have been stated by MR. JUSTICE BRANDEIS with such a wealth of learning. They present considerations that were not laid before us by counsel either in the briefs or in the oral argument, and a determination of their validity and weight may be reserved with propriety until the necessity emerges.

My vote is for affirmance.

I am authorized to state that MR. JUSTICE STONE concurs in this opinion.

DECISIONS PER CURIAM, FROM JANUARY 10, 1933, TO AND INCLUDING MARCH 13, 1933.*

No. 278. FORT SMITH SUBURBAN RY. CO. ET AL. *v.* KANSAS CITY SOUTHERN RY. CO. On writ of certiorari to the Supreme Court of Arkansas. Argued January 11, 1933. Decided January 16, 1933. *Per Curiam:* The writ of certiorari herein is dismissed as improvidently granted. *Mr. Thomas B. Pryor,* with whom *Mr. Edward J. White* was on the brief, for petitioners. *Mr. Frank H. Moore,* with whom *Messrs. James B. McDonough, A. F. Smith, Wm. E. Davis,* and *Samuel W. Moore* were on the brief, for respondent. Reported below: 185 Ark. 1188; 48 S. W. (2d) 225. See also 180 Ark. 492.

No. —, original. EX PARTE MODER ET AL. Motion submitted January 9, 1933. Decided January 16, 1933. The motion for leave to file a petition for writ of *habeas corpus* is denied. *Mr. Jesse C. Duke* for petitioners.

No. —, original. CARVILL *v.* MASSACHUSETTS. January 16, 1933. Motion for leave to file bill of complaint denied. *Mr. Clarence Carvill, pro se.* No appearance for defendant.

No. 5, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 8, original. MICHIGAN ET AL. *v.* SAME; and
No. 9, original. NEW YORK ET AL. *v.* SAME. Motion submitted January 12, 1933. Decided January 16, 1933. The motion to amend the decree herein is denied. *Messrs. Stratton Shartel, L. D. Smith, H. L. Norwood, J. W.*

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* For decisions on applications for certiorari, see *post,* pp. 594, 598.

Carmmack, G. L. Rice, James O'Connor, Daniel N. Kirby, and *Cornelius Lynde* for petitioners in support of the motion. *Messrs. J. E. Finnegan, Patrick H. O'Brien, Harry H. Peterson, John H. Bricker, Joseph E. Hirschberg, Herman L. Ekern, Herbert H. Naujoks,* and *R. T. Jackson* in opposition to the motion.

No. 588. Dr. Bloom Dentist Inc. *v.* Cruise, City Clerk. Appeal from the Supreme Court of New York. Jurisdictional statement submitted January 14, 1933. Decided January 23, 1933. *Per Curiam*: The appeal herein is dismissed for the want of a substantial federal question. *Dent* v. *West Virginia,* 129 U. S. 114; *Douglas* v. *Noble,* 261 U. S. 165; *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 43; *Graves* v. *Minnesota,* 272 U. S. 425, 428; *Lambert* v. *Yellowley,* 272 U. S. 581, 596; *People* v. *Painless Parker Dentist,* 85 Colo. 304, 280 U. S. 566; *Miller* v. *State Board of Dental Examiners,* 90 Colo. 193; 8 P. (2d) 699; 287 U. S. 563. *Mr. Thomas G. Frost* for appellant. *Messrs. Arthur J. W. Hilly* and *J. Joseph Lilly* for appellee. Reported below: 234 App. Div. 274, 254 N. Y. S. 752; 259 N. Y. 358, 182 N. E. 16.

No. 20, original. Wisconsin *v.* Michigan. January 23, 1933. The Clerk is directed to file the answer tendered by the defendant State, and the plaintiff State is given ten days within which to file a replication. Frederick F. Faville, Esq., of Des Moines, Iowa, is appointed master in this cause, with authority to summon witnesses, issue subpoenas, and to take evidence. The master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions and recommendations of the master

shall be subject to consideration, revision or approval by the Court. [The order also makes provision for the compensation and expenses of the master; for the assessment of costs; and authorizes the Chief Justice to make a new appointment if this one be not accepted or if the place become vacant during a recess of the Court.]

No. 572. TERRELL ET AL. *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted December 31, 1932. Decided February 6, 1933. *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 for the want of a properly presented federal question. *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117; *Wall* v. *Chesapeake & Ohio Ry. Co.*, 250 U. S. 125, 126; *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 181. The motion for leave to proceed further herein *in forma pauperis* is denied. *Messrs. Maurice R. Woulfe* and *H. P. Viering* for appellants. *Mr. Eugene Stanley* for appellee. Reported below: 175 La. 758; 144 So. 488.

No. 628. FOURCHY *v.* FLETCHINGER, CHAIRMAN AND ATTORNEY, DISBARMENT COMMITTEE. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted January 21, 1933. Decided February 6, 1933. *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. Maurice R. Woulfe* for appellant. *Mr. John H. Tucker* for appellee. Reported below: 175 La. 628; 143 So. 714.

No. —, original. EX PARTE HESS. February 6, 1933. The motion for leave to file petition for a writ of *habeas corpus* is denied. *Mr. Wilfred R. Hess, pro se.*

No. 335. WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. CHESTATEE PYRITES & CHEMICAL CORP. February 13, 1933. Motion to modify the judgment in this case is granted.

No. 582. NEW YORK EX REL. NEW YORK & ALBANY LIGHTERAGE CO. *v.* LYNCH ET AL., TAX COMMISSIONERS OF NEW YORK. Appeal from the Supreme Court of New York. Submitted February 17, 1933. Decided February 20, 1933. *Per Curiam:* Judgment affirmed. *Cornell Steamboat Co.* v. *Sohmer,* 235 U. S. 549, 559; *Interborough Transit Co.* v. *Sohmer,* 237 U. S. 276, 283; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 161, 162; *Ft. Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 533, 534; *White River Lumber Co.* v. *Arkansas,* 279 U. S. 692, 695–699; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 283–285. *Winifred Sullivan* filed a brief for appellant. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Wendell P. Brown,* Assistant Attorney General, filed a brief for appellees. Reported below: 229 App. Div. 823, 242 N. Y. S. 903; 259 N. Y. 638, 182 N. E. 214.

No. 583. WESTLING *v.* UNITED STATES. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Jurisdictional statement submitted February 11, 1933. Decided

February 20, 1933. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction, it appearing that the Circuit Court of Appeals, in determining this case, did not decide 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. Section 240 (b) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 939). *Public Service Commission* v. *Batesville Telephone Co.,* 284 U. S. 6; *Baxter* v. *Continental Casualty Co.,* 284 U. S. 578; *Bradford Electric Light Co.* v. *Clapper,* 284 U. S. 221, 224, 225. *Mr. Henry C. Carlson* for appellant. No appearance for the United States. Reported below: 60 F. (2d) 398.

No. 662. MORRISON ET AL. *v.* CALIFORNIA. Appeal from the District Court of Appeal, 4th Appellate District, of California. Jurisdictional statement submitted February 11, 1933. Decided February 20, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. (1) *Mobile, Jackson & Kansas City R. Co.* v. *Turnipseed,* 219 U. S. 35, 42, 43; *Yee Hem* v. *United States,* 268 U. S. 178, 183–185; *Atlantic Coast Line R. Co.* v. *Ford,* 287 U. S. 502. (2) *Cockrill* v. *California,* 268 U. S. 258, 261, 262; *Porterfield* v. *Webb,* 263 U. S. 225, 232, 233; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144. *Mr. J. Marion Wright* for appellants. No appearance for appellee. Reported below: 125 Cal. App. 282; 13 P. (2d) 800.

No. 671. LONG *v.* KELLEY ET AL. Appeal from the Supreme Court of Wisconsin. Jurisdictional statement submitted February 11, 1933. Decided February 20, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Castillo* v. *McConnico,* 168 U. S. 674, 683; *Moffit* v. *Kelly,* 218 U. S. 400, 404,

405; *Nickel* v. *Cole,* 256 U. S. 222, 226; *Glenn* v. *Doyal,* 285 U. S. 526. *Mr. John B. Simmons* for appellant. *Mr. Herbert J. Naujoks* for appellees. Reported below: 208 Wis. 668; 242 N. W. 562.

No. 562. COMMISSIONER OF INTERNAL REVENUE *v.* INDEPENDENT LIFE INSURANCE CO. Certificate from the Circuit Court of Appeals for the Sixth Circuit. February 20, 1933. *Per Curiam:* The motion to bring up the entire record and cause is denied. The certificate herein is dismissed. *United States* v. *Mayer,* 235 U. S. 55, 66; *United States* v. *Worley,* 281 U. S. 339, 340; *White* v. *Johnson,* 282 U. S. 367, 371; *Wells* v. *Commissioner,* 286 U. S. 529; *Kroger Grocery & Baking Co.* v. *Yount,* 287 U. S. 574; *Catagrone* v. *United States,* 287 U. S. 574. *Solicitor General Thacher* for the Commissioner of Internal Revenue. *Mr. J. A. Newman* for Independent Life Insurance Co.

No. 3, original. NEVADA *v.* CROWN WILLAMETTE PAPER CO. February 20, 1933. The returns of the parties to the rules issued herein January 23, 1933, to show cause why this case should not be dismissed, are received and filed. Pursuant to stipulation of the parties, this cause is continued to the October Term, 1933; and the parties are directed to make further report as to the status of this cause on or before Monday, October 2, 1933.

No. 17, original. WASHINGTON *v.* OREGON. February 20, 1933. The return of the complainant to the rule issued herein to show cause why this case should not be dismissed for the want of prosecution is received and filed. The motion for the appointment of a Special Master is granted, and it is ordered that William W. Ray, Esq., of Salt

Lake City, Utah, be, and he is hereby, appointed Special Master in this cause, with authority to summon witnesses, issue subpœnas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions, and recommendations of the Master shall be subject to consideration, revision, or approval by the Court. [The order also makes provision for the compensation and expenses of the Master; for the assessment of costs; and authorizes the Chief Justice to make a new appointment if this one be not accepted or if the place become vacant during a recess of the Court.] *Messrs. John H. Dunbar* and *John C. Hurspool* for complainant. *Messrs. I. H. Van Winkle, Geo. T. Cochran,* and *Jos. A. Fee* for defendant.

No. 669. HEALY, CHIEF OF POLICE, *v.* RATTA. Appeal from the District Court of the United States for the District of New Hampshire. February 20, 1933. In this case probable jurisdiction is noted. The Court desires to hear argument upon the questions: (a) whether a case for equitable relief is shown; (b) whether the amount in controversy is such as to sustain the jurisdiction of the court below; and (c) whether the defendant-appellant is a state officer within the meaning of § 266, Judicial Code, as amended (43 Stat. 936, 938; U. S. Code, Title 28, § 380). *Mr. H. Thornton Lorimer,* Assistant Attorney General of New Hampshire, with whom *Mr. Francis W. Johnston,* Attorney General, was on the brief, for appellant. *Messrs. William N. Rogers* and *Jonathan Piper* filed a brief for appellee. Reported below: 1 F. Supp. 669.

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No. 20, original. WISCONSIN *v.* MICHIGAN. March 4, 1933. The reply to the defendant's answer is received and ordered filed.

No. —, original. EX PARTE ATKINS. March 13, 1933. Motion for leave to file petition for writ of *habeas corpus* denied. *Mr. Charles W. Atkins, pro se.*

No. 5, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 8, original. MICHIGAN ET AL. *v.* SAME; and
No. 9, original. NEW YORK ET AL. *v.* SAME. March 13, 1933. The report of the Special Master in these causes is received and ordered to be filed.

DECISIONS GRANTING CERTIORARI, FROM JANUARY 10, 1933, TO AND INCLUDING MARCH 13, 1933.

No. 541. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* A. T. JERGINS TRUST. January 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. Thomas R. Dempsey* and *A. Calder Mackay* for respondent. Reported below: 61 F. (2d) 92.

No. 515. BEMIS BRO. BAG CO. *v.* UNITED STATES. January 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Stanley S. Waite, Abraham Lowenhaupt,* and *R. S. Doyle* for petitioner. *Solicitor General Thacher* for the United States. Reported below: 60 F. (2d) 944.

No. 559. HARRISONVILLE *v.* W. S. DICKEY CLAY MFG. CO. January 23, 1933. Petition for writ of certiorari to the

Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Raymond G. Barnett* for petitioner. *Mr. Maurice H. Winger* for respondent. Reported below: 61 F. (2d) 210.

No. 564. BUFFUM, TRUSTEE IN BANKRUPTCY, *v.* PETER BARCELOUX CO. January 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Robert T. Devlin, William H. Devlin,* and *George R. Freeman* for petitioner. *Mr. Stephen W. Downey* for respondent. Reported below: 61 F. (2d) 145. See also 51 F. (2d) 82.

No. 565. HURN ET AL. *v.* OURSLER ET AL. January 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Louis W. McKernan* and *Keith Lorenz* for petitioners. *Messrs. Arthur Garfield Hays, Alan S. Hays, Fulton Brylawski, Benjamin Pepper,* and *Emily Holt* for respondents. Reported below: 61 F. (2d) 1031.

No. 594. ROSSI ET AL. *v.* UNITED STATES. February 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted, limited to the question of the sufficiency of the evidence to support conviction upon the third and fourth counts. *Messrs. I. R. Wasson,* and *Peter Rossi* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 955.

No. 571. EDELMAN, STATE TREASURER, ET AL. *v.* BOEING AIR TRANSPORT, INC. February 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the

Tenth Circuit granted. *Messrs. James A. Greenwood, Richard J. Jackson, George W. Ferguson,* and *T. S. Taliaferro, Jr.,* for petitioners. *Messrs. John W. Lacey, Elmer E. Todd, William M. Allen,* and *Clarence R. Innis* for respondent. Reported below: 61 F. (2d) 319.

No. 595. LANG *v.* COMMISSIONER OF INTERNAL REVENUE. February 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Washington Bowie, Jr.,* and *J. R. Sherrod* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John G. Remey* for respondent. Reported below: 61 F. (2d) 280.

No. 601. REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, *v.* SMITH ET AL. February 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. Albert L. Hopkins* and *Harry B. Sutter* for respondents. Reported below: 61 F. (2d) 324.

No. 623. AMERICAN CAR & FOUNDRY CO. *v.* BRASSERT. February 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Noah A. Stancliffe, John R. Cochran,* and *Paul R. Conaghan* for petitioner. *Mr. William Rothman* for respondent. Reported below: 61 F. (2d) 162.

Nos. 585 and 586. ROYAL INDEMNITY CO. ET AL. *v.* AMERICAN BOND & MORTGAGE CO. February 20, 1933. The petition for writs of certiorari to the Circuit Court

of Appeals for the Seventh Circuit is granted. *Messrs. Saul S. Myers* and *Selden Bacon* for petitioners. *Messrs. Wm. E. Leahy, Edmund M. Toland, Wm. J. Hughes, Jr.,* and *A. L. Schapiro* for respondent. Reported below: 61 F. (2d) 875.

No. 634. DAUBE *v.* UNITED STATES. March 4, 1933. Petition for writ of certiorari to the Court of Claims granted, limited to the question raised by the assessment for the year 1919. *Messrs. John E. Hughes* and *William Cogger* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Charles F. Kincheloe, H. Brian Holland,* and *L. A. Smith* for the United States. Reported below: 75 Ct. Cls. 633; 59 F. (2d) 842; 1 F. Supp. 771.

No. 626. FIDELITY & DEPOSIT CO. *v.* ARENZ. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Elton Watkins* and *John Lichty* for petitioner. No appearance for respondent. Reported below: 61 F. (2d) 607.

No. 657. FEDERAL RADIO COMMISSION *v.* NELSON BROTHERS BOND & MORTGAGE CO.;

No. 658. SAME *v.* NORTH SHORE CHURCH;

No. 659. FEDERAL RADIO COMMISSION ET AL. *v.* NELSON BROTHERS BOND & MORTGAGE CO.; and

No. 660. SAME *v.* NORTH SHORE CHURCH. March 13, 1933. Petitions for writs of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. G. Davis,* and *Erwin N. Griswold* for Federal Radio Commission, petitioner. *Mrs. Mabel Walker Willebrandt* for Johnson-Kennedy Radio Corp., intervener-petitioner.

Messrs. John Strother Boyd, Edward Clifford, Geo. R. Beneman, Fred W. Weitzel, and *James M. Beck* for respondents. Reported below: 61 App. D. C. 315; 62 F. (2d) 854.

No. 677. UNITED STATES EX REL. GREATHOUSE ET AL. *v.* HURLEY, SECRETARY OF WAR, ET AL. March 13, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. J. Harry Covington, John Marshall,* and *Spencer Gordon* for petitioners. *Solicitor General Thacher* for respondents. Reported below: 61 App. D. C. 360; 63 F. (2d) 137.

No. 680. GROSS ET AL. *v.* IRVING TRUST CO.;

No. 681. WEISMAN ET AL., RECEIVERS, *v.* SAME; and

No. 682. GROSS ET AL. *v.* SAME. March 13, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Merritt Lane* for petitioners. *Messrs. Samuel Kaufman, Nathan Bilder,* and *Arthur Leonard Ross* for respondent. Reported below: 61 F. (2d) 812.

DECISIONS DENYING CERTIORARI, FROM JANUARY 10, 1933, TO AND INCLUDING MARCH 13, 1933.

No. 276. FORT SMITH SUBURBAN RY. CO. ET AL. *v.* KANSAS CITY SOUTHERN RY. CO. See same case, *ante,* p. 587.

No. 602. NEW YORK EX REL. ROTHENBERG *v.* LAWES, WARDEN. January 16, 1933. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further herein *in forma pauperis,* denied. *Mr. Herman Rothenberg, pro se.* No appearance for

respondent. Reported below: 235 App. Div. 814; 256 N. Y. S. 964.

No. 609. MODER ET AL. *v.* UNITED STATES. January 16, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further herein *in forma pauperis,* denied. *Mr. Jesse C. Duke* for petitioners. No appearance for the United States. Reported below: 62 F. (2d) 462.

No. 482. CORTLAND SPECIALTY CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. January 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. M. Manning Marcus* and *F. E. Scott* for petitioners. *Solicitor General Thacher* for respondent. Reported below: 60 F. (2d) 937.

No. 550. ADAMS *v.* HAGEROTT, ADMINISTRATOR. January 16, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Robert G. Dodge* and *Seiforde M. Stellwagen* for petitioner. *Mr. F. H. Stinchfield* for respondent. Reported below: 61 F. (2d) 35.

No. 551. TRINITY METHODIST CHURCH SOUTH *v.* FEDERAL RADIO COMM'N. January 16, 1933. 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,* and *Messrs. Whitney North Seymour, Wm. G. Davis,* and *Duke Patrick* for respondent. Reported below: 62 F. (2d) 850.

Nos. 568 and 569. CANADIAN CLUB CORP. *v.* CANADA DRY GINGER ALE, INC. January 23, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the

Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Messrs. Charles H. Stoddard* and *Paul Freeman* for petitioner. *Messrs. Edward S. Rogers* and *Robert T. McCracken* for respondent. Reported below: 60 F. (2d) 785. See also 46 F. (2d) 964.

No. 548. PALERMO *v.* UNITED STATES. January 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Samuel Feller* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 61 F. (2d) 138.

No. 558. KEYSTONE WAREHOUSING CO. *v.* PUBLIC SERVICE COMMISSION ET AL. January 23, 1933. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. Robert T. McCracken* for petitioner. *Mr. John Fox Weiss* for respondents. Reported below: 105 Pa. Super. Ct. 267; 161 Atl. 891.

No. 560. CONKLIN *v.* LING ET AL. January 23, 1933. Petition for writ of certiorari to the District Court of Appeal, 2nd Appellate District, of California, denied. *Nadia Williams* for petitioner. No appearance for respondents. Reported below: 125 Cal. App. 44; 13 P. (2d) 749.

No. 561. INTERNATIONAL SILVER CO. *v.* UNITED CHROMIUM, INC. January 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. Brown Morton* for petitioner. *Messrs. Livingston Gifford* and *Gustave R. Thompson* for respondent. Reported below: 60 F. (2d) 913.

No. 566. LAWSON *v.* WHITLOCK CORDAGE CO. January 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. W. Hastings Swenarton* for petitioner. *Messrs. Wm. Houston Kenyon* and *Theodore S. Kenyon* for respondent. Reported below: 60 F. (2d) 362.

No. 570. CLAWANS *v.* CARNDUFF. January 23, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Lillian Clawans, pro se.* No appearance for respondent. Reported below: 61 App. D. C. 185; 59 F. (2d) 472.

No. 573. NEW YORK, NEW HAVEN & HARTFORD R. Co. *v.* MURMANN, ADMINISTRATRIX. January 23, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Edward R. Brumley* and *John M. Gibbons* for petitioner. *Messrs. Thos. J. O'Neill* and *Charles D. Lewis* for respondent. Reported below: 236 App. Div. 734; 258 N. Y. S. 545.

No. 613. MUNSON STEAMSHIP LINE *v.* NORTH OF ENGLAND STEAMSHIP CO., LTD. January 23, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Irving L. Evans* and *Horace M. Gray* for petitioner. *Mr. Charles R. Hickox* for respondent. Reported below: 57 F. (2d) 672.

No. 572. TERRELL ET AL. *v.* LOUISIANA. See same case, *ante*, p. 589.

No. 628. FOURCHY *v.* FLETCHINGER, CHAIRMAN. See same case, *ante*, p. 589.

No. 591. AMERICAN MUTUAL LIABILITY INSURANCE CO. *v.* MCDONOUGH, TREASURER. February 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. The motion to consolidate with case No. 590 is also denied. *Mr. Roy D. Keehn* for petitioner. *Mr. Montgomery S. Winning* for respondent. Reported below: 61 F. (2d) 558.

No. 539. BAKER *v.* UNITED STATES. February 6, 1933. 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. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 61 F. (2d) 469.

No. 584. BLAIR *v.* COMMISSIONER OF INTERNAL REVENUE. February 6, 1933. 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, Sewall Key, Wm. Cutler Thompson,* and *Erwin N. Griswold* for respondent. Reported below: 60 F. (2d) 340.

No. 596. FIREMAN'S FUND INSURANCE CO. *v.* ZECHIEL, RECEIVER. February 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arthur L. Gilliom* for petitioner. *Mr. C. Severin Buschmann* for respondent. Reported below: 61 F. (2d) 27.

No. 581. SIEGAL *v.* UNITED STATES. February 6, 1933. Petition for writ of certiorari to the Court of Appeals of

the District of Columbia denied. *Mr. George Wolf* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 61 App. D. C. 282; 61 F. (2d) 923.

No. 590. CESAR *v.* ILLINOIS EX REL. MCDONOUGH. February 6, 1933. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Roy D. Keehn* for petitioner. *Messrs. Wm. H. Sexton, Francis X. Busch,* and *Montgomery S. Winning* for respondent. Reported below: 349 Ill. 372; 182 N. E. 448.

No. 593. GOLD *v.* UNITED STATES. February 6, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry N. Pritzker* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 60 F. (2d) 482.

Nos. 618 and 619. RIO BRAVO OIL CO. ET AL. *v.* WEED ET AL. February 6, 1933. Petitions for writs of certiorari to the Supreme Court of Texas denied. *Messrs. John P. Bullington, J. H. Tallichet,* and *W. D. Gordon* for petitioners. *Messrs. H. L. Stone, Will E. Orgain, R. L. Batts,* and *John E. Green, Jr.,* for respondents. Reported below: 50 S. W. (2d) 1080.

No. 549. VILES *v.* UNITED STATES. February 13, 1933. 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. Edmond L. Viles, pro se.* No appearance for the United States.

No. 652. PARRISH *v.* CHESAPEAKE & OHIO RY. Co. February 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. W. O. Parrish, pro se. Messrs. Walter Leake* and *Meade T. Spicer, Jr.*, for respondent. Reported below: 61 F. (2d) 162.

Nos. 552 and 554. TUNNEL RAILROAD OF ST. LOUIS *v.* COMMISSIONER OF INTERNAL REVENUE;

Nos. 553 and 555. ST. LOUIS BRIDGE Co. *v.* SAME; and

Nos. 556 and 557. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* SAME. February 13, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. T. M. Pierce, S. Mayner Wallace,* and *Fred Esch* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Louis D. Monarch,* and *John G. Remey* for respondent. Reported below: 61 F. (2d) 166. [See *post*, p. 607.]

No. 574. TEXAS PIPE LINE Co. ET AL. *v.* UNITED STATES;

No. 575. TEXAS COMPANY ET AL. *v.* SAME.

No. 576. TEXAS PIPE LINE Co. *v.* SAME; and

No. 577. TEXAS PIPE LINE Co. OF OKLAHOMA *v.* SAME. February 13, 1933. Petition for writs of certiorari to the Court of Claims denied. *Messrs. Wm. J. Hughes, Jr., C. B. Ames,* and *H. T. Klein* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Charles F. Kincheloe,* and *Wm. H. Riley, Jr.*, for the United States. Reported below: 75 Ct. Cls. 136; 58 F. (2d) 852.

No. 578. BRACE, ADMINISTRATRIX, ET AL. *v.* CANADIAN PACIFIC RY. Co. ET AL. February 13, 1933. Petition for

writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Benjamin S. Grosscup, Arthur E. Griffin,* and *Walter Schaffner* for petitioners. *Mr. Cassius E. Gates* for respondents. Reported below: 61 F. (2d) 339.

No. 597. SOUTHERN RY. CO. *v.* EDGERTON. February 13, 1933. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Messrs. Sidney S. Alderman, R. C. Kelly,* and *S. R. Prince* for petitioner. *Mr. J. M. Edgerton, pro se.* Reported below: 203 N. C. 281; 165 S. E. 689.

No. 598. DOUGHNUT MACHINE CORP. *v.* DEMCO, INC. ET AL.; and

No. 599. SAME *v.* JOE-LOWE CORP. ET AL. February 13, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Henry N. Paul* and *Frank B. Fox* for petitioner. *Messrs. Edwin F. Samuels* and *Charles Markell* for respondents. Reported below: 62 F. (2d) 23.

No. 600. NICHOLSON, RECEIVER, *v.* WESTERN LOAN & BLDG. CO. ET AL. February 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. H. W. O'Melveny* and *Walter K. Tuller* for petitioner. *Mr. W. W. Ray* for respondents. Reported below: 60 F. (2d) 516.

No. 604. O'SHAUGHNESSY, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. February 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph P. Tumulty* and *Walter E. Barton* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,*

and *Messrs. Whitney North Seymour, John MacC. Hudson, J. P. Jackson,* and *Erwin N. Griswold* for respondent. Reported below: 60 F. (2d) 235.

No. 606. STILLWELL THEATRE, INC. *v.* KAPLAN;

No. 607. ROSEKAY AMUSEMENT CORP. *v.* SAME; and

No. 608. WINDSOR CIRCUIT CORP. *v.* SAME. February 13, 1933. Petition for writs of certiorari to the Supreme Court of New York denied. *Mr. David P. Siegel* for petitioners. No appearance for respondent. Reported below: 140 Misc. 142, 249 N. Y. S. 122; 235 App. Div. 738, 225 N. Y. S. 715; 259 N. Y. 405, 182 N. E. 63.

No. 610. DOBRA *v.* LINDSEY, U. S. IMMIGRATION INSPECTOR. February 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John L. Darrouzet* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 62 F. (2d) 116.

No. 612. INDUSTRIAL COMMISSION ET AL. *v.* ILLINOIS CENTRAL R. Co. February 13, 1933. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Edwin W. Sims* for petitioners. *Messrs. R. V. Fletcher* and *Edward C. Craig* for respondent. Reported below: 349 Ill. 451; 182 N. E. 626.

No. 622. NEELY *v.* STACY ET AL. February 13, 1933. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Messrs. M. Casewell Heine* and *George Gordon Battle* for petitioner. *Mr.*

Theodore D. Parsons for respondents. Reported below: 111 N. J. Eq. 355.

Nos. 552 and 554. TUNNEL RAILROAD OF ST. LOUIS *v.* COMMISSIONER OF INTERNAL REVENUE;

Nos. 553 and 555. ST. LOUIS BRIDGE CO. *v.* SAME; and

Nos. 556 and 557. TERMINAL RAILROAD ASSN. *v.* SAME. February 14, 1933. Orders denying certiorari withheld on motion of *Mr. Fred Esch* for petitioners. On denial of rehearing, March 13, orders were again effective.

No. 673. BOURKE, ADMINISTRATRIX, *v.* PENNSYLVANIA R. Co. February 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Charles F. Hext* for petitioner. No appearance for respondent. Reported below: 61 F. (2d) 719.

No. 674. ELLIS *v.* UNITED STATES. February 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Ed O. Ellis, pro se.* No appearance for the United States. Reported below: 61 F. (2d) 681.

No. 638. MORTON *v.* UNITED STATES. February 20, 1933. The petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit is denied, for the reason that application for the writ of certiorari was not made within the time provided by law. Act of February 13, 1925, § 8 (a), 43 Stat. 936, 940; U. S. Code, Title 28, § 350. *Mr. Alvin D. Blieden* for petitioner. *Solicitor General Thacher* for the United States. Reported below: 60 F. (2d) 696.

No. 579. HAZELETT STORAGE BATTERY CO. *v.* WESTERN BATTERY & SUPPLY CO.; and

No. 580. WEBSTER *v.* SAME. February 20, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Hadley F. Freeman* for petitioners. *Messrs. Carle Whitehead* and *Albert L. Voge* for respondent. Reported below: 61 F. (2d) 220.

No. 611. NEW AMSTERDAM CASUALTY CO. *v.* HOAGE, DEPUTY U. S. EMPLOYEES' COMPENSATION COMMISSIONER. February 20, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Lawrence Koenigsberger* for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, W. Clifton Stone,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 61 App. D. C. 306; 62 F. (2d) 468.

No. 621. WESTERLIN & CAMPBELL CO. *v.* MICHIGAN ARTIFICIAL ICE PRODUCTS CO. ET AL. February 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John E. MacLeish* for petitioner. *Mr. Fred W. Green* for respondents. Reported below: 61 F. (2d) 1046.

No. 624. GEOPHYSICAL EXPLORATION CO. *v.* KLODGINSKI ET AL. February 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Newton Rayzor* for petitioner. No appearance for respondents. Reported below: 61 F. (2d) 849.

No. 625. SMITH *v.* UNITED STATES. February 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Reuben R. Arnold* and *Young M. Smith* for petitioner. *Solicitor*

General Thacher, Assistant Attorney General Dodds, and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 61 F. (2d) 681.

No. 629. SCHUG, TRUSTEE IN BANKRUPTCY, *v.* CALDWELL ET AL. February 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Edwin C. Brandenburg* and *Louis M. Denit* for petitioner. *Mr. Mortimer C. Rhone* for respondents. Reported below: 61 F. (2d) 1039.

No. 630. SOUTHEASTERN INVESTMENT CO. *v.* TOBLER ET AL. February 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George C. Bedell* for petitioner. *Mr. Eli J. Blair* for respondents. Reported below: 61 F. (2d) 774.

No. 632. BARTOSIK *v.* CHICAGO RIVER & INDIANA R. CO. February 20, 1933. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Mr. Joseph D. Ryan* for petitioner. *Messrs. Sidney C. Murray* and *Marvin A. Jersild* for respondent. Reported below: 266 Ill. App. 28.

No. 716. BLANTON *v.* GREAT ATLANTIC & PACIFIC TEA CO. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Hooper Alexander* for petitioner. No appearance for respondent. Reported below: 61 F. (2d) 427.

No. 648. MISSOURI STATE LIFE INSURANCE CO. *v.* JOHNSON. Petition for writ of certiorari to the Supreme Court of Arkansas. March 4, 1933. The petition for

writ of certiorari in this cause is denied upon the ground that the judgment sought herein to be reviewed is joint and the record fails to disclose summons and severance. *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U. S. 169; *Capital National Bank* v. *Board of Supervisors,* 286 U. S. 550; *Fidelity Union Casualty Co.* v. *Hanson,* 287 U. S. 599; *Louisville & Nashville R. Co.* v. *Parker,* 287 U. S. 569; *Wagner Tug Boat Co.* v. *Meagher,* 287 U. S. 657. *Messrs. George B. Rose, D. H. Cantrell, J. F. Loughborough, A. W. Dobyns,* and *A. F. House* for petitioner. No appearance for respondent. Reported below: 186 Ark. 519; 54 S. W. (2d) 407.

No. 603. Backus et al., Receivers, *v.* United States. March 4, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Carmi A. Thompson, E. F. Colladay,* and *Wilton H. Wallace* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Charles F. Kincheloe,* and *Fred K. Dyar* for the United States. Reported below: 75 Ct. Cls. 69; 59 F. (2d) 242.

No. 614. Western Shade Cloth Co. *v.* United States. March 4, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. Clarence N. Goodwin* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Charles F. Kincheloe,* and *Erwin N. Griswold* for the United States. Reported below: 75 Ct. Cls. 165; 58 F. (2d) 863.

No. 620. Pope *v.* United States. March 4, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George R. Shields* and *George A. King* for petitioner. *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Charles F. Kincheloe,* and *Wm.*

H. Riley, Jr., for the United States. Reported below: 75 Ct. Cls. 436.

No. 631. WHITE *v.* PORTIA LAW SCHOOL ET AL. March 4, 1933. Petition for writ of certiorari to the Supreme Judicial Court, County of Suffolk, Massachusetts, denied. *Jama A. White, pro se.* No appearance for respondents. Reported below: 274 Mass. 162; 174 N. E. 187.

No. 635. CASTELLANO, TRUSTEE IN BANKRUPTCY, *v.* GLOBE INDEMNITY CO. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry H. Schutte* for petitioner. *Mr. F. A. W. Ireland* for respondent. Reported below: 61 F. (2d) 765.

No. 637. BARKER *v.* FISCHER, TRUSTEE IN BANKRUPTCY. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Wendell P. Barker, pro se. Mr. George C. Levin* for respondent. Reported below: 61 F. (2d) 757.

No. 641. MARYLAND CASUALTY CO. *v.* KRAMER. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Newton Rayzor* for petitioner. No appearance for respondent. Reported below: 62 F. (2d) 295.

No. 654. EDGAR P. LEWIS & SONS, INC. *v.* MARS, INC. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Charles E. Riordon* and *C. Russell Riordon* for petitioner. *Messrs. William Furst* and *Hugh W. Ogden* for respondent. Reported below: 62 F. (2d) 406.

No. 605. FULTON BAG & COTTON MILLS *v.* UNITED STATES. March 4, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. W. A. Sutherland* and *Joseph B. Brennan* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour* and *Charles F. Kincheloe* for the United States. Reported below: 74 Ct. Cls. 614; 57 F. (2d) 914.

No. 636. RADIO INVESTMENT CO., INC. (STATION WNJ) *v.* FEDERAL RADIO COMMISSION ET AL. March 4, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wm. J. Hughes, Jr.*, for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. G. Davis,* and *Duke M. Patrick* for the Federal Radio Commission, respondent. *Mr. Paul M. Segal* for New Jersey Broadcasting Corp., respondent. Reported below: 61 App. D. C. 296; 62 F. (2d) 381.

No. 642. WILLIAMS, ADMINISTRATRIX, *v.* WILLIAMS. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George F. Rearick* and *James H. Dyer* for petitioner. *Mr. Edmund D. Adcock* for respondent. Reported below: 61 F. (2d) 257.

No. 644. POWER *v.* COMMISSIONER OF INTERNAL REVENUE. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William H. Oppenheimer, Frank C. Hodgson,* and *Montreville J. Brown* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Wm. Cutler Thompson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 61 F. (2d) 625.

No. 645. IRVING TRUST CO., RECEIVER, *v.* UNITED STATES. March 4, 1933. 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 *John H. McEvers* for the United States. Reported below: 61 F. (2d) 944.

No. 646. SEWARD NATIONAL BANK *v.* FIERMAN, TRUSTEE IN BANKRUPTCY. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frederic L. Clark* for petitioner. *Mr. David W. Kahn* for respondent. Reported below: 61 F. (2d) 952.

No. 647. TITLE INSURANCE & TRUST CO., EXECUTOR, *v.* GOODCELL, COLLECTOR OF INTERNAL REVENUE. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Carey Van Fleet* and *Lloyd M. Robbins* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *J. P. Jackson* for respondent. Reported below: 60 F. (2d) 803.

No. 651. JAMES *v.* UNITED STATES. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Clyde W. Mays* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 61 F. (2d) 912.

No. 655. VIRGINIA ET AL. *v.* APPALACHIAN ELECTRIC POWER CO. (OF VIRGINIA). March 4, 1933. Petition for writ of certiorari to the Supreme Court of Appeals of

Virginia denied. *Messrs. Edwin H. Gibson, John R. Saunders, Collins Denny, Jr.,* and *Edward T. Haynes* for petitioners. *Mr. E. Randolph Williams* for respondent. Reported below: 159 Va. 462; 166 S. E. 461.

No. 656. CAPITOL IRON & METAL CO. ET AL. *v.* ROGERS ET AL. March 4, 1933. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Hobert Price* for petitioners. *Mr. William F. Collins* for respondents. Reported below: 17 P. (2d) 433.

No. 664. UNION SOLVENTS CORP. *v.* GUARANTY TRUST CO. ET AL. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George Wharton Pepper* and *George I. Haight* for petitioner. *Mr. Charles Neave* for respondents. Reported below: 61 F. (2d) 1041.

No. 665. RELMAR HOLDING CO., INC. *v.* MANTON, U. S. JUDGE, ET AL. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel Untermyer* and *Charles Dickerman Williams* for petitioner. *Messrs. Nathan L. Miller, William W. Miller,* and *Charles A. Boston* for respondents. Reported below: 61 F. (2d) 941.

No. 708. SUFFERN NATIONAL BANK & TRUST CO. *v.* ASH ET AL. March 4, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John H. Mariano* for petitioner. *Mr. David Kimmel* for respondents. Reported below: 62 F. (2d) 793.

No. 633. RICHMOND, FREDERICKSBURG & POTOMAC R. Co. *v.* MCCARL, COMPTROLLER GENERAL. March 13, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. W. G. Brantley, Henry W. Anderson,* and *E. Randolph Williams* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour* and *W. Marvin Smith* for respondent. Reported below: 61 App. D. C. 290; 62 F. (2d) 203.

No. 639. CONSOLIDATED PAPER CO. *v.* UNITED STATES. March 13, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. Jesse I. Miller* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Charles F. Kincheloe, Erwin N. Griswold,* and *H. Brian Holland* for the United States. Reported below: 75 Ct. Cls. 215; 59 F. (2d) 281; 1 F. Supp. 858.

No. 649. CROCKER, TRUSTEE IN BANKRUPTCY, *v.* KAY, ADMINISTRATRIX. March 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Roscoe C. Nelson* for petitioner. *Mr. James G. Wilson* for respondent. Reported below: 62 F. (2d) 391.

No. 650. WILSON *v.* BORDEN. March 13, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Rossa F. Downing* and *Joseph J. Malloy* for petitioner. *Mr. H. Mason Welch* for respondent. Reported below: 61 App. D. C. 327; 62 F. (2d) 866.

No. 661. SAVANNAH SUGAR REFINING CORP. *v.* UNITED STATES. March 13, 1933. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied.

Messrs. Robert M. Hatch and *Archibald B. Lovett* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Whitney North Seymour* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 20 C. C. P. A. (Cust.) 272; T. D. 46,061.

No. 666. PERTHUR HOLDING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. March 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Brison Howie* and *Frank S. Bright* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Hayner N. Larson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 61 F. (2d) 785.

No. 667. MCINES *v.* UNITED STATES. March 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John P. Hannon* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 180.

No. 668. DORLAND *v.* WITMER ET AL. March 13, 1933. Petition for writ of certiorari to the Court of Appeals of Stark County, Ohio, denied. *Mr. Russell J. Burt* for petitioner. *Mr. E. L. Mills* for respondents. Reported below: 43 Ohio App. 285; 182 N. E. 686.

No. 670. GAUL *v.* UNITED STATES. March 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Thacher, Assistant Attorney*

General Youngquist, and *Messrs. A. W. Henderson* and *Erwin N. Griswold* for the United States. Reported below: 62 F. (2d) 559.

No. 672. RUBY *v.* UNITED STATES. March 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Patrick H. O'Brien* and *Edward H. Barnard* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller* and *Harry S. Ridgely* for the United States. Reported below: 61 F. (2d) 617.

No. 679. DORRANCE ET AL. *v.* PENNSYLVANIA. March 13, 1933. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. Schofield Andrews, Robert von Moschzisker,* and *Nathan L. Miller* for petitioners. *Messrs. Wm. A. Schnader, Herman J. Goldberg,* and *Wm. A. Gray* for respondent. Reported below: 309 Pa. 151; 163 Atl. 303.

No. 684. CHESAPEAKE & OHIO RY. CO. *v.* BURTON. March 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Douglas W. Brown* for petitioner. *Mr. A. A. Lilly* for respondent. Reported below: 62 F. (2d) 110. See also 50 F. (2d) 730.

No. 640. MARTIN ET AL. *v.* UNITED STATES. March 13, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Henry M. Ehrlich* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 215.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM JANUARY 10, 1933, TO AND INCLUDING MARCH 13, 1933.

No. 7, original. PENNSYLVANIA *v.* NEW JERSEY ET AL. February 6, 1933. Dismissed with costs, on motion of *Mr. Wm. A. Schnader* for complainant.

No. 698. VINCENT *v.* MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. March 13, 1933. Dismissed on motion of *Mr. William Denman* for petitioner. Reported below: 61 F (2d) 657.

AMENDMENTS AND ADDITIONS

TO THE

GENERAL ORDERS IN BANKRUPTCY

AND

ADDITIONS TO THE OFFICIAL FORMS

PROMULGATED BY THE

SUPREME COURT OF THE UNITED STATES

APRIL 17, 1933

NOTE.—For later amendment of General Orders, adding new order numbered LI, see *infra*, p. 655.

AMENDMENTS AND ADDITIONS TO THE GENERAL ORDERS IN BANKRUPTCY AND ADDITIONS TO THE OFFICIAL FORMS

ORDER, April 17, 1933

IT IS ORDERED that Rules I, III, IV, V, X, XII, XIII, XIV, XVII, XVIII, XXI, XXIV, XXVI, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXVI, XXXVIII, XXXIX, XLI, XLII, XLIII, XLIV, and XLVII of the General Orders in Bankruptcy are amended, effective April 24, 1933, to read respectively as follows:

I

DOCKET

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case, if any reference is made, to the referee; and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, shall indicate whether or not the proceeding is brought under any of the sections of Chapter VIII of the Act, and shall at all times be open to public inspection.

III

PROCESS

All process, summons, and subpoenas, except such as are issued by the Interstate Commerce Commission in the

performance of its duties under section 77 of the Act, shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

IV

CONDUCT OF PROCEEDINGS

Proceedings may be conducted by the bankrupt or debtor in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above provided, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the Act or by these general orders, required to be served on the party personally may be served upon his attorney.

V

FRAME OF PETITIONS

1. All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

2. Petitioners in involuntary proceedings for adjudication, whose claims rest upon assignment or transfer from other persons, shall annex to one of the duplicate petitions all instruments of assignment or transfer, and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that

the petitioners are the bona fide holders and legal and beneficial owners thereof and whether or not they were purchased for the purpose of instituting bankruptcy proceedings.

3. Every voluntary bankrupt whose petition is not accompanied by schedules shall file with his petition, unless further time not exceeding ten days is granted by the court for cause shown, a verified list in triplicate of the names of his creditors and their residences, if known, and if unknown that fact to be stated.

X

INDEMNITY FOR EXPENSES

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt, debtor, or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt, debtor, or other person shall be repaid him out of the estate as part of the cost of administering the same.

XII

DUTIES OF REFEREE

1. The order referring a case to a referee shall name a day upon which the bankrupt or debtor shall attend before the referee, and from that day the bankrupt or debtor shall be subject to the orders of the court in all matters relating to the proceedings, and may receive from the referee a protection against arrest to continue, unless suspended or vacated by order of the court, until the final adjudication on his application for a discharge or for the confirmation of a composition or extension proposal. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceed-

ings, except such as are required by the Act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the Act to perform.

3. Applications for a discharge, or for the confirmation of a composition where the proceeding is had under section 12 of the Act, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee, or in proceedings under section 77 of the Act, to a special master, to ascertain and report the facts. Unless otherwise ordered by the judge, applications for the confirmation of a debtor's proposal under section 74 of the Act, and all objections thereto, shall be heard and decided by the referee.

4. If a voluntary bankrupt files the list of creditors required by General Order V, the referee shall promptly call the first meeting of creditors without awaiting the filing of schedules.

XIII

APPOINTMENT AND REMOVAL OF TRUSTEE

The appointment of a trustee by the creditors shall be subject to be approved or disapproved, and he shall be removable, by the referee or by the judge.

XIV

NO OFFICIAL OR GENERAL TRUSTEE

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases. This general

order shall not apply to proceedings under section 77 of the Act.

XVII

DUTIES OF TRUSTEE

1. The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt or debtor that comes into his possession.

2. The trustee shall make report to the court, within five days after receiving the notice of his appointment, unless further time is granted by the court, of the articles set off to the bankrupt or debtor by him, according to the provisions of section 47 of the Act, with the estimated value of each article, and any creditor or the bankrupt or debtor may take exceptions to the determination of the trustee within ten days after the filing of the report, unless further time is granted by the court. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party.

3. The accounts of the trustee, required by section 47 of the Act, shall include a statement of all items of property received and of all items of property disposed of; his final report shall include such accounts, and the referee, except in no asset cases, shall mail a summary of said report and accounts to the creditors with the notice of the final meeting, together with a statement of the amount of claims proved and allowed.

4. The trustee shall examine the correctness of all proofs of claim filed against estates and object to the allowance thereof if he deems them improper.

5. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the Act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty

of the referee to make an order requiring the trustee to show cause before him, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least three days before the time fixed for the hearing.

6. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

7. This general order shall not apply to proceedings under section 77 of the Act.

XVIII

SALE OF PROPERTY

1. All sales shall be by public auction unless otherwise ordered by the court. Where the property is sold by an auctioneer he shall, upon completion of the sale, furnish the receiver or trustee with an itemized statement of the property sold, the name of each purchaser, and the price received for each item, or for the property as a whole if it is sold in bulk.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, debtor, creditor, receiver, or trustee, setting forth that a part or the whole of the estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

4. This general order shall not apply to procedings under section 77 of the Act.

XXI

PROOF OF DEBTS

1. Depositions to prove claims against an estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by a duly authorized officer of the corporation. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or if secured, the security as is required in prov-

ing secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt or debtor may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor or the bankrupt or debtor shall desire the reëxamination of any claim filed against the estate, he may apply by petition to the referee to whom the case is referred for an order for such reëxamination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by

either party and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

7. Every proof of debt filed in extension proceedings under section 74 of the Act shall, unless the court is satisfied from its other allegations that the claim is not based upon money loaned or upon any bond, note or other obligation, contain proof that the claim is free from usury as defined by the laws of the place where the debt is contracted.

8. The provisions of this general order shall not apply to proceedings under section 77 of the Act.

XXIV

LIST OF PROVED CLAIMS

The referee shall maintain open to inspection a list of the claims proved against an estate, with the names and addresses of the proving creditors.

XXVI

ACCOUNTS OF REFEREE

Every referee shall keep an accurate and itemized account showing, with respect to each case referred to him, his receipts and expenditures and their nature. Within sixty days after the expiration of each six months period ending January thirty-first and July thirty-first respectively, in each year, he shall submit to the district court (1) a transcript of such account, with proper vouchers when vouchers can be procured; (2) a statement showing the unexpended balance, if any, of moneys received as indemnity or charges for expenses; (3) if the referee devotes part time to his duties, a statement showing the extent to which and the method by which any overhead expenses have been allocated to and reimbursed out of the cases referred to him; (4) the particular rule

or method by which the amount of expense charges against individual estates is computed or fixed; (5) a statement of the cases referred to him which have remained open for more than eighteen months, giving the reasons in each instance why they have not been closed. The accounts and statements so submitted shall be in duplicate and verified; one copy shall be transmitted by the clerk, forthwith upon its receipt, to the Attorney General.

XXVIII

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS

Whenever it may be deemed for the benefit of an estate to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate, the trustee, or the bankrupt or debtor, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee. This general order shall not apply to proceedings under section 77 of the Act.

XXIX

PAYMENT OF MONEYS DEPOSITED

No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date,

the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks. This general order shall not apply to proceedings under section 77 of the Act.

XXX

IMPRISONED DEBTOR

If, at the time of the commencement of proceedings under this Act, the bankrupt or debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailer or any officer in whose custody he may be, before the court, for the purpose of testifying in any manner relating to said proceedings; and, if committed after the commencement of said proceedings upon process in any civil action founded upon a claim provable under the Act, the court may, upon like application, discharge him from such imprisonment. If the bankrupt or debtor, during the pendency of said proceedings be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable under the Act, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge, the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

XXXI

PETITION FOR DISCHARGE

The petition of a bankrupt or debtor for a discharge shall state concisely, in accordance with the provisions of the Act and the orders of the court, the proceedings in the case and the acts of the bankrupt or debtor.

XXXII

OPPOSITION TO DISCHARGE OR COMPOSITION OR EXTENSION

A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition.

XXXIII

ARBITRATION

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against an estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

XXXVI

APPEALS

Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in equity in courts of the United States.

XXXVIII

FORMS

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case. In proceedings under any of the sections of Chapter VIII of the Bankruptcy Act, unless and until the debtor is adjudicated a bankrupt all forms used shall refer to him as a "debtor" and not a "bankrupt" and shall be captioned "In proceedings for a composition or extension" or "In proceedings for the reorganization of a railroad," as the case may be, and not "In bankruptcy."

XXXIX

REPRESENTATION OF CREDITORS BY RECEIVERS OR THEIR ATTORNEYS

Neither a receiver nor his attorney shall solicit any proof of debt, power of attorney, or other authority to act for, or represent, any creditor for any purpose in connection with the administration of an estate or the acceptance or rejection of any composition or extension proposal. The local bankruptcy court may, however, whenever a banking institution is under local rule or practice always appointed receiver in cases requiring the services of a receiver, by local rule approved by a majority of the circuit judges of the circuit, provide that notice may be given to the creditors of the availability of such institution to act as trustee if elected, and may provide means to facilitate the creditors in filing and voting their claims in favor of the election of such institution as trustee.

XLI

WAIVER OF RIGHT TO SHARE IN COMPOSITION DEPOSITS OR IN PAYMENTS UNDER AN EXTENSION

Before confirming a composition or extension proposal the court shall require all creditors and other persons who

may have waived their right to share in the distribution of the deposit or in payments under the extension, for claims, fees or otherwise, to set forth in writing and under oath all agreements with respect thereto with the bankrupt or debtor, his attorney or other person, and shall also require an affidavit by the bankrupt or debtor that he has not directly or indirectly paid or promised any consideration to any attorney, trustee, receiver, creditor, or other person in connection with the proceedings except as set forth in such affidavit or in the offer of composition or extension, and that he has no knowledge of any such payment or promise by any other party.

XLII

COMPENSATION OF ATTORNEYS, RECEIVERS, AND TRUSTEES

1. Every attorney, receiver, and trustee seeking an allowance of compensation from an estate for services rendered, or reimbursement for expenses incurred in the proceedings, shall file with the court a petition under oath, setting forth a full and detailed statement of such services and expenses and the amount claimed therefor, and, in the case of an attorney or receiver, the amount of the partial allowance, if any, theretofore made. And such petition shall be accompanied by an affidavit of the applicant stating that no agreement has been made, directly or indirectly, and that no understanding exists, for a division of fees between the applicant and the receiver, the trustee, the bankrupt, the debtor, or the attorney of any of them. In the absence of such petition and affidavit no allowance of compensation shall be made; and no allowance shall be made to any attorney for a receiver or trustee except for professional services.

2. Except in proceedings under section 77 of the Act, such petition shall be heard at a meeting of creditors, and the referee in sending the notice of such meeting prescribed by section 58 of the Act shall state by whom and

in what amount the allowance of the compensation or reimbursement for expenses is asked.

XLIII

FEES AND EXPENSES OF ATTORNEYS FOR PETITIONING CREDITORS

The court may deny the allowance of any fee to the attorney for petitioning creditors or the reimbursement of his expenses, or both, if it shall appear that the proceedings were instituted in collusion with the bankrupt or debtor or were not instituted in good faith.

XLIV

APPOINTMENT OF ATTORNEYS FOR RECEIVERS OR TRUSTEES

No attorney for a receiver or a trustee shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver or trustee, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other parties to the proceedings, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, trustee, or any creditor in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee shall have represented any interest adverse to the receiver, trustee, or any creditor in any matter upon which he is employed for such receiver or trustee, the court may deny the allowance of any fee to such attorney, or the reimbursement of

his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry into the connections of said attorney.

Nothing herein contained shall prevent the court, in proceedings under section 77 of the Act, from authorizing the employment of attorneys who are attorneys of the railroad corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under paragraph (c) of section 77, when such employment is found by the court to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

XLVII

REPORTS OF REFEREES

The reports of referees in all proceedings under the Act, and of special masters in proceedings under section 77 of the Act, shall be deemed presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: PROVIDED, That when any matter is referred by consent of all parties in interest and the intention is plainly expressed in the consent order that the submission is to the referee or master as an arbitrator, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator.

IT IS FURTHER ORDERED that the following Rules, XLVIII, XLIX, and L, are adopted and established, effective April 24, 1933, as additions to the General Orders in Bankruptcy:

XLVIII

PROCEEDINGS UNDER SECTION 74 OF THE ACT

The following additional rules shall apply to proceedings under section 74 of the Act:

1. Notice to creditors of the proposed appointment of a custodian or receiver may, in the interests of expedition, be given by publication instead of in writing, if the court so directs.

2. If a custodian or receiver is appointed, the notice of the first meeting which he is required to prepare shall be in form approved by the referee and the date of the meeting shall be fixed by the referee.

3. If the debtor is a wage-earner or a person engaged chiefly in farming or the tillage of the soil, and any happenings occur which under the provisions of subdivision (l) of said section would otherwise be followed by an order of liquidation, and the debtor does not consent to liquidation, the court shall dismiss the proceedings and notify the creditors accordingly. If a composition or extension proposal is set aside for fraud as provided in subdivision (k) of said section, the case shall be reinstated and such proceedings shall be had as upon denial of confirmation under subdivision (l).

4. For the purposes of computing the commissions of the referee and of the custodian or receiver the term "composition" as used in sections 40 and 48 of the Act shall be deemed to include an extension proposal, and the amount of the debts whose maturity is to be extended thereunder and of the debts, if any, to be paid in full on the confirmation, shall be deemed to be "the amount to be paid creditors" within the meaning of said sections. If the estate is liquidated under the provisions of subdivision (l) of section 74 of the Act, the referee shall return to the estate any commissions previously received and shall be entitled to commissions on all moneys dis-

bursed to creditors by the trustee as provided in section 40 of the Act.

XLIX

PROCEEDINGS UNDER SECTION 77 OF THE ACT

The following additional rules shall apply to proceedings under section 77 of the Act:

1. Each Circuit Court of Appeals shall cause written notice to be given the judges of the district courts within the circuit of the names and addresses of the persons from time to time designated and qualified to act as special masters under the provisions of subdivision (c) of section 77.

2. The clerk of the district court in which proceedings under section 77 are brought shall forthwith transmit to the Interstate Commerce Commission copies of (a) the petition of a railroad corporation, or of creditors thereof, desiring to effect a plan of reorganization; (b) the answer, if any, of the corporation, upon receipt of which the commission shall file with the court its recommendations as to the disposition of the answer; (c) the order approving or dismissing the petition; (d) any order appointing or removing a temporary or permanent trustee; (e) the order fixing the date for a hearing on the appointment of permanent trustees; (f) any application by a trustee for authority to issue certificates, upon receipt of which the commission shall file with the court an order approving or disapproving such issuance; (g) any order authorizing such issuance; (h) such schedules and reports as may be submitted by the corporation with respect to the conduct of its affairs and the fairness of any proposed plan; (i) the lists of creditors and stockholders required to be filed by the trustee or the corporation, and the order determining the time within which the claims and interests of creditors and stockholders may be filed or evidenced, the manner in which such claims and interests may be filed or evidenced and allowed, and the

division of creditors and stockholders into classes, upon receipt of which papers the commission may hold a public hearing for the presentation of plans of reorganization as provided in subdivision (d) of section 77; (j) all orders allowing or rejecting such claims and interests, or extending the time within which they may be filed or evidenced; (k) any petition for the fixing of a reasonable time within which a plan of reorganization shall be proposed or accepted, upon receipt of which the commission shall recommend to the court what in its judgment a reasonable time would be; (l) any orders fixing or extending such time, or dismissing the proceedings for failure to comply with such orders; (m) any order issued upon the petition of the commission for the reference of particular matters to a special master, and the report of such master thereon; (n) all orders referring to the commission for its determination, under the fifth or sixth clauses of subdivision (g) of section 77, the fixing of an upset price or the appraisal of securities, upon receipt of which orders the commission shall make the necessary determinations and report thereon to the court; (o) any orders approving the special employment of assistants requested by the commission; (p) all applications for allowances of fees and expenses in the proceeding or in any prior receivership proceeding, upon receipt of which the commission shall determine the maximum limits of such allowances and file with the court its report thereon; (q) any order adjudging the corporation to be solvent or insolvent; (r) the order confirming or disapproving the plan and, if it is disapproved, the judge's opinion stating his reasons for such disapproval; (s) any orders issued to the trustee or trustees with respect to the operation of the corporation's business; (t) the order dismissing the proceedings, if the plan is disapproved, or if it is confirmed directing the transfer or other disposition of the property; (u) the final decree; and (v) such other papers filed in the proceedings as the commission may

request of the clerk or the court may direct him to transmit. All papers filed with the court shall have attached thereto such copies as the clerk may require in carrying out this general order.

3. The commission shall forthwith cause to be filed in the district court having jurisdiction of the proceedings, copies of (a) any order approving the filing of a petition by creditors under subdivision (a) of section 77; (b) each plan of reorganization presented at the hearing provided for in subdivision (d) of section 77; (c) each order or call for a hearing, with a statement of its purposes; (d) the plan subsequently recommended by the commission, together with the report and any supplemental report thereon; (e) in addition to the papers required to be submitted to the court under the provisions of subdivision (f) of said section, the written acceptances of any plan which is finally approved, together with a certificate of the commission that in its judgment the debtor and every other corporation issuing securities or acquiring property under the plan is authorized by its charter or by applicable State or Federal laws, upon confirmation of the plan, to carry out the plan; (f) any orders granting authority, subject to the confirmation of the plan, for the issuance of securities or other steps contemplated by the plan; (g) any orders issued to the trustee or trustees with respect to the operation of the corporation's business; and (h) such other papers filed in the proceedings as the court may direct or the commission deem pertinent. All proceedings before the commission under section 77 shall be conducted in accordance with its rules of practice.

4. Upon application of the commission prior to its approval of a plan of reorganization the court, after a hearing upon notice to the stockholders and to all parties who have appeared in the proceedings, shall determine whether or not the corporation is insolvent.

L

PROCEEDINGS UNDER SECTION 75 OF THE ACT

The following rules shall apply to proceedings under section 75 of the Act:

1. A petition for the appointment within a particular county of a conciliation commissioner must show to the satisfaction of the judge that each petitioner, within the meaning of subdivision (r) of section 75 is a farmer and a resident of the county, and must allege that each petitioner is insolvent or unable to meet his debts as they mature, and that he intends to file a petition for relief under said section. Having granted the petition and appointed a conciliation commissioner for such county, the judge may, without further petition, reappoint him or appoint other or additional conciliation commissioners for such county.

2. Every petition for relief filed under subdivision (b) of section 75 shall specify the county or counties in which any land used in the petitioner's farming operations is situated, and shall not be granted unless a conciliation commissioner for such county, or for one of such counties, has previously been appointed. The clerk shall not accept the petition unless it is accompanied by the filing fee and the schedules, which shall be in duplicate. Upon the filing of the petition the judge shall enter an order either approving it as properly filed under the section, or dismissing it for want of jurisdiction. If the petition is approved, the case shall be referred, and one of the duplicate schedules delivered, to a conciliation commissioner appointed for service in said county or in one of said counties.

3. Within ten days after the approval of the petition, or within such further time as the judge for cause shown may allow, the farmer shall file with the conciliation commissioner an inventory of his estate, and the commissioner

shall thereupon call the first meeting of creditors, to be held before him at such place as he deems most convenient for the parties in interest, upon written and published notice as provided in section 58 of the Act. Prior to the meeting he shall set off to the farmer the exemptions to which the farmer is entitled.

4. If the farmer has not applied for confirmation within such reasonable time as has been finally fixed therefor, which shall be not later than three months after the date of the first meeting the conciliation commissioner shall, unless the judge for cause shown shall have permitted a further extension, forthwith report the facts to the judge, who shall thereupon dismiss the proceedings.

5. The deposit required by subdivision (g) of section 75 shall be made in any one of the designated depositories, subject to withdrawal by the depositor upon the countersignature of the conciliation commissioner. The judge shall furnish a copy of this general order to the depositories and also the name of any conciliation commissioner whose countersignature is authorized.

6. Application for confirmation shall be filed with the conciliation commissioner who shall forthwith transmit it to the judge with (a) the acceptances, (b) the proofs of claims which have been allowed and those which have been disallowed, (c) a list of the debts having priority, (d) a list of the secured debts, with a description of the security of each, (e) the final inventory, with a list of the exemptions, (f) a certificate of the depository showing that the required deposit has been made, and (g) a report of the commissioner recommending or opposing confirmation and, in the case of an extension, stating to what extent, if any, it would be desirable for the court after confirmation to retain jurisdiction of the farmer and his property.

7. The judge shall fix a date and place for a hearing before him upon the application for confirmation. At the hearing any creditor opposing confirmation shall file a

written specification of the grounds of his opposition. If the judge does not confirm the proposal he may dismiss the proceedings, or refer the specifications to the commissioner for testimony and report and thereafter confirm the proposal or dismiss the proceedings.

8. If a composition or extension proposal is set aside for fraud under the provisions of subdivision (m) of section 75 the case may be dismissed and the clerk shall notify the creditors accordingly. Whenever the terms of the proposal are modified under the provisions of subdivision (l) of said section, the clerk shall send a written notice of the modifications to the creditors.

9. The personal representative of a deceased farmer who desires in his representative capacity to effect, under section 75, a composition or extension of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition, (c) a detailed inventory of so much of the property constituting the estate as under the laws of the State of which the decedent died a resident would be available for creditors, and (d) a list of the names and addresses of the creditors, showing the amounts allowed or apparently owing to each, the nature of the securities or liens, if any, held by each, and the claims which are entitled to priority. The petition shall show to the satisfaction of the district court that the decedent at the time of his death was a farmer within the meaning of subdivision (r) of section 75, and shall specify the county or counties in which at the time of the decedent's death his farming operations occurred. If the petition is approved by the district court as properly filed under section 75, the clerk shall file a certified copy of the order of approval with the probate court, and from the date of such order until the case is dismissed the district court shall exercise

exclusive jurisdiction over the property required to be listed in the inventory as above provided.

10. Upon the approval of a personal representative's petition the case shall be referred to a conciliation commissioner and proceeded with as in all other cases under section 75 and this general order, except that (a) the original and any amended or supplementary inventory filed by the petitioner with the approval of the probate court shall be deemed to be correct, and no inventory shall be made by the commissioner; (b) all claims allowed by the probate court, and only such claims, shall be allowed by the commissioner or the district court; (c) the petitioner shall file with the application for confirmation a completed list of the claims allowed up to the date of the application, certified as correct by the probate court; and (d) the clerk shall file with the probate court certified copies of all orders of the judge confirming or denying the proposal, modifying its terms, or dismissing the proceedings before or after confirmation.

11. Insofar as is consistent with the provisions of section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section. A supervisory conciliation commissioner, if appointed, shall exercise such supervision and control over the conduct of proceedings by conciliation commissioners as the judge may from time to time direct.

12. The ten dollar fees of the conciliation commissioner, and the fees and expenses of the supervisory conciliation commissioner, shall be payable out of appropriated funds in accordance with such instructions as may be issued from time to time by the Attorney General.

IT IS FURTHER ORDERED that the following forms, numbered 64 to 75, inclusive, are approved.

FORM No. 64

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 74 OF THE BANKRUPTCY ACT

To the Honorable .....,

Judge of the District Court of the United States for the .....

District of .....:

The petition of ....., of ....., in the county of ....., and district and State of ....., ...[*state occupation*], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicile] for the greater portion of six months next immediately preceding the filing of this petition at ..... within said judicial district; that he is insolvent [*or* unable to meet his debts as they mature]; and that he desires to effect a composition or an extension of time to pay his debts under section 74 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

.....

....., Attorney.

United States of America, District of ....., ss:

I, ..., the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the state-

ments contained therein are true according to the best of my knowledge, information, and belief.

....., Petitioner.

Subscribed and sworn to before me this .... day of ....., A.D. 19...

....., ...
[*Official character*]

FORM No. 65

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT

To the Honorable .....,
Judge of the District Court of the United States for the .....
District of .....:

The petition of ....., of ....., in the county of ....., and district and State of ....., respectfully represents:

That he is personally bona fide engaged primarily in farming operations [*or* that the principal part of his income is derived from farming operations] as follows .....
.....
.....
.....
.....;
that such farming operations occur in the county [*or* counties] of ....., within said judicial district; that he is insolvent [*or* unable to meet his debts as they mature]; and that he desires to effect a composition or extension of time to pay his debts under section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his prop-

erty, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

.....

....., Attorney.

United States of America, District of ....., ss:

I, ..., the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

.....,

Petitioner.

Subscribed and sworn to before me this .... day of ....., A.D. 19...

.....,

.....

[*Official character*]

FORM No. 66

ANSWER UNDER SECTION 74 TO INVOLUNTARY PETITION

In the District Court of the United States for the ..... District of .....

In the Matter of ..... *Debtor*	In Proceedings for a Composition or Extension

At ....., in said district, on the .... day of ..... A.D. 19...

And now the said ..... appears, and in answer to the involuntary petition filed against him asserts that he is insolvent [*or* unable to meet his debts as they mature] and that he desires to effect a composition or an extension of time to pay his debts under section 74 of the Bankruptcy Act; wherefore he prays that the petition for his adjudication be not granted, that his answer be approved, and that the proceedings be thenceforth had under said section.

Subscribed and sworn to before me, this .... day of ....., A.D. 19...

.....

[*Official character*]

FORM No. 67

ORDER APPROVING DEBTOR'S PETITION OR ANSWER IN PROCEEDINGS UNDER SECTION 74, OR HIS PETITION IN PROCEEDINGS UNDER SECTION 75

In the District Court of the United States for the .....
District of .....

In the Matter of .....
Debtor | In Proceedings for a Composition or Extension

At ....., in said district, on the ..... day of ..... A.D. 19.., before the Honorable ..... judge of said court, the petition [*or* answer] of ..... praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 74 [*or* 75] of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said section.

Witness the Honorable ....., judge of said court, and the seal thereof, at ....., in said district, on the ..... day of ..... A.D. 19...

[Seal of the court] .....,
Clerk.

FORM No. 68

ORDER OF REFERENCE IN PROCEEDINGS UNDER SECTION 74 OR SECTION 75

In the District Court of the United States for the.....
District of .....

In the Matter of .....
Debtor | In Proceedings for a Composition or Extension

Whereas the petition [*or* answer] of ....., filed in this court on the ..... day of ....., A.D. 19.., praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 74 [*or* 75] of the Bankruptcy Act, having been duly approved by order of this court on the ..... day of ....., A.D. 19.., it is thereupon ordered, that said matter be referred to ....., one of the referees in bankruptcy [*or* one of the conciliation commissioners] of this court, to take such further proceedings therein as are required by said section; and that the said ..... shall attend before said referee [*or* conciliation commissioner] on

the ..... day of ..... at ....., and thenceforth shall submit to such orders as may be made by said referee [*or* conciliation commissioner] or by this court relating to the proceedings under said section.

Witness the Honorable ....., judge of the said court, and the seal thereof, at ..... in said district, on the ..... day of ....., A.D. 19...

....., *Clerk.*

[Seal of the court.]

FORM No. 69

BOND OF CONCILIATION COMMISSIONER

Know all men by these presents: That we ....., of ....., as principal, and ....., of ..... and ....., of ....., as sureties, are held and firmly bound to the United States of America in the sum of ..... dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ..... day of ....., A.D. 19...

The condition of this obligation is such that whereas the said ..... has been on the ..... day of ....., A.D. 19.., appointed by the Honorable ....., judge of the District Court of the United States for the ..... District of ....., a conciliation commissioner under section 75 of the Bankruptcy Act, in and for the county of ....., in said district:

Now, therefore, if the said ..... shall well and faithfully discharge and perform all the duties pertaining to the said office of conciliation commissioner, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed in the presence of—

..... [L.S.]
..... [L.S.]
..... [L.S.]

Approved this ..... day of .....

....., *District Judge.*

FORM No. 70

NOTICE OF FIRST MEETING OF CREDITORS IN PROCEEDINGS UNDER SECTION 74

In the District Court of the United States for the .....
District of .....

In the Matter of .....
Debtor | In Proceedings for a Composition or Extension

To the creditors of ....., of .....,
in the county of ....., and district aforesaid.

Notice is hereby given that on the ..... day of .....
....., A.D., 19.., the petition [*or* answer] of the said.....
....., praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 74 of the Bankruptcy Act, was approved by this court as properly filed under said section; and that the first meeting of his creditors will be held at ..... in ....., on the ..... day of ....., A.D., 19.., at .... o'clock in the ..... noon, at which time the said creditors may attend, prove their claims, nominate a trustee, examine the debtor, and transact such other business as may properly come before said meeting.

.....,
Referee in Bankruptcy.

..... 19...

FORM No. 71

NOTICE OF FIRST MEETING OF CREDITORS IN PROCEEDINGS UNDER SECTION 75

In the District Court of the United States for the .....
District of .....

In the Matter of .....
Debtor | In Proceedings for a Composition or Extension

To the creditors of ....., of .....,
in the county of ....., and district aforesaid.

Notice is hereby given that on the ..... day of .....
....., A.D. 19.., the petition of the said .....,
praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under section 75 of the

Bankruptcy Act, was approved by this court as properly filed under said section; and that the first meeting of his creditors will be held at ..... in ....., on the ..... day of ....., A.D. 19.., at ..... o'clock in the ..... noon, at which time the said creditors may attend, prove their claims, examine the debtor, and transact such other business as may properly come before said meeting.

....., *Conciliation Commissioner.*

....., 19...

FORM No. 72

APPLICATION FOR CONFIRMATION OF A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 74 OR SECTION 75

In the District Court of the United States for the ..... District of .....

In the Matter of ..... *Debtor*	In Proceedings for a Composition or Extension

To the Honorable ....., Referee in Bankruptcy [*or* Judge] of the District Court of the United States for the ..... District of .....:

At ....., in said district, on the ..... day of ....., A.D. 19.., now comes ....., the above-named debtor, and respectfully represents to the court that, after he had filed in court a schedule of his property and a list of his creditors, as required by law, he offered a proposal for a composition or an extension to his creditors, which proposal has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims; that the consideration to be paid to the creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ..... dollars, has been deposited, subject to the order of the court, in the ..... Bank, of ....., a designated depository.

Wherefore the said ..... respectfully asks that the said proposal be confirmed by the court.

....., *Debtor.*

FORM No. 73

ORDER CONFIRMING A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 74

In the District Court of the United States for the .....
District of .....

In the Matter of
..... } In Proceedings for a Composition or Extension
Debtor

An application for the confirmation of the proposal offered by the debtor under section 74 of the Bankruptcy Act having been filed in court, and it appearing that the proposal has been accepted by a majority in number of creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the said court, and subject to its order; and it also appearing that the proposal includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; that it is for the best interests of all creditors; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a ground for denying his discharge; and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said proposal be, and it hereby is, confirmed.

Witness my hand, this ..... day of ....., A.D. 19...

.....,
Referee in Bankruptcy.

FORM No. 74

ORDER CONFIRMING A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 75

In the District Court of the United States for the .....
District of .....

In the Matter of
..... } In Proceedings for a Composition or Extension
Debtor

An application for the confirmation of the proposal offered by the debtor under section 75 of the Bankruptcy Act having been filed in

court, and it appearing that the proposal has been accepted by a majority in number of creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the said court, and subject to its order; and it also appearing that the proposal includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; that it is for the best interests of all creditors; and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said proposal be, and it hereby is, confirmed.

Witness the Honorable ....., judge of said court, and the seal thereof, this ..... day of ....., A.D. 19...

....., *Clerk.*

[Seal of the court]

FORM NO. 75

PETITION OF FARMERS FOR THE APPOINTMENT OF A CONCILIATION COMMISSIONER

To the Honorable .....,
Judge of the District Court of the United States for the ..... District of .....:

The petition of ....., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., respectfully represents:

That each of your petitioners is personally bona fide engaged in farming operations, or derives the principal part of his income from farming operations, as more fully set forth with respect to each petitioner in the schedules hereto annexed and made a part hereof marked exhibits ..... respectively;

That the farming operations of each of your petitioners occur in the county of ..... in said district; that each of your petitioners is insolvent or unable to meet his debts as they mature,

and that each intends, if a conciliation commissioner for said county is appointed, to file a petition for relief under section 75 of the Bankruptcy Act.

Wherefore your petitioners pray that a conciliation commissioner for said county be appointed as provided in said section.

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[*Form of verification to be signed by each petitioner:*]

United States of America, District of ....., ss:

I [*or* we], ...
....., who executed the foregoing petition, do hereby make solemn oath that the statements contained therein are true to the best of my [*or* our] knowledge, information, and belief.

[*Signatures:*]

Subscribed and sworn to before me this ..... day of .....
....., A.D. 19..

.....

.....

[*Official character*]

ORDER OF MAY 15, 1933.

The General Orders in Bankruptcy heretofore promulgated by this Court are amended by including therein a new order, numbered LI, to be immediately effective, and reading as follows:

"No ancillary receiver shall be appointed in any District Court of the United States in any bankruptcy proceeding pending in any other District of the United States except (1) upon the application of the primary receiver, or (2) upon the application of any party in interest with the consent of the primary receiver, or by leave of the court of original jurisdiction, or a judge thereof. No application for the appointment of such an ancillary receiver shall be granted unless the petition contains a detailed statement of the facts showing the necessity for such appointment, which petition shall be verified by the party in interest, or the primary receiver, or by an agent of the party in interest or primary receiver specifically authorized in writing for that purpose and having knowledge of the facts. Such authorization shall be attached to the petition."

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2. *Id.* Federal court did not lose jurisdiction over creditor or subject matter by granting single creditor leave to sue on bond in state court. *Id.*

3. *Enjoining Suit in State Court.* Order revoking permission to creditor to sue in state court on bond given by purchaser to secure all creditors, and enjoining further proceedings therein, was within jurisdiction of district court. *Id.*

REËNACTMENT. See **Statutes,** 5–6.

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STATUTES. See **Taxation**, I, 1–2; **Treaties**, 6.

1. *Construction.* Statute should be construed so as to avoid grave doubt of its constitutionality. *Interstate Commerce Comm'n* v. *Oregon-Washington R. & N. Co.*, 14.

2. *Construction. Uncertainty.* Unnecessary hardships should be avoided. *Burnet* v. *Guggenheim*, 280.

3. *Legislative History.* See *Burnet* v. *Brooks*, 378; *United States* v. *Dakota-Montana Oil Co.*, 459.

4. *Administrative Construction.* Uniform administrative construction of statute is entitled to great weight and should not be overturned except for cogent reasons. *United States* v. *Chicago North Shore & M. R. Co.*, 1.

5. *Id.* Effect of reënactment. *Massachusetts Mut. Life Ins. Co.* v. *United States*, 269; *Burnet* v. *Brooks*, 378; *United States* v. *Dakota-Montana Oil Co.*, 459.

6. *Id.* Doubt as to construction of statute may be resolved by consistent departmental practice existing before its reënactment. *Cook* v. *United States*, 102.

7. *Separability.* See *Louis K. Liggett Co.* v. *Lee*, 517.

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1. *Rates of Duty. Function of Tariff Commission. Investigations.* Character of "hearing" required; investigating costs of production; confidential data; rules of the Commission. *Norwegian Nitrogen Products Co.* v. *United States*, 294.

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2. *Search and Seizure. Vessels.* Authority of Coast Guard officers beyond territorial limits as affected by Treaty of 1924 with Great Britain. *Cook* v. *United States,* 102.

TAXATION. See **Bankruptcy,** 3; **Constitutional Law,** I, 1–5; II; IV, 1–5; VI, 1–2; VII, (A); VII (B), 1–11, 14; **International Law; Mandamus; Treaties.**

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II. Federal Taxation, p. 673.
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I. **In General.**

1. *Construction of Tax Statutes.* Application of rule that doubt shall be resolved in favor of taxpayer. *Burnet* v. *Guggenheim,* 280.

2. *Id.* Effect of administrative practice and legislative history. *Burnet* v. *Brooks,* 378.

II. **Federal Taxation.**

1. *Income Tax. Distribution of.* Profits on instalment sales of real estate encumbered by liens; validity of regulations. *Burnet* v. *S. & L. Bldg. Corp.,* 406.

2. *Corporations. Consolidated Returns.* Where corporation has legally enforceable control of substantially all stock of another, they are "affiliated" and must make consolidated return under 1918 and 1921 Acts. *Atlantic City Electric Co.* v. *Commissioner,* 152.

3. *Id.* Control of substantially all stock includes preferred stock outstanding with voting rights, though redeemable at any time and interest in dividends limited. *Id.*

4. *Id.* Ownership of 77 per cent. of entire voting stock, preferred and common, *held* insufficient for affiliation. *Id.*

5. *Deductions. Losses in Trade or Business.* Loss not deductible unless actually sustained during taxable year; mere existence of liability is not enough. *Burnet* v. *Huff,* 156.

6. *Id.* Loss by embezzlement from funds of which taxpayer was trustee *held* not "sustained" in year of theft, but in year following when trustee made up deficit. *Id.*

7. *Id. Bad Debts.* Amount due partner by firm not deductible in year before "ascertained to be worthless." *Id.*

8. *Id. Depletion.* Capitalized cost of drilling and developing oil wells *held* subject to depletion, not depreciation, allowance. *United States* v. *Dakota-Montana Oil Co.,* 459; *Petroleum Exploration* v. *Burnet,* 467; *Burnet* v. *A. T. Jergins Trust,* 508.

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II. **Federal Taxation**—Continued.

9. *Id. Life Insurance Company. Cash Accounting Basis.* Interest credited to policyholders, but unpaid, not deductible. *Massachusetts Mut. Life Ins. Co.* v. *United States,* 269.

10. *Transfer Tax. Nonresidents. Intangibles.* Application of 1924 Act to stocks and bonds belonging to nonresident alien and which are actually present in this country at time of death; construction of phrase "situated in the United States." *Burnet* v *Brooks,* 378.

11. *Id.* Local cash deposit included unless "deposited with any person carrying on the banking business." *Id.*

12. *Transfer Tax. Trust Property.* Inclusion under § 302 (d) of 1926 Act of trust property where donor reserved power though not in favor of himself or his estate. *Porter* v. *Commissioner,* 436.

13. *Transfers by Gift.* Deeds of trust reserving power of revocation became taxable as gifts upon termination of power. *Burnet* v. *Guggenheim,* 280.

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1. *Special Assessment.* Effect of request for. *United States* v. *Henry Prentiss & Co.,* 73.

2. *Id.* Differences between provisions for special assessments under 1917 and 1918 Acts. *United States* v. *Factors & Finance Co.,* 89.

3. *Id.* Conclusiveness of Commissioner's certificate favoring special assessment. *Id.*

4. *Id.* Special assessment under § 328 of 1918 Act involves discretionary action by Commissioner and can not be revised by the courts. *Heiner* v. *Diamond Alkali Co.,* 502.

5. *Refunds. Limitations.* Statute limiting time for presentation of claim is to protect against stale demands; administrative regulation as to form of claims is to facilitate research. *United States* v. *Memphis Cotton Oil Co.,* 62.

6. *Claim for Refund. Amendment. Limitations.* General claim for refund not specifying grounds, may be amended at any time before final rejection, though new claim barred by limitation. *United States* v. *Memphis Cotton Oil Co.,* 62; *United States* v. *Henry Prentiss & Co.,* 73; *United States* v. *Factors & Finance Co.,* 89.

TAXATION—Continued.

III. *Id.;* **Assessment, Collection, and Refunds**—Continued.

7. *Id.* General claim for refund may be amended to specify necessity for special assessment as ground, notwithstanding intervening limitation. *United States* v. *Factors & Finance Co.,* 89.

8. *Id.* Claim for refund specifying as sole ground necessity for special assessment could not by amendment be turned into one for revision of assessment because of erroneous valuation of invested capital; claim on latter ground was barred by limitations. *United States* v. *Henry Prentiss & Co.,* 73.

9. *Id.* Administrative practice and analogies of pleading as bearing upon determination of whether amendment of claim for refund allowable. *United States* v. *Memphis Cotton Oil Co.,* 62; *United States* v. *Henry Prentiss & Co.,* 73; *United States* v. *Factors & Finance Co.,* 89.

10. *Id. Final Rejection.* Claim for refund held not finally rejected by Deputy Commissioner's notice to taxpayer that claim would be rejected. *United States* v. *Memphis Cotton Oil Co.,* 62.

11. *Limitations. Waiver.* Validity under § 278 (e) of 1924 Act of waiver in respect of income taxes the assessment and collection of which had become barred before the date of the Act. *McDonnell* v. *United States,* 420; *Pacific Coast Steel Co.* v. *McLaughlin,* 426.

IV. **State Taxation.** See **Constitutional Law,** IV; VII.

1. *Production and Sale of Electricity.* State tax on hydroelectric company licensed by Federal Power Commission valid. *Broad River Power Co.* v. *Query,* 178.

2. *Ad Valorem Tax.* Oil produced from restricted Indian lands. *Indian Territory Oil Co.* v. *Board of Equalization,* 325.

3. *National Banks.* State tax on shares. *Union Bank & Trust Co.* v. *Phelps,* 181.

4. *Chain Stores.* Validity of Florida chain store tax. *Louis K. Liggett Co.* v. *Lee,* 517.

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1. *Subjects of Agreement.* Remedy for multiple taxation by several nations is by international conventions. *Burnet* v. *Brooks,* 378.

2. *Id.* Power of the United States to negotiate in this regard is limited only by such restrictions as may be imposed by its own Constitution. *Id.*

3. *Validity and Effect. Conflicting Statutes.* Treaty of May 22, 1924, with Great Britain, was self-executing and superseded, so far as inconsistent, provision of § 581 of Tariff Act of 1922 conferring authority on Coast Guard officers to board, search and seize beyond our territorial waters. *Cook* v. *United States,* 102.

4. *Construction.* Treaty of 1924 with Great Britain dealt completely with subject of search and seizure, beyond our territorial limits, of British vessels suspected of smuggling liquors. *Id.*

5. *Id.* Treaty of 1924 forbade boarding, search and seizure of British vessel beyond three mile limit and not within one hour's sailing distance of coast. *Id.*

6. *Modification and Abrogation.* Later statute does not modify or abrogate treaty unless purpose is clearly expressed. *Id.*

7. *Id.* Treaty of 1924 with Great Britain was not abrogated by reënactment of § 581 of Tariff Act of 1922 in identical terms in Tariff Act of 1930. *Id.*

TRIAL. See **Employers' Liability Act,** 1–6.

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1. *International Relations.* United States as sovereign possesses all powers necessary to effectively control its international relations. *Burnet* v. *Brooks,* 378.

2. *Suits.* United States as necessary party on appeal. *Interstate Commerce Comm'n* v. *Oregon-Washington R. & N. Co.,* 14.

3. *Priority as Creditor.* Priority under R. S. § 3466 as between debt due United States and lien of state tax not presently enforceable. *New York* v. *Maclay,* 290.

4. *Id.* Deposit of instalments of war-risk insurance and disability compensation paid to guardian appointed pursuant to state law was not preferred claim under R. S. § 3466; guardian was not agent or instrumentality of the United States. *Spicer* v. *Smith,* 430.

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1. *Hazards of Employment.* Injuries sustained by employee while going to or returning from work on service in extra hours or on special errands as within employment. *Voehl* v. *Indemnity Ins. Co.*, 162.

2. *Findings. Longshoremen's Act.* Deputy Commissioner's findings of fact, supported by evidence, conclusive. *Id.*

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