UNITED STATES REPORTS

VOLUME 289

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1932

FROM MARCH 13 (CONCLUDED)
TO AND INCLUDING MAY 29, 1933

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Erratum.—288 U.S. 92, line 1, " 1927 " should read 1925.

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.

HOMER S. CUMMINGS, Attorney General.
THOMAS D. THACHER, Solicitor General.[2]
J. CRAWFORD BIGGS, Solicitor General.[2]
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. Thacher submitted his resignation on March 4, 1933, and it was accepted to take effect upon the qualification of his successor. On April 15, 1933, President Roosevelt nominated Mr. J. Crawford Biggs, of North Carolina. Mr. Biggs was confirmed May 3, commissioned May 4, and took the oath of office on May 5, 1933.

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.

CLARK v. UNITED STATES

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 531. Argued February 6, 7, 1933.—Decided March 13, 1933

1. Concealment or misstatement by a juror upon a *voir dire* examination is punishable as a contempt if its tendency and design are to obstruct the processes of justice. So *held* where the juror, on being asked to state her past employments, mentioned several but deliberately concealed an employment by the defendant, and on being questioned as to bias, replied falsely that she had none,—all with intent to gain a place in the box and thwart the prosecution. P. 10.
2. The gist of the offense is neither the concealment nor the false swearing, but their use to gain acceptance as a juror in the case and under cover of that relation to obstruct the course of justice. P. 11.
3. As respects punishment for contempt, deceit practiced by a talesman in order that he may become a juror—part of the court—and influence or prevent a verdict, is to be distinguished from deceit practiced by a witness in testifying. P. 11.
4. A contemptuous obstruction to judicial power is none the less contempt when aggravated by perjury. P. 11.
5. The privilege from exposure of his votes and arguments in the jury room does not belong to a juror who became such by a fraud on the court. P. 12.
6. A statement by a juror of how she voted, made in her answer to an information for contempt,—*held* a waiver to that extent of the privilege against disclosure. P. 18.

15450°—33——1

7. Evidence of a juror's intentional concealment on *voir dire* of her disqualification by previous employment by defendant, and evidence of her arguments with other jurors while the trial was going on, and of her vote, revealed by her own answer in the contempt proceedings, *held* sufficient to overcome the claim of privilege and let in evidence of her conduct in the jury room after the case had been submitted. P. 18.
8. The rule that the testimony of a juror is not admissible for the impeachment of his verdict bears no relation to the privilege of jurors against exposure of their arguments and votes in the jury room. P. 18.
9. The doctrine allowing purgation by the oath of the contemnor as a bar to prosecution for contempt, is obsolete. P. 19.
10. There was no denial to the petitioner of a fair notice of hearing, nor any variance of substance between the information and the findings, in this case. P. 19.

61 F. (2d) 695, affirmed.

CERTIORARI, 287 U.S. 595, to review the affirmance of a conviction of criminal contempt. See 1 F.Supp. 747.

Mr. Sigurd Ueland for petitioner.

The District Court denied due process of law in proceeding to trial on the return day named in the rule to show cause.

There was a variance between the information and the proofs.

A juror's failure to volunteer information on his *voir dire* is not a contempt. If a prospective juror sworn to make "true answers" complies with his oath, how can it be said he has deceived the court?

It is the function of the examiner to question the juror or the witness until each material fact is either affirmed or denied. This is so notwithstanding the fact that the witness is customarily sworn to tell the "whole truth."

Perjury by a juror on his *voir dire* is not a contempt unless contumacy is shown. A crime committed in the court room may or may not be a contempt. To constitute the act a contempt it must interfere with the order

and decorum in the court room. Otherwise the wrongdoer must be indicted and tried by a jury. *Ex parte Robinson,* 19 Wall. 505; Beale, Contempt of Court, 21 Harv.L.Rev. 161; *Ex parte Hudgings,* 249 U.S. 378; *United States* v. *Appel,* 211 Fed. 495; *State* v. *Muse,* 200 Wis. 460.

For perjury to constitute contempt of court, the testimony must be of such a character that the judge before whom it is given can know judicially that it is false. *Hegelaw* v. *State,* 24 Ohio App. 103; *People* v. *Stone,* 181 Ill. App. 475; *People* v. *Hille,* 192 Ill. App. 139; *Riley* v. *Wallace,* 188 Ky. 471.

A conviction of contempt for committing perjury can not be sustained where based solely upon circumstantial evidence.

Criminal contempt is an "offense against the United States." *Cooke* v. *United States,* 267 U.S. 517; *Ex parte Grossman,* 267 U.S. 87. The defendant can be convicted only by proof beyond a reasonable doubt, and can not be compelled to testify against himself. *United States* v. *Goldman,* 277 U.S. 229; *Gompers* v. *Buck's Stove & Range Co.,* 221 U.S. 418, 444; *Michaelson* v. *United States,* 266 U.S. 42, 66. It is barred by the Statute of Limitations with respect to offenses not capital. *Gompers* v. *United States,* 233 U.S. 604.

The rule of proof in perjury was applied by this Court in *Hammer* v. *United States,* 271 U.S. 620, to a case of subornation. We are unable to see why it should not also be applied in any criminal proceeding where perjury must be shown to sustain the charge.

The statements and vote of a petit juror during the deliberations of the jury are privileged. Wigmore on Evidence, §§ 2285, 2346, 2348–2354; Jones on Evidence, 2d ed., § 2212; Hughes on Evidence, p. 301; *Woodward* v. *Leavitt,* 107 Mass. 453; *Hewitt* v. *Chapman,* 49 Mich. 4; *Matter of Cochran,* 237 N.Y. 336.

Petitioner's sworn answer and positive testimony that she did not intend to mislead the court, and that she answered truthfully with respect to her freedom from bias, were conclusive. "If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury." 4 Blackstone's Commentaries 287; *United States* v. *Shipp,* 203 U.S. 563; *Boyd* v. *Glucklich,* 116 Fed. 131; *Conley* v. *United States,* 59 F. (2d) 929, 935; *Hughes* v. *People,* 5 Colo. 436; *Fishback* v. *State,* 131 Ind. 304; *In re Chadwick,* 109 Mich. 588; *Ex parte Nelson,* 251 Mo. 63; *Percival* v. *State,* 45 Neb. 741; *State* v. *New Mexican Printing Co.,* 25 N.M. 102.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Dodds,* and *Messrs. W. Marvin Smith* and *Wm. H. Riley, Jr.,* were on the brief, for the United States.

The trial court did not deny the defendant due process by proceeding to trial on the return day of the rule to show cause.

The defendant was not convicted of a contempt with which she was not charged; and her conduct constituted one contempt.

Acts tending to obstruct the performance by the court of its judicial duty, whether or not they involve any physical affront to the court or immediate disruption of its proceedings, may constitute contempt. The power to punish for contempt has been extended both in this country and in England to new types of cases as they arose, the inquiry in each instance being merely whether there had been a tendency to interfere with the administration of justice. See *Ex parte Hudgings,* 249 U.S. 378, 383; *Sinclair* v. *United States,* 279 U.S. 749; Oswald, Contempt of Court, pp. 5, 6; *Helmore* v. *Smith,* 35 Ch. Div. 449; *In re Johnson,* 20 Q.B.D. 68, 74; 1 Bailey, Habeas Corpus, § 63.

Abuse of a court by deception is obstructive of the administration of justice and is a punishable contempt. *Lord* v. *Veazie,* 8 How. 250, 255; *Cleveland* v. *Chamberlain,* 1 Black 419, 426. So where witnesses have concealed material facts or have falsified their testimony. In these cases it has been deemed unnecessary to demonstrate actual perjury. The basis of the charge is that the court has been imposed upon and hampered in the conduct of its affairs. *United States* v. *Dachis,* 36 F. (2d) 601; *United States* v. *Karns,* 27 F. (2d) 453, 33 *id.* 489, cert. den., 280 U.S. 592; *Bowles* v. *United States,* 44 F. (2d) 115, 50 *id.* 848, cert. den., 284 U.S. 648; *Ex parte Steiner,* 202 Fed. 419; *In re Michaels,* 194 Fed. 552.

Mere submission to examination has been held not to be a sufficient regard for the demands of an orderly administration of justice, where the witness has displayed a disposition to evade frank answers and to withhold the truth. See *Haimsohn* v. *United States,* 2 F. (2d) 441; *In re Bronstein,* 182 Fed. 349; *In re Fellerman,* 149 Fed. 244; *In re Gitkin,* 164 Fed. 71; *In re Schulman,* 177 Fed. 191; *Loubriel* v. *United States,* 9 F. (2d) 807; *O'Connell* v. *United States,* 40 F. (2d) 201, 204, cert. granted, 281 U.S. 716, dismissed pursuant to stipulation; *Lang* v. *United States,* 55 F. (2d) 922, cert. dismissed as improvidently granted, 286 U.S. 523.

Similar results are reached by a number of state courts in circumstances that disclose interference with the administration of justice by falsification of facts or by failure to disclose information which should have been presented. *Gibson* v. *Tilton,* 1 Bland 352 (Md.); *Welch* v. *Barber,* 52 Conn. 147, 155–156; *State* v. *Moody,* 47 S.D. 111; *Nunns* v. *County Court,* 188 App. Div. 424.

The fact that witnesses may not volunteer unresponsive information furnishes no standard for the duty of a prospective juror. In a *voir dire* examination conducted by

the court, the facilities of counsel who have studied and prepared the case are not involved. Cf. *Pearcy* v. *Michigan Mutual Life Ins. Co.,* 111 Ind. 59.

Whether the false swearing amounted to perjury or not was immaterial. The traditional limitation upon the mode of proof of perjury seems to have no proper place in such a contempt proceeding.

The testimony of defendant's fellow jurors concerning her actions and utterances in the jury room after the case had been submitted was properly received in evidence to show her wilful purpose. *People ex rel. Nunns* v. *County Court,* 188 App. Div. 424; *McDonald* v. *Pless,* 238 U.S. 264, 269. Distinguishing *Matter of Cochran,* 237 N.Y. 336.

Mr. Justice Cardozo delivered the opinion of the Court.

The petitioner, Genevieve A. Clark, has been adjudged guilty of a criminal contempt in that with intent to obstruct justice she gave answers knowingly misleading and others knowingly false in response to questions affecting her qualifications as a juror. 1 F.Supp. 747.

The conviction by the District Court was affirmed by the Circuit Court of Appeals for the Eighth Circuit, the proceeding being remanded, however, to correct an error in the sentence. 61 F. (2d) 695. A writ of certiorari brings the case here.

In September, 1931, there came on for trial in the United States District Court for the District of Minnesota an indictment which had been returned against William B. Foshay and others charging them with the use of the mails in furtherance of a scheme to defraud. The petitioner was one of the panel of jurors summoned to attend. She did not know when the summons came to her for what case she had been called, and telephoned

a sister, Mrs. Brown, that she would like to be excused. She was advised by her sister, who had made inquiry of the Clerk of the Court, that excuses, if there were any, would have to be presented to the judge. At the same time she was informed that the trial for which she had been summoned was the Foshay trial, and that she would probably not be accepted as a juror since she had been employed by the Foshay Company, a corporation with which the indicted men had been connected as officers.

On the day appointed for the trial the petitioner, in company with her husband, reported at the court room. The District Judge examined the members of the panel as to their qualifications for service. While the examination was going on, the petitioner stated to several women on the panel that she wished to serve on the jury, that for this she had a special reason, and that she was afraid her former employment by the Foshay Company would disqualify her; that she had worked for the company as a stenographer and typist for about two weeks in the summer of 1929, but did not know or come in contact with any of the defendants personally.

Her service as stenographer and typist was not the only tie of friendliness that linked her to the Foshay firm. There were other contacts or relations that are not without significance, though less direct and personal. Until her marriage in 1922, she had been employed with the title of assistant cashier in a bank at St. Paul, of which Mr. Clark was then the president. Foshay in those years was a customer of the bank as depositor and borrower. Mr. Clark resigned as president in 1925, but his business relations with Foshay continued in the years that followed. Letters that passed between them are printed in the record. The tone is cordial and almost intimate. True, there is nothing to show that the friendly relations had spread to the petitioner. She denies that she had any

acquaintance with Foshay or his associates, and the District Court by its findings has accepted her denial. It is next to impossible, however, that her husband, who was with her in the court room, had refrained from telling her of his own friendship for one of the prisoners at the bar.

The petitioner, upon being called to the jury box, was questioned under oath by the judge presiding at the trial. She was asked whether she had ever been in any business of any kind. She answered, "I have been a stenographer before my marriage, yes." She was asked in what kind of business she had worked. She answered, "Well, I did some banking and some real estate and insurance, and I was with an automobile concern, with a Nash agency." Finally she was asked whether she felt that her mind was free from bias, and whether if accepted as a juror she would be able and willing to base her verdict on the evidence and the law as given to her by the court. To those inquiries she answered that her mind was clear of bias, and that the law and the evidence would govern her in arriving at a verdict.

The petitioner after thus testifying became a member of the jury, which was thereupon complete. The trial which followed lasted eight weeks. Two officers, a man and a woman, were in charge of the jury from the beginning to the end. During the first week of the trial, the petitioner made the remark to several of her fellow jurors that she regarded Mr. Foshay as a victim of circumstances, that he had gone to New York in the fall of 1929 to borrow $18,000,000, but that, because of the stock market crash, had come back without a dollar. When asked by a juror where she had procured that information, which was not supported by the evidence, she said that it was from a newspaper which she had read before the trial. Later on she gave expression to dissatisfaction with the Government because of the way the soldiers were treated after the war.

During the deliberations of the jury, after the case was finally submitted, she announced that since the prosecuting attorney had been unable to convince her of the guilt of the accused, the other jurors could hardly be expected to do so. At times she placed her hands over her ears when other jurors tried to reason with her, and argument became useless because she was unwilling to reply. She said of a witness for the Government that he had given perjured evidence in the South in an attempt to convict an innocent man. This information had come to her in the course of a conversation with her husband who had seen her at her hotel, in the presence of a bailiff, while the trial was under way. After being kept together for a week, the jury was discharged because unable to agree. The votes of eleven were for conviction. The single vote for acquittal was cast by the petitioner.

On November 4, 1931, the Government filed an information in support of a rule to show cause why the petitioner should not be punished for a criminal contempt. The information charges that her answers upon the *voir dire* examination were wilfully and corruptly false, and that the effect of her misconduct had been to hinder and obstruct the trial. In response to the rule to show cause the defendant filed an answer denying the misconduct, and alleging that her vote for acquittal had been dictated by her conscience. There was a full and patient hearing by a District Court of two judges. The court found the facts as they have been stated in this opinion. It drew from them the conclusion that the juror had obstructed the administration of justice, when examined on her *voir dire,* by "deliberately and intentionally" concealing the fact that she had been employed during the summer of 1929 by the Foshay Company. It drew the conclusion also that she had obstructed the administration of justice by stating falsely that she was free from bias and that her verdict would be based only upon the evidence as

introduced and the law as given by the court. For the contempt thus adjudged there was a sentence of imprisonment and fine.

1. Concealment or misstatement by a juror upon a *voir dire* examination is punishable as a contempt if its tendency and design are to obstruct the processes of justice.

There was concealment by the petitioner, and that wilful and deliberate. She had been asked to state the kinds of work that she had been doing in other years. She counted off a few, and checked herself at the very point where the count, if completed, would be likely to bar her from the box. There is no room for the excuse of oversight or negligence. She had been warned that disclosure would lead to challenge and rejection. With her mind full of the warning she told the part truth that was useless, and held back the other part that had significance and value. Whether this was perjury or false swearing, there is no occasion to inquire. It was a deliberate endeavor to thwart the process of inquiry, and to turn a trial into a futile form.

Added to concealment there was positive misstatement. The petitioner stated to the court that her mind was free from bias. The evidence is persuasive that it was hostile to the Government. Bias is to be gathered from the disingenuous concealment which kept her in the box. She was intruding into a relation for which she believed herself ineligible, and intruding with a motive. The only plausible explanation is a preconceived endeavor to uphold the cause of the defendants and save them from their doom. Bias, thus revealed at the beginning, is confirmed by everything that followed. While the trial was still in progress, she argued with her fellow jurors that Foshay was a hapless victim of circumstances too strong for him, and went outside the evidence, quoting statements in a newspaper to win them to her view. After the

trial was over and deliberations had begun, she waved aside all argument and closed her ears to the debate. She had closed her mind to it before.

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is . . . the characteristic upon which the power to punish for contempt must rest." White, C. J., in *Ex parte Hudgings,* 249 U.S. 378, 383. The petitioner is not condemned for concealment, though concealment has been proved. She is not condemned for false swearing though false swearing has been proved. She is condemned for that she made use of false swearing and concealment as the means whereby to accomplish her acceptance as a juror, and under cover of that relation to obstruct the course of justice. There is a distinction not to be ignored between deceit by a witness and deceit by a talesman. A talesman when accepted as a juror becomes a part or member of the court. *In re Savin,* 131 U.S. 267; *United States* v. *Dachis,* 36 F. (2d) 601. The judge who examines on the *voir dire* is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning.

The books propound the question whether perjury is contempt, and answer it with nice distinctions. Perjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying falsely. *Ex parte Hudgings, supra.*

For offenses of that order the remedy by indictment is appropriate and adequate. On the other hand, obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission of perjury. Cf. *In re Ulmer,* 208 Fed. 461; *United States* v. *Appel,* 211 Fed. 495; *United States* v. *Karns,* 27 F. (2d) 453; *United States* v. *Dachis,* 36 F. (2d) 601; *Lang* v. *United States,* 55 F. (2d) 922; 286 U.S. 523; *United States* v. *McGovern,* 60 F. (2d) 880. We must give heed to all the circumstances, and of these not the least important is the relation to the court of the one charged as a contemnor. Deceit by an attorney may be punished as a contempt if the deceit is an abuse of the functions of his office (*Bowles* v. *United States,* 50 F. (2d) 848, 851; *United States* v. *Ford,* 9 F. (2d) 990), and that apart from its punishable quality if it had been the act of some one else. A talesman, sworn as a juror, becomes, like an attorney, an officer of the court, and must submit to like restraints. The petitioner blurs the picture when she splits her misconduct into parts, as if each were a separate wrong to be separately punished. What is punished is misconceived unless conceived of as a unit, the abuse of an official relation by concealment and deceit. Some of her acts or none of them may be punishable as crimes. The result is all one as to her responsibility here and now. She has trifled with the court of which she was a part, and made its processes a mockery. This is contempt, whatever it may be besides. *Sinclair* v. *United States,* 279 U.S. 749; *In re Savin,* 131 U.S. 267.

2. The admission of testimony as to the conduct of the petitioner during the deliberations of the jury was not a denial or impairment of any lawful privilege.

The books suggest a doctrine that the arguments and votes of jurors, the *media concludendi,* are secrets, protected from disclosure unless the privilege is waived. What is said upon the subject in the adjudicated cases, is

dictum rather than decision. See *Woodward* v. *Leavitt,* 107 Mass. 453, 460; cf. *Matter of Cochran,* 237 N.Y. 336, 340; 143 N.E. 212; *People ex rel. Nunns* v. *County Court,* 188 App. Div. (N.Y.) 424, 430; 176 N.Y.S. 858. Even so, the dicta are significant because they bear with them the implications of an immemorial tradition. The doctrine is developed, and the privilege broadly stated, in the writings of a learned author. Wigmore, Evidence, (2d ed.) vol. 5, § 2346. It has recognition to some extent by other authors of repute (Hughes, Evidence, p. 301; Jones, Commentaries on Evidence, 2d ed., § 2212; Chamberlayne, Evidence, vol. 5, § 3707), but in a way that has confused it with something very different, the competency of witnesses to testify in impeachment of a verdict. What concerns us at the moment is the privilege alone. There will be need to recur later to the rule as to impeachment. For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid. But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process. The function is the more essential where a privilege has its origin in inveterate but vague tradition and where no attempt has been made either in treatise or in decisions to chart its limits with precision.

Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror

while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. Other exceptions may have to be made in other situations not brought before us now. It is sufficient to mark the one that is decisive of the case at hand. The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in.* Upon that showing being made, the debates and ballots in the jury room are admissible as corroborative evidence, supplementing and confirming the case that would exist without them. Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has been responsive to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind. *People ex rel. Nunns* v. *County Court, supra.*

* As to the function of the judge in the decision of such preliminary questions see: Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harvard L.Rev. 392, 397, 403; Morgan, Functions of Judge and Jury, 43 Harvard L. Rev. 165; Maguire and Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale L.J. 1101, and the cases there collected.

We turn to the precedents in the search for an analogy, and the search is not in vain. There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. There are early cases apparently to the effect that a mere charge of illegality, not supported by any evidence, will set the confidences free. See, e.g., *Reynell* v. *Sprye,* 10 Beav. 51, 54, 11 Beav. 618; *In re Postlewaite,* 35 Ch.D. 722, 724; cf. *Regina* v. *Bollivant* [1900] 2 Q.B.D. 163, [1901] A.C. 196. But this conception of the privilege is without support in later rulings. "It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud." *O'Rourke* v. *Darbishire,* [1920] A.C. 581, 604. To drive the privilege away, there must be "something to give colour to the charge;" there must be "*prima facie* evidence that it has some foundation in fact." *O'Rourke* v. *Darbishire, loc. cit., supra;* also pp. 614, 622, 631, 633. When that evidence is supplied, the seal of secrecy is broken. See also: *Regina* v. *Cox,* [1884] 14 Q.B.D. 153, 157, 161, 175; cf. *Bujac* v. *Wilson,* 27 N.Mex. 112; 196 Pac. 513; *In re Niday,* 15 Idaho 559; 98 Pac. 845. The judgment of the House of Lords in *O'Rourke* v. *Darbishire* has given to the whole subject a definitive exposition. Nor does the loss of the privilege depend upon the showing of a conspiracy, upon proof that client and attorney are involved in equal guilt. The attorney may be innocent, and still the guilty client must let the truth come out. *Regina* v. *Cox, supra; Matthews* v. *Hoagland,* 48 N.J.Eq. 455, 469; 21 Atl. 1054; *State* v. *Faulkner,* 175 Mo. 546, 593; 75 S.W. 116; *Standard Fire Ins. Co.* v. *Smithhard,* 183 Ky. 679, 684; 211 S.W. 441; *State* v. *Kidd,* 89 Iowa 54; 56 N.W. 263;

cf. *Bank of Utica* v. *Mersereau,* 3 Barb. Ch. 528, 598; *Coveney* v. *Tannahill,* 1 Hill (N.Y.) 33, 41.

With the aid of this analogy, we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney. Is there sufficient reason to believe that it will be found to be inadequate for the protection of a juror? No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption. Cf. *Attorney-General* v. *Pelletier,* 240 Mass. 264; 134 N.E. 407; *People ex rel. Hirschberg* v. *Board of Supervisors,* 251 N.Y. 156, 170; 167 N.E. 204; *State* v. *Campbell,* 73 Kan. 688; 85 Pac. 784.

Nothing in our decision impairs the authority of *Bushell's* case, Vaughan 135, 1670, with its historic vindication of the privilege of jurors to return a verdict freely according to their conscience. There had been a trial of Penn and Mead on a charge of taking part in an unlawful assembly. The jurors found a verdict of acquittal, though in so doing they refused to follow the instructions of the

court. For this they were fined and imprisoned, but were discharged on *habeas corpus,* Vaughan, C. J. pronouncing "that memorable opinion which soon ended the fining of jurors for their verdicts, and vindicated their character as judges of fact." Thayer, Preliminary Treatise on Evidence at the Common Law, p. 167. *Bushell's* case was born of the fear of the Star Chamber and of the tyranny of the Stuarts. Plucknett, Concise History of the Common Law, p. 114. It stands for a great principle, which is not to be whittled down or sacrificed. On the other hand, it is not to be strained and distorted into fanciful extensions. There is a peril of corruption in these days which is surely no less than the peril of coercion. The true significance of *Bushell's* case is brought out with clearness in declaratory statutes. By one of these, a statute of New York, "No juror shall be questioned [for any verdict rendered by him], or be subject to any action, civil or criminal, except to indictment for corrupt conduct in rendering such verdict, in the cases prescribed by law." R.S. of N.Y., Part 3, c. 7, Title 4, § 69; Civil Rights Law, § 14. The Revisers tell us in their notes that the statute, though new in form, is declaratory of an ancient principle (R.S., 2d ed., vol. 3, p. 741), and so we may assume it is. *Matter of Cochran,* 237 N.Y. 336, 340; 143 N.E. 212; cf. *People ex rel. Nunns* v. *County Court, supra* at p. 448. It would give no help to the petitioner though it were enacted for the federal courts. She has not been held to answer for any verdict that she has rendered, nor for anything said or done in considering her verdict. *Matter of Cochran, supra.* She has been held to answer for the deceit whereby she made herself a juror, and was thereby placed in a position to vote upon the case at all. What was said and done in the jury room is not the gist of her wrongdoing. What was said and done in the jury room is no more than confirmatory evidence of her state of mind

before. One could urge with as much reason that she would be subjected to coercion if she had been indicted and tried for bribery and the same evidence had been accepted in support of the indictment.

Nor is there anything in our decision at variance with the rule, which is not without exceptions (*Mattox* v. *United States,* 146 U.S. 140, 148; cf. Wigmore, Evidence, vol. 5, §§ 2353, 2354; *Woodward* v. *Leavitt,* 107 Mass. 453; *Hyman* v. *Eames,* 41 Fed. 676; *Fuller* v. *Fletcher,* 44 Fed. 34, 39), that the testimony of a juror is not admissible for the impeachment of his verdict. *McDonald* v. *Pless,* 238 U.S. 264. Here there was no verdict, and hence none to be impeached. But in truth the rule against impeachment is wholly unrelated to the problem now before us, the limits of the privilege to maintain a confidence inviolate. Wigmore, *supra,* § 2346. Impeachment may be forbidden though the jurors waive their privilege, and combine with the defeated litigant to make the verdict null. Privilege may be asserted though there is nothing to impeach.

In the record now before us the evidence of guilt is ample, without the happenings in the jury room, to break down the claim of privilege, and thus let in the light. There is the evidence of the concealment of the petitioner's employment with all its sinister implications. There is the evidence of her arguments with the jurors while the trial was going on. There is even the evidence of her vote, for the fact that she had voted for acquittal had been stated in her answer, and to the extent of the voluntary disclosure the privilege had been waived. Indeed what happened in the jury room added so little to the case that the error, if there had been any, in permitting it to be proved, would have to be regarded as unsubstantial and without effect on the result. No one can read the findings of the triers of the facts and hesitate in concluding that even with this evidence omitted

there would have been an adjudication of contempt. In considering with all this fulness the merits of the ruling, we have been moved by the desire to build securely for the future.

3. The oath of a contemnor is no longer a bar to a prosecution for contempt.

Little was left of that defense after the decision of this court in *United States* v. *Shipp,* 203 U.S. 563, 574. Since then there has been no purgation by oath where an overt act of defiance is the gist of the offense. The point was reserved whether sworn disavowal would retain its ancient force "if the sole question were the intent of an ambiguous act."

The time has come, we think, to renounce the doctrine altogether and stamp out its dying embers. It has ceased to be a defense in England since 1796. *Matter of Crossley,* 6 T.R. 701. It has been rejected generally in the States. *Dale* v. *State,* 198 Ind. 110; 150 N.E. 781; *State* v. *District Court,* 92 Mont. 94; 10 P. (2d) 586; *In re Singer,* 105 N.J. Eq. 220; 147 Atl. 328; *State* v. *Keller,* 36 N.M. 81; 8 P. (2d) 786; *Boorde* v. *Commonwealth,* 134 Va. 625; 114 S.E. 731; *Huntington* v. *McMahon,* 48 Conn. 174, 200, 201; *State* v. *Matthews,* 37 N.H. 450, 455; *Bates's Case,* 55 N.H. 325, 327; *State* v. *Harper's Ferry Bridge Co.,* 16 W.Va. 864, 873; cf. *Carson* v. *Ennis,* 146 Ga. 726; 92 S.E. 221; *Matter of Snyder,* 103 N.Y. 178, 181; 8 N.E. 479; note 9 L.R.A. (N.S.) 1119; Curtis, 41 Harvard L. Rev. 51, 65. It has even lost, since the decision in the *Shipp* case, the title to respect that comes of a long historical succession. It has taken its place with ordeal and wager of law and trial by battle among the dimly remembered curios of outworn modes of trial. Thayer, *op. cit., supra,* p. 8, *et seq.*

4. There was no denial to the petitioner of a fair notice of hearing, nor any variance of substance between the information and the findings.

We have considered the arguments to the contrary, and find them without merit.

The judgment of the Circuit Court of Appeals is accordingly *Affirmed.*

ANDERSON, COLLECTOR OF INTERNAL REVENUE, *v.* WILSON ET AL., EXECUTORS *

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 460. Argued February 8, 9, 1933.—Decided March 13, 1933

1. A New York will, providing for the liquidation of residuary real estate, the proceeds of which it bequeathed to designated beneficiaries, directed the executors within the period of two lives in being to dispose of the property, as and when in their judgment it could be sold to advantage. They were free to form and use for this purpose a holding company if they saw fit, and to decide, in their discretion, whether to distribute the proceeds of any sale or to retain them for further conversion before distribution. Until the time of distribution, the net income was to be paid semi-annually to the beneficiaries. *Held:*

   (1) That the executors took the fee title in trust, and not merely a power. P. 24.

   (2) By the law of New York, where land is left by will to executors to convert into money and distribute, the executors take the fee title upon the trust, and the beneficiaries have no interest in the corpus other than to enforce performance of the trust. P. 25.

2. A loss resulting from a sale of real estate by executors holding fee title on a trust to manage and sell and to distribute the proceeds, is a loss of the estate, and can not be deducted by the beneficiary in making his personal return of income under the Revenue Act of 1921. P. 26.

60 F. (2d) 52, affirmed.

CERTIORARI, 287 U.S. 592, on cross petitions to review a judgment reversing a judgment—51 F. (2d) 268—against the Tax Collector and directing a retrial. Upon this re-

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* Together with No. 461, *Wilson et al., Executors,* v. *Anderson, Collector of Internal Revenue.*

view, the reversal is affirmed, but the cause is remanded to the District Court with direction to dismiss the complaint.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Sewall Key* and *Erwin N. Griswold* were on the brief, for Anderson, Collector.

Mr. George E. Cleary, with whom *Mr. Clark T. Brown* was on the brief, for Wilson et al., Executors.

Mr. Justice Cardozo delivered the opinion of the Court.

The question to be decided is whether the difference between the value of real estate at the death of a testator and the proceeds realized thereafter upon a sale by the trustees may be deducted as a loss by the taxpayer, the beneficial owner of the proceeds, upon his return to the collector for the income of the year.

Richard T. Wilson, Sr., a resident of New York, died in November, 1910, the owner of a large estate. By the fourth article of his will he directed his executors to sell and convert into personalty his entire residuary estate, and to divide the proceeds thereof into five equal parts. Out of the fifth part set aside for the use of his son, Richard T. Wilson, Jr., the sum of $500,000 was to be held for the use of the son during life with remainder to lineal descendants, and in default of such descendants to others. "The balance of such part I give to my said son, Richard T. Wilson, Jr., to be his absolutely."

This gift, if it had stood alone, might have seemed to allow to the executors no discretion as to the time of sale, and might have bred uncertainty as to their powers and duties before the time for distribution. The next or fifth article clarifies the meaning. The testator there recalls the fact that after setting up the trust for $500,000 and

other special funds, a large part of his residuary estate will consist of real estate in New York and other states, and shares of manufacturing and business corporations, " which should not be sold excepting under favorable conditions." Accordingly he lays upon his executors the following command: " to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding, however, a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, Jr., and the survivor of them, and I hereby authorize and empower my said executors within said period to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment thereof." Nor is this all. The executors are authorized in their discretion to organize a corporation, to convey to it the whole or any part of the residuary estate in return for the capital stock, and to hold the stock " until it can in their judgment be advantageously disposed of." Finally there is a provision that upon the making of a sale, the executors in their discretion may distribute the proceeds, " or retain the same, or any part thereof for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them." Until the time of distribution the net income is to be paid semi-annually to those entitled to receive it.

Included in the real estate at the death of the testator was a building in the City of New York known as the " Commercial Building," of a value at that time of $290,000. This building the executors held till 1922, when they sold it for $165,000. After allowance for depreciation, the loss to the estate by reason of this sale was $113,300. The executors were at liberty to distribute the entire pro-

ceeds ($165,000) among the residuary legatees if their judgment moved them to that course. They did not do so. They distributed only $50,000, and held the balance in the trust. One fifth of the part distributed belonged and was paid to Richard T. Wilson, Jr. One fifth of the part retained was held for his use as it had been before the sale.

The present controversy grows out of a tax return of income for 1922. From the gross income of that year the taxpayer, Richard T. Wilson, Jr., deducted $25,001.17, one-fifth, according to his computation, of the loss resulting from the sale. It was afterwards agreed that one-fifth of the loss was not more than $22,660, and that the amount of the claimed deduction should be corrected accordingly. The Commissioner disallowed the loss altogether, and assessed an additional tax. The taxpayer upon payment of the tax filed a claim for refund which the Commissioner rejected. This suit was then brought to recover the amount paid upon the additional assessment. During the pendency of the suit the taxpayer died, and his executors were substituted. The District Court gave judgment in their favor, holding that one-fifth of the loss upon the sale of the Commercial Building was a loss suffered by the taxpayer, the beneficiary of the trust, and was a proper deduction from his income for the year of sale. Upon an appeal by the Government, the Court of Appeals for the Second Circuit sustained the representatives of the taxpayer in their claim for a deduction, but reduced the amount. In the view of that court the loss allowable to the beneficiary was not one-fifth of the entire loss that had been suffered by the trust estate, but only that part of one-fifth of the total loss represented by the ratio between the part of the proceeds presently distributed (not more than $50,000), and $165,000, the entire proceeds of the sale. The record left room for some uncertainty whether the payment of $50,000 had

been derived altogether from a sale of the Commercial Building, or in part from other sources. To the end that this uncertainty might be removed, the judgment of the District Court was reversed, and the cause remanded for retrial in accordance with the opinion. 60 F. (2d) 52. Cross-petitions for certiorari, allowed by this court, have brought the controversy here. In No. 460, the Government complains that there was error in the refusal to disallow the deduction altogether. In No. 461, the representatives of the taxpayer complain that there was error to their prejudice in restricting the amount.

To determine whether the loss was one suffered by the trust estate, or one suffered by the taxpayer to whom the proceeds of the sale were payable, there is need at the outset to determine the meaning of the will. The Government contends, and so the courts below have held, that title to the realty was given to the executors upon a valid trust to sell and to apply the rents and profits in the interval. The representatives of the taxpayer contend that the executors had no title, but only a power in trust, and that subject to the execution of that power, the taxpayer was owner. If that be so, the loss was his and no one else's. A mere donee of a power is not the owner of an estate, nor to be classed as a juristic entity to which a loss can be attributed. We think, however, that what passed to the executors was ownership or title. True the will does not say in so many words that the residuary estate is given or devised to them, but the absence of such words is of no controlling significance when a gift or devise is the appropriate and normal medium for the attainment of purposes explicitly declared. *Robert* v. *Corning,* 89 N.Y. 225, 237; *Vernon* v. *Vernon,* 53 N.Y. 351, 359; *Tobias* v. *Ketchum,* 32 N.Y. 319; *Brewster* v. *Striker,* 2 N.Y. 19. Nothing less than ownership will supply that medium here. The executors are charged

with active and continuing duties not susceptible of fulfilment without possession and dominion. They are to collect the income and pay it over in semi-annual instalments after deducting the expenses. They are to "hold and manage" the estate with full discretionary powers. They are even at liberty to convey it to a corporation if they believe that efficient administration will thereby be promoted. Under reiterated judgments of the highest court of New York they are more than the donees of a power. They are the repositories of title. *Morse* v. *Morse,* 85 N.Y. 53; *Robert* v. *Corning, supra; Ward* v. *Ward,* 105 N.Y. 68; 11 N.E. 373; *Mee* v. *Gordon,* 187 N.Y. 400; 80 N.E. 353; *Putnam* v. *Lincoln Safe Deposit Co.,* 191 N.Y. 166, 182; 83 N.E. 789; *Striker* v. *Daly,* 223 N.Y. 468, 472; 119 N.E. 882.

Another question of construction has yet to be considered. We have seen that the effect of the will was to clothe the executors with title to the land. We have yet to determine whether the title that came to them was the fee or something less. If it was the fee, the whole estate was in them, and no one else had any ownership or interest in the land as distinguished from ownership or interest in the proceeds of a sale. *Delafield* v. *Barlow,* 107 N.Y. 535; 14 N.E. 498; *Salisbury* v. *Slade,* 160 N.Y. 278, 290; 54 N.E. 741; *Weintraub* v. *Siegel,* 133 App. Div. (N.Y.) 677, 681; 118 N.Y.S. 261. If it was less than the fee, there may have vested in others upon the death of the testator a future estate in remainder, which would take effect in possession on the termination of the trust. *Losey* v. *Stanley,* 147 N.Y. 560, 568; 42 N.E. 8; *Stevenson* v. *Lesley,* 70 N.Y. 512; *Matter of Easterly,* 202 N.Y. 466, 474; 96 N.E. 122. Under the law of New York what passed to these executors was the title to the fee. By the will of this testator all his property, real and personal (with exceptions not now material) was to be

converted into money. The five sons and daughters among whom the money was to be divided had no interest in the land, aside from a right in equity to compel the performance of the trust. Real Property Law of New York, § 100; *Schenck* v. *Barnes,* 156 N.Y. 316, 321; 50 N.E. 967; *Melenky* v. *Melen,* 233 N.Y. 19, 23; 134 N.E. 822. What was given to them was the money forthcoming from a sale. *Delafield* v. *Barlow, Salisbury* v. *Slade, Weintraub* v. *Siegel, supra.* Their interest in the corpus was that and nothing more.

Our answer to the inquiry as to the meaning of the will comes close to being an answer to the inquiry as to the incidence of the loss. The taxpayer has received the only legacy bequeathed to him, and received it as it was given without the abatement of a dollar. What was bequeathed was an interest in a fund to be made up when the trustees were of opinion that it would be advisable to sell. This alone was given, and this has been received. There has been no loss by the taxpayer of anything that belonged to him before the hour of the sale, for nothing was ever his until the sale had been made and the fund thereby created. A shrinkage of values between the creation of the power of sale and its discretionary exercise is a loss to the trust, which may be allowable as a deduction upon a return by the trustees. It is not a loss to a legatee who has received his legacy in full. One might as well say that a legatee of shares of stock to be bought by executors out of the moneys of the estate would have an allowance of a loss upon a showing that the value would have been greater if the executors in the exercise of their discretion had bought sooner than they did. The legatee must take the legacy as the testator has bequeathed it.

We hold that the trust, and not the taxpayer, has suffered the loss resulting from the sale of the Commercial

Building, and it follows that where loss has not been suffered, there is none to be allowed. Whether the result would be the same if the beneficiaries had been the owner of future estates in remainder, we are not required to determine. Cf. *Francis* v. *Commissioner,* 15 B.T.A. 1332, 1340. Our ruling will be kept within the limits of the case before us. In so ruling we do not forget that the trust is an abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions. The Revenue Act of 1921 under which the tax in question was imposed defines the word "taxpayer" as including a trust or an estate. Revenue Act of 1921, c. 136; 42 Stat. 227, § 2 (9). The definition is pursued to its logical conclusion in a long series of decisions. *Baltzell* v. *Mitchell,* 3 F. (2d) 428; *Whitcomb* v. *Blair,* 58 App.D.C. 104; 25 F. (2d) 528; *Abell* v. *Tait,* 30 F. (2d) 54; *Busch* v. *Commissioner,* 50 F. (2d) 800, 801; *Roxburghe* v. *Burnet,* 61 App.D.C. 141; 58 F. (2d) 693; cf. *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U.S. 509. These and other cases bear witness to the rule that an equitable life tenant may not receive a deduction for the loss of capital assets of the trust, though the result of such a loss is a reduction of his income. The argument will not hold that what was lost to this taxpayer was not the capital of the trust, but rather his own capital, withdrawn from his possession, but held for his account by the executors as custodians or bailiffs. His capital was in the proceeds, to the extent that they were distributed, and never in the land. We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it.

The Circuit Court of Appeals did not err in reversing the judgment of the District Court. It did err in its instructions as to the relief upon a second trial.

The judgment of reversal is accordingly affirmed, and the cause remanded to the District Court with instructions that a judgment should be entered dismissing the complaint. *Affirmed.*

BEMIS BRO. BAG CO. *v.* UNITED STATES

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 515. Argued February 13, 14, 1933.—Decided March 13, 1933

A claim for a tax refund giving notice that, in the assessment of excess profits, items have been erroneously omitted from invested capital, and praying for a special assessment under §§ 327 (a) and 328, Revenue Act of 1918, on the ground that invested capital can not be determined in the ordinary way, is amendable, after the period for filing original claims has expired, by adding an alternative prayer that, if the special assessment be denied, the omitted items may be restored to invested capital and the tax be recalculated on that basis. *United States* v. *Henry Prentiss & Co.*, 288 U.S. 73; *United States* v. *Factors & Finance Co.*, 288 U.S. 89. P. 33.

60 F. (2d) 944, reversed.

CERTIORARI, 288 U.S. 594, to review a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court rejecting a claim for refund of income and excess profits taxes.

Mr. Abraham Lowenhaupt, with whom *Messrs. Stanley S. Waite* and *R. S. Doyle* were on the brief, for petitioner.

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

By leave of Court, *Messrs. Kingman Brewster, James S. Y. Ivins, Percy W. Phillips, O. R. Folsom-Jones,* and *Richard B. Barker* filed a brief as *amici curiae.*

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy to be determined presents another phase of a problem which has been much considered by the court in opinions recently announced. *United States* v. *Memphis Cotton Oil Co.,* 288 U.S. 62; *United States* v. *Prentiss & Co.,* 288 U.S. 73; *United States* v. *Factors & Finance Co.,* 288 U.S. 89. There is need once again to decide whether a claim for the refund of a tax has been presented by the taxpayer in such a form as to be subject to amendment after a claim wholly new would be barred by limitation.

The petitioner, Bemis Bro. Bag Company, having made payment of excess profits taxes for 1918 and 1919, filed its claims for refund with the Commissioner of Internal Revenue. The claims contained a request for a special assessment under §§ 327 and 328 of the Revenue Act of 1918, and in support of the request annexed a statement under oath which had been filed with a like claim as to the taxes of another year.

By the statement thus annexed, the right to the relief demanded is placed upon three grounds which are not to be confused.

The first is that the case is one "where the Commissioner is unable to determine the invested capital" in the ordinary way. This is the ground covered by § 327 (a) of the applicable statute.

The second is that the case is one "where a mixed aggregate of tangible and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective

values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively." This is the ground covered by § 327 (c).

The third is that the case is one where "the tax, if determined without the benefit of this section [327] 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 the benefit of this section and the tax computed by reference to the representative corporations specified in section 328." This is the ground covered by § 327 (d).

The taxpayer in presenting its claims to the Commissioner submitted facts and arguments in support of each of the three grounds.

To show that the invested capital had been inaccurately determined, and could not be accurately determined by resort to the usual methods, the taxpayer stated *inter alia* that the value of printing plates and patterns had been erroneously omitted, and that owing to the loss of vouchers and the changes wrought by the lapse of time, the value of these items could not be measured with complete precision, though it was susceptible even then of being fixed approximately. An estimate of the value was included in the claims.

To show that the case was one of a mixed aggregate of tangibles and intangibles paid for in stock, with the value of the several elements not subject to accurate division, the taxpayer made a statement of the corporate history and structure.

To show that there were abnormal conditions that would bring about injustice if the computation of the tax were to be made according to the usual method, and this though the invested capital were to be accurately determined, the taxpayer made a statement of the inequalities

between its position and that of other corporations engaged in a like business.

Grounds numbers one and two gave notice to the Commissioner that the taxpayer's invested capital had been erroneously assessed and charged him with a duty to inquire into the error and to give appropriate relief. *United States* v. *Factors & Finance Co., supra.* If he found that items had been omitted, but that he was unable to ascertain their value with reasonable accuracy, he might resort to § 328, and order the tax to be assessed in accordance with a special method. If he found that there had been omissions, but that he was able to his own satisfaction to identify and appraise them, he would learn in the process that there had been an undervaluation of invested capital, and that the assessment of the tax was correspondingly erroneous.

Ground number three is independent of the others, and has a different origin and meaning. "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." *United States* v. *Prentiss & Co., supra.*

The Commissioner notified the taxpayer in October and November, 1926, that there was no evidence before him sufficient to justify relief under § 327 (d) on the ground of abnormal conditions in the business of the

claimant as compared with that of others. He seems to have overlooked the fact that the taxpayer was claiming relief also under subdivisions (a) and (c). A protest promptly followed the delivery of the notice, and with the protest went an amended claim. In this amended claim there was no change of importance, unless importance be attached to the form of the relief demanded. The request for a computation in accordance with § 328 was accompanied by a request for relief in the alternative. In the event of a denial of a special assessment, the taxpayer now demanded that the items "improperly eliminated from invested capital should be restored to invested capital, and the excess profits tax recalculated on that basis." The Commissioner ordered another hearing, and considered the claim anew. Upon reconsideration he held that there had been an undervaluation of invested capital in 1918 and 1919 with the result that the taxes for the one year had been overpaid in the sum of $14,054.18, and for the other in the sum of $9,073.15. After thus finding an error in the assessment, he dismissed the claims for refund on the ground that their form as first presented was defective and that the amendment came too late. Cf. *United States* v. *Memphis Cotton Oil Co., supra.* In a suit by the taxpayer to recover the moneys overpaid, the District Court gave judgment for the Government, and the Court of Appeals affirmed. 60 F. (2d) 944. The case is here on certiorari.

We held in *United States* v. *Prentiss & Co., supra,* that after the period of limitation a claim for a special assessment under § 327 (d) may not be turned by amendment into one for the reaudit of invested capital and for the reassessment of the tax accordingly. The two proceedings, it was pointed out, are essentially diverse. The one is non-justiciable, invoking, as it does, an administrative and discretionary jurisdiction. The other is akin to a

judicial inquiry, reëxamining an earlier determination for error of fact or law. The one " assumes adherence to the statute in the valuation of invested capital, and counts upon extraordinary conditions as justifying a claim that the statute is oppressive." The other, rejecting that assumption, is a demand for a new audit. The distinction between a special assessment under subdivision *d* and a claim for like relief under subdivisions *a* and *c* becomes apparent when the *Prentiss* case is compared with another case decided the same day. In *United States* v. *Factors & Finance Co., supra,* there had been a general claim for refund without statement of the grounds. The taxpayer tried to turn it by amendment into a claim for a special assessment under § 210 of the Revenue Act of 1917. The amendment was upheld. We pointed out, in upholding it, that " § 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)." Under § 210 of the earlier act, as under § 327 (a) of the later act, there is a challenge to the valuation of invested capital which opens up the whole subject for revision and readjustment.

We think procedural analogies and administrative practice sustain the contention of the petitioner that the claim as amended does not differ in matter of substance from the claim as first presented.

1. If we look to the analogy of pleadings in a lawsuit, the conclusion is not doubtful. The claim as first presented gives notice to the Commissioner that assets of great value have been omitted from invested capital. It tells him what those assets are, and even estimates their value, though imperfectly and roughly. There is no failure to make disclosures of the substance of the grievance, no dearth of information as to the facts that should be the prelude to inquiry. What is subject to criticism is this and nothing more, that the claim is niggardly, and hence

defective, in its prayer for relief. It asks for a special assessment under §§ 327 and 328. It should have asked for this, and in the alternative that invested capital be reëxamined and increased. But for the purpose of determining the limits of permissible amendment, a change of the legal theory of a suit, "a departure from law to law," is no longer accepted as a test of general validity. *United States* v. *Memphis Cotton Oil Co., supra,* and cases there cited. Still weaker is a test derived from the prayer for relief, the mere demand for judgment. The rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not.* Cf. Equity Rules 19 and 22. A claim for refund is not a pleading, and analogies borrowed from the forms and methods of a lawsuit will be applied to these administrative remedies "in due subordination to differences of end and aim." *United States* v. *Memphis Cotton Oil Co., supra.* Even so, they will have their place of influence, which may turn out to be controlling, if differences of end and aim are obscure or indecisive.

2. In this case administrative practice reinforces the suggestions of procedural analogies, and bids us follow where they point.

When a claim such as the one in controversy is submitted to a Commissioner, there is only one way in which it is possible for him to deal with it. He must look into the omitted items, and determine their effect upon the assessment he has made. If he finds that items have been omitted, and that by reason of their nature they make it impossible for him to determine the value of the capital, he will order a special assessment, for there will be nothing else to do. If he finds that they have been omitted, but

* For a summary of the decisions see Clark on Code Pleading, p. 184.

that he is able to appraise them, he will have learned in the course of the investigation that the assessment is erroneous in a determinable amount. Justice will then require that it be changed to that extent. In amending the claim by a prayer for alternative relief, a taxpayer is not forcing the inquiry into an unexplored territory, into strange and foreign paths. He is asking the Commissioner to take action upon discoveries already in the making or perhaps already made. There is no transfiguring amendment, such as we found in the *Prentiss* case, with its attempted change from a discretionary to a justiciable remedy. There is an adaptation of the relief to a case already proved.

The brief for the Government describes the division of functions between one section and another of the Bureau of Internal Revenue. A claim which appears on its face to be one for a special assessment is sent to the Special Assessment section. A claim for the revaluation of invested capital is sent to a section of the Field Audit Review Division. From this it ensues, we are told, that claims may be handled by different persons, and to some extent in different ways, according to the end in view. More than that must be shown to make out the contention that the substantial identity of the claim will be changed by this amendment. Whatever the distribution of labor may be between one division and another, it is impossible for any of them to pass upon a claim under § 327 (a) without also passing upon the question whether the valuation of the invested capital is wrong, and, if so, whether in a determinable or an indeterminable amount. Once let it be ascertained that the amount is determinable, and all that follows is an incident. At that point discovery has gone on to such a stage that the Commissioner may not rid himself of the duty of pressing forward to the end. He cannot in good conscience be satisfied with less. There may be need to take the case out

of one section and transfer it to another before revision will be complete. All this is quite irrelevant when once a wrong is brought to light. There can be no stopping after that until justice has been done.

The judgment is *Reversed.*

WILLIAMS, RECEIVER OF THE WASHINGTON, BALTIMORE & ANNAPOLIS RAILROAD CO., *v.* MAYOR AND CITY COUNCIL OF BALTIMORE *

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 513. Argued February 13, 1933.—Decided March 13, 1933

1. A municipal corporation, created by a State for the better ordering of Government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to a statute of the State. P. 40.
2. A special exemption of railroad property from state, county and city taxation, granted by the Maryland Legislature for the period of two years, as an aid to continuing in operation a financially crippled railroad (in the hands of a receiver) because of its peculiar public importance as a carrier of millions of passengers and as the only railroad serving the capital of the State,—*held* consistent with the uniformity of taxation provision (Art. 15) of the Maryland Declaration of Rights. P. 40.
3. Tax exemptions to promote the construction of railroads and tax exemptions to help keep constructed railroads in operation when they are failing, rest on the same public policy. P. 44.
4. The statute above-described is not repugnant to Art. III, § 33, of the Maryland Constitution, which provides that "the General Assembly shall pass no special law for any case for which provision has been made by an existing general law." P. 45.
5. This provision leaves the Legislature a wide margin of discretion to enact special laws for special evils not met by the general laws; and only in cases of plain abuse may courts declare the special laws invalid. P. 46.

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* Together with No. 514, *Williams, Receiver,* v. *Mayor, Counselor and Aldermen of Annapolis.*

6. An Act of the Legislature exempting a railroad from taxation is not a "local law" within the meaning of the Home Rule Article of the Maryland Constitution, when so drawn as to apply to two "geographical subdivisions" of the State, e.g., Baltimore and Annapolis. P. 47.
7. Franchise payments due from a railroad to the cities of Baltimore and Annapolis under city ordinances describing them as "taxes," *held* "charges in the nature of a tax," within the meaning of a state statute exempting the railroad. P. 47.
8. The standing of a municipal corporation to assail a statute of its State as repugnant to the state constitution, depends upon the state law. P. 47.

61 F. (2d) 374, reversed.

CERTIORARI, 287 U.S. 594, to review decrees which reversed orders of the District Court disallowing claims for overdue taxes, filed with the receiver of the Washington, Baltimore & Annapolis Electric Railroad Company by the corporations of Baltimore and Annapolis.

Messrs. George Weems Williams and *William L. Rawls,* with whom *Mr. William L. Marbury, Jr.,* was on the brief, for petitioner.

Messrs. R. E. Lee Marshall and *Lawrence B. Fenneman,* with whom *Mr. Hector J. Ciotti* was on the brief, for the Mayor and City Council of Baltimore, respondent.

Mr. Roscoe C. Rowe for the Mayor, Counselor and Aldermen of Annapolis, respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy in these cases hinges upon the validity of a statute of Maryland, adopted by the General Assembly in June, 1931, whereby the property of a particular railroad was made exempt from taxation. Acts of 1931, c. 497.

For an understanding of the merits there is need that the statute be quoted in full.

"An Act to exempt the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, from all state taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

"WHEREAS, The Washington, Baltimore and Annapolis Electric Railroad Company did not in the year 1930 earn its operating charges, and it is of the utmost importance for the welfare of the State and particularly the communities served by said railroad, that the operation of said railroad be continued, and

"WHEREAS, It is in the judgment of the General Assembly of Maryland a wise and sound public policy to encourage the continued operation of said railroad by the exemption herein provided:

"SECTION 1. *Be it enacted by the General Assembly of Maryland,* That the railroad property of the Washington, Baltimore and Annapolis Electric Railroad Company, or so much thereof as may be used for railroad purposes by said company, its receiver, successors and assigns, be exempt from all State taxes and charges, including contributions to the cost of construction of railroad crossings made or to be made under the authority of the State Roads Commission, and from all county and city taxes and charges in the nature of a tax for the years during which the property is so used, but not exceeding two years beginning January 1, 1931.

"SECTION 2. And be it further enacted, That this Act shall take effect June 1, 1931."

At the passage of this act, the Washington, Baltimore and Annapolis Electric Railroad Company was in the hands of a receiver, appointed in January, 1931 by the Federal District Court. For ten years preceding the receivership the gross receipts from its business had progressively declined. In 1930 the total revenues derived from the operation of its line were $1,347,967.03, and the operating expenses $1,191,897.32. These expenses were exclusive of taxes and fixed charges, such as interest on its debts. There was a funded debt of more than nine million dollars and an unsecured debt of nearly a million. In 1930, 3,247,534 passengers had traveled on the road, which supplied the only rail service to Annapolis, the capital of the state. Large public interests were involved in keeping the service going.

The Mayor and City Council of Baltimore, and the Mayor, Counselor and Aldermen of the City of Annapolis, municipal corporations, challenged the validity of the exemption, and filed proofs of claim with the receiver for taxes overdue. The claim of the City of Baltimore was for real property taxes on the terminals and rights of way, for personal property taxes on the cars, and for franchise taxes or charges under a municipal ordinance. The claim of the City of Annapolis was for taxes on real property and for local taxes or charges owing for the franchise. The District Court upheld the validity of the statute, and disallowed the claims. Upon appeal to the Circuit Court of Appeals for the Fourth Circuit the orders were reversed upon the ground that the statute was invalid under the Fourteenth Amendment of the Federal Constitution and under several provisions of the Constitution of the State. 61 F. (2d) 374. Writs of certiorari were granted by this court. The writ in No. 513 brings up the claim filed with the receiver by the City of Baltimore; the writ in No. 514 brings up the claim of the City of Annapolis.

1. There is error in the holding of the Circuit Court of Appeals that the statute of Maryland creating this exemption is a denial to the respondents of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. *Trenton* v. *New Jersey,* 262 U.S. 182; *Newark* v. *New Jersey,* 262 U.S. 192; *Worcester* v. *Worcester Consolidated Street Ry. Co.,* 196 U.S. 539; *Pawhuska* v. *Pawhuska Oil Co.,* 250 U.S. 394; *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U.S. 378, 390; *Railroad Commission* v. *Los Angeles Ry. Corp.,* 280 U.S. 145, 156.

2. There is error in the holding of the Circuit Court of Appeals that the statute is invalid under the Constitution of Maryland.

Several provisions of that constitution are invoked by the respondents. They will be considered in succession.

(a) The statute is not repugnant to Article 15 of the Maryland Declaration of Rights wherein it is provided " that the levying of taxes by the poll is grievous and oppressive and ought to be prohibited; that paupers ought not to be assessed for the support of the Government; that the General Assembly shall, by uniform rules, provide for separate assessment of land and classification and sub-classifications of improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the counties and by the City of Baltimore for their respective purposes, shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respecting taxing powers

may have directed to be subjected to the tax levy; yet fines, duties or taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community."

The courts of Maryland hold that the rule of uniformity established by these provisions does not forbid the creation of reasonable exemptions in furtherance of the public good. *Baltimore* v. *B. & O. R. Co.,* 6 Gill 288; *State* v. *B. & O. R. Co.,* 48 Md. 49; *State* v. *B. & O. R. Co.,* 127 Md. 434; 96 Atl. 636; *State* v. *N. C. R. Co.,* 44 Md. 131; *State* v. *P. W. & B. R. Co.,* 45 Md. 361; *Daly* v. *Morgan,* 69 Md. 460, 467; 16 Atl. 287; *B. C. & A. Ry. Co.* v. *Ocean City,* 89 Md. 89; 42 Atl. 922; *B. C. & A. Ry. Co.* v. *Wicomico Co.,* 93 Md. 113; 48 Atl. 853; *Havre de Grace* v. *Bridge Co.,* 145 Md. 491; 125 Atl. 704; *The Tax Cases,* 12 G. & J. 117; cf. *Gordon* v. *Appeal Tax Court,* 3 How. (U.S.) 133; *Picard* v. *East Tennessee, V. & G. R. Co.,* 130 U.S. 637, 641. It does not even prohibit an exemption in favor of an individual as distinguished from one for the benefit of the members of a class. All that it exacts in respect of the narrower exemption is the presence of a relation, fairly discernible, between the good of the individual and the good of the community. There must be something more than an arbitrary preference of one among many. *Baltimore* v. *Starr Church,* 106 Md. 281, 287, 288; 67 Atl. 261.

Furtherance of the public good is written over the face of this statute from beginning to end as its animating motive. "It is of the utmost importance for the welfare of the State and particularly the communities served by said railroad that the operation of said railroad be continued." "It is the judgment of the General Assembly" that "to encourage the continued operation" of the road by the grant of an exemption will be to give heed to the promptings of "a wise and sound public policy." The

exemption is to be confined to that part of the property of the company which is used for railroad purposes, is to continue only so long as the property is so used, and is to expire in any event at the end of the two years beginning in January, 1931. It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. *Otis* v. *Parker,* 187 U.S. 606, 609; *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U.S. 267; *Sproles* v. *Binford,* 286 U.S. 374, 388, 389. The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way. *Otis* v. *Parker, supra.* Nor in marking out that field will a court be forgetful of presumptions that help to fix the boundaries. "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U.S. 251, 257. There has been no departure from that principle in the judgments of the highest court of Maryland. *Wampler* v. *LeCompte,* 159 Md. 222; 150 Atl. 455; 282 U.S. 172, 175.

We are told that the signs of an arbitrary preference are written on the statute because the exemption is confined to this particular insolvent when it might have been extended to all other insolvents engaged in a like business. There is nothing to show that any Maryland railroad other than this one was in the hands of a receiver. The assailants of the statute have the burden of proving everything essential to their case. *Pullman Co.* v. *Knott,* 235 U.S. 23, 25; *Wampler* v. *LeCompte, supra.* But the result will be no different if other insolvents be assumed. The public policy that made it wise in the judgment of

the legislature to help this particular railroad and keep its business going may have failed altogether in respect of any other railroad, solvent or insolvent. Here was a line carrying millions of passengers, and supplying the only railroad service between the capital of the state and its most populous city. The rescue of such a road might be dictated by the public interest when a road in some other territory might wisely be abandoned to its fate.

We are told that the statute is not to be distinguished in principle from the one considered by the highest court of Maryland in the case of the Starr Church, and there condemned as arbitrary. *Baltimore* v. *Starr Church,* 106 Md. 281; 67 Atl. 261. But we think the distinctions are many and obvious. A religious corporation, the Starr Church, had received a gift of wharf property which it leased for profit. The General Assembly passed an act exempting the wharf from taxes so long as it continued in the ownership of the church. The exemption for other churches was confined to a place of worship and a parsonage. The statute did not say that the new exemption was designed to promote the comfort or well-being of the community at large. For all that appeared no such interests were involved. The statute said no more than this, that the exemption would be "a great relief and benefit to said religious body," which was singled out for privileges denied to any other. This preference for one, with no profession of a purpose to advance the common weal and with nothing in the situation to indicate that such a purpose would be served, is the evil that the court denounced.

We are told that the many cases upholding an exemption to a railroad at the time of its formation have no bearing upon this exemption which was granted later on. A charter, so it is argued, is a contract, or becomes one when accepted. There is thus a *quid pro quo.* A privilege conferred thereafter is nothing more than a gratuity,

and hence an arbitrary preference irrespective of its motive. But this is to misread the cases and misconceive the rationale back of them. The charter exemption to a railroad does not gain validity from the circumstance that a charter is a contract. If the exemption is a valid one, the contract may mean that there will be no power of revocation, though exemptions not contractual are terminable at will. *Gordon* v. *Appeal Tax Court,* 3 How. (U.S.) 133. Even this difference will be absent if there is a reservation by the state of the power to repeal or change. *Northern Central Ry. Co.* v. *Maryland,* 187 U.S. 258, affirming *Maryland* v. *Northern Central Ry. Co.,* 90 Md. 447; 45 Atl. 465. Revocable or irrevocable, the contract will not give validity to what would otherwise be void. *Stearns* v. *Minnesota,* 179 U.S. 223, 254; *Duluth & I. R. R. Co.* v. *St. Louis County,* 179 U.S. 302; and cf. *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 357; *Union Dry Goods Co.* v. *Georgia Public Service Corp.,* 248 U.S. 372, 375, 376. To see that this is so we have only to inquire what the consequence would be if a charter exemption were to be given to a mere private corporation, conducted for profit solely like any other business enterprise. Charter or no charter, the exemption would not stand. *Baltimore* v. *Starr Church, supra.*

The policy that sustains an exemption in order to keep a crippled railroad going is precisely the same as the one that sustains an exemption to set it going at the start. In the one case as in the other, the state maintains the highways upon which its people are dependent for their economic and social life. *Cole* v. *La Grange,* 113 U.S. 1, 7. It is idle to say that a railroad, when once it has been organized, is under a duty to go on, and hence that its distress is not important for any one except itself. Science has wrought her wonders, but the time is not yet here when trains will run under the impulsion of duty

without more. There is room, indeed, for question whether even the duty is so absolute as the respondents' argument assumes. *Railroad Commission* v. *Eastern Texas R. Co.,* 264 U.S. 79, 85. Certain it is, in any event, that operation may end with the consent of the Public Service Commission when the earnings are inadequate. Code of Public General Laws of Maryland, Bagby's ed., 1929 supplement, Art. 23, § 380; *Benson* v. *Public Service Comm'n,* 141 Md. 398; 118 Atl. 852 Nor is there need to show a probability of utter cessation or abandonment. Service is likely to be inefficient and even dangerous if operation is continued in the face of an increasing deficit. The state has an interest in seeing to it that railroads shall be run, but an interest also in how they shall be run.

The General Assembly, weighing these and other considerations, has found them adequate to justify a temporary exemption from the burdens of taxation. Nothing in the Constitution of Maryland or in the decisions of her courts enables us to say that there has been a clear abuse of power. We may not nullify for doubt alone. There must be something near to certainty. We do not reach it here.

(b) The statute is not repugnant to Article II, § 33, of the Maryland Constitution, wherein it is said that "the General Assembly shall pass no special law for any case for which provision has been made by an existing general law."

The highest court of Maryland has considered this provision, and defined its meaning and effect. *The Police Pension Cases,* 131 Md. 315; 101 Atl. 786; *Baltimore* v. *United Railways Co.,* 126 Md. 39; 94 Atl. 378; *Baltimore* v. *Starr Church, supra; Littleton* v. *Hagerstown,* 150 Md. 163; 132 Atl. 773; *O'Brian & Co.* v. *County Commissioners,* 51 Md. 15; *Hodges* v. *Baltimore Union Pass. Ry. Co.,* 58 Md. 603. There has been need, now and again, to

develop close distinctions. Our endeavor in what follows is to extract the essence of the decisions and to give effect to it as law.

Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so the correcting statute may be as narrow as the mischief. The Constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which existing general laws are incompetent to cope. The special public purpose will then sustain the special form. *Baltimore* v. *United Railways Co., supra.* The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts. *Baltimore* v. *United Railways Co., supra,* at p. 52. If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. *Baltimore* v. *Starr Church, supra.* If special circumstances have developed, and circumstances of such a nature as to call for a new rule, the special act will stand. *The Police Pension Cases, supra.*

The distinction is neatly pointed by comparing two decisions. In *Baltimore* v. *Starr Church, supra,* the court condemned a special act as a merely arbitrary departure from the rule of uniform taxation. Declaration of Rights, § 15. It held at the same time that the act was void under another section of the Constitution (Article III, § 33) because no evil had arisen, no circumstances had developed, to give even colorable grounds of reason for the adoption of a special rule. *The Police Pension Cases, supra,* show the picture from a different angle. There were general laws upon the statute books providing for the grant of pensions to members of the police force, not

including matrons. A matron was dismissed for physical disability after many years of service. The legislature, impressed by the hardship of her position, passed a special act for her relief. The court took the view that here was a special case not provided for or considered in an existing general law, and so upheld what had been done. See also *O'Brian & Co.* v. *County Commissioners; Hodges* v. *Baltimore Union Pass. Ry. Co.*, applying a like rule.

(c) The statute is not repugnant to Article XI A, the home rule article, of the Maryland Constitution.

"SEC. 4. From and after the adoption of a charter under the provisions of this Article by the City of Baltimore or any County of this State, no public local law shall be enacted by the General Assembly for said City or County on any subject covered by express powers granted as above provided. Any law so drawn as to apply to two or more of the geographical sub-divisions of this State shall not be deemed a Local Law, within the Meaning of this Act. The term 'geographical sub-division' herein used shall be taken to mean the City of Baltimore or any of the Counties of this State."

The act of exemption is so drawn as to apply to two or more geographical subdivisions of the state, i.e., to Baltimore and Annapolis. It is thus within the powers expressly reserved to the General Assembly.

3. There is error in the holding of the Circuit Court of Appeals that the franchise payments due to the two cities under municipal ordinances wherein the payments are characterized as "taxes" are not "charges in the nature of a tax" within the meaning of the statute.

They were plainly so intended.

4. We have assumed, without deciding, that the respondents, though without standing to invoke the protection of the Federal Constitution, will be heard to complain of a violation of the Constitution of the State.

Their standing for that purpose, at least in the state courts, is a question of state practice (*Columbus & Greenville Ry. Co.* v. *Miller,* 283 U.S. 96, 99; *Braxton County Court* v. *West Virginia,* 208 U.S. 192, 197, 198; *Stewart* v. *Kansas City,* 239 U.S. 14, 16), as to which the federal courts do not exercise an independent judgment.

The Maryland decisions proceed on the assumption that municipal corporations assailing a statute of exemption or other special legislation have an interest in the controversy which entitles them to be heard (*Baltimore* v. *Starr Church, supra; Baltimore* v. *Alleghany County,* 99 Md. 1; 57 Atl. 632), though the reports do not show that their interest was questioned.

In the absence of any argument to the contrary in behalf of the petitioner, we make the same assumption here.

The judgments are *Reversed.*

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS *v.* UNITED STATES

CERTIORARI TO THE COURT OF CUSTOMS AND PATENT APPEALS

No. 538. Argued February 17, 1933.—Decided March 20, 1933

1. The power of Congress to regulate commerce with foreign nations is plenary and exclusive, not subject in its exercise to be limited, qualified or impeded to any extent by state action. P. 56.
2. This power is buttressed by the express provision of the Constitution denying to the States authority to lay duties on imports or exports without the consent of Congress. P. 57.
3. Although the taxing power is a distinct power and embraces the power to lay duties, it is established that duties may also be imposed in the exercise of the power to regulate commerce. P. 58.
4. Where Congress exercises its power to regulate foreign commerce by means of a tariff, declaring, as in the Tariff Act of 1922, that it is so exercising it, the judicial department may not attempt, in its own conception of policy, to distribute the duties thus fixed, by allocating some of them to the exercise of the power to regulate commerce and others to an independent exercise of the taxing power. P. 58.

5. It is for Congress to say to what extent the States and their instrumentalities shall be relieved of the duties on articles imported by them. P. 59.
6. The principle of state immunity from federal taxation springs from and is limited by the necessity of maintaining our dual system of government, and has no application to duties imposed in the exercise of the power to regulate foreign commerce. P. 59.

20 C.C.P.A. (Cust.) 134; 61 Treas. Dec. 1334, affirmed.

CERTIORARI, 287 U.S. 596, to review the affirmance of a decision of the Customs Court (59 Treas. Dec. 747), overruling protests made by the trustees and officers of the University of Illinois against customs duties collected on articles imported by it for use in one of its educational departments.

Mr. Sveinbjorn Johnson for petitioner.

The petitioner is in law a public, as distinguished from a private, corporation. *Thomas* v. *Industrial University,* 71 Ill. 310, 312; *Spalding* v. *People,* 172 Ill. 40; *People* v. *Board,* 283 Ill. 494, 499.

The instrumentalities which the States have created for the purpose of operating universities have generally been held to be mere instrumentalities or departments of the State itself. *State* v. *Chase,* 175 Minn. 259; *Auditor* v. *Regents,* 83 Mich. 467, 468; *Oklahoma* v. *Willis,* 6 Okla. 593; *Neil* v. *Board,* 31 Ohio St. 15; *Russell* v. *Purdue University,* 201 Ind. 367; *University* v. *Peoples Bank,* 157 Tenn. 87.

Congress may not tax the States or their governmental agencies. *Collector* v. *Day,* 11 Wall. 113, 124; *South Carolina* v. *United States,* 199 U.S. 437; *Indian Motocycle Co.* v. *United States,* 283 U.S. 570; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393; *Clallam County* v. *United States* and *United States* v. *Spruce Corp.,* 263 U.S. 341, 344; *Willcuts* v. *Bunn,* 282 U.S. 216; *Johnson* v. *Maryland,* 254 U.S. 51, 55–56.

The customs duty is a tax. *Brown* v. *Maryland,* 12 Wheat. 419, 436, 439; *Hampton & Co.* v. *United States,*

276 U.S. 394, 411, 412; *United States* v. *Shallus,* 9 Ct. Cust. App. 168, 171.

The Tariff Act is a revenue measure in the constitutional sense, notwithstanding its provisions are so adjusted as to have a regulatory effect on commerce. *Hampton & Co.* v. *United States,* 276 U.S. 394, 411.

The intent of Congress in arranging the schedules of customs duties may have been to encourage—to regulate—certain industries within certain States, a purpose, which, if primary and "shown upon the face of the Act" (*Drexel Furniture Co.* v. *Bailey,* 259 U.S. 20, 43) would have been beyond the power of Congress; nevertheless, the Act is constitutional because the primary purpose—in the constitutional sense—is revenue, although the desired and undisclosed economic results lie within a field beyond the power of Congress to enter. *Hampton & Co.* v. *United States, supra; McCray* v. *United States,* 195 U.S. 27; *Knowlton* v. *Moore,* 178 U.S. 41; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *United States* v. *Doremus,* 249 U.S. 86; *Hammer* v. *Dagenhart,* 247 U.S. 251; and *Drexel Furniture Co.* v. *Bailey,* 259 U.S. 20.

Regulations under the commerce clause (Art. I, § 8, par. 3) need not be uniform throughout the United States, *Clark Distilling Co.* v. *Western Missouri Ry. Co.,* 242 U.S. 311, 327; *Alaska* v. *Troy,* 258 U.S. 101. Customs duties and excises must be uniform. Art. I, § 8, par. 1. If the position of the lower court be sound, customs duties might be one thing at the port of Los Angeles and another for that of San Francisco, etc., and they would be sustained on the claim that they were assessed under the clause to regulate commerce, which does not require uniformity. Congress obviously can not play ducks and drakes with these constitutional powers. The Act under which the duty challenged is levied is, in general, a revenue act, and the particular paragraphs clearly are revenue provisions.

When Congress enacts a law providing for import duties, it is exerting the taxing power, and not its power over commerce. This was settled as early as *Gibbons* v. *Ogden,* 9 Wheat. 1, 199, where Chief Justice Marshall says that the act of laying customs duties is an exertion of a "branch of the taxing power." To the same effect, see *State Tonnage Tax Cases,* 12 Wall. 204, and *Hampton & Co.* v. *United States,* 276 U.S. 394.

The power over commerce is subject to certain constitutional limitations. It is no more complete than the power to tax. *Drexel Furniture Co.* v. *Bailey,* 259 U.S. 20. It may not be so exerted as directly and substantially to burden or embarrass the States in the exercise of strictly governmental activities. *Adair* v. *United States,* 208 U.S. 161.

This Court, even when speaking of a power so vital to the very existence of the Nation as is that of taxation, has always made it plain that there is little room for the concept of arbitrary power in our constitutional scheme. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541.

The grant of power over interstate and foreign commerce is in the same terms, "and the two powers are undoubtedly of the same class and character and equally extensive," *Bowman* v. *Chicago Ry. Co.,* 125 U.S. 465, 482; and "the power of Congress over interstate commerce is as absolute as its power over foreign commerce" under the commerce clause. *Brown* v. *Houston,* 114 U.S. 622, 630; *Crutcher* v. *Kentucky,* 141 U.S. 47, 56.

The lower court seems to assume that the power to declare an embargo—Justice Story said that ". . . the embargo . . . stands on the extreme verge of the Constitution," Story, I, 185, Autobiographical Sketch, 1831—is sustainable exclusively under the commerce clause, whereas its validity rests more logically on the doctrine of "resulting powers" (resulting or implied from a num-

ber of enumerated powers), adverted to by Justice Story in his Commentaries on the Constitution, Book III, Chap. XXIV, but to be carefully differentiated from the concept of inherent powers derived from the notion of "inherent sovereignty."

If the commerce clause gives Congress power to levy customs duties, it must also imply a power to levy excise taxes on interstate commerce, a proposition which we deny *in toto*. The anomaly of denying Congress the power to authorize a tax on the sale of a motorcycle to a city for a policeman's use (*Indian Motocycle Co.* v. *United States*, 283 U.S. 570) as a direct and unconstitutional burden on a strictly governmental instrumentality, and permitting such a direct burden when imposed in the assumed exercise of the power over commerce, seems to have escaped the notice of the lower court.

If the power to levy the duty challenged is neither an express nor an implied power, it can not be sustained as an exercise of an inherent power. *Kansas* v. *Colorado*, 206 U.S. 46.

Solicitor General Thacher, with whom *Assistant Attorney General Lawrence* and *Mr. Erwin N. Griswold* were on the brief, for the United States.

The power of Congress over foreign commerce is not subject to any implied limitation in favor of the States. It includes the power to impose a protective tariff, and the States are not exempt from the payment of duties unless Congress so declares. *Gibbons* v. *Ogden*, 9 Wheat. 1, 193, 196–197.

Although later decisions have shown that the power of Congress over interstate commerce is subject to some limitations (see *Hammer* v. *Dagenhart*, 247 U.S. 251), these limitations do not extend to the power to regulate commerce with foreign nations and with the Indian tribes. See Fuller, C.J., dissenting in the *Lottery Case*,

188 U.S. 321, 374; *United States* v. *43 Gallons of Whiskey,* 93 U.S. 188, 194; *Buttfield* v. *Stranahan,* 192 U.S. 470, 492–493. *Oceanic Navigation Co.* v. *Stranahan,* 214 U.S. 320, 334; *The Abby Dodge,* 223 U.S. 166, 176; *Brolan* v. *United States,* 236 U.S. 216, 218; *Weber* v. *Freed,* 239 U.S. 325, 329. Cf. *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 434.

Congress may exercise this plenary power over foreign commerce for the encouragement and protection of American industries, and this purpose may be accomplished by levying duties upon the products of foreign countries not for the sake of revenue but to exclude from our markets the competition of foreign goods. *Hampton & Co.* v. *United States,* 276 U.S. 394, 411. Cf. *Alaska Fish Co.* v. *Smith,* 255 U.S. 44, 48; 1 Stanwood, American Tariff Controversies, 293–294; Annals of Congress, Mar. 31, 1824, p. 1994. See 2 Story, Commentaries on Const., §§ 1077–1095, and the material collected at pp. 138–153 of the brief for the United States in *United States* v. *Realty Co.,* 163 U.S. 427, Nos. 869, 870, October Term, 1895. See also 1 Stanwood, American Tariff Controversies, c. IX; Winston, The Tariff and the Constitution, 5 Jour. Pol. Econ. 40; Cahill, Curtis and Backworth, "Is a Protective Tariff Constitutional?" 1 Mich.L.J. 348; 2 Willoughby, Const. Law, 680.

The grant of power to Congress to impose a protective tariff would be largely futile if the States might import from abroad as they chose. *South Carolina* v. *United* States, 199 U.S. 437.

It is established by *Veazie Bank* v. *Fenno,* 8 Wall. 533, that regulation may take the form of taxation. See also *Head Money Cases,* 112 U.S. 580, 595–596; 2 Story, Commentaries, §§ 1080, 1081, 1088.

That the regulation is valid although it takes the form of a tax seems necessarily to follow from the decisions holding that the power to regulate foreign commerce in-

cludes the power to prohibit the importation of any article. *Buttfield* v. *Stranahan,* 192 U.S. 470; *Brolan* v. *United States,* 236 U.S. 216; *Weber* v. *Freed,* 239 U.S. 325. At an early date, the power of Congress to regulate foreign commerce was exercised by a complete embargo on all foreign commerce. Act of December 22, 1807, c. 5, 2 Stat. 451, as supplemented by the Act of January 9, 1808, c. 8, 2 Stat. 453. The statute was sustained in *United States* v. *The Brig William,* 2 Hall Law J. 255, Fed. Cas. No. 16700. See 2 Story, Commentaries, §§ 1290, 1292; Kent's Commentaries, 431–432. This power has been exercised in many subsequent Acts, including §§ 305, 306, and 307 of the Tariff Act of 1922.

The States reserved no power with reference to the importation of merchandise, and none may be implied in derogation of the constitutional power of Congress. The Constitution not only expressly gives to Congress the power to lay and collect duties and imposts (Art. I, § 8, par. 1), but the States are expressly forbidden to "lay any Imposts or Duties on Imports or Exports," with the exceptions which are not material here (Art. I, § 10, par. 2).

The plenary power to regulate foreign commerce, including the power to prohibit as well as to tax, if exercised without discrimination may not be challenged as destructive of the States and their instrumentalities of government.

Further support for the correctness of these conclusions is found, we believe, in (1) the long continued practical construction of the Constitution with respect to the power of Congress to collect duties on state imports, (2) by the analogy of decisions under other clauses of the Constitution, and (3) by considerations derived from this Court's decision in *South Carolina* v. *United States,* 199 U.S. 437.

See *Little* v. *United States,* 104 Fed. 540; *University of Missouri* v. *United States,* T.D. 26641, 10 T.D. 135; *Eimer*

v. *United States,* T.D. 27089, 11 T.D. 213; *United States* v. *Wyman & Co.,* 2 Ct. Cust. App. 440; *United States* v. *Kastor & Bros.* 6 Ct. Cust. App. 52. See also 21 Op.A.G. 301.

It has been the uniform practice of the Treasury for a great many years not to exempt imports by States or state instrumentalities if they were otherwise taxable under the Tariff Acts. It appears that for 135 years after the adoption of the Constitution the officials of the States did not question the power of Congress to impose duties on their imports, and did not even think the matter doubtful enough to warrant an application to the Treasury for a ruling. The earliest published ruling is in 48 T.D. 728 (1925).

It seems to be well settled that a State engaging in commerce is not exempt from the regulatory power of Congress. *South Carolina* v. *United States,* 199 U.S. 437, 454; *Georgia* v. *Chattanooga,* 264 U.S. 472, 481; *McCallum* v. *United States,* 298 Fed. 373, cert. den., 266 U.S. 606; *Tilden* v. *United States,* 21 F. (2d) 967; *Mathewes* v. *Port Utilities Comm'n,* 32 F. (2d) 913. Cf. *Sherman* v. *United States,* 282 U.S. 25.

State or municipally-owned railroads have often submitted to the jurisdiction of the Interstate Commerce Commission without question.

Another example of this practical construction of the commerce clause appears in the Act of February 17, 1917, c. 84, 39 Stat. 922 (U.S.C., Title 49, § 53), allowing the issuance of passes to the trustees, officers, and agents of a railroad owned by a State. Also the Act of January 19, 1929, c. 79, 45 Stat. (U.S.C. Supp. VI, Title 49, § 65), which divests convict-made goods of their interstate commerce character. Other analogies are the ex-

clusive power of Congress with respect to aliens; 26 Ops.A.G. 180; *id.*, 410; 27 Ops.A.G. 479; bankruptcy; patents and copyrights.

Messrs. William A. Schnader, Attorney General of Pennsylvania, and *William A. Stevens,* Attorney General of New Jersey, by leave of Court, filed a brief as *amici curiae.*

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

The University of Illinois imported scientific apparatus for use in one of its educational departments. Customs duties were exacted at the rates prescribed by the Tariff Act of 1922, c. 356, 42 Stat. 858. The University paid under protest, insisting that as an instrumentality of the State of Illinois, and discharging a governmental function, it was entitled to import the articles duty free. At the hearing on the protest, the Customs Court decided in favor of the Government (59 Treas. Dec. 747) and the Court of Customs and Patent Appeals affirmed the decision. 61 Treas. Dec. 1334. This Court granted certiorari. 28 U.S.C. § 308; 287 U.S. 596.

The Tariff Act of 1922 is entitled—"An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes." The Congress thus asserted that it was exercising its constitutional authority "to regulate commerce with foreign nations." Art. I, § 8, par. 3. The words of the Constitution "comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend." *Gibbons* v. *Ogden,* 9 Wheat. 1, 193. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not

be limited, qualified or impeded to any extent by state action. *Id.* pp. 196–200; *Brown* v. *Maryland,* 12 Wheat. 419, 446; *Almy* v. *California,* 24 How. 169, 173; *Buttfield* v. *Stranahan,* 192 U.S. 470, 492, 493. The power is buttressed by the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Art. I, § 10, par. 2.

The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. *Buttfield* v. *Stranahan, supra; The Abby Dodge,* 223 U.S. 166, 176, 177; *Brolan* v. *United States,* 236 U.S. 216, 218, 219; *Weber* v. *Freed,* 239 U.S. 325, 329, 330. If the Congress saw fit to lay an embargo or to prohibit altogether the importation of specified articles, as the Congress may (*The Brigantine William,* 2 Hall's Amer.L.J., 255; Fed. Cas. No. 16700; *Gibbons* v. *Ogden, supra,* pp. 192, 193; *Brolan* v. *United States, supra; Weber* v. *Freed, supra; Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 434), no State by virtue of any interest of its own would be entitled to override the restriction. The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.

Appellant argues that the Tariff Act is a revenue measure; that it is not the less so because it is framed with a view, as its title states, of encouraging the industries of the United States (*Hampton & Co.* v. *United States,* 276 U.S. 394, 411, 412); that the duty is a tax, that the Act is not one for the regulation of commerce but is an exertion of the taxing power, and that, as such, it is subject to the constitutional limitation that the Congress may not lay a tax so as to impose a direct burden upon an instru-

mentality of a State used in the performance of a governmental function.

It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. *Gibbons* v. *Ogden, supra,* p. 201. It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons* v. *Ogden, supra,* p. 202. "Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property." *Groves* v. *Slaughter,* 15 Pet. 449, 505. The laying of duties is "a common means of executing the power." 2 Story on the Constitution, § 1088. It has not been questioned that this power may be exerted by laying duties "to countervail the regulations and restrictions of foreign nations." *Id.,* § 1087. And the Congress may, and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects. Its requirements are not the less regulatory because they are not prohibitory or retaliatory. They embody the congressional conception of the extent to which regulation should go. But if the Congress may thus exercise the power, and asserts, as it has asserted here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power. The purpose to regulate foreign commerce permeates the entire congressional plan. The revenue resulting from the duties

" is an incident to such an exercise of the power. It flows from, but does not create the power." *Id.*

The principle invoked by the petitioner, of the immunity of state instrumentalities from federal taxation, has its inherent limitations. *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 128. It is a principle implied from the necessity of maintaining our dual system of government. *Collector* v. *Day,* 11 Wall. 113, 127; *Willcuts* v. *Bunn,* 282 U.S. 216, 225; *Indian Motocycle Co.* v. *United States,* 283 U.S. 570, 575. Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached. The fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress. In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the federal power has been exerted. To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles.

The contention of the petitioner finds no support in the history of tariff acts or in departmental practice. It is

not necessary to review this practical construction. It is sufficient to say that only in recent years has any question been raised by state officials as to the authority of Congress to impose duties upon their imports.

In view of these conclusions, we find it unnecessary to consider the questions raised with respect to the particular functions of the petitioner and its right to invoke the principle for which it contends.

Judgment affirmed.

FIRST NATIONAL BANK OF SHREVEPORT ET AL. *v.* LOUISIANA TAX COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 293. Argued January 12, 1933.—Decided March 20, 1933

1. Where several suits were consolidated for trial and tried in a state court, appealed to the state supreme court on a single transcript, and there docketed and argued as one case and disposed of by a single written opinion,—*held* a complete consolidation reviewable in this Court by a single appeal, although there was a separate judgment for each suit in the trial court. P. 62.
2. A state law taxing all the property of banks that make loans mainly from money of depositors, but exempting other competing moneyed capital employed in making loans mainly from money supplied otherwise than by deposits, is consistent with the equal protection clause of the Fourteenth Amendment. P. 63.
3. To avoid a state tax on national bank shares under R.S., § 5219, it is necessary to prove not only that the bank was authorized to engage in, but that, during the tax year, its moneys were actually and in substantial amount employed in, some line of business which was then being carried on also by other and less heavily taxed moneyed capital. So *held* where there was no reason to suppose that national banks were prevented from competing by the tax discrimination. P. 64.
4. The evidence in this case does not prove that the complaining national banks were engaged in lending money on real estate mortgages, or were in competition with "small loan" companies, so-called Morris Plan and Morgan Plan companies, or automobile

finance companies, in the making of small loans and the financing of purchases of automobiles and household goods. P. 65.
175 La. 119; 143 So. 23, 28, affirmed.

APPEAL from a judgment of the Supreme Court of Louisiana which reversed the judgment of the trial court annulling tax assessments on three national banks. The suits were consolidated.

Messrs. Howard B. Warren and *Lewell C. Butler* for appellants.

Mr. Elias Goldstein, with whom *Messrs. G. L. Porterie, Aubrey M. Pyburn, H. C. Walker, Jr.,* and *Leon O'Quin* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Three national banks, located at Shreveport, Louisiana,—the Commercial National, the First National and the American National—brought, in a district court of that State, separate suits against the Tax Commission and officials of Caddo parish, to annul the assessment of all taxes, other than upon real estate, which had been imposed upon their corporate property for the year 1930, under Louisiana Act 14 of 1917, as amended by Act 116 of 1922 and Act 221 of 1928. The claim in each case was that the statute as applied is void, because other moneyed capital employed in the same locality in competition with the capital of the plaintiff is not taxed at all, or is taxed less heavily, in violation of both § 5219 of the Revised Statutes of the United States and the equality clause of the Fourteenth Amendment.[1]

[1] There was also, in each case, a claim that a small tax had been laid illegally upon the plaintiff's furniture and fixtures. The rights of each plaintiff in this regard were expressly reserved by the decree of the Supreme Court of the State.

The three cases were by agreement consolidated for trial; and were heard upon the same evidence, which in abbreviated form occupies, with the exhibits, 617 pages of the printed record. In each case judgment was entered for the plaintiff; and in each the defendants took a separate appeal to the Supreme Court of Louisiana, which reversed the judgments of the trial court. 175 La. 119; 143 So. 23, 28. The plaintiffs appealed to this Court; and the defendants moved to dismiss the appeal on the ground that the plaintiffs had embraced in a single appeal the separate judgments rendered in the three cases. Consideration of that motion was postponed to the argument on the merits.

The argument for dismissal is that the cases had been consolidated below only for the purpose of trial; that since there was no true consolidation of the causes below, and a separate judgment was rendered in each, the separate causes cannot be brought for review to this Court by a single appeal. Compare *Brown* v. *Spofford,* 95 U.S. 474, 484–485. The record discloses that a complete consolidation of the causes was effected. Not only were the three cases consolidated for trial in the District Court; they were taken to the Supreme Court of the State on a single transcript; were there docketed and argued as one case; and were there disposed of by a single written opinion. The record shows also that a joint petition for a rehearing was filed and likewise disposed of by a single opinion. The motion to dismiss the appeal is denied.

The claims of invalidity rest upon the following provisions of the Louisiana laws. The real estate of all banking corporations, state or national, is assessed to the corporation at its full value and the shares are assessed to the stockholders at their book value after deducting the value of the real estate. No other tax is laid on the property of a bank. Corporations other than those engaged in banking are taxed by assessing to them all of their prop-

erty not exempt from taxation, in the same manner that the property of an individual is assessed to him. The shares of stock in such corporations are not taxed. The discrimination charged is that under these statutes all banking capital is taxed, whereas a large part of the moneyed capital employed in competition with the plaintiffs by non-banking corporations escapes taxation, wholly or in part, by reason of the following provisions of the local law:

(a) Article X, § 4, of the Louisiana Constitution, which exempts from taxation:

"Cash on hand or on deposit; loans or other obligations secured by mortgage on property located exclusively in the State of Louisiana, and the notes or other evidence thereof; loans by life insurance companies to policyholders, secured solely by their policies; loans by homestead associations to their members, secured solely by stock of such associations; debts due for merchandise or other articles of commerce or for services; obligations of the State or its political subdivisions; household property of the value of one thousand dollars; legal reserve of life insurance companies organized under the laws of this State; . . ."

(b) Act 24 of the Extra Session of 1918, which allows, in the assessment of credits, an offset for accounts payable, bills payable, and other liabilities of a similar character. Act 163 of 1924, which provides that bonds of other states and political subdivisions thereof, bonds of railways, railroads and other public utilities, manufacturing and industrial corporations, and bonds secured by real estate, except such as are exempt from taxation by law, shall be assessed at 10 per cent of their market value.

First. It is contended that the statutes violate, on their face, the equal protection clause of the Fourteenth Amendment, since banks are taxed more heavily than loan companies, finance and securities companies, pawn-

brokers, homestead and building associations, Federal Joint Stock Land Banks, life insurance companies, real estate mortgage and investment, or bond and investment brokers; and that the court must take judicial notice that all of these other corporations lend money in competition with the plaintiffs. That contention is unfounded. If we may take judicial notice of the functions of these alleged competitors of the plaintiffs, there appears ample basis for the classification, among other things, in this: There is a fundamental difference between banks, which make loans mainly from money of depositors, and the other financial institutions, which make loans mainly from the money supplied otherwise than by deposits. Compare *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U.S. 132, 140–141; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U.S. 32, 40.

Second. It is contended that the statute as applied must be held void under § 5219 of the Revised Statutes of the United States, since it appears that, during the tax year, moneyed capital was employed by non-banking corporations in some lines of business in which the plaintiffs are authorized to engage. In other words, it is claimed that inconsistency of the state statutes with § 5219 may be established without proving the fact that the plaintiffs were actually competing, during 1930, in some line of business in which the non-banking corporations were engaged. The trial court, in rendering judgment for the plaintiffs, approved this contention. But it is unfounded. To establish the invalidity, it is necessary to prove not only that the plaintiffs were empowered by law and authorized by their stockholders to engage in a competitive line of business, but that, during the tax year, moneys of these national banks were in fact employed in substantial amount in some line of business which was carried on, during the year, by less heavily taxed non-banking concerns. It is as necessary to prove that the

bank's capital was so employed as it is to prove that moneyed capital was actually employed by others in substantial competition with the national banks. Compare *First National Bank of Garnett* v. *Ayers,* 160 U.S. 660, 667; *National Bank of Wellington* v. *Chapman,* 173 U.S. 205, 217–219; *Georgetown National Bank* v. *McFarland,* 273 U.S. 568. For plaintiffs are entitled to the relief against statutes alleged to be unconstitutional only if the statute as applied discriminates injuriously against them. *Supervisors* v. *Stanley,* 105 U.S. 305, 314. It is argued that national banks might conceivably be prevented from engaging in actual competition with other moneyed capital by reason of the very features complained of in the taxing statutes. Compare *People ex rel. Pratt* v. *Goldfogle,* 242 N.Y. 277, 302; 151 N.E. 452. But no suggestion is made that such was the situation in the case at bar.

Third. The contention mainly relied upon is that, upon the evidence, it appears that moneyed capital of the plaintiffs was employed during the tax year in several lines of business in which moneyed capital was also employed by non-banking corporations; and that the latter were not taxed thereon.

(a) The item most strenuously urged upon us is that the plaintiffs were engaged in lending money on mortgages of real estate, a line of business in which many mortgage companies, insurance companies, building and loan associations, and individuals were also engaged; and that the latter escaped taxation thereon. The record discloses that each of the banks held real estate mortgages in a substantial amount. But the fact that the banks held mortgages does not prove that they lent money on the security of those mortgages. These may have been taken to secure pre-existing liabilities or as additional security for personal loans. The Supreme Court found: "The testimony leaves no doubt that there was no com-

petition with the national banks on the part of any concern lending money on mortgage of real estate, because national banks will never handle such loans." The record contains evidence ample to support that finding.

(b) Other items relate to alleged competition of the banks with the capital employed by loan companies, so-called Morris Plan and Morgan Plan companies, and automobile finance companies, in the making of small loans and the financing of purchases of automobiles and household goods. The record shows that the plaintiff banks conducted small-loans departments. But there was evidence to indicate that those to whom the banks granted such loans differed as a class from those who borrowed from the institutions alleged to be competing. The Supreme Court found: "The small loan companies, complained of in this suit, are those that make only loans not exceeding $300, and that are allowed to charge interest at the rate of 3½ per cent per month. The loans, as a rule, are secured by chattel mortgages. The testimony of the officers of these companies, and of the officers of the national banks, leaves no doubt that these small loan companies are not competitors of the national banks. The business of the small loan companies, the same as that of the pawnbrokers, is not in any class of business done by national banks, and is not in competition with any of the business done by national banks. The business of the Morris Plan Company and that of the Morgan Plan Company is the making of small loans, averaging $180 payable out of the borrower's salary. The testimony of the bank officials shows that the business of such companies is not in competition with the business done or desired by the national banks. And that is true also of the so-called finance and securities companies, whose business is to lend money on long series of notes given for the price of automobiles, refrigerators, radios, etc., and secured by

chattel mortgages. The national banks would never handle such business. They prefer to—and do in fact—lend to such companies." These findings are supported by the record.

As we should not be warranted in disturbing these, or any of the other, findings of the Supreme Court complained of, compare *Georgetown National Bank* v. *McFarland,* 273 U.S. 568, we have no occasion to consider an alternative ground urged for affirmance—that the operation of the taxing system of the State resulted, in fact, in substantial equality between bank shares and other moneyed capital. *Affirmed.*

PUBLIC SERVICE COMMISSION OF WISCONSIN ET AL. *v.* WISCONSIN TELEPHONE CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN

No. 517. Argued March 15, 1933.—Decided March 27, 1933

1. The importance of statements by the District Courts of the grounds of their decisions, covering both facts and law, is again emphasized. P. 69.
2. It is particularly important that the appellate court should be adequately advised of the basis of the determination of the court below when the decree enjoins the enforcement of a state law or the action of state officials under state law. P. 70.
3. The reasons exist, and are not the less imperative, when the injunction is interlocutory. *Id.*
4. Although Equity Rule 70½, requiring that "in deciding suits in equity" the court of first instance shall find the facts specially and state separately its conclusions of law thereon, does not embrace interlocutory applications, the duty to set forth the grounds and reasons for an interlocutory injunction restraining enforcement of rates fixed by a state commission was not altered by the adoption of that Rule. P. 70.
5. Where the court below fails to perform this duty, this Court will not search a voluminous record to find a basis for the interlocutory decree, but will vacate the decree and remand the cause for proper findings and conclusions. P. 71.

APPEAL from a decree of interlocutory injunction granted by the District Court of three judges, restraining the enforcement of reduced telephone rates, fixed by the Public Service Commission.

Mr. Alvin C. Reis, with whom *Mr. James E. Finnegan,* Attorney General of Wisconsin, was on the brief, for appellants.

Mr. Edwin S. Mack, with whom *Messrs. Arthur W. Fairchild, J. Gilbert Hardgrove, Frederic Sammond,* and *Charles M. Bracelen* were on the brief, for appellee.

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

This is an appeal from a decree of the District Court, composed of three judges, granting an interlocutory injunction which restrained the enforcement of an order of the Public Service Commission of Wisconsin reducing telephone rates. 28 U.S.C., § 380.

In July, 1931, the Public Service Commission of Wisconsin instituted a statewide investigation of the rates, rules, services and practices of the Wisconsin Telephone Company. While hearings in this investigation were in progress, and on June 30, 1932, the Commission issued an "interlocutory" order reducing the rates for "exchange" service, that is, rates for local service within a single exchange, by 12½ percent. The Commission found that the existing rates were unjust and unreasonable and that the reduced rates would be just and reasonable to be applied for a temporary period. The rates were to be effective for one year from July 31, 1932, the Commission retaining jurisdiction to modify its order at any time for cause shown. The Commission rendered an elaborate opinion (154 printed pages) setting forth the "reasons and facts" underlying its findings.

On July 28, 1932, the Company brought this suit to restrain the enforcement of the prescribed rates and two days later the District Judge made a temporary restraining order. Application for an interlocutory injunction was heard by three judges on September 21, 1932. The hearing was upon the pleadings and voluminous affidavits making a record of several hundred pages. On the same day, after argument, the court announced its decision granting the injunction upon the giving of a bond for $1,000,000 and meanwhile continuing the temporary restraining order. The decree for injunction was entered on October 18, 1932, and contained a general statement that the rates prescribed by the Commission's order "would result in the confiscation of the property" of the complainant, would deprive it of its property "without compensation and without due process of law," and that there would be irreparable injury if an interlocutory injunction were not issued.

No opinion was rendered by the District Court and, apart from the general statement above mentioned, the court made no findings. Not only did the court fail to set forth the facts pertinent to a conclusion that an interlocutory injunction should issue, but the court declared that the prescribed rates were confiscatory without any findings warranting such a conclusion. Appellee moves to affirm the decree. Appellants, resisting the motion, contend that the District Court abused its discretion and that the decree should be reversed, or at least should be set aside and the cause remanded for findings of fact and conclusions of law.

We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this Court. While it is always desirable that an appellate court should be adequately advised of the basis of the determination of the

court below, we have pointed out that it is particularly important that this basis should appear when the decree enjoins the enforcement of a state law or the action of state officials under that law. *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 675; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U.S. 588, 596; *Hammond* v. *Schappi Bus Line,* 275 U.S. 164, 171, 172; *Railroad Commission* v. *Maxcy,* 281 U.S. 82, 83. "For then, the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown." These reasons exist, and are not the less imperative, when the injunction is interlocutory. *Lawrence* v. *St. Louis-San Francisco Ry. Co., supra.* It was to insure careful and deliberate action upon such interlocutory applications that the Congress has required that they should be heard before three judges. That requirement applies only when an interlocutory injunction is sought. *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U.S. 10, 15.

It is true, as the appellee contends, that the terms of Equity Rule 70½, relating to decisions of suits in equity, apply to decisions upon final hearing and do not embrace decisions upon interlocutory applications. But the duty of the court in dealing with interlocutory applications, to which this Court had previously directed attention, was not altered by the adoption of that rule. While an application for an interlocutory injunction does not involve a final determination of the merits, it does involve the exercise of a sound judicial discretion. That discretion can be exercised only upon a determination, in the light of the issues and of the facts presented, whether the complainant has made, or has failed to make, such a showing of the gravity of his complaint as to warrant interlocutory relief. Thus, if the issue is confiscation, the complainant must make a factual showing of the probable confiscatory effect of the statute or order with such clarity and per-

suasiveness as to demonstrate the propriety in the interest of justice, and in order to prevent irreparable injury, of restraining the State's action until hearing upon the merits can be had. *Phoenix Ry. Co.* v. *Geary,* 239 U.S. 277, 281; *Gilchrist* v. *Interborough Rapid Transit Co.,* 279 U.S. 159, 207; *Ohio Oil Co.* v. *Conway,* 279 U.S. 813, 815. The result of the court's inquiry into the issues and into the facts presented upon the interlocutory application, in order to satisfy itself as to the gravity of complainant's case and the probable consequences of unrestrained enforcement of the statute or order, should be set forth by the court in a statement of the facts and law constituting the grounds of its decision. While that decision is not on the merits and does not require the findings of fact and conclusions of law which would be appropriate upon final hearing, the court should make the findings of fact and conclusions of law that are appropriate to the interlocutory proceeding.

That duty the court below failed to perform in the instant case and we are not called upon, unaided by opinion or findings, to search this voluminous record to find a basis for the court's decree. The decree is accordingly vacated and the cause is remanded to the District Court, as specially constituted, for findings and conclusions appropriate to a decision upon the application for an interlocutory injunction, the temporary restraining order to remain in force pending that determination.

Decree vacated and cause remanded.

ROBERTS *v.* RICHLAND IRRIGATION DISTRICT ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 516. Argued February 16, 1933.—Decided March 27, 1933

1. A State has power to create irrigation districts with authority to lay taxes, distributed in accordance with estimated benefits, on the

lands in the districts, in order to pay the general bonded indebtedness incurred by the districts in the making of the irrigation improvements. P. 74.

2. An assessment for this purpose, made necessary by the delinquencies of some of the landowners and permitted by the statute governing the district, is not confiscatory and unconstitutional as applied to another of the landowners, even though, when added to prior assessments paid by him, it exceeds the amount in which his land was actually benefited by the improvement. P. 75.

169 Wash. 156; 13 P. (2d) 437, affirmed.

APPEAL from the affirmance of a judgment dismissing a bill to enjoin the assessment of a tax on land in an irrigation district.

Mr. R. J. Venables, with whom *Mr. Charles H. Farrell* was on the brief, for appellant.

Mr. O. B. Thorgrimson, with whom *Messrs. Harold Preston* and *L. T. Turner* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Richland Irrigation District is a corporation organized under the laws of Washington; and appellant owns forty acres of agricultural land within its limits. In 1920, at an election duly held, a majority of the votes cast (appellant objecting) authorized the Directors to issue and sell $538,000 of its interest-bearing bonds. This was done and the proceeds were devoted to improvements for irrigation purposes as contemplated. Interest on the bonds was made payable semi-annually; the principal in annual installments commencing July 1, 1931.

For ten years the Directors assessed against separate tracts of land lying within the District, in proportion to estimated benefits received by each from the improvements, such sums as were necessary to pay accruing obligations. Prior to 1931 the appellant paid a total of $1,168.65 on account of assessments against his land. In

January of that year the Directors threatened to make a further assessment of $757.53 to meet deficiencies resulting from failure of others to pay assessments against their lands.

It is now asserted that appellant's land was benefited no more than $350 by the improvements ($10 for each irrigable acre); that he has already paid far more than that sum, with interest; and that to require further contributions to discharge the obligation represented by the bonds would deprive him of property without due process of law and thus violate the XIV Amendment. By bill, filed January 12, 1931, in the Superior Court of Benton County, he sought an injunction forbidding the threatened action. The trial court sustained a demurrer. The Supreme Court affirmed the judgment [169 Wash. 156; 13 P. (2d) 437]; and in support of its action said [pp. 160–161]—

"An irrigation district is a public corporation having some of the powers of a municipal corporation. The bond obligation is a general corporate obligation. The landowner is not entitled to a segregation of his share of the obligation at the time it is created, or at a later time. There is no provision in the irrigation act for a segregation at any time. The obligation is a general one and all lands within the district are subject to taxation for the payment of the entire obligation. *State ex rel. Clancy* v. *Columbia Irrigation District,* 121 Wash. 79, 208 Pac. 27; *State ex rel. Wells* v. *Hartung,* 150 Wash. 490, 274 Pac. 181.

"In 1919 there was a due adjudication of the organization of the district determining the lands to be included within the district, the amount of bonds to be issued and the interest to be paid thereon. It must be conclusively presumed, from that adjudication, as we said in *State ex rel. Wells* v. *Hartung, supra,* ' . . . that the total benefits to the lands comprised in the district were then finally ad-

judicated. Each tract of land within the district then became generally liable for the payment of the bonds and interest.' . . . Under the statute (Rem. Comp. Stat., § 7434) all lands within the district became and will remain subject to specific assessment, in proportion to benefits, until the obligation is paid. The statute provides that irrigation district bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district ' . . . and all the real property in the district shall be and remain liable to be assessed for such payment until fully paid as hereinafter provided.' . . . "

Counsel for appellant admit that the Directors rightly assessed appellant's land so long as the total did not substantially exceed actual benefits received. They concede liability because of delinquencies within the limit of benefits; but they assert that the threatened assessment would create a substantially larger charge and therefore is not permissible. The sole question now presented, they submit, is this: To what extent has the Irrigation District the right to assess in order to provide for payment of delinquencies?

The Supreme Court of the State has declared that under her laws the obligation of the bonds is a general one; that " all lands within the District became and will remain subject to specific assessment, in proportion to benefits, until the obligation is paid." And thus the only question for our consideration—the federal one—is whether the State had power to create such a corporation as that court has declared the Irrigation District to be and to authorize the questioned assessment.

The power of a State to create local improvement districts with authority to lay taxes according to value, acreage, front foot, or benefits is definitely recognized by this Court. Also that the action of such a district in apportioning the burden of taxation cannot be assailed under

the XIV Amendment unless palpably arbitrary and a plain abuse. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 176. *Houck* v. *Little River Drainage Dist.,* 239 U. S. 254, 262; *Miller & Lux* v. *Sacramento & San Joaquin Drainage Dist.,* 256 U.S. 129; *Valley Farms Co.* v. *Westchester County,* 261 U.S. 155.

If to meet a general obligation an irrigation district, proceeding under authority granted by the State, should lay a tax distributed according to value, there hardly could be reasonable doubt of its validity under the XIV Amendment. *Fallbrook Irrigation District* v. *Bradley, supra; French* v. *Barber Asphalt Paving Co.,* 181 U.S. 324; *Webster* v. *Fargo,* 181 U.S. 394. And in the present case we are unable to say that, because the assessment was distributed in proportion to estimated benefits, an exaction exceeding such benefits would amount to spoliation and represent a plain abuse of power. A general tax distributed in proportion to benefits received is not indicative of arbitrary action.

The principle applied in *Norwood* v. *Baker,* 172 U.S. 269, and similar cases, has no application here. Appellant's land will be assessed to meet a general obligation of the corporation; and the mere fact that the apportioned burden will exceed estimated benefits gives no color to the claim of confiscation. As pointed out in the cases cited, lands may be taxed to pay for local improvements although they receive no actual benefits. Never, as the Supreme Court of the State has said, was appellant entitled to the segregation of his share of the corporate obligation. The statute did not contemplate that assessments against any tract should be limited to payment of its increased value. A general obligation was created and every tract subjected thereto.

Affirmed.

Mr. Justice Sutherland took no part in the consideration or decision of this case.

ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* MISSOURI PACIFIC RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 364. Argued January 18, 1933.—Decided March 27, 1933

1. In a proceeding under an Arkansas statute to determine the place and manner in which a proposed track of one railroad may cross the track of another railroad, the question whether the proposed track is an "extension" for the construction of which a certificate must first be obtained from the Interstate Commerce Commission was irrelevant. P. 81.
2. The remedy of a railroad company which objects to a proposed crossing as an "extension" for which no certificate has been granted by the Interstate Commerce Commission, is not by defense in the state proceeding to fix the place and manner of crossing, but by suit for injunction under paragraph 20 of § 1 of the Interstate Commerce Act. P. 82.
3. A judgment of the Supreme Court of Arkansas in the state statutory proceeding, merely fixing the place and manner of the crossing, is not in conflict with the federal law, whether the proposed track will be a spur or an extension. P. 83.
4. Where the state supreme court, besides ordering the fixing of the place and manner of crossing, characterized the proposed track as a spur and not an extension, thus undertaking to decide an irrelevant federal question,—*held* that the judgment, and its affirmance in other respects by this Court, would not operate as *res judicata* on that question. P. 84.

185 Ark. 824; 49 S.W. (2d) 1054, affirmed.

CERTIORARI, 287 U.S. 589, to review the affirmance of a judgment which reversed an order of the Arkansas Railroad Commission denying an application to fix the place and manner of a proposed crossing of railroad tracks.

Mr. Harold R. Small, with whom *Mr. Arthur L. Adams* was on the brief, for petitioner.

Mr. Robert E. Wiley, with whom *Mr. Edward J. White* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Constitution of Arkansas, Article XVII, § 1, declares: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other road." A statute provides that the Railroad Commission "shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad. . . ." Act April 1, 1919, p. 411, § 9; Crawford & Moses Digest, § 1643.

Proceeding under that statute, without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity under paragraph 18 of § 1 of the Interstate Commerce Act as amended by Transportation Act, 1920,[1] the Missouri Pacific Railroad applied to the Arkansas Commission for a crossing with an industrial track of a spur of the St. Louis Southwestern Railway at grade, at a point in North Little Rock—the crossing to be constructed at the applicant's expense and in accordance "with the terms of installation, operation, maintenance and protection of such crossing as may be fixed by" the Commission. At the hearing thereon the St. Louis Southwestern appeared in opposition; but it filed no pleading and made no statement as to the ground of its opposition.

[1] "No carrier by railroad subject to this Act 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, or operation, or construction and operation, of such additional or extended line of railroad. . . ." Act of February 28, 1920, c. 91, § 402 (18), 41 Stat. 456, 477.

Both companies are interstate carriers. The record of the proceedings before the Arkansas Commission occupies 82 pages of the printed record. But there is in it nothing which indicates that either party had then in mind any question arising under the Interstate Commerce Act. The application to the Arkansas Commission alleged that the Missouri Pacific hauls over its extensive system most of the traffic to and from the plant of the Dixie Cotton Oil Mills at North Little Rock; that in order to handle this traffic, cars must now be switched from or to its lines for a distance of 500 feet over tracks of the St. Louis Southwestern; that if the Missouri Pacific were enabled to reach the plant wholly over its own lines, operations would be facilitated; that to this end it had arranged to build to the plant a spur 5,460 feet long; and that to make this connection with its main line the crossing is necessary. At the opening of the hearing, counsel for the Missouri Pacific asked leave to amend the application by alleging that the proposed industrial track would be "an industrial lead throughout its entire length, for the service of the public generally, and operation and serving of industries that may be located in this new territory"—that is, an industrial track from which switches would lead to new industries that might be located there.

The St. Louis Southwestern objected to the allowance of the amendment; its objection was sustained by the Commission; and its counsel stated that the introduction of any evidence of the purpose to make the track an industrial lead would be objected to. But as the hearing proceeded there was evidence (brought out largely through the cross-examination by the St. Louis Southwestern's counsel) that it was the hope of the Missouri Pacific that the proposed track would ultimately be used as an industrial lead track. The Arkansas Commission denied the Missouri Pacific's application to fix the place

and manner of the crossing. Why it did so does not appear. It rendered no opinion; and its order stated merely that "having heard all the evidence" and "after having made a personal inspection of all the physical properties described in the petition and involved in this proceeding, [the Commission] is of the opinion that said application should be denied." A rehearing sought was also denied without opinion or other indication of the reason for the Commission's action.

From the order, and upon the record made before the Commission, the Missouri Pacific appealed to the Circuit Court of Pulaski County. Act of February 15, 1921, p. 177, § 20; Crawford & Moses Digest (Castle's 1927 Supp.), § 8417z3. There, the St. Louis Southwestern set up, by requests for findings and rulings, several objections to the granting of the application. Among them, was a request to find that the proposed track of the Missouri Pacific was an extension of its lines into new territory, as distinguished from a spur to an industry; and to rule that, for this reason, the track could not be lawfully built or used without first procuring from the Interstate Commerce Commission a certificate of public convenience and necessity. The Circuit Court refused to make the finding and ruling requested; held that the Missouri Pacific was entitled to the crossing as prayed for; and directed the Commission to take action accordingly. The St. Louis Southwestern then appealed to the Supreme Court of Arkansas; and, besides a claim based wholly on the state law, insisted that the Arkansas Commission was without power to fix the point and manner of crossing, since no certificate of public convenience and necessity had been secured from the Interstate Commerce Commission. That court, in affirming the judgment, held specifically that the proposed track was a spur located wholly in the State of Arkansas, within the meaning of paragraph 22

of § 1 of the Interstate Commerce Act,[2] and so not subject to the requirement of a certificate from the federal Commission. 185 Ark. 824; 49 S.W. (2d) 1054. Because of the decision of that federal question certiorari was granted. 287 U.S. 589.

The St. Louis Southwestern asks us to reverse the judgment on the ground that upon the evidence introduced before the Arkansas Commission the proposed track should be held to be an extension of the Missouri Pacific's line into new territory, within the meaning of paragraph 18, as applied in *Texas Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U.S. 266. The Missouri Pacific insists that its right to the crossing cannot be questioned in this proceeding, which is limited to fixing the place and manner of the crossing; that under the state practice its right to a crossing could be challenged only by an independent suit—a bill in equity; that, in any event, the judgment should be affirmed, because, if the character of the proposed track is relevant in this enquiry, the Supreme Court properly held it to be a spur; and that since it is located wholly within the State of Arkansas, the Interstate Commerce Commission had no authority over its construction.

The Supreme Court of Arkansas stated in its opinion the contentions of the St. Louis Southwestern and then proceeded to answer them. The contentions stated were that " the circuit court erred in directing the Commission to fix the point and manner of crossing, because first: under the statute it has no authority to act until appellee acquires the right of way by condemnation proceedings,

[2] " The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State. . . ." Act of February 28, 1920, c. 91, § 402 (22), 41 Stat. 456, 478.

and second: until it obtains a certificate of convenience and necessity for the crossing from the Interstate Commerce Commission." That court's answers to the contentions were: First, that the right to the crossing exists under the state constitution and that " the orderly way would be to first fix the place and manner of crossing and then proceed in the proper tribunal to condemn the land needed to effect the crossing at the place fixed or designated." Second, that upon the evidence the proposed track, which is located wholly within Arkansas, is a spur; and being so, it was unnecessary to secure the certificate from the Interstate Commerce Commission. Thus, the Arkansas court decided the case by determining the character of the proposed track, without expressly passing upon, or so far as appears considering, the question whether that federal issue was relevant in the proceeding under review.

We think that it was not relevant. If the proposed track is believed to be an extension, the remedy is not by way of defense to an application to fix the place and manner of the crossing. The statute of Arkansas which confers upon the Railroad Commission exclusive power to determine the place and manner of crossing antedates Transportation Act, 1920, which introduced paragraphs 18 to 22 of § 1 of the Interstate Commerce Act. The St. Louis Southwestern does not contend that the law of Arkansas requires denial of the application in the absence of a certificate from the Interstate Commerce Commission. It contends that the federal law requires the state commission to refrain from fixing the place and manner of crossing unless a certificate for building the proposed track shall have been secured from the Interstate Commerce Commission. There is no basis for such a contention. Transportation Act, 1920, which confers upon an interested carrier the right not to be subjected

to such new competition unless it is found to be in the public interest, prescribes the remedy for the protection of that right. The remedy prescribed is a proceeding to enjoin. Paragraph 20 of § 1 declares that "any construction or operation" contrary to the provisions of paragraphs 18, 19 or 20 "may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest." That procedure affords an opportunity "to secure an orderly hearing and proper determination of the matter," *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U.S. 47, 52; and the remedy is "both affirmative and complete," *Texas Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 273.[3] The propriety of

[3] The method prescribed by paragraph 20 was pursued in the following cases: *Texas* v. *Eastern Texas R. Co.*, 258 U.S. 204; *Smyth* v. *Asphalt Belt Ry. Co.*, 267 U.S. 326; *Texas Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 273; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244; *Texas & N. O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475; *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U.S. 47; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U.S. 382, 391-392; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299; *Detroit & M. Ry Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540; *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F. (2d) 777; *Detroit Terminal R. Co.* v. *Pennsylvania-Detroit R. Co.*, 15 F. (2d) 507; *Missouri-Kansas-Texas R. Co.* v. *Northern Oklahoma Rys.*, 25 F. (2d) 689; *Missouri Pacific R. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 41 F. (2d) 188; *Bremner* v. *Mason City & C. L. R. Co.*, 48 F. (2d) 615; *Missouri Pacific R. Co.* v. *Union Pacific Ry. Co.*, 60 F. (2d) 126; *Marion & E. R. Co.* v. *Missouri Pacific R. Co.*, 318 Ill. 436; 149 N.E. 492; compare *State* v. *Atlantic Coast Line R. Co.*, 95 Fla. 14; 116 So. 48. No case in the federal courts has been found in which any other method was pursued to secure relief against what was believed to be an unauthorized extension. Compare, however, *Seaboard Air Line* v. *Tampa Southern R. Co.*, 97 Fla. 340; 121 So. 477. In *Missouri Pacific R. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 41

requiring resort to the remedy by injunction is illustrated by the proceedings in the case at bar. The question whether the proposed track is a spur or an extension has been decided by the Supreme Court of the State upon a record made before the state commission although, so far as appears, the issue was not raised there and neither that body nor the parties treated it as relevant.

Confining the St. Louis Southwestern to the remedy prescribed by Transportation Act, 1920, does not abridge the protection of its rights. If the proposed track is a spur, the question of the place and manner of the crossing presents a purely local problem to be decided by the state commission under the laws of the State, unless a claim were made that by allowing a crossing at grade the operation of trains in interstate commerce over the spur of the St. Louis Southwestern would be obstructed. The record is barren of any such suggestion. If the proposed track is an extension, the order of the state commission does not impair the right of the St. Louis Southwestern to be free from invasion of its territory unless the extension is in the public interest. The application to the Arkansas commission is not for leave to build the track or for leave to use it; it is solely to have fixed the place, manner and terms of the crossing. The order of the state commission does not purport to authorize the construction of the track, or its use when constructed. It would seem that a proposed larger use of the track, if an industrial lead and not a spur to a single industry, might well have been deemed relevant to the state commission's determination of the appropriate place and manner of crossing. But its determination of that matter in no way

F. (2d) 188; cited above, the relief sought and granted was an injunction against unauthorized construction and also against prosecution before the Arkansas railroad commission of a petition for a crossing.

concludes the federal claim of the St. Louis Southwestern here asserted. And postponement of the determination whether the track is a spur or an extension will prejudice no federal right of the St. Louis Southwestern. If the track should be held in the later proceeding to be a spur, obviously the St. Louis Southwestern will have no ground to complain of the order of the state commission. If the track is held to be an extension, that order will not become effective unless the Missouri Pacific should secure a certificate from the Interstate Commerce Commission. Indeed, the prior determination by the state commission of the place, manner and terms of the crossing may, by making the plan more concrete and definitive, aid the federal commission in reaching an informed judgment on the application. Compare Los Angeles Passenger Terminal Cases, 100 I.C.C. 421, 459.

For the reasons stated, we are of opinion that the judgment of the Supreme Court of Arkansas, as it directed merely that an order be entered fixing the place and manner of the crossing, is not in conflict with the federal law, whether the proposed track is a spur or an extension; and that in passing upon the character of the track, the state court determined a federal question not pertinent to the decision of the case. It was stated at the bar that there is now pending, in the federal court for Arkansas, a suit commenced by the St. Louis Southwestern, under paragraph 20 of § 1 of the Interstate Commerce Act, to enjoin construction of the proposed track on the ground that it is an extension. Since the question whether the proposed track is a spur or an extension was not pertinent to the decision of this case in the state courts, and as we necessarily refrain from passing on that question, it follows that neither the judgment of the Supreme Court of Arkansas, nor the judgment of this Court, will operate as *res judicata* on that issue. As thus defined the judgment is

Affirmed.

CONSOLIDATED TEXTILE CORP. *v.* GREGORY, JUDGE

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 587. Argued March 22, 1933.—Decided April 10, 1933

1. When it is claimed in a case from a state court that service on a foreign corporation is void under the due process clause of the Fourteenth Amendment because the corporation was not present and doing business in the State, this Court will ascertain for itself the facts disclosed by the record. P. 86.
2. Selling goods in a State through a controlled subsidiary does not subject a foreign corporation to a general liability to be sued there. *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U.S. 333, 336, 337. P. 88.
3. In order to hold a foreign corporation, not licensed to do business in a State, responsible under the process of a local court, the record must disclose that it was carrying on business there at the time of attempted service. P. 88.

209 Wis. 476; 245 N.W. 194, reversed.

APPEAL from a judgment denying a writ of prohibition to prevent further prosecution of an action on certain bonds.

Mr. Eldon Bisbee, with whom *Messrs. H. G. Pickering, Bertram F. Shipman, Louis A. Lecher,* and *Suel O. Arnold* were on the brief, for appellant.

Mr. Morris Karon, with whom *Mr. Walter L. Gold* was on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By an original proceeding in the Supreme Court of Wisconsin appellant unsuccessfully sought a writ commanding the Judge of the Circuit Court of Milwaukee County to desist from further proceedings in the cause instituted against it by Katherine Gold to recover principal and interest of certain bonds then in default. The

petition disclosed the circumstances under which the original summons and complaint were served upon the president of the corporation and alleged that although the Circuit Court had not acquired jurisdiction it was about to enter judgment contrary to the inhibition of the XIV Amendment.

An alternative writ issued. The trial Judge, appellee here, made a return in which he incorporated the evidence relied on to sustain his conclusion that jurisdiction had been acquired through service of summons as authorized by statute. The Supreme Court ruled that the statute—Wisconsin Statutes, (1931) § 262.09—had been properly construed and applied; also that there was nothing to show conflict with the Federal Constitution. Accordingly the prayer for relief was denied. The validity of the statute was adequately challenged; the matter is here by appeal.

In the circumstances we must ascertain for ourselves the facts disclosed by the record. *Philadelphia & Reading Ry. Co.* v. *McKibbin,* 243 U.S. 264; *Truax* v. *Corrigan,* 257 U.S. 312, 324, 325. These appear from the pleadings and three affidavits presented in the trial court on the motion to vacate service of the summons—one by Frederick Rupprecht in support of the motion and two in opposition by Walter L. Gold and Morris Karon.

It appears:

The Consolidated Textile Corporation is organized under the laws of Delaware. It has never been licensed to do business in Wisconsin; has no place of business or property therein, and no officer or agent is stationed in that State. Its principal place of business is New York City and its president, Frederick K. Rupprecht, resides there.

In 1921 the Corporation issued and sold a series of twenty-year, 8% bonds, with interest coupons payable semi-annually. Coupons due December 1, 1930, and

thereafter, were not paid. A Bondholders' Committee received on deposit 70% of the outstanding bonds.

Walter L. Gold, an attorney with offices in Milwaukee, Wisconsin, and others represented by him, owners of $9,200 of these bonds, declined to deposit them with the Committee and caused suit to be brought in the Municipal Court, New York City, to recover interest which fell due December 1, 1930. In that suit motion for summary judgment was granted.

Rupprecht, President of the Corporation, believing that the interest of all bondholders would be subserved if final judgment were withheld, by communications sent from New York sought a conference with Gold at Milwaukee for the purpose of acquainting him with the facts and dissuading him from permitting final judgment. He, with reluctance, assented. With the sole purpose of engaging in such conference and without intending to submit the Corporation to the jurisdiction of the State of Wisconsin, Rupprecht went to Gold's law office in Milwaukee on the morning of January 14, 1932. His intention was to discuss the New York suit and to present facts which he believed would cause Gold to withhold final judgment in the New York case and agree to deposit his own bonds, and recommend the deposit of others, with the Bondholders' Committee.

During an interview lasting one and one-half hours, in the attorney's office, sundry matters relating to the Corporation's affairs were discussed. While there, Rupprecht was served with summonses (also complaints) addressed to the Corporation, commanding that it appear and answer in separate actions instituted by Katherine Gold and six others to recover upon certain of the above-described bonds and interest—all of whom Gold represented. In anticipation of Rupprecht's arrival in Milwaukee the summonses and complaints had been prepared.

In his affidavit Gold stated that he had "been informed that through Consolidated Selling Co., Inc., which is the selling agency for Consolidated Textile Corporation and is a subsidiary wholly controlled by Consolidated Textile Corporation and is an agent of Consolidated Textile Corporation, the Consolidated Textile Corporation sells goods in Wisconsin, to-wit: to Gimbel Bros. in Milwaukee and Sears, Roebuck & Co., in Milwaukee."

The unimportance of the statement concerning acts of the controlled corporation (Consolidated Selling Company) is clear enough in the light of what we said in *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U.S. 333, 336, 337.

In order to hold a foreign corporation, not licensed to do business in a State, responsible under the process of a local court, the record must disclose that it was carrying on business there at the time of attempted service. *International Harvester Co.* v. *Kentucky*, 234 U.S. 579, 583, 585.

"The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U.S. 79, 87.

Opinions here in recent causes sanctioning and applying this general rule show plainly enough, we think, that the appellant Corporation was not present within the jurisdiction of Wisconsin as required. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U.S. 264; *Rosenberg Co.* v. *Curtis Brown Co.*, 260 U.S. 516; *Bank of America* v. *Whitney Bank*, 261 U.S. 171, 173; *James-Dickinson Co.* v. *Harry*, 273 U.S. 119, 122.

The judgment of the court below must be reversed. The cause will be remanded there for further proceedings not inconsistent with this opinion. *Reversed.*

ROSSI ET AL. *v.* UNITED STATES

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 594. Argued March 13, 1933.—Decided April 10, 1933

1. Under § 3266 R.S.; 26 U.S.C., § 291, a person may not register, or have lawful custody or control of, a still set up in a dwelling house for the manufacture of alcoholic spirits. P. 91.
2. In prosecutions for carrying on the business of a distiller without giving bond and for having possession and control of a still not registered, the failure to register and to give bond may be inferred from proof that the still, in the custody and control of the defendants, was set up and operating, or ready to operate, in a dwelling house. P. 90.
3. The burden of proof to show execution of a bond and registration of the still was upon the defendants. *Id.*
4. It is not incumbent upon the prosecution to adduce positive evidence to support a negative averment, the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendants' possession or control. P. 91.

60 F. (2d) 955, affirmed.

CERTIORARI, 288 U.S. 595, to review the affirmance of convictions under an indictment charging violations of the Internal Revenue Laws.

Mr. Harry C. Heyl submitted for petitioners.

Mr. Paul D. Miller, with whom *Solicitor General Thacher* and *Mr. John J. Byrne* were on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

An indictment, five counts, in the United States District Court, Southern District of Illinois, alleged that petitioners had violated the Internal Revenue laws in sundry

ways. The third count charged them with carrying on the business of a distiller without having given the bond required by § 3260, Rev. Stats., U.S.C. Title 26, § 284.[1] The fourth charged possession and control of a still not registered as required by § 3258, Rev. Stats., U.S.C. Title 26, § 281.[2] They pleaded not guilty; waived a jury; went to trial before the Judge. He found them guilty under both the third and fourth counts and imposed appropriate sentence.

The only point presented by the record for our consideration is whether there was adequate evidence to support the conviction.

There was enough to show that the petitioners had custody and control of a still for the manufacture of alcoholic spirits, set up and operating, or ready for operation, in a dwelling house. They did not take the stand; no affirmative evidence of failure to register the still or to give bond as required by the Revised Statutes was presented.

The United States claim that in such circumstances the burden of proof to show execution of the bond and regis-

[1] SEC. 284. Every person intending to commence or to continue the business of a distiller shall . . . before proceeding with such business . . . execute a bond [with specified conditions]. . . . Every person who fails or refuses to give the bond hereinbefore required . . . shall forfeit the distillery, distilling apparatus, and all real estate and premises connected therewith, and shall be fined not less than $500 nor more than $5,000, and imprisoned not less than six months nor more than two years.

[2] SEC. 281. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same . . . Stills and distilling apparatus shall be registered immediately upon their being set up. . . . And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

tration of the still rested upon the petitioners; that having failed to sustain this, the Judge properly declared them guilty as charged. And with this view we agree.

Section 3266, Rev. Stats., U.S.C. Title 26, § 291, provides:

"No person shall use any still . . . in any dwelling house, or in any shed, yard, or inclosure connected with any dwelling house . . . ; and every person who does any of the acts prohibited by this section, or aids or assists therein, . . . shall be fined $1,000 and imprisoned for not less than six months nor more than two years, in the discretion of the court, ..."

It was impossible for the petitioners lawfully to register the still or to give the required bond.

The lower federal courts generally have accepted the doctrine that proof of the custody or control of a still for unlawful distillation of alcoholic spirits is enough to give rise to an inference of lack of registration and failure to give bond which the defendant must overcome by proof. *Barton* v. *United States,* 267 Fed. 174, 175; *McCurry* v. *United States,* 281 Fed. 532, 533; *Goodfriend* v. *United States,* 294 Fed. 148, 150; *Giacolone* v. *United States,* 13 F. (2d) 108, 110; *Seiden* v. *United States,* 16 F. (2d) 197, 199; *Colasurdo* v. *United States,* 22 F. (2d) 934, 935; *Cardenti* v. *United States,* 24 F. (2d) 782, 783; *Mangiaracina* v. *United States,* 40 F. (2d) 164, 166; *Stark* v. *United States,* 44 F. (2d) 946, 949, 950. And see *Faraone* v. *United States,* 259 Fed. 507, 509; *Sharp* v. *United States,* 280 Fed. 86, 89.

The general principle, and we think the correct one, underlying the foregoing decisions is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of doc-

uments or other evidence probably within the defendant's possession or control. See Chamberlayne's Modern Law of Evidence, Vol. 2, § 983; Greenleaf on Evidence, 16th ed., Vol. 1, § 79, p. 154; *Wilson* v. *United States,* 162 U.S. 613, 619; *Dunlop* v. *United States,* 165 U.S. 486, 502, 503; *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U.S. 35, 42; *Yee Hem* v. *United States,* 268 U.S. 178, 185.

The only decision called to our attention which seems in conflict with those cited above is *Mansbach* v. *United States,* 11 F. (2d) 221, 223, 224. And with the doctrine there apparently approved, so far as in conflict with the commonly accepted view, we cannot agree.

Affirmed.

C. A. BRADLEY, DOING BUSINESS AS WOLVERINE MOTOR FREIGHT LINES, *v.* PUBLIC UTILITIES COMMISSION OF OHIO

APPEAL FROM THE SUPREME COURT OF OHIO

No. 395. Argued January 20, 23, 1933.—Decided April 10, 1933

1. A state commission, after full hearing, denied a certificate of public convenience and necessity to operate by motor, as a common carrier of property, over a particular state highway to the state line with final destination beyond in an adjacent State, upon the ground that the route specified was already so badly congested by motor traffic that the addition of the applicant's proposed service would cause excessive hazard to the safety of travelers and property upon that highway. The applicant, though at liberty to do so, did not apply for another route; nor did he prove that none other was feasible. *Held,* that the order was not void as an exclusion from interstate commerce. P. 94.
2. A state order denying a common carrier by motor a certificate to engage in interstate commerce, when made to promote public safety and because of highway congestion, is an exercise of the police power, and its effect on interstate commerce is merely incidental. P. 95.
3. In dealing with the problem of safety of the highways, as in other problems of motor transportation, the State may adopt measures

which favor vehicles used solely in the business of their owners, as distinguished from those which are operated for hire by carriers who use the highways as their place of business. P. 97.

4. Permitting operation by carriers already certificated, but denying additional certificates to others, to avoid dangerous traffic congestion, is consistent with the equal protection clause of the Fourteenth Amendment. P. 97.
5. The question whether a state statutory provision makes an unconstitutional discrimination need not be decided when the party complaining does not appear to have been affected by it. P. 97.

125 Ohio St. 381; 181 N.E. 668, affirmed.

APPEAL from a judgment sustaining an order of the Public Utilities Commission which denied a certificate of public convenience and necessity to appellant to operate as a common carrier by motor over a state highway.

Mr. LaRue Brown, with whom *Mr. John T. Scott* was on the brief, for appellant.

Mr. Thomas J. Herbert, with whom *Mr. John W. Bricker,* Attorney General of Ohio, was on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Bradley applied to the Public Utilities Commission of Ohio for a certificate of public convenience and necessity to operate by motor as a common carrier of property over State Route No. 20, extending from Cleveland, Ohio, to the Ohio-Michigan line, with Flint, Michigan, as final destination. The New York Central Railroad and the Pennsylvania Railroad, opposing, moved that the application be dismissed on the ground of the present congested condition of that highway. Upon a full hearing, the Commission found " that said State Route No. 20, at this time, is so badly congested by established motor vehicle operations, that the addition of the applicant's

proposed service would create and maintain an excessive and undue hazard to the safety and security of the travelling public, and the property upon such highway." It therefore ordered: "That in the interest of preserving the public welfare, the application be, and hereby is, denied."

In a petition for a rehearing, which was also denied, Bradley urged, among other things, that denial of the application for the certificate on the ground stated violated rights guaranteed to the applicant by the commerce clause of the Federal Constitution and the equality clause of the Fourteenth Amendment. The same claims were asserted in a petition in error to the Supreme Court of the State; were there denied (125 Ohio State 381; 181 N.E. 668) upon the authority of *Motor Transport Co.* v. *Public Utilities Co.*, 125 Ohio State 374; 181 N.E. 665; and are renewed here upon this appeal. We are of opinion that the claims are unfounded.

First. It is contended that the order of the Commission is void because it excludes Bradley from interstate commerce. The order does not in terms exclude him from operating interstate. The denial of the certificate excludes him merely from Route 20. In specifying the route, Bradley complied with the statutory requirement that an applicant for a certificate shall set forth "the complete route" over which he desires to operate. Ohio General Code, § 614-90 (c). But the statute confers upon an applicant the right to amend his application before or after hearing or action by the Commission. § 614-91. And it authorizes him, after the certificate is refused, to "file a new application or supplement any former application, for the purpose of changing" the route. § 614-93. No amendment of the application was made or new application filed. For aught that appears, some alternate or amended route was available on which there was no congestion. If no other feasible

route existed and that fact was deemed relevant, the duty to prove it rested upon the applicant. It was not incumbent upon the Commission to offer a certificate over an alternate route.

Second. It is contended that an order denying to a common carrier by motor a certificate to engage in interstate transportation necessarily violates the Commerce Clause. The argument is that under the rule declared in *Buck* v. *Kuykendall,* 267 U.S. 307 and *Bush & Sons Co.* v. *Maloy,* 267 U.S. 317, an interstate carrier is entitled to a certificate as of right; and that hence the reason for the commission's refusal and its purpose are immaterial. In those cases, safety was doubtless promoted when the certificate was denied, because intensification of traffic was thereby prevented. See *Stephenson* v. *Binford,* 287 U.S. 251, 269–272. But there, promotion of safety was merely an incident of the denial. Its purpose was to prevent competition deemed undesirable. The test employed was the adequacy of existing transportation facilities; and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, the purpose of the denial was to promote safety; and the test employed was congestion of the highway. The effect of the denial upon interstate commerce was merely an incident.

Protection against accidents, as against crime, presents ordinarily a local problem. Regulation to ensure safety is an exercise of the police power. It is primarily a state function, whether the *locus* be private property or the public highways. Congress has not dealt with the subject. Hence, even where the motor cars are used exclusively in interstate commerce, a State may freely exact registration of the vehicle and an operator's license, *Hendrick* v. *Maryland,* 235 U.S. 610, 622; *Clark* v. *Poor,* 274 U. S. 554, 557; *Sprout* v. *South Bend,* 277 U.S. 163, 169; may require the appointment of an agent upon whom

process can be served in an action arising out of operation of the vehicle within the State, *Kane* v. *New Jersey,* 242 U.S. 160; *Hess* v. *Pawloski,* 274 U.S. 352, 356; and may require carriers to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries resulting from their operations. *Continental Baking Co.* v. *Woodring,* 286 U.S. 352, 365-366. Compare *Packard* v. *Banton,* 264 U.S. 140; *Sprout* v. *South Bend,* 277 U.S. 163, 171-172; *Hodge Co.* v. *Cincinnati,* 284 U.S. 335, 337. The State may exclude from the public highways vehicles engaged exclusively in interstate commerce, if of a size deemed dangerous to the public safety, *Morris* v. *Duby,* 274 U.S. 135, 144; *Sproles* v. *Binford,* 286 U.S. 374, 389-390. Safety may require that no additional vehicle be admitted to the highway. The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety. Compare *Hammond* v. *Schappi Bus Line,* 275 U.S. 164, 170-171.[1]

Third. It is contended that the order is void under the Commerce Clause because the finding of congestion of Route 20 is unsupported by evidence. The argument is that the only evidence introduced on that issue consisted of two traffic counts, both in the single city of Fremont; that this evidence was insufficient because Route 20 extends for only 2.2 miles through Fremont, whereas the total length of the portion which would be traversed is about 100 miles; and that the evidence was conflicting. The evidence was adequate to support the finding.

[1] See also *Johnson Transfer & Freight Lines* v. *Perry,* 47 F. (2d) 900, 902; *Phillips* v. *Moulton,* 54 F. (2d) 119; *Newport Electric Corp.* v. *Oakley,* 47 R.I. 19; 129 Atl. 613; *Farnum* v. *Public Utilities Comm'n,* 52 R.I. 128; 158 Atl. 713. Compare contra, *Red Ball Transit Co.* v. *Marshall,* 8 F. (2d) 635, 639; *Magnuson* v. *Kelly,* 35 F. (2d), 867, 869.

Moreover, no such objection is set forth in the statement as to jurisdiction filed pursuant to Rule 12.

Fourth. It is contended that the statute as applied to the plaintiff violates the equal protection clause of the Fourteenth Amendment. There is no suggestion that the plaintiff was treated less favorably than others who applied at the same time or thereafter for certificates as common carriers; nor is there any suggestion that the classification operates to favor intrastate over interstate carriers. One argument is that the statute discriminates unlawfully against common carriers in favor of shippers who operate their own trucks. In dealing with the problem of safety of the highways, as in other problems of motor transportation, the State may adopt measures which favor vehicles used solely in the business of their owners, as distinguished from those which are operated for hire by carriers who use the highways as their place of business. See *Packard* v. *Banton,* 264 U.S. 140, 144. Compare *Bekins Van Lines* v. *Riley,* 280 U.S. 80, 82; *Continental Baking Co.* v. *Woodring,* 286 U.S. 352, 373; *Sproles* v. *Binford,* 286 U.S. 374, 396. Another objection is that to deny certificates to subsequent applicants discriminates unlawfully in favor of carriers previously certificated. But classification based on priority of authorized operation has a natural and obvious relation to the purpose of the regulation. Conceivably, restriction of the volume of traffic might be secured by limiting the extent of each certificate-holder's use. But that would involve re-apportionment whenever a new applicant appeared. The guaranty of equal protection does not prevent the State from adopting the simple expedient of prohibiting operations by additional carriers.

There is a further argument that the statute discriminates unlawfully between common and contract carriers. It rests upon the assumption that the statute is, as a

matter of construction, inapplicable to contract carriers. On the question of construction, there appears to be no authoritative decision.[2] We have no occasion to consider that question. For it does not appear that there has been discrimination against the plaintiff in favor of contract carriers. Compare *Supervisors* v. *Stanley*, 105 U.S. 305, 314. *Affirmed.*

GANT ET AL. *v.* OKLAHOMA CITY ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

No. 547. Argued March 15, 1933.—Decided April 10, 1933

1. Jurisdiction of this Court of an appeal from the final judgment of a state supreme court sufficiently appears, where the opinion of that court on a first appeal of the case, from an interlocutory judgment, shows that the requisite federal question was raised by and decided against the appellant, and where the second and final decision of that court was made upon the authority of the first one. P. 100.
2. A city ordinance conditioned the right to drill for oil or gas within the city limits upon the filing of a bond, in the sum of $200,000 for each well, to secure payment of damages from injuries to any persons or property "resulting from the drilling, operation or maintenance of any well" or structures appurtenant thereto. *Held* consistent with the due process clause of the Fourteenth Amendment. P. 101.
3. A further requirement that the bond be executed by some bonding or indemnity company authorized to do business in the State, is also valid. P. 101.
4. The wisdom and fairness of this requirement were for the city council to decide, and its conclusion, not being clearly arbitrary or unreasonable, binds the court. P. 102.

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[2] Compare Act of March 29, 1923, 110 Ohio Laws, pp. 211, 212–213; *Hissem* v. *Guran*, 112 Oh. St. 59; 146 N.E. 808; Act of April 11, 1925, 111 Ohio Laws, pp. 512, 513, 515; *Motor Freight, Inc.* v. *Public Utilities Comm'n*, 120 Oh. St. 1; 165 N.E. 355. Following the last decision, the statute was amended by Act of April 19, 1929, 113 Ohio Laws, p. 482.

5. An otherwise valid statute or ordinance conferring a privilege, is not rendered invalid merely because it chances that particular persons find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend. P. 102.

150 Okla. 86, 89; 160 *id.* 62, affirmed.

APPEAL from the affirmance of a decree denying an injunction against the enforcement of a city ordinance and granting an injunction against its violation.

Mr. James S. Twyford, with whom *Mr. J. H. Everest* was on the brief, for appellants.

Mr. Harlan T. Deupree, with whom *Mr. W. H. Brown* was on the brief, for appellees.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The bill of complaint alleges that plaintiffs (appellants here) are lessees of a tract of land in Oklahoma City, State of Oklahoma, supposed to contain gas and oil; that by the terms of the lease they are required to commence drilling a well within a time fixed; that they have contracted for such drilling and the work has been begun and is now in progress; that they have a permit from the authorities of the city as required by ordinance, but defendants threaten to and will forcibly stop the work, to plaintiffs' irreparable damage, unless they execute and file a bond conditioned as provided by the city ordinance in the penal sum of $200,000, signed by some surety company authorized to transact business within the state; that the ordinance making such requirement is unreasonable and unconstitutional, and if enforced will have the effect of depriving plaintiffs of valuable property rights without due process of law. An answer was filed denying generally the allegations of the bill, and a cross-petition,

praying that plaintiffs be restrained from continuing the drilling of the well until plaintiffs had executed the bond required by the ordinance. After a hearing, at which evidence was introduced in support of the bill, the trial court denied plaintiffs' prayer for an injunction and granted a permanent injunction against them upon the cross-petition.

The bill does not in terms charge an infringement of the Fourteenth Amendment or of any other provision of the federal Constitution; and the record does not disclose whether the trial court at any time considered or determined that question. Nor is there anything in the present record to show, except inferentially, that the federal question was raised by appellants or considered by the supreme court. A basis for our jurisdiction must be found, if at all, in the decision and opinion of the state supreme court upon a prior appeal in the same case from a decree granting an interlocutory injunction. *Gant* v. *Oklahoma City*, 150 Okla. 86, 89; 6 P. (2d) 1065. It there appears that an attack upon the ordinance as infringing the due process of law clause of the Fourteenth Amendment was argued before and considered by that court, and the ordinance sustained as valid under that clause as well as under the due process clause of the state constitution. An appeal to this court followed but was dismissed for the want of jurisdiction, the decree not being final. 284 U.S. 594. After the remand to the state court of first instance, final decree on the merits was rendered against appellants. From that decree an appeal was taken to the state supreme court, which affirmed on the authority of its prior decision. 160 Okla. 62; 15 P. (2d) 833. In effect, the earlier decision was thereby read into, and made a part of, the later one. Appellants, by this appeal, therefore, have invoked the jurisdiction of this court at the first opportunity open to them, and the federal question, having been considered by the state supreme court, is properly here. *Grays Har-*

bor Co. v. *Coats-Fordney Co.*, 243 U.S. 251, 256–257; *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U.S. 99, 101–102; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U.S. 207, 214.

The ordinance, so far as pertinent, provides that no well shall be drilled within the limits of the city until there shall be filed with the city clerk a bond in the sum of $200,000 covering each well, executed by "some bonding or indemnity company authorized to do business in the State of Oklahoma," conditioned for the payment of damages on account of injuries to property, bodily injuries, etc., suffered by anyone and resulting from the drilling, operation or maintenance of any well or any structures, etc., appurtenant thereto.

In view of the peculiar dangers incident to the drilling and operation of an oil or gas well within the limits of a city and of the large interest involved if the well be successful, neither the requirement for a bond nor the amount fixed can be declared arbitrary or unreasonable. Indeed, the objection to the ordinance on these grounds was but indifferently urged at the bar. The point stressed was that the provision of the ordinance requiring the bond to be given by a bonding or indemnity company authorized to do business in the state, and thereby excluding the furnishing of personal sureties, is so arbitrary and unreasonable as to constitute a denial of due process of law. That contention also is without merit. The most that can be said is that whether the guaranty of a bonding or indemnity company operating under state law and subject to state regulation, is of greater worth than that of personal sureties, is a question about which opinions reasonably may differ. But the question is one primarily addressed to the judgment of the lawmaking body, and that body having determined that the former is so far superior that the latter should be excluded from eligibility altogether, there is nothing in the due

process of law clause of the Fourteenth Amendment which requires the courts to upset the conclusion. "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all." *Otis* v. *Parker,* 187 U.S. 606, 608–609.

Whether the judgment of the common council of the city in the present case was wise, or whether the requirement will produce hardship in particular instances, are matters with which this court has nothing to do. It is impossible for us to say that the provisions of the ordinance are clearly arbitrary and unreasonable. If there be room for fair debate, this court "will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Zahn* v. *Board of Public Works,* 274 U.S. 325, 328; *Standard Oil Co.* v. *Marysville,* 279 U.S. 582, 584.

There is evidence in the record tending to show that conditions were imposed by surety companies of an onerous character, with which appellants were unable to comply. But it also appears that other operators within the city limits were able to comply with all conditions imposed and had procured and filed bonds in accordance with the ordinance. So far as the record discloses, appellants stood alone in their inability to satisfy the requirements of the bonding companies. The fact that appellants, for reasons peculiar to themselves, could not meet the imposed requirements does not militate against the constitutionality of the ordinance. *Packard* v. *Banton,* 264 U.S. 140, 145; *Standard Oil Co.* v. *Marysville, supra,* at p. 586; *Hodge Co.* v. *Cincinnati,* 123 Ohio St. 284, 296; 175 N.E. 196. An otherwise valid statute or

ordinance conferring a privilege is not rendered invalid merely because it chances that particular persons find it hard or even impossible to comply with precedent conditions upon which enjoyment of the privilege is made to depend. *Decree affirmed.*

LEVERING & GARRIGUES CO. ET AL. *v.* MORRIN ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 423. Argued February 17, 1933.—Decided April 10, 1933

1. The jurisdiction of the District Court on the ground of federal question is to be determined by the allegations of the bill, and not upon the facts as they may turn out, or by a decision of the merits. P. 105.
2. If the bill or the complaint sets forth a substantial claim under a federal statute, the case is within the federal jurisdiction, however the court may decide upon the legal sufficiency of the facts alleged to support the claim. *Id.*
3. But if the claim pleaded is plainly unsubstantial, jurisdiction is wanting. *Id.*
4. The federal claim averred may be plainly unsubstantial either because obviously without merit or because it is clearly foreclosed by the previous decisions of this Court. *Id.*
5. A conspiracy to halt or suppress local building operations solely for the purpose of compelling employment of union labor can not be adjudged a conspiracy to restrain interstate commerce, merely because, incidentally, by checking the local use of building materials, it will curtail the sale and shipment of those materials in interstate commerce. *Industrial Assn.* v. *United States,* 268 U.S. 64, 77–78, 80–82. P. 106.

61 F. (2d) 115, affirmed.

CERTIORARI, 287 U.S. 590, to review the reversal of a decree of injunction in a suit by building concerns alleging conspiracy by union labor organizations.

Mr. Merritt Lane for petitioners.

Mr. Frank P. Walsh for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit brought by petitioners against respondents in the federal district court for the southern district of New York to enjoin respondents from combining or conspiring to compel petitioners to employ, in their work of fabricating and erecting structural iron and steel, only members of a labor union, and to refrain from employing non-members; from conducting, inducing, or advising a boycott of petitioners; and from other enumerated acts. The bill invoked the jurisdiction of the federal court upon the ground of diversity of citizenship, and also upon the ground that acts complained of unlawfully interfered with interstate commerce and constituted a violation of the federal anti-trust acts. The case was sent to a referee, who, after a hearing, made a report and decision sustaining the charge of boycotting, but holding that the interference occasioned thereby was local in character and did not constitute an interference with interstate commerce. The report and decision were confirmed by the district court, and the bill dismissed as to certain of the respondents, and an injunction issued against others, the particulars of which, in the view we take of the case, it is not necessary to state.

The circuit court of appeals reversed the decree of the district court, holding that the allegations of the bill were insufficient to establish jurisdiction on the ground of diversity of citizenship, and that the case having failed on the federal question, the court was without power to consider the nonfederal question because it was asserted in an independent cause of action. While resting its decision upon these considerations, that court expressed the further view that the allegations of the bill in respect of the claim of federal jurisdiction under the anti-trust acts were probably so unsubstantial as to disclose, on the face

of the bill, a lack of federal jurisdiction. The district court was directed to dismiss the bill without prejudice for lack of jurisdiction unless amendments could be made to correct the defect in respect of diversity of citizenship. 61 F. (2d) 115. This court granted certiorari limited to the question of federal jurisdiction other than questions relating to diversity of citizenship.

The question of jurisdiction as thus limited is to be determined by the allegations of the bill, and not upon the facts as they may turn out, or by a decision of the merits. *Mosher* v. *Phoenix,* 287 U.S. 29, 30, and cases cited. Whether an objection that a bill or a complaint fails to state a case under a federal statute raises a question of jurisdiction or of merits is to be determined by the application of a well settled rule. If the bill or the complaint sets forth a substantial claim, a case is presented within the federal jurisdiction, however the court, upon consideration, may decide as to the legal sufficiency of the facts alleged to support the claim. But jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. The cases have stated the rule in a variety of ways, but all to that effect. See for example, *Mosher* v. *Phoenix, supra; Hull* v. *Burr,* 234 U.S. 712, 720; *Western Union Tel. Co.* v. *Ann Arbor R. Co.,* 178 U.S. 239, 244; *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 305, *et seq.; South Covington & C. St. Ry. Co.* v. *Newport,* 259 U.S. 97, 99; *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77, 82; *Montana Catholic Missions* v. *Missoula County,* 200 U.S. 118, 130; *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561, 576. And the federal question averred may be plainly unsubstantial either because obviously without merit, or "because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of con-

troversy." *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288; *McGilvra* v. *Ross,* 215 U.S. 70, 76–77, 80; *Norton* v. *Whiteside,* 239 U.S. 144, 153; *Bianchi* v. *Morales,* 262 U.S. 170; *Kansas* v. *Bradley,* 26 Fed. 289, 290; *Harris* v. *Rosenberger,* 145 Fed. 449, 452.

Passing, without inquiry, the first of these tests, a consideration of the decisions of this court rendered prior to the filing of the present bill demonstrates that the question is concluded by an application of the second test.

The prayer for relief primarily is based upon the averments that petitioners are engaged in fabricating and erecting structural iron and steel; that they are, and have been for a long time, operating in such business on the open shop method in relation to their employment of labor; that they have large contracts for the construction of work in the City of New York; that respondents are organizations of labor and officers and agents thereof; that by means and in ways which are set forth, respondents have conspired, and are attempting, to compel petitioners and others to employ, exclusively, union labor in their building operations; that in pursuance of the conspiracy respondents have called out on strike petitioners' union employees, and conducted boycotts, and undertaken other injurious interferences particularly set forth in the bill. These allegations conclude with the statement: "The sole purpose of the activities of the said defendants [respondents] is to compel a putting into effect the closed union shop in the industry of erecting structural iron and steel and inasmuch as this branch of the building industry is the only branch of the building industry where a person not a member of the labor union can secure employment if successful the entire building industry in the entire Metropolitan District will be closed union."

Following these allegations the bill contains averments to the effect that all the steel used by petitioners in the City of New York is transported from other states, being

either bought or fabricated by petitioners in other states and transported to New York to be erected by petitioners therein; that the purpose and intent of respondents is to prevent the use of said steel therein, and wherever erected by petitioners; that the effect of the success of respondents would be, among other things, to destroy the interstate traffic of petitioners in steel. All this, however, is no more than to say that respondents' interference with the erection of the steel in New York will have the effect of interfering with the bringing of the steel from other states. Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. Compare *Bedford Cut Stone Co.* v. *Stone Cutters Assn.*, 274 U.S. 37, 46–47; *Anderson* v. *Shipowners Assn.*, 272 U.S. 359, 363–364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 410–411; *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457. The controlling application of these cases to the present one is apparent from the review of them in the later case of the *Industrial Assn.* v. *United States*, 268 U.S. 64, 77–78, 80–82.

That case involved a combination on the part of building contractors and others to establish the "open shop" plan of employing labor by requiring builders who desired materials of certain kinds to obtain permits from a builders exchange, and by refusing such permits to those who did not support the plan. We held that any resulting interference with the free movement of materials from other states, due to the lack of demand therefor upon the part of builders who were excluded from purchasing such materials by reason of their refusal to support the plan, was incidental, indirect and remote, and, therefore, not an unlawful interference with interstate commerce. After pointing out that the question was thus determined by applying the *Coronado* and *United Leather Workers* cases, we said:

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

The pertinent facts of that case and those here alleged are substantially the same, and subject to the same rule. It follows that the federal district court was without jurisdiction because the federal question presented was plainly unsubstantial, since it had, prior to the filing of the bill, been foreclosed by the two previous decisions last named, and was no longer the subject of controversy. See also *Browning* v. *Waycross,* 233 U.S. 16, 22–23; *General Railway Signal Co.* v. *Virginia,* 246 U.S. 500, 509–510. The decree must be affirmed for this reason and it becomes unnecessary to consider the other ground discussed by the court below and upon which its decision primarily was predicated.

Decree affirmed.

LANG *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 595. Argued March 22, 1933.—Decided April 10, 1933

1. Section 204 (a) of the Revenue Act of 1926 provides: "The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that— . . .

"(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition." *Held:*

(1) That upon the termination of an estate by the entirety through the death of one spouse, the survivor does not succeed to anything by "inheritance," within the meaning of this exception, but holds the estate under the original limitation, it being merely freed from participation by the other tenant. *Tyler* v. *United States,* 281 U.S. 497, distinguished. P. 110.

(2) Therefore, upon a sale of the property by the survivor, the gain was properly determined on the basis of what the two tenants paid for the property when acquired, and not upon the basis of the part of that payment that was contributed by the survivor added to a part of the value of the property at the time of the other spouse's death proportionate to his contribution to the purchase. *Id.*

2. This construction is confirmed by the fact that the statute expressly declares the exception applicable to certain of the interests that are listed in § 302 as embraced in decedents estates, but significantly omits from the declaration the interest of a tenant by the entirety, although it also is listed in that section. P. 111.

3. Unless there is a violation of the Constitution, Congress may select the subjects of taxation and tax them differently as it sees fit; and if it does so in plain words, the courts are not at liberty to modify the Act by construction in order to avoid special hardship. P. 113.

61 F. (2d) 280, affirmed.

CERTIORARI, 288 U.S. 596, to review the affirmance of a decision of the Board of Tax Appeals, 23 B.T.A. 854, sustaining a deficiency assessment of income taxes.

Mr. Washington Bowie, Jr., with whom *Mr. J. R. Sherrod* was on the brief, for petitioner.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher* and *Messrs. Sewall Key* and *Norman D. Keller* were on the brief, for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

In 1915 petitioner and her husband purchased certain real property at a cost of $13,000, title being vested in them as tenants by the entirety. Of this amount petitioner contributed $1,560 (12 per cent.), and her husband the remaining 88 per cent. The husband died in 1924, the property at that time having a market value of $40,000; and 88 per cent. of that amount was included in the value of the decedent's gross estate for the purposes of the federal estate tax. In 1925 the property was sold for the sum last named. Petitioner, in her income tax return for that year, computed the profit on the basis of the market value of the property at the time of her husband's death, with the exception of 12 per cent., representing the sum which she had contributed to the purchase price of $13,000. The Commissioner determined a deficiency, using the entire 1915 cost as the basis for computing the amount of profit realized. The Commissioner's ruling was affirmed by a decision of the Board of Tax Appeals (23 B.T.A. 854), and that in turn was affirmed by the court below. 61 F. (2d) 280.

The question to be determined, therefore, is whether cost of the property in 1915, or its market value at the time of decedent's death (with allowable deductions), is the proper basis for determining the gain from the sale in 1925.

The solution of the problem depends upon the meaning of the provision contained in § 204 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 14, which reads:

"The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

. . . . . .

"(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition."

An estate by the entirety is held by the husband and wife in single ownership, by a single title. They do not take by moieties, but both and each take the whole estate, that is to say, the entirety. The tenancy results from the common law principle of marital unity; and is said to be *sui generis*. Upon the death of one of the tenants "the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other; . . ." 1 Washburn, Real Property, 6th ed., § 912. In the present case, therefore, when the husband died, the wife, in respect of this estate, did not succeed to anything. She simply continued, in virtue of the nature of the tenancy, to possess and own what she already had. Giving the words of the statute their natural and ordinary meaning, as must be done, it is obvious that nothing passed to her by bequest, devise, or inheritance.

The foregoing view is confirmed, if that be necessary, by a consideration of the language immediately following the quotation from paragraph (5), § 204 (a), *supra*, namely, "The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision . . . (c) or (f) of section 302 of this Act." Subdivision (c) deals with transfers by the decedent made in contemplation of or intended to take effect in possession or enjoyment at or after his death; and subdivision (f) has reference to property passing under a general power of appointment, exercised by the decedent

by will or deed in like contemplation or with like intention. Ch. 27, 44 Stat. 70–71. The significant circumstance is that subdivision (e), which relates to interests held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, is not included in the enumeration. The result is that the interest held by a joint tenant or tenants by the entirety is expressly included in determining the value of the gross estate for purposes of the estate tax, but not so included as a basis for determining gain or loss under § 204 (a). The express inclusion of the subdivision in the former case and its omission in the latter persuasively suggests that Congress did not intend to include estates by the entirety under the phrase "by bequest, devise, or inheritance." If Congress did so intend, it is hard to understand why subdivision (e) of § 302 was not expressly adopted as were (c) and (f). Compare *Bend* v. *Hoyt*, 13 Pet. 263, 272–273.

It is said that the decision of this court in *Tyler* v. *United States*, 281 U.S. 497, requires a different conclusion. But that case does not decide that property held by tenants by the entirety is inherited by the survivor or passes from the dead to the living by right of succession. The decision rests alone upon the fact that Congress had provided in express words—§ 202 (c), Revenue Act of 1916, c. 463, 39 Stat. 756, 777–778—that the value of such property, to the extent designated in subdivision (c), should be included for the purpose of determining the value of the gross estate. And the tax was upheld not upon the theory that there was a "transfer" of the property by the death of decedent, or a receipt of it by right of succession, but upon the ground that death had resulted in such an accession of rights in respect of the control of the property as to make appropriate the imposition of a tax upon that result. In other words, the death of the husband had the effect of freeing the estate

from his equal right of participation in its possession, use and disposition, which, while he lived, stood in the way of the wife's exclusive enjoyment of those rights which ordinarily flow from ownership; and this expansion of her power of control, and consequent enlargement of its value, furnished a sufficient occasion for the imposition of an excise tax, which Congress might denominate a death tax, or a transfer tax, or anything else it saw fit, although, in the absence of an expression of the legislative will, it properly could not thus be characterized. *Tyler* v. *United States, supra,* at pp. 502–503.

If the legislation here under review results in imposing an unfair burden upon the taxpayer, the remedy is with Congress and not with the courts. Unless there is a violation of the Constitution, Congress may select the subjects of taxation and tax them differently as it sees fit; and if it does so in plain words, as it has done here, the courts are not at liberty to modify the act by construction in order to avoid special hardship. *Crooks* v. *Harrelson,* 282 U.S. 55, 61.

Judgment affirmed.

MOFFAT TUNNEL LEAGUE ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

No. 499. Argued February 15, 1933.—Decided April 10, 1933

1. Voluntary associations which are not corporations, or quasi-corporations, nor organized pursuant to or recognized by any law, are not legal persons, and without the authority of statute have no capacity to sue. P. 118.
2. In a suit against the United States to set aside an order of the Interstate Commerce Commission authorizing one railroad company to acquire control of another by purchase of its stock, the complaint must show that the plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. P. 119.

3. Apprehension felt by dwellers beyond the terminus of a railroad that acquisition of control of the railroad by a rival will lessen the possibility of its extension, is not ground for suit to set aside an order of the Commission permitting such acquisition. P. 119.
4. The right to appear and be heard, or to intervene, in a suit brought by another to annul an order of the Commission, is to be distinguished from the right to bring such suit. Jud. Code, §§ 212, 213; 28 U.S.C. § 45 (a). P. 120.

59 F. (2d) 760, affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission.

Mr. Albert L. Vogl, with whom *Mr. Carle Whitehead* was on the brief, for appellants.

Parties having the necessary interest in the subject matter are not debarred from instituting and maintaining a suit to set aside an order of the Commission merely because they are unincorporated associations. *Baltimore & Ohio R. Co.* v. *United States,* 264 U.S. 258; *McLean Lumber Co.* v. *United States,* 237 Fed. 460; *Merchants Association* v. *United States,* 231 Fed. 292, 294; *Interstate Commerce Comm'n* v. *Diffenbaugh,* 222 U.S. 42; *Hubbard* v. *United States,* 278 Fed. 754.

The interest of appellants in the subject matter is sufficient to enable them to maintain this suit to set aside the order. *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U.S. 382; *Western Pac. C. R. Co.* v. *Southern Pacific Co.,* 284 U.S. 47; *Texas & Pac. R. Co.* v. *Gulf, C. & S. F. R. Co.,* 270 U.S. 266; *Baltimore & Ohio R. Co.* v. *United States,* 264 U.S. 258. Distinguishing: *Sprunt & Son* v. *United States,* 281 U.S. 249; *Pittsburgh & West Va. R. Co.* v. *United States,* 281 U.S. 479.

Mr. Nelson Thomas, with whom *Solicitor General Thacher* and *Messrs. Daniel W. Knowlton* and *Elmer B. Collins* were on the brief, for the United States et al., appellees.

Mr. Henry McAllister, with whom *Messrs. Elmer L. Brock* and *Erskine R. Myer* were on the brief, for Denver & Rio Grande Western R. Co. et al., appellees.

Mr. Justice Butler delivered the opinion of the Court.

Appellants brought this suit against the United States, the Interstate Commerce Commission and the Denver and Rio Grande Western Railroad Company to set aside an order of the Commission, made pursuant to 49 U.S.C., § 5 (2),[1] authorizing that company by stock purchase to acquire control of the Denver and Salt Lake Railway Company—called the Moffat Road. The latter, the Moffat Tunnel Improvement District, and the State of Colorado, by its Public Utilities Commission, intervened as parties defendant. The grounds of suit alleged in the complaint are that the order is not supported by evidence and that, because the examiner excluded what plaintiffs assert to be material evidence concerning the effect of such acquisition upon the public interest, the Commission failed to hold a hearing as required by the Act. They have now abandoned the first of these contentions. Copies of the report, 170 I.C.C. 4, and the supplemental report and order, 175 I.C.C. 542, together with a narrative

[1] "Whenever the Commission is of opinion after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

Added by § 407 of the Transportation Act of February 28, 1920, 41 Stat. 480. 49 U.S.C., § 5 (2).

of evidence before the Commission were attached to the complaint.

All the defendants prayed that the suit be dismissed. In substance they maintained that neither plaintiff is a legal entity or has capacity to maintain this suit on its own behalf or as representative of others, and that neither was a party in interest before the Commission or has any pecuniary, property or legal right or interest injuriously affected or threatened by the order.

Plaintiffs applied to the court, consisting of three judges, for a temporary injunction. The motions to dismiss were submitted at the same time. The court held that plaintiffs failed to show that they had a right to maintain the suit. But, conceiving that on review dismissal on that ground might be deemed not sufficient finally to dispose of the litigation, it also passed upon the merits. Decree was entered accordingly. 59 F. (2d) 760.

The Rio Grande was built between 1871 and 1890. Its main line between Denver and Ogden, 782 miles, follows a circuitous and difficult route through mountainous country. It extends from Denver, a mile above sea level, southerly 120 miles to Pueblo, where the elevation is 4,668 feet, thence westerly, northerly, southwesterly and northwesterly to Ogden. It rises to 10,240 feet over the Continental Divide at Tennessee Pass east of Dotsero and descends to a level of 4,583 at Grand Junction and 4,293 at Ogden. This line constitutes an important stretch for through transportation, via St. Louis and Chicago, between Pacific Coast points and the East. But as to traffic to or from the west originating at, destined to or passing through Denver, the Rio Grande is at a great disadvantage because of its circuitous route between Pueblo and Dotsero.

The Moffat Road was constructed between 1903 and 1913 and extends westerly from Denver 232 miles through

Grand and Routt counties to Craig in Moffat county, Colorado. Its promoters at first intended to construct the line more than 250 miles farther into and through Duchesne and Uintah counties, Utah, to reach Provo, Salt Lake or Ogden. But that became impossible, and it appears from the evidence that the company now has no such plans. Originally the line crossed the Continental Divide, rising from an elevation of 5,170 feet at Denver to 11,660 at Corona, and descending to 6,700 at Orestod, which is 41 miles northeasterly of Dotsero on the Rio Grande. The use of the line over the divide was so expensive and difficult that its abandonment was contemplated. Its continued operation was deemed of great importance to Denver and the northwestern part of Colorado. Accordingly the General Assembly of 1922 created the Moffat Tunnel Improvement District, including all of Denver and parts or all of the counties traversed by the road, and provided for the construction of a tunnel to be used as a transportation facility for railroads, power, water, telephone and telegraph. The cost was to be covered by an issue of bonds and, if necessary, by special assessments on real estate in the District, according to benefits determined by the Moffat Tunnel Commission, which was also created by the Act. The tunnel was constructed at a cost of $15,470,000. In January, 1926, the District made a lease to the Moffat covering all railroad uses, and the tunnel has since been used as a part of its line. The commission assessed the benefits against all real estate in the district at $45,000,000, of which 89% is upon property in Denver. The other parts of the District are mountainous and sparsely settled.

Construction of about 41 miles of line between Orestod on the Moffat and Dotsero on the Rio Grande, and use by the latter of the Moffat road through the tunnel, would reduce the distance between Denver and points on the Rio Grande west of Dotsero by 173 miles and avoid the heavy

grades over the divide. The Interstate Commerce Commission's order declaring that public convenience and necessity require the cut-off, and its order authorizing the Rio Grande to secure stock control of the Moffat, open the way for this development.[2]

The complaint alleges that the Moffat Tunnel League is an unincorporated voluntary association organized for the purpose of assisting in the development of commercial interests and adequate transportation facilities in Grand, Routt and Moffat counties. The evidence shows that it consists of nine unnamed persons who were selected, three by each of the county boards of commissioners, from persons designated by commercial and other clubs, none of which is identified. The complaint alleges that the Uintah Basin Railroad League is an unincorporated voluntary association organized to promote the interests of Uintah and Duchesne counties. The evidence tends to show that it was created shortly before the hearing to secure railroad facilities for these counties, and that it is made up of clubs, towns and irrigation companies. But none of these is named or in any manner identified. It is said that the League also includes the boards of these two counties. But no authorization by local law or official action on the part of either is disclosed.

These leagues are not corporations, quasi-corporations, or organized pursuant to or recognized by any law. Neither is a person in law and, unless authorized by statute, they have no capacity to sue. *Brown* v. *United States,* 276 U.S. 134, 141. *United Mine Workers* v. *Coronado Coal Co.,* 259 U.S. 344, 385. *St. Paul Typothetae* v. *Bookbinders' Union,* 94 Minn. 351, 357; 102 N.W. 725. *Pickett* v. *Walsh,* 192 Mass. 572, 589; 78 N.E. 753. *Kar-*

[2] See Colorado Sess. Laws, Ex. Sess., 1922, c. 2, p. 88. *Milheim* v. *Moffat Tunnel Dist.,* 72 Colo. 268; 211 Pac. 649; 262 U.S. 710. *Moffat Tunnel Imp. Dist.* v. *Denver & S. L. Ry. Co.,* 45 F. (2d) 715; certiorari denied, 283 U.S. 837.

ges Furniture Co. v. *Amalgamated Woodworkers Union,* 165 Ind. 421, 423; 75 N.E. 877. *Anti-Vice Committee* v. *Simon,* 151 La. 494; 91 So. 851. There is no federal statute that purports to give any unincorporated voluntary association standing to bring suit to set aside an order of the Commission. Every such suit must be brought against the United States. Urgent Deficiencies Act, 38 Stat. 219. 28 U.S.C., §§ 41 (28), 46, 48. And, save as authorized by the Congress, it may not be sued. The Act does not specify the classes of persons, natural or artificial, who may sue, or what shall constitute a cause of action for the setting aside of an order. But it does require that the petition shall set forth "the facts constituting petitioner's cause of action," and by other provisions shows that for failure so to do the suit shall be dismissed. *Id.,* § 45. Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. *Edward Hines Trustees* v. *United States,* 263 U.S. 143, 148. *Sprunt & Son* v. *United States,* 281 U.S. 249, 254. *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479, 486. Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. It is no more than a sentiment, such as may be entertained by members of the public in the territory west of Craig, that the improvement of transportation facilities authorized by the Commission will lessen the possibility of construction by a rival of the Rio Grande of an extension of the Moffat to Utah common points. Cf. *Interstate Commerce Commission* v. *Oregon-Washington Co.,* 288 U.S. 14.

Plaintiffs contend that they are empowered to sue by the first proviso of § 45a.[3] And they seek support from

[3] "The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, . . . : *Provided,* That the Interstate Commerce

the second proviso of that section. But these clauses do not purport to authorize those within their terms to bring suit. The first provides that a party in interest to proceedings before the Commission in which an order is made may appear and be heard in a suit involving the "validity of such order . . . and the interest of such party." The second declares that "communities" and others there mentioned, who are interested in the "controversy or question" in any suit brought by anyone under specified sections, may intervene at any time after institution of the suit. The right so to appear and be heard or so to intervene in a suit brought by another is to be distinguished from an authorization to bring suit. The case is utterly unlike *Chicago Junction Case,* 264 U.S. 258, 267; *Western Pacific Cal. R. Co.* v. *Southern Pacific Co.,* 284

Commission and any party or parties in interest to the proceedings 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 . . . : *Provided 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 provisions of the aforesaid sections 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 therein.

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States." §§ 212, 213, Judicial Code. 28 U.S.C., § 45 (a).

U.S. 47, and *Claiborne-Annapolis Ferry* v. *United States*, 285 U.S. 382. In each of these a carrier brought suit to set aside an order of the Commission. No question of its capacity to sue was involved. The order assailed directly affected its transportation business.

Here plaintiffs have neither capacity to sue nor legal interest or right affected by the order. *Affirmed.*

TRANSIT COMMISSION ET AL. *v.* UNITED STATES ET AL.

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

No. 535. Argued March 13, 14, 1933.—Decided April 10, 1933

1. By paragraphs 18–20 of § 1 of the Interstate Commerce Act (added by the Transportation Act, 1920), Congress intended to confer on the Interstate Commerce Commission plenary power to limit the expenditures of interstate carriers for construction or operation to lines of railroad reasonably necessary for the service of the public. P. 127.
2. The Act is to be construed so that this authority may be fully effective. P. 128.
3. Extension of the traffic of an interstate carrier beyond its own terminus over the line and to and from the terminus of another carrier, under a trackage agreement allowing it the use of these facilities jointly with their owner, is an "extension" of the railroad of the lessee or licensee and an "operation of a line of railroad" by it, within the meaning of § 1 (18) of the Interstate Commerce Act; and the making of such agreement and its terms, including the rental, are subject to the jurisdiction of the Interstate Commerce Commission to the exclusion of state authority. P. 128.
4. Where such joint use began before the date of the Transportation Act under an agreement approved by the State, and was continued after that date and after the agreement had expired, the arrangement, and the terms of a new agreement for it, necessarily fell within the provisions of § 1 (18). P. 129.

1 F.Supp. 595, affirmed.

APPEAL from a decree of the District Court of three judges denying a preliminary injunction and dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission.

Mr. George H. Stover, with whom *Messrs. John J. Bennett, Jr., Wendell P. Brown,* and *Philip Hodes* were on the brief, for appellants.

Section 1 (18) of the Interstate Commerce Act confers jurisdiction over the making, by an interstate carrier, of additions to its own line, through construction or acquisition, and over the operation of lines so added, but not over the mere use by such carrier jointly with the owner, of existing lines of another interstate carrier.

The intent of Congress was to guard against the unnecessary building or acquisition of additional lines, the construction or operation of which might strain the resources of the owner or weaken its competitors.

The statements by those in charge of the Transportation Act in Congress confirm the view that the purpose of § 1 (18) was merely, by restricting construction, to prevent the unnecessary duplication of existing facilities. H.Rep. No. 456, 66th Cong., 1st Sess.; 58 Cong. Rec., pp. 8309–8319; 59 Cong. Rec., pp. 748–750, 862–863.

The previous attitude of the Interstate Commerce Commission did not give rise to a practical construction which can be considered in construing the plain language of the statute.

The provisions of § 1 (18) are not retroactive; and, even assuming that they apply to operation under trackage rights, do not apply to operation begun ten years before the paragraph was enacted and carried on continuously ever since.

If the Commission did have jurisdiction, it would extend merely to the granting of the certificate; and the matter of controlling the contractual rights and obligations of the parties would remain with the State.

The court below erred in holding that the Long Island, in operating under the trackage rights, was operating a line of railroad, and was extending its line of railroad; and that jurisdiction was properly assumed by the Interstate Commerce Commission, because the Long Island, when running its trains under the proposed trackage agreement, would be preventing an abandonment.

Mr. John Lord O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston, Hammond E. Chaffetz, Daniel W. Knowlton,* and *H. L. Underwood* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. Alfred A. Gardner, with whom *Messrs. D. P. Williams* and *Joseph F. Keany* were on the brief, for the Pennsylvania and Long Island Railroad Companies, appellees.

Mr. Justice Butler delivered the opinion of the Court.

Each appellant sued the United States and the railroad companies to set aside an order made by the Interstate Commerce Commission under § 1 (18) of the Interstate Commerce Act. The Commission intervened. The order certifies that the present and future public convenience and necessity require that upon terms specified the Long Island continue to operate over tracks, and to share in the use of other facilities, of the Pennsylvania Tunnel and Terminal Railroad Company. Appellants applied for a temporary injunction, the cases were consolidated, the evidence before the Commission was introduced and, the cases having been submitted on such application and upon the merits, the court made findings of fact, stated its conclusions of law and entered a decree that the preliminary injunction be denied and that the bills be dismissed. 1 F. Supp. 595.

Appellants contend that the use by the Long Island of the terminal company's tracks and facilities is not within the jurisdiction of the Interstate Commerce Commission but is governed by § 148 of the New York Railroad Law. That section provides that, subject to the permission and approval of the public service commission (the transit commission is its successor), any corporation owning or operating a railroad route may contract with any other such corporation for the use of their respective roads. And appellants maintain that the Interstate Commerce Commission was not authorized to issue the certificate: that § 1 (18) does not apply to railroad operation under trackage rights; that, if it does, it is not retroactive and does not apply to a use which began before the enactment, and that the Commission is without power, to the exclusion of the state authorities, to pass on or prescribe the terms and conditions of the agreement made by the carriers to govern such operation.

The Pennsylvania railway station and yards in midtown Manhattan constitute the eastern terminus of that system. In addition to such station and yards the terminal properties include four single-track tunnels extending easterly under the city and East river, the Sunnyside yard in Queens, and connecting lines. The Long Island Railroad connects with that yard. The legal title of the terminal properties is in the terminal company. The Pennsylvania Railroad Company is its lessee and owns all its stock and practically all that of the Long Island.

The station was opened for use in 1910, and in September of that year the Long Island commenced to operate its trains over the terminal lines of railroad through the tunnels, to and from the station and yards in Manhattan. This operation was pursuant to an agreement made by the carriers for which they obtained the approval of the first district state public service commission. The rental payable by the Long Island was, in

1920 and again in 1922, increased, with the approval of the public service commission, and, after 1921, of its successor, the transit commission. In 1923 the carriers sought approval of an amendment of the agreement that would involve a further increase. The application was denied. In March, 1925, the carriers submitted another agreement. After modification to lessen the proposed rental, the transit commission, July 28, 1925, approved. In November the carriers made application for approval of a higher charge. In December the commission disallowed it but granted extension to January 1, 1927, of the agreement which it had approved July 28, 1925.

In 1929 the carriers, invoking § 1 (18), applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing the Long Island to continue operation at the rental rejected by the transit commission in December, 1925. The Interstate Commerce Commission held that it had jurisdiction but denied the application without prejudice upon the ground that the agreement imposed unreasonable terms on the Long Island. 162 I.C.C. 218. December 27, 1930, the carriers submitted a proposed agreement somewhat more favorable to the Long Island. February 8, 1932, the Commission approved and, subject to conditions specified, granted the certificate. 180 I.C.C. 439. The carriers accepted the prescribed terms. In addition to the facts above stated, the court found that between January 1, 1927, and the consummation of the agreement pursuant to the certificate, the Long Island was a tenant at will and that the carriers continued during that period to operate under the conditions approved July 28, 1925.

The Commission found, and it is conceded, that public convenience and necessity require that the Long Island continue to use the lines and other facilities covered by the trackage agreement. It declared that the reasonableness of a joint facility rental is a matter of public inter-

est, as well as one affecting the operations of the carriers, and should be considered in deciding upon public convenience and necessity; that the financial as well as the transportation features of the carriers' application, might be dealt with under the authority conferred by § 1 (18); and that in cases of extensions of operations under trackage rights, the cost is not less important than in cases of extension by construction, acquisition, or lease. Appellants raise no question as to the sufficiency of the evidence to sustain the order or as to the reasonableness of the rentals or other terms of the agreement.

The district court found that operation under trackage agreements over existing lines of another carrier may affect interstate commerce; that an extension, whether arising out of such agreements or otherwise, has a vital effect on such commerce and that the same dangers that are to be guarded against when a railroad extends its line for its own use, or leases it for the sole use of another, exist where it agrees to a joint use by itself and another road. And upon a consideration of the language of § 1 (18) in the light of facts found and of settled governmental policies in respect of the regulation of interstate transportation, the court concluded that the case is within the statute; that the federal commission had jurisdiction over the trackage agreements and that § 148 of the New York Railroad Law no longer applies.

Section 1 (18) was added by Transportation Act, 1920. It provides: "No carrier . . . shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended 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, or operation, or construction and operation, of such additional or extended line of railroad . . ." The paragraph also declares that no carrier shall abandon the operation of any portion of a line of railroad until it obtains the Commission's certificate that public convenience and necessity permit it. Paragraph (20) authorizes the Commission to impose such terms and conditions as in its judgment the public convenience and necessity may require, and provides that " without securing approval other than such certificate " the carrier may " proceed with the construction, operation, or abandonment covered thereby."

These provisions do not specifically mention trackage agreements providing for joint use of railroad lines, tracks or other facilities by two or more carriers. The question is whether the general language of paragraph (18) includes the arrangement under consideration. Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. *Minnesota Rate Cases,* 230 U.S. 352, 433. And it was everywhere known that enormous sums had been expended by interstate railroad carriers for the construction and operation of lines that were not needed or likely to be needed. Such investments had brought financial ruin to some and had made doubtful the power of many to continue operation in other than flush times. Need for effective regulation in this field had become urgent; and undoubtedly the Congress, by the provisions above referred to, intended to

confer upon the Commission plenary power to limit interstate carriers' expenditures for construction or operation to lines of railroad reasonably necessary for the service of the public.

So far as concerns the purpose to be attained by this legislation, there is no room for a distinction between unjustifiable expenditures for the construction or operation of new mileage, on the one hand, and inadequate rentals or extortionate exactions under trackage agreements, on the other. The reasons for the exertion of federal authority, to the exclusion of state regulation, apply with like force to both. The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. *Wisconsin R. R. Comm'n* v. *C., B. & Q. R. Co.*, 257 U.S. 563, 585, 589–590. *New England Divisions Case*, 261 U.S. 184, 189. *Railroad Comm'n* v. *Southern Pac. Co.*, 264 U.S. 331, 343. *Texas & Pac. Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U.S. 266, 277. *Colorado* v. *United States*, 271 U.S. 153, 163. *Alabama & V. Ry.* v. *Jackson & E. Ry.*, 271 U.S. 244, 249.

The words employed are broad enough to include the Long Island operations under the trackage agreement. The phrase "to operate any line of railroad" seems quite sufficient to include such use. There is nothing to suggest that the "operation" for which the commission's approval is required may not be by other than the owner or lessee of the line or that it is to be limited to exclusive use. For more than a score of years the Long Island has used these lines for the passage of frequent trains carrying an enormous and ever increasing traffic between the terminus of its owned railroad at Sunnyside and the Pennsylvania station. It is no stretch to say that it has been operating such lines or that they constitute an "exten-

sion" of its own railroad. The use is a joint one but it is nevertheless "operation." And the phrase, "engage in transportation . . . by means of such additional or extended line of railroad" reasonably may be deemed to include a line owned by another carrier. The Long Island's use of the Pennsylvania lines covered by the agreement serves the same purpose as would the acquisition of such lines by purchase or the construction by it of a like extension into Manhattan. The provision as to abandonment is also significant, for if the Long Island were to cease to use the lines covered by the agreement, it reasonably might be held to have abandoned a "portion of a line of railroad." Any interpretation excluding the lines of railroad in question would conflict with implications of our decisions. *Alabama & V. Ry.* v. *Jackson & E. Ry., supra,* 250. *Cleveland, C., C. & St. L. Ry.* v. *United States,* 275 U.S. 404, 409. The provisions of paragraph (18) undoubtedly apply to the operations under trackage agreements such as that under consideration.

There is no merit in appellants' contention that, because the joint use commenced prior to the Transportation Act and has since been continuous, the provisions of paragraph (18) do not apply. The extended term of the contract approved by the state commission expired January 1, 1927. The agreement submitted to the Interstate Commerce Commission for approval was made long after such expiration and when there was no agreement for continuing joint operation or use of the lines and other facilities. On the taking effect of the Transportation Act the state commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount and, in respect of the operation and agreement under consideration, it is necessarily exclusive.

Affirmed.

PUBLIC SERVICE COMMISSION OF MONTANA ET AL. *v.* GREAT NORTHERN UTILITIES CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

No. 627. Argued March 23, 24, 1933.—Decided April 10, 1933

1. A specific rate fixed by a municipality on gas sold by a public service corporation is not objectionable under the Fourteenth Amendment because it prevents the corporation from cutting its rates below necessary cost in an effort to do away with ruinous competition. P. 134.
2. An allegation merely asserting in general language that rates are confiscatory is not sufficient to invoke constitutional protection. The facts relied on must be specifically set forth and from them it must clearly appear that the rates would necessarily deny to plaintiff just compensation and deprive it of its property without due process of law. *Aetna Insurance Co.* v. *Hyde*, 275 U.S. 440, 447. P. 136.

1 F.Supp. 328, reversed.

APPEAL from a final decree of a District Court of three judges, holding an order fixing rates on gas invalid, and making permanent an interlocutory injunction. See also 52 F. (2d) 802; 285 U.S. 524; 88 Mont. 180.

Mr. Francis A. Silver, with whom *Mr. Raymond T. Nagle,* Attorney General of Montana, was on the brief, for appellants.

Messrs. M. S. Gunn and *E. G. Toomey* for appellee.

Rates which, because of competition, will deprive a utility of its patronage and may ultimately require it to abandon the field to a competitor, are as objectionable as rates which will not furnish a fair return where there is no competition. The power of regulation does not warrant confiscation, whether resulting from rates unreasonably low or from rates which will deprive the utility

of its patronage. 10 C.J., p. 420; *Interstate Commerce Comm'n* v. *Chicago G. W. Ry. Co.,* 209 U.S. 108, 119.

The right to charge any rate not discriminatory within the limits of a reasonable rate is a right guaranteed by the due process clause of the Fourteenth Amendment. Cooley, Const. Lim., 7th ed., p. 124; *Munn* v. *Illinois,* 94 U.S. 113; *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 564, 565; *Interstate Commerce Comm'n* v. *Chicago G. W. Ry. Co., supra; Budd* v. *New York,* 143 U.S. 517; *Dow* v. *Beidelman,* 125 U.S. 680; *Cotting* v. *Goddard,* 183 U.S. 79; *Lough* v. *Outerbridge,* 143 N.Y. 271; *Fitchburg R. Co.* v. *Gage,* 12 Gray 393; *Johnson* v. *Pensacola R. Co.,* 16 Fla. 623.

Congress can authorize the Interstate Commerce Commission to fix minimum rates, because the commerce clause is a grant of power in the Constitution itself. *Brushaber* v. *Union Pacific R. Co.,* 240 U.S. 1, 24; *Prout* v. *Starr,* 188 U.S. 537, 543; *Billings* v. *United States,* 232 U.S. 261, 282; *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211, 229; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 324. But what the States may do without violating due process involves a consideration of the common law. *Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522.

The order deprives the plaintiff of the liberty of contract and takes its property without due process of law, in violation of the Fourteenth Amendment. *Lochner* v. *New York,* 198 U.S. 45; *Tyson & Bro.* v. *Banton,* 273 U.S. 418, 429.

Mr. Justice Butler delivered the opinion of the Court.

By this appeal we are called on to decide whether an order of the commission prescribing specific, as distinguished from maximum, rates to be charged for natural gas furnished by a public utility, is repugnant to the due process clause of the Fourteenth Amendment.

The appellee, authorized by a non-exclusive franchise ordinance, has been engaged since 1923 in furnishing natural gas to consumers in Shelby, a Montana city having a population of about 2,000. It has an adequate distribution system. September 21, 1927, the commission instituted an inquiry as to the reasonableness of its rates. The schedule then in force specified for each customer a base rate of 60 cents per thousand cubic feet for the first five thousand and, by steps, lower rates based on monthly consumption.[1] Appellee filed a schedule, effective November 25, 1927, reducing the base rate to 50 cents. The commission approved tentatively and continued investigation.

The Citizens Gas Company, similarly authorized, installed a distribution system and, in October, 1928, commenced furnishing natural gas to consumers in Shelby. Its schedule, specifying a base rate of 35 cents, was approved by the commission. Within a brief period many of appellee's customers left it, and have since obtained their gas from the other company. In November appellee filed and, though the commission did not approve, put in force a schedule specifying a base rate of 20 cents. The commission ordered it to submit evidence as to the reasonableness of such rates. Appellee did not support them as adequate or compensatory, but insisted that under competitive conditions then existing they were justified. And it declared that should the Citizens company meet them it would propose a further reduction.

The commission, January 22, 1929, found the 20 cent schedule too low to yield enough to cover reasonable operating expenses including depreciation; that such rates would tend to imperil or impair appellee's ability dependably to serve; held such schedule contrary to the public

[1] All schedules referred to in the opinion similarly specify step rates and are conveniently identified by the highest or base rate.

interest; condemned the 50 cent schedule as unreasonable, and prescribed a base rate of 35 cents, being precisely the same as that filed by the Citizens company and approved by the commission. Appellee refused to charge the rates so ordered, and sued to enjoin the enforcement of the order upon the ground that the commission was not empowered by statute to prescribe specific rates and that the order violated the state constitution and the due process clause of the Fourteenth Amendment. The trial court gave appellee judgment on the pleadings. July 29, 1930, the supreme court sustained the order, reversed the judgment and remanded the case for further proceedings. 88 Mont. 180, 232; 293 Pac. 294.

The Citizens company had filed, January, 1930, and without the commission's approval put in force a schedule naming as a base rate 23 cents but subject to a reduction of 3 cents for prompt payment. The record shows that, notwithstanding appellee's reduction to the base rate of 20 cents and a further reduction, September 1, 1931, to a flat rate of 15 cents, its sales of gas decreased from 129 million cubic feet in 1927 to 106 million in 1928, to 73 in 1929, to 67 in 1930, to 58 in 1931. The sales of the Citizens company have correspondingly increased. During the first seven months of 1932, the latest period for which the figures are given, appellee sold less than 40 million cubic feet and the Citizens company sold over 67 million.

December 22, 1930, appellee brought this suit and dismissed the one in the state court. The district court granted a temporary injunction against the enforcement of the order on the ground that, as the utility necessarily lowered its rates for self-preservation, the order prescribing higher rates was unreasonable and repugnant to the due process clause of the Fourteenth Amendment. In a concurring opinion one of the judges construed the complaint to charge confiscation, and maintained that the

order shows that the commission deliberately disregarded the rule entitling public utilities to a fair return and that this, without further evidence, was sufficient ground for temporary injunction. 52 F. (2d) 802, 805. The commission appealed from the interlocutory decree and this court affirmed. 285 U.S. 524. Upon the final hearing, on evidence taken before an examiner, the district court found that the community is insufficient to support, at rates affording fair return, the competing systems; that the prescribed rates deprive appellee of its right of competition and would fail to produce legitimate operating expenses, taxes, depreciation and a fair return upon the value of appellee's property. As its conclusions of law, the court declared the order invalid and that the interlocutory injunction should be made permanent, 1 F. Supp. 328. It so decreed.

The rights conferred upon appellee by the authorizing ordinance are subject not only to the proper exertion of power of the State to regulate its services and rates, but also to authority of the city to grant to others the privilege similarly to serve. The city was free to admit other purveyors of gas. *Madera Water Works* v. *Madera,* 228 U.S. 454. *Piedmont Power Co.* v. *Graham,* 253 U.S. 193. *Springfield Gas Co.* v. *Springfield,* 257 U.S. 66, 70. The appellee does not complain that the rates imposed upon it by the order differ from those which have been established and are binding on its competitor. The gravamen of its complaint is that the enforcement of the order will deprive it of the "right of competition in rates essential to protection and preservation of its property and business," and of the "right to charge rates concededly less than reasonable rates." The demand for gas in the community served is not sufficient to require both systems, and there is no suggestion that it is likely to become great enough to justify the expenditures made for them. The

facts disclosed by the record compel the conclusion that, if competition shall continue in the future as in the past, appellee will not be able upon any rates within constitutional protection against reduction to earn a reasonable return upon the value of its property employed in the public service. The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U.S. 362, 410. *Smyth* v. *Ames,* 169 U.S. 466, 546. *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19, 41. *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U.S. 340, 347. *Minnesota Rate Cases,* 230 U.S. 352, 434. *Board of Comm'rs* v. *N. Y. Tel. Co.,* 271 U.S. 23, 31. But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used. The loss of, or the failure to obtain, patronage, due to competition, does not justify the imposition of charges that are exorbitant and unjust to the public. The clause of the Constitution here invoked does not protect public utilities against such business hazards. *Reagan* v. *Farmers' Loan & Trust Co., supra,* 412. *Covington & L. Turnpike Co.* v. *Sandford,* 164 U.S. 578, 596. *Smyth* v. *Ames, supra,* 544–545. *San Diego Land & Town Co.* v. *Jasper,* 189 U.S. 439, 446. *Darnell* v. *Edwards,* 244 U.S. 564, 569–570. *Aetna Insurance Co.* v. *Hyde,* 275 U.S. 440, 447, 448.

But appellee, having undertaken to serve under conditions permitting competition, now insists that it has a constitutional right by unrestrained cutting of rates to destroy the competitor. And for that purpose it has made reductions from the 60 cent schedule in force until shortly before the Citizens company entered the field to the flat rate of 15 cents, which yields less than the necessary cost of the service. The commission found that the

rates specified in the 20 cent schedule are too low, unreasonable, liable to impair the service, and contrary to the public interest. The decision of the state supreme court is to the same effect. 88 Mont. 180, 218; 293 Pac. 294. The facts disclosed by the record are not sufficient to show that the exertion by the commission of its power to prescribe specific rates was arbitrary or an infringement of any constitutional right of the appellee. See *Stephenson* v. *Binford,* 287 U.S. 251, 273 *et seq. United States* v. *Illinois Central R. Co.,* 263 U.S. 515, 525. *Mapleton* v. *Iowa Public Service Co.,* 209 Ia. 400, 404, 407; 223 N.W. 476. *Economic Gas Co.* v. *Los Angeles,* 168 Cal. 448, 450; 143 Pac. 717. *Community Natural Gas Co.* v. *Natural Gas & Fuel Co.,* 34 S.W. (2d) 900, 902. *Farmersville* v. *Texas-Louisiana Power Co.,* 55 S.W. (2d) 195, 200.

The appellee contends that the rates prescribed by the order are so unreasonably low as to deprive it of just compensation. The appellants maintain that no such question is presented by the record. The complaint was grounded upon the claim, not that the rates were too low, but that the order prevented appellee from charging lower ones. It prayed judgment that it be allowed to charge less than the rates prescribed in the order. After the evidence was taken, appellee proposed an amendment. It merely alleged that the rates prescribed "are not sufficient to furnish plaintiff a fair or any return on the value of its gas plant or system and such rates, if made effective, would confiscate and deprive this plaintiff of its property" without due process of law. Appellee here admitted that its purpose in asserting the belated claim that the rates specified in the order are too low was not that it might collect more for its services but that it might continue, once the order was set aside, to serve at a loss and so if possible force the other company out of the field. It is a well-established rule that an allegation merely asserting in general language that rates are con-

fiscatory is not sufficient and that, in order to invoke constitutional protection, the facts relied on must be specifically set forth and from them it must clearly appear that the rates would necessarily deny to plaintiff just compensation and deprive it of its property without due process of law. *Aetna Insurance Co.* v. *Hyde, supra,* 447. This allegation is not sufficient.

Reversed.

UNITED STATES v. FLORES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 567. Argued March 14, 1933.—Decided April 10, 1933

1. The clause of the Constitution, Art. I, § 8, specifically granting to Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," and the general provision of Art. III, § 2, extending the judicial power "to all cases of admiralty and maritime jurisdiction," are the results of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the National Government. P. 146.
2. In view of the history of the two clauses and the manner of their adoption, the grant of power to define and punish piracies and felonies on the high seas can not be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by Art. III, § 2. P. 149.
3. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the States and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution, including the power to define and punish crimes, of less gravity than felonies, committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters. P. 149.
4. The jurisdiction over admiralty and maritime cases extends to crimes committed on vessels of the United States while in navigable waters within the territorial jurisdiction of foreign sovereigns. P. 150.

5. The jurisdiction is not affected by the fact that the vessel is on a river at a place remote from the sea where the water is not salt or tidal. P. 153.
6. Section 272 of the Criminal Code, making murder and other offenses punishable "when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, on board any vessel belonging in whole or in part to the United States" or any of its citizens, etc., is broad enough to include crimes in the territorial waters of foreign sovereignties. Pp. 145, 155.
7. Congress, by incorporating in the statute the very language of the constitutional grant of power, has made its exercise of the power co-extensive with the grant. P. 155.
8. The general rule that criminal statutes of the United States are not to be given extraterritorial effect, is inapplicable to our merchant vessels. P. 155.
9. A merchant ship, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty. P. 155.
10. For some purposes, the jurisdiction to punish crimes committed on a foreign vessel in territorial waters is concurrent in the territorial sovereign and the sovereign of the vessel's flag. P. 157.
11. In the absence of any controlling treaty provision, and of any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law. P. 159.

3 F.Supp. 134, reversed.

Appeal from a judgment sustaining a demurrer to an indictment, which charged the appellee, an American citizen, with having murdered another American citizen aboard an American ship in foreign territorial waters. The case was decided below on the authority of *United States* v. *Mathues,* 21 F. (2d) 533; 27 *id.* 518.

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

Section 2 of Art. III, extending the judicial power to all cases of admiralty and maritime jurisdiction, dealt with

the powers retained by the States under the Articles of Confederation over matters within the admiralty and maritime jurisdiction; and clause 10, § 8, of Art. I dealt with the power granted to Congress under the Articles of Confederation to define and punish piracies and felonies on the high seas and offenses against the Law of Nations. Although Art. III, § 2, contains no express grant of legislative power over the substantive maritime law, the provision was regarded from the beginning as implicitly investing such power in the United States. This provision is therefore to be read as if it contained an express grant to Congress of legislative power over all matters within the admiralty and maritime jurisdiction. *Panama R. Co.* v. *Johnson,* 264 U.S. 375, 386–388; *United States* v. *Bevans,* 3 Wheat. 336, 389; *Crowell* v. *Benson,* 285 U.S. 22, 39.

Considering the source and purpose of these two clauses of the Constitution, they must be regarded as complementary and as inclusive of all powers of sovereignty over maritime matters whether exercised by the Congress or by the States under the Articles of Confederation. To construe the express grant of power to define and punish piracies and felonies committed on the high seas as an exclusive definition of the power of Congress to punish offenses within the admiralty and maritime jurisdiction would at once bring the two clauses into irreconcilable conflict, with the result that a power inherent in sovereignty would be found to reside neither in the States nor in the United States.

The offense charged in the indictment was within the maritime and admiralty jurisdiction as that jurisdiction was understood when the Constitution was framed and adopted. *De Lovio* v. *Boit,* 2 Gall. 398, 459, 7 Fed. Cas. 418, 438.

The admiralty from the highest antiquity has exercised a very extensive criminal jurisdiction. 27 Henry VIII,

c. 4; 28 *id.*, c. 15; Holdsworth, History of English Law, 4th ed., I, 550–552; C. M. Andrews, Guide to Materials for American History in Pub. Records Office Great Britain, Vol. 2, 305, 306; Hale, Pleas of the Crown, 17; 15 Richard II, c. 3; Benedict on Admiralty, 5th ed., 743, 748, 774; *King* v. *Bruce,* 2 Leach, Crown Cases, 353; Stephen, History of Criminal Law, II, 16–23; Brooks, Trial of Captain Kidd, 40, 57; *Queen* v. *Carr,* L.R., 10 Q.B.D. 76; *Queen* v. *Anderson,* L.R. 1 Crown Cases Reserved 161.

In the Colonies, as in England, offenses committed on the high seas or on streams within the ebb and flow of the tides were considered to be within the admiralty and maritime jurisdiction. 28 Henry VIII, c. 15; 11 and 12 Will. 3, c. 7; 2 Stephen, History of Criminal Law, 20. So far as we have been able to discover, only petty maritime offenses were tried before the Colonial Vice-Admiralty Courts. Serious offenses, such as piracy, murder, and other felonies were tried before special Admiralty Courts in the Colonies or were sent to England for trial by Commissioners appointed under the Statute of Henry VIII. Publications of Colonial Society of Massachusetts, Vol. II, 237, 288; Benedict on Admiralty, 5th ed., 792–811; Record Book of Maryland Court of Vice-Admiralty, in Manuscripts Division, Library of Congress, fols. 74, 82; Rhode Island, Letters from Governors in America, 1756, P.R.O.:C.O. 5: 17, p. 639; Jameson, Privateering and Piracy in the Colonial Period, pp. 143, note 2; 278, note 1; 286, note 1; 577–580; 3 Hening 176. See Hough's Cases in Vice-Admiralty and Admiralty: *King* v. *Booth* (1730), p. 12; *King* v. *Burgess* (1748), p. 56; *King* v. *White* (1754), p. 81.

Both Congress and this Court have recognized that criminal offenses, even when committed within the territorial waters of a foreign sovereignty, are within the maritime jurisdiction of the United States. Act of Apr. 30, 1790, c. 9, § 8, 1 Stat. 112, 113; *United States* v. *Bevans,* 3

Wheat. 336, 389; *United States* v. *Wiltberger,* 5 Wheat. 76, 104; Act of Mar. 3, 1825, c. 65, §§ 4, 5, 4 Stat. 115; Gale & Seaton's Register of Debates, vol. 1, cols. 154, 158; Rev. Stats., §§ 5339, 5346; *Wynne* v. *United States,* 217 U.S. 234; *United States* v. *Rodgers,* 150 U.S. 249.

The exercise by Congress of its admiralty and maritime jurisdiction over offenses committed on board American vessels lying in foreign ports is in accord with the Law of Nations. *United States* v. *Rodgers,* 150 U.S. 249; *Queen* v. *Anderson,* L.R. 1 Crown Cases Reserved 161; *Queen* v. *Carr and Wilson,* 10 Q.B.D. 76; Fiore's Internat. L. Codified (trans. by E. M. Borchard), pp. 192, 193; 6th English ed., Wheaton's Internat. L., I, 245; Hall, Internat. L. 8th ed., p. 258; Moore, Internat. Law Digest, II, p. 297.

Mr. John V. Lovitt for appellee.

The criminal jurisdiction of the United States is based upon the territorial principle. *United States* v. *Bowman,* 260 U.S. 94, 98; Moore, Dig. Internat. L., vol. 2, p. 263.

A vessel is part of the territory of the nation whose flag she flies only in a metaphoric sense. Wharton, Internat. L., 2d ed., vol. 1, § 35a; Woolsey, § 54; Field, Code, § 309. Distinguishing: *King* v. *Bruce,* 2 Leach 353; *Queen* v. *Carr,* L.R., 10 Q.B.D. 76; *Queen* v. *Anderson,* L.R. 1 Crown Cases Reserved 161; *Crowell* v. *Benson,* 285 U.S. 241; and *Panama R. Co.* v. *Johnson,* 264 U.S. 375. See Jessup, Law of Territorial Waters, p. 119; *Wildenhus's Case,* 120 U.S. 1.

The prior legislation now embodied in § 272 of the Criminal Code and the interpretation of these statutes by the Court show that Congress did not intend to depart from the territorial principle and punish murder committed within the territorial jurisdiction of another sovereign. *De Lovio* v. *Boit,* 7 Fed. Cas. 418; *United States* v. *Coombs,* 12 Pet. 70; *United States* v. *McGill,* 4 Dall. 424, 427; *United States* v. *Bevans,* 3 Wheat. 336, 388;

United States v. *Wiltberger,* 5 Wheat. 76; *Wynne* v. *United States,* 217 U.S. 234, 241, 244. Distinguishing: *United States* v. *Rodgers,* 150 U.S. 249, 258, 266; *U. S. ex rel. Maro* v. *Mathues,* 21 F. (2d) 533, 534; *Mathues* v. *U. S. ex rel. Maro,* 27 F. (2d) 518.

We are here dealing with the criminal jurisdiction of the district courts which is entirely distinct from the admiralty courts' jurisdiction over contracts and torts and other special cases. Cf. *Waring* v. *Clarke,* 5 How. 441, 454, 464; *Genesee Chief* v. *Fitzhugh,* 12 How. 443, 454.

If we assume that all navigable waters are comprehended by the phrase "admiralty and maritime jurisdiction" in the Criminal Code, the jurisdiction will be absurdly extended. Such a construction would cover a crime committed on a foreign ship by a foreigner against another foreigner in any navigable river on the globe (excepting only waters within the jurisdiction of a State of the United States.) Furthermore, if this were so, the third clause of the section referring to crimes committed on an American vessel would have no meaning since the case would be covered by the second clause.

Obviously, the general words of the statute must be limited to the jurisdiction of the sovereign and the intended objects of the legislation. *United States* v. *Palmer,* 3 Wheat. 610.

If in the statute of 1825 the general provision was to operate within a foreign jurisdiction, there would be no need for the limited jurisdiction over certain offenses committed on American ships covered by § 5, which section by its very terms applies to foreign ports. The conclusion therefore seems irresistible that the general provision did not contemplate a foreign port and since the general phraseology is carried into the present Act, its construction must be the same as it was in prior Acts.

The provision respecting crimes on American vessels in the Revised Statutes and in the Criminal Code is like-

wise generalized and not limited to the personnel of the ship or its internal regulation. Congress must have been aware that under previous legislation the only crimes in a foreign port made punishable were those under § 5 of the Act of 1825. Can it be said that by dropping the express language extending the jurisdiction to a foreign port, Congress intended to assert greater jurisdiction in such a port? Failure to state expressly an extraterritorial operation of a criminal statute negatives the purpose of Congress in this regard. *United States* v. *Bowman,* 260 U.S. 94, 98.

Every principle which takes out of the operation of the Acts of Congress crimes committed by Americans on foreign vessels on the high seas, applies with greater force to offenses committed within the acknowledged and fixed territorial limits of a foreign State, because it is dependent entirely on the national character of the place of the offense, and can not, by any sound reasoning, reach that which is territorial by implication only, and yet be excluded from that which is actual territory.

It is submitted that at most, Congress, by the broad phraseology of the Criminal Code covering offenses committed on American ships, intended no enlargement of the jurisdiction given by § 5 of the Act of March 3, 1825, c. 65, in foreign ports. Such jurisdiction would not cover the case at bar because it is not alleged in the indictment that the defendant and the deceased were members of the crew or passengers. Only such a construction would bring the statute into conformity with international law and the territorial principle of criminal jurisdiction as applied by the federal courts.

Criminal statutes must be construed strictly and the phrase "admiralty and maritime jurisdiction of the United States" must be construed as including those places where that jurisdiction is complete—where, as a matter of absolute right, the executive officers of the

Government can enforce the laws and make arrests—where no other sovereign has jurisdiction. This applies externally only to the " high seas " or waters which are in their nature high seas over which no one nation can exercise exclusive dominion. 7 Op.A.G. 721.

The grant of legislative power to Congress to define and punish felonies committed on waters rests on Art. I, § 8, cl. 10, of the Constitution and the Criminal Code must be construed with reference to the constitutional grant.

Congress is given no grant of legislative power over the substantive maritime law. The grant of jurisdiction of admiralty and maritime cases occurs in an entirely separate article and it is submitted that the concluding paragraph of Art. I, giving Congress the right " to make all laws which shall be necessary and proper," etc. has no direct application to § 2 of Art. III, since this section merely transferred the existing admiralty jurisdiction residing in the States under the Articles of Confederation to the Federal Government. "Authority of Congress under this clause of the Constitution does not extend to punishing offenses committed above and beyond high water mark." *United States* v. *Coombs,* 12 Pet. 72, 78; *United States* v. *McGill,* 4 Dall. 424; *U. S. ex rel. Maro* v. *Mathues,* 21 F. (2d) 533; *Mathues* v. *U. S. ex rel. Maro,* 27 F. (2d) 518.

Where a power is given in express terms, Congress can not ignore the express power and infer the same power without limitation from some other provision in which the power is not expressed. *People* v. *Tyler,* 7 Mich. 162.

Mr. Justice Stone delivered the opinion of the Court.

By indictment found in the District Court for Eastern Pennsylvania, it was charged that appellee, a citizen of the United States, murdered another citizen of the United States upon the S.S. " Padnsay," an American vessel,

while at anchor in the Port of Matadi, in the Belgian Congo, a place subject to the sovereignty of the Kingdom of Belgium, and that appellee, after the commission of the crime, was first brought into the Port of Philadelphia, a place within the territorial jurisdiction of the District Court. By stipulation it was conceded, as though stated in a bill of particulars, that the "Padnsay," at the time of the offense charged, was unloading, being attached to the shore by cables, at a point two hundred and fifty miles inland from the mouth of the Congo River.

The District Court, following its earlier decision in *United States ex rel. Maro* v. *Mathues*, 21 F. (2d) 533, affirmed, 27 F. (2d) 518, sustained a demurrer to the indictment and discharged the prisoner on the ground that the court was without jurisdiction to try the offense charged. The case comes here by direct appeal under the Act of March 2, 1907, c. 2564, 34 Stat. 1264, 18 U.S.C. § 682 and § 238 of the Judicial Code, as amended by Act of February 13, 1925, 28 U.S.C. § 345, the court below certifying that its decision was founded upon its construction of § 272 of the Criminal Code, 18 U.S.C. § 451.

Sections 273 and 275 of the Criminal Code, 18 U.S.C. §§ 452, 454, define murder and fix its punishment. Section 272,[1] upon the construction of which the court below rested its decision, makes punishable offenses defined by other sections of the Criminal Code, among other cases,

[1] § 272. "The crimes and offenses defined in this chapter shall be punished as herein prescribed:

"First: When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof. . . ."

"when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state, on board any vessel belonging in whole or in part to the United States" or any of its nationals. And by § 41 of the Judicial Code, 28 U.S.C. § 102, venue to try offenses "committed upon the high seas or elsewhere out of the jurisdiction of any particular State or district," is "in the district where the offender is found or into which he is first brought." As the offense charged here was committed on board a vessel lying outside the territorial jurisdiction of a state, see *Wynne* v. *United States,* 217 U.S. 234; *United States* v. *Rodgers,* 150 U.S. 249, 265, and within that of a foreign sovereignty, the court below was without jurisdiction to try and punish the offense unless it was within the admiralty and maritime jurisdiction of the United States.

Two questions are presented on this appeal, first, whether the extension of the judicial power of the federal government "to all cases of admiralty and maritime jurisdiction," by Art. III, § 2 of the Constitution confers on Congress power to define and punish offenses perpetrated by a citizen of the United States on board one of its merchant vessels lying in navigable waters within the territorial limits of another sovereignty; and second, whether Congress has exercised that power by the enactment of § 272 of the Criminal Code under which the indictment was found.

The court below thought, as appellee argues, that as § 8 of Art. I of the Constitution specifically granted to Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," and "to make rules concerning captures on land and water," that provision must be regarded as a limitation on the general provision of § 2 of Art. III, that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction"; that as the specific

grant of power to punish offenses outside the territorial limits of the United States was thus restricted to offenses occurring on the high seas, the more general grant could not be resorted to as extending either the legislative or judicial power over offenses committed on vessels outside the territorial limits of the United States and not on the high seas.

Before the adoption of the Constitution, jurisdiction in admiralty and maritime cases was distributed between the Confederation and the individual States. Article IX of the Articles of Confederation provided that "the United States, in Congress assembled, shall have the sole and exclusive right and power . . . of establishing rules for deciding in all cases what captures on land or water shall be legal, . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures . . ." So much of the general admiralty and maritime jurisdiction as was not included in this grant of power remained with the States. The powers thus granted were in substance the same as those later conferred on the national government by Article I, § 8 of the Federal Constitution. This section was adopted to carry out a resolution of the Convention "that the national legislature ought to possess the legislative rights vested in Congress by the Confederation." Its primary purpose and effect were to transfer to the newly organized government the powers in admiralty matters previously vested in the Confederation.[2]

[2] On July 16, 1787, the Convention agreed *nem. con.* "that the national legislature ought to possess the legislative rights vested in Congress by the Confederation." This proposal was committed to the Committee of Detail in resolution VI, of July 26th. The Committee, on August 6th in Article VII of their draft, recommended a provision, based on the articles of Confederation, which, as formulated by the Convention on August 17th, and amended in matters not now

A proposal independently made and considered in the Convention that "the admiralty jurisdiction ought to be given wholly to the national government," resulted in the adoption of Article III, § 2, by which the judicial power of the United States was extended to all cases of admiralty and maritime jurisdiction.[3]

This section has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies, and, by implication, conferring on Congress the power, subject to well recognized limitations not here material,[4] to alter, qualify, or

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material by the Committee on Style, was included in Article I, § 8, of the Constitution. See Madison's Diary, International Edition, pp. 260, 333, 340, 341, 415, 416.

[3] On June 5, 1787, Wilson stated to the Convention that he thought the admiralty jurisdiction should be given wholly to the national government. Resolution XVI, which was referred to the Committee on Detail on July 26th, provided that the jurisdiction of the national judiciary "shall extend to cases arising under laws passed by the general legislature and to such other questions as involve the natural peace and harmony." Wilson was one of the five members of the Committee on Detail, chosen on July 24th, which reported, August 6th, Article XI, dealing with the jurisdiction of federal courts, and containing in § 3 a provision extending the jurisdiction of the Supreme Court "to all cases of admiralty and maritime jurisdiction," which was ultimately incorporated in § 2 of Article III of the Constitution, as finally adopted. Madison's Diary, International Edition, pp. 61, 336, 317, 318, 344.

[4] In *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 386, 387, the Court said: "When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments,—when not relating to matters whose

supplement it as experience or changing conditions may require. *Panama R. Co.* v. *Johnson,* 264 U.S. 375, 386, 388; *Crowell* v. *Benson,* 285 U.S. 22, 39; see *The Oconee,* 280 Fed. 927; *United States* v. *Bevans,* 3 Wheat. 336, 389.

In view of the history of the two clauses and the manner of their adoption, the grant of power to define and punish piracies and felonies on the high seas cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the national government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the national government. It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the states and the national government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the

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existence or influence is confined to a more restricted field, as in *Cooley* v. *Board of Wardens,* 12 How. 299, 319,—shall be coextensive with and operate uniformly in the whole of the United States. *Waring* v. *Clarke,* 5 How. 441, 457; *The Lottawanna,* 21 Wall. 558, 574, 577; *Butler* v. *Boston & Savannah S.S. Co.,* 130 U.S. 527, 556, 557; *In re Garnett,* 141 U.S. 1, 12; *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 215; *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149, 164; *Washington* v. *Dawson & Co.,* 264 U.S. 219; 2 Story Const., 5th ed., §§ 1663, 1664, 1672."

high seas, and crimes of every grade committed on them while in foreign territorial waters.

As we cannot say that the specific grant of power to define and punish felonies on the high seas operated to curtail the legislative or judicial power conferred by Art. III, § 2, we come to the question principally argued, whether the jurisdiction over admiralty and maritime cases, which it gave, extends to the punishment of crimes committed on vessels of the United States while in foreign waters. As was pointed out by Mr. Justice Story, in the course of an elaborate review of the history of admiralty jurisdiction, in *DeLovio* v. *Boit,* 7 Fed. Cas. 418, 438, admiralty "from the highest antiquity has exercised a very extensive criminal jurisdiction and punished offenses by fine and imprisonment." [5] The English courts have

[5] In England, serious offenses committed "upon the sea, or in any other haven, river, creek or place where the admiral or admirals have or pretend to have power, authority or jurisdiction" were, after the statutes 27 Henry VIII, c. 4, and 28 Henry VIII, c. 15, tried according to the course of the common law before specially constituted admiralty courts, the judges of which were designated to sit by the Lord Chancellor. They were often common law judges who sat as commissioners for the trial of crimes within the admiralty and maritime jurisdiction. Holdsworth, History of English Law, 3d ed., Vol. I, 550–552; Hale, Pleas of the Crown, Vol. II, 17; Stephen, History of Criminal Law of England, Vol. II, 16–23; cf. Brooks, Trial of Captain Kidd, 40, 57. There is evidence that during the seventeenth century the courts of Virginia and Maryland tried felonies and piracies which, in England, would have been within the jurisdiction of the Admiralty Commissioners. See Crump, Colonial Admiralty Jurisdiction in the Seventeenth Century, 68. The practice under the statute, 28 Henry VIII, c. 15, was extended to the Colonies in cases of "piracy, felonies and robberies," by statute 11 and 12 William III, c. 7. See 2 Stephen, *supra,* 20. In Virginia, very shortly before the enactment of this statute, an act was passed adopting the provisions of the statute of Henry VIII. 3 Hening, Statutes at Large of Virginia, 176. For instances of minor offenses prosecuted in the Colonial Courts of Vice-Admiralty in the eighteenth century, see Hough's Cases in Vice-Admiralty and Admiralty: *King* v. *Booth*

consistently held that jurisdiction is not restricted to vessels within the navigable waters of the realm, but follows its ships upon the high seas and into ports and rivers within the territorial jurisdiction of foreign sovereigns. *Queen* v. *Carr & Wilson,* 10 Q.B.D. 76; *Queen* v. *Anderson,* L.R. 1 Crown Cases Reserved 161; *Rex* v. *Allen,* 1 Moody C.C. 494; see *Rex* v. *Jemot,* 1 Russell on Crimes, 4th ed. 153.

The criminal jurisdiction of the United States is wholly statutory, see *United States* v. *Hudson,* 7 Cranch 32, but it has never been doubted that the grant of admiralty and maritime jurisdiction to the federal government includes the legislative power to define and punish crimes committed upon vessels lying in navigable waters of the United States. From the very organization of the government, and without intermission, Congress has also asserted the power, analogous to that exercised by English courts of admiralty, to punish crimes committed on vessels of the United States while on the high seas or on navigable waters not within the territorial jurisdiction of

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(1730), p. 12; *King* v. *Burgess* (1748), p. 56; *King* v. *White* (1754), p. 81. Eighteenth century Vice-Admiralty commissions in the Colonies contain verbal grants of jurisdiction over crimes within the admiralty jurisdiction. Publications of Colonial Society of Massachusetts, vol. II, 237, 238; Benedict on Admiralty, 5th ed., 787–811; Record Book of Maryland Court of Vice-Admiralty in Manuscripts Division of the Library of Congress, fols. 74, 82. And there is evidence of the trial of piracies in the Colonies, see Jameson, Privateering and Piracy in the Colonial Period, pp. 143, 278, note 1, 286, note 1; and see 577 to 580. Compare Rhode Island: Letters from Governors in America, 1756, P.R.O.: CO. 5: 17, p. 639 (Ms. copy in Library of Congress), which indicates a trial at Providence for murder on the high seas in a special admiralty court constituted under the statute 11 and 12 William III. Captain Kidd, who was arrested in Boston prior to 1700 for murder and piracy on the high seas, was transported to England for trial before an admiralty court organized pursuant to royal commission (see 14 Howell's State Trials, 123, 147, 191) and this practice may well have continued after the statute of William III.

a State. The Act of April 30, 1790, c. 9, § 8, 1 Stat. 112, 113, provided for the punishment of murder committed "upon the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular state," and provided for the trial of the offender in the district where he might be apprehended or "into which he may first be brought." Section 12 of this Act dealt with manslaughter, but only when committed upon the high seas. It is true that in *United States* v. *Bevans,* 3 Wheat. 336, the prisoner, charged with murder on a warship in Boston Harbor, was discharged, as was one charged with manslaughter committed on a vessel on a Chinese River in *United States* v. *Wiltberger,* 5 Wheat. 76. But the judgments were based not upon a want of power in Congress to define and punish the crimes charged, but upon the ground that the statute did not apply, in the one case, for the reason that the place of the offense was not out of the jurisdiction of a state, and in the other, because the offense, manslaughter, was not committed on the high seas.[6]

The Act of March 3, 1825, c. 65, § 4, 4 Stat. 115, provided for the punishment of any person committing murder "upon the high seas or in any arm of the sea or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state," and § 22 provided for the punishment of assault with a dangerous

[6] In *United States* v. *McGill,* 4 Dall. 426, Mr. Justice Washington, sitting in the Circuit Court in a case where the offense charged was murder committed on a vessel lying in the haven of Cape Francois, held that the statute did not apply where the mortal stroke was given on the vessel, but the death occurred on shore, since the murder was not committed on the high seas or any river, basin or bay. He doubted whether the offense thus committed was cognizable in admiralty in the absence of statute, but stated he had no doubt of the power of Congress to provide for it.

weapon, committed under similar circumstances.[7] The provisions of the latter section, carried into § 5346 of the Revised Statutes, were upheld in *United States* v. *Rodgers, supra,* as a constitutional exercise of the power of Congress to define and punish offenses occurring in American vessels while within territorial waters of another sovereignty. Rodgers had been convicted of assault with a dangerous weapon, committed on a vessel of the United States lying in the Detroit River within the territorial jurisdiction of Canada, and his conviction was sustained by this Court. It was assumed that the statute was applicable only with respect to offenses committed on the high seas and waters tributary to them, and the decision turned on whether the Great Lakes were to be deemed "high seas" within the meaning of the statute. It was held that they were, and the power of Congress to punish offenses committed on an American vessel within the territorial waters of Canada, tributary to the Lakes, was expressly affirmed.

As the offense charged here appears to have been committed on an American vessel while discharging cargo in port, the jurisdiction is not affected by the fact that she

[7] By § 5, the provisions of the act of 1825 were specifically made applicable to any offense "committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign state or sovereign, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger . . ." This language was not, in terms, incorporated in the Revised Statutes.

Daniel Webster, Chairman of the House Committee having in charge the bill which became the Act of 1825, pointed out in introducing it that the offenses for which it provided punishment had actually occurred upon our ships, while lying in the harbors of foreign nations and had gone unpunished for want of such legislation. Gall & Seaton's Register of Debates in Congress, Vol. 1, cols. 154, 158.

was then at a point on the Congo remote from the sea, where it does not affirmatively appear that the water is salt or tidal. On this point also *United States* v. *Rodgers, supra,* is controlling, for there the offense committed within a foreign territorial jurisdiction was upon non-tidal fresh water.[8]

[8] That the jurisdiction in admiralty "extends as far as the tide ebbs and flows" was a convenient definition of its limits in the historic controversy over the conflicting claims of jurisdiction of the English courts of common law and admiralty over waters within the realm (see *DeLovio* v. *Boit,* 7 Fed. Cas. 418, 428; compare *Waring* v. *Clarke,* 5 How. 441, 453; *United States* v. *Coombs,* 12 Pet. 72; *Manchester* v. *Massachusetts,* 139 U. S. 240), a conflict which was but an aspect of the struggle for supremacy of the common law and the prerogative courts. Cf. Julius Goebel, Cases and Materials on the Development of Legal Institutions (1931), 225. But it is a very different question whether the traditional jurisdiction of admiralty conferred upon the United States by the Constitution, extends to non-tidal waters. In England public navigable waters are tidal, and with respect to them the terms have been used interchangeably. But there is nothing in the nature of maritime transactions or the maritime law, which is concerned with the affairs of vessels and those who sail, own, use or injure them, which need limit its application to tidal waters. See Benedict on Admiralty, 5th ed., §§ 39, 43. This was recognized and acted upon by the Vice-Admiralty Courts in the Colonies. See *Waring* v. *Clarke, supra,* 454, 455, 456. In *Queen* v. *Anderson,* L. R. 1 Crown Cases Reserved 161, Mr. Justice Blackburn, in upholding the admiralty jurisdiction over manslaughter committed on a British ship forty-five miles up the River Garronne, said, p. 169, that "the jurisdiction of the Admiralty extends over vessels, not only when they are on the open sea, but also when in places where great ships do generally go." And in *Rex* v. *Allen,* 1 Moody C. C. 494, the judges of England upheld the admiralty jurisdiction of the crime of larceny committed on a British vessel on a Chinese river, twenty or thirty miles from the sea, although it did not appear that the water was tidal. Following the decision in *The Genesee Chief,* 12 How. 443, that there was constitutional power in Congress to extend the admiralty jurisdiction to non-tidal waters of the United States navigable in fact, civil jurisdiction of admiralty over a collision occurring in the non-tidal waters of the Detroit River within the territorial jurisdiction

The appellee insists that even though Congress has power to define and punish crimes on American vessels in foreign waters, it has not done so by the present statute since the criminal jurisdiction of the United States is based upon the territorial principle and the statute cannot rightly be interpreted to be a departure from that principle. But the language of the statute making it applicable to offenses committed on an American vessel outside the jurisdiction of a State "within the admiralty and maritime jurisdiction of the United States" is broad enough to include crimes in the territorial waters of a foreign sovereignty. For Congress, by incorporating in the statute the very language of the constitutional grant of power, has made its exercise of the power co-extensive with the grant. Compare *The Hine* v. *Trevor,* 4 Wall. 555.

It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect. *United States* v. *Bowman,* 260 U.S. 94, 98; compare *Blackmer* v. *United States,* 284 U.S. 421. But that principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable

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of Canada, was sustained in *The Eagle,* 8 Wall. 15, and a like jurisdiction over a crime defined and punished by Act of Congress was sustained in *United States* v. *Rodgers,* 150 U. S. 249. See also *Jackson* v. *The Magnolia,* 20 How. 296; *The Hine* v. *Trevor,* 4 Wall. 555; and *In re Garnett,* 141 U. S. 1, 17, 18, where Mr. Justice Bradley said, p. 18, that "we have no hesitation in saying that the Savannah River from its mouth to the highest point to which it is navigable is subject to the maritime law and the admiralty jurisdiction of the United States."

waters within the territorial limits of another sovereignty. *United States* v. *Rodgers, supra;* compare *Thomas* v. *Lane,* 2 Sumner 1; *Queen* v. *Anderson, supra; Queen* v. *Carr & Wilson, supra; Rex* v. *Allen, supra; Rex.* v. *Jemot, supra.* This qualification of the territorial principle in the case of vessels of the flag was urged by Mr. Webster while Secretary of State, in his letter to Lord Ashburton [9] of August 1, 1842, quoted with approval in *United States* v.

[9] "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offense is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or whereso-ever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307.

Rodgers, supra, 264, 265. Subject to the right of the territorial sovereignty to assert jurisdiction over offenses disturbing the peace of the port, it has been supported by writers on international law, and has been recognized by France, Belgium, and other continental countries, as well as by England and the United States. See Moore, International Law Digest, Vol. 2, 287, 297; Fiore, International Law Codified, translated by E. M. Borchard, 192, 193; Wheaton, International Law, Vol. I, 245; Hall, International Law, 8th ed. 253–258; Jessup, The Law of Territorial Waters, 144–193.

In view of the wide recognition of this principle of extra-territorial jurisdiction over crimes committed on merchant vessels and its explicit adoption in *United States* v. *Rodgers, supra,* we cannot say that the language of the present statute punishing offenses on United States vessels out of the jurisdiction of a State, "when committed within the admiralty and maritime jurisdiction of the United States," was not intended to give effect to it. If the meaning of the statute were doubtful, the doubt would be resolved by the report on these sections by the Special Joint Committee on the Revision of the Laws, 60th Congress, 1st Sess., Rep. 10, part 1, p. 10, in which it was pointed out that the jurisdiction extends to vessels of the United States when on navigable waters within the limits of a foreign state, and "all cases arising on board such vessels while on any such waters, are clearly cases within the admiralty and maritime jurisdiction of the United States."

A related but different question, not presented here, may arise when jurisdiction over an offense committed on a foreign vessel is asserted by the sovereignty in whose waters it was lying at the time of its commission, since for some purposes the jurisdiction may be regarded as concurrent, in that the courts of either sovereignty may try the offense.

There is not entire agreement among nations or the writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both. See Jessup, the Law of Territorial Waters, 144–193. The position of the United States, exemplified in *Wildenhus's Case,* 120 U. S. 1, has been that at least in the case of major crimes, affecting the peace and tranquillity of the port, the jurisdiction asserted by the sovereignty of the port must prevail over that of the vessel. In that case the Belgian Consul sought release on habeas corpus of Wildenhus, a seaman, who was held in a New Jersey jail on a charge of homicide committed on a Belgian vessel lying in New Jersey waters, on the ground that Article XI of the Convention between Belgium and the United States of March 9, 1880, 21 Stat. 781, gave consular officers of the sovereignty of the vessel sole cognizance of offenses on board ship, except those of a nature to disturb the tranquillity and public order on shore and those involving a person not belonging to the crew. The court construed the Convention as inapplicable to the crime of murder and upheld the jurisdiction of the local court as conforming to the principles of international law. It said, p. 12:

"And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority."

This doctrine does not impinge on that laid down in *United States* v. *Rodgers, supra,* that the United States may define and punish offenses committed by its own citizens on its own vessels while within foreign waters where the local sovereign has not asserted its jurisdiction.[10] In the absence of any controlling treaty provision, and any assertion of jurisdiction by the territorial sovereign, it is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in the light of recognized principles of international law. So applied the indictment here sufficiently charges an offense within the admiralty and maritime jurisdiction of the United States and the judgment below must be

Reversed.

UNITED STATES *v.* BURROUGHS AND JAMES CANNON, JR.

CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 683. Argued March 14, 15, 1933.—Decided April 10, 1933

1. Under § 935 of the Code of Laws for the District of Columbia, passed in 1901, the Court of Appeals of the District has jurisdiction of an appeal by the United States from a judgment of the Supreme Court of the District which sustained a demurrer to an indictment on two grounds, one involving a construction of the statute on which the indictment was founded, and the other a construction of the indictment; and on such appeal the ruling of the trial court based on the construction of the statute is reviewable. P. 161.
2. The Criminal Appeals Act, passed in 1907, providing for direct review by this Court of decisions of the "district or circuit courts" quashing indictments when based upon the invalidity or construction of the statutes upon which the indictments are founded, etc.,

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[10] That the doctrines are not in conflict was pointed out by Webster in his letter to Lord Ashburton, quoted *supra* note 9. See also Hall, International Law, 8th ed., 255–256.

is not to be construed as applicable to the courts of the District of Columbia and as working an implied repeal of the appellate system established under § 935 of the D. C. Code. P. 161.

3. Implied repeals are not favored, and if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in effect. P. 164.
4. The declarations of the District Code (Title 18, § 43) that the Supreme Court of the District is to be "deemed a court of the United States," and "shall possess the same powers and exercise the same jurisdiction as district courts of the United States," do not make that court a district court of the United States. P. 163.

RESPONSE to questions certified by the Court of Appeals of the District of Columbia upon appeal by the United States from a judgment sustaining a demurrer to an indictment for violation of the Federal Corrupt Practices Act.

Solicitor General Thacher, with whom *Mr. W. Marvin Smith* was on the brief, for the United States.

Messrs. Robert H. McNeill and *Levi H. David* for Burroughs and Cannon.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Court of Appeals of the District of Columbia has certified the following questions:

"Question No. 1: Where on a criminal indictment a demurrer is sustained and the indictment quashed on two grounds, one involving a construction of the statute and the other the interpretation of the indictment as a pleading, will an appeal lie at the instance of the United States from the trial court of the District of Columbia to the Court of Appeals of the District of Columbia?

"If Question No. 1 be answered in the affirmative, then

"Question No. 2: May the Court of Appeals of the District of Columbia on such appeal review the ruling of the trial court based on the construction of the statute?"

We are advised by the certificate that the defendants were indicted by a grand jury of the District of Columbia for violation of the Federal Corrupt Practices Act.[1] They interposed a demurrer asserting that the conduct imputed to them did not constitute the offense defined by the Act, and that, in any event, the indictment was insufficient as a pleading in omitting to aver knowledge on the part of the defendants, which was claimed to be an essential element of the crime. From a judgment of the Supreme Court of the District of Columbia sustaining the demurrer and quashing the indictment, the Government appealed to the Court of Appeals. The appellees contended that court lacked jurisdiction, since the Criminal Appeals Act [2] governs the right of review in such cases and permits only a direct appeal to this court. The solution of the questions propounded therefore requires that we answer another: Does the Criminal Appeals Act embrace cases triable in the Supreme Court of the District of Columbia?

In the absence of express statutory authority no appeal may be taken on behalf of the United States in any criminal case. *United States* v. *Sanges,* 144 U.S. 310; *United States* v. *Ainsworth,* 3 App.D.C. 483. March 3, 1901, Congress adopted the Code of Law for the District of Columbia,[3] whereby it defined the jurisdiction of the Police Court and the Supreme Court of the District, sanctioned appeals from both to the Court of Appeals, and by § 935 enacted: [4]

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the

[1] Act of February 28, 1925; U.S.C., Tit. 2, Chap. 8.

[2] Act of March 2, 1907; 34 Stat. 1246; U.S.C., Tit. 18, § 682.

[3] 31 Stat. 1189.

[4] 31 Stat. 1341. By the Act of March 19, 1906, 34 Stat. 73, a Juvenile Court was established and appeals from its judgments to the Court of Appeals authorized and regulated.

same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside." [5]

The Criminal Appeals Act was not adopted until 1907. It authorized a writ of error (now an appeal) " by and on behalf of the United States from the district or circuit courts direct to " this court " in all criminal cases, in the following instances." Three classes are enumerated: decisions quashing or sustaining a demurrer to an indictment, based upon the invalidity or construction of the statute on which the indictment is founded; decisions arresting judgment for insufficiency of the indictment, based upon such invalidity or construction of the statute; and decisions sustaining a special plea in bar when the defendant has not been put in jeopardy. No appeal is permitted where there has been a verdict in favor of the defendant. The Court of Appeals, holding this Act, so far as applicable, superseded § 935 of the District Code,[6] desires a ruling as to its jurisdiction on appeal where a decision will involve both a construction of the statute on which the indictment is based and a ruling as to the validity of the indictment as a pleading. We think, however, the answer is clear; for we are of opinion that the Criminal Appeals Act is inapplicable to criminal cases tried in the Supreme Court of the District. These are regulated solely by § 935 of the Code.

It is said that the Criminal Appeals Act is pertinent because the Code provides that the Supreme Court is to

[5] In *United States* v. *Evans,* 28 App.D.C. 264, approved 213 U.S. 297, it was held that the proviso was ineffective to afford the Government a review of alleged errors in the course of a trial resulting in acquittal.

[6] See *United States* v. *Denison,* 47 F. (2d) 433; 60 App.D.C. 71.

be "deemed a court of the United States"[7] (compare *Embry* v. *Palmer,* 107 U.S. 3), but designation of a tribunal as a court of the United States, does not constitute it a district court. *In re Mills,* 135 U.S. 263, 267–8; *Stephens* v. *Cherokee Nation,* 174 U.S. 445.

Appellees further urge the statement in the Code[8] that the Supreme Court "shall possess the same powers and exercise the same jurisdiction as the district courts of the United States" has the effect of making it a district court as that phrase is used in the Criminal Appeals Act. Where a statute uses this or similar language to define the jurisdiction of a court, such a court is authorized to try statutory actions declared to be cognizable by district courts, as if the tribunal were in fact a district court of the United States. And the same rule is applicable to appellate proceedings. Compare *In re Cooper,* 143 U.S. 472, 494; *Hine* v. *Morse,* 218 U.S. 493; *Federal Trade Commission* v. *Klesner,* 274 U.S. 145, 154; *United States* v. *California Coöperative Canneries,* 279 U.S. 553, 558. But vesting a court with "the same jurisdiction as is vested in district courts" does not make it a district court of the United States. This has been repeatedly said with reference to territorial courts. *Reynolds* v. *United States,* 98 U.S. 145, 154; *Stephens* v. *Cherokee Nation, supra,* p. 476; *Summers* v. *United States,* 231 U.S. 92, 101.

The Criminal Appeals Act, in naming the courts from which appeals may be taken to this court, employs the phrase "district courts"; not "courts of the United States," or "courts exercising the same jurisdiction as district courts." We need not, however, determine whether the statute should be construed to embrace criminal cases tried in the Supreme Court of the District if § 935 of the District Code were not in effect. That

[7] Code, District of Columbia, Tit. 18, § 43.

[8] *Ibid.*

section deals comprehensively with appeals in criminal cases from all of the courts of first instance of the District and confers on the Court of Appeals jurisdiction of appeals by the Government seeking review of the judgments of those courts. The Criminal Appeals Act, on the other hand, affects only certain specified classes of decisions in district courts, contains no repealing clause, and no reference to the courts of the District of Columbia or the territorial courts, upon many of which jurisdiction is conferred by language quite similar to that of the Code of Law of the District.[9] We cannot construe it as impliedly repealing the complete appellate system created for the District of Columbia by § 935 of the Code, in the absence of expression on the part of Congress indicating that purpose. Implied repeals are not favored; and if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force. *Frost* v. *Wenie,* 157 U.S. 46, 58; *United States* v. *Healey,* 160 U.S. 136, 147; *United States* v. *Greathouse,* 166 U.S. 601, 605; *Petri* v. *Creelman*

[9] *Alaska:* "There is established a district court for the Territory of Alaska, with the jurisdiction of district courts of the United States . . ." U.S. Code, Tit. 48, § 101.

Hawaii: "There shall be . . . a district court . . ." "The said court shall have the jurisdiction of district courts of the United States . . ." U.S. Code, Tit. 48, §§ 641, 642.

Puerto Rico: "Porto Rico shall constitute a judicial district to be called 'the district of Porto Rico.' . . . Such district court shall have jurisdiction of all cases cognizable in the district courts of the United States . . ." U.S. Code, Tit. 48, § 863.

Congress has expressly provided for direct appeal from the District Court of Puerto Rico to this court, thus: "The said district court shall be attached to and included in the first circuit of the United States, with the right of appeal and review by said circuit court of appeals in all cases where the same would lie from any district court to a circuit court of appeals of the United States, *and with the right of appeal and review directly by the Supreme Court of the United States in all cases where a direct appeal would be from such district courts.*" U.S. Code, Tit. 48, § 864.

Lumber Co., 199 U.S. 487, 497; *Ex parte United States*, 226 U.S. 420, 424; *Washington* v. *Miller*, 235 U.S. 422, 428.

The Court of Appeals has jurisdiction of both issues presented by the appeal from the decree of the Supreme Court.

Question No. 1 answered "Yes."
Question No. 2 answered "Yes."

MR. JUSTICE CARDOZO concurs in the result.

ROYAL INDEMNITY CO. ET AL. *v.* AMERICAN BOND & MORTGAGE CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 585 and 586. Argued March 21, 1933.—Decided April 10, 1933

1. The principal place of business of a corporation does not cease to be such, for the purposes of jurisdiction in bankruptcy, because its assets and affairs were in the custody and control of equity receivers for the greater portion of six months preceding the filing of the petition. P. 167.
2. This is equally true whether the purpose of the receivership is to wind up, or is merely to rehabilitate, the business. P. 169.
3. A state statute forbidding the transfer, except in the usual course of business, of the franchises or assets of a corporation, without the assent of stockholders, does not prevent the filing of a voluntary petition in bankruptcy by authority of a resolution of the board of directors. P. 170.
4. Creditors of a corporation have no standing to attack an adjudication in bankruptcy based on a petition filed by authority of the directors, although a statute of the State of incorporation forbids transfer, except in the usual course of business, of the franchises or assets of the company, without the assent of stockholders. P. 171.

61 F. (2d) 875, affirmed.

CERTIORARI, 288 U.S. 596, to review a decree affirming orders of the district court refusing to vacate an adjudication of bankruptcy.

Mr. Selden Bacon, with whom *Mr. Saul S. Myers* was on the brief, for petitioners.

Mr. William E. Leahy, with whom *Messrs. Edmund M. Toland, William J. Hughes, Jr.,* and *A. L. Schapiro* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases present two questions:

Has the location where a corporation maintained its main office and transacted most of its business ceased to be the principal place of business for the purposes of jurisdiction in bankruptcy if, during the greater portion of six months preceding the filing of the petition, the company's assets and affairs were in custody and control of equity receivers?

Have creditors standing to ask the vacation of an adjudication based on a petition filed by authority of the directors of the bankrupt, where a statute of the state of incorporation forbids transfer, except in the usual course of business, of the franchises or assets of the company, without stockholders' assent?

The relevant facts may be briefly stated.

The respondent, a Maine corporation, had its principal place of business in Chicago, Illinois. May 21, 1931, unsecured creditors brought suit against it in the United States District Court for Northern Illinois, averring solvency and existing difficulty in meeting pressing obligations, and praying the appointment of receivers. On the same day other creditors filed a petition in bankruptcy in the same court. The company appeared in the equity suit and consented to the granting of the prayer of the bill. Receivers were appointed, took possession of the assets and proceeded to administer them. An answer to the petition in bankruptcy denied insolvency or acts of bankruptcy. May 25, 1931, the Royal Indemnity Company

and others filed a petition in bankruptcy against the respondent in the United States Court for the District of Maine. Answer was made denying insolvency and the commission of the alleged acts of bankruptcy. The company sought to transfer the cause to the court in Illinois, which the petitioners opposed. Thereafter the petitioners moved in the Illinois bankruptcy proceeding to dismiss the petition, for alleged defects, and to stay all proceedings under General Order No. 6, pending hearing upon the involuntary petition in Maine. The court denied the motion to dismiss, but granted a stay effective until hearing in the Maine district. September 5, 1931, the respondent withdrew its answers in the Illinois and Maine bankruptcy cases, thus abandoning its contest of adjudication in both. On the same day it filed a voluntary petition in the Illinois District Court, and adjudication was immediately entered.

September 10, 1931, the petitioners prayed the Illinois court to vacate the adjudication and for a stay pending action in Maine. The motion to vacate raised the questions of law we have stated. The court set the cause down under Equity Rule 29 for disposition of these questions. By order entered April 6, 1932, it decided them adversely to the petitioners. The respondent having filed an answer denying certain of the averments of the petition, the court directed that the cause be set for hearing so that the petitioners, if they desired, might offer proof. No evidence was offered, and in default thereof the court held a hearing on the petition and answer, and on May 3, 1932 made a final order refusing to vacate the adjudication. Separate appeals were allowed from both orders, and the Circuit Court of Appeals affirmed them. The case is here on certiorari.

First. The Bankruptcy Act invests each district court, as a court of bankruptcy, with jurisdiction to "adjudge persons bankrupt who have had their principal place of

business, resided, or had their domicile" within the court's territorial jurisdiction, "for the preceding six months, or the greater portion thereof."[1] For three months and ten days of the six months preceding the filing of the respondent's voluntary petition, its affairs had been in the control of receivers having the usual powers of management. The decree appointing them included an injunction restraining the corporation, its officers and agents, from interfering with, transferring, selling, or disposing of the property, assets or income of the respondent, or taking possession or attempting to sell or dispose of any part of the same. The result, say the petitioners, is that the corporation thereupon ceased to have a principal place of business in the Northern District of Illinois. The claim is that the Bankruptcy Act refers to the place where the bankrupt is doing business, and not to a place where a business the company once owned is being conducted by someone else; that the business is not a separate entity or essence irrespective of the identity of the person conducting it. The business is said to have passed out of the hands of the respondent and to have been taken over in such sense that the company ceased to be in the business theretofore conducted at its former place of business, even though the business itself, as such, was continued by the receivers.

The argument ignores the practical purpose of the statute as applied to such a situation. The decree in equity and its execution by officers of the court did not change the ownership of the assets or of the business. The corporation continued to have the only business owned before the appointment of receivers, though the actual conduct of its operations was for the time being vested in the court's appointees. Its corporate existence

[1] U.S.C., Tit. 11, § 11. The word "persons" as used in this section includes corporations. U.S.C., Tit. 11, § 1 (19).

and functions as a corporation continued. Whether its affairs were in the course of winding up or were being managed in the hope of restoration of full control to the corporate agencies is immaterial. Until a winding up had been effected, the business formerly conducted by the company in Chicago continued to be the respondent's business and not that of another, and the place where that business was conducted, whether by receivers or by the corporate officers, still remained the "principal place of business," in the common acceptation of the phrase. In these days of corporate activity it is not unusual for a company chartered in one of the states to conduct most, if not all, of its business in another state far removed from that of incorporation. Considerations of convenience no doubt prompted the Congress to permit the initiation of a bankruptcy in the state where the business is in fact transacted rather than that of the domicile, where often none is done. Unnecessary inconvenience and expense may be inflicted upon creditors if they are required to participate in a proceeding conducted hundreds or thousands of miles from the situs of the bankrupt's activities, where the books and records are usually kept. That Congress was mindful of this is evident from the provisions for transfer of a cause by one court of bankruptcy to another where a proceeding is pending against the same bankrupt, for the greater convenience of the parties in interest.[2] We should therefore construe the language of the act so as to effectuate the evident purpose of the legislation, and not so narrowly as to defeat the true intent of Congress. We hold that the District Court for the Northern District of Illinois, in re-

[2] The respondent petitioned the Maine District Court to transfer the proceeding there initiated to the Illinois District Court, as authorized by U.S. Code, Tit. 11, §§ 11 (19) and 55. An order for such transfer was made, 58 F. (2d) 379, for the reason that administration in Illinois would be more convenient to the parties in interest.

spect of respondent's principal place of business, had jurisdiction to entertain the petition.[3]

Second. The Revised Statutes of Maine, Chap. 56, under the caption "Rights of Minority Stockholders," enact:

"SEC. 63. Corporation not to sell franchises or entire property without consent of stockholders. No corporation shall sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at an annual or special meeting, the call for which shall give notice of the proposed sale, lease or consolidation. All such sales, leases and consolidations shall be subject to the provisions of this and the eleven following sections, and to the prior lien of stockholders as therein defined."

After providing that the act shall not apply to mortgages of corporate property, the sections following regulate methods of effecting consolidations, the valuation and payment for the stock of dissenting minority shareholders, etc. We are told that this statute prohibits the filing of a voluntary petition in bankruptcy by authority of a resolution of the board of directors, and that a shareholders' vote is required to authorize such action. No case decided by the Maine courts is cited in support of this assertion. But it is said that the filing of such a petition is a conveyance of all of the corporate property, and so plainly within the statutory prohibition. We cannot agree.

[3] Compare *In re C. Moench & Sons Co.*, 130 Fed. 685; *Tiffany* v. *La Plume Condensed Milk Co.*, 141 Fed. 444; *In re Monarch Oil Corp.*, 272 Fed. 524; *In re American & British Mfg. Co.*, 300 Fed. 839. Contra, *In re Perry Aldrich Co.*, 165 Fed. 249; *In re McNally Co.*, 208 Fed. 291.

The petition in a voluntary or involuntary proceeding is a pleading. The entry of an adjudication vests title in the trustee, and this is the act of the court, not of the petitioner. Moreover, it seems too plain to need elaboration that the statute does not in terms affect the initiation of a bankruptcy proceeding, and was passed for a wholly different purpose.

We might rest our decision as to the second question upon this ground. But there is another equally persuasive. Statutes such as the one relied on are intended for the protection of stockholders and have nothing to do with the interests or rights of creditors. Even if action of directors authorizing the filing of a voluntary petition, or admitting inability of the corporation to pay its debts and its willingness on that ground to be adjudged a bankrupt, thus creating an act of bankruptcy under § 21 of the Act,[4] were in excess of the authority conferred, or otherwise invalid, creditors could not for that reason attack the consequent adjudication.[5] The question is purely one of the internal management of the corporation. Creditors have no standing to plead statutory requirements not intended for their protection. If the stockholders' rights had been infringed, and they chose to waive them, a creditor could not assert them in opposing an adjudication.

The judgments are

Affirmed.

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[4] U.S.C., Tit. 11, § 21 (a) (5).

[5] See *In re Guanacevi Tunnel Co.*, 201 Fed. 316; *In re United Grocery Co.*, 239 Fed. 1016; *In re Ann Arbor Mach. Corp.*, 274 Fed. 24; *In re E. T. Russell Co.*, 291 Fed. 809; *In re A. C. Wagy & Co., Inc.*, 22 F. (2d) 9; *In re Pneumatic T. S. Co.*, 60 F. (2d) 524; *Chicago Bank of Commerce* v. *Carter*, 61 F. (2d) 986. Contra: *In re Bates Machine Co.*, 91 Fed. 625; *Home Powder Co.* v. *Geis*, 204 Fed. 568; *In re Russell Wheel & Foundry Co.*, 222 Fed. 569; *In re Standard Shipyard Co.*, 262 Fed. 522.

REINECKE, FORMERLY COLLECTOR OF INTERNAL REVENUE, *v.* SMITH ET AL., EXECUTORS

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 601. Argued March 22, 23, 1933.—Decided April 10, 1933

Section 219 (g) of the Revenue Act of June 2, 1924, provides: "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." *Held:*

1. A trustee is not a "beneficiary" of the trust within the meaning of the statute. P. 174.

2. The provision is not arbitrarily retroactive, since it applies not to transactions consummated before its passage but to the income accruing after the effective date of the Act, January 1, 1924. P. 175.

3. The same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income. P. 175.

4. Where a settlor of a trust vests the power to modify or revoke it in himself and the trustee, the trustee is under no fiduciary obligation to the *cestui que trust* to refrain from exercising the power, and the situation in that regard is as though it were vested in the grantor jointly with a stranger to the trust. P. 176.

5. To tax the income of such a trust to the settlor while he and the trustee jointly retain the power to revoke or modify the trust, is consistent with the Fifth Amendment, and helps to make the income tax system complete and consistent and prevent evasions. P. 177.

61 F. (2d) 324, reversed.

CERTIORARI, 288 U.S. 596, to review the affirmance of a recovery from the Collector of money collected as taxes from the respondents' testator.

Mr. Erwin N. Griswold, with whom *Solicitor General Thacher* and *Messrs. Sewall Key* and *Hayner N. Larson* were on the brief, for petitioner.

Mr. Albert L. Hopkins, with whom *Mr. Harry B. Sutter* was on the brief, for respondents.

Mr. Justice Roberts delivered the opinion of the Court.

In 1922 Douglas Smith, by five instruments, created as many trusts for the benefit of his wife and four children. The trustees named were the grantor; a son who was a direct beneficiary of one of the trusts and a contingent beneficiary of the others; and a banking company possessed of trust powers. Neither the grantor nor the corporate trustee was a *cestui que trust* under any of the writings. In each agreement it was stipulated:

"Anything herein contained to the contrary notwithstanding, this Trust may be modified or revoked at any time by an instrument in writing signed by Douglas Smith [the grantor] and either one of the other two trustees or their successors."

October 22, 1924, each of the agreements was modified by striking out the quoted clause, and the grantor resigned as trustee. He did not report any of the income which accrued in the year 1924 upon the trust property. The Revenue Act of 1924, § 219 (g) (43 Stat. 253, 277) directs:

" Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

The Commissioner of Internal Revenue held that this section required a return by Smith of the trust income for the period January 1, 1924, to October 22, 1924, and assessed against him additional tax, which was paid under protest. The respondents, who are the personal representatives of Smith, now deceased, brought this suit to recover the sum paid. A demurrer to the declaration was overruled and judgment given for the respondents. The Circuit Court of Appeals affirmed, holding that as to trusts created prior to the adoption of the Act, § 219 (g) violates the Fifth Amendment when applied to impose a tax by reason of property and the income therefrom disposed of by the grantor before the passage of that or any other law taxing the income of such a trust to the settlor. The case is here on certiorari.

Petitioner maintains the section in terms applies in the circumstances disclosed; as the tax is laid only upon income accruing after January 1, 1924, the statute is not retroactive; and, as the grantor retained a measure of control, to tax him upon the income is not arbitrary or unreasonable though the trusts were created before any statute had laid a tax upon the settlor measured by the income of such a trust.

The respondents argue in support of the judgment that the trustee is a beneficiary of the trust as the phrase is used in the section, and the income in question is therefore exempt from taxation to the settlor; and that if this view be rejected the provision offends the Fifth Amendment.

The unambiguous phraseology of the Act precludes the suggested construction. A trustee is not subsumed under the designation beneficiary. Both words have a common and accepted meaning; the former signifies the person who holds title to the *res* and administers it for the benefit of others; the latter the *cestui que trust* who enjoys the

advantages of such administration. The ordinary meaning of the terms used, which we are bound to adopt (*Old Colony R. Co.* v. *Commissioner,* 284 U.S. 552, 560,) and the view held by those charged with the enforcement of the Act, ratified by reënactment of the section,[1] alike forbid the adoption of the construction for which the respondents contend.

Nor do we think the act has such a retroactive effect as to render its requirements arbitrary within the principle announced as to estate and gift taxes in *Nichols* v. *Coolidge,* 274 U.S. 531; *Untermyer* v. *Anderson,* 276 U.S. 440, and *Blodgett* v. *Holden,* 275 U.S. 142. In those cases the issue was the validity of a tax on a transaction consummated before the enactment of the statute authorizing the exaction. In the present case the subject of the tax is not the creation of the trusts or the transfer of the corpus from the grantor to the trustees, but the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924.[2] Although the act was passed June 2, 1924, the imposition of the tax on income received or accrued from the beginning of the year has been held unobjectionable. *Cooper* v. *United States,* 280 U.S. 409, 411. Compare *Fawcus Machine Co.* v. *United States,* 282 U.S. 375, 379.

We come then to the final position of the respondents: That when applied in this case the statute is so arbitrary and unreasonable as to deny the due process guaranteed by the Fifth Amendment, since the exaction is based not on the settlor's income or on income from his property, but on that which accrued to other persons from property to which they alone had sole and exclusive title. The

[1] Revenue Acts of 1926, c. 27, 44 Stat. 32; 1928, c. 852, 45 Stat. 840; 1932, c. 209, 47 Stat. 221. Regulations 65, Art. 347; Regulations 69, Art. 347; Regulations 74, Art. 881.

[2] See § 283, 42 Stat. 303.

argument proceeds upon the theory that until alteration or revocation of the trust the trustees held the legal title to the property for the sole benefit of the *cestuis,* and received the income; that both principal and income were beyond the control of the grantor until the alteration of the trust on October 22, 1924.

We have not heretofore had occasion to pass upon the question thus presented. In *Corliss* v. *Bowers,* 281 U.S. 376, the section of the Revenue Act of 1924 now under consideration was held to justify assessment of income tax to the settlor with respect to the income of a trust revocable by him alone. *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339, construed § 402 (c) of the Revenue Act of 1921, which included within the sweep of a transfer tax any interest of which a decedent had at any time made a transfer, or with respect to which he had created a trust intended to take effect in possession or enjoyment at or after his death. The tax was upheld as applied to the corpus of trusts over which the grantor had sole power of revocation. It was, however, condemned as to those where revocation was dependent upon joint action of the grantor and the beneficiary, for the reason that the interest of the beneficiary was adverse and the grantor unable at will to alter or destroy the trust. In the latter case the transfer was said to be effective when made, not at death. As pointed out in *Burnet* v. *Guggenheim,* 288 U.S. 280, the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income.

In approaching the decision of the question before us it is to be borne in mind that the trustee is not a trustee of the power of revocation and owes no duty to the beneficiary to resist alteration or revocation of the trust. Of course he owes a duty to the beneficiary to protect the trust *res,* faithfully to administer it, and to distribute the

income; but the very fact that he participates in the right of alteration or revocation negatives any fiduciary duty to the beneficiary to refrain from exercising the power. The facts of this case illustrate the point; for it appears the trust in favor of the grantor's wife was substantially modified, to her financial detriment, by the concurrent action of the grantor and the trustees. This case must be viewed, therefore, as if the reserved right of revocation had been vested jointly in the grantor and a stranger to the trust.

Decisions of this court declare that where taxing acts are challenged we look not to the refinements of title but to the actual command over the property taxed,—the actual benefit for which the tax is paid. *Corliss* v. *Bowers, supra,* at p. 378; *Tyler* v. *United States,* 281 U.S. 497, 503; *Burnet* v. *Guggenheim, supra.* A settlor who at every moment retains the power to repossess the corpus and enjoy the income has such a measure of control as justifies the imposition of the tax upon him. *Corliss* v. *Bowers, supra.* We think Congress may with reason declare that where one has placed his property in trust subject to a right of revocation in himself and another, not a beneficiary, he shall be deemed to be in control of the property. We cannot say that this enactment is so arbitrary and capricious as to amount to a deprivation of property without due process of law. As declared by the Committee reporting the section in question, a revocable trust amounts, in its practical aspects, to no more than an assignment of income. This court has repeatedly said that such an assignment, where the assignor continued to own the corpus, does not immunize him from taxation upon the income. *Burnet* v. *Leininger,* 285 U.S. 136; *Lucas* v. *Earl,* 281 U.S. 111. It cannot therefore be successfully urged that as the legal title was held by the trustees the income necessarily must for income taxation be

deemed to accrue from property of someone other than Douglas Smith. The case is plainly distinguishable from *Hoeper* v. *Tax Commission,* 284 U.S. 206, on which respondents rely, for there the attempt was to tax income arising from property always owned by one other than the taxpayer, who had never had title to or control over either the property or the income from it. The measure of control of corpus and income retained by the grantor was sufficient to justify the attribution of the income of the trust to him. The enactment does not violate the Fifth Amendment.

A contrary decision would make evasion of the tax a simple matter. There being no legally significant distinction between the trustee and a stranger to the trust as joint holder with the grantor of a power to revoke, if the contention of the respondents were accepted it would be easy to select a friend or relative as co-holder of such a power and so place large amounts of principal and income accruing therefrom beyond the reach of taxation upon the grantor while he retained to all intents and purposes control of both. Congress had power, in order to make the system of income taxation complete and consistent and to prevent facile evasion of the law, to make provision by § 219 (g) for taxation of trust income to the grantor in the circumstances here disclosed. Compare *Taft* v. *Bowers,* 278 U.S. 470, 482, 483; *Tyler* v. *United States, supra,* at p. 505.

Judgment reversed.

UNITED STATES *v.* DUBILIER CONDENSER CORP.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 316, 317, and 318. Argued January 13, 16, 1933.—Decided April 10, 1933

1. One who is employed to invent is bound by contractual obligation to assign the patent for the invention to his employer. P. 187.

2. Where the contract of employment does not contemplate invention, but an invention is made by the employee during the hours of his employment and with the aid of the employer's materials and appliances, the right of patent belongs to the employee, and the employer's interest in the invention is limited to a non-exclusive right to practice it—a "shop-right." P. 188.
3. These principles are settled as respects private employment and they apply also as between the United States and its employees. P. 189.
4. No servant of the United States has by statute been disqualified from applying for and receiving a patent for his invention, save officers and employees of the Patent Office during the period for which they hold their appointments. P. 189.
5. Scientists employed by the United States in the Radio Section of the Electric Division of the Bureau of Standards, while assigned to research concerning use of radio in airplanes, made discoveries concerning the use of alternating current in broadcast receiving sets—a subject not within their assignment and not being investigated by the Section; and, having with the consent of their superior perfected their inventions in the Bureau laboratory, obtained patents. *Held,* upon the facts, that there was no employment to invent and no basis for implying a contract to assign to the United States, or a trust in its favor, save as to shop-rights. P. 193.
6. The proposition that anyone who is employed by the United States for scientific research should be forbidden to obtain a patent for what he invents is at variance with the policy heretofore evidenced by Congress. P. 199.
7. If public policy demands such a prohibition, Congress, and not the courts, must declare it. Pp. 197, 208.

59 F. (2d) 387, affirmed.

CERTIORARI, 287 U.S. 588, to review the affirmance of decrees dismissing the bills in three suits brought by the United States to compel the exclusive licensee under certain patents to assign all its right, title and interest in them to the United States, and for an accounting.

Solicitor General Thacher, with whom *Assistant Attorney General Rugg* and *Messrs. Alexander Holtzoff, Paul D. Miller,* and *H. Brian Holland* were on the brief, for the United States.

This Court has held that if one is expressly hired for the purpose of making a specific invention, or is designated or directed to develop such invention, the patent rights arising out of such invention become the property of the employer. The *ratio decidendi* of this holding is that in making the invention the employee is merely doing what he was hired to do, having contracted in advance for the performance of work of an inventive character, and therefore the fruits of his work belong to the employer.

The same result should follow if an employee, instead of being hired or being assigned to make a specific invention, is hired for the purpose of doing inventive work in a particular field. If in such event the employee makes an invention within that field, he has only done that which he was hired to do and accordingly the patent rights to such invention are the property of the employer.

The employment of Lowell and Dunmore included the duty to exercise their inventive faculties within the general field to which they were assigned. It is not disputed that they were in the actual performance of their employment while engaged in the research which led to the inventions in question. Their duties were not confined to the solution of specially designated problems, but they were expected to and did follow " leads " uncovered during the progress of their work. The inventions in question represented a natural and progressive development of the work which they were pursuing under the direction of their superiors, and which they systematically described in their official reports.

Essentially the purpose of industrial research is to apply to industry the discoveries of science. When one is employed for scientific research to meet the needs of a rapidly advancing industrial art, such as radio, his employment necessarily includes the duty to employ his

talent in devising new and useful appliances for the improvement of the art. If, in this process, discovery and application to useful purposes rise to the level of invention, the invention is the fruit of the employment.

There is no basis for the holding that because "research" and "invention" are not synonymous, the research work of Lowell and Dunmore did not include the duty to make inventions. The research work in which they were engaged had for its express purpose the improvement of the radio art by invention.

In the efficient conduct of modern research laboratories it is necessary to permit scientists to exercise initiative and freedom in the solution of particular problems and in following suggestions or leads arising out of a specific task. Discoveries and inventions seldom can be anticipated and, hence, it is often impossible to assign the development of a particular invention as a task to be performed.

Research work regularly resulting in numerous inventions is continually being carried on in laboratories conducted by governmental agencies. It is against public interest that private individuals should collect royalties for the use of inventions developed at public cost.

The rule adopted by the courts below, if allowed to stand, would tend to demoralize the Bureau of Standards as a center for scientific and industrial research. The experience of private industry shows that invention is not discouraged where the employer retains property rights to the inventions of employees engaged in inventive work.

The Act of March 3, 1883, as amended by the Act of April 30, 1928, does not express the entire governmental policy with regard to patent rights on inventions of government employees. Its obvious purpose was to accord the privilege of obtaining patents without charge to gov-

ernment employees who might make an invention under such circumstances that the Government would have neither title to the patent nor a license under it.

Mr. James H. Hughes, Jr., with whom *Messrs. E. Ennalls Berl* and *John B. Brady* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Three suits were brought in the District Court for Delaware against the respondent as exclusive licensee under three separate patents issued to Francis W. Dunmore and Percival D. Lowell. The bills recite that the inventions were made while the patentees were employed in the radio laboratories of the Bureau of Standards, and are therefore, in equity, the property of the United States. The prayers are for a declaration that the respondent is a trustee for the Government, and, as such, required to assign to the United States all its right, title and interest in the patents; for an accounting of all moneys received as licensee, and for general relief. The District Court consolidated the cases for trial, and after a hearing dismissed the bills.[1] The Court of Appeals for the Third Circuit affirmed the decree.[2]

The courts below concurred in findings which are not challenged and, in summary, are:

The Bureau of Standards is a subdivision of the Department of Commerce.[3] Its functions consist in the custody of standards; the comparison of standards used in scientific investigations, engineering, manufacturing, commerce, and educational institutions with those adopted

[1] 49 F. (2d) 306.

[2] 59 F. (2d) 381.

[3] See Act of March 3, 1901, 31 Stat. 1449; Act of February 14, 1903, § 4, 32 Stat. 826.

or recognized by the Government; the construction of standards, their multiples or subdivisions; the testing and calibration of standard measuring apparatus; the solution of problems which arise in connection with standards; and the physical properties of materials. In 1915 the Bureau was also charged by Congress with the duty of investigation and standardization of methods and instruments employed in radio communication, for which special appropriations were made.[4] In recent years it has been engaged in research and testing work of various kinds for the benefit of private industries, other departments of the Government, and the general public.[5]

The Bureau is composed of divisions, each charged with a specified field of activity, one of which is the electrical division. These are further subdivided into sections. One section of the electrical division is the radio section. In 1921 and 1922 the employees in the laboratory of this section numbered approximately twenty men doing technical work, and some draftsmen and mechanics. The twenty were engaged in testing radio apparatus and methods and in radio research work. They were subdivided into ten groups, each group having a chief. The work of each group was defined in outlines by the chief or alternate chief of the section.

Dunmore and Lowell were employed in the radio section and engaged in research and testing in the laboratory. In the outlines of laboratory work the subject of "airplane radio" was assigned to the group of which Dunmore was chief and Lowell a member. The subject of "radio receiving sets" was assigned to a group of which J. L. Preston was chief, but to which neither Lowell nor Dunmore belonged.

[4] Act of March 4, 1915, 38 Stat. 1044; Act of May 29, 1920, 41 Stat. 684; Act of March 3, 1921, 41 Stat. 1303.

[5] The fees charged cover merely the cost of the service rendered, as provided in the Act of June 30, 1932, § 312, 47 Stat. 410.

In May, 1921, the Air Corps of the Army and the Bureau of Standards entered into an arrangement whereby the latter undertook the prosecution of forty-four research projects for the benefit of the Air Corps. To pay the cost of such work, the Corps transferred and allocated to the Bureau the sum of $267,500. Projects Nos. 37 to 42, inclusive, relating to the use of radio in connection with aircraft, were assigned to the radio section and $25,000 was allocated to pay the cost of the work. Project No. 38 was styled "visual indicator for radio signals," and suggested the construction of a modification of what was known as an "Eckhart recorder." Project No. 42 was styled "airship bomb control and marine torpedo control." Both were problems of design merely.

In the summer of 1921 Dunmore, as chief of the group to which "airplane radio" problems had been assigned, without further instructions from his superiors, picked out for himself one of these navy problems, that of operating a relay for remote control of bombs on airships and torpedoes in the sea, "as one of particular interest and having perhaps a rather easy solution, and worked on it." In September he solved it.

In the midst of aircraft investigations and numerous routine problems of the section, Dunmore was wrestling in his own mind, impelled thereto solely by his own scientific curiosity, with the subject of substituting house-lighting alternating current for direct battery current in radio apparatus. He obtained a relay for operating a telegraph instrument which was in no way related to the remote control relay devised for aircraft use. The conception of the application of alternating current concerned particularly broadcast reception. This idea was conceived by Dunmore August 3, 1921, and he reduced the invention to practice December 16, 1921. Early in 1922 he advised his superior of his invention and spent addi-

tional time in perfecting the details. February 27, 1922 he filed an application for a patent.

In the fall of 1921 both Dunmore and Lowell were considering the problem of applying alternating current to broadcast receiving sets. This project was not involved in or suggested by the problems with which the radio section was then dealing and was not assigned by any superior as a task to be solved by either of these employees. It was independent of their work and voluntarily assumed.

While performing their regular tasks they experimented at the laboratory in devising apparatus for operating a radio receiving set by alternating current with the hum incident thereto eliminated. The invention was completed on December 10, 1921. Before its completion no instructions were received from and no conversations relative to the invention were held by these employees with the head of the radio section, or with any superior.

They also conceived the idea of energizing a dynamic type of loud speaker from an alternating current house-lighting circuit, and reduced the invention to practice on January 25, 1922. March 21, 1922, they filed an application for a "power amplifier." The conception embodied in this patent was devised by the patentees without suggestion, instruction, or assignment from any superior.

Dunmore and Lowell were permitted by their chief, after the discoveries had been brought to his attention, to pursue their work in the laboratory and to perfect the devices embodying their inventions. No one advised them prior to the filing of applications for patents that they would be expected to assign the patents to the United States or to grant the Government exclusive rights thereunder.

The respondent concedes that the United States may practice the inventions without payment of royalty, but asserts that all others are excluded, during the life of the

patents, from using them without the respondent's consent. The petitioner insists that the circumstances require a declaration either that the Government has sole and exclusive property in the inventions or that they have been dedicated to the public so that anyone may use them.

First. By Article I, § 8, clause 8 of the Constitution, Congress is given power to promote the progress of science and the useful arts by securing for limited times to inventors the exclusive rights to their respective discoveries. R.S. 4886 as amended (U.S. Code, Title 35, § 31) is the last of a series of statutes which since 1793 have implemented the constitutional provision.

Though often so characterized, a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. *Seymour* v. *Osborne,* 11 Wall. 516, 533. The term monopoly connotes the giving of an exclusive privilege for buying, selling, working or using a thing which the public freely enjoyed prior to the grant.[6] Thus a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge. *United States* v. *Bell Telephone Co.,* 167 U.S. 224, 239; *Paper Bag Patent Case,* 210 U.S. 405, 424; *Brooks* v. *Jenkins,* 3 McLean 432, 437; *Parker* v. *Haworth,* 4 McLean 370, 372; *Allen* v. *Hunter,* 6 McLean 303, 305–306; *Attorney General* v. *Rumford Chemical Works,* 2 Bann. & Ard. 298, 302. He may keep his invention secret and reap its fruits indefinitely. In consideration of its disclosure and the consequent benefit to the community, the patent is granted. An exclusive enjoyment is guaranteed him for

[6] Webster's New International Dictionary: "Monopoly."

seventeen years, but upon the expiration of that period, the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use. *Kendall* v. *Winsor,* 21 How. 322, 327; *United States* v. *Bell Telephone Co., supra,* p. 239. To this end the law requires such disclosure to be made in the application for patent that others skilled in the art may understand the invention and how to put it to use.[7]

A patent is property and title to it can pass only by assignment. If not yet issued an agreement to assign when issued, if valid as a contract, will be specifically enforced. The respective rights and obligations of employer and employee, touching an invention conceived by the latter, spring from the contract of employment.

One employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained. The reason is that he has only produced that which he was employed to invent. His invention is the precise subject of the contract of employment. A term of the agreement necessarily is that what he is paid to produce belongs to his paymaster. *Standard Parts Co.* v. *Peck,* 264 U.S. 52. On the other hand, if the employment be general, albeit it cover a field of labor and effort in the performance of which the employee conceived the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent. *Hapgood* v. *Hewitt,* 119 U.S. 226; *Dalzell* v. *Dueber Watch Case Mfg. Co.* 149 U.S. 315. In the latter case it was said [p. 320]:

"But a manufacturing corporation, which has employed a skilled workman, for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles

[7] U.S. Code, Tit. 35, § 33.

there manufactured, is not entitled to a conveyance of patents obtained for inventions made by him while so employed, in the absence of express agreement to that effect."

The reluctance of courts to imply or infer an agreement by the employee to assign his patent is due to a recognition of the peculiar nature of the act of invention, which consists neither in finding out the laws of nature, nor in fruitful research as to the operation of natural laws, but in discovering how those laws may be utilized or applied for some beneficial purpose, by a process, a device or a machine. It is the result of an inventive act, the birth of an idea and its reduction to practice; the product of original thought; a concept demonstrated to be true by practical application or embodiment in tangible form. *Clark Thread Co.* v. *Willimantic Linen Co.,* 140 U.S. 481, 489; *Symington Co.* v. *National Castings Co.,* 250 U.S. 383, 386; *Pyrene Mfg. Co.* v. *Boyce,* 292 Fed. 480, 481.

Though the mental concept is embodied or realized in a mechanism or a physical or chemical aggregate, the embodiment is not the invention and is not the subject of a patent. This distinction between the idea and its application in practice is the basis of the rule that employment merely to design or to construct or to devise methods of manufacture is not the same as employment to invent. Recognition of the nature of the act of invention also defines the limits of the so-called shop-right, which shortly stated, is that where a servant, during his hours of employment, working with his master's materials and appliances, conceives and perfects an invention for which he obtains a patent, he must accord his master a non-exclusive right to practice the invention. *McClurg* v. *Kingsland,* 1 How. 202; *Solomons* v. *United States,* 137 U.S. 342; *Lane & Bodley Co.* v. *Locke,* 150 U.S. 193. This is an application of equitable principles. Since the servant uses his master's time, facilities and materials to attain a

concrete result, the latter is in equity entitled to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business. But the employer in such a case has no equity to demand a conveyance of the invention, which is the original conception of the employee alone, in which the employer had no part. This remains the property of him who conceived it, together with the right conferred by the patent, to exclude all others than the employer from the accruing benefits. These principles are settled as respects private employment.

Second. Does the character of the service call for different rules as to the relative rights of the United States and its employees?

The title of a patentee is subject to no superior right of the Government. The grant of letters patent is not, as in England, a matter of grace or favor, so that conditions may be annexed at the pleasure of the executive. To the laws passed by the Congress, and to them alone, may we look for guidance as to the extent and the limitations of the respective rights of the inventor and the public. *Attorney General* v. *Rumford Chemical Works, supra,* at pp. 303–4. And this court has held that the Constitution evinces no public policy which requires the holder of a patent to cede the use or benefit of the invention to the United States, even though the discovery concerns matters which can properly be used only by the Government; as, for example, munitions of war. *James* v. *Campbell,* 104 U.S. 356, 358. *Hollister* v. *Benedict Mfg. Co.,* 113 U.S. 59, 67.

No servant of the United States has by statute been disqualified from applying for and receiving a patent for his invention, save officers and employees of the Patent Office during the period for which they hold their appointments.[8]

[8] R.S. 480; U.S. Code, Tit. 35, § 4.

This being so, this court has applied the rules enforced as between private employers and their servants to the relation between the Government and its officers and employees.

United States v. *Burns,* 12 Wall. 246, was a suit in the Court of Claims by an army officer as assignee of a patent obtained by another such officer for a military tent, to recover royalty under a contract made by the Secretary of War for the use of the tents. The court said, in affirming a judgment for the plaintiff [p. 252]:

"If an officer in the military service, *not specially employed to make experiments with a view to suggest improvements,* devises a new and valuable improvement in arms, tents, or any other kind of war material, he is entitled to the benefit of it, and to letters-patent for the improvement from the United States, equally with any other citizen not engaged in such service; and the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him."

In *United States* v. *Palmer,* 128 U.S. 262, Palmer, a lieutenant in the army, patented certain improvements in infantry accoutrements. An army board recommended their use and the Secretary of War confirmed the recommendation. The United States manufactured and purchased a large number of the articles. Palmer brought suit in the Court of Claims for a sum alleged to be a fair and reasonable royalty. From a judgment for the plaintiff the United States appealed. This court, in affirming, said [p. 270]:

"It was at one time somewhat doubted whether the government might not be entitled to the use and benefit of every patented invention, by analogy to the English law which reserves this right to the crown. But that

notion no longer exists. It was ignored in the case of Burns."

These principles were recognized in later cases involving the relative rights of the Government and its employees in instances where the subject-matter of the patent was useful to the public generally. While these did not involve a claim to an assignment of the patent, the court reiterated the views earlier announced.

In *Solomons* v. *United States,* 137 U.S. 342, 346, it was said:

"The government has no more power to appropriate a man's property invested in a patent than it has to take his property invested in real estate; *nor does the mere fact that an inventor is at the time of his invention in the employ of the government transfer to it any title to, or interest in it.* An employé, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property. *There is no difference between the government and any other employer in this respect.*"

And in *Gill* v. *United States,* 160 U.S. 426, 435:

"There is no doubt whatever of the proposition laid down in *Solomons case,* that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor, as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property, than any other proprietor would have. . . ."

The distinction between an employment to make an invention and a general employment in the course of

which the servant conceives an invention has been recognized by the executive department of the Government. A lieutenant in the navy patented an anchor while he was on duty in the Bureau of Equipment and Recruiting, which was charged with the duty of furnishing anchors for the navy; he was not while attached to the bureau specially employed to make experiments with a view to suggesting improvements to anchors or assigned the duty of making or improving. The Attorney General advised that as the invention did not relate to a matter as to which the lieutenant was specially directed to experiment with a view to suggesting improvements, he was entitled to compensation from the Government for the use of his invention in addition to his salary or pay as a navy officer.[9]

A similar ruling was made with respect to an ensign who obtained a patent for improvements in "B.L.R. ordnance" and who offered to sell the improvements, or the right to use them, to the Government. It was held that the navy might properly make a contract with him to this end.[10]

The United States is entitled, in the same way and to the same extent as a private employer, to shop-rights, that is, the free and non-exclusive use of a patent which results from effort of its employee in his working hours and with material belonging to the Government. *Solomons* v. *United States, supra,* pp. 346–7; *McAleer* v. *United States,* 150 U.S. 424; *Gill* v. *United States, supra.*

The statutes, decisions and administrative practice negate the existence of a duty binding one in the service of the Government different from the obligation of one in private employment.

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[9] 19 Opinions Attorney-General, 407.

[10] 20 Opinions Attorney-General, 329. And compare Report Judge Advocate General of the Navy, 1901, p. 6; Digest, Opinions Judge Advocate General of the Army, 1912–1930, p. 237; Opinions, Judge Advocate General of the Army, 1918, Vol. 2, pp. 529, 988, 1066.

Third. When the United States filed its bills it recognized the law as heretofore declared; realized that it must like any other employer, if it desired an assignment of the respondent's rights, prove a contractual obligation on the part of Lowell and Dunmore to assign the patents to the Government. The averments clearly disclose this. The bill in No. 316 is typical. After reciting that the employees were laboratory apprentice and associate physicist, and laboratory assistant and associate physicist, respectively, and that one of their duties was "to carry on investigation research and experimentation in such problems relating to radio and wireless *as might be assigned to them* by their superiors," it is charged "in the course of his employment as aforesaid, *there was assigned* to said Lowell by his superiors in said radio section, for *investigation and research,* the problem of developing a radio receiving set capable of operation by alternating current. . . ."

Thus the Government understood that respondent could be deprived of rights under the patents only by proof that Dunmore and Lowell were employed to devise the inventions. The findings of the courts below show how far the proofs fell short of sustaining these averments.

The Government is consequently driven to the contention that though the employees were not specifically assigned the task of making the inventions (as in *Standard Parts Co.* v. *Peck, supra*), still, as the discoveries were "within the general field of their research and *inventive work,*" the United States is entitled to an assignment of the patents. The courts below expressly found that Dunmore and Lowell did not agree to exercise their inventive faculties in their work, and that invention was not within its scope. In this connection it is to be remembered that the written evidence of their employment does not mention research, much less invention; that never was there

a word said to either of them, prior to their discoveries, concerning invention or patents or their duties or obligations respecting these matters; that as shown by the records of the patent office, employees of the Bureau of Standards and other departments had, while so employed, received numerous patents and enjoyed the exclusive rights obtained as against all private persons without let or hindrance from the Government.[11] In no proper

[11] No exhaustive examination of the official records has been attempted. It is sufficient, however, for present purposes, to call attention to the following instances.

Dr. Frederick A. Kolster was employed in the radio section, Bureau of Standards, from December, 1912, until about March 1, 1921. He applied for the following patents: No. 1,609,366, for radio apparatus, application dated November 26, 1920. No. 1,447,165, for radio method and apparatus, application dated January 30, 1919. No. 1,311,654, for radio method and apparatus, application dated March 25, 1916. No. 1,394,560, for apparatus for transmitting radiant energy, application dated November 24, 1916. The Patent Office records show assignments of these patents to Federal Telegraph Company, San Francisco, Cal., of which Dr. Kolster is now president. He testified that these are all subject to a non-exclusive license in the United States to use and practice the same.

Burten McCollum was an employee of the Bureau of Standards between 1911 and 1924. On the dates mentioned he filed the following applications for patents, which were issued to him. No. 1,035,373, alternating current induction motor, March 11, 1912. No. 1,156,364, induction motor, February 25, 1915. No. 1,226,091, alternating current induction motor, August 2, 1915. No. 1,724,495, method and apparatus for determining the slope of subsurface rock boundaries, October 24, 1923. No. 1,724,720, method and apparatus for studying subsurface contours, October 12 ,1923. The last two inventions were assigned to McCollum Geological Explorations, Inc., a Delaware corporation.

Herbert B. Brooks, while an employee of the Bureau between 1912 and 1930, filed, November 1, 1919, an application on which patent No. 1,357,197, for an electric transformer, was issued.

William W. Coblentz, an employee of the Bureau of Standards from 1913, and still such at the date of the trial, on the dates mentioned, filed applications on which patents issued as follows: No.

sense may it be said that the contract of employment contemplated invention; everything that Dunmore and Lowell knew negatived the theory that they were employed to invent; they knew, on the contrary, that the past and then present practice was that the employees of the Bureau were allowed to take patents on their inventions and have the benefits thereby conferred save as to use by the

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1,418,362, for electrical resistance, September 22, 1920. No. 1,458,165, system of electrical control, September 22, 1920. No. 1,450,061, optical method for producing pulsating electric current, August 6, 1920. No. 1,563,557, optical means for rectifying alternating currents, September 18, 1923. The Patent Office records show that all of these stand in the name of Coblentz, but are subject to a license to the United States of America.

August Hund, who was an employee of the Bureau from 1922 to 1927, on the dates mentioned filed applications on which letters patent issued: No. 1,649,828, method of preparing Piezo-electric plates, September 30, 1925. No. 1,688,713, Piezo-electric-crystal oscillator system, May 10, 1927. No. 1,688,714, Piezo-electric-crystal apparatus, May 12, 1927. No. 1,648,689, condenser transmitter, April 10, 1926. All of these patents are shown of record to have been assigned to Wired Radio, Inc., a corporation.

Paul R. Heyl and Lyman J. Briggs, while employees of the Bureau, filed an application January 11, 1922, for patent No. 1,660,751, on inductor compass, and assigned the same to the Aeronautical Instrument Company of Pittsburgh, Pennsylvania.

C. W. Burrows was an employee of the Bureau of Standards between 1912 and 1919. While such employee he filed applications on the dates mentioned for patents, which were issued: No. 1,322,405, October 4, 1917, method and apparatus for testing magnetizable objects by magnetic leakage; assigned to Magnetic Analysis Corporation, Long Island City, N.Y. No. 1,329,578, relay, March 13, 1918; exclusive license issued to make, use and sell for the field of railway signaling and train control, to Union Switch & Signal Company, Swissvale, Pa. No. 1,459,970, method of and apparatus for testing magnetizable objects, July 25, 1917; assigned to Magnetic Analysis Corporation, Long Island City, N.Y.

John A. Willoughby, an employee of the Bureau of Standards between 1918 and 1922, while so employed, on June 26, 1919, applied for and was granted a patent, No. 1,555,345, for a loop antenna.

United States. The circumstances preclude the implication of any agreement to assign their inventions or patents.

The record affords even less basis for inferring a contract on the part of the inventors to refrain from patenting their discoveries than for finding an agreement to assign them.

The bills aver that the inventions and patents are held in trust for the United States, and that the court should so declare. It is claimed that as the work of the Bureau, including all that Dunmore and Lowell did, was in the public interest, these public servants had dedicated the offspring of their brains to the public, and so held their patents in trust for the common weal, represented here in a corporate capacity by the United States. The patentees, we are told, should surrender the patents for cancellation, and the respondent must also give up its rights under the patents.

The trust cannot be express. Every fact in the case negatives the existence of one. Nor can it arise *ex maleficio*. The employees' conduct was not fraudulent in any respect. They promptly disclosed their inventions. Their superiors encouraged them to proceed in perfecting and applying the discoveries. Their note books and reports disclosed the work they were doing, and there is not a syllable to suggest their use of time or material was clandestine or improper. No word was spoken regarding any claim of title by the Government until after applications for patents were filed. And, as we have seen, no such trust has been spelled out of the relation of master and servant, even in the cases where the employee has perfected his invention by the use of his employer's time and materials. The cases recognizing the doctrine of shop rights may be said to fix a trust upon the employee in favor of his master as respects the use of the invention

by the latter, but they do not affect the title to the patent and the exclusive rights conferred by it against the public.

The Government's position in reality is, and must be, that a public policy, to be declared by a court, forbids one employed by the United States, for scientific research, to obtain a patent for what he invents, though neither the Constitution nor any statute so declares.

Where shall the courts set the limits of the doctrine? For, confessedly, it must be limited. The field of research is as broad as that of science itself. If the petitioner is entitled to a cancellation of the patents in this case, would it be so entitled if the employees had done their work at home, in their own time and with their own appliances and materials? What is to be said of an invention evolved as the result of the solution of a problem in a realm apart from that to which the employee is assigned by his official superiors? We have seen that the Bureau has numerous divisions. It is entirely possible that an employee in one division may make an invention falling within the work of some other division. Indeed this case presents that exact situation, for the inventions in question had to do with radio reception, a matter assigned to a group of which Dunmore and Lowell were not members. Did the mere fact of their employment by the Bureau require these employees to cede to the public every device they might conceive?

Is the doctrine to be applied only where the employment is in a bureau devoted to scientific investigation *pro bono publico?* Unless it is to be so circumscribed, the statements of this court in *United States* v. *Burns, supra, Solomons* v. *United States, supra,* and *Gill* v. *United States, supra,* must be held for naught.

Again, what are to be defined as bureaus devoted entirely to scientific research? It is common knowledge that many in the Department of Agriculture conduct re-

searches and investigations; that divisions of the War and Navy Departments do the like; and doubtless there are many other bureaus and sections in various departments of government where employees are set the task of solving problems all of which involve more or less of science. Shall the field of the scientist be distinguished from the art of a skilled mechanic? Is it conceivable that one working on a formula for a drug or an antiseptic in the Department of Agriculture stands in a different class from a machinist in an arsenal? Is the distinction to be that where the government department is, so to speak, a business department operating a business activity of the government, the employee has the same rights as one in private employment, whereas if his work be for a bureau interested more particularly in what may be termed scientific research he is upon notice that whatever he invents in the field of activity of the bureau, broadly defined, belongs to the public and is unpatentable? Illustrations of the difficulties which would attend an attempt to define the policy for which the Government contends might be multiplied indefinitely.

The courts ought not to declare any such policy; its formulation belongs solely to the Congress. Will permission to an employee to enjoy patent rights as against all others than the Government tend to the improvement of the public service by attracting a higher class of employees? Is there in fact greater benefit to the people in a dedication to the public of inventions conceived by officers of government, than in their exploitation under patents by private industry? Should certain classes of invention be treated in one way and other classes differently? These are not legal questions, which courts are competent to answer. They are practical questions, and the decision as to what will accomplish the greatest good for the inventor, the Government and the public rests

with the Congress. We should not read into the patent laws limitations and conditions which the legislature has not expressed.

Fourth. Moreover, we are of opinion Congress has approved a policy at variance with the petitioner's contentions. This is demonstrated by examination of two statutes, with their legislative history, and the hearings and debates respecting proposed legislation which failed of passage.

Since 1883 there has been in force an act [12] which provides:

"The Secretary of the Interior [now the Secretary of Commerce, Act of February 14, 1903, c. 552, § 12, 32 Stat. 830] and the Commissioner of Patents are authorized to grant any officer of the government, except officers and employees of the Patent Office, a patent for any invention of the classes mentioned in section forty eight hundred and eighty six of the Revised Statutes, when such invention is used or to be used in the public service, without the payment of any fee: *Provided,* That the applicant in his application shall state that the invention described therein, if patented, may be used by the government or any of its officers or employees in the prosecution of work for the government, or by any other person in the United States, without the payment to him of any royalty thereon, which stipulation shall be included in the patent."

This law was evidently intended to encourage government employees to obtain patents, by relieving them of the payment of the usual fees. The condition upon which the privilege was accorded is stated as the grant of free use by the government, "its officers or employees in the prosecution of work for the government, *or by any*

[12] Act of March 3, 1883, c. 143, 22 Stat. 625.

other person in the United States." For some time the effect of the italicized phrase was a matter of doubt.

In 1910 the Judge Advocate General of the Army rendered an opinion to the effect that one taking a patent pursuant to the act threw his invention "open to public and private use in the United States." [13] It was later realized that this view made such a patent a contradiction in terms, for it secured no exclusive right to anyone. In 1918 the Judge Advocate General gave a well-reasoned opinion [14] holding that if the statute were construed to involve a dedication to the public, the so-called patent would at most amount to a publication or prior reference. He concluded that the intent of the act was that the free use of the invention extended only to the Government or those doing work for it. A similar construction was adopted in an opinion of the Attorney General.[15] Several federal courts referred to the statute and in *dicta* indicated disagreement with the views expressed in these later opinions.[16]

The departments of government were anxious to have the situation cleared, and repeatedly requested that the act be amended. Pursuant to the recommendations of the War Department an amendment was enacted April 30, 1928.[17] The proviso was changed to read:

"*Provided,* That the applicant in his application shall state that the invention described therein, if patented,

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[13] See *Squier* v. *American T. & T. Co.*, 21 F. (2d) 747, 748.

[14] November 30, 1918; Opinions of Judge Advocate General, 1918, Vol. 2, p. 1029.

[15] 32 Opinions Attorney General, 145.

[16] See *Squier* v. *American Tel. & Tel. Co.*, 7 F. (2d) 831, 21 F. (2d) 747; *Hazeltine Corporation* v. *Electric Service Engineering Corp.*, 18 F. (2d) 662; *Hazeltine Corporation* v. *A. W. Grebe & Co.*, 21 F. (2d) 643; *Selden Co.* v. *National Aniline & Chemical Co.*, 48 F. (2d) 270.

[17] 45 Stat. 467, 468.

may be manufactured or used by or for the Government for governmental purposes without the payment to him of any royalty thereon, which stipulation shall be included in the patent."

The legislative history of the amendment clearly discloses the purpose to save to the employee his right to exclude the public.[18] In the report of the Senate Committee on Patents submitted with the amendment, the object of the bill was said to be the protection of the interests of the Government, primarily by securing patents on inventions made by officers and employees, presently useful in the interest of the national defense or those which may prove useful in the interest of national defense in the future; and secondarily, to encourage the patenting of inventions by officers and employees of the Government with the view to future protection of the Government against suits for infringement of patents. The committee stated that the bill had the approval of the Commissioner of Patents and was introduced at the request of the Secretary of War. Appended to the report is a copy of a letter of the Secretary of War addressed to the committees of both Houses stating that the language of the legislation then existing was susceptible of two interpretations contrary to each other. The letter quoted the proviso of the section as it then stood, and continued:

"It is clear that a literal construction of this proviso would work a dedication to the public of every patent taken out under the act. If the proviso must be construed literally we would have a situation wherein all the patents taken out under the act would be nullified by the

[18] Report No. 871, 70th Cong., 1st Sess., House of Representatives, to accompany H.R. 6103; Report No. 765, 70th Cong., 1st Sess., Senate, to accompany H.R. 6103; Cong. Rec., House of Representatives, March 19, 1928, 70th Cong., 1st Sess., p. 5013; Cong. Rec., Senate, April 24, 1928, 70th Cong., 1st Sess., p. 7066.

very terms of the act under which they were granted, for the reason that a patent which does not carry with it the limited monopoly referred to in the Constitution is in reality not a patent at all. The only value that a patent has is the right that it extends to the patentee to exclude all others from making, using, or selling the invention for a certain period of years. A patent that is dedicated to the public is virtually the same as a patent that has expired."

After referring to the interpretation of the Judge Advocate General and the Attorney General and mentioning that no satisfactory adjudication of the question had been afforded by the courts, the letter went on to state:

"Because of the ambiguity referred to and the unsettled condition that has arisen therefrom, it has become the policy of the War Department to advise all its personnel who desire to file applications for letters patent, to do so under the general law and pay the required patent-office fee in each case."

And added:

"If the proposed legislation is enacted into law, Government officers and employees may unhesitatingly avail themselves of the benefits of the act with full assurance that in so doing their patent is not dedicated to the public by operation of law. The War Department has been favoring legislation along the lines of the proposed bill for the past five or six years."

When the bill came up for passage in the House a colloquy occurred which clearly disclosed the purpose of the amendment.[19] The intent was that a government

[19] Cong. Rec., 70th Cong., 1st Sess., Vol. 69, Part 5, p. 5013:

"Mr. LaGuardia. Mr. Speaker, reserving the right to object, is not the proviso too broad? Suppose an employee of the Government invents some improvement which is very valuable, is he compelled to give the Government free use of it?

"Mr. Vestal [who reported the bill for the Committee and was in charge of it]. If he is employed by the Government and the in-

employee who in the course of his employment conceives an invention should afford the Government free use thereof, but should be protected in his right to exclude all others. If Dunmore and Lowell, who tendered the Government a non-exclusive license without royalty, and always understood that the Government might use their inventions freely, had proceeded under the act of 1883, they would have retained their rights as against all but the United States. This is clear from the executive interpretation of the act. But for greater security they pursued the very course then advised by the law officers of the Government. It would be surprising if they thus lost all rights as patentees; especially so, since Congress has now confirmed the soundness of the views held by the law officers of the Government.

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vention is made while working in his capacity as an agent of the Government. If the head of the bureau certifies this invention will be used by the Government, then the Government, of course gets it without the payment of any royalty.

"Mr. LaGuardia. *The same as a factory rule?*

"Mr. Vestal. *Yes; but the man who takes out the patent has his commercial rights outside.*

"Mr. LaGuardia. *Outside of the Government?*

"Mr. Vestal. *Yes.*

"Mr. LaGuardia. But the custom is, and without this bill, the Government has the right to the use of the improvement without payment if it is invented in Government time and in Government work.

"Mr. Vestal. That is correct; and then on top of that, may I say that a number of instances have occurred where an employee of the Government, instead of taking out a patent had some one else take out the patent and the Government has been involved in a number of suits. There is now $600,000,000 worth of such claims in the Court of Claims."

It will be noted from the last statement of the gentleman in charge of the bill that Congress was concerned with questions of policy in the adoption of the amendment. These, as stated above, are questions of business policy and business judgment—what is to the best advantage of the Government and the public. They are not questions as to which the courts ought to invade the province of the Congress.

Until the year 1910 the Court of Claims was without jurisdiction to award compensation to the owner of a patent for unauthorized use by the United States or its agents. Its power extended only to the trial of claims based upon an express or implied contract for such use.[20] In that year Congress enlarged the jurisdiction to embrace the former class of claims.[21] In giving consent to be sued, the restriction was imposed that it should not extend to owners of patents obtained by employees of the Government while in the service. From this it is inferred that Congress recognized no right in such patentees to exclude the public from practicing the invention. But

[20] See *Belknap* v. *Schild*, 161 U.S. 10, 16; *Eager* v. *United States*, 35 Ct. Cls. 556.

[21] Act of June 25, 1910, 36 Stat. 851: (See *Crozier* v. *Krupp*, 224 U.S. 290.)

"That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof *or lawful right to use the same*, such owner may recover reasonable compensation for such use by suit in the Court of Claims: *Provided, however*, That said Court of Claims shall not entertain a suit or reward [*sic*] compensation under the provisions of this Act where the claim for compensation is based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States: *Provided further*, That in any such suit the United States may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise: *And provided further*, That the benefits of this Act shall not inure to any patentee, who, when he makes such claim is in the employment or service of the Government of the United States; or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service."

The Act was amended in respects immaterial to the present question, July 1, 1918, 40 Stat. 705. See *William Cramp & Sons Co.* v. *Curtis Turbine Co.*, 246 U.S. 28; *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 343. As amended it appears in U.S.C., Tit. 35, § 68.

an examination of the legislative record completely refutes the contention.

The House Committee in reporting the bill, after referring to the law as laid down in the *Solomons* case, said: "The United States in such a case has an implied license to use the patent without compensation, for the reason that the inventor used the time or the money or the material of the United States in perfecting his invention. The use by the United States of such a patented invention without any authority from the owner thereof is a lawful use under existing law, and we have inserted the words 'or lawful right to use the same' in order to make it plain that we do not intend to make any change in existing law in this respect, and do not intend to give the owner of such a patent any claim against the United States for its use." [22] From this it is clear that Congress had no purpose to declare a policy at variance with the decisions of this court.

The executive departments have advocated legislation regulating the taking of patents by government employees and the administration by government agencies of the patents so obtained. In 1919 and 1920 a bill sponsored by the Interior Department was introduced. It provided for the voluntary assignment or license by any government employee, to the Federal Trade Commission, of a patent applied for by him, and the licensing of manufacturers by the Commission, the license fees to be paid into the Treasury and such part of them as the President might deem equitable to be turned over to the patentee.[23] In the hearings and reports upon this measure stress was laid not only upon the fact that action by an employee thereunder would be voluntary, but that the inventor would be protected at least to some extent in his private

[22] House Report 1288, 61st Cong., 2d Sess.

[23] S. 5265, 65th Cong. 3d Sess.; S. 3223, 66th Cong., 2d Sess.; H.R. 9932, 66th Cong., 2d Sess.; H.R. 11984, 66th Cong., 3d Sess.

right of exclusion. It was recognized that the Government could not compel an assignment, was incapable of taking such assignment or administering the patent, and that it had shop-rights in a patent perfected by the use of government material and in government working time. Nothing contained in the bill itself or in the hearings or reports indicates any intent to change the existing and well understood rights of government employees who obtain patents for their inventions made while in the service. The measure failed of passage.

In 1923 the President sent to the Congress the report of an interdepartmental patents-board created by executive order to study the question of patents within the government service and to recommend regulations establishing a policy to be followed in respect thereof. The report adverted to the fact that in the absence of a contract providing otherwise a patent taken out by a government employee, and any invention developed by one in the public service, is the sole property of the inventor. The committee recommended strongly against public dedication of such an invention, saying that this in effect voids a patent, and, if this were not so, "there is little incentive for anyone to take up a patent and spend time, effort, and money . . . on its commercial development without at least some measure of protection against others free to take the patent as developed by him and compete in its use. In such a case one of the chief objects of the patent law would be defeated." [24] In full accord is the statement on behalf of the Department of the Interior in a memorandum furnished with respect to the bill introduced in 1919.[25]

With respect to a policy of permitting the patentee to take a patent and control it in his own interest (subject,

[24] Sen. Doc. No. 83, 68th Cong., 1st Sess., p. 3.

[25] Hearings, Senate Patent Committee, 66th Cong., 2d Sess., January 23, 1920, p. 11.

of course, to the Government's right of use, if any) the committee said:

". . . it must not be lost sight of that in general it is the constitutional right of every patentee to exploit his patent as he may desire, however expedient it may appear to endeavor to modify this right in the interest of the public when the patentee is in the Government service." [26]

Concerning a requirement that all patents obtained by government employees be assigned to the United States or its agent, the committee said:

". . . it would, on the one hand, render difficult securing the best sort of technical men for the service and, on the other, would influence technical workers to resign in order to exploit inventions which they might evolve and suppress while still in the service. There has always been more or less of a tendency for able men in the service to do this, particularly in view of the comparative meagerness of Government salaries; thus the Government has suffered loss among its most capable class of workers." [27]

The committee recommended legislation to create an Interdepartmental Patents Board; and further that the law make it part of the express terms of employment, having the effect of a contract, that any patent application made or patent granted for an invention discovered or developed during the period of government service and incident to the line of official duties, which in the judgment of the board should, in the interest of the national defense, or otherwise in the public interest, be controlled by the Government, should upon demand by the board be assigned by the employee to an agent of the Government. The recommended measures were not adopted.

[26] Sen. Doc. No. 83, 68th Cong., 1st Sess., p. 3.

[27] *Ibid.*, p. 4.

Fifth. Congress has refrained from imposing upon government servants a contract obligation of the sort above described. At least one department has attempted to do so by regulation.[28] Since the record in this case discloses that the Bureau of Standards had no such regulation, it is unnecessary to consider whether the various departments have power to impose such a contract upon employees without authorization by act of Congress. The question is more difficult under our form of government than under that of Great Britain, where such departmental regulations seem to settle the matter.[29]

All of this legislative history emphasizes what we have stated—that the courts are incompetent to answer the difficult question whether the patentee is to be allowed his exclusive right or compelled to dedicate his invention to the public. It is suggested that the election rests with the authoritative officers of the Government. Under what power, express or implied, may such officers, by administrative fiat, determine the nature and extent of rights exercised under a charter granted a patentee pursuant to constitutional and legislative provisions? Apart from the fact that express authority is nowhere to be found, the question arises, who are the authoritative officers whose determination shall bind the United States and the patentee? The Government's position comes to this—that the courts may not reëxamine the exercise of an authority by some officer, not named, purporting to deprive the patentee of the rights conferred upon him by law. Nothing would be settled by such a holding, except that the determination of the reciprocal rights and obligations of the Government and its employee as re-

[28] See Annual Report, Department of Agriculture, for 1907, p. 775. See *Selden Co.* v. *National Aniline & Chemical Co.*, 48 F. (2d) 270, 273.

[29] Queen's Regulations (Addenda 1895, 1st February); Ch. 1, Instructions for Officers in General, pp. 15–16.

spects inventions are to be adjudicated, without review, by an unspecified department head or bureau chief. Hitherto both the executive and the legislative branches of the Government have concurred in what we consider the correct view,—that any such declaration of policy must come from Congress and that no power to declare it is vested in administrative officers.

The decrees are *Affirmed.*

MR. JUSTICE STONE, dissenting.

I think the decrees should be reversed.

The Court's conclusion that the employment of Dunmore and Lowell did not contemplate that they should exercise inventive faculties in their service to the government, and that both courts below so found, seems to render superfluous much that is said in the opinion. For it has not been contended, and I certainly do not contend, that if such were the fact there would be any foundation for the claim asserted by the government. But I think the record does not support the Court's conclusion of fact. I am also unable to agree with the reasoning of the opinion, although on my view of the facts it would lead to the reversal of the decree below, which I favor.

When originally organized [1] as a subdivision of the Department of Commerce, the functions of the Bureau of Standards consisted principally of the custody, comparison, construction, testing and calibration of standards and the solution of problems arising in connection with standards. But in the course of its investigation of standards of quality and performance it has gradually expanded into a laboratory for research of the broadest character in various branches of science and industry and particularly

[1] Act of March 3, 1901, 31 Stat. 1449; Act of February 14, 1903, § 4, 32 Stat. 825, 826. For an account of the origin and development of the Bureau and its predecessor, see Weber, The Bureau of Standards, 1–75.

in the field of engineering.[2] Work of this nature is carried on for other government departments,[3] the general public[4] and private industries.[5] It is almost entirely supported by public funds,[6] and is maintained in the pub-

[2] Much of the expansion of the Bureau's activities in this direction took place during the war. See Annual Report of the Director, Bureau of Standards, for 1919, p. 25; War Work of the Bureau of Standards (1921), Misc. Publications of the Bureau of Standards No. 46. The scope of the Bureau's scientific work is revealed by the annual reports of the Director. See also the bibliography of Bureau publications for the years 1901–1925, Circular of the Bureau of Standards No. 24 (1925).

[3] The Act of May 29, 1920, 41 Stat. 631, 683, 684, permitted other departments to transfer funds to the Bureau of Standards for such purposes, though even before that time it was one of the major functions of the Bureau to be of assistance to other branches of the service. See *e.g.* Annual Reports of the Director for 1915, 1916, 1917, p. 16; Annual Report for 1918, p. 18; compare Annual Report for 1921, p. 25; for 1922, p. 10.

[4] The consuming public is directly benefited not only by the Bureau's work in improving the standards of quality and performance of industry, but also by the assistance which it lends to governmental bodies, state and city. See Annual Reports of the Director for 1915, 1916, 1917, p. 14; Annual Report for 1918, p. 16; National Bureau of Standards, Its Functions and Activity, Circular of the Bureau of Standards, No. 1 (1925), pp. 28, 33.

[5] Coöperation with private industry has been the major method relied upon to make the accomplishments of the Bureau effective. See Annual Report for 1922, p. 7; Annual Report for 1923, p. 3. A system of research associates permits industrial groups to maintain men at the Bureau for research of mutual concern. The plan has facilitated coöperation. See Annual Report for 1923, p. 4; Annual Report for 1924, p. 35; Annual Report for 1925, p. 38; Annual Reports for 1926, 1928, 1929, 1931, 1932, p. 1; Research Associates at the Bureau of Standards, Bureau Circular No. 296 (1926). For a list of coöperating organizations as of December 1, 1926, see Misc. Publications No. 96 (1927).

[6] No fees have been charged except to cover the cost of testing, but the Act of June 30, 1932, c. 314, § 312, 47 Stat. 410, directs that "for all comparisons, calibrations, tests or investigations, performed" by the Bureau except those performed for the Government of the United

lic interest. In 1915, as the importance of radio to the government and to the public increased, Congress appropriated funds[7] to the Bureau "for investigation and standardization of methods and instruments employed in radio communication." Similar annual appropriations have been made since and public funds were allotted by Acts of July 1, 1916, c. 209, 39 Stat. 262, 324 and October 6, 1917, c. 79, 40 Stat. 345, 375, for the construction of a fireproof laboratory building "to provide additional space to be used for research and testing in radio communication," as well as "space and facilities for coöperative research and experimental work in radio communication" by other departments of the government. Thus, the conduct of research and scientific investigation in the field of radio has been a duty imposed by law upon the Bureau of Standards since 1915.

Radio research has been conducted in the Radio Section of the Electric Division of the Bureau. In 1921 and 1922, when Dunmore and Lowell made the inventions in controversy, they were employed in this section as members of the scientific staff. They were not, of course, engaged to invent, in the sense in which a carpenter is employed to build a chest, but they were employed to conduct scientific investigations in a laboratory devoted principally to applied rather than pure science with full knowledge and expectation of all concerned that their investigations might normally lead, as they did, to invention. The Bureau was as much devoted to the advancement of the radio art by invention as by discovery which falls short of it. Hence, invention in the field of radio was a goal intimately related to and embraced within the purposes of the work of the scientific staff.

States or a State, "a fee sufficient in each case to compensate the . . . Bureau . . . for the entire cost of the services rendered shall be charged. . . ."

[7] Act of March 4, 1915, c. 141, 38 Stat. 997, 1044.

Both courts below found that Dunmore and Lowell were impelled to make these inventions "solely by their own scientific curiosity." They undoubtedly proceeded upon their own initiative beyond the specific problems upon which they were authorized or directed to work by their superiors in the Bureau, who did not actively supervise their work in its inventive stages. But the evidence leaves no doubt that in all they did they were following the established practice of the Section. For members of the research staff were expected and encouraged to follow their own scientific impulses in pursuing their researches and discoveries to the point of useful application, whether they involved invention or not, and even though they did not relate to the immediate problem in hand. After the inventions had been conceived they were disclosed by the inventors to their chief and they devoted considerable time to perfecting them, with his express approval. All the work was carried on by them in the government laboratory with the use of government materials and facilities, during the hours for which they received a government salary. Its progress was recorded throughout in weekly and monthly reports which they were required to file, as well as in their laboratory notebooks. It seems clear that in thus exercising their inventive powers in the pursuit of ideas reaching beyond their specific assignments, the inventors were discharging the duties expected of scientists employed in the laboratory; Dunmore as well as his supervisors, testified that such was their conception of the nature of the work. The conclusion is irresistible that their scientific curiosity was precisely what gave the inventors value as research workers; the government employed it and gave it free rein in performing the broad duty of the Bureau of advancing the radio art by discovery and invention.

The courts below did not find that there was any agreement between the government and the inventors as to

their relative rights in the patents and there was no evidence to support such a finding. They did not find, and upon the facts in evidence and within the range of judicial notice, they could not find that the work done by Dunmore and Lowell leading to the inventions in controversy was not within the scope of their employment. Such a finding was unnecessary to support the decisions below, which proceeded on the theory relied on by the respondent here, that in the absence of an express contract to assign it, an employer is entitled to the full benefit of the patent granted to an employee, only when it is for a particular invention which the employee was specifically hired or directed to make. The bare references by the court below to the obvious facts that "research" and "invention" are not synonymous, and that all research work in the Bureau is not concerned with invention, fall far short of a finding that the work in the Bureau did not contemplate invention at all. Those references were directed to a different end, to the establishment of what is conceded here, that Dunmore and Lowell were not *specifically* hired or directed to make the inventions because in doing so they proceeded beyond the assignments given them by their superiors. The court's conception of the law, applied to this ultimate fact, led inevitably to its stated conclusion that the claim of the government is without support in reason or authority "unless we should regard a general employment for research work as synonymous with a particular employment (or assignment) for inventive work."

The opinion of this Court apparently rejects the distinction between specific employment or assignment and general employment to invent, adopted by the court below and supported by authority, in favor of the broader position urged by the government that wherever the employee's duties involve the exercise of inventive powers, the employer is entitled to an assignment of the pat-

ent on any invention made in the scope of the general employment. As I view the facts, I think such a rule, to which this Court has not hitherto given explicit support, would require a decree in favor of the government. It would also require a decree in favor of a private employer, on the ground stated by the court that as the employee "has only produced what he is employed to invent," a specifically enforcible "term of the agreement necessarily is that what he is paid to produce belongs to his paymaster." A theory of decision so mechanical is not forced upon us by precedent and cannot, I think, be supported.

What the employee agrees to assign to his employer is always a question of fact. It cannot be said that merely because an employee agrees to invent, he also agrees to assign any patent secured for the invention. Accordingly, if an assignment is ordered in such a case it is no more to be explained and supported as the specific enforcement of an agreement to transfer property in the patent than is the shop-right which equity likewise decrees, where the employment does not contemplate invention. All the varying and conflicting language of the books cannot obscure the reality that in any case where the rights of the employer to the invention are not fixed by express contract, and no agreement in fact may fairly be implied, equity determines after the event what they shall be. In thus adjudicating *in invitum* the consequences of the employment relationship, equity must reconcile the conflicting claims of the employee who has evolved the idea and the employer who has paid him for his time and supplied the materials utilized in experimentation and construction. A task so delicate cannot be performed by accepting the formula advanced by the petitioner any more than by adopting that urged by the respondent, though both are not without support in the

opinions of this Court. Compare *Hapgood* v. *Hewitt,* 119 U.S. 226; *Dalzell* v. *Dueber Mfg. Co.,* 149 U.S. 315; *Solomons* v. *United States,* 137 U.S. 342, 346; *Gill* v. *United States,* 160 U.S. 426, 435; *Standard Parts Co.* v. *Peck,* 264 U.S. 52.

Where the employment does not contemplate the exercise of inventive talent the policy of the patent laws to stimulate invention by awarding the benefits of the monopoly to the inventor and not to someone else leads to a ready compromise: a shop-right gives the employer an adequate share in the unanticipated boon.[8] *Hapgood* v. *Hewitt, supra; Lane & Bodley Co.* v. *Locke,* 150 U.S. 193; *Dalzell* v. *Dueber Mfg. Co., supra; Pressed Steel Car Co.* v. *Hansen,* 137 Fed. 403; *Amdyco Corp.* v. *Urquhart,* 39 F. (2d) 943, aff'd 51 F. (2d) 1072; *Ingle* v. *Landis Tool Co.,* 272 Fed. 464; see *Beecroft & Blackman* v. *Rooney,* 268 Fed. 545, 549.

But where, as in this case, the employment contemplates invention, the adequacy of such a compromise is more doubtful not because it contravenes an agreement for an assignment, which may not exist, but because, arguably, as the patent is the fruit of the very work which the employee is hired to do and for which he is paid, it should no more be withheld from the employer, in equity and good conscience, than the product of any other service which the employee engages to render. This result has been reached where the contract was to devise a means for solving a defined problem, *Standard Parts Co.* v. *Peck, supra,* and the decision has been thought to establish the employer's right wherever the employee is hired or assigned to evolve a process or mechanism for meeting a specific need. *Magnetic Mfg. Co.* v. *Dings Magnetic Separator Co.,* 16 F. (2d) 739; *Goodyear Tire & Rubber*

[8] See the cases collected in 30 Columbia Law Rev. 1172; 36 Harvard Law Rev. 468.

Co. v. *Miller,* 22 F. (2d) 353, 356; *Houghton* v. *United States,* 23 F. (2d) 386. But the court below and others have thought (*Pressed Steel Car Co.* v. *Hansen, supra; Houghton* v. *United States, supra; Amdyco Corp.* v. *Urquhart, supra*), as the respondent argues, that only in cases where the employment or assignment is thus specific may the employer demand all the benefits of the employee's invention. The basis of such a limitation is not articulate in the cases. There is at least a question whether its application may not be attributed, in some instances, to the readier implication of an actual promise to assign the patent, where the duty is to invent a specific thing (see *Pressed Steel Car Co.* v. *Hansen, supra,* 415), or, in any case, to the reluctance of equity logically to extend, in this field, the principle that the right to claim the service includes the right to claim its product. The latter alternative may find support in the policy of the patent laws to secure to the inventor the fruits of his inventive genius, in the hardship which may be involved in imposing a duty to assign all inventions, see *Dalzell* v. *Dueber Mfg. Co., supra,* 323, cf. *Aspinwall Mfg. Co.* v. *Gill,* 32 Fed. 697, 700, and in a possible inequality in bargaining power of employer and employee. But compare *Goodyear Tire & Rubber Co.* v. *Miller, supra,* 355; *Hulse* v. *Bonsack Mach. Co.,* 65 Fed. 864, 868; see 30 Columbia Law Rev. 1172, 1176–8. There is no reason for determining now the weight which should be accorded these objections to complete control of the invention by the employer, in cases of ordinary employment for private purposes. Once it is recognized, as it must be, that the function of the Court in every case is to determine whether the employee may, in equity and good conscience retain the benefits of the patent, it is apparent that the present case turns upon considerations which distinguish it from any which has thus far been decided.

The inventors were not only employed to engage in work which unmistakably required them to exercise their inventive genius as occasion arose; they were a part of a public enterprise. It was devoted to the improvement of the art of radio communication for the benefit of the people of the United States, carried on in a government laboratory, maintained by public funds. Considerations which might favor the employee where the interest of the employer is only in private gain are therefore of slight significance; the policy dominating the research in the Bureau, as the inventors knew, was that of the government to further the interests of the public by advancing the radio art. For the work to be successful, the government must be free to use the results for the benefit of the public in the most effective way. A patent monopoly in individual employees, carrying with it the power to suppress the invention, or at least to exclude others from using it, would destroy this freedom; a shop-right in the government would not confer it. For these employees, in the circumstances, to attempt to withhold from the public and from the government the full benefit of the inventions which it has paid them to produce, appears to me so unconscionable and inequitable as to demand the interposition of a court exercising chancery powers. A court which habitually enjoins a mortgagor from acquiring and setting up a tax title adversely to the mortgagee, *Middletown Savings Bank* v. *Bacharach,* 46 Conn. 513, 524; *Chamberlain* v. *Forbes,* 126 Mich. 86; 85 N.W. 253; *Waring* v. *National Savings & Trust Co.,* 138 Md. 367; 114 Atl. 57; see 2 Jones on Mortgages (8th ed.), § 841, should find no difficulty in enjoining these employees and the respondent claiming under them from asserting, under the patent laws, rights which would defeat the very object of their employment. The capacity of equitable doctrine for growth and of courts of equity to mould it to

new situations, was not exhausted with the establishment of the employer's shop-right. See *Essex Trust Co.* v. *Enwright,* 214 Mass. 507; 102 N.E. 441; *Meinhard* v. *Salmon,* 249 N.Y. 458; 164 N.E. 545.

If, in the application of familiar principles to the situation presented here, we must advance somewhat beyond the decided cases, I see nothing revolutionary in the step. We need not be deterred by fear of the necessity, inescapable in the development of the law, of setting limits to the doctrine we apply, as the need arises. That prospect does not require us to shut our eyes to the obvious consequences of the decree which has been rendered here. The result is repugnant to common notions of justice and to policy as well, and the case must turn upon these considerations if we abandon the illusion that equity is called upon merely to enforce a contract, albeit, one that is "implied." The case would be more dramatic if the inventions produced at public expense were important to the preservation of human life, or the public health, or the agricultural resources of the country. The principle is the same here, though the inventions are of importance only in the furtherance of human happiness. In enlisting their scientific talent and curiosity in the performance of the public service in which the Bureau was engaged, Dunmore and Lowell necessarily renounced the prospect of deriving from their work commercial rewards incompatible with it.[9] Hence, there is nothing oppressive or

[9] It has been said that many scientists in the employ of the government regard the acceptance of patent rights leading to commercial rewards in any case as an abasement of their work. Hearings on Exploitation of Inventions by Government Employees, Senate Committee on Patents, 65th Cong., 3d Sess. (1919), pp. 16, 17; see also the Hearings before the same Committee, January 23, 1920, 66th Cong., 2d Sess. (1920), p. 5. The opinion of the Court attributes importance to the fact, seemingly irrelevant, that other employees of the Bureau have in some instances in the past taken out patents on their

unconscionable in requiring them or their licensee to surrender their patents at the instance of the United States, as there probably would be if the inventions had not been made within the scope of their employment or if the employment did not contemplate invention at all.

The issue raised here is unaffected by legislation. Undoubtedly the power rests with Congress to enact a rule of decision for determining the ownership and control of patents on inventions made by government employees in the course of their employment. But I find no basis for saying that Congress has done so or that it has manifested any affirmative policy for the disposition of cases of this kind, which is at variance with the considerations which are controlling here.

The Act of June 25, 1910, 36 Stat. 851, as amended July 1, 1918, 40 Stat. 704, 705, permitted patentees to sue the government in the Court of Claims for the unauthorized use of their patents. It was in effect an eminent domain statute by which just compensation was secured to the patentee, whose patent had been used by the government. See *Richmond Screw Anchor Co.* v. *United States,* 275 U.S. 331. This statute excluded government employees from the benefits of the Act in order, as the House Committee Report explicitly points out, to leave unaffected the shop-rights of the government. See H.R. Report No. 1288, 61st Cong. 2d Sess. A statute thus

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inventions which, so far as appears, the government has not prevented them from enjoying. The circumstances under which those inventions were made do not appear. But even if they were the same as those in the present case there is no basis for contending that because the government saw fit not to assert its rights in other cases it has lost them in this. Moreover, there is no necessary inconsistency in the government's position if it concluded in those cases that the public interest would be served best by permitting the employees to exploit their inventions themselves, and adopted a contrary conclusion here.

aimed at protecting in every case the minimum rights of the government can hardly be taken to deny other and greater rights growing out of the special equity of cases like the present.

The Act of April 30, 1928, 45 Stat. 467, 468, amending an earlier statute of 1883 (22 Stat. 625), so as to permit a patent to be issued to a government employee without payment of fees, for any invention which the head of a department or independent bureau certifies "is used or liable to be used in the public service," and which the application specifies may, if patented, "be manufactured and used by or for the Government for governmental purposes without the payment of . . . any royalty," was passed, it is true, with the general purpose of encouraging government employees to take out patents on their inventions. But this purpose was not, as the opinion of the Court suggests, born of a Congressional intent that a government employee who conceives an invention in the course of his employment should be protected in his right to exclude all others but the government from using it. Congress was concerned neither with enlarging nor with narrowing the relative rights of the government and its employees.[10] This is apparent from the language of the statute that the patent shall be issued without a fee "subject to existing law," as well as from the records of its legislative history.[11]

[10] Throughout the various speculations in committee as to what those rights were, it was generally agreed that they were intended to remain unchanged by the bill. See Hearings before the House Committee on Patents, 68th Cong., 2d Sess., on H.R. 3267 and 11403 (1925); Hearings before the same Committee, 70th Cong., 1st Sess. (1928), especially at pp. 8-13. The discussion on the floor of the House, referred to in the opinion of the Court (see note 19) does not indicate the contrary.

[11] In addition to the hearings cited *supra*, note 10, see H.R. Report No. 1596, 68th Cong., 2d Sess.; H.R. Report No. 871, Senate Report

The purpose of Congress in facilitating the patenting of inventions by government employees was to protect the existing right of the government to use all devices invented in the service, whether or not the patentee was employed to use his inventive powers. Experience had shown that this shop-right was jeopardized unless the employee applied for a patent, since without the disclosure incident to the application the government was frequently hampered in its defense of claims by others asserting priority of invention. But doubt which had arisen whether an application for a patent under the Act of 1883 did not operate to dedicate the patent to the public,[12] and reluctance to pay the fees otherwise required, had led government employees to neglect to make applications, even when they were entitled to the benefits of the monopoly subject only to the government's right of use. This doubt the amendment removed. It can hardly be contended that in removing it in order to aid the government in the protection of its shopright, Congress declared a policy that it should have no greater right to control a patent procured either under this special statute or under the general patent laws by fraud or any other type of inequitable conduct. Had such a policy been declared, it is difficult to see on what basis we could award the government a remedy, as it seems to be agreed we would, if Dunmore and Lowell had been specifically employed to make the inventions. There is nothing to indicate that Congress adopted one policy for such a case and a contrary one for this.

No. 765, 70th Cong., 1st Sess. The bill was originally a companion proposal to the Federal Trade Commission bill discussed *infra*, note 13. See the references given there.

[12] See *Selden Co.* v. *National Aniline & Chemical Co.*, 48 F. (2d) 270, 272; *Squier* v. *American Telephone & Telegraph Co.*, 7 F. (2d) 831, 832, affirmed 21 F. (2d) 747.

Other legislation proposed but not enacted,[13] requires but a word. Even had Congress expressly rejected a bill purporting to enact into law the rule of decision which I think applicable here, its failure to act could not be accorded the force of law. But no such legislation has been proposed to Congress, and that which was suggested may have been and probably was defeated for reasons unconnected with the issue presented in this case. The legislative record does show, as the opinion of the Court states, that it is a difficult question which has been the subject of consideration at least since the war, whether the public interest is best served by the

[13] The bill referred to in the opinion of the Court was one sponsored by the executive departments to endow the Federal Trade Commission with the power to accept assignments of patents from government employees and administer them in the public interest. It passed the Senate on one occasion and the House on another but failed to become a law. (S. 5265, 65th Cong., 3d Sess., S. 3223, 66th Cong., 1st Sess., H.R. 9932, 66th Cong., 1st Sess., H.R. 11984, 66th Cong., 3d Sess.) In the course of hearings and debates many points of view were expressed. See Hearings on Exploitation of Inventions by Government Employees, Senate Committee on Patents, 65th Cong., 3d Sess. (1919); Hearing before the same Committee, 66th Cong., 2d Sess. (1920); Senate Report No. 405, H.R. Report No. 595, 66th Cong., 2d Sess., recommending passage. See 59 Cong. Rec., 2300, 2421, 2430, 3908, 4682, 4771, 8359, 8360, 8483, 8490; 60 *ibid.* 356; Conference Report, H.R. No. 1294, Sen. Doc. No. 379, 66th Cong., 3d Sess. And see 60 Cong. Rec., 2890, 3229, 3264–3269, 3537. Differences were stressed in the purposes and needs of different agencies of the Government. See especially Hearings (1919), *supra*, pp. 22, 24-5. The need of commercial incentives to private exploiters, as well as the general desirability of such exploitation were admitted, but the dangers were recognized as well. It was thought that the public interest would best be served by the establishment of a single agency for government control, with the power to determine upon some compensation for the inventor.

After the death of this bill in the Senate, February 21, 1921, the subject was again considered by an Interdepartmental Board estab-

dedication of an invention to the public or by its exploitation with patent protection under license from the government or the inventor. But the difficulty of resolving the question does not justify a decree which does answer it in favor of permitting government employees such as these to exploit their inventions without restriction, rather than one which would require the cancellation of their patents or their assignment to the United States.

The decrees should be reversed.

MR. JUSTICE CARDOZO concurs in this opinion.

MR. CHIEF JUSTICE HUGHES, dissenting:

I agree with Mr. Justice Stone's analysis of the facts showing the nature of the employment of Dunmore and Lowell, and with his conclusions as to the legal effect

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lished by executive order of President Harding, August 9, 1922. Its report was transmitted to Congress by President Coolidge, in December, 1923. Sen. Doc. No. 83, 68th Cong., 1st Sess. The Board found that there had never been any general governmental policy established with respect to inventions, that whether public dedication, private exploitation or governmental control and administration is desirable, depends largely on the nature of the invention. Accordingly, legislation was recommended establishing a permanent Interdepartmental Patents Board with the power to demand assignments of patents on those inventions thereafter developed in the service which "in the interest of the national defense, or otherwise in the public interest" should be controlled by the Government. No action was taken upon this proposal.

Since that time the Director of the Bureau of Standards has recommended that a "uniform, equitable policy of procedure" be defined for the government by legislation. (Annual Report for 1925, p. 40.) In the Report for 1931 it is said (p. 46) that the "patent policy of this Bureau has always been that patentable devices developed by employees paid out of public funds belong to the public," and the Report for 1932 adds (p. 40) "if not so dedicated directly, the vested rights should be held by the Government."

of that employment. As the people of the United States should have the unrestricted benefit of the inventions in such a case, I think that the appropriate remedy would be to cancel the patents.

UNITED STATES *v.* DARBY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

No. 653. Argued March 14, 1933.—Decided April 10, 1933

Under R.S., § 5209, as amended, which makes it a crime for an officer of a Federal Reserve Bank, or of any member bank, to make any false entry in its books with intent to defraud, the entry of a name appearing on a discounted note as that of co-maker, is a false entry if made with knowledge that the name is a forgery. P. 226.

2 F.Supp. 378, reversed.

APPEAL from a judgment quashing an indictment.

Mr. Whitney North Seymour argued the cause, and *Solicitor General Thacher* and *Messrs. Paul D. Miller* and *William H. Ramsey* filed a brief, on behalf of the United States.

Mr. Lucien H. Mercier for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The case involves the construction of a statute of the United States which makes it a crime for an officer or employee of a federal reserve bank, or of any member bank, to make any entry in its books with intent to defraud. R.S. § 5209 as amended by the Act of Septem-

ber 26, 1918, c. 177, § 7, 40 Stat. 972; 12 U.S. Code, § 592.[1]

An indictment in sixteen counts charges the appellee, John G. Darby, with a violation of this statute. Eight entries are alleged to have been falsely made. Each has relation to a separate promissory note discounted by the Montgomery County National Bank of Rockville, Maryland. The notes bore the genuine signature of J. G. Darby as maker. They bore what appeared to be the signature of Bessie D. Darby as co-maker or endorser. In fact, as the appellee well knew, her signature was a forgery. With this knowledge he entered in the discount book the name of Bessie D. Darby as co-maker or endorser, and did this in the course of his employment as assistant cashier. The odd numbered counts charge an intent to injure and defraud the bank, and the even numbered counts an intent to deceive the officers of the bank and the Comptroller of the Currency. A demurrer to the indictment was sustained by the District Court on the ground that the discount of the paper had been recorded as it occurred, and hence that the entries were not false within the meaning of the statute. The case is here

[1] Sec. 5209. Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank . . . who . . . makes any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve bank or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or the Federal Reserve Board; . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court.

under the Criminal Appeals Act (Act of March 2, 1907, c. 2564, 34 Stat. 1246; 18 U.S. Code, § 682; cf. Judicial Code, § 238; 28 U.S. Code, § 345) upon an appeal by the Government.

"The crime of making false entries by an officer of a national bank with the intent to defraud . . . includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association." *Agnew* v. *United States,* 165 U.S. 36, 52. The act charged to the appellee is criminal if subjected to that test. At the time of the entry, no note was in existence with the signature of Bessie D. Darby as co-maker or endorser. No note with such a signature had been discounted by the bank. The forged signature was a nullity, as much so as if the name had been blotted out before the discount, or never placed upon the notes at all. Verity was not imparted to the entry by the simulacrum of a signature known to be spurious. *Agnew* v. *United States, supra; Coffin* v. *United States,* 162 U.S. 664, 683; *United States* v. *Morse,* 161 Fed. 429, 436; *Morse* v. *United States,* 174 Fed. 539, 552; *United States* v. *Warn,* 295 Fed. 328, 330; *Billingsley* v. *United States,* 178 Fed. 653, 659, 662; *Peters* v. *United States,* 94 Fed. 127, 144. As well might it be said that dollars known to be counterfeit might have been entered in the books as cash.

To read the statute otherwise is to be forgetful of its aim. Its aim was to give assurance that upon an inspection of a bank, public officers and others would discover in its books of account a picture of its true condition. *United States* v. *Corbett,* 215 U.S. 233, 241, 242; *Billingsley* v. *United States, supra.* One will not find the picture here. Upon the face of the books there was a statement to examiners that paper with two signatures had been discounted by the bank and was then in its possession.

In truth, to the knowledge of the maker of the entries, there were not two signatures, but one.

Nothing at war with our conclusion was said, much less decided, in *Coffin* v. *United States,* 156 U.S. 432, 462. The opinion in that case is to be read in the light of a later opinion in the same case (162 U.S. 664), and of the still later opinion in *Agnew* v. *United States, supra.* Whether the conclusion would be the same if the signature had been genuine, but the signer had been known to be an insolvent, or a man of straw (cf. *Cooper* v. *United States,* 13 F. (2d) 16; *Morse* v. *United States, supra; United States* v. *Warn, supra, Billingsley* v. *United States, supra*), there is no occasion to determine. Our decision does not go beyond the limits of the case before us.

The judgment should be reversed and the case remanded to the District Court for further proceedings in accordance with this opinion. *Reversed.*

BUFFUM, TRUSTEE IN BANKRUPTCY, *v.* PETER BARCELOUX CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 564. Argued March 20, 21, 1933.—Decided April 10, 1933

1. Where a pledge, followed by a secret and unfair sale to the pledgee for much less than value, was part of a general scheme of the parties to defraud the pledgor's creditors, the remedy of his trustee in bankruptcy is not merely to set aside the sale and have a new one ordered, but to set aside the pledge and recover the property or its value. Bankruptcy Act, § 70 (e). P. 232.
2. Even though one of the creditors of a bankrupt, by accepting a junior lien, may have estopped himself from attacking a pledge made by the bankrupt in fraud of creditors, this does not prevent the Trustee from setting it aside under § 70 (e); and recovery will be for the benefit of all the creditors. *Moore* v. *Bay,* 284 U.S. 4. P. 233.

3. A creditor who takes security on his insolvent debtor's property subject to a specific lien may be estopped while he retains the benefit from disavowing the attendant burden; but the basis for an estoppel is cut away if the transaction is lawfully disaffirmed and his security is abandoned. P. 234.
4. The right to object to equity jurisdiction, upon the ground of adequate remedy at law, may be waived. P. 235.
5. A trustee who sells property in fraud of his trust and buys it back pending suit, must account, at the option of the *cestui que trust*, for the value at the time of sale, with interest, or for the property itself. Pp. 235–236.
6. This duty is the same whether the trust be actual or constructive, for the implication of a trust is the implication of every duty proper to a trust. P. 237.
7. A creditor of a bankrupt is entitled to participate on the same basis with other creditors in the distribution of assets recovered from him by the trustee in a suit under § 70 (e). *Moore* v. *Bay*, 284 U.S. 4. P. 237.

61 F. (2d) 145, reversed.

CERTIORARI 288 U.S. 595, to review the reversal of a money decree secured by Buffum, Trustee, in a suit under § 70 (e) of the Bankruptcy Act to set aside a fraudulent transfer. 51 F. (2d) 80, modified and affirmed.

Messrs. Horace B. Wulff and *George R. Freeman*, with whom *Messrs. Robert T. Devlin* and *Wm. H. Devlin* were on the brief, for petitioner.

Mr. Arthur C. Huston, with whom *Mr. Stephen W. Downey* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

In April, 1926, the bankrupt, Henry Barceloux, was the owner of 2500 shares of the Peter Barceloux Company, a quarter of the capital stock. The other three quarters were owned, one by his brother George, one by his sister Cora, and one by three nephews, the sons of a deceased

brother. The book value of the bankrupt's shares was over $90,000, and the actual value over $94,000, but the shares were not traded in, and had no current value in the market. The business was a family affair, and strangers were not welcome within the family preserve.

A time arrived when the unwelcome stranger seemed likely to break in. The family combined to maintain its solidarity and keep the intruder out. Henry Barceloux had become heavily involved in debt. A former partner, Freeman, had recovered a judgment against him for nearly $50,000. Freeman had been lenient, but Freeman was now dead, and the administrator was asking for security as the price of delay. There were other creditors too, though they are not shown to have been importunate. With these intruders visible, the family set out to build protective barriers. There is testimony that Henry Barceloux was indebted to the corporation in upwards of $33,000. On April 27, 1926, he secured part of this indebtedness by a pledge of 2499 shares of the Barceloux stock. The agreement was in writing. We are assured by the family that it was confirmatory of an oral agreement made some years before, but the testimony as to this is not persuasive, and might, not unreasonably, be rejected by the trier of the facts. The movement of events was swift thereafter. The Freeman administrator had still to be placated. He was put off in June, 1926, with an assignment of the equity in the Barceloux shares together with an assignment of an interest in heavily mortgaged lands. He gave notice to the corporation of his interest in the shares and made demand upon the secretary for a statement of the indebtedness secured by the superior lien. He also asked for an agreement that the corporation give him notice of ninety days before enforcing its security. His activity aroused the family to new measures of protection. The request for notice was

refused, and the defensive barrier extended. Henry Barceloux was then the owner of shares of stock in other corporations, his ownership till then being clear of any lien. On June 29, 1926, he pledged his interest in these shares (worth about $2158) as additional security for the family debt. In so doing he stripped himself of the control of all or nearly all his unincumbered assets. On the same day, or perhaps a few days later, the corporation canceled the certificate for 2499 shares which was in the name of the pledgor, and took out a new certificate in its own name as pledgee.

The scene was now ready. The time for action was at hand. On August 16, 1926, there was the gesture of a public sale. A printed notice had been posted on a telegraph pole and perhaps elsewhere. There was no other notice either to Freeman or to any one else. At the appointed time, the members of the family, accompanied by a lawyer, went through the form of an auction on the steps of the court house. The debtor's sister, Cora, who was a director of the corporation, read the notice of sale and asked for bids; all the collateral, both the Barceloux shares and the others, being offered as a single lot. The brother George, who was then the president, made a bid for the entire lot in the name of the Barceloux corporation, the bid being for the amount of its claim against the debtor and a fee for its attorney. No sooner had the corporation bought than it sold back again to George. In payment for what it sold, it took his promissory note with a pledge of the shares as collateral security. About two years later, it canceled the resale, gave back the promissory note and thereafter held the shares as owner. In the meanwhile a few scraps of property retained by Henry Barceloux had been put out of his name. He still held one share in the Barceloux Company. He sold it to his sister. He had equities in other properties, lands and shares of stock. He sold part to his sister and part to his

wife. The value in each instance was in excess of the price. The equity in collateral pledged with a bank in San Francisco went to the Barceloux Company, which assumed the payment of the debt. All that was then left to him was his office furniture and fixtures, and this he transferred to his attorney. By October, 1926, he had stripped himself of everything. He waited four months, and became a voluntary bankrupt.

The trustee in bankruptcy has brought this suit under § 70 (e) of the National Bankruptcy Act * to recover from the Barceloux Company the value of property pledged by the bankrupt with fraudulent intent. At the filing of the bill the company had resold the shares to George Barceloux, its president; and the prayer for relief, adapting itself to the situation then existing, was for the value of the shares on August 16, 1926, with interest at 7%, the statutory rate of interest in the state of California. There was also a prayer for an accounting and for any other relief consistent with equity. The District Court found that the fraudulent intent had been made out; that both pledgor and pledgee were sharers in it; and that there should be an appointment of a master to take and state an account and to report the value of the property covered by the pledge. Upon the coming in of the report, there was a final judgment for $106,409.44, with costs, in favor of the trustee. 51 F. (2d) 80.

An appeal by the defendant followed with the result that the decree was reversed, one judge dissenting. 61 F. (2d) 145. The Court of Appeals held that the Freeman

* "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication." National Bankruptcy Act, § 70 (e), July 1, 1898, c. 541, 30 Stat. 565; 11 U.S. Code, § 110.

administrator was estopped from contesting the validity of the pledge by reason of the fact that he had accepted a pledge of the equity in the shares, subject by its terms to the pledge already made. Finding no sufficient evidence that other creditors were aggrieved, it refused to pass upon the question whether the pledge as to them was good or bad. It held, however, that the sale under the pledge had not been fairly made, and that a resale should be ordered. Upon the argument the defendant had made profert of the Barceloux certificate, and had left it with the court to be disposed of in any way consistent with equity and conscience. The shares in other corporations it could not produce, having disposed of them again. The court held that there could be no recovery of the value of the Barceloux shares in view of the willingness of the defendant to submit to a resale. Judgment was therefore ordered that the shares be resold under the direction of the court of bankruptcy; that out of the proceeds the Barceloux Company be paid its indebtedness with interest (less the value of the shares that it was unable to surrender); and that only the surplus, if any, be paid to the trustee. A writ of certiorari brings the case here.

1. The evidence sustains the finding of the District Court that the pledge to the defendant was made in fraud of creditors.

More is here than a mere preference. If that and nothing else had been intended, the pledge would be proof against attack, for it was made more than four months before the bankruptcy petition. But in truth there was much besides. The pledge was a step in a general plan which must be viewed as a whole with all its composite implications. *Dean* v. *Davis,* 242 U.S. 438, 444; *Coder* v. *Arts,* 213 U.S. 223, 224. The principal assets of the debtor were his certificates of stock in the family corporation. There was to be a delivery of these certificates as security for an indebtedness much less than the value of

the collateral deposited. There was to be a delivery of other security to make sure that all the assets of the debtor, not otherwise incumbered, would be within the control of the pledgee. There was to be a sale so secret that none of the creditors would be likely to know anything about it, with the result that other bids would be forestalled, and embarrassing inquiries as to preferences averted. Finally, to make the job a thorough one, the odds and ends of other assets were to be conveyed to friends or relatives. As the outcome of these manœuvres the Barceloux Company canceled an indebtedness of about $33,000, and became the owner of stock certificates worth triple that amount. The unconscionable sale is not to be viewed in isolation, as something disconnected from the pledge, an accident or afterthought. It was the fruit for which the seed was planted, or so the trier of the facts might look at it. The Barceloux Company set out to do something more than secure the payment of a debt. It became a party to a plan to appropriate a surplus and in combination with its debtor to hold his creditors at bay. *Dean* v. *Davis, supra; Shapiro* v. *Wilgus,* 287 U.S. 348. So the District Judge interpreted the transaction, viewing the events consecutively as stages of an unfolding plot. We discover no sufficient reason for rejecting his conclusion. Indeed the Circuit Court of Appeals held nothing to the contrary. It refrained from approving or condemning the purpose of the pledge, being led to that course by the application of the doctrine of estoppel. The finding therefore stands.

2. The trustee is not subject to the bar of an estoppel in his effort to undo the fraud.

The argument for the defendant is that the Freeman administrator is estopped by force of his acceptance of a junior lien upon the shares, and that the trustee as his champion enjoys no better right. To overcome the supposed estoppel it is enough to recall the fact that at the

time of the unlawful pledge the Freeman administrator was not the only creditor. The uncontradicted evidence is that there were many other creditors whose claims are still unpaid. What the trustee recovers will be for the benefit of all. *Moore* v. *Bay,* 284 U.S. 4.

The result would not be different, however, if the administrator stood alone. Neither in his own name nor indirectly through the trustee is he building any rights upon the pledge or claiming any preference over others. He has rejected the security, and claims as a general creditor. There may have been obscurity as to this at the beginning of the suit. The bill of complaint which was a declaration by the trustee, and not by the administrator, gives recognition to the junior pledge as valid and subsisting. There has been no obscurity, however, since the trial and the interlocutory judgment. The pledge to the administrator is disregarded, and he is left in the same position with reference to any general creditors as if the transaction putting him ahead of them had been undone from the beginning. One who takes a mortgage or an assignment of an interest in property subject to a specific lien may be estopped while he retains the benefit from disavowing the attendant burden. *Freeman* v. *Auld,* 44 N.Y. 50, 53; *Matter of Oakes,* 248 N.Y. 280, 284; 162 N.E. 79. He either takes the security upon the terms conditioning the offer, or does not take it at all. The basis for an estoppel is cut away if the transaction is lawfully disaffirmed and the security abandoned. *Old National Bank* v. *Heckman,* 148 Ind. 490, 507; 47 N.E. 953. Cf. *Bybee* v. *Oregon & Cal. R. Co.,* 139 U.S. 663, 682.

Disaffirmance and abandonment in this instance rested on sufficient grounds. The Freeman administrator, though informed of the fact that there was a pledge superior to his, had no knowledge of anything else. He was not informed of the circumstances essential to an

understanding of the fraud. He did not even know, so far as the evidence discloses, whether the pledge was new or old. Only through later events was the collusive plan exhibited in all its sinister significance. There can be no irrevocable estoppel when the truth has been withheld.

3. The repurchase of the certificates by the fraudulent grantee during the pendency of the suit did not make it error for a court of equity to render judgment for the value.

There is no occasion to consider what relief would have been proper if the certificates had been owned by the defendant at the filing of the bill, and had been continuously retained thereafter. We may assume, though we do not decide, that the trustee, suing in such circumstances for an accounting in equity, would have had the shares, and not the value. See *Dunphy* v. *Kleinsmith,* 11 Wall. 610; *Wasey* v. *Holbrook,* 141 App. Div. 336, 125 N.Y.S. 1087; 206 N.Y. 708, 99 N.E. 1119; and compare American Law Institute, Restatement of Law of Trusts, Tentative Draft No. 3, § 199, and cases cited, pp. 157, 158. The fact is, however, that at the filing of the bill, the defendant had assigned the certificates to another, who was not a party to the suit. The assignment is alleged in the complaint and admitted in the answer. Not till May 11, 1928, after the answer had been filed, did George Barceloux return his certificates to the defendant and thus reinstate its title. This being so, the suit in its inception was properly framed as one for money relief, the value of the shares at the time of the foreclosure of the pledge. There was no objection at any stage of the controversy that the case was triable by a jury. *Schoenthal* v. *Irving Trust Co.,* 287 U.S. 92; *United States* v. *Bitter Root Co.,* 200 U.S. 451. In saying this we do not intimate that the objection would have prevailed, if seasonably urged. There were entanglements that may have called for discovery and accounting,

at least in possible contingencies. The point will not be labored, for at the trial the defendant did not argue to the contrary (*Reynes* v. *Dumont,* 130 U.S. 354, 395; *American Mills Co.* v. *American Surety Co.,* 260 U.S. 360, 363; *Schoenthal* v. *Irving Trust Co., supra,* at p. 96), and does not even now. By common consent the suit was tried as one in equity, the fraudulent grantee being held to account as a trustee *ex maleficio* for the value of the shares which it had fraudulently acquired and then conveyed to some one else. *United States* v. *Dunn,* 268 U.S. 121; *Independent Coal & Coke Co.* v. *United States,* 274 U.S. 640, 647; *Newton* v. *Porter,* 69 N.Y. 133; *Hamilton National Bank* v. *Halsted,* 134 N.Y. 520, 527; 31 N.E. 900. A like recovery would have been permitted if the suit had been at law.

The defendant being chargeable with the value upon the filing of the bill, the question for us now is whether it could change its liability by buying back the shares. The answer is supplied by the opinion of Story, J., in *Oliver* v. *Piatt,* 3 How. 333, 401, a landmark in the law of trusts. The trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value. Cf. *Hamilton National Bank* v. *Halsted, supra.* Nothing that he can do afterwards in buying the property back will affect that liability, except at the option of the beneficiary complaining of the wrong. "This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any repurchase of the trust property, although in the latter case the *cestui que trust* may, if he pleases, avail himself of his own right, and take back and hold the property upon the original trust; but he is not compellable so to do." *Oliver* v. *Piatt, supra;* and cf. *Bunnel* v. *Stoddard,* 4 Fed. Cas. 667, 683; *Miles* v. *Coombs,* 120 Maine 453, 455;

115 Atl. 249; *Burwell* v. *Burwell's Guardian,* 78 Va. 574, 582; *Bate* v. *Scales,* 12 Ves. 402; American Law Institute, Restatement of Law of Trusts, *supra.* Any other rule, it was said, would enable the wrongdoer to take advantage of his own wrong; to let the transaction stand, if the investment showed a profit and by aid of a repurchase to charge the beneficiary with an intermediate decline. Cf. *Barney* v. *Saunders,* 16 How. 535, 543. The standard of duty is no different whether the trust to be enforced is actual or constructive. *United States* v. *Dunn, supra; Independent Coal & Coke Co.* v. *United States, supra; Newton* v. *Porter, supra.* The implication of a trust is the implication of every duty proper to a trust. Equity has its distinctive standards of fidelity and honor, higher at times than the standards of the market place. *Meinhard* v. *Salmon,* 249 N.Y. 458, 468; 164 N.E. 545. Whoever is a fiduciary or in conscience chargeable as a fiduciary is expected to live up to them.

4. The ruling of the trial court whereby the highest value of the property up to the time of the decree was made the measure of the recovery was not harmful to the defendant.

The recovery would have been larger if the value at the sale with legal interest thereafter had been adopted as the measure.

5. The defendant may participate on the same basis with other creditors in the distribution of the assets.

The decree of the District Court is erroneous in so far as the claim of the defendant is postponed to those of others. *Moore* v. *Bay, supra.*

The decree of the Circuit Court of Appeals is reversed, and that of the District Court modified in accordance with this opinion and as modified affirmed.

Reversed.

Counsel for Parties.

HURN ET AL. *v.* OURSLER ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 565. Argued February 17, 1933.—Decided April 17, 1933

1. A bill in the District Court made a claim of copyright infringement, raising a substantial federal question, and also sought relief upon the ground that the very same acts constituting the alleged infringement constituted unfair competition under the state law. *Held:*
   (1) That the federal question raised by the pleading gave jurisdiction of the case. P. 240.
   (2) When the federal claim was rejected on the merits, the court still had jurisdiction to decide the claim of unfair competition on the merits. *Leschen Rope Co.* v. *Broderick*, 201 U.S. 166, and *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U.S. 665, criticized. Pp. 240–244.
2. It is a general rule that where the federal court has acquired jurisdiction by virtue of a substantial federal question raised in the bill or the complaint, it may decide not only that question but also the local questions involved. P. 243.
3. This rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. P. 245.
4. From the jurisdictional standpoint, the claims of copyright infringement and of unfair competition pleaded in this case are not separate causes of action, but are different grounds asserted in support of the same cause of action. P. 246.

61 F. (2d) 1031, modified and affirmed.

CERTIORARI, 288 U.S. 595, to review the affirmance of a decree dismissing a bill on the merits in so far as grounded on copyright infringement, and for want of jurisdiction in so far as grounded on unfair competition.

Mr. Joseph Lorenz, with whom *Messrs. Keith Lorenz* and *Louis W. McKernan* were on the brief, for petitioners.

Mr. Alan S. Hays, with whom *Mr. Arthur Garfield Hays* was on the brief, for Oursler, respondent.

Mr. Benjamin Pepper for Lewis et al., respondents.

Emily Holt for Brentano, respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioners brought this suit to enjoin respondents from publicly producing, presenting or performing a play called "The Spider," on the ground that it infringed a copyrighted play of petitioners, called "The Evil Hour." There was also a prayer for damages and an accounting. The bill, as amended, alleged that "The Evil Hour" had been composed by petitioners and duly copyrighted under the laws of the United States; that the play thereafter was revised, but the revision was uncopyrighted; that the play, both in its copyrighted and its revised uncopyrighted form, was submitted to certain of the respondents, who considered and discussed its production; that the feature of the play consisted in the representation of a spiritualistic seance on the stage, with the audience taking part therein; that respondents were the owners of "The Spider," also copyrighted, but as originally produced containing no representation of a spiritualistic seance of any kind; that respondents, instead of producing petitioners' play, altered their own by incorporating therein the idea of a spiritualistic seance on the stage, and also certain incidental "business and effects" and certain portions of "The Evil Hour"; that their action in that respect was a violation of the copyright laws of the United States and also constituted "unfair business practices and unfair competition against the [petitioners]." The parties are citizens of the same state.

The trial court, considering the claim of infringement on the merits, found that "The Spider" did not infringe in any way "The Evil Hour," in contravention of the copyright law of the United States, and concluded that

in view thereof, the court was without jurisdiction to entertain the allegations in so far as they were based upon claims other than for a violation of the copyright law. A decree followed dismissing the bill. The circuit court of appeals affirmed upon the authority of cases cited. 61 F. (2d) 1031.

It is apparent from the language of the trial court that the claim of unfair competition in respect of the copyrighted play, as well as in respect of the uncopyrighted version, was rejected not on the merits but for lack of jurisdiction. In that view the decree of the court was assailed and defended here.

One. We consider the question first from the standpoint of the copyrighted play. While, as presently will appear, the claim of unfair competition is without merit and the dismissal must stand in any event, it is important that if the determination of the court was put upon the wrong ground we should so declare, that it may not be followed as a precedent.

The unfair competition in respect of the copyrighted play, according to the allegations, results from the same acts which constitute the infringement and is inseparable therefrom. The court below proceeded upon the theory that the allegations of the bill in respect of infringement presented a substantial federal question. Certainly, the question is not plainly unsubstantial; and the jurisdiction of the federal court was rightly upheld. Disposal of the infringement, therefore, on the merits was proper; and the precise question for determination is whether the claim of unfair competition was properly dismissed for lack of jurisdiction, or, likewise, should have been considered and disposed of on the merits.

A multitude of cases in the lower federal courts have dealt with the question in its various phases and have reached different conclusions. The opinions present a great variety of views and of differences. We shall not

undertake to review these cases. A few out of many are mentioned in the footnote * as illustrative of the confusion and as indicating the importance of attempting to formulate some rule on the subject. And to that end we first direct attention to certain decisions of this court which seem most nearly in point.

In *Stark Bros. Co.* v. *Stark,* 255 U.S. 50, suit was brought for infringement of a trademark and unfair competition. The circuit court of appeals limited damages to the date when notice was given of the registered mark, and refused to allow damages for earlier injuries. This court pointed out that the suit was for infringement of a

* Some cases seem to hold that however intimately the claims of unfair competition and infringement are related, the federal court is without power to consider the former. *Planten* v. *Gedney,* 224 Fed. 382, 386; *Recamier Mfg. Co.* v. *Harriet Hubbard Ayer, Inc.,* 59 F. (2d) 802, 806. This is what is sometimes spoken of as the "second circuit rule," and has been followed in a large number of cases. Other cases have denied jurisdiction on the ground that the two claims constitute separate causes of action, although in some the separateness does not clearly appear. *U. S. Expansion Bolt Co.* v. *Kroncke Hardware Co.,* 234 Fed. 868, 872-875. Compare *Moore* v. *N. Y. Cotton Exchange,* 270 U.S. 593, 607, *et seq., Dickinson Tire & Machine Co.* v. *Dickinson,* 29 F. (2d) 493. In *Onondaga Indian Wigwam Co.* v. *Ka-Noo-No Indian Mfg. Co.,* 182 Fed. 832, the rule of the *Siler* case, *infra,* was definitely applied to a case where the acts of defendant were alleged as constituting an infringement of a patent and also unfair competition. Some courts have taken jurisdiction of unfair competition in infringement suits as an element constituting "aggravation of damages." *Ludwigs* v. *Payson Mfg. Co.,* 206 Fed. 60, 65; *W. F. Burns Co.* v. *Automatic Recording Safe Co.,* 241 Fed. 472, 486; *Payton* v. *Ideal Jewelry Mfg. Co.,* 7 F. (2d) 113. Relief has been denied for unfair competition where the patent or trademark has been held valid but not infringed—*Sprigg* v. *Fisher,* 222 Fed. 964; *Detroit Showcase Co.* v. *Kawneer Mfg. Co.,* 250 Fed. 234, 240; *Taylor* v. *Bostic,* 299 Fed. 232, while the contrary is stated with much force in *Vogue Co.* v. *Vogue Hat Co.,* 12 F. (2d) 991, 992-995. One case, at least, seems to consider the question of retention of jurisdiction a matter of discretion. *Mallinson* v. *Ryan,* 242 Fed. 951, 953.

registered trademark, not simply of a trademark, and that this was the scope of the federal jurisdiction. Agreeing with the lower court that the cause of action for the earlier damages lay outside the federal jurisdiction, this court assumed, though without deciding, that plaintiff "could recover for unfair competition that was inseparable from the statutory wrong, but it could not reach back and recover for earlier injuries to rights derived from a different source."

In that view, so far as the unfair competition alleged was thus inseparable from the statutory wrong, it would seem that a failure to establish the infringement would not have deprived the federal court of jurisdiction of the claim of unfair competition, but would have left that matter to be disposed of upon the merits. And that is the effect of the decision of this court in *Moore* v. *N.Y. Cotton Exchange,* 270 U.S. 593, 607–610. In that case federal jurisdiction was invoked under the federal anti-trust laws. The answer set up a counterclaim non-federal in character, but arising out of the same transaction. This court held that although the allegations of the bill were insufficient to make a case under the federal law, they were not plainly unsubstantial so as to deprive the federal court of jurisdiction, and sustained a dismissal of the bill on the merits and not for the want of jurisdiction. Nevertheless, we held, under Equity Rule 30, that the counterclaim was so much a part of the case sought to be stated in the bill that the dismissal of the latter on the merits did not deprive the court of jurisdiction to dispose of the former on the merits. We think the question there and the one here, in principle, cannot be distinguished. That a statement of the particular counterclaim there was required by the rule is not material, since the federal jurisdiction can neither be extended nor abridged by a rule of court.

As early as *Osborn* v. *U. S. Bank,* 9 Wheat. 738, 823, Chief Justice Marshall, speaking for the court, said:

"We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

In *Siler* v. *Louisville & Nashville R. Co.,* 213 U.S. 175, 191, the bill sought to enjoin the enforcement of an order made by the railroad commission of Kentucky fixing intrastate rates of transportation upon the railroad of the company. The validity of the order was assailed on the ground that the Kentucky statute under which the commission assumed to act was violative of the federal Constitution in several particulars, and upon the further ground that such order was unauthorized by the state statute. This court held that the circuit court, having acquired jurisdiction by reason of the federal questions involved, "had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

Lincoln Gas Co. v. *Lincoln,* 250 U.S. 256, involved, among other things, the validity of an ordinance assessing an annual occupation tax upon gas companies in the city. The ordinance was attacked on the ground that it violated the due process and equal protection clauses of the Fourteenth Amendment, and also upon grounds of state law. The federal district court held that the ordinance violated the constitution of Nebraska, and upon that ground granted a permanent injunction against its enforcement.

This court, in disposing of the appeal, said (p. 264): "... if the bill presented a substantial controversy under the Constitution of the United States, and the requisite

amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the federal questions."

These decisions are illustrative of many cases where the rule has been stated and restated in substantially the same way. See *Louisville & Nash. R. Co.* v. *Garrett,* 231 U.S. 298, 303; *Ohio Tax Cases,* 232 U.S. 576, 586–587; *Greene* v. *Louisville & Interurban R. Co.,* 244 U.S. 499, 508; *Louisville & N. R. Co.* v. *Greene,* 244 U.S. 522, 527; *Davis* v. *Wallace,* 257 U.S. 478, 482; *Sterling* v. *Constantin,* 287 U.S. 378, 393–394.

Leschen Rope Co. v. *Broderick Co.,* 201 U.S. 166, is said to establish a different doctrine. In that case the plaintiff alleged that it owned a duly registered trademark which had been infringed by defendant. Upon demurrer the bill was dismissed on the ground that it disclosed that the trademark was not a lawful and valid trademark. This court sustained the dismissal for want of jurisdiction, holding that the jurisdiction of the federal court depended entirely upon whether the registered trademark was valid. Having held that the lower court was without jurisdiction because of the invalidity of the trademark, the court further said that jurisdiction of the case could not then be assumed as one wherein the defendant had made use of the device for the purpose of defrauding the plaintiff and palming off its goods as those of plaintiff's manufacture.

Whether the court was right or wrong in denying jurisdiction to consider the claim of infringement, the ground of the decision seems to be that such denial necessarily carried with it, also for lack of jurisdiction, any claim of unfair competition dependent upon the same facts. That is to say, if the court had no jurisdiction of the former claim, it followed that it had no jurisdiction of the latter. Whether the federal question averred by the bill was plainly unsubstantial was not considered. The court

summarily disposed of the matter (p. 172) in a single sentence: "Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark valid under the act of Congress, and, for the reasons above given, we think it has not." This is a broad statement, which, taken literally, applies whether the invalidity of the registry so appears on the face of the bill as to render the federal question plainly unsubstantial, or, the bill being sufficient to meet this test, such invalidity is otherwise disclosed.

Elgin Watch Co. v. *Illinois Watch Co.*, 179 U.S. 665, 677, goes no further than to recognize the same doctrine, the court simply saying: "Was it a lawfully registered trade mark? If the absolute right to the word as a trade mark belonged to appellant, then the Circuit Court had jurisdiction under the statute to award relief for infringement; but if it were not a lawfully registered trade mark, then the Circuit Court of Appeals correctly held that jurisdiction could not be maintained."

We shall not attempt to harmonize the two cases last cited with the *Siler* and the other cases following it. It is not easy to do so unless on the ground that cases involving patents, trademarks, and copyrights constitute an exception to the general rule stated in the *Siler* and other like cases. And accepting the view that this is the effect of the *Leschen Rope* and the *Elgin Watch* cases, *supra,* we are of opinion that such a distinction is altogether unsound. The *Siler* and like cases announce the rule broadly, without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such—as controlling in patent, trademark, and copyright cases as it was in the cases where it is announced.

But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the

same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter it may not do so upon the non-federal *cause of action.*

The case at bar falls within the first category. The bill alleges the violation of a single right, namely, the right to protection of the copyrighted play. And it is this violation which constitutes the cause of action. Indeed, the claims of infringement and unfair competition so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances. The primary relief sought is an injunction to put an end to an essentially single wrong, however differently characterized, not to enjoin distinct wrongs constituting the basis for independent causes of action. The applicable rule is stated, and authorities cited, in *Baltimore S. S. Co.* v. *Phillips,* 274 U.S. 316. "A cause of action does not consist of facts," this court there said (p. 321), "but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. . . . 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.' "

Thus tested, the claims of infringement and of unfair competition averred in the present bill of complaint are not separate causes of action, but different grounds asserted in support of the same cause of action.

We do not mean by what has just been said to lay down a hard and fast test by which to determine in all situations what constitutes a cause of action. "A 'cause of action' may mean one thing for one purpose and something different for another," *United States* v. *Memphis Oil Co.*, 288 U.S. 62; but for the purpose of determining the bounds between state and federal jurisdiction, the meaning should be kept within the limits indicated. Compare *B. & O. S. W. R. Co.* v. *Carroll*, 280 U.S. 491, 494–495, and cases cited.

It is entirely plain that the holding of the trial court disposing of the claim of infringement on the merits also disposed of the claim of unfair competition in respect of the copyrighted play, since both depended upon the same allegations of wrongful appropriation of certain parts of, and conceptions embodied in, petitioners' play. The finding of the court is comprehensive—"That no version of the defendants' play 'The Spider' infringed in any way, either with respect to plot, material, arrangement or sequence of events, or incidents, or otherwise, the plaintiffs' copyrighted play." This finding—not challenged here—contains every essential element necessary to justify the conclusion that there was likewise no unfair competition in respect of the copyrighted play, since it negatives the allegations of the bill made for the purpose of establishing by the same facts an infringement of the copyrighted play and unfair competition in relation thereto. Upon this finding the court was right in dismissing the bill in so far as it set up a claim of unfair business practices and unfair competition; but was wrong in dismissing it for the want of jurisdiction. It

should have been dismissed, as was the infringement claim, upon the merits. Since a decree to that effect must follow, upon this record, as a matter of course, no further proceedings in the district court are necessary. Accordingly the decree will be modified in the respect suggested, and as so modified, will be affirmed.

Two. During the pendency of the suit petitioners amended their bill so as to make its allegations apply to the uncopyrighted version of their play, namely, that the wrongful acts of respondents were in violation of the rights of petitioners and constituted unfair business practices and unfair competition with respect to that version as well as to the original. Since that claim did not rest upon any federal ground and was wholly independent of the claim of copyright infringement, the district court was clearly right in dismissing it for want of jurisdiction. The bill as amended, although badly drawn, sets forth facts alleged to be in violation of two distinct rights, namely, the right to the protection of the copyrighted play, and the right to the protection of the uncopyrighted play. From these averments two separate and distinct causes of action resulted, one arising under a law of the United States, and the other arising under general law. For reasons that have already been made manifest, the latter is entirely outside the federal jurisdiction and subject to dismissal at any stage of the case. It is hardly necessary to say that a federal court is without the judicial power to entertain a cause of action not within its jurisdiction, merely because that cause of action has mistakenly been joined in the complaint with another which is within its jurisdiction.

Decree modified in accordance with the foregoing opinion, and as modified, affirmed.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE think the decree should be affirmed without modification.

EDELMAN, STATE TREASURER, ET AL. *v.* BOEING AIR TRANSPORT, INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 571. Argued March 21, 1933.—Decided April 17, 1933

1. A state use-tax may constitutionally be imposed on gasoline that has been imported and stored by an air-transport company and is drawn from the tanks to fill the airplanes that use it in interstate commerce, if the "use" to which the tax is applied is in the withdrawal of the gasoline from the tanks and the placing of it in the fuel tanks of the planes, before its use in interstate transportation begins. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249. P. 251.
2. A possible interpretation of a state tax law which might render it unconstitutional, but which has not been and may never be adopted by the state taxing officers or the state courts, will not be ruled upon in a suit in a federal court of equity to enjoin collection of the tax. P. 253.

61 F. (2d) 319, reversed.

CERTIORARI, 288 U.S. 595, to review the reversal of a decree dismissing a bill to enjoin collection of a state tax.

Messrs. James A. Greenwood, Attorney General of Wyoming, and *George W. Ferguson,* Assistant Attorney General, with whom *Messrs. Richard J. Jackson,* Deputy Attorney General, *R. Dwight Wallace,* Assistant Attorney General, and *T. S. Taliaferro, Jr.,* were on the brief, for petitioners.

Mr. William M. Allen, with whom *Messrs. John W. Lacey, Elmer E. Todd,* and *Clarence R. Innis* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent, a Washington corporation operating airplanes in Wyoming, brought this suit in equity in the

District Court of Wyoming against petitioners, state tax officials, and the cities of Cheyenne and Rock Springs, to enjoin the collection of a state excise tax levied upon the use of gasoline by respondent within the State, as a violation of the commerce clause of the Constitution. As respondent waived relief by interlocutory injunction, see *Smith* v. *Wilson,* 273 U.S. 388, 391, the case was tried before a single judge who upheld the tax and dismissed the case on the merits. 51 F. (2d) 130. On appeal the Court of Appeals for the Tenth Circuit reversed the decree and directed that the petitioners be enjoined from assessing the tax on gasoline procured by respondent by "purchases completed outside the State of Wyoming and then brought into that State and used in its planes in interstate commerce." 61 F. (2d) 319. This Court granted certiorari.

The statute[1] levies a "license tax of four cents per gallon . . . on all gasoline used or sold in this State . . . for domestic consumption" and requires every "wholesaler" engaged in the "sale or use of gasoline" within the State to report to the state treasurer each month all the gasoline "sold or used" by it in the State, and to pay the tax upon it. Gasoline "exported or sold for exportation from the State" is exempted from the tax. A "wholesaler" is defined as any person (1) who "imports or causes to be imported gasoline . . . for sale in the State . . . to the jobber or consumer, or to the persons . . . who, in turn, sell to the jobber or consumer," or (2) who "produces, refines, manufactures, blends or compounds gasoline" in Wyoming "for use, sale or distribution in this State." In addition the statute provides that "every person . . . who shall use any gasoline in this State upon which the said tax has not been paid by any

[1] Wyoming Laws of 1929, c. 14, amending Laws of 1929, c. 139; Laws of 1927, c. 70; Laws of 1925, c. 89; Laws of 1923, c. 73.

wholesaler in this State," shall render a like statement and pay a like tax.

Respondent maintains an airplane service for the transportation in interstate commerce of passengers, mail and express with airports at Cheyenne and Rock Springs. It purchases gasoline both within and without the State, which it intermingles and stores in tanks at the two airports. It pays the tax without objection on all gasoline which it sells within the State at its airports or withdraws from the tanks for local use. But it contends, and the court below held, that the tax cannot validly be applied to the gasoline imported from outside the State, stored in tanks at the airports and used for " filling " the interstate airplanes in which it is eventually consumed.

The opinion below leaves us uncertain whether the injunction was granted upon the ground that the taxing statute does not, in any event, apply to gasoline purchased without the state, if not sold within it, or upon the ground that the taxation of gasoline purchased outside the state and used at respondent's airports to " fill " its interstate planes, though authorized by the statute, is a prohibited burden on interstate commerce. But the bill of complaint sought no relief on the ground that the statute does not apply to the gasoline so used and no question of the applicability of the tax is argued here. Issue is joined on the only question raised by the pleadings, whether the taxation of the gasoline which respondent withdraws from storage and uses for " filling " its planes imposes an unconstitutional burden on interstate commerce. Hence we confine our decision to that question.

As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline

consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. Compare *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* 288 U.S. 249; *Gregg Dyeing Co.* v. *Query,* 286 U.S. 472; *Hart Refineries* v. *Harmon,* 278 U.S. 499; *Bowman* v. *Continental Oil Co.,* 256 U.S. 642.

A State may validly tax the "use" to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra.* There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky,*" 279 U.S. 245. As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

Despite the fact that the statute as applied is identical in operation with that sustained in *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra,* respondent contends that as the statute is written, the tax is one on the consumption of gasoline in propelling its airplanes in interstate commerce, invalid under *Helson* v. *Kentucky, supra.* In that case a Kentucky statute taxing the use of gasoline was applied to that purchased and placed in the tanks of a ferry boat outside the State for use in operat-

ing it in interstate commerce. The tax, which was levied only with respect to the gasoline consumed while the ferry boat was within the State, was held to be invalid as, in effect, a direct tax on the privilege of carrying on interstate commerce.

But the officers of Wyoming, charged with the enforcement of the taxing statute, are giving no such application to it as was given to that in *Helson* v. *Kentucky, supra,* and it is not suggested that they will. All that has been done or threatened by them, under their interpretation of the statute, infringes no constitutional right of the complainant. In the circumstances, no case is presented, either by pleadings or proof, calling on a federal court of equity to rule upon the correctness of some other construction which may never be adopted by the state administrative officials or by the state courts.

Reversed.

Mr. Justice Van Devanter took no part in the consideration or decision of this case.

YOUNG *v.* MASCI

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY

No. 643. Argued March 24, 1933.—Decided April 24, 1933

A state statute making the owner of an automobile liable for personal injuries resulting from its negligent operation by another to whom he has entrusted it, is consistent with due process as applied to a non-resident owner who was not in that State when the accident occurred and who had merely lent his machine to one not his agent or engaged on business for him, with express or implied permission to take it there from the State of the owner's residence, where the bailment occurred and whose laws did not impose such liability. P. 256.

109 N.J.L. 453, affirmed.

Appeal from a judgment affirming a recovery for personal injuries.

Mr. Daniel Thew Wright, with whom *Messrs. R. Robinson Chance* and *Philip Ershler* were on the brief, for appellant.

The law of New Jersey at once attached to the contract of bailment and protected Young from liability for the bailee's negligence. The drawing of the New York statute over the state line after the contract was made impaired the contract. Whether this was done by New York officials or New Jersey officials or a combination of both, is immaterial. Neither a single State, nor any combination of States, can wipe out a constitutional right.

Young was not chargeable with knowledge of the New York law because he was never within the jurisdiction of New York. Even in the court in New Jersey the law of New York had to be proved by the introduction of evidence. The loan of the automobile was a valid contract of bailment under which Young was protected from liability for the negligence of Balbino by the law of the State where the contract of bailment was made. *Gavin* v. *Cohen,* 163 Atl. 330; *New York, L. E. & W. R. Co.* v. *N. J. Electric R. Co.,* 60 N.J.L. 338; *Doran* v. *Thompson,* 76 N.J.L. 754; *Maurer* v. *Brown,* 106 N.J.L. 284, 285.

That the laws of a State or sovereignty have no extraterritorial operation is axiomatic. *Sanford* v. *McDonald,* 248 U.S. 185, 195; *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347–357; *Pennoyer* v. *Neff,* 95 U.S. 714.

It is quite true that the courts of one State will enforce a transitory cause of action arising in another State; but this is enforcing an existing personal right arising out of the *lex loci;* it is not giving extraterritorial operation to a law, by applying it so as to create a cause of action in another State. The question of the power to extend the operation of a state statute beyond the territorial limits of the State is directly met and disposed of in *New York Life Ins. Co.* v. *Head,* 234 U.S. 160.

Actions in tort are in their nature transitory; in transitory actions liability may be enforced wherever the person against whom liability exists can be found; but comity can never impose liability upon one against whom by the law of his situs no liability exists.

The application of the New York statute to Young in New Jersey deprives him of liberty to make in New Jersey, the State of his domicile, and to enjoy, a contract of bailment which is protected by the law of that State, and under which contract the *lex loci contractus* protects him from liability for the negligence of the bailee. *Allgeyer* v. *Louisiana,* 165 U.S. 589; *Adair* v. *United States,* 208 U.S. 161; *Coppage* v. *Kansas,* 236 U.S. 1, 14; *Twin City Pipe Line Co.* v. *Harding Glass Co.,* 283 U.S. 353; *Meyer* v. *Nebraska,* 262 U.S. 399; *Wolff Packing Co.* v. *Industrial Court,* 262 U.S. 522.

The extraterritorial operation given to the statute also takes Young's property without due process of law in violation of the Amendment under the reasoning in *New York Life Ins. Co.* v. *Head,* 234 U.S. 160. Owing to the fact that New York can not give its statute any extraterritorial operation, that statute, as applied in this case, amounts to an imposition of liability which the State was without power to impose. *Frick* v. *Pennsylvania,* 268 U.S. 473.

The State of New Jersey, through its courts, in this case, denied appellant Young the equal protection of the law of New Jersey guaranteed by the Fourteenth Amendment.

Mr. Samuel Kaufman for appellee.

Mr. Justice Brandeis delivered the opinion of the Court.

A New York statute provides: "Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries

to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." Laws N.Y. 1929, Vol. 1, p. 82; Vehicle and Traffic Law, § 59.

Masci, a citizen and resident of New York, brought this action in a court of New Jersey against Young, a citizen and resident of the latter State, to enforce liability under the above statute. The case was tried before a jury. It appeared that Young lent his automobile to Michael Balbino for a day without restriction upon its use, the contract of bailment and delivery of the car being made in New Jersey; that Balbino took the car to New York; and that while driving there negligently he struck Masci. There was evidence to justify a finding that the car was taken to New York with Young's permission, express or implied. Young moved for a directed verdict on the ground that the bailment was made in New Jersey; that he was not in New York at the time of the accident; that Balbino was not his agent or engaged on business for him; and that to apply the law of New York and so make the defendant responsible for something done by Balbino in New York would deprive the defendant of his property and his liberty without due process of law, in violation of the Fourteenth Amendment. The presiding judge declined to direct the verdict; ruled that if negligence was proved, the law of New York was controlling on the question of liability; and charged that the defendant was responsible if the operator " was driving this automobile at the time of the accident with the permission of the defendant, either express or implied." The jury found a verdict for the plaintiff; and the judgment entered thereon was affirmed by the highest court of that State. 109 N.J.L. 453; 162 Atl. 623.

Young appealed to this Court on the ground, among others, that the statute as applied violates the due process

clause of the Fourteenth Amendment. He does not challenge its constitutionality on the broad ground that an owner cannot be made liable for the driver's negligence unless the relation of master and servant exists. The contrary had been held in New York in respect to this statute. *Downing* v. *New York,* 219 App. Div. 444, 446; 220 N.Y.S. 76; affirmed, 245 N.Y. 597; 157 N.E. 873; *Dawley* v. *McKibbin,* 245 N.Y. 557; 157 N.E. 856. And in *Van Oster* v. *Kansas,* 272 U.S. 465, 467, where it was held that the due process clause does not prevent a State from forfeiting property of an innocent owner for the unauthorized act of one to whom he has entrusted it, the Court states that it is not "uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it;" and refers to the legislation of New York "imposing liability on owners of vehicles for the negligent operation by those entrusted with their use, regardless of a master-servant relation." Compare *Pizitz Co.* v. *Yeldell,* 274 U.S. 112, 115–116. Statutes of like character have been sustained also by the highest courts of other States.[1]

Nor does Young question the State's power to regulate the use of motor vehicles of non-residents on its highways. Compare *Hendrick* v. *Maryland,* 235 U.S. 610; *Kane* v. *New Jersey,* 242 U.S. 160. He challenges the

[1] *Levy* v. *Daniels' U-Drive Auto Renting Co.,* 108 Conn. 333; 143 Atl. 163; *Seleine* v. *Wisner,* 200 Iowa 1389; 206 N.W. 130; *Stapleton* v. *Independent Brewing Co.,* 198 Mich. 170; 164 N.W. 520 (compare *Hawkins* v. *Ermatinger,* 211 Mich. 578; 179 N.W. 249); *Kernan* v. *Webb,* 50 R.I. 394; 148 Atl. 186. Statutes in South Carolina and Tennessee subject the vehicles to a lien for damages resulting from negligent operation under certain circumstances. See *Ex parte Maryland Motor Car Ins. Co.,* 117 S.Car. 100; 108 S.E. 260; *Parker-Harris Co.* v. *Tate,* 135 Tenn. 509; 188 S.W. 54. A California statute imposes in the case of negligent operation by a minor, liability upon the parent or guardian who has signed the minor's application for a license. See *Buelke* v. *Levenstadt,* 190 Cal. 684; 214 Pac. 42.

statute only as applied to a non-resident owner who made the bailment outside the State of New York and who was not within it at the time of the accident.

The contention is that subjection of the owner to liability under the New York law deprives him of immunity from liability to third parties which he had acquired in New Jersey by virtue of the contract of bailment made there; and that thus the statute deprives him of his liberty to contract and his property without due process of law. If such a contract can be found in the case at bar, the statute does not purport to affect it. The statute neither forbids the making nor alters the terms of any contract. Compare *Home Insurance Co.* v. *Dick,* 281 U.S. 397. It does not purport to affect rights as between owner and bailee. Moreover, the contract of bailment could not have conferred upon the owner immunity from liability to third persons for the driver's negligence. Liability for a tort depends upon the law of the place of the injury; and (apart from the effect of the full faith and credit clause, which is not here involved) agreements made elsewhere cannot curtail the power of a State to impose responsibility for injuries within its borders. Compare *Bradford Electric Light Co.* v. *Clapper,* 286 U.S. 145, 154. Thus the essential question is the power of New York to make the absent owner liable personally for the injury inflicted within the State by his machine.

When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument. The cases are many

in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it. Thus, liability is commonly imposed under such circumstances for homicide, *Commonwealth* v. *Macloon,* 101 Mass. 1; for maintenance of a nuisance, *State* v. *Lord,* 16 N.H. 357, 359; for blasting operations, *Cameron* v. *Vandergriff,* 53 Ark. 381, 386; 13 S.W. 1092; and for negligent manufacture, *MacPherson* v. *Buick Motor Co.,* 217 N.Y. 382; 111 N.E. 1050.

The power of the State to protect itself and its inhabitants is not limited by the scope of the doctrine of principal and agent. The inadequacy of that doctrine to cope with the menacing problem of practical responsibility for motor accidents has been widely felt in cases where the injurious consequences are the immediate result of an intervening negligent act of another. Some courts have held, in actions against the owner for injuries resulting from the driver's negligence, that a presumption of the employment relationship arises from the fact of ownership; [2] or that, if the relationship is proved, a presumption arises that the accident occurred within the scope of the employment.[3] Many courts have extended responsibility, without the aid of legislation, by imposing liability upon the owner for injuries resulting from the negligent operation of the car by a member of his family.[4]

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[2] *Louis* v. *Johnson,* 146 Md. 115, 118; 125 Atl. 895; *Tischler* v. *Steinholtz,* 99 N.J.L. 149, 152; 122 Atl. 880; *West* v. *Kern,* 88 Ore. 247; 171 Pac. 413, 1050; *Griffin* v. *Smith,* 132 Wash. 624; 232 Pac. 929; compare *Freeman* v. *Dalton,* 183 N.C. 538; 111 S.E. 863.

[3] *Benn* v. *Forrest,* 213 Fed. 763; *Foundation Co.* v. *Henderson,* 264 Fed. 483; *Penticost* v. *Massey,* 201 Ala. 261; 77 So. 675; *Wood* v. *Indianapolis Abattoir Co.,* 178 Ky. 188; 198 S.W. 732.

[4] *Hutchins* v. *Haffner,* 63 Colo. 365; 167 Pac. 966; *Stickney* v. *Epstein,* 100 Conn. 170; 123 Atl. 1; *Griffin* v. *Russell,* 144 Ga. 275; 87 S.E. 10; *Steele* v. *Age's Administratrix,* 233 Ky. 714; 26 S.W. (2d) 563; *Plasch* v. *Fass,* 144 Minn. 44; 174 N.W. 438; *Linch* v. *Dobson,*

In some States, including New York, the problem was left to the legislature. See *Van Blaricom* v. *Dodgson,* 220 N.Y. 111, 117; 115 N.E. 443. Its statute makes mere permission to use the car the basis of liability in case of negligent injury. We have no occasion to decide where the line is to be drawn generally between conduct which may validly subject an absent party to the laws of a State and that which may not. No good reason is suggested why, where there is permission to take the automobile into a State for use upon its highways, personal liability should not be imposed upon the owner in case of injury inflicted there by the driver's negligence, regardless of the fact that the owner is a citizen and resident of another State. Compare *Thomas* v. *Matthiessen,* 232 U.S. 221, 234–235.[5]

The claim is made that the statute as applied violates the equality clause of the Fourteenth Amendment, because in New Jersey, under a contract of bailment made within the State, other citizens are protected from liabil-

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108 Neb. 632; 184 N.W. 227; *Boes* v. *Howell,* 24 N.Mex. 142; 173 Pac. 966; *Grier* v. *Woodside,* 200 N.Car. 759; 158 S.E. 491; *Ulman* v. *Lindeman,* 44 N.Dak. 36; 176 N.W. 25; *Davis* v. *Littlefield,* 97 S.Car. 171; 81 S.E. 487; *Birch* v. *Abercrombie,* 74 Wash. 486; 133 Pac. 1020; *Jones* v. *Cook,* 90 W.Va. 710; 111 S.E. 828.

Compare the liability for harm done by a "dangerous instrumentality" entrusted by the defendant to an employee but not used, at the time of the injury, in the course of the employment. *Barmore* v. *Railway Co.,* 85 Miss. 426, 448; 38 So. 210; *Stewart* v. *Cary Lumber Co.,* 146 N. Car. 47; 59 S.E. 545; *Railway Co.* v. *Shields,* 47 Ohio St. 387, 392; 24 N.E. 658. Compare also the liability of a contractee for harm caused by an independent contractor in the performance of work "inherently dangerous." *Norwalk Gaslight Co.* v. *Norwalk,* 63 Conn. 495; 28 Atl. 32; *Joliet* v. *Harwood,* 86 Ill. 110; *Bonaparte* v. *Wiseman,* 89 Md. 12, 21-22; 42 Atl. 918.

[5] Compare the scope of the jurisdiction of the courts of a State over nonresidents in actions based on the operation of motor vehicles within the State. *Hess* v. *Pawloski,* 274 U.S. 352; *Kane* v. *New Jersey,* 242 U.S. 160.

ity for the negligence of the bailee. Obviously there is no denial of equal protection, since all who permit their cars to be driven in New York are treated alike. A claim is also made that the statute as applied violates the contract clause of the Federal Constitution, because it impairs the obligation of the contract of bailment made in New Jersey. As it does not appear that any claim under the contract clause was made below, we need not consider the answers to this contention.

Affirmed.

AMERICAN CAR & FOUNDRY CO. *v.* BRASSERT

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 623. Argued March 23, 1933.—Decided May 8, 1933

The statute limiting the liability of shipowners (R.S. 4283; 46 U.S.C. 183) is inapplicable to the case of the manufacturer of a vessel, who has delivered it to a purchaser, retaining title merely to secure payment of the price, and who seeks protection against liability based on actionable negligence in the manufacture of the vessel. P. 263.

61 F. (2d) 162, affirmed.

CERTIORARI, 288 U.S. 596, to review the affirmance of a decree dismissing a libel seeking limitation of liability.

Messrs. Leonard F. Martin and *Paul R. Conaghan,* with whom *Messrs. Noah A. Stancliffe* and *John R. Cochran* were on the brief, for petitioner.

Mr. Lewis C. Jesseph, with whom *Mr. William Rothmann* was on the brief for respondent.

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

Petitioner, American Car and Foundry Company, a manufacturer of gasoline propelled yachts and cruisers,

made a conditional sale of a cruiser to respondent. While respondent was cruising in the vessel on the waters of Lake Michigan an explosion occurred midship, fire followed, and the vessel became a total wreck and in consequence lay sunken and worthless. Alleging these facts, that respondent and other persons with him on the vessel had been injured, and that respondent's personal effects, as well as the vessel, its machinery, equipment and supplies, were a total loss, and that all the alleged injuries and damages were occasioned and incurred without its privity or knowledge, petitioner filed this libel against respondent seeking limitation of liability under the Act of March 3, 1851, c. 43, § 3. 46 U.S.C. 183. Respondent filed exceptions upon the ground that the libel did not disclose that libellant was the owner of the vessel or engaged in maritime commerce, or any facts sufficient to show that libellant was entitled to the limitation. The District Court dismissed the libel and the Circuit Court of Appeals affirmed the decree. 61 F. (2d) 162. This Court granted certiorari.

The libel disclosed that the sole relation of petitioner to the cruiser was that of manufacturer and vendor under a contract of conditional sale. Respondent gave his order for the cruiser to be delivered on the terms stated and subject to warranty against " defects in workmanship and material " which by its terms was limited to replacement of parts. The order was followed by a " conditional sale agreement," by which respondent acknowledged receipt of the boat in good condition and which provided for the payment of the balance of the purchase price within ninety days after delivery and that, until such payment or tender, title to the boat should remain in the seller. Subject to the conditions of the agreement, the purchaser was entitled to the possession and use of the boat with the right on the part of the seller to retake it and its equipment in case of the purchaser's default. The purchaser

was required to keep the boat insured with full marine coverage, to pay all taxes and charges, to comply with all applicable laws, and to hold the seller harmless from all "liability, claim, demand, cost, charge and expense in any way imposed upon or accruing to seller" by reason of the use or operation of the boat. The libel alleged that the vessel when delivered to respondent was "sturdy, safe and seaworthy." The cause of the accident, except as above stated, is not shown. It appears to have occurred prior to any default on the part of respondent and while he was operating the vessel on his own behalf. The libellant, while proceeding directly against respondent, sought limitation against all claims.

The statute [1] limiting the liability of shipowners was enacted to encourage investments in ships and their employment in commerce. That purpose embraced, as petitioner insists, the promotion of shipbuilding, but it was not concerned with construction as a mere enterprise of manufacture, which itself was not a maritime activity (*People's Ferry Co.* v. *Beers,* 20 How. 393, 402; *Edwards* v. *Elliott,* 21 Wall. 532, 554, 557; *Thames Towboat Co.* v. *The Francis McDonald,* 254 U.S. 243, 244), but with the promotion of commerce and the encouragement "of persons engaged in the business of navigation," to the end that the shipping interests of this country might not suffer in competition with foreign vessels. *Moore* v. *American Transportation Co.,* 24 How. 1, 39; *Norwich Co.* v. *Wright,* 13 Wall. 104, 121; *The Main* v. *Williams,* 152

[1] "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." R.S. 4283, 46 U.S.C. 183.

U.S. 122, 131; *Evansville & B. G. Packet Co.* v. *Chero Cola Co.*, 271 U.S. 19, 21; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U.S. 207, 214; *Flink* v. *Paladini*, 279 U.S. 59, 62. The statute embodied the principle of the general maritime law that shipowners should not "be liable beyond their interest in the ship and freight for the acts of the master and the crew done without their privity or knowledge." *Butler* v. *Boston Steamship Co.*, 130 U.S. 527, 549. The liability thus limited is an imputed liability; it is a liability imputed by law by reason of the ownership of the vessel. For his own fault, neglect and contracts the owner remains liable. *Richardson* v. *Harmon*, 222 U.S. 96, 103, 106; *Pendleton* v. *Benner Line*, 246 U.S. 353, 356.

Petitioner retained title solely for the purpose of securing the purchase price of the vessel, and prior to default in payment, petitioner had no control over the vessel's operation. Petitioner did not man or operate her, and had no right to do so. For all purposes of use in navigation the vessel belonged to respondent. In these circumstances, petitioner was not liable as owner for acts of respondent or for those of the master and crew. It is well settled [2] that a mortgagee out of possession, and not exercising authority, is not answerable for the acts of the master or other agent of the ship. See *Morgan's Assignees* v. *Shinn*, 15 Wall. 105, 110; *McIntyre* v. *Scott*, 8 Johns. 159; *Macy* v. *Wheeler*, 30 N.Y. 231; *Brooks* v. *Bondsey*, 17 Pick. 441; *Davidson* v. *Baldwin*, 79 Fed. 95; *Calumet & Hecla Mining Co.* v. *Equitable Trust Company*, 275 Fed. 552; Parsons on Shipping and Admiralty, 129, *note;* Abbott, Merchant Ships and Seamen, 14th ed., p. 55. The same is true of a vendor who retains title as

[2] Compare *Jackson* v. *Vernon*, 1 H.Bl. 114; *Westerdell* v. *Dale*, 7 Term Rep. 306; *Mitcheson* v. *Oliver*, 5 El. and Bl. 419; *Tucker* v. *Buffington*, 15 Mass. 477.

security for the payment of the purchase price. See *Philips* v. *Ledley,* 1 Wash.C.C. 226; Fed. Cas. No. 11,096; *Wendover* v. *Hogeboom,* 7 Johns. 308; *Leonard* v. *Huntington,* 15 Johns. 298; *Thorn* v. *Hicks,* 7 Cow. 697; *Jones* v. *Pitcher,* 3 Stewart 135; *Hemm* v. *Williamson,* 47 Ohio St. 493; 25 N.E. 1; *The Boise Penrose,* 22 F. (2d) 919, 920; *The John E. Berwind,* 56 F. (2d) 13. The principle, generally recognized, was thus emphatically stated in *Thorn* v. *Hicks, supra:* "The mere circumstance of the naked legal title to the vessel" remaining in the vendors "to secure the purchase money for which she had been sold, unquestionably would not render them liable as owners, on the contracts of the master, or for the consequences of his negligence and unskilfulness."

What, then, is the liability which petitioner seeks to limit? It is manifestly not a liability imputed to petitioner as shipowner. With respect to respondent, the mere fact that petitioner retained the legal title to the vessel, in order to secure the payment of the remainder of the price, neither created liability for the injury alleged to have been sustained on account of the explosion nor conferred immunity. If such liability existed, it arose not because petitioner reserved title, while delivering possession and control of use, but because it was manufacturer and vendor. The question of liability would be determined with reference to the obligations which were expressly assumed by the vendor, or were inherent in the transaction, irrespective of the title retained as security. Similarly, as to other persons who are alleged to have suffered injury from the accident—the possible claimants described in the libel—petitioner's liability, if any, had no relation to any responsibility of petitioner as holder of the naked title, but would depend upon petitioner's conduct as maker of the vessel, that is, upon the question whether in the circumstances petitioner could be held

guilty of actionable neglect in its manufacture. See Bohlen, "Studies in the Law of Torts," pp. 109 *et seq.; MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382; 111 N.E. 1050. That question is not before us. Whatever liability there may be in that aspect, either to respondent or to others, it is not a liability falling within the policy and purview of the Act of Congress limiting the liability of shipowners.

Decree affirmed.

FEDERAL RADIO COMMISSION *v.* NELSON BROTHERS BOND & MORTGAGE CO. (STATION WIBO)*

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 657. Argued April 11, 1933.—Decided May 8, 1933

1. Congress can confer administrative authority on courts of the District of Columbia; but jurisdiction to review administrative questions can not be exercised by this Court. P. 274.
2. Under the amended Radio Act, which limits review of the Radio Commission by the Court of Appeals of the District of Columbia to "questions of law" and provides "that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious," the function of that court is no longer administrative but is purely judicial, and its judgments are reviewable in this Court by certiorari. *Federal Radio Comm'n* v. *General Electric Co.*, 281 U.S. 464, distinguished. Pp. 275–278.
3. The fact that the judicial remedy is by appeal from the Commission rather than by a suit *de novo*, does not affect its judicial quality. P. 277.
4. That clause of the Act which provides that in case of a reversal the court "shall remand the case to the Commission to carry out

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* Together with No. 658, *Federal Radio Comm'n* v. *North Shore Church (Station WPCC)*; No. 659, *Federal Radio Comm'n et al.* v. *Nelson Brothers Bond & Mortgage Co. (Station WIBO)*; and No. 660, *Federal Radio Comm'n et al.* v. *North Shore Church (Station WPCC)*.

the judgment of the court," means no more than that the Commission in its further action is to respect and follow the court's determination of the questions of law. P. 278.

5. Congress has power under the commerce clause to regulate radio communication. P. 279.
6. The duty of the Radio Commission to make "fair and equitable allocation of licenses, wave lengths, time of operation and station power to each of the States within each zone according to population," under the Radio Act as amended, does not require separate allocation on that basis as to each of the three types of stations—"clear, regional and local"—in the Commission's classification P. 281.
7. The Commission, in making allocations of frequencies to States within a zone, has the power to license operation by a station in an under-quota State on a frequency theretofore assigned to a station in an over-quota State, provided the Commission does not act arbitrarily or capriciously. P. 282.
8. The authority granted the Commission to effect adjustment of broadcasting facilities as between States "by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power," plainly extends to the deletion of existing stations if that course be found necessary to produce an equitable result. P. 282.
9. That Congress had the power to give this authority to delete stations, in view of the limited radio facilities available and confusion resulting from interferences, is not open to question. P. 282.
10. Owners of broadcasting stations necessarily make their investments and contracts subject to the paramount regulatory power of Congress. P. 282.
11. The power of Congress to regulate interstate commerce is not to be fettered by a necessity for maintaining private arrangements that would interfere with the execution of its policy. P. 282.
12. In providing for "equal" allocation as between zones and "fair and equitable" allocation as between States in a zone, the Act seeks reasonable equality, not geographical merely, but of opportunity to the people; and this involves an equitable distribution not only as between zones but between States as well. P. 283.
13. To construe the authority conferred, in relation to the deletion of stations, as being applicable only to an apportionment between zones and not between States, would defeat the manifest purpose of the Act. P. 283.

14. A broadcasting license in one State may be renewed temporarily, subject to future action on an application pending for assignment of its wave length to a station in another State of the same zone; and when the Commission decides to make the transfer, the license may be terminated in accordance with the reservation. Proceedings for revocation under § 14 of the Act are not involved. P. 284.

15. The standard of "public convenience, interest or necessity" set up by the Act is not objectionable as conferring indefinite and unlimited power, but is defined by the context and subject matter, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. P. 285.

16. In making "fair and equitable allocation," the equities of existing stations must be considered; and the weight of the evidence on that subject and all other pertinent facts, is for the determination of the Commission. P. 285.

17. The Commission is not bound to maintain an allocation if fair and equitable distribution makes a change necessary. P. 285.

18. The Commission must reach its own conclusions on the evidence though at variance from the conclusions of its examiner. P. 285.

19. A general order of the Radio Commission requiring that applicants in an under-quota State in a zone already enjoying its full *pro rata* share of broadcasting facilities shall apply for "some facility already in use in that zone by an over-quota State," *held* merely a rule of procedural convenience, which does not preclude consideration of whether other facilities in the over-quota State should be granted in place of those applied for. P. 286.

20. Parties who were fully heard by the Commission's examiner and notified of the taking of the case to the Commission by their opponent upon exceptions to the examiner's report, have no ground to complain of the Commission's omission to grant them an oral hearing for which they did not ask. P. 287.

62 F. (2d) 854, reversed.

CERTIORARI, 288 U.S. 597, to review the reversal of an order of the Federal Radio Commission licensing a broadcasting station in Indiana to operate on a radio frequency theretofore assigned to and enjoyed by two stations in Illinois, and terminating the licenses of those stations.

Solicitor General Thacher, with whom *Messrs. William G. Davis* and *Hammond E. Chaffetz* were on the brief, for the Federal Radio Commission, petitioner.

Mrs. Mabel Walker Willebrandt for Johnson-Kennedy Radio Corp., petitioner.

Mr. James M. Beck, with whom *Messrs. George R. Beneman, Fred W. Weitzel, John Strother Boyd,* and *Edward Clifford* were on the brief, for respondents.

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

The Johnson-Kennedy Radio Corporation, owning Station WJKS at Gary, Indiana, applied to the Federal Radio Commission for modification of license so as to permit operation, with unlimited time, on the frequency of 560 kc. then assigned for the use of Station WIBO, owned by Nelson Brothers Bond & Mortgage Company, and Station WPCC, owned by the North Shore Church, both of Chicago, Illinois. These owners appeared before the chief examiner, who, after taking voluminous testimony, recommended that the application be denied. The applicant filed exceptions and, on consideration of the evidence, the Commission granted the application and directed a modified license to issue to the applicant authorizing the operation of Station WJKS on the frequency of 560 kc. and terminating the existing licenses theretofore issued for Stations WIBO and WPCC. On appeal, the Court of Appeals of the District of Columbia reversed the Commission's decision upon the ground that it was "in a legal sense arbitrary and capricious." 61 App.D.C. 315; 62 F. (2d) 854. This Court granted certiorari.

The action of the Commission was taken under § 9 of the Radio Act of 1927 (c. 169, 44 Stat. 1166), as amended by § 5 of the Act of March 28, 1928, c. 263, 45 Stat. 373;

47 U.S.C. 89.[1] The findings of fact upon which the Commission based its order included the following:

Gary, Indiana, about 30 miles from Chicago, is the largest steel center in the world. It has a population of approximately 110,000 and is located in what is known as the Calumet region which has a population of about 800,000, sixty per cent. of whom are foreign born and represent over fifty nationalities. Station WJKS is the only radio station in Gary and the programs it broadcasts are well designed to meet the needs of the foreign popula-

[1] Section 5 of the Act of March 28, 1928, 45 Stat. 373, is as follows:

"Sec. 5. The second paragraph of section 9 of the Radio Act of 1927 is amended to read as follows:

"It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided,* That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located."

tion. These programs include " broadcasts for Hungarian, Italian, Mexican, Spanish, German, Russian, Polish, Croatian, Lithuanian, Scotch and Irish people," and " are musical, educational and instructive in their nature and stress loyalty to the community and the Nation." Programs are arranged and supervised " to stimulate community and racial origin pride and rivalry and to instruct in citizenship and American ideals and responsibilities." " Special safety prevention talks " are given for workingmen, explaining the application of new safeguards of various types of machinery used in the steel mills. The children's hour utilizes selections from various schools. There are " good citizenship talks " weekly by civic leaders. The facilities of the station are made available to the local police department and to all fraternal, charitable and religious organizations in the Calumet region, without charge. Sunday programs consist mainly " of church service broadcasts " including all churches and denominations desiring to participate. Although the Calumet area is served by a station at Fort Wayne and by several stations in Chicago, Station WJKS " is the only station which serves a substantial portion of the area with excellent or even good service." While Station WJKS " delivers a signal of sufficient strength to give good reception in its normal service area if not interfered with, heterodyne and cross-talk interference exist to within three miles of the transmitter and constant objection to interference is found in the good service area of the station, particularly to the south, southeast and east." This interference has increased during the past two years.

Station WIBO is operated by Nelson Brothers Bond & Mortgage Company separately from its mortgage and real estate business. It employs 55 persons and its total monthly expenses average $17,000. In March, 1931, it earned a net profit of $9,000. It represents a total cost of $346,362.99 less a reserve for depreciation of $54,627.36,

and has been operated since April, 1925. Station WIBO was licensed to share time with Station WPCC, the latter being authorized to operate on Sundays during stated hours and by agreement has operated on certain week days in exchange for Sunday hours.

The licenses for Stations WIBO and WPCC, effective from September 1, 1931, to March 1, 1932, were issued upon the following condition: "This license is issued on a temporary basis and subject to such action as the Commission may take after hearing on the application filed by Station WJKS, Gary, Indiana, for the frequency 560 kc. No authority contained herein shall be construed as a finding by the Federal Radio Commission that the operation of this station is or will be in the public interest beyond the term hereof."

The programs broadcast by Station WIBO include a large number of chain programs originating in the National Broadcasting network and are almost entirely commercial in their nature. The same general type of programs broadcast by WIBO, including National Broadcasting chain programs, are received in the service area of WIBO from many other stations located in the Chicago district.

Station WPCC, owned by the North Shore Church, has programs made up entirely of sermons, religious music and talks relating to the work and interests of the church. Contributions are solicited for the use of the church and to advance the matters in which it is interested; it is not used by other denominations or societies. "Other stations in Chicago, including WMBI, owned by the Moody Bible Institute, devoting more time to programs of a religious nature than WPCC, are received in the service area of that station."

"The State of Indiana is 2.08 units or 22 per cent. under-quota in station assignments and the State of Illinois is 12.49 units or 55 per cent. over-quota in such assignments.

The Fourth Zone, in which both States are located, is 21.00 units or 26 per cent. over-quota in station assignments. The granting of this application and deletion of WIBO and WPCC would reduce the over-quota status of the State of Illinois and the Fourth Zone by .88 unit and .45 unit, respectively, and would increase the quota of Indiana by .43 unit."

Summarizing the grounds of its decision, the Commission found:

"1. The applicant station (WJKS) now renders an excellent public service in the Calumet region and the granting of this application would enable that station to further extend and enlarge upon that service.

"2. The deletion of Stations WIBO and WPCC would not deprive the persons within the service areas of those stations of any type of programs not now received from other stations.

"3. Objectionable interference is now experienced within the service area of WJKS through the operation of other stations on the same and adjacent frequencies.

"4. The granting of this application and deletion of Stations WIBO and WPCC would not increase interference within the good service areas of any other stations.

"5. The granting of this application and deletion of Stations WIBO and WPCC would work a more equitable distribution of broadcasting facilities within the Fourth Zone, in that there would be an increase in the radio broadcasting facilities of Indiana which is now assigned less than its share of such facilities and a decrease in the radio broadcasting facilities of Illinois which is now assigned more than its share of such facilities.

"6. Public interest, convenience and/or necessity would be served by the granting of this application."

The Court of Appeals was divided in opinion. The majority pointed out that the Court had repeatedly held that "it would not be consistent with the legislative policy

to equalize the comparative broadcasting facilities of the various states or zones by unnecessarily injuring stations already established which are rendering valuable service to their natural service areas"; and they were of opinion that the evidence showed that Stations WIBO and WPCC had been "serving public interest, convenience and necessity certainly to as great an extent as the applicant station" and that "the conclusively established and admitted facts" furnished no legal basis for the Commission's decision. The minority of the Court took the view that the Court was substituting its own conclusions for those of the Commission; that the Commission had acted within its authority, and that its findings were sustained by the evidence.

First. Respondents challenge the jurisdiction of this Court. They insist that the decision of the Court of Appeals is not a 'judicial judgment'; that, for the purpose of the appeal to it, the Court of Appeals is merely a part of the machinery of the Radio Commission and that the decision of the Court is an administrative decision. Respondents further insist that if this Court examines the record, its decision "would not be a judgment, or permit of a judgment to be made in any lower court, but would permit only consummation of the administrative function of issuing or withholding a permit to operate the station."

Under § 16 of the Radio Act of 1927, the Court of Appeals, on appeal from decisions of the Radio Commission, was directed to "hear, review, and determine the appeal" upon the record made before the Commission, and upon such additional evidence as the Court might receive, and was empowered to "alter or revise the decision appealed from and enter such judgment as to it may seem just." 44 Stat. 1169. This provision made the Court "a superior and revising agency" in the administrative field and consequently its decision was not a judicial judgment reviewable by this Court. *Federal Radio*

Commission v. *General Electric Co.*, 281 U.S. 464, 467. The province of the Court of Appeals was found to be substantially the same as that which it had, until recently, on appeals from administrative decisions of the Commissioner of Patents. While the Congress can confer upon the courts of the District of Columbia such administrative authority, this Court cannot be invested with jurisdiction of that character whether for the purpose of review or otherwise. It cannot give decisions which are merely advisory, nor can it exercise functions which are essentially legislative or administrative. *Id.*, pp. 468, 469. *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428, 442–444; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 700.

In the light of the decision in the *General Electric* case, *supra*, the Congress, by the Act of July 1, 1930, c. 788, amended § 16 of the Radio Act of 1927 so as to limit the review by the Court of Appeals. 46 Stat. 844; 47 U.S.C. 96.[2] That review is now expressly limited to " questions

[2] By this amendment, § 16 (d) reads as follows:

"At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal." 46 Stat. 844; 47 U.S.C. 96.

In reporting this amendment, the Committee on the Merchant Marine and Fisheries of the House of Representatives stated: " The purpose of the amendment is to clarify the procedure on appeal to the

of law" and it is provided "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious." This limitation is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an ad-

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court from decisions of the Federal Radio Commission, to more clearly define the scope of the subject matter of such appeals, and to insure a review of the decision of the Court of Appeals of the District of Columbia by the Supreme Court." H.R.Rep. No. 1665, 71st Cong., 2d Sess., p. 2.

ministrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. *Interstate Commerce Commission* v. *Illinois Central R. Co.,* 215 U.S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.,* 222 U.S. 541, 547, 548; *New England Divisions Case,* 261 U.S. 184, 203, 204; *Keller* v. *Potomac Electric Power Co., supra; Chicago Junction Case,* 264 U.S. 258, 263, 265; *Silberschein* v. *United States,* 266 U.S. 221, 225; *Ma-King Products Co.* v. *Blair,* 271 U.S. 479, 483; *Federal Trade Commission* v. *Klesner,* 280 U.S. 19, 30; *Tagg Bros.* v. *United States,* 280 U.S. 420, 442; *Federal Trade Commission* v. *Raladam Co.,* 283 U.S. 643, 654; *Crowell* v. *Benson,* 285 U.S. 22, 49, 50.

If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not " be misled by a name, but look to the substance and intent of the proceeding." *United States* v. *Ritchie,* 17 How. 525, 534; *Stephens* v. *Cherokee Nation,* 174 U.S. 445, 479; *Federal Trade Commission* v. *Eastman Co.,* 274 U.S. 619, 623; *Old Colony Trust Co.* v. *Commissioner,* 279

U.S. 716, 722–724. "It is not important," we said in *Old Colony Trust Co.* v. *Commissioner, supra,* "whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law." Nor is it necessary that the proceeding to be judicial should be one entirely *de novo.* When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. The provision that, in case the Court reverses the decision of the Commission, "it shall remand the case to the Commission to carry out the judgment of the Court" means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous. *Osborn* v. *United States Bank,* 9 Wheat. 738, 819; *In re Pacific Railway Commission,* 32 Fed. 241, 255; *Federal Trade Commission* v. *Klesner, supra; Federal Trade Commission* v. *Raladam Co., supra; Old Colony Trust Co.* v. *Commissioner, supra.*

Second. In this aspect, the questions presented are (1) whether the Commission, in making allocations of frequencies or wave lengths to States within a zone, has power to license operation by a station in an 'under-quota' State on a frequency theretofore assigned to a station in an 'over-quota' State, and to terminate the license of the latter station; (2) whether, if the Commis-

sion has this power, its findings of fact sustain its order in the instant case, in the light of the statutory requirements for the exercise of the power, and, if so, whether these findings are supported by substantial evidence; and (3) whether, in its procedure, the Commission denied to the respondents any substantial right.

(1) No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communications. No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities. In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses. The Commission has been set up as the licensing authority and invested with broad powers of distribution in order to secure a reasonable equality of opportunity in radio transmission and reception.

The Radio Act divides the United States into five zones, and Illinois and Indiana are in the Fourth Zone. § 2; 47 U.S.C. 82. Except as otherwise provided in the Act, the Commission "from time to time, as public convenience, interest, or necessity requires," is directed to "assign bands of frequency or wave lengths to the various classes of stations and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate," and to "determine the location of classes of stations or individual stations." § 4 (c) (d); 47 U.S.C. 84. By § 9, as amended in 1928, the Congress declared that the people of all the zones "are entitled to equality of radio broadcasting service, both of transmission and of reception," and that "in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones

when and in so far as there are applications therefor"; and the Commission is further directed to "make a fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States, . . . within each zone, according to population"; and the Commission is to "carry into effect the equality of broadcasting service, . . . whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation and by increasing or decreasing station power when applications are made for licenses or renewals of licenses." § 9; 47 U.S.C. 89.[3]

By its General Order No. 40, of August 30, 1928,[4] the Commission established a basis for the equitable distribution of broadcasting facilities in accordance with the Act. That order, as amended, provided for the required apportionment by setting aside a certain number of frequencies for use by stations operating on clear channels for distant service, and other frequencies for simultaneous use by stations operating in different zones, each station serving a regional area, and still others for use by stations serving city or local areas. These three classes of stations have become known as "clear, regional, and local channel stations." A new allocation of frequencies, power and hours of operation, was made in November, 1928,[5] to conform to the prescribed classification. It was found to be impracticable to determine the total value of the three classes of assignments so that it could be ascertained whether a State was actually "under or over quota on total radio facilities," and the Commission developed a "unit system" in order "to evaluate stations, based on type of channel, power and hours of operation, and all other considerations required by law." In June 1930, the

[3] See Note 1.

[4] Report, 1928, Federal Radio Commission, pp. 17, 48.

[5] Id., pp. 18, 215–218.

Commission issued its General Order No. 92[6] specifying the "unit value" of stations of various types, and in this way the Commission was able to make a tabulation by zones and States showing the "units due," based on estimated population, and the "units assigned." This action called for administrative judgment, and no ground is shown for assailing it. It appears that, with respect to total broadcasting facilities, Indiana is "under quota" and Illinois is "over quota" in station assignments.

Respondents contend that the Commission has departed from the principle set forth in its General Order No. 92, because it has ignored the fact that, both Indiana and Illinois being under quota in regional station assignments, Indiana has more of such assignments in proportion to its quota than has Illinois, and by ordering the deletion of regional stations in Illinois in favor of an Indiana station, the Commission has violated the command of Congress, by increasing the under quota condition of Illinois in favor of the already superior condition of Indiana with respect to stations of that type. We find in the Act no command with the import upon which respondents insist. The command is that there shall be a "fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone." It cannot be said that this demanded equality between States with respect to every type of station. Nor does it appear that the Commission ignored any of the facts shown by the evidence. The fact that there was a disparity in regional station assignments, and that Indiana had more of this type than Illinois, could not be regarded as controlling. In making its "fair and equitable allocations," the Commission was entitled and required to consider all the broadcasting facilities assigned to the respective States, and all the advantages thereby enjoyed,

[6] Report, 1930, Federal Radio Commission, pp. 4, 24.

and to determine whether, in view of all the circumstances of distribution, a more equitable adjustment would be effected by the granting of the application of Station WJKS and the deletion of Stations WIBO and WPCC.

To accomplish its purpose, the statute authorized the Commission to effect the desired adjustment "by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power." This broad authority plainly extended to the deletion of existing stations if that course was found to be necessary to produce an equitable result. The context, as already observed, shows clearly that the Congress did not authorize the Commission to act arbitrarily or capriciously in making a redistribution, but only in a reasonable manner to attain a legitimate end. That the Congress had the power to give this authority to delete stations, in view of the limited radio facilities available and the confusion that would result from interferences, is not open to question. Those who operated broadcasting stations had no right superior to the exercise of this power of regulation. They necessarily made their investments and their contracts in the light of, and subject to, this paramount authority. This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises. *Union Bridge Co.* v. *United States,* 204 U.S. 364, 400, 401; *Philadelphia Company* v. *Stimson,* 223 U.S. 605, 634, 638; *Philadelphia, Baltimore & Washington R. Co.* v. *Schubert,* 224 U.S. 603, 613, 614; *Greenleaf John-*

son Lumber Co. v. *Garrison,* 237 U.S. 251, 260; *Continental Insurance Co.* v. *United States,* 259 U.S. 156, 171; *Sproles* v. *Binford,* 286 U.S. 374, 390, 391; *Stephenson* v. *Binford,* 287 U.S. 251, 276; *City of New York* v. *Federal Radio Commission,* 36 F. (2d) 115; 281 U.S. 729; *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318; 285 U.S. 538; *Trinity Methodist Church, South* v. *Federal Radio Commission,* 61 App.D.C. 311; 62 F. (2d) 850; 288 U.S. 599.

Respondents urge that the Commission has misconstrued the Act of Congress by apparently treating allocation between States within a zone as subject to the mandatory direction of the Congress relating to the zones themselves. Respondents say that as to zones Congress requires an "equal" allocation, but as between States only "a fair and equitable" allocation, and that the provision "for granting or refusing licenses or renewals of licenses" relates to the former and not to the latter. It is urged that this construction is fortified by the proviso in § 9 as to temporary permits for zones.[7] We think that this attempted distinction is without basis. The Congress was not seeking in either case "an exact mathematical division."[8] It was recognized that this might be physically impossible. The equality sought was not a mere matter of geographical delimitation. The concern of the Congress was with the interests of the people,—that they might have a reasonable equality of opportunity in radio transmission and reception, and this involved an equitable distribution not only as between zones but as between States as well. And to construe the authority conferred, in relation to the deletion of stations, as being applicable only to an apportionment between zones and

[7] See Note 1.

[8] Report of the Committee on the Merchant Marine and Fisheries, H.R.Rep. No. 800, 70th Cong. 1st sess., p. 3.

not between States, would defeat the manifest purpose of the Act.

We conclude that the Commission, in making allocations of frequencies to States within a zone, has the power to license operation by a station in an under-quota State on a frequency theretofore assigned to a station in an over-quota State, provided the Commission does not act arbitrarily or capriciously.

(2) Respondents contend that the deletion of their stations was arbitrary, in that they were giving good service, that they had not failed to comply with any of the regulations of the Commission, and that no proceeding had been instituted for the revocation of their licenses as provided in § 14 of the Act. 47 U.S.C., 94. That section permits revocation of particular licenses by reason of false statements or for failure to operate as the license required or to observe any of the restrictions and conditions imposed by law or by the Commission's regulations. There is, respondents say, no warrant in the Act for a " forfeiture " such as that here attempted. But the question here is not with respect to revocation under § 14, but as to the equitable adjustment of allocations demanded by § 9. The question is not simply as to the service rendered by particular stations, independently considered, but as to relative facilities,—the apportionment as between States. At the time of the proceeding in question respondents were operating under licenses running from September 1, 1931, to March 1, 1932, and which provided in terms that they were issued " on a temporary basis and subject to such action as the Commission may take after hearing on the application filed by Station WJKS " for the frequency 560 kc. Charged with the duty of making an equitable distribution as between States, it was appropriate for the Commission to issue temporary licenses with such a reservation in order to preserve its freedom to act in the light of its decision on that application. And when

decision was reached, there was nothing either in the provisions of § 14, or otherwise in the Act, which precluded the Commission from terminating the licenses in accordance with the reservation stipulated.

In granting licenses the Commission is required to act "as public convenience, interest or necessity requires." This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *N.Y. Central Securities Co.* v. *United States,* 287 U.S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. In making such an adjustment the equities of existing stations undoubtedly demand consideration. They are not to be the victims of official favoritism. But the weight of the evidence as to these equities and all other pertinent facts is for the determination of the Commission in exercising its authority to make a "fair and equitable allocation."

In the instant case the Commission was entitled to consider the advantages enjoyed by the people of Illinois under the assignments to that State, the services rendered by the respective stations, the reasonable demands of the people of Indiana, and the special requirements of radio service at Gary. The Commission's findings show that all these matters were considered. Respondents say that there had been no material change in conditions since the general reallocation of 1928. But the Commission was not bound to maintain that allocation if it appeared that a fair and equitable distribution made a change necessary. Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was

not only at liberty but was required to reach its own conclusions upon the evidence.

We are of the opinion that the Commission's findings of fact, which we summarized at the outset, support its decision, and an examination of the record leaves no room for doubt that these findings rest upon substantial evidence.

(3) Respondents raise a further question with respect to the procedure adopted by the Commission. In January, 1931, the Commission issued its General Order No. 102[9] relating to applications from under quota States. This order provided, among other things, that "applications from under-quota States in zones which have already allocated to them their pro rata share of radio facilities should be for a facility already in use in that zone by an over-quota State," and that, since the Commission had allocated frequencies for the different classes of stations, "applications should be for frequencies set aside by the Commission for the character of station applied for." Respondents insist that these requirements foreclosed the exercise of discretion by the Commission by permitting the applicant to select the station and the facilities which it desired; that this "naked action of the applicant" precluded the Commission from "giving general consideration to the field" and from making that fair and equitable allocation which is the primary command of the statute. We think that this argument misconstrues General Order No. 102. That order is merely a rule of procedural convenience, requiring the applicant to frame a precise proposal and thus to present a definite issue. The order in no way derogates from the authority of the Commission. While it required the applicant to state the facilities it desires, there was nothing to prevent respondents from contesting the applicant's demand upon the ground

[9] Report, 1931, Federal Radio Commission, p. 91.

that other facilities were available and should be granted in place of those which the applicant designated. If such a contention had been made, there would have been no difficulty in bringing before the Commission other stations whose interests might be drawn in question. There is no showing that the respondents were prejudiced by the operation of the order in question.

Respondents complain that they were not heard in argument before the Commission. They were heard before the examiner and the evidence they offered was considered by the Commission. The exceptions filed by the applicant to the examiner's report were filed and served upon the respondents in August, 1931, and the decision of the Commission was made in the following October. While the request of the applicant for oral argument was denied, it does not appear that any such request was made by respondents or that they sought any other hearing than that which was accorded.

We find no ground for denying effect to the Commission's action. The judgment of the Court of Appeals is reversed and the cause is remanded with direction to affirm the decision of the Commission.

Reversed.

LOS ANGELES GAS & ELECTRIC CORP. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 412. Argued February 7, 8, 1933.—Decided May 8, 1933

1. The legislative discretion implied in the rate-making power embraces the methods of reaching the legislative determination as well as the determination itself. P. 304.
2. While the method used in fixing rates of a public utility may have definite bearing upon the validity of the result, the Court is not

to revise the legislative process, but is confined to the constitutional question, whether the rates fixed are confiscatory. P. 304.

3. Upon that question the party complaining has the burden of proof, and the Court may not interfere unless the confiscation is clearly established. P. 305.
4. In determining whether a public utility has been deprived of a fair return for the service rendered the public in the use of its property, the basis of calculation is the fair value of the property, that is, its reasonable value at the time it is being used for the public. P. 305.
5. The judicial ascertainment of values for the purpose of deciding whether rates are confiscatory, is not a matter of formulæ, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. P. 306.
6. The actual cost of the property is a relevant fact, but not an exclusive or final test. P. 306.
7. The time and circumstances of the outlay and the effect of altered conditions demand consideration. P. 306.
8. Even when cost is revised so as to reflect what may be deemed to have been invested prudently and in good faith, the investment may embrace property no longer used and useful for the public good. P. 306.
9. The reasonable cost of an efficient public utility system is good evidence of its value at the time of construction. P. 306.
10. Such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices. P. 306.
11. When such change in the price level has occurred, actual experience in the construction and development of the property, especially in a recent period, may be an important check on extravagant estimates. P. 306.
12. In order to determine present value, the cost of reproducing the property is a relevant fact. P. 307.
13. This Court has not decided that the cost of reproduction furnishes an exclusive test. P. 307.
14. The Court has emphasized the danger in resting conclusions upon estimates of a conjectural nature. P. 307.
15. The weight to be given to actual cost, to historical cost and to cost of reproduction new, is to be determined on the facts of the particular case. P. 308.

16. Judicial notice taken of the high level of prices of labor and materials prevailing not only from 1917, as an incident of the War, but also in 1922 and 1923, and that there was no "substantial general decline" in such prices from that time to 1926. P. 308.
17. The Court finds no warrant for concluding that since 1917, when the gas plant here in question was first valued by the state commission, there has been any change in prices of labor and materials making it unfair, in fixing rates for the future, to take the historical cost found by the commission, as evidence of the value of the company's structural property at the time of the rate order; it clearly appearing that the prices of labor and materials reflected in the historical cost were higher than those obtaining during the later period to which the prescribed rates apply. P. 309.
18. A difference between the commission and the company as to the amounts to be added for overheads in estimating historical cost, becomes immaterial in this case, since the company's higher estimate of that cost is less than the amount taken by the commission on the basis of fair value as an undepreciated rate base. P. 309.
19. In estimating cost of reproduction, items for financing and for promoters' remuneration, which are merely conjectural, should not be included. P. 310.
20. Plant facilities that have become unnecessary are not included in estimating cost of reproduction as a base for future rates. P. 311.
21. The determination of present value is not an end in itself, but is to afford ground for a prediction of future values upon which to determine valid future rates. P. 311.
22. Estimates of present value, taken as the cost of reproduction as of December 31, 1929, based upon average prices from 1926 to 1929, furnished no dependable criterion of values in the succeeding years, because of the serious decline of prices which the country was facing in a depression amounting to a change of economic level. P. 311.
23. "Going Value" is included in the base in determining whether rates are confiscatory; but not "good will." P. 313.
24. The concept of "going value" is not to be used to escape rate-fixing authority; but on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones. P. 313.
25. Where the estimate purports to give the fair value of the plant as a going property with business attached, and exceeds substantially the value assigned to the physical property, omitting parts no

longer needed in the business but including allowances for interest, organization expenses, franchises, land values, overheads, etc., the excess may be assigned to "going value," although not so described in terms by the commission making the valuation. P. 316.

26. An allowance for "going-concern" value will not be adjudged so insufficient as to result in confiscation, where the evidence offered to prove its insufficiency is highly uncertain and speculative. P. 317.

27. Principles governing the calculation of fair rate of return,—restated. P. 319.

28. Considering the financial history of the company, its relations and opportunities and the general situation with regard to investments, the Court can not say that 7% return is confiscatory in this case. P. 319.

29. The Court finds no reason to disturb the finding in this case as to revenue and expenses, the former depending largely upon probable future temperatures (influencing the consumption of gas for heating) and the latter upon the sufficiency of the depreciation annuity allowed by the commission. P. 320.

58 F. (2d) 256, affirmed.

APPEAL from a decree of the District Court, constituted of three judges, which dismissed the bill in a suit by the appellant gas company to enjoin the defendant state commission and officers from enforcing new gas rates, which it attacked as confiscatory.

Mr. Herman Phleger, with whom *Messrs. Paul Overton, Maurice E. Harrison,* and *James S. Moore, Jr.,* were on the brief, for appellant.

Mr. Arthur T. George for appellees.

Mr. Frederick von Schrader, with whom *Messrs. Erwin P. Werner* and *William H. Neal* were on the brief, for the City of Los Angeles, intervener.

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

The Los Angeles Gas & Electric Corporation assails as confiscatory the gas rates fixed by an order of the California Railroad Commission in November, 1930, effective January 1, 1931. 35 C.R.C. 442. The District Court,

of three judges, granted an interlocutory injunction and on final hearing dismissed the bill. 58 F. (2d) 256. The Company appeals.

The Company, organized in 1909, supplies both gas and electric current. Its rates for the latter are not in controversy. The two departments, both with respect to investment and operation, are distinct and have been separately treated for rate-making purposes for many years. From 1913, when natural gas in substantial quantities was first made available in Los Angeles, until 1927, the Company distributed a mixture of natural and manufactured gas, and since 1927 straight natural gas has been distributed. The Company's service extends over the greater part of Los Angeles and neighboring cities and unincorporated territory. It has over 2,900 miles of mains and 385,000 meters. From 1917 the Company's gas rates have been fixed by the California Railroad Commission. Rate orders were made in 1917, 1919, 1921, 1923, 1926 and 1928. During this period the Company's business greatly increased. The rate base for its gas department, as fixed by the Commission, grew from approximately $12,500,000 in 1916 to about $59,000,000 in 1929. The growth was financed by the sale of the Company's bonds and preferred stock. These, according to the finding of the Commission, had been marketed at a gradually lessening cost so that, at the time of the hearing which resulted in the order under review, it was found that the "annual cost of its bond and preferred stock money" was 6.17 per cent. Approximately 60 per cent. of the amounts thus realized is chargeable to the gas department.[1]

[1] Reviewing the financial history of the Company, the Commission found: "On December 31, 1929, the Company had outstanding in the hands of the public $47,070,000 par value of bonds, $19,469,995 par value preferred stock, and $20,000,000 par value of common stock. Its depreciation reserve on that date was reported at $16,804,105.15. All of its common stock is owned by Pacific Lighting Corporation. Since 1916 but $4,500,000 of this stock has been purchased for cash,

Under the Commission's order of 1928, the gas rates were estimated to yield a return slightly in excess of 7.5 per cent. 32 C.R.C. 379, 386. Concluding that these rates actually yielded a much higher return, the Commission reduced the rates by the order now under review. It was intended to effect a reduction of 9 per cent. in gross revenue. 35 C.R.C., pp. 463, 469. The reduction amounted to about $1,300,000 in gross revenue and about $1,080,000 in net revenue.

1. *The Commission's valuations.* In determining the rate base, the Commission made two sorts of valuations of the gas properties for the year 1930,—one of $60,-704,000 on the basis of "historical cost," and the other of $65,500,000 on the basis of "fair value." The Commission estimated that the return to the Company on the former basis would be 7.7 per cent. and, on the latter, 7 per cent. 35 C.R.C., p. 464.

Historical cost. The finding as to historical cost had relation to the method previously adopted by the Commission in the regulation of the Company's rates. The original rate base was established by the Commission in 1917 upon a valuation made by the Commission's engineers as of October, 1915. 13 C.R.C. 724. In the later rate proceedings, including the one now under review, the

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$5,500,000, however, having been distributed to Pacific Lighting Corporation in the form of stock dividends, representing earnings left in the property. Dividends have been paid on its common stock of 7.20 per cent. per share ($100 par value) in 1916, 1917 and 1918; 7.4 per cent. in 1919; 8.4 per cent. in 1920, 1921 and 1922; 8.7 per cent. in 1923; 33.75 per cent. in 1924, included in which is 25 per cent. as a stock dividend of $2,500,000; 9 per cent. in 1925; 9.815 per cent. in 1926; 35.17 per cent. in 1927, which includes a stock dividend of 21.42 per cent., or $3,000,000; 15 per cent. in 1928, and 17 per cent. in 1929. The Company's surplus has grown from $381,212.97 in 1916 to $4,176,663.09 in 1929, while its depreciation reserve increased from $3,804,383.36 to, as said above, $16,804,105.15." 35 C.R.C., pp. 447, 448.

historical cost was built upon the value established in 1917 augmented by net additions and betterments as entered upon the Company's books, but with land at current values.[2] Of the total amount fixed by the Commission on the basis of historical cost, the sum of $1,862,103 was for materials and supplies, working capital and estimated net additions and betterments for 1930, leaving $58,842,187 as the historical cost of the fixed property at the end of 1929. Aside from overheads, the estimates made by the Company and by the Commission of the historical cost of this property did not differ widely.[3] The main difference lay in the treatment of overheads in the book entries of additions and betterments from 1916 to 1929; the Company contends that the amounts recorded in its books in respect to indirect construction costs were inadequate. The reference is to the amounts which should

[2] See 16 C.R.C. 478, 482; 20 *id.* 93, 96; 29 *id.* 164, 181; 32 *id.* 379, 381.

[3] The Commission found: "Estimates of the historical cost of the structural property were made in this proceeding, both by the Company and by the Commission's Valuation Department. Excluding overheads, the Company reached a figure approximately $300,000 higher than the one obtained by taking the 1917 rate base as fixed by the Commission in its first decision and building up on that, while the Valuation Department of the Commission reached a figure approximately $300,000 lower than the one thus obtained. The fact that each of these estimates, independently reached by employing somewhat different methods and procedure, corresponded so closely to the historical cost figure as used and accepted by the Commission and by the Company as correct in the series of rate determinations running from 1917 to 1928, confirms its substantial accuracy. The figure used conforms to the accounting practice of the Company as to the bulk of its investment, which has increased from approximately $13,000,000 in 1917 to over $58,000,000 in 1929, the difference representing net additions and betterments during this period as inscribed in the Company's books and records. Mr. McAuliffe [the Commission's appraiser] and the Company's land appraiser were surprisingly close in their results. In the few points of difference Mr. McAuliffe's testimony was the more convincing." 35 C.R.C., p. 451.

be included for engineering and superintendence, legal expenses, injuries and damages, insurance, taxes, interest during construction and contingencies. The general instructions of the Commission as to classification of fixed capital accounts provided that such overheads should be assigned or apportioned to particular accounts so that each item of property should bear its proper share, and a considerable range of discretion in making allocations rested with the Company. 35 C.R.C., p. 451. The Company had availed itself of this opportunity and the average charge on the Company's books for these costs from 1913 to 1929 was about 6 per cent. of the direct labor and material charges. The Commission's engineers were of the opinion that 11.25 per cent. might reasonably have been charged to capital and, on that basis, the total historical cost of fixed property would have been raised from $58,842,187 to $61,019,662. The Company's engineers estimated that 14.48 per cent. should be allowed for these overheads, bringing that historical cost up to $63,413,246. The Commission stated that its conclusions had been reached upon the assumption that the Company's allocations in reporting additions and betterments were properly made, and that the effect of the long-continued practice of the Company was that it had been allowed under the rate orders, in the form of operating expenses, the items which it now claims should have been added to capital. The Commission thought that the Company was not in a position to raise the question. The Commission recognized an exception in the item of interest during construction which, when not charged to capital, had been charged to income accounts and did not go into operating expenses, and accordingly there was included in the Commission's finding of historical cost an additional allowance, for that interest, of $155,000 which the Commission deemed to be fair. 35 C.R.C. 451–453.

No deduction was made from the total historical cost for the investment in the generating plant and equipment which the Commission found were being rendered unnecessary by the introduction of natural gas. In order to meet the rapidly increasing demand, the gas manufacturing plant had been greatly expanded until in 1924 the Company had a plant of 98,500,000 cubic feet daily capacity. The book value of this plant was approximately $10,000,000 and the amount included therefor in the Company's estimate of historical cost was approximately $10,500,000. Since April, 1927, on account of the supply of natural gas, the Company has not manufactured gas except on one occasion, on March 13, 1928, when, in anticipation of a shortage, a certain amount (569,000 cubic feet) was manufactured which constituted but nine-tenths of one per cent. of the gas sent out on that day. The Commission found that the evidence convincingly established "the existence of a natural gas supply adequate for years to come." But as the investment in the manufacturing plant had been made prudently and in good faith, it was included by the Commission in the estimate of the historical cost of the Company's gas properties.

In that estimate, as thus made, nothing was deducted for depreciation and nothing was added for going concern value.

Fair value. The Company claimed before the Commission a rate base of approximately $95,000,000 on the basis of reproduction cost new as of January 1, 1930, less accrued depreciation. 35 C.R.C., p. 456. On comparing the Company's estimate as of that date with the estimate of the Commission's engineer of reproduction cost new (of December 31, 1929), in each case without deduction for depreciation, it appears that the difference, exclusive of overheads and the items mentioned below, was only about

$3,000,000 in the valuation of the physical property.[4] In its estimate the Company included overheads at 24.27 per cent., or a total of $14,990,278. On that basis, the value of the physical property was estimated by the Company, without depreciation, at $76,754,919.[5] This included $12,134,665 as the "reproduction value of the standby manufacturing facilities," above mentioned. The Company's witness testified before the Commission (in 1930)[6] that in his estimate of reproduction cost he had "attempted to obtain prices that would be reasonably stable and might prevail over the next three years"; that the prices used were "very close to the average of those which prevailed for a 3-year period prior to January 1, 1930"; and while in his opinion there was "a temporary slump in prices," he did not think it probable that there would be "any substantial change within the next two or three years."

The estimate of the Commission's engineer for reproduction cost new of the same physical property including the gas manufacturing plant, as of December 31, 1929, without depreciation, taking unit prices of that day and overheads at 21.65 per cent., was $72,471,207. As of the same date, but using four-year average unit prices for the years 1926 to 1929, his estimate was $73,210,136, with overheads taken at 22.32 per cent.[7] His estimates on the

[4] The amount, exclusive of overheads, thus reached by the Company was $62,596,422, and by the Commission's engineer $59,413,008.

[5] This is the total of Items 2, 3 and 4 of the Company's valuation of physical property, as shown in the Company's exhibit and set forth in the Commission's findings. 35 C.R.C., p. 456. This amount, with Item 1 ($831,781) for "organization and franchises" make up the total of $77,586,700 claimed by the Company as the reproduction cost new of its fixed property.

[6] The hearing before the Commission was completed on July 16, 1930, and its order was made on November 24, 1930.

[7] This amount, with $427,406 allowed by the Commission's engineer for "organization and franchises" makes the total of $73,637,542 as

last mentioned basis, but with overheads at 6 per cent. and 11.25 per cent., respectively, were $64,082,282 and $67,007,569.[8] With unit prices as of June 15, 1930, his estimates for reproduction cost new as of that day, without depreciation, and with overheads at 6 per cent., 11.25 per cent., and 21.64 per cent., respectively, were $63,399,822, $66,291,307 and $72,040,522.[9]

In arriving at its total estimate of reproduction cost new, the Company added to its valuation of its physical property the items of "Cost of financing, $5,921,470," "Promoters' remuneration, $2,500,000," and "Going concern value, $9,228,667." These items the Commission did not allow. The items of "cost of financing" and "promoters' profits" were rejected as "too hypothetical and far removed from actuality to properly find lodgment in a rate base." The Company's claim for "going concern" value was based upon expert testimony which the Commission regarded as involving unacceptable theories and assumptions. 35 C.R.C., pp. 459, 460.

Depreciation. The Company estimated $3,470,326 for accrued depreciation. The Commission found that this was too little and that the accrued depreciation was not less than $7,650,000. The Commission stated that this amount was reached after a careful and detailed study involving a physical inspection of the property and analysis of the Company's records. *Id.*, p. 461.

Commission's conclusion as to fair value. The Commission's final conclusion was as follows: "Subject to deduction for accrued and realized depreciation in a sum of approximately $7,650,000, the fair value of the property

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the reproduction cost new of the fixed property which was covered by the Company's estimate of $77,586,700.

[8] Adding the item of $427,406 (see Note 6), these estimates were $64,509,688 and $67,434,975, as shown by the Commission's exhibit.

[9] Or, with the addition of $427,406 (see Note 6), these estimates were $63,827,228, $66,718,713 and $72,467,928.

here involved as a going property with business attached, giving full effect to the current level of prices and allowing for any intangible elements of value not fully cared for in the usual and current operating expense allowances but excluding various built up claims of value incident to a reproduction of the property under an assumed reconstruction program as too uncertain and hypothetical to enter into a rate base figure, did not for the year 1928, using round figures, exceed $62,500,000, and for the year 1929 $64,000,000, and for the year 1930 does not exceed $65,500,000, which figures, for the purposes hereof, are spoken of as rate base." These amounts included the allowances (*supra,* p. 293) for additions and betterments (for 1930) and for working capital, materials and supplies. *Id.,* pp. 461, 462.

Although the accrued depreciation was thus treated by the Commission as deductible, in order to arrive at fair value, the Commission thought that operating results under the fair value theory could best be shown by using an undepreciated rate base. The result is that the Commission allowed for the year 1930, as a basis for its calculation of return, a valuation of $65,500,000 without deduction for depreciation. *Id.,* p. 462.

2. *The Commission's estimate of return.* Based upon assumed revenue and operating expenses, and with allowance for a depreciation annuity and taxes, the Commission estimated that the Company would earn a net return of 7 per cent. upon this undepreciated rate base. The Commission stated that the year 1930 was "in many respects an abnormal year"; that the temperatures had been higher than normal, and that the business depression had had an adverse effect upon the Company's growth and revenue. Still it was found that the Company's business was growing and that with growth there was a tendency for the rate of return to increase. The Commission rested

its conclusions " on the assumption that temperature conditions in the future will be normal and that business conditions will approximate those of the year 1930 and that the gross revenue of 1931 with normal temperatures will not be less than that of 1930." The Commission recognized that the revenue for 1930 might be less than that estimated and, on the other hand, that the operating expenses for that year were not at a normal figure. It was thought that " any diminution in revenue is offset by the amount by which operating expense is out of normal." But the Commission clearly perceived that " the *actual* earning position of the Company in the year 1931 " might be " either worse or better than it would be were these assumptions realized." It was thought that the disturbing element of varying temperatures might be guarded against by the establishment of a temperature reserve. The Commission pointed out that the depreciation reserve of the gas department, on December 31, 1929, was $9,350,689, which was " substantially in excess of the amount of accrued depreciation." The annual amounts which had been allowed for depreciation expense had proved to be larger than necessary, and it was suggested that a considerable part of the depreciation reserve might be transferred to a temperature reserve. While, for the present purpose, the Commission assumed that the creation of such a reserve was a matter of company policy, its desirability was emphasized. The Commission's order of November 24, 1930, establishing the rates here in question, provided for the acceptance at the Company's option of an alternative plan. This gave, in lieu of the rates prescribed, a provisional schedule of rates to be charged in 1931, and until the further order of the Commission, which was deemed to involve a reduction in revenue of approximately 7 per cent., instead of 9 per cent. as otherwise contemplated, the Company to agree to establish

a temperature reserve to which should be credited the amount by which the net earnings of its gas department for the year 1931 should be in excess of a stated sum. This plan was not accepted.

3. *Decision of the District Court.* The Company brought this suit in December, 1930, attacking the findings of the Commission as to both rate base and return. The Company alleged that the fair value of its gas properties exceeded $95,000,000, that its gross and net revenues were overestimated by the Commission, that under the rates prescribed the Company would have earned, for the twelve months ending October 31, 1930, but 4.25 per cent. upon the fair value which it claimed, and that the temporary optional rates, for which the Commission's order provided, would also yield less than a fair return and were equally invalid. Upon the motion for interlocutory injunction, the entire record before the Commission was received in evidence together with additional affidavits, and upon the same evidence the parties submitted the cause for final determination.

While the District Court did not make specific findings of values, revenue, expense and rate of return, the Court reviewed the findings of the Commission and the evidence and held that the Commission's valuations were reasonable and that the prescribed rates permitted a reasonable return. Two opinions were delivered, one for the majority of the Court and a concurring opinion by the Circuit Judge, in which the contentions of the Company were examined.

Considering the growth and stable position of the Company, the Court pointed out that " with a history of successful and profitable business, and no real competition to meet in its field of service, the hazard is small and the probabilities of continued demand assured. Electricity has not to any great extent supplanted gas as a fuel. All of the conditions noted, as affecting the business of the

Company, sustained the Commission in its statement that the plaintiff's securities are capable of being marketed at moderate interest rates, and that it will continue to grow." 58 F. (2d) p. 259. The Court found that the Commission "was very liberal in its treatment of certain items of property"; that "since 1924" the Company has served natural gas, "which is plentiful in the numerous oil fields in southern California"; that "there is no evidence which destroys the Commission's conclusion that the supply of natural gas will be abundant and constant"; that the Commission had found in effect that "at least two of the artificial gas manufacturing plants" were no longer needed and might well be retired; that nevertheless the Commission had included them in its valuation "as a live necessary part of the operative property"; and that, had these plants been eliminated, "the fair value base would have been reduced by approximately $3,000,000." *Id.*

In the evidence produced on the application for interlocutory injunction was an affidavit of the Commission's engineer who brought the valuation of the Company's properties down to December 15, 1930, by applying the unit prices prevailing on that date. This witness, Mr. Dufour, who had been employed from 1915 to 1921 by the Interstate Commerce Commission, and from that time had served with the California Commission, stated that "he kept in close touch with the prevailing labor and material costs," maintaining as part of the valuation division of the Commission a cost bureau for that purpose; that "the present [December, 1930] trend of material and labor cost is downward; due to the present acute unemployment situation the wages paid the class of labor required for this type of construction is now lower and due to the large number of applicants for employment from which capable men may be selected the efficiency of labor is higher, tending to materially decrease the labor costs";

that he estimated "that the current price level cost of plaintiff's gas properties used and useful in the public service applying prices prevailing December 15, 1930, including land market value as of December 31, 1929, and excluding difficulty factor,[10] is $60,009,099, undepreciated"; that this amount would represent the cost of the properties as they existed December 31, 1929, if the unit costs and prices prevailing on December 15, 1930, were used, applying overhead charges of six per cent." The Company's expert witness, in replying to this affidavit, gave his opinion that "the variations in price levels during the year 1930 do not constitute a permanent change in price levels and prices will for a reasonable period in the future be on a higher level than existed on December 15, 1930, and will, on the average over the next few years, approximate the prices used by him in his estimate of labor cost new reflected in the value of $95,767,351 shown in the affidavit filed herein on December 23, 1930."

Summing up its conclusions as to the action of the Commission, the Court said: "What the Commission did then in reaching its base rate figure of fair value was to include all items of property used and useful in the operative plant of the plaintiff, and appraise the value thereof at current market prices. It included original organization costs and franchise values as well. It assumed a live active plant, and affirmed that the ultimate total included all costs of attaching business as the same had accrued and been accounted for. Its fair value figure, assuming the correct estimate and allocation of

[10] The "difficulty factor," which had been estimated at $615,007, was stated by the witness to represent his estimate "of the increased labor costs that would be experienced in constructing the property under present physical conditions over those originally encountered, such as increased traffic difficulties and increased subterranean obstructions."

items hereinafter referred to, was one which essentially represented the investment cost, at the present time, of all the operative property and its connected incidentals." 58 F. (2d) p. 260. The Court regarded the ruling of the Commission in taking overheads in accordance with the Company's accounting practice as reasonable. The Court held that "the large amounts claimed by the Company for cost of financing, $5,921,470; promoters' remuneration, $2,500,000; cost of attaching business (going concern value), $9,228,667; added 'difficulty' costs, $580,195, were properly rejected as for their total amounts." *Id.*, p. 262.

The Court observed that the matter of accrued depreciation, which had not been deducted from the fair value base as used by the Commission, was important as affecting the annuity allowance to be considered in arriving at prospective income. The amount allowed by the Commission as depreciation annuity was $1,072,000, while the Company claimed that it should be not less than $2,344,744. The Court noted the inconsistency of this claim, when the Company asserted that the total accrued depreciation affecting its property was only $3,470,326. The Court concluded that the allowances for depreciation annuities which had been made prior to the rate hearing under review were excessive and were not controlling; that depreciation was a matter not capable of definite ascertainment and that it had not been shown that the Commission had not exercised a reasonable judgment. *Id.*, p. 261.

With respect to estimated income for the future, the Court referred to the Company's complaint that the two preceding years had been marked by unusually high temperatures and consequent diminished demand for gas, and that "it was improper to assume average temperatures." But the Court, familiar with conditions in Los

Angeles, thought that the practice adopted by the Commission was fair, adding: "We may note that the winter of 1931–32 in the city of Los Angeles, as it has thus far progressed at the end of January, has been one of the coldest in many years. And so, the rule of assumed average temperatures seems to be the only reasonable one to adopt. During unusually mild winters the utility service will earn less than was estimated to be allowed to it, and in colder winters will earn more." *Id.*, p. 262.

The action of the Commission was also approved with respect to the allowances for materials and supplies and for working capital.

In the final decree the Court set forth its finding "that the values for plaintiff's property as fixed and determined by the defendant Railroad Commission are the reasonable values thereof; that the rates fixed are such as to render a reasonable return on such values and that said rates are therefore not confiscatory," and the Court adopted, "as representing its further findings," the opinion filed by the two District Judges. The Circuit Judge concurred in the decree, referring to his concurring opinion for the findings of fact upon which his action was based.

4. We approach the decision of the particular questions thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the Court. We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co.* v. *Jasper,* 189 U.S. 439, 446. The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the valid-

ity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established.

As the property remains in the ownership of the complainant, the question is whether the complainant has been deprived of a fair return for the service rendered to the public in the use of the property. This Court has repeatedly held that the basis of calculation is the fair value of the property, that is, that what the complainant is entitled to demand, in order that it may have "just compensation," is "a fair return upon the reasonable value of the property at the time it is being used for the public." [11] In determining that basis, the criteria at hand for ascertaining market value, or what is called exchange value, are not commonly available. The property is not ordinarily the subject of barter and sale and, when rates themselves are in dispute, earnings produced by rates do not afford a standard for decision. The value of the property, or rate base, must be determined under these inescapable limitations. And mindful of its distinctive function in the enforcement of constitutional rights, the Court has refused to be bound by any artificial rule or formula which changed conditions might upset. We have said

[11] See *Smyth* v. *Ames*, 169 U.S. 466, 547; *San Diego Land & Town Co.* v. *National City*, 174 U.S. 739, 757; *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 41; *Minnesota Rate Cases*, 230 U.S. 352, 434; *Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U.S. 276, 287; *Georgia Railway & Power Co.* v. *Railroad Commission*, 262 U.S. 625, 631; *Bluefield Water Works Co.* v. *Public Service Commission*, 262 U.S. 679, 690; *Board of Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 31; *McCardle* v. *Indianapolis Water Co.*, 272 U.S. 400, 410; *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U.S. 461, 484, 485.

that the judicial ascertainment of value for the purpose of deciding whether rates are confiscatory " is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." *Minnesota Rate Cases,* 230 U.S. 352, 434; *Georgia Railway & Power Co.* v. *Railroad Commission,* 262 U.S. 625, 630; *Bluefield Water Works Co.* v. *Public Service Commission,* 262 U.S. 679, 690.

The actual cost of the property—the investment the owners have made—is a relevant fact. *Smyth* v. *Ames,* 169 U.S. 466, 547. But while cost must be considered, the Court has held that it is not an exclusive or final test. The public have not underwritten the investment. The property, on any admissible standard of present value, may be worth more or less than it actually cost. The time and circumstances of the outlay, and the effect of altered conditions demand consideration. Even when cost is revised so as to reflect what may be deemed to have been invested prudently and in good faith, the investment may embrace property no longer used and useful for the public. This is strikingly illustrated in the present case, where the Company has a large gas manufacturing plant which, in view of the supply of natural gas, has not been used for several years and is not likely to be used for many years to come, if at all. But no one would question that the reasonable cost of an efficient public utility system " is good evidence of its value at the time of construction." We have said that " such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices." *McCardle* v. *Indianapolis Water Co.,* 272 U.S. 400, 411. And when such a change in the price level has occurred, actual experience in the construction and development of the property, especially experience in a recent period, may be an important check upon extravagant estimates.

This Court has further declared that, in order to determine present value, the cost of reproducing the property is a relevant fact which should have appropriate consideration. *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U.S. 276, 287, 288; *Bluefield Water Works* v. *Public Service Commission, supra; Standard Oil Co.* v. *Southern Pacific Co.,* 268 U.S. 146, 156; *McCardle* v. *Indianapolis Water Co., supra,* p. 410. In *Southwestern Bell Telephone Co.* v. *Public Service Commission, supra,* this Court said that " it is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded, such a forecast becomes impossible." See *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U.S. 461, 485. But again, the Court has not decided that the cost of reproduction furnishes an exclusive test. See *Smyth* v. *Ames, supra; Minnesota Rate Cases, supra; Georgia Railway & Power Co.* v. *Railroad Commission, supra.* We have emphasized the danger in resting conclusions upon estimates of a conjectural character. We said, in *Minnesota Rate Cases, supra,* p. 452,—" The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. It is fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional invalidity must be manifest and if it rests upon disputed questions of fact, the invalidating facts must be proved. And

this is true of asserted value as of other facts." The weight to be given to actual cost, to historical cost, and to cost of reproduction new, is to be determined in the light of the facts of the particular case. *McCardle* v. *Indianapolis Water Co., supra.*

5. In determining the weight to be ascribed in the instant case to historical cost as shown by the evidence, the outstanding fact is that the development of the property had, for the most part, taken place in a recent period. We agree with the Court below that no ground is shown for assailing the valuation placed upon the Company's property by the Commission in 1917, in its first decision (13 C.R.C., p. 724) and which appears to have been accepted by the Company as a starting point in later rate investigations. See 16 C.R.C., p. 481 (1919); 20 C.R.C., p. 96 (1921). The rate base fixed in 1917 was approximately $13,000,000. From that time the cost of additions and betterments was under constant supervision and was established by the Company's records under the accounting regulations of the Commission. From 1917 to 1919 there was but little change, the Company's estimate of capital, and the rate base as fixed by the Commission, for 1919, being under $14,000,000. 16 C.R.C., pp. 481, 482. Thus the additions and betterments which brought the historical cost of the fixed property (with land at current values) up to $58,842,187, as found by the Commission at the end of 1929, took place in the ten preceding years and approximately two-thirds of the latter amount appears to have been the cost of additions and betterments after January 1, 1922, as the rate base taken at that time was approximately $20,000,000. 20 C.R.C., pp. 97, 98. We have had occasion to take judicial notice of the high level of prices of labor and materials prevailing not only from 1917, as incident to the war, but also in 1922 and 1923 and that there was no "substantial general de-

cline" in such prices from that time to 1926.[12] See *Lincoln Gas Co.* v. *Lincoln,* 250 U.S. 256, 268; *Galveston Electric Co.* v. *Galveston,* 258 U.S. 388, 402; *McCardle* v. *Indianapolis Water Co., supra,* p. 412. During these years the historical cost of the Company's fixed property increased by additions and betterments to over $52,000,000. 29 C.R.C., p. 181. There can be no question that the cost of additions and betterments from 1926—in the period just preceding the Commission's order under review—was good evidence of their value at that time. And, so far as prices of labor and materials are concerned, we find no warrant for a conclusion that there had been any change in levels during the years that intervened from the first valuation in 1917 which made it unfair to the Company, in fixing rates for the future, to take the historical cost as found by the Commission as evidence of the value of the Company's structural property at the time of the rate order. On the contrary, it clearly appears that, by reason of the downward trend, the prices for labor and materials, which were reflected in that historical cost were higher than those which obtained during the later period to which the prescribed rates apply.

We noted at the outset that there is a difference between the parties with respect to the amount which should be taken as historical cost. The Company contends that in entering additions and betterments in its books it charged too little to capital account for overheads, and it directs attention to the opinion of the Commission's engineers that 11.25 per cent. of direct labor and material items could reasonably have been charged to capital for indirect construction costs instead of 6 per cent., the amount actually charged. The difference is over $2,000,000. With an allowance of 11.25 per cent. for overheads, the Commission's engineers estimated the historical cost of fixed

[12] See Bulletin on "Wholesale Prices," U.S. Department of Labor, February, 1933.

property at $61,019,662 instead of $58,842,187, allowed by the Commission. It is unnecessary to review the contentions upon this point, as if the valuation were made at the higher figure, while it would exceed the $60,704,000 found by the Commission as historical cost, it would still be under the amount of $65,500,000 which the Commission took, on the basis of fair value, as an undepreciated rate base.

6. Coming to cost of reproduction, we agree with the Court below that the items included in the Company's estimate for "cost of financing, $5,921,470," and "promoters' remuneration, $2,500,000," were too conjectural to be allowed. *Wabash Valley Electric Co.* v. *Young,* 287 U.S. 488, 500. Aside from these items, and that of going value to which we shall presently refer, the Company's estimate of cost of reproduction new of the fixed property, without deduction for depreciation, was $77,586,700, which included $831,781 for organization and franchises, leaving for the physical property $76,754,919. While this estimate was described as of January 1, 1930, it was stated to be based, not on spot prices of that date, but upon prices which were "close to the average" of the prevailing prices for the preceding three years. That is, the estimate rests on prices prevailing from 1927 to 1929, inclusive. In making this calculation, overheads were taken at 24.27 per cent. The estimate made by the Commission's engineer of reproduction cost new, without depreciation, which most closely corresponds to the above estimate of the Company, was $73,637,542, including $427,406 for organization and franchises, leaving $73,210,136 for the physical property. This estimate was of December 31, 1929, but was based on four-year average unit prices for the years 1926 to 1929, and overheads were figured at 22.32 per cent.

In both of these estimates the gas manufacturing plant was included without any deduction for disuse. The sum

of $12,134,665 was included in the Company's estimate as the cost of reproducing this plant. Whatever may be said of the propriety of including this entire plant in a valuation based on historical cost, in the light of prudent investment, we perceive no reason for embracing unnecessary facilities in an estimate of cost of reproduction. In a new construction under present conditions it does not appear that such an extensive manufacturing plant would be established, and the finding of the District Court is amply sustained that if the manufacturing facilities no longer needed had been eliminated, the fair value base would have been reduced by about $3,000,000. With that deduction, the estimate of the Commission's engineer would be about $70,000,000, without allowance for depreciation.

We find it unnecessary, however, to consider the details of these estimates, for there is a fundamental objection to their acceptance as a basis for a finding of confiscation. The determination of present value is not an end in itself. Its purpose is to afford ground for prediction as to the future. It is to make possible an "intelligent forecast of probable future values" in order that the validity of rates for the future may be determined. "Estimates for to-morrow," the Court has said, "cannot ignore prices of to-day." *Southwestern Bell Telephone Co.* v. *Public Service Commission, supra; Bluefield Water Works* v. *Public Service Commission, supra,* p. 691; *St. Louis & O'Fallon Ry. Co.* v. *United States, supra.* But we know that the estimates of present value, taken as the cost of reproduction as of December 31, 1929, based upon average prices from 1926 or 1927 to 1929, furnished no dependable criterion of values in the succeeding years. The country was facing a most serious decline in prices. It was entering upon a period of such depression as to constitute "a new experience to the present generation."

It was not the usual case of possible fluctuating conditions but of a changed economic level. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U.S. 248, 260, 262. That an important change was in progress was shown by the evidence submitted on the application for interlocutory injunction in January, 1931, to which we have already referred. The Commission's witness then called attention to the downward trend of prices, estimating the cost of the property on the basis of prices prevailing December 15, 1930, and taking overhead at 6 per cent., at $60,009,099 as against $64,082,282 as of December 31, 1929, and $63,399,822 as of June 15, 1930. See *supra,* p. 6. The mistaken outlook of the Company's expert witness is disclosed by his affidavit in reply, supporting his former estimate, that, in his opinion, prices for the immediate future, and "for several years to come," would be "on the average higher than the present level and approximately at the 1929 level." It is apparent that the estimates of cost of reproduction new of 1929, or of 1930, upon which the Company relies, afforded no secure foundation for prediction of future values, and the rate base as fixed by the Commission is not to be invalidated as involving confiscation by reason of these estimates which the course of events deprived of credit as trustworthy prophecies.

7. No ground appears for challenging the finding of the Commission, made upon inspection and appraisal, that the accrued depreciation of the property amounted to $7,650,000. While not admitting the accuracy of the finding, the Company does not undertake to contest it here, but takes the amount as the maximum which can be allowed upon the evidence. In determining present value, deduction must be made for accrued depreciation. *Knoxville* v. *Knoxville Water Co.,* 212 U.S. 1, 10; *Minnesota Rate Cases, supra,* pp. 457, 458. But the Commis-

sion made its calculation of the Company's return, under the rates prescribed, upon the rate base it fixed, undepreciated.

8. As an item additional to the estimates of value thus far considered, the Company claims to be entitled to an allowance of $9,228,667 for "going value." This Court has declared it to be self-evident "that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced," and that this element of value is "a property right" which should be considered "in determining the value of the property upon which the owner has a right to make a fair return." *Des Moines Gas Co.* v. *Des Moines,* 238 U.S. 153, 165; *Denver* v. *Denver Union Water Co.,* 246 U.S. 178, 191, 192; *McCardle* v. *Indianapolis Water Co., supra,* p. 414. The going value thus recognized is not to be confused with good will, in the sense of that "element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business," which, as the Court has repeatedly said, is not to be considered in determining whether rates fixed for public service corporations are confiscatory. *Des Moines Gas Co.* v. *Des Moines, supra.* See *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19, 52; *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 223 U.S. 655, 669; *Galveston Electric Co.* v. *Galveston, supra,* p. 396. Nor does this recognition of going value countenance a mere attempt to recoup past losses. *Galveston Electric Co.* v. *Galveston, supra,* pp. 394, 395. Deficits in the past do not afford a legal basis for invalidating rates, otherwise compensatory, any more than past profits can be used to sustain confiscatory rates for the future. *Board of Commissioners* v. *New York Telephone Co.,* 271 U.S. 23, 31, 32. The concept of going value is not to be used to escape the

just exercise of the regulatory power in fixing rates, and, on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones.

The principle as thus recognized and limited is obviously difficult of application. *Cedar Rapids Gas Co.* v. *Cedar Rapids, supra.* It does not give license to mere speculation; it calls for consideration of the history and circumstances of the particular enterprise, and attempts at precise definition have been avoided. It is necessary again, in this relation, to distinguish between the legislative and judicial functions. It is the appropriate task of the Commission to determine the value of the property affected by the rates it fixes, as that of an integrated, operating enterprise, and it is the function of the Court in deciding whether rates are confiscatory not to lay down a formula, much less to prescribe an arbitrary allowance, but to examine the result of the legislative action in order to determine whether its total effect is to deny to the owner of the property a fair return for its use.

Thus, in *Cedar Rapids Gas Co.* v. *Cedar Rapids, supra,* this Court noted that, in the decision under review, the fact "that the plant was in successful operation" had expressly been taken into account and that a value had been fixed which "considerably exceeded its cost," and hence the court found no warrant for changing the result. In *Des Moines Gas Co.* v. *Des Moines, supra,* the Court, dealing with the Master's report and the exclusion of a special item for going value, observed that the Master, "applying the rule of the *Cedar Rapids* case," had "already valued the property in the estimate of what he called its physical value, upon the basis of a plant in actual and successful operation." As the Master had included overheads at 15 per cent. in that valuation, in addition to organization expenses, the Court was unable to hold that "the element of going value" had not been given the consideration it deserved. In *Denver* v. *Den-*

ver Union Water Co., supra, the Court, premising that "each case must be controlled by its own circumstances," pointed out that the Master had "expressly declared that his detailed valuation of the physical property and water rights included no increment because the property constituted an assembled and established plant, doing business and earning money," and that an examination of his elaborate report convinced the Court that this was true. And in that case the Court found that the return allowed by the ordinance in question was clearly confiscatory. In *Lincoln Gas Co.* v. *Lincoln, supra,* pp. 267, 268, the Court questioned the propriety of the Master's treatment of going value, but noting compensatory errors in favor of the complainant could not conclude that the Master was wrong in holding that the ordinance was not shown to be confiscatory. In *Galveston Electric Co.* v. *Galveston, supra,* the Court took occasion to say that the expressions in the *Denver* case and in the *Lincoln* case were not to be taken as modifying in any respect the rule declared in the *Des Moines* case as to the exclusion of good will. In *Georgia Railway & Power Co.* v. *Railroad Commission, supra,* the finding below as to going value was not disturbed. In *Bluefield Water Works Co.* v. *Public Service Commission, supra,* while ten per cent. had been added for going value, the total result was a valuation which could not be sustained. In *McCardle* v. *Indianapolis Water Co., supra,* where the rates were held to be confiscatory, the Court found that the evidence was "more than sufficient to sustain 9.5 per cent. for going value" and that the Commission's engineer had made no appraisal of that element.

In the light of these decisions, our inquiry must be, *first,* as to the actual scope and effect of the legislative determination in relation to the value of the property as that of an integrated and established enterprise, and, *second,* whether the evidence requires the conclusion that

by reason of the inadequacy of the valuation the result is confiscation. As to the first question, it is urged that the Commission declined to allow any amount for going value. It is true that the Commission, refusing to admit the assumptions underlying the Company's claim for the amount of $9,228,667 as going value, stated that it did allow "for the so-called intangible going concern value by treating its cost as a current operating expense." But we cannot fail to give effect to the fact that the Commission, determining its rate base at $65,500,000 for 1930, on the basis of fair value, stated that (apart from deduction for accrued depreciation) this amount was "the fair value of the property here involved as a going property with business attached, giving full effect to the current level of prices and allowing for any intangible elements of value not fully cared for in the usual and current operating expense." And the District Court, in its majority opinion, concluded that "this rate base figure of fair value" included "original organization costs and franchise values as well," and "assumed a live active plant and affirmed that the ultimate total included all costs of attaching business as the same had accrued and been accounted for." What the Commission did was to take the historical cost of the plant, calculated on the same basis as to cost of additions and betterments as that used in the several previous rate proceedings, and this amount, together with the sums allowed for materials and supplies, and for working capital, with the additional allowance for interest, with the amount assigned to organization expenses and franchises, and with land at current values, made up a total "historical cost" of $60,704,000. To that total, the Commission added $4,796,000 in reaching its fair value figure, or rate base, of $65,500,000. Included in that rate base was approximately $10,500,000 as the cost of the gas manufacturing plant, or about $3,000,000 which, as the District Court found, represented facilities no longer

needed. Eliminating the latter amount, the margin in the rate base, as taken at fair value, over historical cost, was about $7,796,000. If allowance be made for increased overheads, by taking them at 11.25 per cent. in figuring the cost of additions and betterments (instead of the 6 per cent. as allocated to capital by the Company in its books), the allowance of which the Company urges in the light of the testimony of the Commission's engineers, and if the difference of $2,177,765 be deducted, there would still remain $5,618,235 in the rate base over the historical cost as thus revised. As the historical cost of the far greater part of the fixed property appears to have been taken at price levels which were higher than those which have obtained in the period to which the prescribed rates are applicable, and cannot fairly be said to underestimate the value of the plant as of that period, this excess amount of over $5,500,000 can appropriately be assigned to elements of value which may not have been fully covered. The record affords no adequate basis for criticising the allowance made by the Commission for materials and supplies and working capital, and thus the entire excess may be regarded as applicable to whatever intangible value the property had as a going concern. The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element.

The remaining question, then, is whether the Company has proved, with requisite persuasiveness, a greater amount for going value than that which may be treated as substantially allowed. An examination of the evidence offered by the Company upon this subject shows it to be of a highly speculative and uncertain character. There were two witnesses and the grounds of their estimates put their results in a strong light. The Company's valuation expert, Mr. Luick, gave three methods which he had used as guides in the forming of his judgment as to going

value. The first method was " gross revenue," which the witness used on the basis of his experience " that a purchaser will ordinarily and reasonably pay for a property with established earnings, and on a stabilized operating basis approximately one year's gross revenue over and above the value of physical property." This basis the witness said would indicate a going value of $15,801,208.21 " based on revenues for the year ended December 31, 1929." His second method was to take a percentage of the physical property, the witness stating that in his opinion a purchaser " would pay approximately 15 per cent. above the cost of reproduction because of the going value of a property so developed." This percentage produced a total of $10,638,005. The third method he called the " consumer method " which was based on a cost of not less than $25 per meter and gave an aggregate of $8,886,700. The witness said that he had also given consideration to the fact that the Company had " an exceptionally good history of growth, an established business, with satisfactory record of earnings and excellent future prospects." The witness alluded to the growth of Los Angeles and adjoining communities, and considering all these factors estimated the going value as of January 1, 1930, at $10,000,000.

The other witness, Mr. Miller, took Mr. Luick's construction program, in which the latter had figured the cost of reproduction, and had assumed that there would be turned over to the operating department " one-twentieth of the service mains during each quarter of the second to sixth years inclusive." Estimating year by year the cost of securing the business during the construction period, the witness took the difference between 8 per cent. interest on the property used and useful during the year and the net earnings estimated to have been received, and the total of these differences with interest, during the period assumed to be required, was taken to represent the cost of

securing the present business of the Company. This was thus calculated to amount, from the second through the seventh year inclusive, to $8,721,878. To this sum the witness added as the estimated cost "of organizing property and personnel," $506,789, thus reaching the total of $9,228,667 which the Company claims as going value. It is unnecessary to analyze the testimony of these witnesses, as it is obviously too conjectural to justify us in treating the failure to include their estimates as a sufficient basis for a finding of confiscation.

Our conclusion is that the Company has failed to sustain its attack upon the rate base of $65,500,000.

9. The Commission calculated that the Company would have a return of 7 per cent. on this rate base. We said in *Bluefield Water Works Co.* v. *Public Service Commission, supra,* pp. 692, 693, that a "public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." We added that the return "should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." And we recognized that "a rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally." See *Smith* v. *Illinois Bell Telephone Co.,* 282 U.S. 133, 160, 161. Applying these principles, and considering the financial history of

the Company,[13] its relations and opportunities, and the general situation as to investments, we find it impossible to hold that a return of 7 per cent. is so low as to be confiscatory. *Wabash Electric Co.* v. *Young, supra,* p. 502.

The question, then, is as to the estimates of revenue and expenses. The Company complains that the Commission's estimate of revenue was too high. The problem largely concerns temperatures, and it is plain that the Commission was justified, in fixing rates which were to apply for a considerable period, in taking average temperatures. The District Court, with its special knowledge of local conditions, and speaking in April, 1932, held that the action of the Commission was fair. The Circuit Judge supplemented this finding of the majority by his holding that there was " nothing unreasonable in the estimate of returns by the Commission so far as temperature is concerned " and that there was " nothing to indicate that due consideration was not given to the possible effect of the depression upon the consumption of gas." 58 F. (2d) 262, 286.

The controversy as to estimate of expenses turns on the sufficiency of the depreciation annuity allowed by the Commission. The company claimed $2,344,000 (or $2,306,606) as against the Commission's allowance of $1,072,000. But it is not clearly shown that what the Commission allowed will not be adequate protection for the purpose in view, and there is no basis for concluding that the Commission's practice under which the Company has accumulated a large depreciation reserve has resulted in injustice to the Company.[14] The fact that the property represented by the Company's depreciation reserve could not be used to support the imposition of a confiscatory rate did not make it necessary for the Commission to make an annual allowance which in

[13] See Note 1.

[14] See Note 1.

the light of experience would be excessive. *Smith* v. *Illinois Bell Telephone Co., supra,* p. 158. The Commission was entitled to form its judgment, and the three judges in the court below were agreed in the view that the discretion of the Commission in this regard had not been unreasonably exercised. We see no reason to disturb this conclusion.

The few minor questions which remain do not require specific mention.

Decree affirmed.

MR. JUSTICE VAN DEVANTER did not hear the argument and took no part in the consideration and decision of this case.

MR. JUSTICE BUTLER, dissenting.

This is an important case. The amount at stake is great, and the principles involved are more important. The reduction made by the commission when prescribing what it found to be reasonable rates, October, 1928, is not definitely shown. But the amount by which the rate of return was reduced indicates a probable reduction by more than a million per year. The net reduction made in November, 1930, by the order under consideration is more than one million per year. That is enough to yield a return of seven per cent. on over $14,000,000. There is also involved more than $2,500,000 now held by the company subject to claims of customers that it be refunded to them if the order shall be sustained.

The commission, following theories that admittedly are contrary to our decisions in confiscation cases, refused to ascertain or to consider the value of the property.[1] It

[1] The report (35 C.R.C. 443) in this case states (p. 445): "This Commission for many years, in the exercise of its jurisdiction to establish reasonable rates for utilities of this character, has fixed rates to yield upon the historical or actual cost of the property, taking land, however, at current values and depreciation calculated on a sinking

made the last reduction upon mere cost figures. Its "fair value" figure is higher than its "historical cost." The

fund basis, a return somewhat in excess of the cost of the money invested in the property." And Commissioner Decoto said (p. 474): "For thirty-two years the Supreme Court of the United States has consistently adhered to the controlling principles of valuation laid down by it. In spite of the fact that the pathway is now made reasonably clear by the decisions of the courts, some state commissions seem to be inclined to be a law unto themselves and persist in ignoring the law as laid down by the courts. The California Commission has to all outward appearance been one of these. It has clung ostensibly and theoretically to the historical rate base. In reality it has given effect to the different elements mentioned by the federal courts including fair value including going value by allowing a rate return between 8 per cent. and 8½ per cent. on historical cost if there be added to the historical rate base an amount between 10 per cent. and 12½ per cent., the rate base so obtained will approximate fair value including going value. So, also if there is deducted from 10 per cent. to 12½ per cent. from a rate of return of 8 per cent. or 8½ per cent. on an historical cost rate base, it is readily seen that there is an actual return varying from 7 per cent. to 7.75 per cent. upon fair value including therein a reasonable amount for going value. With this arrangement our public utilities have been content. During the last two years this commission has shown a tendency to cut the rate return upon an historical rate base from between 8 per cent. and 8½ per cent. to 7 per cent., which reduced the rate of return upon a fair value base to 6.12½ per cent. and 6.3 per cent. This is confiscation and not regulation."

The president of the commission, October 21, 1931, in an address before the National Association of Railroad and Public Utilities Commissioners apparently in opposition to constitutional law as established by numerous decisions here, said: "It is safe to say that in practically none, if any of the cases in which there have been permanent injunctive orders issued by the federal courts, would actual confiscation have followed the Commission findings. This is stated not only from general knowledge of the facts but from specific knowledge of the experience in California. A study of the court opinions indicates beyond reasonable doubt that in practically every major rate case in the last seventeen years in that state the findings of the Commission could not have withstood the test imposed by the federal tribunals." Report, Forty-third Annual Convention, 1931, pp. 180, 190.

commission based that increase on its finding that unit prices properly applicable to the prescribing of reasonable rates for the future are higher than were those actually paid throughout the years for the construction of the property. This increase amounted to $4,796,000 and it was found correct by the district court and also in the concurring opinion below. But this court excludes it and holds to original cost. The amount involved in that item alone is more than enough to require reversal.

The commission excluded from overhead expenditures actually made by the company the difference between six per cent. and 11.25 per cent. upon the ground that the company charged such difference to operating expenses and not to capital. It refused to give any consideration to the findings of its own engineer that in a proper estimate of the cost of reproduction as of the date of the inquiry such overheads would exceed 22 per cent. The company's estimate was about 24 per cent. Each of these rulings is directly contrary to our decisions. *Board of Comm'rs* v. *N. Y. Tel. Co.*, 271 U.S. 23, 31; *S. W. Tel. Co.* v. *Pub. Serv. Comm'n*, 262 U.S. 276, 287; *Ohio Utilities Co.* v. *Commission*, 267 U.S. 359, 362; *McCardle* v. *Indianapolis Water Co.*, 272 U.S. 400, 408–410; *St. L. & O'Fallon Ry. Co.* v. *United States*, 279 U.S. 461, 484–485. The district court followed the commission. This court in accordance with law settled by its own decisions, repudiates that method of treating overheads and adopts 11.25 per cent. It refuses, as did the commission and the lower court, to give any weight to admitted reproduction cost in respect of overhead expenditures.

The valuation by the commission was based upon an inventory agreed to be correct by the plaintiff and commission. It included two standby plants to which the commission attributed $3,000,000. The district court adopted that figure. It declared, 58 F. (2d) 259, that

the commission included these plants as a "live, necessary part of the operative property."[2] But this court excludes the item. Three million so thrown out is sufficient to require reversal. It was for the commission to decide whether these plants are required properly to safeguard the public service. This court should hesitate long before holding they are not. Seven per cent. on three million dollars so eliminated is $210,000, about 58 cents on each of the 385,000 meters, a small charge to insure readiness to serve.

The commission refused to consider or allow anything for going value. Plaintiff's gas properties adequately serve a great and, before the present depression, a rapidly growing demand. If permitted to charge reasonable rates, or those merely high enough to be non-confiscatory, plaintiff will continue to be able to earn an ample rate of return upon the value of the property. Its charges for gas are low in comparison with those generally collected for like service. The record shows that, having regard to the effective thermal units in the natural gas that plaintiff has been furnishing in recent years, its rates are less than one-half those formerly collected by it. And, in absence of contrary showing and finding, its charges must be deemed to have been considered just and reasonable by the regulatory authorities of the State and by the public.

[2] The court's statement follows: "The commission was very liberal in its treatment of certain items of property. The company in its early operations furnished artificial gas. Since 1924 it has served natural gas, which is plentiful in the numerous oil fields in Southern California. There is no evidence which discredits the commission's conclusion that the supply of natural gas will be abundant and constant. The commission found in effect that at least two of the artificial gas manufacturing plants of plaintiff were no longer needed and might well be retired. Nevertheless, it included them in its valuation as a live necessary part of the operative property. It appears that, had these plants been eliminated, the fair value base would have been reduced by approximately $3,000,000." 58 F. (2d) 256, 259.

Unquestionably, and the opinion of this court so implies, millions should be added to the cost figures applicable to the physical items in order to find the value of plaintiff's property, the amount protected by the Constitution. The ground on which the commission excluded going value was that the cost of attaching the business was charged to operating expenses. The district court followed the commission. That being contrary to law, this court repudiates the rulings of both and uses over $5,500,000 as going value. Its calculations to reach value produce a figure substantially the same as the commission's "fair value" cost figure. But that was attained by the application of formula, a thing repeatedly condemned here. *Minnesota Rate Cases,* 230 U.S. 352, 434; *Bluefield Water Works Co.* v. *Pub. Serv. Comm'n,* 262 U.S. 679, 690; *McCardle* v. *Indianapolis Water Co.,* 272 U.S. *supra,* 410.

This Court's conclusion—depending upon mere coincidences—that value is the same as the "fair value" cost figures found by the commission is without support. The figure used to cover going value was arrived at upon considerations that have no relation to the amount that in any view reasonably may be assigned to that element. It comes about thus: Add $3,000,000 (made available by excluding the standby plants found necessary by the commission and included by the district court) to $4,796,000 (obtained by reversing the findings of commission and accepted by the lower court in respect of unit prices). A part of that total is used to neutralize the errors in law committed by the commission and the lower court in respect of overheads. Enough is taken to increase that item from 6 per cent. to 11.25 per cent. And the calculated balance, $5,618,235, is assigned to going value. That figure certainly is not the result of an appraisal or valuation of plaintiff's going value. Neither the amount attributed to the standby plants eliminated by this court nor the

commission's addition to original cost to get its "fair value" figure has any relation to going value. When in confiscation cases any going value exists, the amount justly attributable thereto must be ascertained and included. See, e.g., *National Waterworks Co.* v. *Kansas City,* 62 Fed. 853, 865; *Omaha* v. *Omaha Water Co.,* 218 U.S. 180, 202; *Des Moines Gas Co.* v. *Des Moines,* 238 U.S. 153, 165; *Denver* v. *Denver Union Water Co.,* 246 U.S. 178, 192; *Galveston Elec. Co.* v. *Galveston,* 258 U.S. 388, 396; *McCardle* v. *Indianapolis Water Co., supra,* 414; *People ex rel. Kings County L. Co.* v. *Willcox,* 210 N.Y. 479, 486; 104 N.E. 911.

The rates should be set aside because arrived at by arbitrary methods condemned by our decisions.

The State, by the exertion of legislative power, established the rule that public utility rates, including those charged for gas, shall be just and reasonable. It is powerless to enforce, and therefore must be presumed to have intended that its commission should not attempt to prescribe, confiscatory rates. The commission's field of action is within reasonable limits above the point or line where confiscation would commence. *Banton* v. *Belt Line Ry.,* 268 U.S. 413, 422–423. In ascertaining the return protected by the Constitution, the commission is required to take into account and make proper allowances for the actual original, and the estimated present, cost of the property, including overheads. It is bound to include a just and reasonable amount to cover going value. The amount omitted in respect of each of these items is large enough to invalidate rates based on the valuation. There is no warrant for inquiry by this court to ascertain whether under the evidence the valuation of the property might otherwise have been pared down to the figure used by the commission and adopted by the district court. It is definitely settled by our decisions that where public utility rates, prescribed by a state commission as reasonable, are

attacked as confiscatory, the courts may inquire into the method by which the commission's conclusion was reached and that, if such rates are based upon property valuation or other essential fact that was arbitrarily arrived at or that is without support in the evidence, such rates will be set aside. *Northern Pac. Ry. Co.* v. *Dept. Public Works,* 268 U.S. 39, 42–45; *Chicago, M. & St. P. Ry. Co.* v. *Pub. Util. Comm'n,* 274 U.S. 344, 351; *St. L. & O'Fallon Ry. Co.* v. *United States, supra,* 485. Cf. *United States* v. *Abilene & So. Ry.,* 265 U.S. 274, 288; *Chicago Junction Case,* 264 U.S. 258, 263; *Interstate Commerce Commission* v. *Union Pacific R. Co.,* 222 U.S. 541, 547.

The lower court's decree and opinion taken together may not reasonably be construed to comply with Equity Rule 70½. In confiscation cases, the rule should be strictly enforced. The trial court should make a definite and complete statement of the facts on which it rests its judgment. Cf. *Aetna Insurance Co.* v. *Hyde,* 275 U.S. 440, 447. In a number of cases decided in recent years specially constituted district courts failed to make definite findings or to give reasons upon which they grounded their decrees. This court repeatedly and emphatically reminded them of the proper practice and required that it be followed. *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 675; *Lawrence* v. *St. L.-S. F. Ry.,* 274 U.S. 588, 596; *Arkansas R. R. Comm'n* v. *Chicago, R. I. & P. Ry. Co.,* 274 U.S. 597, 603; *Hammond* v. *Schappi Bus Line,* 275 U.S. 164, 171; *Cleveland, C., C. & St. L. Ry. Co.* v. *United States,* 275 U.S. 404, 414; *B. & O. R. Co.* v. *United States,* 279 U.S. 781, 787; *Railroad Commission* v. *Maxcy,* 281 U.S. 82; *Smith* v. *Illinois Bell Tel. Co.,* 282 U.S. 133, 162; *Tax Commissioners* v. *Jackson,* 283 U.S. 527, 533; *Public Service Comm'n* v. *Northern Indiana Co., post,* p. 703; *Public Service Comm'n* v. *Wisconsin Tel. Co., ante,* p. 67. Finally, June 2, 1930, we promulgated the rule, 281 U.S. 773: " In deciding suits in equity, including those re-

quired to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

The command that the trial court "shall find the facts specially" means at least that the statement shall be definite, concise and complete as distinguished from discursive, argumentative, obscure or fragmentary. *Tax Commissioners* v. *Jackson, supra,* 533. The direction "and state separately its conclusions of law thereon" shows that discussion of facts and law in the course of explanation, reasoning or opinion to clarify or support the conclusion or judgment reached, is not sufficient. The opinion filed in this case as a concurring one appears on its face to have been prepared for adoption by and as the opinion of the court. It was not accepted by either of the other judges; in any event that opinion could not be considered a compliance with the rule. The rule was intended to make unnecessary, analysis or extended examination for the ascertainment of the facts and propositions of law on which rest decrees of the courts of first instance. The opinion of the majority does not purport to "find the facts specially" or to "state separately its conclusions of law thereon."

The decree is not a compliance with the rule. "The court now finds that the values for plaintiff's property as fixed and determined by the defendant Railroad Commission are the reasonable values thereof; that the rates fixed are such as to render a reasonable return on such values and that said rates are therefore not confiscatory. And the court adopts, as representing its further findings, the opinion filed herein on April 8, 1932, as concurred in by the two district judges who participated in the hearing

and decision hereof." This is within the condemnation of our decisions. *Railroad Commission* v. *Maxcy, supra; Tax Commissioners* v. *Jackson, supra; Public Service Comm'n* v. *Northern Indiana Co., supra.*

Public Service Comm'n v. *Wisconsin Tel. Co., supra,* decided after the argument of this case, is of special interest. The commission appealed from an interlocutory decree declaring that enforcement of telephone rates prescribed by the commission would result in confiscation of the company's property. The district court filed no opinion and made no special findings of fact. The company moved to affirm. The commission's contention was that the decree should be reversed for lack of specification of the facts on which it rested. The company maintained that the decree was abundantly sustained by the facts shown in the record. We held that Rule 70½ does not apply to decisions on applications for temporary injunctions and made it clear that the duty of the court in passing on such applications was not altered by the adoption of the rule. We said (*ante,* p. 70): "While an application for an interlocutory injunction does not involve a final determination of the merits, it does involve the exercise of a sound judicial discretion. That discretion can be exercised only upon a determination, in the light of the issues and of the facts presented, whether the complainant has made, or has failed to make, such a showing of the gravity of his complaint as to warrant interlocutory relief. Thus, if the issue is confiscation, the complainant must make a factual showing of the probable confiscatory effect of the statute or order with such clarity and persuasiveness as to demonstrate the propriety in the interest of justice, and in order to prevent irreparable injury, of restraining the State's action until hearing upon the merits can be had. . . . the court should make the findings of fact and conclusions of law that are appropriate to the interlocutory proceeding." And we refused, even when

aided by adequate brief and argument of counsel, to consider whether the temporary injunction was warranted by the facts shown in the record. We vacated the decree with costs against the utility and remanded the case for findings and conclusions appropriate to a decision upon the application for an interlocutory injunction. And it is the purpose of this court to promulgate a rule definitely requiring district courts to make special findings of fact in such cases.

The reasons for the enforcement of such a rule are stronger where final judgment is entered. The work done for the court by the writer of the opinion should not be undertaken here. Our rules do not permit adequate opportunity for presentation of such cases as upon trial *de novo*. Nor is the time that the Justices can give to preparation for and in our conferences sufficient to enable them to reach reasonable conclusions in respect of the bases or details of calculations, revisions and determinations reflected by the elaborate opinion in this case.

We should follow *Public Service Comm'n* v. *Wisconsin Tel. Co.*, vacate the decree and remand the case for special findings. The district court should appoint a special master to hear the parties, make specific findings of fact, and state separately his conclusions of law and recommendation for a decree.

The district court should have referred the case to a special master for such a report. Experience has made it plain that rate confiscation cases are intricate in respect of facts and involve complicated, grave and difficult questions that are impossible of adequate examination by a court without the assistance of a master. *Dubourg de St. Colombe's Heirs* v. *United States*, 7 Pet. 625. The report of the commission in this case occupies 54 pages of the record and the opinions of the participating judges extend through more than 71 pages. That the burden of mere analysis, comparison or concordance is very great

can be gathered from the opinion of this court. The lack of definite findings in respect of essential facts is obvious and it is likely that, if the district court had undertaken separately to state its conclusions of law, it would not have fallen into the errors sought to be corrected by the opinion here. Its decision was not announced until more than nine months after final submission of the case. This statement implies no adverse criticism, for it is often difficult for the judges, consistently with performance of their other duties, to give the time required for travel, full hearings, adequate conferences in advance of decision and for preparation of draft opinions. The requirement that three judges shall participate undoubtedly increases the need for a special master.

Chicago, M. & St. P. Ry. Co. v. *Tompkins,* 176 U.S. 167, was a confiscation case involving the validity of state-made railroad rates. The trial judge, without the aid of a master, examined the pleadings and proof, made findings of fact, stated his conclusions of law, delivered an opinion and rendered a decree dismissing the bill. But he failed to find an essential fact, the cost of doing local business. This court remanded the case with instructions to refer it to a competent master. Speaking through Mr. Justice Brewer, it said (p. 179): "The question then arises what disposition of the case shall this court make. Ought we to examine the testimony, find the facts, and from those facts, deduce the proper conclusion? It would doubtless be within the competency of this court on an appeal in equity to do this, but we are constrained to think that it would not (particularly in a case like the present) be the proper course to pursue. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party

then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In *Smyth* v. *Ames, supra,* a similar case, he, as Circuit Judge presiding in the Circuit Court of Nebraska, undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master . . . We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light matter to permit such legislation to wreck large property interests."

Lincoln Gas Co. v. *Lincoln,* 223 U.S. 349, involved the validity of a city ordinance regulating charges for gas. The court below failed to make findings of fact in respect of the sums annually required for depreciation and replacements. This court, speaking through Mr. Justice Lurton, said (p. 361): "The cause should have gone at the beginning to a skilled master, upon whose report specific errors could have been assigned and a ruling from the court obtained." The case was remanded to the district court with instructions to refer it to a competent master with directions to report fully his findings upon all questions raised by either party, and with leave to both parties to take additional evidence.

While the practice since *Chicago, M. & St. P. Ry. Co.* v. *Tompkins* has not been uniform, special masters have been appointed quite generally.[3]

To summarize:

1. There is no warrant for reversal here of the commission and district court in respect of unit prices upon which they built up their "fair value" figure. If business conditions since the commission made its order are deemed to affect that figure, we should remand with directions to the district court to find the facts. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U.S. 248, 260, 262.

2. This court should not undertake to ascertain the amount of overheads properly to be included. But, if that matter is to be considered here, the 22 per cent. included in the commission's reproduction estimate and the company's 24 per cent. should not be ignored but should be considered in connection with the 11.25 per cent. in-

[3] *Knoxville* v. *Knoxville Water Co.,* 212 U.S. 1; *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19, 24; *Louisville* v. *Cumberland Tel. & Tel. Co.,* 225 U.S. 430; *Minnesota Rate Cases,* 230 U.S. 352; *Des Moines Gas Co.* v. *Des Moines,* 238 U.S. 153; *Denver* v. *Denver Union Water Co.,* 246 U.S. 178; *Newton* v. *Consolidated Gas Co.,* 258 U.S. 165; *Galveston Elec. Co.* v. *Galveston,* 258 U.S. 388; *Houston* v. *Southwestern Tel. Co.,* 259 U.S. 318; *Brush Elec. Co.* v. *Galveston,* 262 U.S. 443; *Pacific Gas Co.* v. *San Francisco,* 265 U.S. 403; *Railroad Comm'n* v. *Duluth St. Ry. Co.,* 273 U.S. 625; *Denney* v. *Pacific Tel. & Tel. Co.,* 276 U.S. 97; *Wabash Valley Elec. Co.* v. *Young,* 287 U.S. 488. In *Missouri Rate Cases,* 230 U.S. 474, part of testimony was taken by master and part in open court.

None was appointed in: *San Diego Land & Town Co.* v. *Jasper,* 189 U.S. 439; *Louisiana R.R. Comm'n* v. *Cumberland Tel. Co.,* 212 U.S. 414; *Allen* v. *St. Louis, Iron Mt. & S. Ry.,* 230 U.S. 553. (At the urgent request of the parties, the court consented to try the case without the aid of a master. 187 Fed. 290, 294.) *Darnell* v. *Edwards,* 244 U.S. 564; *McCardle* v. *Indianapolis Water Co.,* 272 U.S. 400; *United Fuel Gas Co.* v. *R.R. Comm'n,* 278 U.S. 300; *Railroad Comm'n* v. *Los Angeles Ry. Corp.,* 280 U.S. 145; *Smith* v. *Illinois Bell Tel. Co.,* 282 U.S. 133. (Assigned for the taking of testimony to one of the three judges. 38 F. (2d) 77, 79.)

cluded in the original or historical cost figures. An appraisal of the item should be made on the basis of all the relevant facts.

3. There is no warrant for this court's elimination from the agreed inventory of standby plants which were included by the commission and district court.

4. There has been no appraisal of going value. That element was arbitrarily excluded below. There is no rational foundation for the amount attributed to it here.

5. As the commission's refusal to apply principles of valuation established by our decisions resulted in arbitrary undervaluations, the prescribed rates should on that ground be set aside.

6. The decree appealed from should be vacated and the case remanded for compliance with Rule 70½.

7. The district court should refer the case to a special master to report in accordance with the practice followed in cases such as this.

MR. JUSTICE SUTHERLAND joins in this opinion.

HARRISONVILLE *v.* W. S. DICKEY CLAY MANUFACTURING CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 559. Argued March 20, 1933.—Decided May 8, 1933

1. Although the nuisance be clear, relief by injunction against continuous or recurrent pollution of a stream may be denied where substantial redress can be afforded the injured landowner by payment of money and where an injunction would subject the defendant to grossly disproportionate hardship. Pp. 337–338.
2. If an important public interest would be prejudiced by the injunction the reasons for denying it may be compelling. P. 338.
3. In this case an injunction would compel a city either to abandon its sewage disposal plant, constructed at large cost, and revert

to primitive methods, or to erect an expensive auxiliary plant, which it feels unable to do; while, on the other hand, the damage to the plaintiff's farm from the stream pollution complained of is relatively small, and measurable in money. *Held:*

(1) That an injunction should be denied, conditional however upon prompt payment of an amount equal to the depreciation in the value of the farm on account of the nuisance. P. 339.

(2) This payment is required, not upon the ground that the nuisance is permanent, but upon the ground that to oblige the landowner to bring repeated actions at law for loss of rental would be so onerous as to deny adequate relief. P. 339.

4. Possession by a city of the right to condemn land that is subjected to effluent from its sewerage system favors rather than opposes resort to money compensation instead of an injunction, for relief of the injured landowner. P. 340.

5. Where a nuisance resulting from pollution of a creek by effluent from a city sewage disposal plant could at any time have been removed by the city by providing auxiliary sewage treatment, the nuisance can not be deemed permanent as of the date of the installation of the disposal plant, and the statute of limitations on a suit for abatement did not run from that date. P. 341.

61 F. (2d) 210, reversed.

CERTIORARI, 288 U.S. 594, to review the affirmance (in part) of a decree for damages and injunction in a nuisance case.

Mr. Raymond G. Barnett for petitioner.

Mr. Leland Hazard, with whom *Mr. Maurice H. Winger* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

W. S. Dickey Clay Manufacturing Company, a Delaware Corporation, owns a stock farm of 300 acres lying near the sewage disposal plant of the City of Harrisonville, Missouri. A small, meandering, intermittent stream called Town Creek flows through a detached portion of the farm, consisting of 100 acres, devoted solely

to pasturage. Since 1923, a drain pipe has discharged into the creek, at a point in the pasture, the effluent from the disposal plant of the City's general sewage system. In 1928, the Company brought, in the federal court for western Missouri, this suit against the City, alleging injury to the property through drainage of the effluent from the disposal plant and seeking both damages and an injunction. The land was acquired by the Company in 1925 and has been leased ever since. Prior to 1925 it was owned by W. S. Dickey, the president and majority stockholder of the Company, who is a resident of Missouri. Jurisdiction of the federal court is based solely on diversity of citizenship. No federal question, constitutional or statutory, is involved.

The disposal plant consists of an Imhoff tank and the drain. It was installed by the City in 1923, after conference with the Public Health Department of the State; and has since been in continuous use. The tank is a primary method of sewage disposal which removes only sixty per cent. of the putrescible organic matter. An additional plant for further treatment of the sewage, which would have removed thirty per cent. more of such matter, could have been installed in 1923. But such additional treatment was not then common in Missouri; nor was it then recommended by the Health Department. In 1928, additional treatment of the sewage was recommended by it; but was not required. The population of the City is 2000; but only about 1400 of the inhabitants are served by the general sewage system. The cost of the general sewage system and disposal plant was about $60,000. The cost of a secondary disposal plant would be $25,000 to $30,000. It is asserted by the City that it cannot erect such a plant now because it has no surplus revenues and its borrowing capacity is nearly exhausted.

The District Court found that the detached portion of the Company's land used for pasturage is seriously affected by the pollution of Town Creek; that the aggregate loss

in rental for the five years during which it owned the land had been $500; and that it would cost $3500 to restore the creek to the condition existing prior to the nuisance. The court, therefore, awarded damages in the sum of $4000. It held, also, that the Company was entitled to an injunction; but allowed the City six months within which to abate the nuisance by introducing some method that would prevent the discharge of putrescible sewage into the creek. Upon an appeal by the City, the Circuit Court of Appeals modified the decree by eliminating therefrom the item of $3500 damages. As so modified the decree was affirmed. 61 F. (2d) 210. The Company acquiesced in the modification; and in this Court the City did not question the propriety of the award of $500 damages. But, on the ground that the injunction should have been denied, it petitioned for a writ of certiorari, which was granted. 288 U.S. 594.

The City contends that the injunction should not issue, because, according to the law of Missouri, the sewer system and disposal plant constitute a permanent nuisance; that in granting the injunction instead of requiring the Company to seek damages for the depreciation of the property, the federal courts acted in direct conflict with the law of the State; and that since the question involved is in essence the extent of rights incident to ownership of real property, the state law is controlling. The Company denies that under the decisions of the state courts the nuisance is to be deemed a permanent one; and insists that for this continuing nuisance the remedy of damages is inadequate.

First. The discharge of the effluent into the creek is a tort; and the nuisance, being continuous or recurrent, is an injury for which an injunction may be granted. Thus, the question here is not one of equitable jurisdiction. The question is whether, upon the facts found, an injunction is the appropriate remedy. For an injunction is

not a remedy which issues as of course. Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable. This is true even if the conflict is between interests which are primarily private. Compare *Parker* v. *Winnipiseogee Lake Cotton & Woolen Co.*, 2 Black 545, 552–553.[1] Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.[2] See *Osborne* v. *Missouri Pacific Ry. Co.*, 147 U.S. 248, 258, 259; *New York City* v. *Pine*, 185 U.S. 93, 97; *Cubbins* v. *Mississippi River Commission*, 204 Fed. 299, 307.[3] Such we think is the situation in the case at bar.

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[1] See also *McCarthy* v. *Bunker Hill & Sullivan Mining Co.*, 164 Fed. 927, 940; *Bliss* v. *Washoe Copper Co.*, 186 Fed. 789; *Sussex Land & Live Stock Co.* v. *Midwest Rfg. Co.*, 294 Fed. 597, 604–605; *Smith* v. *Staso Milling Co.*, 18 F. (2d) 736; *De Blois* v. *Bowers*, 44 F. (2d) 621. In these cases the interest of the community was incidentally involved. See, however, cases of physical occupation of the land, constituting a continuing trespass, where the plaintiff was confined to an action for damages because the injury was small and an injunction would have imposed a great burden on the defendant. *E. g., Coombs* v. *Lenox Realty Co.*, 111 Me. 178; 88 Atl. 477; *Lynch* v. *Union Institution for Savings*, 159 Mass. 306; 34 N.E. 364; *Hunter* v. *Carroll*, 64 N.H. 572; 15 Atl. 17; *Crocker* v. *Manhattan Life Ins. Co.*, 61 App. Div. 226; 70 N.Y.S. 492. Compare *Kershishian* v. *Johnson*, 210 Mass. 135; 96 N.E. 56.

[2] In some other classes of controversies the public interest has been deemed so strong that a general principle of non-interference by injunction has been adopted with respect to them. Compare Act of March 2, 1867, 14 Stat. 475, R.S. § 3224; *Giles* v. *Harris*, 189 U.S. 475, 486; *Near* v. *Minnesota*, 283 U.S. 697, 719. Changed conditions in the community may lead a court to deny an injunction where otherwise it would be granted. *Texas & Pacific Ry. Co.* v. *Marshall*, 136 U.S. 393, 405; *Jackson* v. *Stevenson*, 156 Mass. 496; 31 N.E. 691; *Amerman* v. *Deane*, 132 N.Y. 355; 30 N.E. 741.

[3] Compare *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 238; *Hurley* v. *Kincaid*, 285 U.S. 95, 104, note 3; *York Haven Water & Power Co.* v. *York Haven Paper Co.*, 201 Fed. 270, 279–280. See also

If an injunction is granted the courses open to the City are (a) to abandon the present sewage disposal plant, erected at a cost of $60,000, and leave the residents to the primitive methods theretofore employed, if the State authorities should permit; or (b) to erect an auxiliary plant at a cost of $25,000 or more, if it should be legally and practically possible to raise that sum. That expenditure would be for a desirable purpose; but the City feels unable to make it. On the other hand, the injury to the Company is wholly financial. The pasture land affected by the effluent would be worth, it was said, $50 or $60 an acre if the stream were freed from pollution. Denial of the injunction would subject the Company to a loss in value of the land amounting, on the basis of the trial court's findings, to approximately $100 per year. That loss can be measured by the reduction in rental or the depreciation in the market value of the farm, assuming the nuisance continues; and can be made good by the payment of money. The compensation payable would obviously be small as compared with the cost of installing an auxiliary plant, for the annual interest on its cost would be many times the annual loss resulting to the Company from the nuisance. Complete monetary redress may be given in this suit by making denial of an injunction conditional upon prompt payment as compensation of an amount equal to the depreciation in value of the farm on account of the nuisance complained of. We require this payment not on the ground that the nuisance is to be deemed a permanent one as contended,[4] but because

Daniels v. *Keokuk Water Works,* 61 Iowa 549; 16 N.W. 705; *Simmons* v. *Paterson,* 60 N.J.Eq. 385; 45 Atl. 995; *Daughtry* v. *Warren,* 85 N.C. 136; *Elliott Nursery Co.* v. *Duquesne Light Co.,* 281 Pa. 166; 126 Atl. 345.

[4] Where a nuisance to real property results from a structure which is in character relatively enduring and not likely to be abated either voluntarily or by order of a court, it is frequently held that the nuisance is a permanent one; and if the prospective damages result-

to oblige the Company to bring, from time to time, actions at law for its loss in rental would be so onerous as to deny to it adequate relief.

Second. By the Company it is contended that the City should be enjoined because it had the power to condemn the land or its use for sewage purposes. The City questions the existence of that power. We have no occasion to determine this issue of Missouri law. Possession of the right of condemnation would afford added reason why compensation should be substituted for an injunction.[5] See *Osborne* v. *Missouri Pacific Ry.*, 147 U.S. 248, 259; *Winslow* v. *Baltimore & Ohio R. Co.*, 188 U.S. 646, 660; *Kamper* v. *Chicago*, 215 Fed. 706, 708; *Woodlawn Trust & Savings Bank* v. *Drainage District No. 2*, 251 Fed. 568, 570.

Third. By the City it is contended that under the Missouri law a permanent nuisance was created when the disposal plant was installed in 1923; that the cause of

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ing therefrom can be estimated with reasonable certainty, the diminution in the value of the property is immediately recoverable as damages. *Highland Ave. & Belt R. Co.* v. *Matthews*, 99 Ala. 24; 10 So. 267; *Finley* v. *Hershey*, 41 Iowa 389; *Troy* v. *Cheshire R. Co.*, 23 N.H. 83; *Southern Ry. Co.* v. *White*, 128 Va. 551; 104 S.E. 865; compare *Fowle* v. *New Haven & Northampton Co.*, 112 Mass. 334, 338–339; *Ridley* v. *Seaboard & Roanoke R. Co.*, 118 N.C. 996, 1009; 24 S.E. 730. In some States the doctrine has been rejected. *E. g.*, *Pond* v. *Metropolitan Elev. Ry. Co.*, 112 N.Y. 186; 19 N.E. 487. But in New York permanent damages may be imposed in equity as a condition of withholding an injunction, where the defendant has the right of eminent domain. *Pappenheim* v. *Metropolitan Elev. Ry. Co.*, 128 N.Y. 436; 28 N.E. 518. See, generally, Charles T. McCormick, Damages for Anticipated Injury to Land, 37 Harvard Law Review, p. 574; Note, Continuing and Permanent Nuisances, 9 Columbia Law Review, p. 538.

[5] Compare *Hulbert* v. *California Portland Cement Co.*, 161 Cal. 239, 245; 118 Pac. 928; *Hennessy* v. *Carmony*, 50 N.J.Eq. 616, 621; 25 Atl. 374; *Rhyne* v. *Flint Mfg. Co.*, 182 N.C. 489, 492; 109 S.E. 376.

action therefor accrued then to the Company's grantor; that this cause of action did not pass to the Company, and, indeed, has been barred by the statute of limitations; and that, hence, both injunction and damages should be denied. We have no occasion to determine the scope of the doctrine of permanent nuisance as applied in Missouri;[6] nor need we consider to what extent the local law on that subject would be accepted as controlling in the federal courts. This nuisance has at all times been removable by the device of secondary treatment of the sewage. It may be hereafter abated at any time by the State health authorities requiring such treatment. The City may itself conclude that this should be done in the public interest, financial or otherwise. Being so terminable, pollution of the creek cannot be deemed to be a permanent nuisance as of the date of the installation of the disposal plant in 1923.

The decree is reversed and the cause remanded to the District Court for further proceedings to determine the depreciation in value of the property on account of the nuisance, and to enter a decree withholding an injunction if such sum be paid within the time to be fixed by that court.

Reversed.

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[6] The doctrine of permanent nuisance has been applied in some cases by the Missouri courts. *Smith* v. *Sedalia,* 244 Mo. 107; 149 S.W. 597; *Blankenship* v. *Kansas Explorations,* 325 Mo. 998; 30 S.W. (2d) 471. It has been held, as a corollary, that the cause of action is single and arises at the time of the first injury, and that the statute of limitations runs from that date. *De Geofroy* v. *Merchants Bridge Terminal Ry.,* 179 Mo. 698, 720–721; 79 S.W. 386; *Kent* v. *Trenton,* 48 S.W. (2d) 571; see also *Hayes* v. *St. Louis & S. F. R. Co.,* 177 Mo. App. 201, 217; 162 S.W. 266. Compare *Powers* v. *Council Bluffs,* 45 Iowa 652; *Virginia Hot Springs Co.* v. *McCray,* 106 Va. 461; 56 S.E. 216.

GROSS ET AL. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY *

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 680. Argued April 12, 1933.—Decided May 8, 1933

The supervention of bankruptcy within four months of the beginning of a suit against the bankrupt in a state court in which receivers were appointed for part of his assets, deprives that court of its power to fix the compensation of the receivers and their counsel and vests it in the court of bankruptcy. P. 345.

61 F. (2d) 812, affirmed.

CERTIORARI, 288 U.S. 598, to review the affirmance of an order of a court of bankruptcy requiring state court receivers and their counsel to turn over to the trustee in bankruptcy, money that had been allowed them for their services by the state court.

Mr. Merritt Lane for petitioners.

Mr. Samuel Kaufman, with whom *Messrs. Nathan Bilder* and *Arthur Leonard Ross* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

October 13, 1931, the Court of Chancery of New Jersey, upon a bill of complaint previously filed, appointed receivers for Crosby Stores, Inc. The receivers took possession of the assets located in New Jersey and operated the business. On October 14, 1931, an involuntary petition in bankruptcy against the corporation was filed in the federal district court for the Southern District of New York, and the Irving Trust Company was appointed receiver in bankruptcy by that court. The corporation was ad-

* Together with No. 681, *Weisman et al., Receivers,* v. *Irving Trust Co., Trustee,* and No. 682, *Gross et al.* v. *Irving Trust Co., Trustee.*

judged a bankrupt, and the trust company was continued as trustee in bankruptcy and later sold all the assets of the bankrupt, including those which had passed into the hands of the New Jersey receivers. On December 11, 1931, the federal district court ordered the New Jersey receivers to show cause (rule made absolute December 14) why they should not turn over all the assets to the trustee in bankruptcy and account to the federal court. On December 14 the state chancery court made allowances to its receivers and their counsel in sums aggregating $10,350. Subsequently (December 21, 1931), the federal district court enjoined the receivers from interfering with the trustee and from disposing of the moneys paid to them as allowances under the order of the state chancery court.

The trustee then filed its petition in the federal district court, sitting as a court in bankruptcy, averring that the payments to the receivers were void as in violation of the bankruptcy act, and that application must be made to the bankruptcy court for allowances of compensation for any services rendered by the receivers and their counsel inuring to the benefit of the bankrupt's estate. An appropriate order was asked against the receivers and their counsel and was granted by the federal district court, and affirmed by the circuit court of appeals. 61 F. (2d) 812. This court granted certiorari.

The sole question presented for our determination is: Did the state chancery court have the power to fix the compensation of its receivers and their counsel after bankruptcy had supervened within four months of the filing of the bill of complaint in, and the appointment of receivers by, that court? *

* The decision of the circuit court of appeals is assailed as erroneous upon the further ground that that court held that the district court had power to proceed in a summary proceeding in bankruptcy, although the receivers and their counsel were adverse claimants. We do not consider this contention, because it appears from the record that the point was abandoned in the district court.

The state courts of New Jersey have steadily held in the affirmative, and that view is not without support. We deem it unnecessary, however, to review these decisions. They are not in harmony with the views expressed by this court or with other decisions, which, in our opinion, state the true rule.

Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that court's possession and control of the estate cannot be affected by proceedings in other courts, state or federal. *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U.S. 734, 737, and cases cited. Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself. *Id.*, 739. "The filing of the petition is a caveat to all the world and in fact an attachment and an injunction." *May* v. *Henderson,* 268 U.S. 111, 117, and citations. And see generally *Moore* v. *Scott,* 55 F. (2d) 863; *In re Diamond's Estate,* 259 Fed. 70.

The fact that the jurisdiction of the bankruptcy court is paramount effectually distinguishes that class of cases which hold that as between courts of *concurrent* jurisdiction property already in the hands of a receiver of one of them cannot rightfully be taken from him without that court's consent by a receiver subsequently appointed by the other court. In *Buck* v. *Colbath,* 3 Wall. 334, 341, the rule is stated to be that "whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, *or some superior jurisdiction in the premises.*"

And see *Covell* v. *Heyman,* 111 U.S. 176, 180. The present case falls within the italicized exception, since the jurisdiction of the bankruptcy court is paramount and not concurrent.

Nevertheless, due regard for comity—which means, in this connection, no more than judicial courtesy between the courts undertaking to deal with the same matter—would suggest that ordinarily the trustee in bankruptcy might well be instructed by the bankruptcy court, before taking final action, to request the state court to recognize the exclusive jurisdiction of the former and set aside any orders already made conflicting therewith, as was done with good results in the case of *In re Diamond's Estate, supra,* pp. 72, 75. In the present case, however, such a course would probably have been futile, in view of the fixed attitude of the state courts on the subject.

The jurisdiction of the bankruptcy court being paramount, the power of the state court to fix the compensation of its receivers and the fees of their counsel necessarily came to an end with the supervening bankruptcy. When the bankruptcy court acquired jurisdiction, the sole power to fix such compensation and fees passed to that court. *In re Diamond's Estate, supra,* 74; *Moore* v. *Scott, supra; Silberberg* v. *Ray Chain Stores,* 54 F. (2d) 650, affirmed, 58 F. (2d) 766. We adopt, as stating the correct rule, the language used in *Lion Bonding Co.* v. *Karatz,* 262 U.S. 640, 642, although it was not strictly necessary to that decision: "Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court." See authorities cited in the footnote following this statement.

Affirmed.

MINTZ ET AL. *v.* BALDWIN, COMMISSIONER OF AGRICULTURE AND MARKETS OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

No. 760. Argued April 10, 1933.—Decided May 8, 1933

1. To prevent the spread of an infectious disease, a State, if not prevented by action of Congress, may require that cattle shall not be imported for dairy or breeding purposes unless accompanied by the certificate of the proper sanitary official of the State of origin certifying that the animals to be brought in, and also the herds from which they come, are free of the disease. Pp. 349–350.
2. Congress will not be deemed to have superseded or excluded such state action under the commerce clause, unless its intention to do so has been made definite and clear. P. 350.
3. The Cattle Contagious Diseases Act of March 3, 1905, applying only to shipments from quarantined districts established by the Secretary of Agriculture, does not conflict with the state inspection measure here in question as applied to shipments not made from such a district. P. 350.
4. The Cattle Contagious Diseases Act of February 2, 1903, is not inconsistent with enforcement of a state inspection order as to cattle which have not been inspected and certified by federal authority. P. 350.
5. The expression in that Act of a purpose to exclude state inspection in cases where federal inspection has been made and certificate issued, strongly suggests that Congress intended not otherwise to trammel enforcement of state quarantine measures. P. 351.
6. Much weight is to be given to the practical interpretation of the Act of 1903 by the Department of Agriculture through its acquiescence in state measures to suppress the disease involved in this case. P. 351.
7. *Oregon-Washington R. & N. Co.* v. *Washington,* 270 U.S. 87, distinguished. P. 351.

2 F. Supp. 700, affirmed.

APPEAL from a decree of the three-judge District Court denying a temporary injunction and dismissing the bill in a suit to restrain a state official from preventing the importation of plaintiffs' cattle.

Mr. J. E. Messerschmidt, Assistant Attorney General of Wisconsin, with whom *Messrs. James E. Finnegan,* Attorney General, and *R. M. Orchard,* Assistant Attorney General, were on the brief, for appellants.

Mr. Henry S. Manley, with whom *Messers John J. Bennett, Jr.,* Attorney General of New York, and *Wendell P. Brown,* Assistant Attorney General, were on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

Plaintiffs have a large and valuable business in the raising, and in the sale and transportation from Wisconsin to New York, of cattle for dairy and breeding purposes. Defendant, acting under state statutes, made and is enforcing an order [1] to guard against Bang's disease,

[1] It appearing that Bang's disease, an infectious and communicable disease affecting domestic animals, exists outside of the state of New York in areas from which cattle are or may be imported into this state,

Now, therefore, to prevent the bringing into this state of such disease, and in pursuance of the authority conferred upon me by Sections 72 and 74 of the Agriculture and Markets Law, I do hereby order that all bovine animals coming into the State of New York shall comply with the following requirements:

All cattle over six months of age imported for dairy or breeding purposes shall come directly from herds certified to be free from Bang's disease by the chief livestock sanitary official by whatever name known of the country, province or state of origin. Such animals at the time of import must be accompanied by a certificate authenticated by such livestock sanitary official showing the name and address of the laboratory or person making the last blood test on such herd with a complete statement of the results of such test on the animals so imported. Such certificate shall describe each animal in such manner as to enable its identification by ear tag number, name and registration number in the case of pure breds and ear tag number in the case of grades. Such certificate shall include or be accompanied by the certificate above mentioned as to freedom of the herd from Bang's disease. A duplicate of such authenticated certificate or

bovine infectious abortion. The order requires that the cattle imported into New York for such purposes and also the herds from which they come shall be certified to be free from that disease by the chief sanitary official of the State of origin and that each shipment be accompanied by such a certificate.

Plaintiffs shipped 20 head from Wisconsin for delivery to one Bartlett in New York. The animals were accompanied by a certificate which was sufficient as to them, but there was nothing to show the freedom from Bang's disease of the herd or herds from which they came. For that reason defendant refused to permit them to be delivered, and so plaintiffs were compelled to take them out of New York.

Plaintiffs brought this suit for a temporary and perpetual injunction to restrain enforcement of the order. Their claim, so far as here material, is that the order is repugnant to the commerce clause because in conflict with federal statutes relating to interstate transportation of livestock. Cattle Contagious Diseases Acts: February 2, 1903, 32 Stat. 791, 21 U.S.C., §§ 111, 120–122; March 3, 1905, 33 Stat. 1264, 18 U.S.C., § 118, 21 U.S.C., §§ 123–127.[2] Their application for a temporary injunction was brought on for hearing before a specially constituted court. 28 U.S.C., § 380. Defendant answered and, upon stipulation of the parties, plaintiffs' motion for interlocutory de-

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certificates must be filed with the Department of Agriculture and Markets, Albany, N.Y., by the consignee at the time the shipment is received, unless such duplicate has previously been filed by the consignor.

This order shall not apply to the following classes of bovine animals:

(a) Cattle for immediate slaughter, consigned to the public stockyards.

(b) Steers and beef type cattle for feeding and grazing purposes.

[2] Both Acts were amended by the Act of February 7, 1928, 45 Stat. 59.

cree and defendant's motion to dismiss the complaint were submitted upon the pleadings, the affidavit of one of the plaintiffs, the affidavit of defendant and affidavits of others in his behalf. Temporary injunction was denied and the bill was dismissed.

The court made special findings of fact which include the following: Bang's disease prevails throughout the United States and is one of the greatest limiting factors, both as to reproduction and milk yield. Undulant fever may be caused by the disease germs when introduced into the human body by drinking raw milk of an infected cow. The disease may generally be diagnosed about 60 days after infection though the time may be considerably longer. Two blood tests are customarily made to detect the disease but they may not disclose it in the incubative stage. A substantial percentage of cattle imported into New York under certificate that they have passed tests for the disease are shown to have been infected. There is a body of expert opinion that such cattle should only be admitted when certified to have come from a clean herd, and that by such a safeguard danger of infection would be greatly lessened. The disease is exceedingly infectious and the defendant concluded that in order to protect herd owners and milk consumers he should require a certificate not only that imported cattle showed no infection but that they came from herds free from disease. This resulted in the order. By reason of danger of infection from the disease, many States of the Union have imposed restrictions upon the admission of cattle. The Federal Department of Agriculture, November 15, 1932, by letter to defendant declared that the Department had issued no quarantine or regulations pertaining to Bang's disease and that its policy for the present is to leave the control with the various States.

The order is an inspection measure. Undoubtedly it was promulgated in good faith and is appropriate for the

prevention of further spread of the disease among dairy cattle and to safeguard public health. It cannot be maintained therefore that the order so unnecessarily burdens interstate transportation as to contravene the commerce clause. *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 204; *Minnesota Rate Cases*, 230 U.S. 352, 402, 406; *Reid* v. *Colorado*, 187 U.S. 137, 151, 152; *Railroad Co.* v. *Husen*, 95 U.S. 465; *Henderson* v. *Mayor*, 92 U.S. 259, 268. Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order. The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear. *Atchison, T. & S. F. Ry. Co.* v. *Railroad Comm'n*, 283 U.S. 380, 391; *Carey* v. *South Dakota*, 250 U.S. 118, 122; *Savage* v. *Jones*, 225 U.S. 501, 533; *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U.S. 613, 623.

Plaintiffs' contention that the order is in conflict with the Act of March 3, 1905, is groundless. That Act applies only to shipments from quarantined districts that it authorizes the Secretary to establish. Plaintiffs' shipments are not made from such a district.

Examination of the Act of 1903 is necessary. It is a measure intended to enable the Secretary to prevent the spread of disease among cattle and other livestock. He is authorized and directed from time to time to establish such rules and regulations concerning interstate transportation from any place "where he may have reason to believe such diseases may exist . . . and all such rules and regulations shall have the force of law." "Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle . . . which were about to be shipped . . . from such locality . . . and

had found them free from . . . communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place" in interstate commerce "without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture . . ." § 1; 21 U.S.C., §§ 120, 121.

Plaintiffs' cattle were not inspected by, and no certificate was issued under, federal authority. Unless the Act itself operates to prevent the enforcement of the order the suit was rightly dismissed. The express exclusion of state inspection extends only to cases where federal inspection has been made and certificate issued. The clause cannot be read to extend to other cases. The expression of purpose so to limit the exertion of state power strongly suggests that Congress intended not otherwise to trammel the enforcement of state quarantine measures. *United States* v. *Arredondo,* 6 Pet. 691, 725. Much weight is to be given to the practical interpretation of the Act by the Federal Department through its acquiescence in the enforcement of state measures to suppress Bang's disease. This case is governed by the principle on which rests the decision in *Asbell* v. *Kansas,* 209 U.S. 251. Defendant's order does not conflict with the Act of 1903.

Plaintiffs lean upon our decision in *Oregon-Washington R. & N. Co.* v. *Washington,* 270 U.S. 87. But, as concerns the question of conflict with state measures, the Act of 1903 is to be distinguished from the Plant Quarantine Act there interpreted. Act of August 20, 1912, 37 Stat. 315, as amended. 7 U.S.C., §§ 151–154, 156–165. In that case upon full consideration of the latter we said (p. 99): "All the sections look to a complete provision for quarantine against importation into the country and quarantine as between the States under the direction and supervision of the Secretary of Agriculture. . . . [p. 101.] It [the

Act] covers the whole field so far as the spread of the plant disease by interstate transportation can be affected and restrained . . . The state laws of quarantine that affect interstate commerce and this federal law cannot stand together. The relief sought to protect the different States, in so far as it depends on the regulation of interstate commerce, must be obtained through application to the Secretary of Agriculture."

Unlike the Act of 1903, the Plant Quarantine Act does not, by specification of the cases in which action under it shall be exclusive, disclose the intention of Congress that, subject to the limitations defined, state measures may be enforced. This difference is essential and controlling.

Plaintiffs' other contentions are not substantial and need not be specifically discussed.

Affirmed.

UNITED STATES EX REL. GREATHOUSE ET AL. *v.* DERN, SECRETARY OF WAR, ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 677. Argued April 11, 12, 1933.—Decided May 8, 1933

1. Allowance of the remedy by mandamus is controlled by equitable principles. P. 359.
2. The court, in its discretion, may refuse mandamus to compel the doing of an idle act, or where public injury or embarrassment would result from granting it. P. 360.
3. Owners of land on the Virginia side of the Potomac opposite Washington, claiming title to upland extending by accretion to present high water, and the right, by common law and under the Maryland-Virginia Compact of 1785, to wharf out in a manner approved by the Chief of Army Engineers as not obstructive of navigation, sought by mandamus to compel the Secretary of War to approve under the Act of March 3, 1899, to the end that they might consummate a sale of the land under a contract made conditional upon such

approval. *Held* that, putting aside doubts concerning the petitioners' property and the duty of the Secretary under the statute, mandamus was properly refused upon the grounds that the Government has devoted both the lands of the United States constituting the bed of the river at the *locus in quo*, and the upland adjacent, to a parkway, the plans for which contemplate the taking of part of petitioners' property, so that the apparent consequence of authorizing the wharf would be only to increase the expense to the Government of constructing such parkway. Pp. 358–360.

63 F. (2d) 137, affirmed.

CERTIORARI, 288 U.S. 598, to review the affirmance of a judgment denying a writ of mandamus.

Mr. Spencer Gordon, with whom *Messrs. J. Harry Covington* and *John Marshall* were on the brief, for petitioners.

Mr. Seth W. Richardson, with whom *Solicitor General Thacher* and *Messrs. G. A. Iverson* and *Erwin N. Griswold* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

The relators, petitioners here, filed their petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Secretary of War and the Chief of Engineers to authorize the construction of a wharf in the Potomac River within the District of Columbia adjacent to their land on the Virginia shore, the construction being forbidden by § 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U.S.C., § 403, "except on plans recommended by the Chief of Engineers and authorized by the Secretary of War." The judgment of the Supreme Court denying the writ was affirmed by the District Court of Appeals. 61 App.D.C. 360; 63 F. (2d) 137. This Court granted certiorari. 288 U.S. 598.

Petitioners claim title through a grant to their predecessors in interest of a plot of upland lying in the

State of Virginia, which extended at the time of the grant to the Potomac River. The upland has been enlarged by the recession of the river toward the north and it is the contention of the petitioners that the enlargement is due to accretion, with the result that their ownership has been extended beyond the shore line of the river, as it existed at the time of the grant, to the present high water line, a claim which is put in issue by the answer. But it is conceded that the bed of the river below high water mark, where the proposed wharf is to be built, lies within the District of Columbia and that title to it and sovereignty over it were vested in the United States by cession from the State of Maryland of the area constituting the present District of Columbia. See Maryland Laws, 2 Kilty, Sess. of November 1791, c. 45; *Smoot Sand & Gravel Corp.* v. *Washington Airport,* 283 U.S. 348; *Maryland* v. *West Virginia,* 217 U.S. 577; *Marine Railway Co.* v. *United States,* 257 U.S. 47, 64; *Morris* v. *United States,* 174 U.S. 196, 225; Revised Statutes relating to the District of Columbia (1875), § 1. Within this area Congress has the plenary power to control navigation which was vested in the United States before the cession and which it exercises generally over navigable waters within the several states. It also acquired by the cession proprietary powers over the lands lying under water, and under Article 1, § 8 of the Constitution, granting exclusive legislative power over the District, the sovereign power to regulate and control their use for public purposes other than navigation.

Petitioners have entered into a contract for the sale of their lands, conditioned upon securing permission to build the wharf, which is to be built and used by the purchaser in connection with a plant to be established on the upland for the storage of gasoline. It is stipulated on the record that the proposed wharf, which is to be constructed in conformity to plans approved by the Chief of Engi-

neers, will not interfere with navigation. Petitioners assert a right as riparian owners to build and maintain it upon two grounds, first, that by the common law rule as developed in the United States, the ownership of land bordering on a navigable river carries with it the right to build and maintain below high water mark a wharf or other structure, not an obstruction to navigation (see *Shively* v. *Bowlby,* 152 U.S. 1; *United States* v. *River Rouge Co.,* 269 U.S. 411, 418; *Norfolk* v. *Cooke,* 27 Grat. 430; *Baltimore & Ohio R. Co.* v. *Chase,* 43 Md. 23) and, second, that by Paragraph "Seventh" of the Compact of 1785 between Maryland and Virginia, ratified by Virginia March 28, 1785, 12 Hening, Virginia Stat. 50, and by Maryland, March 12, 1786, Maryland Laws, 2 Kilty, Session of November 1785, c. 1, it was provided:

"The citizens of each state respectively shall have full property in the shores of Patowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river; . . ."

They insist that as the proposed wharf will not interfere with navigation and as plans for its construction have been approved by the Chief of Engineers, it is the legal duty of the Secretary of War, under § 10 of the Rivers and Harbors Appropriation Act of March 3, 1899, to grant the desired permit. It is conceded by the government that the only basis for the Secretary's refusal to authorize the construction of the wharf is that it would be inimical to the establishment of the proposed George Washington Memorial Parkway authorized by Act of Congress of May 29, 1930, c. 354, 46 Stat. 482.

By this legislation Congress appropriated $7,500,000 for the construction of a parkway a part of which is to extend along the Virginia shore of the Potomac River from Mount Vernon to a point above the Great Falls.

It authorized the National Capital Park and Planning Commission " to occupy such land belonging to the United States as may be necessary for the development and protection " of the Parkway. Construction of the Parkway was authorized as a part of the federal-aid highway program and was made conditional upon the contribution by Maryland or Virginia or others of one-half the cost of the required lands, other than those of the United States. But the Commission was empowered, in its discretion, to advance the full cost of the Parkway upon securing undertakings from these states, upon terms prescribed by the statute, to repay one-half of the cost to the federal government. A part of the Parkway, the Mount Vernon Memorial Highway, extending along the Virginia shore of the river from Mount Vernon to a point within the District of Columbia, a short distance below the land of the petitioners, has been completed.

Pending this suit, but before its trial, the Park and Planning Commission, by resolutions of September 24–26, 1931, declared that certain lands of the United States, described by metes and bounds, running along the high water line of 1863 on the Virginia side of the river, as established by United States Coast Survey, and extending to the center line of the channel of the river, are necessary for the development and protection of the Parkway. By further resolution, the Commission declared that it took complete and exclusive possession of these lands, which include the river bed where it is proposed to build the wharf and the upland claimed by petitioners by accretion. It directed that copies of the resolutions be posted on each parcel, which was done before the hearing in this suit. A description of each was also sent to the Attorney General for the purpose of having suits filed under the Act of April 27, 1912, c. 96, 37 Stat. 93, which authorizes suits by the Attorney General to quiet title to lands adversely held or claimed lying under and adjacent to the Potomac

River within the District of Columbia. The plans of the Commission also contemplate the construction of a highway across petitioners' upland as a means of access to the Parkway.

It is apparent that petitioners are entitled to the relief prayed only if several doubtful questions are resolved in their favor. They are (1) whether a mandatory duty is imposed upon the Secretary of War by § 10 of the Rivers and Harbors Appropriation Act to authorize the construction of the proposed wharf if he is satisfied that it will not interfere with navigation; (2) whether in fact petitioners have title, by accretion, to the upland adjacent to the river at the point where it is proposed to build the wharf, and thus have the status of riparian owners; (3) whether even as riparian owners of land lying within Virginia, petitioners, in the absence of a legislative grant either by Maryland before the cession or by the United States after it, have a common law right to build a wharf on the adjacent lands of the United States lying in the bed of the river, see *Casey's Lessee* v. *Inloes*, 1 Gill 430; *Browne* v. *Kennedy*, 5 Harris & J. 195; *Giraud's Lessee* v. *Hughes*, 1 Gill & Johns. 249, 265; *Wilson's Lessee* v. *Inloes*, 11 Gill & Johns. 351; *Hammond's Lessee* v. *Inloes*, 4 Md. 138; *Horner* v. *Pleasants*, 66 Md. 475; 7 Atl. 691; *Attorney General* v. *Hudson County Water Co.*, 76 N.J.Eq. 543; 76 Atl. 560, or if not (4) whether their predecessors in title acquired such a right under Paragraph Seventh of the Maryland-Virginia Compact, *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U.S. 672, 675; (5) whether, if such a right were derived from the Compact, it was not lost before its exercise by the union in the single ownership of the United States of the land under the river, and on both sides of it, which resulted from the cession by Maryland and Virginia of the area originally embraced in the District of Columbia and continued until the retro-

cession in 1846 of the lands on the Virginia side, see *Georgetown* v. *Alexandria Canal Co., supra; Evans* v. *United States,* 31 App.D.C. 544, 550; *Herald* v. *United States,* 284 Fed. 927; and (6) whether the right claimed is not in any case subordinate to the power of the United States, in its capacity as proprietor and sovereign, to devote the river bed to a public purpose, as has been done by the action of the Commission, taken under authority of Act of Congress authorizing the George Washington Memorial Parkway. See *Fox River Paper Co.* v. *Railroad Commission of Wisconsin,* 274 U.S. 651; *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53; *Barney* v. *Keokuk,* 94 U.S. 324; *Giraud's Lessee* v. *Hughes, supra; Casey's Lessee* v. *Inloes, supra; Linthicum* v. *Coan,* 64 Md. 439, 453; 2 Atl. 826; *Classen* v. *Chesapeake Guano Co.,* 81 Md. 258, 267; 31 Atl. 808.

The Government contends that in view of the nature of these questions the case is not an appropriate one for mandamus, since ordinarily mandamus against a public officer will not lie unless the right of the petitioner and the duty of the officer, performance of which is to be commanded, are both clear. See *McLennan* v. *Wilbur,* 283 U.S. 414, 419, 420; *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.,* 287 U.S. 178; *Redfield* v. *Windom,* 137 U.S. 636; *Bayard* v. *White,* 127 U.S. 246. It is insisted that both the petitioners' riparian ownership and the right to build the wharf which they claim to have derived from it, are doubtful; and in any event that the duty of the Secretary under the statute [1] is not plain and certain, since

[1] "Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water

the words forbidding all structures in any navigable river, "except on plans recommended by the Chief of Engineers and authorized by the Secretary of War," are only permissive, not mandatory, and there is no plain implication of a duty on the part of the Secretary to authorize a structure in the Potomac River within the District of Columbia to which there is substantial objection that it infringes the rights or obstructs the public policy of the United States as owner and sovereign of the river bed.

But we find it unnecessary, in the circumstances of this case, to say what effect should be given to these objections alone, whether considered each separately or together. Although the remedy by mandamus is at law, its allowance is controlled by equitable principles, see *Duncan Townsite Co.* v. *Lane,* 245 U.S. 308, 311; *Arant* v. *Lane,* 249 U.S. 367, 371; *Redfield* v. *Windom, supra,* 644; cf. *Turner* v. *Fisher,* 222 U.S. 204; *Ex parte Skinner & Eddy Corp.,* 265 U.S. 86, 95; *People ex rel. Wood* v. *Assessors,* 137 N.Y. 201; 33 N.E. 145; *Matter of Lindgren,* 232 N.Y. 59; 133 N.E. 353; *McCarthy* v. *Street Comm'rs,* 188 Mass. 338; 74 N.E. 659; *People ex rel. Stettauer* v. *Olsen,* 215 Ill. 620; 74 N.E. 785, and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right. For such reasons we think the relief sought by

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of the United States outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

mandamus should be denied here, even if petitioners' title to the upland adjacent to the river and their right to build the wharf were less doubtful than they are. The government, through its duly authorized agency, the Park Commission, has declared that both the bed of the river and the upland adjacent to it shall be devoted to a public purpose for the construction of the Parkway, and the plans of the Commission contemplate the taking, by purchase or condemnation, of a part of petitioners' property as a means of access to it. The apparent consequence of authorizing the construction of the wharf would be only to increase the expense to the government of constructing the Parkway, by the cost of destroying the wharf, and by so much of the cost of the wharf and of the other proposed improvements as may be included in the just compensation to be awarded for their taking. Thus the extraordinary remedy by mandamus, invoked to protect rights to which petitioners are not shown to be clearly entitled, would be burdensome to the government without any substantially equivalent benefit or advantage to the petitioners or their vendee, apart from the incidental and irrelevant consequence that petitioners might secure the performance of their conditional contract.

The court, in its discretion, may refuse mandamus to compel the doing of an idle act, *Turner* v. *Fisher, supra,* 209; *Wilson* v. *Blake,* 169 Cal. 449; 147 Pac. 129; or to give a remedy which would work a public injury or embarrassment, (see *Duncan Townsite Co.* v. *Lane, supra; Arant* v. *Lane, supra; Effingham, Maynard & Co.* v. *Hamilton,* 68 Miss. 523; 10 So. 39; cf. *Matter of Lindgren, supra,* 66; *McCarthy* v. *Street Comm'rs, supra*) just as in its sound discretion a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest. See *Seaboard Air Line Ry. Co.* v. *Atlanta B. & C. R. Co.,* 35 F. (2d) 609;

Conger v. *New York, W. S. & B. R. Co.,* 120 N.Y. 29; 23 N.E. 983; *Clarke* v. *Rochester, L. & N. F. R. Co.,* 18 Barb. 350; *Whalen* v. *Baltimore & Ohio R. Co.,* 108 Md. 11; 69 Atl. 390; *Curran* v. *Holyoke Water Power Co.,* 116 Mass. 90; *Southern Ry. Co.* v. *Franklin & P. R. Co.,* 96 Va. 693; 32 S.E. 485; cf. *Willard* v. *Tayloe,* 8 Wall. 557.

Affirmed.

WASHINGTON EX REL. BOND & GOODWIN & TUCKER, INC. *v.* SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 663. Argued April 19, 1933.—Decided May 8, 1933

1. A State may provide, among the conditions upon which a foreign corporation may be admitted to do local business, that if the corporation withdraw from the State and fail to maintain a local agency for receiving service of process, service may be made on a designated state official. P. 364.
2. Failure to provide further for notifying the absent corporation of such substituted service does not make the statute obnoxious to due process, in the case of a corporation which entered the State by complying with the statute; since by so doing it accepted the statutory terms, and since, having withdrawn, it could have assured itself of notice by designating a new agent or otherwise. P. 365.
3. The question whether under a state statute providing for service on the Secretary of State service may be made on the Assistant Secretary of State, is not a federal question. P. 366.
4. State statutes providing that, as to domestic corporations having no local office, and as to foreign insurance companies, substituted service on the Secretary of State shall be valid only if he sends notice to the corporation so served, but making no provision for such further notice to other foreign corporations, do not deny to the latter the equal protection of the laws. P. 366.

169 Wash. 688; 15 P. (2d) 660, affirmed.

APPEAL from a judgment refusing a writ of prohibition to prevent further prosecution of an action begun by substituted service.

Mr. Frank E. Holman, with whom *Messrs. Elmer E. Todd, William M. Allen,* and *Clarence R. Innis* were on the brief, for appellant.

Mr. Parker W. Kimball, with whom *Mr. Herbert W. Erskine* was on the brief, for appellees.

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a final decree of the Supreme Court of the State of Washington refusing a writ of prohibition to prevent the further prosecution of an action pending in the Superior Court of Spokane County.

Bond & Goodwin & Tucker, a Delaware corporation, qualified in 1926 to do business in the State of Washington, pursuant to the applicable statute.[1] One Duncan Shaw of Seattle, was appointed resident agent for the acceptance of service of process, as the law required. In 1929 the company withdrew from the State, ceased to transact business there, and filed formal notice of withdrawal with the Secretary of State. The corporation was dissolved in accordance with the laws of Delaware, but the appointment of Shaw as statutory agent was never revoked. In 1929 he removed to California. In 1932 one Monroe commenced a civil action in the Superior Court, naming Bond & Goodwin & Tucker as one of the defendants, and instructed the sheriff to serve the summons and complaint upon the Secretary of State. The return and proof of service show that this was done by handing the papers to an assistant Secretary. Neither the summons and complaint nor any copy of them, nor any notice touching the same, were forwarded to Bond & Goodwin & Tucker by the Secretary of State or anyone else. No other form of service was made.

[1] Section 3854, Remington's Compiled Statutes, 1922.

The appellant appeared specially and moved to quash the service. The motion was overruled. Thereupon application was made to the Supreme Court of the State for a writ of prohibition. The present appeal is from the judgment refusing the writ.

The appellant urges that the statute denies the due process and equal protection guaranteed by the Fourteenth Amendment. The first contention rests upon the fact that substituted service upon the Secretary of State is validated without any requirement that he shall give the defendant notice of the pendency of the action; the second is bottomed upon the circumstance that a different procedure requiring the Secretary of State to send notice to defendants is prescribed as respects suits against domestic corporations having no office within the State, and foreign insurance companies.

The statute requires a foreign corporation to appoint and register a resident agent empowered to accept service of process in any action or suit pertaining to the property, business or transactions of such corporation within the State. The agent may be changed by filing with the Secretary of State a new appointment. The portion of the Act which gives rise to the present controversy is:

". . . in the event such foreign corporation shall withdraw from this state and cease to transact business therein it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings and papers may be made, until the statute of limitations shall have run against anyone bringing an action against said corporation, which accrued prior to its withdrawal from this state. In case said corporation shall revoke the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against causes of action accruing against it, then in that event service of process, pleadings and papers in such actions may be made upon the secre-

tary of state of the state of Washington, and the same shall be held as due and sufficient service upon such corporation."

We are told that when the appellant appointed Shaw and registered him as its agent to accept service, it had complied with all conditions requisite to its lawful transaction of business within the State; that the provision for another sort of substituted service in the event of Shaw's removal from the State, or the revocation of his appointment without registration of another agent, is permissible only if it requires notice to the defendant; that by qualifying as a foreign corporation appellant did not consent to the arbitrary and unconstitutional condition that it might be cast in judgment without notice of suit. We think, however, that the position is unsound.

The State need not have admitted the corporation to do business within its borders. *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Lafayette Insurance Co.* v. *French,* 18 How. 404, 407. Admission might be conditioned upon the requirement of substituted service upon a person to be designated either by the corporation, *St. Clair* v. *Cox,* 106 U.S. 350, 356, or by the State itself, *Mutual Reserve Assn.* v. *Phelps,* 190 U.S. 147, 158, or might, as here, be upon the terms that if the corporation had failed to appoint or maintain an agent service should be made upon a state officer, *American Railway Express Co.* v. *Royster Guano Co.,* 273 U.S. 274, 280. The provision that the liability thus to be served should continue after withdrawal from the State afforded a lawful and constitutional protection of persons who had there transacted business with the appellant. *American Railway Express Co.* v. *Kentucky,* 273 U.S. 269, 274.

It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its

part to all the reasonable conditions imposed. *Lafayette Insurance Co.* v. *French, supra,* 408; *St. Clair* v. *Cox, supra,* 356; *Connecticut Mutual Life Insurance Co.* v. *Spratley,* 172 U.S. 602, 614; *Old Wayne Mut. Life Assn.* v. *McDonough,* 204 U.S. 8, 22; *Commercial Mutual Accident Co.* v. *Davis,* 213 U.S. 245, 254. It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights, as was attempted in the cases on which the appellant relies. *Terral* v. *Burke Construction Co.,* 257 U.S. 529; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U.S. 426; *Frost Trucking Co.* v. *Railroad Commission,* 271 U.S. 583; *Hanover Fire Insurance Co.* v. *Harding,* 272 U.S. 494. And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission, *Power Mfg. Co.* v. *Saunders,* 274 U.S. 490. But the statute here challenged has no such operation. It goes no further than to require that the corporation may be made to answer just claims asserted against it according to law. By appointing a new agent when Shaw ceased to be a resident of the State the appellant could have assured itself of notice of any action. The statute informed the company that if it elected not to appoint a successor to Shaw the Secretary of State would by law become its agent for the purpose of service. The burden lay upon the appellant to make such arrangement for notice as was thought desirable. There is no denial of due process in the omission to require the corporation's agent to give it such notice.

The power of the State altogether to exclude the corporation, and the consequent ability to condition its entrance into the State, distinguishes this case from those involving substituted service upon individuals, *Flexner* v. *Farson,* 248 U.S. 289; *Wuchter* v. *Pizzutti,* 276 U.S. 13, whose entrance into a State may render them amenable to action there, only if the statute providing for substituted

service incorporates reasonable provision for giving the defendant notice of the initiation of litigation, *Hess* v. *Pawloski*, 274 U.S. 352. The fact that appellant qualified to do business in the State and complied with the registration statute also distinguishes cases of attempted service on a state official pursuant to a statute with which the defendant corporation had never complied, and where at the time of suit it had removed from the state and was transacting no business there. *Old Wayne Mutual Life Assn.* v. *McDonough, supra; Consolidated Flour Mills Co.* v. *Muegge*, 127 Okla. 295; 260 Pac. 745; 278 U.S. 559.

Appellant suggests that it was denied due process because the Act demands service upon the Secretary of State, whereas the summons and complaint were handed to an assistant Secretary. The State court has held the service sufficient since the assistant Secretary in contemplation of law was the Secretary. This construction of the statute raises no federal question.

Complaint is made because other legislation validates substituted service on domestic corporations having no office in Washington, and on foreign insurance companies registered to do business therein, only if the Secretary of State sends notice to the defendant. It is said that a failure to make similar provision with respect to other foreign corporations deprives the appellant of the equal protection of the laws. The contention is without merit. The legislature was entitled to classify corporations in this respect, and a mere difference in the method of prescribing how substituted service should be accomplished works no unjust or unequal treatment of the appellant. Compare *National Union Fire Ins. Co.* v. *Wanberg*, 260 U.S. 71.

The judgment is

Affirmed.

DAUBE *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 634. Argued April 10, 11, 1933.—Decided May 8, 1933.

1. A schedule of refunds and credits was signed by the Commissioner of Internal Revenue and sent to the Collector together with a check to be delivered to a taxpayer for the making of a refund entered on the schedule. *Held* that, in the absence of notice and delivery to the taxpayer, the Commissioner retained the right to revoke his action and there was no account stated. P. 370.
2. The essence of a statement of an account lies in knowledge and consent of the parties to it. P. 370.
3. The ruling in *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, by which a specific limitation on the time for filing claims for the recovery of taxes is set aside and superseded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid, is not to be extended through an enlargement of the concept of an account stated by latitudinarian construction. P. 373.

75 Ct. Cls. 633; 59 F. (2d) 842; 1 F. Supp. 771, affirmed.

CERTIORARI, 288 U.S. 597, to review a judgment dismissing a claim for money alleged to have been unlawfully exacted as an income tax.

Mr. John E. Hughes, with whom *Mr. William Cogger* was on the brief, for petitioner.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher* and *Messrs. John MacC. Hudson* and *William W. Scott* were on the brief, for the United States.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The petitioner brought suit in the Court of Claims upon a claim that for two years, 1918 and 1919, he had overpaid his income tax. As to the tax for 1918, the claim was dismissed upon the merits. As to the tax for

1919, it was dismissed upon the ground that suit had not been brought within the time prescribed by law. 59 F. (2d) 842; 1 F. Supp. 771. A writ of certiorari, restricted to the assessment for 1919, brings the case here.

The Commissioner, upon an audit of the petitioner's returns, found underassessments for 1916, 1917, and 1920, and overassessments for 1918 and 1919. A notice of the result of the audit was mailed to the petitioner on November 10, 1923, the notice by its terms being provisional and tentative. Later, and on January 31, 1924, the Commissioner signed a schedule of overassessments, $22,151.88 for 1918, and $2,628.26 for 1919, and forwarded the schedule to the Collector of the District of Oklahoma, the petitioner's residence. In accordance with the practice of the bureau, the Collector was instructed to examine the accounts of the taxpayer and apply the excess payments as a credit against taxes due for other years. Upon such examination the Collector found that there were additional assessments, still unpaid, for 1916, 1917, and 1920, in the sum of $11,277.24. This left an excess for 1918 of $10,874.64, and one of $2,628.26 for 1919, a total of $13,502.90. Upon that basis the Collector made out a schedule of refunds and credits, which he returned to the Commissioner with the schedule of overassessments.

At this stage complications developed by reason of the tax liability of a partnership of which petitioner was a member. The partnership owed the Government more than fifty thousand dollars, the amount of an excess profits tax for 1917, though the precise extent of the indebtedness was still undetermined. In anticipation of an assessment, petitioner had filed with the bureau an agreement and direction that any refund due to him individually for the year 1918 (but without mention of any other year) should be applied as a credit upon the taxes owing from the partnership. When the schedule of refunds and credits came back from the Collector, the Commissioner over-

looked the order, then on file in his office, for the merger of the two accounts, and dealt with them as separate. He made an additional assessment against the partnership for $53,012.47. On the same day, March 29, 1924, he signed an approval of the schedule of refunds and credits without applying any part of the overpayment to the partnership liability, and made out a check to the order of the petitioner for $13,502.90, which he mailed to the Collector. The Collector discovered the mistake, and instead of delivering the check returned it to the Commissioner. Thereupon the Commissioner canceled the check, revoked his earlier instructions, and ordered the Collector to apply the overpayments made by the petitioner individually upon the deficiency then owing from the members of the partnership. This order was proper to the extent of $10,874.64, the 1918 overpayment, for the credit to that extent was in accordance with the petitioner's agreement. It was an error in so far as it included the 1919 overpayment ($2,628.26), for the petitioner's agreement did not cover that year. The Collector did what the Commissioner commanded. No notice, however, of his action was transmitted to the taxpayer. There was no delivery to the taxpayer of a certificate of overassessment. There was no delivery of a copy of any schedule of refunds and credits. Six years went by, almost to the day, without demand or protest. Then, on March 28, 1930, the petitioner began this suit, asking judgment for $24,780.14 with interest. He repudiated all the credits against the partnership deficiency, as well as other credits which there is no need to go into, for he allowed them later on. At the trial the contest narrowed down to two items. The first, $10,874.64, is the overpayment for 1918, as it stood before it was applied upon the partnership assessment. The second, $2,628.26, is the overpayment for 1919. The writ of certiorari brings up the second item to the exclusion of any other.

By § 3226 of the Revised Statutes as amended by the Revenue Act of 1921, no suit may be maintained for the recovery of any internal revenue tax erroneously or illegally assessed or collected unless begun within five years from the date of payment. Revenue Act of 1921, c. 136, 42 Stat. 268, § 1318, amending R.S. § 3226; 26 U.S. Code, § 156. This suit was not brought within the time so limited. It is therefore too late, if it is a suit for the recovery of a tax within the meaning of the statute. The petitioner insists that it is not such a suit, but one upon an account stated. The statement of an account gives rise to a new cause of action with a new term of limitation. *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, 265. We are thus brought to the question whether there was such a statement here.

If the traditional tests, familiar to the law of contracts, are to be accepted as our guide, there was no account stated between Government and taxpayer. No balance was arrived at as the result of computation and agreement. *Volkening* v. *DeGraaf,* 81 N.Y. 268, 271. The Commissioner did not inform the taxpayer that the tax had been overpaid in a determinate amount. The taxpayer did not give assent either expressly or by silence to the outcome of the audit. The essentials of an account stated in any strict or proper sense are lacking altogether. *Toland* v. *Sprague,* 12 Pet. 300, 333; *Nutt* v. *United States,* 125 U.S. 650, 655; *Volkening* v. *DeGraaf, supra; Newburger-Morris Co.* v. *Talcott,* 219 N.Y. 505, 511, 512; 114 N.E. 846. A different situation was disclosed in the *Bonwit Teller* case, *supra.* There the certificate of overassessment had been delivered to the taxpayer. "Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought." *Bonwit Teller & Co.* v. *United States, supra,* p. 265. Cf. *Wm. J. Friday & Co.* v. *United States,* 61 F. (2d) 370.

The argument is made, however, that the allowance of the schedule of refunds and credits on March 29, 1924, was something near to an account stated, something "equivalent" thereto, though not the standard article to be marked by the standard label. This doctrine of equivalence is borne out, we are told, by cases in this court and elsewhere, which were cited in the *Bonwit Teller* case and are again pressed upon us now. *United States* v. *Kaufman,* 96 U.S. 567, 575; *United States* v. *Savings Bank,* 104 U.S. 728; *First National Bank of Greencastle* v. *United States,* 15 Ct. Cls. 225. They fall short by a great deal of teaching such a lesson. The *Kaufman* case will serve as typical of the others, for they vary little in their facts. The Commissioner of Internal Revenue had been authorized by statute to make allowance to brewers for the value of tax stamps lost or wasted. He did make such an allowance, and certified his ruling to the Comptroller of the Treasury. The claimant suing in the Court of Claims to recover the amount of the award was met by the objection that he must prove his claim anew. This court held that the allowance by the Commissioner was effective without more to make out a *prima facie* case, and spoke of it as at least "equivalent to an account stated between private parties, which is good until impeached for fraud or mistake." There was no question in the case as to the effect of the allowance in lifting the bar of a statute of limitations. The claim had been seasonably filed and diligently pressed. There was no question as to the effect of revocation or rescission. Cf. *Ridgway* v. *United States,* 18 Ct. Cls. 707, 714, 715. What had been done by the Commissioner had never been undone. There was only the question as to the probative force of an adjudication by an officer who had been appointed to decide and had definitively decided. The statute had given him the position of an administrative tri-

bunal. He had done all that he could do. He had made the allowance and had certified his action to the disbursing agents of the treasury, whose duty was not to revise, but merely to obey. Notice of his action had been given to the claimant, who had accepted and approved it. *Kaufman* v. *United States,* 11 Ct. Cls. 659, 662. The suit was on an award which had all the finality and authority that an award could ever gain.

A very different situation is laid before us here. No definitive adjudication in favor of this taxpayer was ever made by the Commissioner or by other competent authority. The transaction never went beyond the stage of intra-departmental conference and parley. The Commissioner had put his hand, it is true, to a schedule of refunds and credits, and had transmitted a check to one of his subordinates to be delivered to the claimant. By none of these acts had he so divested himself of control as to generate rights or interests in favor of the taxpayer if there was revocation or rescission in advance of notice or delivery. There had been messages back and forth between the officers and branches of an administrative bureau. There had been none to the outer world. The Commissioner, after signing the schedule, might scratch out his signature, and declare it inadvertent. Cf. *Ridgway* v. *United States, supra; Austin Co.* v. *Commissioner,* 35 F. (2d) 910. This in substance is what he did. After signing a check and mailing it to his agent, he might cancel the check while the agent still held it, and revoke the authority improvidently granted. The matter was still *in fieri.*

High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended. By the ruling in the *Bonwit Teller* case a specific limitation applicable to claims for the recovery of taxes is set aside and superseded whenever the statement of an account sustains the

inference of an agreement that the tax shall be repaid. As soon as this appears, a fresh term of limitation is born and set in motion. It is a ruling not to be extended through an enlargement of the concept of an account stated by latitudinarian construction.

Girard Trust Co. v. *United States,* 270 U.S. 163, and *United States* v. *Swift & Co.,* 282 U.S. 468, are pressed upon us by counsel as helpful to the taxpayer. They do not touch the case at hand. In the case of the *Girard Trust Co.,* a statute called for interest on the amount of the refund to the date of allowance. The claimant made the point that allowance was not perfected unless accompanied by payment, and that interest on the refund should be correspondingly extended. The court rejecting that contention held that allowance was complete within the meaning of the statute when the schedule of refunds was approved by the Commissioner. In the case of *Swift & Co.,* a like ruling was made as to the effect of the approval of a credit. In neither case was there any question as to the existence of an account stated, or as to the effect of an improvident allowance, unknown to the taxpayer.

The judgment is *Affirmed.*

GEORGE MOORE ICE CREAM CO., INC. *v.* ROSE, COLLECTOR OF INTERNAL REVENUE.

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

No. 675. Argued April 19, 20, 1933.—Decided May 8, 1933.

1. Section 1014 of the Revenue Act of 1924, amending R.S., § 3226, provides that no suit to recover a tax alleged to have been erroneously or illegally assessed or collected, shall be maintained until claim for refund or credit has been filed, and that such suit may be maintained whether or not the tax was paid under protest. It further provides "This section shall not affect any proceeding in court instituted prior to the enactment of this Act." *Held:*

(1) That the former rule requiring a protest at the time of payment, as a condition precedent to recovery, is abolished as to any suit brought after the date of the Act, irrespective of the date of the underlying payment. P. 375.

(2) This view results from the phraseology and implications of the statute, and is confirmed by its history and congressional reports. P. 377.

2. The rule that statutes should be so construed as to avoid grave doubts of their validity, is inapplicable where the statutory intent is clear. P. 379.
3. Where an internal revenue collector, acting by direction of the Commissioner, collects and turns in an income tax assessed by the latter and is sued by the taxpayer for recovery, he is entitled by R.S., § 989, (28 U.S.C. 842,) if judgment go against him, to a certificate of the court showing that he so acted, and is relieved of liability to execution; the judgment is payable from the Treasury and the suit is in effect a suit against the United States. P. 380.
4. As to such cases, therefore, it can not be said that § 1014 of the Act of 1924, *supra*, by abolishing retroactively the requirement of protest by the taxpayer as a condition to his right of action, infringes any right of the collector under the due process clause of the Fifth Amendment. P. 383.
5. A general claim of error in assessing net income—*held* amendable after the statutory period. *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62; *United States* v. *Factors & Finance Co.*, 288 U.S. 89. P. 384.

61 F. (2d) 605, reversed.

CERTIORARI * to review the affirmance of a judgment dismissing the complaint in an action by a taxpayer against the Collector to recover money alleged to have been illegally collected as income and profits taxes.

Mr. J. C. Murphy for petitioner.

Mr. Paul D. Miller, with whom *Solicitor General Thacher* and *Messrs. Sewall Key* and *J. P. Jackson* were on the brief, for respondent.

By leave of Court, *Messrs. John G. Buchanan* and *Paul G. Rodewald* filed a brief as *amici curiae.*

* See Table of Cases Reported in this volume.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The petitioner, a corporation, brought suit against the respondent, a Collector of Internal Revenue, to recover income and profits taxes alleged to have been wrongfully collected. A demurrer by the Collector was sustained in the District Court upon two grounds: first, that the payment of the taxes had been made without protest; and second, that the original claim for refund filed with the Commissioner was defective and that amendment came too late. The Circuit Court of Appeals upheld the decision upon the second ground without passing on the first. 61 F. (2d) 605. The case is here on certiorari.

On April 1, 1918, the petitioner filed its return for the year 1917, disclaiming any tax liability. The Commissioner of Internal Revenue, auditing the return, found a tax liability in the sum of $6,871.18, and assessed a tax accordingly. The respondent, after notice of the assessment, made demand upon the taxpayer, giving notice that there would be distraint and sale unless payment was made within ten days. On November 5, 1923, the taxpayer yielded to the demand, moved by the desire to avoid the seizure of its property, but without protest to the Collector that the tax was illegal, either wholly or in part. Four years later, on November 5, 1927, it filed a claim for refund with the Commissioner, and on November 13, 1928, an amended claim, amplifying and making more specific the statements of the first one. The claims were rejected by the Commissioner, though a revenue agent had reported that a refund was due in the sum of $4,551.01. The petitioner alleges that the payment was excessive to that extent and sues the Collector for the moneys overpaid.

1. At common law, and for many years under the federal statutes, protest at the time of payment was a condition precedent to the recovery of a tax. *Elliott* v.

Swartwout, 10 Pet. 137, 153; *Curtis's Adm'x* v. *Fiedler,* 2 Black 461; *Chesebrough* v. *United States,* 192 U.S. 253; *United States* v. *N.Y. & Cuba Mail S.S. Co.,* 200 U.S. 488. The rule persisted till 1924, when it was abolished by the Revenue Act of that year, with a proviso that pending suits should be unaffected by the change. Revenue Act of 1924, c. 234, 43 Stat. 253, 343, § 1014, amending R.S. § 3226; [1] 26 U.S.C., § 156. This suit was not begun till March, 1931, and is thus outside of the proviso. Even so, the payment to be recovered was made in 1923, when protest was still necessary. The petitioner contends that the new rule applies to all suits begun after the adoption of the amendment. The Government contends that the old rule survives if the payment was before the amendment, though the suit was begun afterwards.

[1] Section 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected 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; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

We think the intention of the Congress was to remove the requirement of protest in any suit thereafter brought, irrespective of the date of the underlying payment.[2]

The tokens of intention are within the statute and outside of it.

Of the tokens within the statute, the saving clause, (b), is entitled to a leading place. "This section shall not affect any proceeding in court instituted prior to the enactment of this act." The implication is that any proceeding not covered by the exception is to be subject to the rule. *Moses* v. *United States,* 61 F. (2d) 791, 794. Cf. *Brown* v. *Maryland,* 12 Wheat. 419, 438. But there are other tokens, and tokens still within the statute, that point the same way. The phraseology of the section in all its parts imports a regulation of procedure. No suit "shall be maintained" until a claim for refund or credit has been filed with the Commissioner. If such a claim has been filed, suit may be "maintained," though there was neither protest nor duress. Even pending actions would commonly be covered by such words. "To maintain a suit is to uphold, continue on foot, and keep from collapse a suit already begun." *Smallwood* v. *Gallardo,* 275 U.S. 56, 61. If suits already begun are taken out by an exception, to "maintain" can mean no less than to prosecute with effect, without reference to the date of the transaction at the root. *Collector* v. *Hubbard,* 12 Wall. 1, 14. In saying this we speak of the inference to be drawn when the balance is not shifted by countervailing weights. None can be discovered here. There could

[2] In the lower federal courts the decisions are conflicting. Most of them have taken the view adopted here. *Beatty* v. *Heiner,* 10 F. (2d) 390; *Warner* v. *Walsh,* 24 F. (2d) 449; *Hyatt Roller Bearing Co.* v. *United States,* 43 F. (2d) 1008; *Weir* v. *McGrath,* 52 F. (2d) 201; *Electric Storage Battery Co.* v. *McCaughn,* 52 F. (2d) 205; cf. *Winant* v. *Gardner,* 29 F. (2d) 836; *Moses* v. *United States,* 61 F. (2d) 791. Contra: *Warner* v. *Walsh,* 27 F. (2d) 952.

be no denial by anyone that transactions antedating the statute would be subject to the rule that the suit is not maintainable without the filing of a claim. The inference is cogent that the same transactions are covered when it is said in the same sentence that the suit *may* be maintained without evidence or averment of protest or duress. There is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function. The field of operation is not shifted between the clauses of a sentence.

If we turn to extrinsic tokens of intention, and view the statute in the light of its history and aims, the signposts are the same. The requirement of protest as it stood before the statute was not limited to suits against a collector of internal revenue or other public officer. It extended and was often applied to suits against the Government itself. Even in suits against the Collector, the United States was almost always the genuine defendant, the liability of the nominal defendant being formal rather than substantial. In this situation the Government was unjustly enriched at the expense of the taxpayer when it held on to moneys that had been illegally collected, whether with protest or without. So at least the lawmakers believed, and gave expression to that belief, not only in the statute, but in Congressional reports. Senate Report, No. 398, 68th Congress, First Session, pp. 44, 45; [3] House Report, No. 179, 68th Con-

[3] The Senate Report contains the following:

"Section 1114. The provisions of Section 1318 of existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums, or penalties paid, that such amounts shall have been paid under protest or duress. The fact protest was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well advised taxpayers are concerned and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed."

gress, First Session, pp. 33, 34. The amendment was designed to right an ancient wrong. It did not draw a distinction between suits against the body politic and suits against a public officer who was to be paid out of the public purse. It put them in a single class, and made them subject to a common rule. A high-minded Government renounced an advantage that was felt to be ignoble, and set up a new standard of equity and conscience. There was no thought to discriminate between payments made and those to come. A fine sense of honor had brought the statute into being. We are to read it in a kindred spirit. *United States* v. *Emery Realty Co.*, 237 U.S. 28, 32.

The argument is made that power was lacking, though intention be assumed. Defect of power is not suggested where the claim for restitution is against the Government itself. The case assumes another aspect, we are told, when the suit is against an officer who is to be personally charged. Until 1924, a Collector was not liable to a taxpayer for a tax illegally collected unless protest gave him notice that he was a party to a wrong. The Government suggests that there is an infraction of the Fifth Amendment, a denial of due process, if liability is cast upon him after the event. There is a subsidiary point that at least the doubt is so great as to canalize construction along the course of safety. *United States* v. *La Franca*, 282 U.S. 568, 574; *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States* v. *Jin Fuey Moy, supra.* But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered.

As applied to this respondent in the circumstances of his official action stated in the record, the statute is constitutional though its effect is to broaden liability both for the past and for the future. As the law stood before later statutes, the taxpayer's protest was notice to a Collector that suit was about to follow, and was warning not to pay into the Treasury the moneys collected. *Elliott* v. *Swartwout, supra; Smietanka* v. *Indiana Steel Co.,* 257 U.S. 1, 4. Statutes first enacted in 1839 (Act of March 3, 1839, c. 82, § 2, 5 Stat. 348) and progressively broadened (R.S., § 3210; 26 U.S.C., § 140), made it the duty of Collectors to pay the money over to the Government, whether there had been protest or no protest. At first this was thought to have relieved them of personal liability (*Cary* v. *Curtis,* 3 How. 236; *Smietanka* v. *Indiana Steel Co., supra*), but later acts of Congress established a different rule, though maintaining the duty to make remittance to the Treasury. *Philadelphia* v. *Collector,* 5 Wall. 720, 731; *Curtis's Adm'x* v. *Fiedler,* 2 Black 461, 479; *Collector* v. *Hubbard, supra; Arnson* v. *Murphy,* 109 U.S. 238, 241; 5 Stat. 727; 12 Stat. 434, 725, 729; 12 Stat. 741, § 12; 13 Stat. 239; 14 Stat. 329, § 8. Along with the duty there went a pledge of indemnity by the Government itself, a pledge not absolute, it is true, but subject to a condition. 12 Stat. 741, § 12; *United States* v. *Sherman,* 98 U.S. 565; *Philadelphia* v. *Collector, supra,* p. 733; *Smietanka* v. *Indiana Steel Co., supra.* The condition was that a certificate be granted by the court either (a) that there was probable cause for the act done by the Collector or other officer, or (b) that he acted under the directions of the Secretary of the Treasury or other proper officer of the Government. 12 Stat. 741, § 12; Act of March 3, 1863. In that event no execution was to issue upon the judgment, but the amount of the recovery was to be paid out of the Treasury. The pledge of indemnity was carried forward into

the Revised Statutes with only verbal changes (R.S. 989), and stands upon the books today. 28 U.S.C., § 842.[4] The effect of the certificate, when given, is to convert the suit against the Collector into a suit against the Government. *United States* v. *Sherman, supra.*

This Collector did act under the directions of the Secretary of the Treasury, or other proper officer of the Government in the collection of the tax. The complaint shows upon its face that the tax had been duly assessed by the Commissioner of Internal Revenue. In that situation the Collector was under a ministerial duty to proceed to collect it. R.S. § 3182; 26 U.S.C., § 102; *Erskine* v. *Hohnbach,* 14 Wall. 613. There was nothing left to his discretion. Other duties less definitely prescribed may leave a margin for judgment and for individual initiative. Cf. *Agnew* v. *Haymes,* 141 Fed. 631. There was no such margin here. His duty being imperative, he is protected by the command of his superior from liability for trespass (*Erskine* v. *Hohnbach, supra; Haffin* v. *Mason,* 15 Wall. 671, 675; *Harding* v. *Woodcock,* 137 U.S. 43, 46), and is entitled as of right to a certificate converting the suit against him into one against the Government. *United States* v. *Sherman, supra.* His position could be no better if there had been protest at the time of payment. He would still have been under a duty to obey the command of his superior and collect the tax assessed. Also he would

[4] § 842. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

still have been under a duty to make prompt remittance to the Treasury. There had been confided to him no power to review or to revise. *Erskine* v. *Hohnbach, supra; Harding* v. *Woodcock, supra.* The case is not one for a certificate of probable cause, as it might be if the officer had trespassed under a mistaken sense of duty. In such circumstances a certain latitude of judgment may be accorded to the certifying judge, though even then it is enough that a seizure has been made upon grounds of reasonable suspicion. *Locke* v. *United States,* 7 Cranch 339; *Agnew* v. *Haymes, supra; Carroll* v. *United States,* 267 U.S. 132, 149; *Dumbra* v. *United States,* 268 U.S. 435, 441. One does not speak of probable cause when justification is complete. Here the certifying judge will be subject to a specific duty upon the facts admitted by the demurrer to relieve the Collector of personal liability and to shift the burden to the Treasury. This court has often held that a pledge of the public faith and credit will permit the seizure of property by right of eminent domain, though what is due for compensation must be ascertained thereafter. *Sweet* v. *Rechel,* 159 U.S. 380; *Crozier* v. *Krupp,* 224 U.S. 290; *Joslin Mfg. Co.* v. *Providence,* 262 U.S. 668, 677; *Dohany* v. *Rogers,* 281 U.S. 362, 366; *Hurley* v. *Kincaid,* 285 U.S. 95, 104, 105. The assurance of indemnity is as ample, the reparation prompter and more summary, upon the facts before us here.

A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. *Philadelphia* v. *Collector, supra,* p. 731. There may have been utility in such procedural devices in days when the Government was not suable as freely as now.

United States v. *Emery, supra; Ex parte Bakelite Corp.*, 279 U.S. 438, 452; Act of February 24, 1855, c. 122, 10 Stat. 612, §§ 1 and 9; Judicial Code, § 145; 28 U.S.C., § 250; Judicial Code, § 24 (20); 28 U.S.C., § 41 (20). They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.

The case comes down to this: In its application to this Collector the amendment of 1924 has left the law the same as it had been for many years. There has been no change to his detriment in the definition of rights and wrongs. His conduct must have been the same though the statute had been on the books from the beginning. There has not even been any change to his detriment in the law of remedies. Execution can never issue against him upon any judgment recovered in favor of the taxpayer. The Government has enlarged the remedy against itself by dispensing with what was once an indispensable formality. As to subordinate officials who have acted in the line of duty it has made the change innocuous by assuming liability. One who is brought before the court as a formal party only will not be heard to object that there has been a denial of due process in enlarging the liability to be borne by some one else. Enough that the legislation is valid as to him, whether it be valid or invalid in its bearing upon others.

The decision of this case does not require us to determine whether the Act of 1924 would affect the respondent's liability if the certificate of the court converting the suit into one against the Government were dependent upon controverted facts, or upon facts permitting different inferences or calling upon the judge to exercise discretion.

No such situation is presented by the record now before us. Indeed, no such situation, it would seem, can ever be presented where a Collector has done no more than accept payment of a tax assessed by a superior who has been invested by the statute with power to command. Our duty does not require us to deal with problems merely hypothetical. If a case should develop where a certificate might issue as a matter of discretion, other questions would be here. There would then be need to consider whether the objection of a denial of due process would be open to a Collector until a request for the certificate had been made and refused. "Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment." *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 168; *York* v. *Texas,* 137 U.S. 15, 20. There would be need also to consider whether in its application to an officer acting of his own motion, and not in the fulfilment of the command of a superior, the requirement of protest is a procedural limitation upon the remedy for a wrong, or one of the substantive elements of the wrong itself. We leave those questions open.

2. The Government contends that the claim for refund filed by the petitioner with the Commissioner of Internal Revenue was not subject to amendment after the time had gone by when a claim wholly new would have been barred by limitation.

The claim in its original form gave notice of specific errors in the adjustment of invested capital. It gave notice also in general terms that aside from any errors in the adjustment of the capital there had been an erroneous assessment of net income at the sum of $16,940.18, when in fact there had been a loss. We think the statements as to income were subject to amendment. *United States* v. *Memphis Cotton Oil Co.,* 288 U.S. 62; *United States* v. *Factors & Finance Co.,* 288 U.S. 89.

The judgment is *Reversed.*

Syllabus.

INTERSTATE COMMERCE COMMISSION *v.* UNITED STATES EX REL. CAMPBELL ET AL.

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

No. 748. Argued April 21, 1933.—Decided May 8, 1933.

1. Where the Interstate Commerce Commission finds that a system of rates discriminates unjustly against a shipper, and orders the discrimination removed for the future, but also finds that the rates he paid were not in themselves unreasonable, and dismisses his complaint for damages because the record before it will not support an award of reparation based on the undue prejudice, its action in the latter aspect is judicial in character, negative in form and not reviewable elsewhere. P. 387.
2. Discrimination alone being the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper, though it is one of the evidentiary circumstances. P. 389.
3. When a shipper who paid only reasonable rates sues for damages on account of rate discrimination, he must prove, not merely that business competitors enjoyed lower rates, but how much he himself lost through diversion of business and profits, lowered market prices, etc., because of the discrimination; and such consequences are not necessarily to be inferred from the discrimination without more. P. 390.
4. Mandamus is an appropriate remedy to compel a judicial officer to act, but it may not be used to compel a decision in a particular way, or as a substitute for an appeal or writ of error to dictate the manner of his action. P. 394.
5. Even if the Interstate Commerce Commission committed an error of law in the present case in refusing to find the ultimate fact of damage as an inference from the evidentiary facts set out in its decision, the error can not be corrected by mandamus. P. 393.
6. The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts. A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. P. 394.

61 App. D.C. 382; 63 F. (2d) 358, reversed.

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CERTIORARI * to review the reversal of a judgment of the Supreme Court of the District of Columbia refusing a writ of mandamus.

Mr. Daniel W. Knowlton, with whom *Mr. Edward M. Reidy* was on the brief, for petitioner.

Mr. A. Henry Walter, with whom *Mr. Johnston B. Campbell* was on the brief, for respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Upon a complaint filed by the Birch Valley Lumber Company against carriers by rail engaged in interstate commerce, the Interstate Commerce Commission determined that rates maintained by the carriers were unduly prejudicial to the complainant and unduly preferential to its competitors, but that the record would not support an award of damages. Thereupon the complainant sued in the Supreme Court of the District of Columbia for a writ of mandamus commanding the Commission to make an award of damages in accordance with a stated formula. The Court of Appeals, reversing the determination of the lower court, held that the writ should issue. 61 App.D.C. 382; 63 F. (2d) 358. The case is here on certiorari.

The complainant before the Commission, the respondent in this court, is a lumber company engaged in business at Tioga, West Virginia. Transportation service to and from Tioga is supplied by the Strouds Creek and Muddlety Railroad Company (the S. C. & M.), a short line railroad running from Delphi, West Virginia, to Allingdale in that state, a distance of nine and a half miles. The terminus of this road at Allingdale is a junction point with the Baltimore & Ohio Railroad (the B. & O.), and through it with connecting lines beyond. Lumber dealers on the route of the B. & O. have had the benefit of blanket

* See Table of Cases Reported in this volume.

or group rates established by that road and others jointly. The complainant has had to pay the group rate, and in addition a charge for carriage on the S. C. & M., the short line connection. The result has been to put it at a disadvantage as compared with competitors in the same producing territory. "Complainant," it is found, "does not question the reasonableness *per se* of the blanket or group rates for Allingdale or the other points in the group, but assails only what it terms the relatively high through rates from Tioga and Delphi. It also admits that the charge of the S. C. & M. is not unreasonably high." The controversy hinges upon the effect of an unlawful preference.

For rate making purposes the producing territory tributary to the B. & O. in Pennsylvania, Maryland, and West Virginia is divided into several groups. One of these groups known as the Richwood group has its terminus at Allingdale. So also has another group known as number 9. Lumber dealers competing with the complainant do business within this territory, and pay the group or blanket rate, which takes no heed of distances within the group area. Cf. *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 522. In some instances the blanket rate has been extended to short line connections, but this has been exceptional, and has not included any points on the S. C. & M. The additional charge paid by the complainant for the short line connection between Allingdale and Tioga (7.1 miles) is $15 per car. Another lumber company, engaged in business at Delphi, intervened in the proceedings and joined in the complaint. Both the complainant and the intervening shipper were "forced to base their prices on the group rates and absorb the charges of the S. C. & M."

The Commission found that the failure of the carriers to establish joint or group rates over the short line connections had the effect of an undue preference to lumber companies doing business within the group territory,

though apart from the preference the rates were not unreasonable. Accordingly it made an order directed to the B. & O. and other connecting railroads to "cease and desist" from the unlawful practice. There was no award of damages. "The record," the Commission held, "will not support an award of reparation based on the undue prejudice found to exist."

The Interstate Commerce Act makes it unlawful for a carrier to give any undue or unreasonable preference to a person or locality, or to subject any person or locality to an undue disadvantage (24 Stat. 380, § 3; 41 Stat. 479, § 405; 49 U.S.C., § 3), and charges the offender with liability for the full amount of damages resulting from the unlawful act. § 8. Upon the hearing of a complaint, the Commission is empowered to ascertain the damages and award them. § 16 (1). The respondent by its complaint to the Commission invoked this dual jurisdiction, the administrative jurisdiction to prescribe a rule for the future (*Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291; *Baltimore & Ohio R. Co.* v. *Brady*, 288 U.S. 448), and the judicial or quasi-judicial jurisdiction to give reparation for the past. *Baltimore & Ohio R. Co.* v. *Brady, supra.* In dismissing such a complaint, the Commission speaks with finality. Its orders purely negative—negative in form and substance—are not subject to review by this court or any other. *Standard Oil Co.* v. *United States*, 283 U.S. 235; *Alton R. Co.* v. *United States*, 287 U.S. 229; *Procter & Gamble Co.* v. *United States*, 225 U.S. 282; *Baltimore & O. R. Co.* v. *Brady, supra.* Damages for discrimination denied by the Commission are not recoverable somewhere else.

The respondent, conceding these restrictions upon the remedies available in the courts, professes to abide by them. The argument is that damages were found by the

Commission, and after being found were arbitrarily withheld. Damages were found, it is said, because the evidentiary facts set forth in the findings lead to a conclusion of damage in a determinate amount, and lead to that conclusion as an inference of law. Damages, being found, were arbitrarily withheld, because discretion is excluded when the loss is ascertained. In that view, the denial of an award is the breach of a ministerial duty to be corrected by mandamus, as if a court after determining in favor of a suitor the amount of his recovery were to refuse him execution.

1. "The record will not support an award of reparation based on the undue prejudice found to exist." This is not a finding that damages in the sum of $15 per car or in any other sum have been suffered by the complainant, but will not be awarded. This is a finding that upon the evidence before the Commission, which is not before us, there is not a sufficient basis for a finding of any damage whatever. Nothing in the recital of evidentiary facts is inconsistent as a matter of law with this negation of loss. The Commission does not find, and the complainant does not assert, that the rate was unreasonable in the sense that it would be subject to condemnation if a like rate had been charged to others similarly situated. What is unlawful in the action of the carriers inheres in its discriminatory quality, and not in anything else. When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. *Penn. R. Co.* v. *International Coal Co.*, 230 U.S. 184; *Mitchell Coal Co.* v. *Penn. R. Co.*, 230 U.S. 247, 258; *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, 534; *Keogh* v. *C. & N. W. Ry. Co.*, 260 U.S. 156, 165. Cf. *Postal Tel. Cable Co.* v. *Associated Press*, 228 N.Y. 370, 379, 380; 127 N.E. 256. It is an evidentiary circumstance to be viewed along

with others in the setting of the occasion. It is not the measure without more. *Penn. R. Co.* v. *International Coal Co., supra; Keogh* v. *C. & N. W. Ry. Co., supra.*

Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When the rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. "The carrier ought not to be allowed to retain his illegal profit and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum." *Southern Pac. Co.* v. *Darnell-Taenzer Co., supra,* p. 534. But a different measure of recovery is applicable "where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less." *So. Pac. Co.* v. *Darnell-Taenzer Co., supra.* Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less (*Penn. R. Co.* v. *International Coal Co., supra,* pp. 206, 207), but which, whether more or less, is something to be proved and not presumed. *Ibid,* p. 204. "Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted." *Keogh* v. *C. & N. W. Ry. Co., supra,* p. 165. The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.

The answer to that question is not independent of time and place and circumstance. It calls for something more than the use of a mathematical formula. If by reason of the discrimination, the preferred producers have been

able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price (*Penn. R. Co.* v. *International Coal Co., supra,* p. 207; *Hoover* v. *Penn. R. Co.,* 156 Pa. St. 220, 244; 27 Atl. 282), damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more. This complainant was in competition with producers in the Allingdale group. It was in competition, however, with many other producers doing business in distant territory, for its dealings were far flung. It had markets in Canada, Kentucky, Illinois, Michigan, Ohio, Pennsylvania, New York, New Jersey, Maryland, and the New England states. The finding is that "the lumber is sold in competition with that produced throughout the country," though "especially with that produced in the same general territory." For all that appears the prices charged for lumber by producers within the group were the market prices current generally throughout the entire field of competition.[1] If that is so, the producers in the favored territory were not making use of the preference to mark the price down to an equivalent extent, and thus deprive the complainant, less favorably situated, of a reasonable return. They were letting the price stand as it would have been if the tariff had been equal, and taking advantage of the preference to increase the profit for themselves.

[1] Cf. Donner Steel Co. *v.* Delaware, Lackawanna & Western R. Co., 92 I.C.C. 595, 599; Hylton Flour Mills *v.* Los Angeles & Salt Lake R. Co., 152 I.C.C. 81; Coal Switching Reparation Cases at Chicago, 36 I.C.C. 226; also the following cases in which the prices had been fixed by the government: Home Packing & Ice Co. *v.* Director General, 57 I.C.C. 691; Wharton Steel Co. *v.* Director General, 59 I.C.C. 11.

That was gain to them but it was not loss to the complainant.

The truth of this is seen more clearly when we keep in mind the varying methods available to remove discrimination and restore equality. The respondent argues as if there were one method, and one only, and this by cutting down the Tioga and Delphi rates and thus reducing them to the level of the rates within the group. But that is to ignore the other methods of adjustment open to the carriers. The discrimination might be removed either by cutting one set of charges down, or by lifting the other up, or by establishing a new rate intermediate between them. *United States* v. *Illinois Central R. Co., supra,* at p. 521; *American Express Co.* v. *South Dakota,* 244 U.S. 617, 624. The situation comes out into clear relief if we assume recourse to be had to the second of these methods. Rates within the favored territory might be raised to the same level as those outside of it, and yet after the change the complainant would be no better off, if the discrimination had not tended to hold market prices down. The profit of the favored shippers would in that event be less, just as it would be if they had been receiving a rebate from the published tariff (*Penn. R. Co.* v. *International Coal Co., supra*); but because their profit would be less, the conclusion would not be inevitable that the complainant's would be greater. The two would not fluctuate in any constant ratio. There would be no necessary correspondence between preference and damage. In varied situations the Interstate Commerce Commission has thus interpreted the doctrine of the International Coal case, and so given or withheld relief. The rulings of the Commission are consistent to the effect that the absorption by a complainant of a discriminatory charge does not avail to establish damage, or to measure its extent, in the absence of a showing that prices were affected by the differential

rate.[2] There must be full disclosure of the conditions of the business, or of those affecting competition, including, in particular, the capacity of the preferred producers to fix the prices for the market. Only then will the ultimate fact of damage emerge from the evidentiary facts as an appropriate conclusion. One cannot say from this record that there was that disclosure here.

2. The result, however, would be the same if we were to assume *arguendo,* that there was error of law in the refusal to find the ultimate fact of damage as an inference from the evidentiary facts set out in the decision. The respondent even then is faced with the difficulty that the Commission did not think the inference permissible, and so declined to make it. One has only to read the opinions in *Pennsylvania R. Co.* v. *International Coal Co., supra,* and the cases that have followed it, to see how much the rule of damages is beset by delicate distinctions, how preëminently in applying it there is a call upon the judge to think and act judicially, to use judgment and discretion. Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact. If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it

[2] Memphis Freight Bureau *v.* Chicago & Eastern Illinois Ry. Co., 101 I.C.C. 26; Hylton Flour Mills *v.* Los Angeles & Salt Lake R. Co., 152 I.C.C. 81; Coal Switching Reparation Cases at Chicago, 36 I.C.C. 226; Wharton Steel Co. *v.* Director General, 59 I.C.C. 11; Home Packing & Ice Co. *v.* Director General, 57 I.C.C. 691; Donner Steel Co. *v.* D. L. & W. R. Co., 57 I.C.C. 745; Badger Lumber & Coal Co. *v.* A. T. & S. F. Ry. Co., 136 I.C.C. 350; Iten Biscuit Co. *v.* Chicago, B. & Q. R. Co., 53 I.C.C. 729; Stauffer Chemical Co. *v.* Houston & Brazos Valley Ry. Co., 142 I.C.C. 327. Cf. Gallagher *v.* Pennsylvania R. Co., 160 I.C.C. 563; Brooks Coal Co. *v.* Wabash R. Co., 39 I.C.C. 426; Chicago Bridge & Iron Works *v.* Director General, 85 I.C.C. 99.

to its duty. That is not what happened. The Commission heard the complaint and proceeded to a decision. If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action. *Interstate Commerce Commission* v. *Waste Merchants Ass'n,* 260 U.S. 32, 34; *Wilbur* v. *Kadrie,* 281 U.S. 206, 218; *Interstate Commerce Commission* v. *N. Y., N. H. & H. R. Co.,* 287 U.S. 178, 204.

The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts. *Standard Oil Co.* v. *United States, supra; Alton R. Co.* v. *United States, supra; Procter & Gamble Co.* v. *United States, supra; B. & O. R. Co.* v. *Brady, supra.* A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. *I.C.C.* v. *Waste Merchants Ass'n, supra,* p. 35. There have been like attempts before in other branches of the law of remedies. *In re Pennsylvania Co.,* 137 U.S. 451, 454; *Missouri Pacific Ry. Co.* v. *Fitzgerald,* 160 U.S. 556, 581. They have met with no success.

The judgment of the Court of Appeals should be reversed and the petition for the writ denied.

Reversed.

WISCONSIN ET AL. *v.* ILLINOIS ET AL.*

HEARING ON THE REPORT OF THE SPECIAL MASTER.

No. 5, original. Argued April 17, 1933.—Decided May 22, 1933.

1. The State of Illinois is the primary and responsible defendant in this suit, with full liability for the acts of its instrumentality, the Sanitary District of Chicago. P. 399.
2. The Rivers and Harbors Act of July 3, 1930, with respect to the Illinois Waterway, does not purport to authorize diversion of water from Lake Michigan in excess of the amounts allowed by the former decree in this case, 281 U.S. 696; nor does it conflict in any way with the terms of the decree. P. 402.
3. The operation of the decree and the obligation of the defendants to carry it out have not been affected by the possibility that under a proposed treaty with Canada, and appropriations in the Rivers and Harbors Act of July 3, 1930, works may be erected in the Niagara and St. Croix Rivers to compensate for the diversions of water at Chicago. P. 404.
4. The authority of the Court to enjoin the continued perpetration of the wrong inflicted upon the complainant States by defendants' diversion of waters from Lake Michigan necessarily embraces the authority to require that measures be taken to end conditions within control of the defendant State and which may stand in the way of the execution of the decree. P. 406.
5. In providing other means of sewage disposal for the protection of the health and lives of her citizens as the flow of lake water through the drainage canal is reduced by force of the decree, the State is not exercising her police power, strictly speaking, but is complying with her duty to end the conditions which she has urged, and still urges, as a ground for postponing the relief to which the complainant States have been found entitled. P. 405.
6. In view of defendants' representation that controlling works—part of the plan hereinbefore considered—will not be needed before December 31, 1935, the date set in the decree for reduction of the diversion from the lake to 5,000 cubic feet per second, the Court deems it unnecessary at this time to enlarge the decree by a special requirement as to controlling works. P. 407.

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* Together with No. 8, original, *Michigan* v. *Illinois et al.*, and No. 9, original, *New York* v. *Illinois et al.*

7. It appearing that the Sanitary District can not construct the necessary sewage disposal works in time, for want of financial resources, the decree is enlarged to prescribe in terms: "That the State of Illinois is hereby required to take all necessary steps, including whatever authorizations or requirements, or provisions for the raising, appropriation and application of moneys, may be needed in order to cause and secure the completion of adequate sewage treatment or sewage disposal plants and sewers, together with controlling works to prevent reversals of the Chicago River if such works are necessary, and all other incidental facilities, for the disposition of the sewage of the area embraced within the Sanitary District of Chicago so as to preclude any ground of objection on the part of the State or of any of its municipalities to the reduction of the diversion of the waters of the Great Lakes-St. Lawrence system or watershed to the extent, and at the times and in the manner, provided in this decree." P. 410.
8. The State of Illinois is further required to file in the office of the Clerk of this Court, on or before October 2, 1933, a report to this Court of its action in compliance with this provision. P. 411.
9. The application of the complainant States for the appointment of a commissioner or special officer to execute the decree of April 21, 1930, on behalf of and at the expense of the defendants, is denied. P. 412.
10. Costs, including expenses and compensation of the Special Master, to be taxed against defendants. P. 412.

This is an application by the complainant States to secure execution of the decree of April 21, 1930 (281 U.S. 696), by compelling the construction of the works necessary for treatment and disposal of sewage in order that the amounts of water taken from Lake Michigan through the Chicago Drainage Canal may be reduced from time to time, as the decree requires, without creating a dangerously insanitary condition in and about Chicago. See the earlier opinions, 281 U.S. 179 and 278 U.S. 367.*

* On January 12, 1933, Missouri and the other intervening States of the Mississippi Valley, applied for a modification of the decree of April 21, 1930, and an enlargement of the pending reference, upon the assumption that a change of the situation with respect to their claims upon the water of Lake Michigan for promoting commerce on

Mr. Raymond T. Jackson, with whom *Messrs. J. E. Finnegan,* Attorney General of Wisconsin, *Patrick H. O'Brien,* Attorney General of Michigan, *Harry H. Peterson,* Attorney General of Minnesota, *John W. Bricker,* Attorney General of Ohio, *Gerald K. O'Brien,* Deputy Attorney General of Michigan, *Joseph G. Hirschberg,* Deputy Attorney General of Wisconsin, *Herman L. Ekern,* Special Assistant Attorney General of Wisconsin, and *Herbert H. Naujoks,* Assistant Attorney General of Wisconsin, were on the brief, for complainants.

Mr. Cornelius Lynde, Special Assistant Attorney General of Illinois, with whom *Messrs. Otto Kerner,* Attorney General, and *Truman A. Snell,* Assistant Attorney General, were on the brief, for the State of Illinois, defendant.

Messrs. Joseph B. Fleming and *William Rothmann,* with whom *Messrs. James Hamilton Lewis, Joseph H. Pleck, Frank Johnston, Jr.,* and *Lawrence J. Fenlon* were on the brief, for the Sanitary District of Chicago, defendant.

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

In October, 1932, complainant States, Wisconsin, Minnesota, Ohio and Michigan, applied for the appointment of a commissioner or special officer to execute the decree of April 21, 1930 (281 U.S. 696) on behalf and at the expense of defendants. The applicants complained of the delay in the construction of the works and facilities embraced in the program of the Sanitary District of Chicago for the treatment and disposition of sewage so as to obviate danger to the health of the inhabitants of the District

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the Illinois Waterway had been brought about by the passage of the Rivers and Harbors Act of 1930. The application was denied January 16, 1933, 288 U.S. 587.

on the reduction, as the decree provides, of the diversion of water from Lake Michigan through the Drainage Canal. The Court directed defendants to show cause why they have not taken appropriate steps to effect compliance with the requirements of the decree.

After hearing upon the return to the rule, the Court appointed Edward F. McClennen as Special Master to make summary inquiry and to report to the Court (1) as to the causes of the delay in obtaining approval by the Secretary of War of the construction of controlling works in the Chicago River and the steps which should now be taken to secure such approval and prompt construction; (2) as to the causes of the delay in providing for the construction of the Southwest Side Treatment Works and the steps which should now be taken for that purpose or, in case of a change in site, for the construction of an adequate substitute; and (3) as to the financial measures on the part of the Sanitary District or the State of Illinois which are reasonable and necessary in order to carry out the decree of the Court. 287 U.S. 578. The Master has proceeded accordingly, and, after full hearing and careful review of the evidence received by him, has submitted his report and recommendations, upon which the parties have been heard.

The Master has found that the causes of the delay in obtaining approval of the construction of controlling works in the Chicago River "are a total and inexcusable failure of the defendants to make an application to the Secretary of War for such approval," and that the causes of the delay in providing for the construction of the Southwest Side Treatment Works "are (1) an inexcusable and planned postponement of the beginning of construction of these Works to January 1, 1935, which left an inadequate time for their completion before December 31, 1938, at the rate of progress expected or to be expected under the methods pursued by the Sanitary District, and

(2) the failure to proceed to a definite decision as to a site and to the acquisition of the site so chosen, and (3) the failure to proceed with reasonable diligence to prepare designs, plans, and specifications for the Works at this site or on the site of the West Side Works." The evidence taken by the Master supports these findings.

With respect to the steps which should now be taken to secure completion of the works above mentioned, the Master finds that, because of its financial situation, the defendant Sanitary District is at present powerless to contract " for the design or for the construction of controlling works, or for the construction in a large way of the Southwest Side Treatment Works." This is found to be due to the unmarketability of its bonds and its inability to obtain the needed moneys through levy of taxes or assessments. The Master finds that " in the conditions which now exist, there is no reasonable financial measure which the Sanitary District can take, which it is failing to take "; and that " no way has come to light, whereby this decree can be performed under tolerable conditions, unless the State of Illinois meets its responsibility and provides the money." The Master recommends that the decree be enlarged so as to require the State of Illinois to provide the moneys necessary and to take the appropriate steps to secure the completion of adequate facilities for the treatment and disposition of sewage in order to carry out the decree of this Court.

First. The State of Illinois raises questions as to its relation to this suit and its obligation under the decree. Counsel for the State present the view that the Sanitary District is the " active defendant," and that, while no objection has been, or is made, to the joining of the State as a party defendant, there has been no determination in this suit as to the exact nature and extent of the " legal liability of the State of Illinois for the acts of the Sanitary District," and that this Court " should not now assume the

existence of a legal liability on the part of the State." This argument is untenable.

In this controversy between States, the State of Illinois by virtue of its status and authority as a State is the primary and responsible defendant. While the Sanitary District is the immediate instrumentality of the wrong found to have been committed against the complainant States by the diversion of water from Lake Michigan, that instrumentality was created and has continuously been maintained by the State of Illinois. Every act of the Sanitary District in establishing and continuing the diversion has derived its authority and sanction from the action of the State, and is directly chargeable to the State. The adjudication as to the right of the complainant States to have the diversion reduced as provided in the decree is an adjudication not merely as against the Sanitary District but as against the State as the defendant responsible under the Federal Constitution to its sister States for the acts which its creature and agent, the Sanitary District, has committed under the State's direction.

This conclusion would be inevitable even if the Drainage Canal had been established solely as a project for local benefit, that is, for the sanitation of the area immediately concerned and thus to meet the needs of the inhabitants of the great metropolis within that area. But while the establishment and use of the Drainage Canal were primarily, as heretofore found, for the purpose of sanitation, the State did not authorize it with that purpose exclusively in view, but the canal project from its first initiation has been promoted by the State of Illinois to provide a waterway for general state purposes and the advantage of the people of the State at large. The Act of the state legislature of 1836 (Illinois Laws, 1834–37, p. 118), contemplated a canal to insure navigation and to be supplied with water from Lake Michigan and such other sources as the canal commissioner should think proper.

By the Act of 1861 (Illinois Laws, 1861, p. 277), the legislature provided for improvement in the canal and a larger flow of water from Lake Michigan. The menace from the pollution of the Chicago River through the introduction of sewage made it imperative to provide plans for purification, and while a waterway of such dimensions as to furnish ample dilution was regarded as the most economical plan, the advantages to the State of such a waterway as a highway of commerce were also in view. *Wisconsin* v. *Illinois,* 278 U.S. 367, 401–403, 419. When the provision was made in 1889 (Illinois Laws, 1889, p. 125) for the creation of sanitary districts to provide for drainage and to improve navigable waterways, the legislature, by joint resolution (Illinois Laws, 1889, p. 376), set forth "the policy of the State of Illinois to procure the construction of a waterway of the greatest practicable depth and usefulness for navigation from Lake Michigan by the Des Plaines and Illinois Rivers to the Mississippi River."

In this suit, the State of Illinois has defended from the beginning upon the ground that diversion was essential with reference not only to the needs of sanitation but also for a continuous waterway from the Lake to the Gulf. *Wisconsin* v. *Illinois, supra,* pp. 388, 396. But the Court found this contention unavailing and that the existing diversion was unlawful. The Court found no basis for the argument that the diversion had been authorized by the Congress. *Id.,* pp. 416–420.

After a full examination of the facts, and considering the questions presented in all their aspects, the Court deemed it to be its duty "by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis and thus to restore the navigable capacity of Lake Michigan to its normal level." *Id.,* p. 420. The "restoration of the just rights of the complainants was made gradual rather than immediate in order to avoid so far as might be possible pestilence and ruin with

which the defendants have done much to confront themselves." *Wisconsin* v. *Illinois,* 281 U.S. 179, 196. The final decree fixed the time and amount of the reduction of the diversion with this object in view. *Id.* That decree in terms bound the State of Illinois, no less than its creature, the Sanitary District. In delivering the opinion of the Court, Mr. Justice Holmes summed up the matter by saying: " It already has been decided that the defendants are doing a wrong to the complainants and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defences upon difficulties that it has itself created. If its constitution stands in the way of prompt action it must amend it or yield to an authority that is paramount to the State." *Id.,* p. 197.

Second. The State of Illinois and the Sanitary District contend that the provision of the Rivers and Harbors Act of July 3, 1930 (c. 847, 46 Stat. 918, 929) with respect to the Illinois waterway is an exercise of the paramount authority of the Congress and requires modification of the decree. That provision—an enactment made after the decree and in the light of its terms—is as follows:

" Illinois River, Illinois, in accordance with the report of the Chief of Engineers, submitted in Senate Document Numbered 126, Seventy-first Congress, second session, and subject to the conditions set forth in his report in said document, but the said project shall be so constructed as to require the smallest flow of water with which said project can be practically accomplished, in the development of a commercially useful waterway: *Provided,* That there is hereby authorized to be appropriated for this project a sum not to exceed $7,500,000: *Provided further,* That the water authorized at Lockport, Illinois, by the decree of the Supreme Court of the United States, rendered

April 21, 1930, and reported in volume 281, United States Reports, in Cases Numbered 7, 11, and 12 Original—October term, 1929, of Wisconsin and others against Illinois, and others, and Michigan against Illinois and others, and New York against Illinois and others, according to the opinion of the court in the cases reported as Wisconsin against Illinois, in volume 281, United States, page 179, is hereby authorized to be used for the navigation of said waterway: *Provided further,* That as soon as practicable after the Illinois waterway shall have been completed in accordance with this Act, the Secretary of War shall cause a study of the amount of water that will be required as an annual average flow to meet the needs of a commercially useful waterway as defined in said Senate document, and shall, on or before January 31, 1938, report to the Congress the results of such study with his recommendations as to the minimum amount of such flow that will be required annually to meet the needs of such waterway and that will not substantially injure the existing navigation on the Great Lakes to the end that Congress may take such action as it may deem advisable."

The text of the statute is a complete answer to defendants' contention. So far as the Congress purports to authorize a diversion of water from Lake Michigan for the navigation of the waterway, the authorization is explicitly limited to the amount allowed by the Court's decree. The Congress expressly withholds further action until there is opportunity to consider the results of the study which the Secretary of War is required to make. Meanwhile, and that is sufficient for the present purpose, nothing has been determined or enacted in any way conflicting with the terms of the decree. It is urged that the Act of Congress discloses an intention to control the extent of the diversion in aid of the waterway. We find in the provision no evidence of any controlling purpose. Intention and future action remain a matter of conjecture. Whatever its

intention or authority, the Congress has taken no action which affects the operation of the decree but on the contrary has adopted the amount fixed in the decree as the limit of permitted withdrawal.

Third. Similar considerations apply to the argument based on the provisions of the Rivers and Harbors Act of July 3, 1930,[1] and of the pending Treaty with Canada as to the Great Lakes-St. Lawrence Waterway, in relation to compensation works through which, it is urged, the restoration of lake levels may be effected. The reference is to the construction of compensation works in the Niagara and St. Clair rivers. Counsel for Illinois say that " upon the adoption of this Treaty the appropriation made for the projects authorized in the Rivers and Harbors Bill of 1930, including compensation works, by the War Department Appropriation Bill of 1931, becomes immediately available for carrying out this Treaty requirement," and that the Court should assume that, either under the Treaty or under the Act of 1930, compensation works with the desired result will be installed. But it is apparent that there is no basis for the suggested assumption. It would be manifestly inappropriate to discuss the provisions of the pending Treaty, bearing upon the diversion of water from Lake Michigan, as the Treaty is not in effect. And there is no ground for concluding that the compensation works to which reference is made could be installed in the absence of treaty.[2] What, if anything, will be done in the establishment of compensation works is undetermined.

The decisive point is that nothing has been done which affects the operation of the decree and that the obligation of defendants to carry out its terms is in full force.

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[1] Act of July 3, 1930 (c. 847, 46 Stat. 930); House Doc. No. 253, 70th Cong., 1st Sess.

[2] See House Doc. No. 253, 70th Cong., 1st Sess., pp. 82, 84; Report of Special Board of Engineers, pars. 164, 166, 182.

Fourth. Resisting the Master's recommendations for the enlargement of the decree, so as to insure compliance with its provisions, the State of Illinois contends that the terms of the decree have not yet been violated; that the decree is confined to relief through injunction against the continuance of the diversion beyond specified amounts at stated times. Counsel for the State argue that measures for the protection of the lives and health of its citizens are exclusively within the police power of the State, and that no obligation to exercise that power is imposed upon the State by the Federal Constitution.

The argument ignores the fact that the question does not concern the ordinary exercise of the police power of the State, but rather concerns the duty of the State to take measures to end the condition which it has urged, and still urges, as a ground for the postponement of the relief to which the complainant States have been found to be entitled. The wrong has been inflicted and is a continuing one. The decision was that this wrong must be stopped. It was not stopped at once merely because of the plight of the residents of Chicago and the adjacent area, in whose interest time was sought to provide works and facilities for sewage disposal. The Court fittingly recognized this exigency. The Court directed a careful inquiry in order to ascertain the time necessary to provide adequate protection. The duty to supply that protection was, and is, the duty of the State. The Sanitary District, acting under the authority of the State—as its instrumentality—presented its program for the construction of sewage works. That program was thoroughly examined and was made the subject of report to the Court. After full hearing the Court fixed the times and extent of diminution of the diversion in the light of the time found to be necessary for carrying out that program. The reduction of the diversion was graduated accordingly. The decree required reports as to the progress of construction. The

Court retained jurisdiction of the cause and the decree provided that any of the parties complainants or defendants, might "apply to the Court for such action or relief, either with respect to the time to be allowed for the construction, or the progress of construction, or the methods of operation, of any of said sewage treatment plants, or with respect to the diversion of water from Lake Michigan, as may be deemed to be appropriate." 281 U.S. p. 698. The present application of complainants is based upon this provision of the decree and upon the charge that defendants have unwarrantably delayed the installation of the works which they sought an opportunity to supply before the injunction of the diversion should become effective.

In this aspect of the case, there is no room for the contention that the defendant State, if it were so disposed, by failing to provide protection for its people and by trusting to what it terms "the same compelling humanitarian necessity which originally induced the Court to postpone the final stoppage of diversion," could, in effect and according to its pleasure, by reason of the inability of the Court to impose specific requirements as to needed measures, delay or prevent the enforcement of the decree. The Court did not exhaust its power by the provisions enjoining the diversion according to the times and amounts prescribed. The Court omitted further specific requirements not because of want of power but in the expectation that the diligence of defendants in carrying out the program they had submitted to the Court would give no occasion for such specifications. In deciding this controversy between States, the authority of the Court to enjoin the continued perpetration of the wrong inflicted upon complainants, necessarily embraces the authority to require measures to be taken to end conditions, within the control of defendant State, which may stand in the way of the execution of the decree.

Fifth. We pass from questions of power to the consideration of the requirement that is now reasonable and necessary.

The Master was directed to report, in particular, with respect to the controlling works in the Chicago River and the Southwest Side Treatment Works, as these works appeared to be pivotal in defendants' program. The controlling works were proposed to avoid the danger of the pollution of the water supply of the City of Chicago by reversals of the Chicago River in times of storm. Because of that danger, it was not deemed to be practicable to direct a reduction of the diversion below the initial reduction to an annual average of 6500 cubic feet per second (required to be made by July 1, 1930) pending the completion of the sewage treatment works and without controlling works. Two years were found to be an adequate time for the installation of controlling works in the river after authorization by the Secretary of War. With this fact in view, the decree provided that unless good cause were shown to the contrary, the diversion should be reduced to 5000 cubic feet per second, in addition to domestic pumpage, on and after December 31, 1935. 281 U.S. pp. 198, 696. Not only were these controlling works embraced in defendants' construction program, but they have been set forth as a part of that program in all of the semi-annual reports filed by the Sanitary District under the decree. Despite this, it appears from the findings of the Master that no appropriate application and submission of plans for such works have been made to the Secretary of War, and the Master finds this delay to be inexcusable. He finds that it was not due to bad faith and that there was no intention to violate the decree. It is unnecessary to review the circumstances.

Defendants now assert, upon the conclusions reached by the Sanitary District engineers, that controlling works will not be needed so long as the diversion does not fall

below 5000 cubic feet per second (the limit fixed for December 31, 1935), and that if they are needed at a later time, appropriate proceedings for their installation will be taken. Formal representation is made to the Court as follows:

"The Sanitary District is prepared, upon the completion of the intercepting sewers along the main channel of the Chicago River adjacent to Lake Michigan, to accept the reduction to 5000 c.f.s. without controlling works. Upon this determination by the Sanitary District involving a conclusion on an engineering and sanitation problem which is not challenged by the complaining States, this Court has been relieved of responsibility and the grounds for the apprehension of the former Special Master have been removed. If the provision of the decree, directing a reduction in diversion to 1500 c.f.s. at the end of 1938, is not changed as a result of the study to be made by the Chief of Engineers under the Rivers and Harbors Act of July 3, 1930, and if it appears that controlling works are necessary to keep Lake Michigan free of pollution upon the completion of all sewage treatment projects, with a diversion of 1500 c.f.s., controlling works will be designed and constructed, if the War Department approves, to meet the reduction. Compulsion will be unnecessary."

The State of Illinois "joins with and affirms" the contention submitted by the Sanitary District with respect to these works, and in its separate brief states that "the defendants will undoubtedly be prepared under existing circumstances to accept the reduction called for by the original decree to 5000 c.f.s. at the end of 1935." In view of these representations, the Court does not deem it necessary at this time to enlarge the decree by a special requirement as to controlling works.

Upon the hearing preceding the entry of the decree, the vast plant known as the Southwest Side Treatment Works

was considered by all parties to be the critical, or controlling, factor in the sewage treatment program, as it was found to require the longest time to construct. The project involved the acquisition of site, preliminary studies, the designing of the plant, the awarding of contracts and the physical construction. The time necessary for completion was in sharp controversy. The former Special Master reported to the Court that a reasonable time for this purpose, assuming available funds, and thus for carrying out the entire program for sewage treatment, would be nine calendar years from January 1, 1930, that is, until December 31, 1938. On this basis, considering the time allowance to be as liberal as the evidence permitted, the Court fixed December 31, 1938, unless good cause were shown to the contrary, for the reduction of the diversion to the final limit stated in the decree. 281 U.S. pp. 198, 199, 697. Now it appears that, after more than three years, there has been no definite selection of site and that the contemplated proceedings for the construction of these works have not been taken.

The Master finds that the failure to purchase or condemn a site has not delayed construction because the Sanitary District has altered its plans. The Sanitary District has brought forward new methods which it asserts to be more economical both for construction and for operation. It appears that, without definite action, it has been virtually decided to place the works wholly on the presently owned site on which other works, known as the West Side Works, are located. The Master finds that it is " only by the exercise of unusual diligence that the time already lost to progress on the Southwest Side Treatment Works can be counteracted and the Works completed before December 31, 1938." But he also finds that " they can be completed by that date if the work of design and construction begins at once and is pressed vigorously." For our present purpose we take this last mentioned find-

ing as presenting the controlling fact, and we shall not attempt to review the charges and excuses as to the delay.

The finding of the Master that it is still possible to complete the sewage treatment works, within the time fixed by the decree for the ultimate limit of the diversion, finds support in the statements now submitted by the defendants. On the hearing before the Master the Sanitary District took the position that "ample time remains for this construction assuming that funds will be available" and "that a finding that the District will not obtain the necessary funds or will not construct these Works by December 31, 1938, is premature and unwarranted." And in its present argument before this Court the Sanitary District states:

"No delay has occurred which will affect the ultimate completion of the works before the end of 1938, except the delay caused by a lack of money. The evidence does not disclose that there need be any apprehension on the part of this Court as to the diligence it may expect from the Sanitary District. On the contrary, the testimony to which we have referred indicates that this Court may anticipate that the Sanitary District will act with all possible speed in the performance of work necessary to effect compliance with the decree."

The question, then, comes down to the procuring of the money necessary to effect the prompt completion of the sewage treatment works and the complementary facilities. To provide the needed money is the special responsibility of the State of Illinois. For the present halting of its work the Sanitary District is not responsible. It appears to be virtually at the end of its resources. The Master states that, due to its financial situation, the Sanitary District cannot go forward in any adequate manner with either contracts or construction. We find that the Master's conclusion, that there is no way by which the

decree can be performed under tolerable conditions "unless the State of Illinois meets its responsibility and provides the money," is abundantly supported by the record.

That responsibility the State should meet. Despite existing economic difficulties, the State has adequate resources, and we find it impossible to conclude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable protection to its people to the end that its obligation to its sister States, as adjudged by this Court, shall be properly discharged.

We do not undertake to prescribe the particular measures to be taken or to specify the works and facilities to be provided. But in view of the delay that has occurred and the importance of prompt action, and in order that there may be no ground for misapprehension as to the import of the decree or the duty of the defendant State, we think that complainant States are entitled to have the decree enlarged by the addition of the following provision:

"That the State of Illinois is hereby required to take all necessary steps, including whatever authorizations or requirements, or provisions for the raising, appropriation and application of moneys, may be needed in order to cause and secure the completion of adequate sewage treatment or sewage disposal plants and sewers, together with controlling works to prevent reversals of the Chicago River if such works are necessary, and all other incidental facilities, for the disposition of the sewage of the area embraced within the Sanitary District of Chicago so as to preclude any ground of objection on the part of the State or of any of its municipalities to the reduction of the diversion of the waters of the Great Lakes-St. Lawrence system or watershed to the extent, and at the times and in the manner, provided in this decree.

"And the State of Illinois is hereby required to file in the office of the Clerk of this Court, on or before October

2, 1933, a report to this Court of its action in compliance with this provision."

The decree will be enlarged accordingly and, except as thus provided, the application of complainant States is denied. Costs, including the expenses incurred by the Special Master and his compensation, to be fixed by the Court, shall be taxable against defendants. 281 U.S. p. 200.

It is so ordered.

SOUTH CAROLINA *v.* BAILEY.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 685. Argued April 21, 1933.—Decided May 22, 1933.

1. The question whether a person arrested for interstate rendition should be delivered to the demanding State or should be released upon the ground that by clear evidence he has shown his absence from that State when the crime was committed and consequently that he is not a fugitive from justice, is a question of federal right which, when raised in a court of the arresting State, should be decided under Art. IV, § 2, par. 2 of the Constitution and § 5278 Rev. Stat., 18 U.S.C. 662, as construed by this Court. P. 419.
2. A person who has been arrested in one State under Constitution, Art. IV, § 2, par. 2, Rev. Stat., § 5278, 18 U.S.C. 662, as a fugitive from justice and who seeks discharge by *habeas corpus* upon the ground that he was not in the demanding State at the time of the alleged crime, has the burden of proving the alibi beyond a reasonable doubt; if the evidence is conflicting, he should not be released. P. 420.
3. The *habeas corpus* proceeding is in no sense a criminal trial; and if the evidence of alibi is suspicious, the judge may well require the prisoner to submit to examination also and to show what effort has been made to secure the presence of important witnesses. P. 418.

203 N.C. 362; 166 S.E. 165, reversed.

CERTIORARI * to review the affirmance of a judgment of discharge, in *habeas corpus*.

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* See Table of Cases Reported in this volume.

Mr. William C. Wolfe, with whom *Messrs. John M. Daniel,* Attorney General of South Carolina, *J. Ivey Humphrey* and *J. Ingraham Wilson,* Assistant Attorneys General, were on the brief, for petitioner.

Section 2, par. 2, Art IV, of the Constitution governs the States and is to be obeyed by every citizen and officer. *State* v. *Anderson,* 1 Hill (S.C.) 228. The Act of Congress, 18 U.S.C., c. 20, § 662, defines the rights and powers of the States in relation to extradition. *Dennison* v. *Christian,* 101 N.W. 1045; *Munsey* v. *Clough,* 196 U.S. 364.

Evidence of an alibi will not justify discharge, where there is some evidence *contra.* The question of guilt or innocence can not be tried on *habeas corpus. Hyatt* v. *New York,* 188 U.S. 710.

Mr. Clyde R. Hoey for respondent.

Extradition of a citizen from one State to another must be upon the ground that he is a fugitive from justice in the demanding State. U.S. Const., Art. IV, § 2, par. 2.

When *habeas corpus* is sued out, the demanding State must satisfy the tribunal that the relator is a fugitive from its justice. *Innes* v. *Tobin,* 240 U.S. 127; *Biddinger* v. *Police Commissioner,* 245 U. S. 135; *Illinois ex rel. McNichols* v. *Pease,* 207 U.S. 100.

Hyatt v. *N.Y. ex rel. Corkran,* 186 U.S. 692, holds clearly that one who was not within a State when the crime was committed, can not be deemed a fugitive within the meaning of Rev. Stat., § 5278; also that an extradition warrant issued by the Governor is but *prima facie* sufficient. *Munsey* v. *Clough,* 196 U. S. 364, distinguished. See 196 N.C. 662; 146 S.E. 599, 601; *In re Hubbard,* 201 N.C. 472; 160 S.E. 569.

Findings of fact by the judge, if there is any competent evidence upon which to base them, are conclusive. *In re Bailey,* 203 N.C. 363; 166 S.E. 166, 167; *Oteiza y Cortes* v. *Jacobus,* 136 U.S. 338.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Sunday night, May 1st, 1932, (probably about 10:30 Eastern Time) Hunt, a police officer, was murdered on a well-lighted street in Greenville, South Carolina. An affidavit by policeman Corea, May 5th, before a local magistrate charged Ray Bailey, respondent here, with the crime. As provided by the federal statute, demand was made upon the Governor of North Carolina for delivery of the accused as a fugitive from justice. Bramlett and Hammond were designated as agents to bring him back.

This requisition was promptly honored; and a warrant issued directing officers in North Carolina to arrest respondent, "Afford him such opportunity to sue out a writ of habeas corpus as is prescribed by the laws of this State and to thereafter deliver him into the custody of the said C. R. Bramlett and L. W. Hammond to be taken back to the said State, from which he fled." June 7th, acting as commanded, the sheriff of Jackson County took him into custody. He at once obtained a writ of habeas corpus from the local Superior Court. His petition therefor alleged illegality of custody " for that the defendant is charged with an offense in the State of South Carolina, to-wit, the murder of A. B. Hunt, on or about the 1st day of May, 1932, when, at which time, this affiant was in the State of North Carolina, and was not in the State of South Carolina."

The sheriff in his return to the writ alleged that Bailey " is being legally and lawfully held in custody after having been arrested on a warrant of extradition issued by the Governor of North Carolina on the 9th day of May, 1932, upon requisition for same by the Governor of South Carolina, on and for a charge of murder alleged to have been committed in the State of South Carolina, said war-

rant of extradition having been duly executed by me on the said Ray Bailey, alias Ray Keith, on the 7th day of June, 1932."

The Judge of the Superior Court sitting at Sylva, N.C., heard the cause June 27th, 1932. A number of affidavits were received without objection, and thirty or more witnesses were examined in open court. At the conclusion of the testimony the Judge announced:

" Gentlemen, I think there has been an issue raised here, I don't think I have a right to pass on, that of identity, and at the same time I don't think it would be fair to the defendant to send him to South Carolina to stand a trial, as it would be very expensive to him and his folks; under the testimony I don't think there would be a jury anywhere that would ever find him guilty beyond a reasonable doubt. I shall, therefore, discharge him under the writ and let him go."

This formal judgment followed:

" 1. That Ray Bailey (alias Ray Keith) is a citizen and resident of the State of North Carolina.

" 2. That he is not a fugitive from justice from the State of South Carolina, and was not present at the time of the commission of the alleged crime at Greenville, South Carolina.

" 3. That the State of South Carolina has failed to show probable cause for holding the said Ray Bailey in custody, or that he committed the alleged crime—the murder of A. B. Hunt, and has failed to produce sufficient evidence to warrant the Court in refusing the Writ, and the Court finding from all the evidence introduced in this cause that the petitioner is entitled to the relief sought in his petition and the Writ of Habeas Corpus; . . .

" It is, therefore, upon motion . . . considered, ordered, decreed and adjudged by the Court that the petition and Writ be allowed and that the defendant be and he is hereby released from custody."

The Supreme Court of North Carolina reviewed the cause upon certiorari under title —" In the matter of Ray Bailey alias Ray Keith." It affirmed the challenged judgment and, among other things, said [203 N.C. 362; 166 S.E. 165]—

" In the case at bar a controversy of fact arose between the contending parties, that is the demanding state and the prisoner, as to whether the prisoner was in the demanding state at the time the alleged offense was committed. The Writ of Habeas Corpus was created and fashioned for the express purpose of determining such controverted fact. The statute and public policy require that such fact be determined in a summary manner. Doubtless in given cases different minds would work out diverse conclusions, but after all it is perhaps wise that the determination of the ultimate fact should be lodged in the sound legal discretion of an impartial judge, commissioned by the law of the land and the inherent sense of the responsibility of his high office ' to do what to justice appertains.' He hears the witnesses and observes their mental leanings or bias toward the question involved. He senses the atmosphere of the case. Moreover it would doubtless be a dangerous experiment to undertake by a judicial decree of an appellate court to prescribe a legal strait-jacket for such matters.

" Exercising the power delegated by statute and supported in principle by the decisions of this state, the hearing judge found certain facts and set them forth in his judgment. The last inquiry in the solution of the appeal is: What is the effect of the findings of fact set out in the judgment? Whatever may be the variable conclusions reached by other courts, that inquiry is settled in North Carolina. The law is thus stated: ' The findings of fact made by the judge of the Superior Court, found as they are upon competent evidence, are also conclusive on us,

and we must therefore base our judgment upon his findings, which amply sustain his order.' *In re Hamilton,* 182 N.C. 44, 108 S.E. 385. See also *Clegg* v. *Clegg,* 186 N.C. 28, 118 S.E. 824; *In re Hayes,* 200 N.C. 133, 156 S.E. 791."

The matter is here on certiorari.

No question is raised concerning the form or adequacy of the writ issued by the Governor of North Carolina.

Prima facie Bailey was in lawful custody and upon him rested the burden of overcoming this presumption by proof. *McNichols* v. *Pease,* 207 U.S. 100, 109.

This he undertook to do. His own affidavit positively asserted his presence in North Carolina when the alleged crime occurred. He narrated his movements, all within that State, from Sunday morning, May 1st, when he was at Asheville (north of Greenville, S.C., sixty-one miles over a well-paved highway) until 5:30 o'clock Monday morning when he entered the hospital at Sylva, N.C., fifty miles southwest of Asheville (a paved highway connects these towns) under an assumed name. A number of affidavits and the testimony of several witnesses given in open court tend to support his narrative.

He claimed that he left Asheville about dark Sunday night, May 1st, in a car with a friend with whom he had been drinking and gambling during the afternoon; both were under the influence of alcohol; they were going towards Bailey's home in Yancey County; at a point on the roadside some twenty-five miles north of Asheville, between ten and eleven o'clock, P.M. (Central time), this friend, after shooting him, left him on the roadside; shortly thereafter two strangers appeared, put him in their car and carried him to his brother's house in Asheville; from there an ambulance conveyed him to the hospital, fifty miles away, where he gave an assumed name.

The doctors found two bullets had passed through his body; also that a bullet had wounded his right hand at the base of the thumb.

Although present in court at the hearing Bailey did not take the stand, and several persons who probably could have thrown much light upon the issue were neither called nor accounted for. Among these were the respondent's friend who shot him, the brother to whose house at Asheville respondent was taken, two women said to have been there, and the doctor who there dressed his wounds. Other important witnesses made *ex parte* affidavits.

Such a tale should have been subjected to rigid scrutiny. The hearing was in no sense a criminal trial and the judge would have been well advised if he had demanded that the prisoner present himself for examination; also should show what effort had been made to secure the presence of important witnesses in order that they might be questioned. Viewed as a whole the evidence for respondent leaves much to be desired—certainly it is unsatisfactory. If true, it supports the conclusions of the Judge that Bailey had not fled from the justice of South Carolina.

On the other hand, the demanding State presented three witnesses—police officers Corea and Singleton and a merchant—residents of Greenville, S.C., who identified Bailey and positively asserted that in their presence he shot officer Hunt about 10:30 Sunday night, May 1st. They had never seen Bailey until he suddenly appeared and commenced to shoot. The officers gave a circumstantial account of the homicide, declared they were within a few feet of the assailant, shot at him nine times after he had fatally wounded Hunt and thought they wounded him in the body and right hand. They further said that during the melee an automobile stopped nearby and its occupants shot at them many times. The culprit finally entered and escaped in that car. The whole affray continued for only a very short time—a few moments.

While some circumstances tend to support these statements, they are not free from doubt. If true, Bailey was a fugitive.

The record presents an irreconcilable conflict of evidence. It is not possible to say with certainty where the truth lies.

The rights of the parties depend upon the proper construction and application of Art. IV, § 2, par. 2, of the Federal Constitution [1] and § 5278, Rev. Stat. (U.S. Code, Tit. 18, § 662)[2] derived from the Act of February 12, 1793.

The demanding State asserted a right to the custody of the respondent under the Federal Constitution and statute. He claimed that these impliedly forbade his surrender since the evidence made it clear that he was beyond the limits of South Carolina at the time of the homicide and, therefore, was not a fugitive from the justice of that State.

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[1] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[2] Rev. Stats. § 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory.

These questions of federal right were properly submitted for consideration by the state court upon the return to the writ of habeas corpus. And it was the duty of that court to administer the law prescribed by the Constitution and statute of the United States, as construed by this Court. *Second Employers' Liability Cases,* 223 U.S. 1, 55; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin,* 241 U.S. 319, 326.

In effect the matter for determination was whether the accused appeared to be held contrary to the Federal Constitution and laws. The ultimate question of his guilt or innocence of the charge of murder preferred against him did not arise—the sole point for decision related to his absence from the State of South Carolina at the time of the crime. It was wholly beyond the province of the judge to speculate, as he seems to have done, concerning the probable outcome of any trial which might follow rendition to the demanding State. The circumstances require this Court to search the record and determine for ourselves whether upon the facts presented the courts below reached the proper conclusion.

The applicable provision of the Federal Constitution and of the statute intended to implement it have often been considered here. Some of the more important cases are collected in the margin.[3]

In *Munsey* v. *Clough,* 196 U.S. 364, 374, through Mr. Justice Peckham, this Court said—"When it is conceded, or when it is so conclusively proved, that no question can be made that the person was not within the demanding State when the crime is said to have been committed, and

[3] *Kentucky* v. *Dennison,* 24 How. 66; *Ex parte Reggel,* 114 U.S. 642; *Roberts* v. *Reilly,* 116 U.S. 80; *Hyatt* v. *Corkran,* 188 U.S. 691; *Munsey* v. *Clough,* 196 U.S. 364; *Appleyard* v. *Massachusetts,* 203 U.S. 222; *McNichols* v. *Pease,* 207 U.S. 100; *Drew* v. *Thaw,* 235 U.S. 432; *Innes* v. *Tobin,* 240 U.S. 127; *Biddinger* v. *Commissioner of Police,* 245 U.S. 128.

his arrest is sought on the ground only of a constructive presence at that time, in the demanding State, then the court will discharge the defendant. *Hyatt* v. *Corkran,* 188 U.S. 691, affirming the judgment of the New York Court of Appeals, 172 N.Y. 176; 64 N.E. 825. But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as *habeas corpus* is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

Speaking for the Court in *McNichols* v. *Pease,* 207 U.S. 100, 112, Mr. Justice Harlan said—"When a person is held in custody as a fugitive from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States. We may repeat the thought expressed in Appleyard's case, above cited, that a faithful, vigorous enforcement of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the States, and that 'while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State.'"

Considering the Constitution and statute and the declarations of this Court, we may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South

Carolina at the time of the homicide. Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed and, consequently, could not be a fugitive from her justice.

The record discloses only a conflict of evidence; the requirement which we have indicated has not been met; and the challenged judgment must be reversed.

The cause will be remanded to the Supreme Court of North Carolina for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE BUTLER are of the opinion that the evidence, while possibly sufficient to sustain, does not require a finding that there is probable cause to believe that the accused was a fugitive from South Carolina, and therefore this court is not warranted in reversing the judgment of the Supreme Court of North Carolina.

UNITED STATES EX REL. VOLPE *v.* SMITH, DIRECTOR OF IMMIGRATION.

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

No. 724. Argued May 10, 1933.—Decided May 22, 1933.

1. The crime of counterfeiting obligations of the United States involves moral turpitude. P. 423.
2. In § 19 of the Immigration Act of February 5, 1917, the provision that any alien who was convicted, or who admits the commission, "prior to entry," of a crime involving moral turpitude shall be deported, applies to an alien who committed the crime in this country while lawfully here, and who afterwards went abroad and returned. P. 424.
3. The second coming of an alien from a foreign country into the United States is an entry. P. 425.

4. The fact that an immigration officer to whose custody an alien was remanded for deportation, in a *habeas corpus* proceeding, had been moved to another station, *held* not to have caused the proceeding to abate, it appearing that he remained attached to the Department of Labor, presumably with authority to execute the order of deportation, and the question of abatement not having been raised until long after his transfer and after the case had reached this Court. P. 426.

62 F. (2d) 808, affirmed.

CERTIORARI * to review the affirmance of a judgment dismissing a proceeding in *habeas corpus*.

Mr. John Elliott Byrne, with whom *Mr. Frank R. Reid* was on the brief, for petitioner.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher* and *Messrs. W. Marvin Smith* and *Albert E. Reitzel* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In 1906, when sixteen years old, petitioner, Volpe, entered the United States from Italy as an alien. He has resided here continuously since that time, but has remained an alien.

In 1925 he pleaded guilty and was imprisoned under a charge of counterfeiting obligations of the United States—plainly a crime involving moral turpitude.

During June, 1928, without a passport, he made a brief visit to Cuba. Returning, he landed from an airplane at Key West, Florida, and secured admission by Immigrant Inspector Phillips.

December 15, 1930, Volpe was taken into custody under a warrant issued by the Secretary of Labor which charged him with being unlawfully in this country because "he has been convicted of, or admits the commission of a

* See Table of Cases Reported in this volume.

felony, or other crime or misdemeanor, involving moral turpitude, to-wit: possessing and passing counterfeit U.S. War Savings Stamps, prior to his entry into the United States."

Following a hearing, a warrant of deportation issued and he was taken into custody. Claiming unlawful detention, he instituted habeas corpus proceedings in the District Court of the United States at Chicago. That court dismissed the petition and remanded him to the custody of S. D. Smith, District Director of Immigration at Chicago, for deportation. The Circuit Court of Appeals affirmed the judgment [62 F. (2d) 808] and the matter is here by certiorari.

The only substantial point which we need consider is this:—Was the petitioner subject to deportation under the provisions of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 875, 889, 890, (U.S.C., Title 8, §§ 136, 155, 173) because he reëntered the United States from a foreign country after conviction, during permitted residence in the United States, of a crime committed therein which involved moral turpitude? Relevant provisions of the Act of 1917 are in the margin.*

* Sec. 1. That the word "alien" wherever used in this Act shall include any person not a native-born or naturalized citizen of the United States; . . .

Sec. 3. That the following classes of aliens shall be excluded from admission into the United States: . . . persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; . . .

Sec. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; . . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude,

Upon this question federal courts have reached diverse views. The cases are cited in the opinion announced below in the present cause.

We accept the view that the word "entry" in the provision of § 19 which directs that "any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported," includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one. And this requires affirmance of the challenged judgment.

The power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question. *Turner* v. *Williams,* 194 U.S. 279; *Low Wah Suey* v. *Backus,* 225 U.S. 460, 468; *Bugajewitz* v. *Adams,* 228 U.S. 585, 591.

That the second coming of an alien from a foreign country into the United States is an entry within the usual acceptation of that word is clear enough from *Lewis* v. *Frick,* 233 U.S. 291; *Claussen* v. *Day,* 279 U.S. 398.

An examination of the Immigration Act of 1917, we think, reveals nothing sufficient to indicate that Congress did not intend the word "entry" in § 19 should have its ordinary meaning. Aliens who have committed crimes while permitted to remain here may be decidedly more objectionable than persons who have transgressed laws of another country.

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committed at any time after entry; . . . any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien . . . who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported: . . .

It may be true that if Volpe had remained within the United States, he could not have been expelled because of his conviction of crime in 1925, more than five years after his original entry; but it does not follow that after he voluntarily departed he had the right of reëntry. In sufficiently plain language Congress has declared to the contrary.

With hesitation, the Solicitor General suggested here that possibly the cause had abated, since S. D. Smith is no longer District Director of Immigration at Chicago, where he formerly held the petitioner in custody. The record indicates that Smith has continued to be an officer in the Department of Labor, although not presently stationed at Chicago. So far as we are advised, under existing regulations, he may carry into effect the order of deportation. Moreover, the cause was permitted to proceed without question, as instituted, long after Smith is said to have left Chicago; and the petitioner insists that no cause has been shown for abatement. The point, we think, lacks merit.

The judgment is

Affirmed.

NATIONAL SURETY CO. ET AL. *v.* CORIELL ET AL.

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

No. 8. Argued December 15, 1932.—Decided May 22, 1933.

1. It is improper for the District Court in a receivership case to pass upon the wisdom and fairness of a plan of reorganization and the rights of non-assenting creditors, without definite, detailed and authentic information. *Held* that a decree of approval, made without any trustworthy appraisal of assets, or account showing the result of recent operations of the business; without an accurate determination of the number of creditors, the amounts of their re-

spective claims, and the extent to which collateral given or payments made to some of them might be deemed preferences,—must be reversed. P. 435.

2. The error of the District Court in not requiring such relevant information before approving a plan of reorganization over objections of dissenting creditors, is not cured by a direction from the Circuit Court of Appeals a year later, declaring those creditors entitled to an aliquot share of what, it may be estimated, the property would have brought at public sale, and allowing them recovery accordingly if assets to satisfy their claims are then available. P. 436.

54 F. (2d) 255, reversed.

CERTIORARI, 286 U.S. 537, to review the reversal of a decree approving a plan of reorganization in a receivership case.

Mr. Charles H. Tuttle, with whom *Messrs. Gregory Hankin* and *Saul S. Myers* were on the brief, for petitioners.

Mr. John S. Sheppard, with whom *Messrs. Joseph Glass* and *Jerome Weinstein* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case involves the validity of the reorganization of Morris White, Inc., pursuant to a decree of the federal court for southern New York. The old company, a New York corporation, is said to have been the largest manufacturer in the world of ladies' handbags and fancy leather goods. For many years prior to 1930 the business had been very profitable. Then, the company became financially embarrassed, partly through cancellation of orders due to the general depression, partly through withdrawals of large sums by Morris White for investments in stocks and real estate. The bank creditors intervened;

and for nearly six months prior to April 6, 1931, the business was conducted by White under their financial supervision and control. On that day, they caused to be brought in the name of Coriell, a citizen of New Jersey, this suit through which the reorganization was effected.

The bill alleged that the company's assets exceed $4,000,000 and that its liabilities are approximately $1,000,000; that no quick assets are available to meet liabilities immediately payable; and that unless a receiver is appointed the assets will be wasted and the business destroyed through proceedings of creditors seeking payment. The prayers were that a receiver be appointed with power to carry on the business; and that, at the proper time, the properties be sold for the benefit of creditors, or be returned to the company. On the same day on which the bill was filed, the defendant answered admitting its allegations and assenting to the appointment of a temporary receiver. The Irving Trust Company was appointed. The receiver employed as counsel the solicitor for the complainant.

The receiver called promptly a meeting of the creditors; and a committee there elected examined into the company's affairs. The committee prepared a plan of reorganization which was submitted to the court in the form of an offer by Lily White (wife of Morris) to purchase all the assets. The plan (with later amendments) provided that all the purchased assets should be transferred, subject to existing liens, to a new corporation called the Morris White Handbags Corp.; that all creditors of the old company having claims not exceeding $100 be paid in cash; that the claims of creditors having priority by law, the fees and expenses of the receiver, the counsel fees and other expenses of the Creditors' Committee, be paid or assumed by the new company; and that all other creditors should receive in payment of their claims 20 per cent in

unsecured notes of the new company and 80 per cent in its preferred stock. No new money was to be embarked in the enterprise by either the Whites or others. Morris White (who had created and managed the business and owned all of the stock of the old company except a minority interest held by his brother, an employee) was to agree to serve the new company for three years at a salary not exceeding $60,000 a year. He and his wife were to have all of the common stock and, through control of the board of directors, substantial control of the new corporation. Accompanying the offer was an accountants' certificate, unitemized, stating that the liabilities shown on the books of the company as of April 6, the date of the appointment of the temporary receiver, were $1,072,000.30.

On May 12, 1931, the District Court entered an order requiring creditors to show cause on May 26th why that offer should not be accepted; and to consider and act upon any other offer which might then be made. On May 26th and 27th hearings were held. The receiver made no recommendation. The committee made no written report. Its counsel, who represented also several of the bank creditors, recommended, on its behalf, acceptance of the plan. He stated that the committee believed, in view of Morris White's record of achievement, that he would within a few years earn profits sufficient to pay all the creditors amounts equal to their existing claims, if he were permitted to resume the control and management of the business, with the prospect of complete ownership. The bank creditors and the larger merchandise creditors urged acceptance of the plan. The federal and state governments offered to agree that the taxes due them might be paid by the new company in instalments.

The receiver had made no inventory and had not determined the amount of the liabilities. No one had made

even an estimate of the value of the assets as of the date of the order to show cause, or, except as stated below, as of the date of the hearing. No figures were presented to indicate the course and results of the business while under the informal supervision and control of the banks, during the five months prior to the appointment of the temporary receiver; or during the seven weeks following his appointment. But that the bill had grossly overstated the assets was obvious. Instead of assets exceeding $4,000,000 as there alleged, it appeared that those available were worth, at most, a fourth of that amount. Items aggregating $2,277,714.89 consisted of obligations and securities of associated and subsidiary companies, which were probably worthless. The substantial assets consisted, according to the books, of the following items: Merchandise and supplies which had cost $1,241,208.09; bills receivable aggregating $301,852.12, of which $251,409.42 were pledged to the banks; machinery entered as having cost, less depreciation, $74,265.01; and $5,614.60 cash. Based on an appraisal made by a subcommittee shortly after the appointment of the temporary receiver, the Creditors' Committee estimated the value of the merchandise as of that date to be $717,000, on the basis of a continuing business. Counsel for the receiver, estimating the value of the merchandise as of the date of the hearing, on the basis of a continuing business, stated that it was worth about $462,500; and that there was cash on hand in the amount of $54,000 and unpledged accounts receivable of $67,000. He stated that the committee estimated the value of the merchandise, if disposed of at forced sale, to be $357,000. Another statement was made to the effect that the committee estimated the total value of the assets at forced sale to be $182,000. Whether this figure included the assets pledged to the banks was left in doubt. The court was told that Morris White had an informal

assurance that banks would give to the new company the necessary temporary accommodations required for working capital.

A substantial minority of the creditors objected strenuously to the acceptance of the plan. The dissenting creditors urged, in support of their objections, that no inventory and valuation of the assets had been made by the receiver or under any order of the court; and that not even the amount and character of the liabilities had been determined by the receiver, or otherwise by the court. They questioned whether bank creditors had not received (while they were in substantial control of the business) unlawful preferences. They asked that time be given for the appropriate determination of these matters and for further investigation as to the merits of the plan. They pointed out that under it the banks were to receive notes and preferred stock to the full amount of their claims, although they held assigned accounts as collateral. And they protested against disposing of the assets otherwise than for cash after public sale and without competitive bids being sought. The committee of creditors insisted that any delay would be disastrous, the business being seasonal.

The District Judge announced, at the close of the hearing on May 27th, that he would direct the receiver to accept the Lily White offer. An order making permanent the receivership was entered later. On June 15, 1931, pursuant to the decree, the assets were transferred to the Morris White Handbags Corp. And it entered upon the conduct of the business, although application for allowance of an appeal had been promptly made by the National Surety Company and other dissenting creditors. Five months later the Circuit Court of Appeals reversed the decree of the District Court and remanded the cause

for further proceedings in accordance with its opinion. 54 F. (2d) 255.

The Court of Appeals held, among other things, that creditors who refuse to assent to a plan of reorganization have "the right to share immediately in a forced sale of the corporation's assets"; and that a court of equity lacks "power to compel a creditor of any kind to accept stocks or promises to pay in the future in full extinguishment of his claim, without being afforded the alternative of receiving his proportionate share of the proceeds of the conventional sale of the property in cash." It declared that ordinarily dissenting creditors would be "entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder"; that this right must be fully protected; but that, in the case at bar, this right could be fully protected without setting aside the sale made to the new corporation; that the right of the dissenting creditors would be protected "by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale"; by the payment to them of "their proportionate share of the price which would have been realized at such sale after deduction of administrative expenses"; and by providing that if "payment is not thus made in cash, the several amounts which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation."

Pursuant to the mandate of the Circuit Court of Appeals, the District Court entered on February 2, 1932, a decree which ordered that (subject to the orders to be made), "the reorganization plan approved by it June 15, 1931, be allowed to continue in operation and the Morris White Handbags Corporation be and is hereby permitted to continue in the conduct of the business heretofore

transferred to it. . . ." [1] On February 23, 1932, the dissenting creditors petitioned for a writ of certiorari to review the decree of the Circuit Court of Appeals entered November 23, 1931; and the writ was granted on May 12, 1932. 286 U.S. 537.

[1] The decree entered February 2, 1932, modified that of June 15, 1931, as follows:

(A) It reversed the same so far as it affects the rights of the National Surety Company and the other dissenting creditors.

(B) It provided that a special master be appointed who shall:

(1) "Ascertain the several amounts of [their] respective claims," among other things.

(2) "Make an appraisal of the realizable value of said claims as of June 15, 1931" and that to this end the Special Master "shall ascertain and report the then realizable value of said assets as if sold at a public sale; and shall also take account of the liabilities of Morris White, Inc., as of April 6, 1931, and shall ascertain and report which, if any, of said liabilities are entitled to priority of payment; and shall also take an account of the obligations of the Receiver herein and of the expenses of administration of the estate herein incurred up to the fifteenth day of June, 1931; and shall determine through examination of officers and/or agents of the defendant and/or The Morris White Handbags Corporation, the nature, quality and amount of inventory on hand as of such dates as may be pertinent to this inquiry; . . .

(3) "Ascertain and report the aliquot share of the assets to be awarded and paid in cash, subject to further order of this court, to National Surety Company [and to the other dissenting creditors] out of the sum ascertained to be the amount that would have been realized for the assets of Morris White, Inc., on June 15, 1931, had a public sale of said assets been held, after the deduction from said sum of such portion of the obligations of the Receiver and the expenses of administration herein as would have been properly chargeable against the estate had the assets of Morris White, Inc., been liquidated by sale, and the proceeds distributed to creditors in ordinary course, and after the deduction of the liabilities of Morris White, Inc., entitled to priority of payment; or at the option of each of them the preferred stock and notes heretofore offered to them, pursuant to said offer of Lily White, may and shall in like manner be valued by

The petitioners contend that the District Court had no power to deprive the dissenting creditors of a cash share in the assets; that the amount of this share should have been determined by a public sale; that the right of dissenting creditors was not protected by the decree directing an appraisal (in 1932) of the assets as if disposed of at public sale on June 15, 1931; and that they were entitled to recover their claims in full. The respondents insist that the District Court had power to compel participation in the reorganization without the alternative of a share of the assets in cash; and that even if the District Court lacked that power, the modification of the decree by the Circuit Court of Appeals gave full protection to the rights of the dissenting creditors. We have no oc-

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said Special Master, as of the date the reorganization plan became effective, to be awarded and to be paid in cash to them or any of them subject to the further order of this court; . . .

(4) "That pending the entry of an order of this court upon the report of the said Special Master and for the purpose of securing to National Surety Company [and the other dissenting creditors] payment by the said The Morris White Handbags Corp., out of the assets transferred to the said The Morris White Handbags Corp., pursuant to the order herein dated June 15, 1931, of the amounts which may be determined to be paid to them in cash upon their respective claims, a lien is hereby imposed upon all the assets of Morris White, Inc., transferred to and remaining in the possession of said The Morris White Handbags Corp., pursuant to said order dated June 15, 1931; except that as to such of said assets as the said The Morris White Handbags Corp. shall hereafter in good faith transfer in the regular course of its business for fair and proper consideration, said lien shall attach to the proceeds of such transfer or successive transfers of such proceeds, and the said The Morris White Handbags Corp. is hereby enjoined and restrained subject to the further order of this court, from transferring any of said assets of Morris White, Inc., remaining in its possession except in good faith in the regular course of its business and for fair and proper consideration, unless the said The Morris White Handbags Corp. shall file a bond or other security in such amount as may be fixed and approved by this court after hearing the parties in interest; . . ."

casion to pass upon any of these contentions.[2] For we are of opinion that the decree approving the plan should have been reversed in its entirety because the procedure pursued by the District Court was improper.

First. The non-assenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based on adequate data. The District Court had before it, in support of the plan, only informal, inadequate and conflicting *ex parte* assertions unsupported by testimony. It undertook to pass upon the wisdom and fairness of the plan of reorganization, and the rights of non-assenting creditors. For the proper disposition of these questions definite, detailed, and authentic information was essential. Such information was wholly lacking. The receiver submitted no facts and made no recommendations. There was no evidence on which the court could have found even that a majority of the unsecured creditors favored the plan.[3] There was

[2] The petitioners made the further contention that the court should have ordered the case to proceed in bankruptcy, or at least should not have permitted it to continue in equity. This question was not before us on the writ of certiorari. The order of June 3, 1931, making the receivership permanent, recited that there was no opposition to the order. It was affirmed by the Circuit Court of Appeals, and certiorari was denied by this Court. 286 U.S. 553.

[3] Even the number of creditors appears to have been undetermined. The number was stated by Mr. White to be 150, in addition to 5 bank creditors. The president of one of the creditor banks gave the number as 150 including the banks. Counsel for Morris White, Inc., stated that there were 245 creditors, "not 145." Counsel for the receiver stated that there were 193 creditors whose claims were each less than $100. Counsel for Morris White, Inc., gave the number of such creditors as 50 or 100. The amount represented by the creditors' committee appears likewise to have been in doubt. Counsel for the committee stated that it represented merchandise claims in the amount of $178,000. Counsel for Morris White, Inc., stated that the committee represented merchandise claims of over $300,000; later he gave the figure as $180,000 out of $442,000 of

no valuation of the assets by a disinterested appraiser; no account of the results of the operations of the business during the five months in which it was under the control of the banks; no account of the result of the operations under the receivership; and no dependable schedule of liabilities of the corporation showing the number of creditors, the amount owed to each, and the collateral held. A trustworthy appraisal; an account showing the result of recent operations of the business; an accurate determination of the number of creditors, the amounts of their respective claims, and the extent to which collateral given or payments made to them might be deemed preferences; these were facts which might have influenced the court in deciding whether the plan should be approved or should be approved only upon a public sale. The failure to require relevant data before deciding whether the plan should be approved was not cured by the declaration of the Circuit Court of Appeals that the dissenting creditors were entitled to an aliquot share of what, a year later, it might be estimated the property would have brought at a public sale, and authorizing them to recover that amount, if assets to satisfy their claims were then available.

Second. Every important determination by the court in receivership proceedings calls for an informed, independent judgment. In the case at bar special reasons existed why the court should have secured adequate, trustworthy information. The proceeding was not an adversary one; and jurisdiction rested wholly upon the consent of the defendant corporation.[4] The court did not have

merchandise claims. At the argument in this Court it was stated that, at the hearing before the District Court pursuant to the mandate of the Circuit Court of Appeals, a new claim against Morris White, Inc., in the sum of $1,025,000 was presented and that a rule to show cause issued.

[4] Compare *Harkin* v. *Brundage*, 276 U.S. 36, 52, 55; *Michigan* v. *Michigan Trust Co.*, 286 U.S. 334, 345; *Municipal Financial Corp.*

the advice of its receiver. The creditors who approved of the plan of reorganization appeared to be actuated in their recommendations and desires by considerations not applicable to the dissenting creditors. For the bank creditors, unlike the others, were to a large extent secured by the pledge of assets and may, moreover, have received preferences which would be held invalid if bankruptcy proceedings were instituted. The assenting merchandise creditors were interested not merely as creditors but as sellers of goods; and it appeared that at least some were far more interested in expected profits from future sales than in possible dividends on their existing claims. On the other hand, the dissenting creditors, largely credit indemnity companies, were anxious to have determined the amounts of their risks and to obtain as promptly as possible dividends in cash.

The respondents directed attention to the proposed amendments to the Bankruptcy Act, which have been enacted in part since the argument,[5] and, as justifying the procedure challenged, urge that those amendments confer power on the District Courts in Bankruptcy similar to that exercised in the case at bar. But this is not true. Those amendments relating to compositions and exten-

v. *Bankus Corp.*, 45 F. (2d) 902; *Kingsport Press, Inc.* v. *Brief English Systems, Inc.*, 54 F. (2d) 497, 501.

[5] Act of March 3, 1933, c. 204, § 1, 47 Stat. 1467. Particular attention was called to the proposed section providing for corporate reorganizations. This section was not enacted. It was intended as an extension of the principle of composition agreements, "that the views of a substantial majority of the creditors should control the measures to be adopted for the protection and preservation of their rights in the failing business, subject at all times to a finding by the court that what they propose is fair and equitable to the minority." See Report of Attorney General on Bankruptcy Law and Practice, Appendix to Message of the President Recommending the Strengthening of Procedure in the Judicial System, Sen. Doc. No. 65, 72d Cong., 1st Sess., p. 90.

sions for insolvent debtors make detailed provision for an inventory by the receiver; for a schedule of liabilities; for an examination of the debtor; and for fixing, with reference to the convenience of the parties, a date and place for hearings upon applications for confirmation of composition or extension proposals.[6]

The decree of the Circuit Court of Appeals is reversed; that of the District Court entered February 2, 1932 vacated; and the case is remanded to the District Court for further proceedings not inconsistent with this opinion. We do not pass upon the scope, the measure or the incidence of the relief to which the petitioners are entitled; among other reasons, because of the following facts brought to our attention at the argument. On April 29, 1932, the Morris White Handbags Corp. was adjudged bankrupt. On June 6, 1932, a sale for $53,850 of all its tangible assets was confirmed by the District Court. The Morris White Handbags Corp., its trustee in bankruptcy, and the purchaser at the bankruptcy sale are not parties to the case at bar.

Reversed.

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[6] Section 74 (b)-(g). The procedure was designed to be more rigorous than that previously obtaining. See Report of Attorney General, *supra*, note 5, p. 87; also, Hearings before the Subcommittees of the Committees on the Judiciary, 72 Cong., 1st Sess., on S. 3866, p. 635 (Statement of Lloyd Garrison, Special Assistant to the Attorney General); *id.*, p. 113 (Annotation to subsection (b)). The requirements for the reorganization of railroads are more rigorous.

Compare the recommendations of The Special Committee on Equity Receiverships of the Association of The Bar of The City of New York, Year Book, 1927, pp. 299-331; *id.*, 1930, pp. 407-411; *id.*, 1932, pp. 333-334; and the minority report, *id.*, 1930, pp. 411-422. See also Equity Rules IV-XI, Southern District of New York, effective July 1, 1931.

OHIO *v.* CHATTANOOGA BOILER & TANK CO.

No. 18, Original. Argued April 10, 1933.—Decided May 22, 1933.

1. The Full Faith and Credit Clause does not give any greater effect to a state statute elsewhere than is given in the courts of the State that enacted it. P. 443.
2. The Tennessee Workmen's Compensation Act, as construed by the Supreme Court of the State, does not preclude recovery from an employer, under the compensation act, and in the courts, of another State, on account of an injury suffered there by an employee in the course of his employment, although both employer and employee were citizens of Tennessee, and the employer had its principal place of business in Tennessee and the contract of employment was made there. *Bradford Electric Light Co.* v. *Clapper,* 286 U.S. 145, distinguished. P. 442.

Judgment for Plaintiff.

ORIGINAL action by the State of Ohio to recover from a Tennessee corporation the amount paid out of an Ohio insurance fund to satisfy an award against the corporation in a proceeding under the Ohio Workmen's Compensation Act.

Messrs. John W. Bricker, Attorney General of Ohio, and *Oscar A. Brown,* Assistant Attorney General, for plaintiff.

Mr. Francis J. Wright for defendant.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The State of Ohio invokes, by an action at law, the original jurisdiction of this Court to recover the sum of $4,910.64 from the Chattanooga Boiler and Tank Company, a corporation organized in Tennessee and having its principal place of business there. Reimbursement is sought by the State of the amount paid from its insurance fund to Mrs. Cora Tidwell, as compensation for the death

of her husband, an employee of the company, who was killed at Ironton, Ohio, while engaged in erecting a tank. The claim rests upon the Workmen's Compensation Act of Ohio, § 1465-37–110 of the General Code,—a law of the compulsory type held constitutional in *Mountain Timber Co.* v. *Washington,* 243 U.S. 219.

The proceeding at bar is one to enforce a statutory cause of action for liquidated damages, based on an award made to Mrs. Tidwell by the Industrial Commission.[1] The employer relies, as its only defense, upon the full faith and credit clause, invoking the rule declared in *Bradford Electric Light Co.* v. *Clapper,* 286 U.S. 145. That defense was not set up in the proceedings before the Ohio Commission. The Ohio law does not provide for review of an award by an appeal; but the employer is entitled to challenge, in an action for reimbursement, the correctness of the award in

[1] "Any employe whose employer has failed to comply with the provisions of section 1465–69, who has been injured or has suffered an occupational disease in the course of his employment, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceedings against his employer by civil action in the courts, as provided in section 1465-73, file his application with the commission for compensation and the commission shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such claimant as he would be entitled to receive if such employer had complied with the provisions of section 1465-69, and such employer shall pay such award in the manner and amount fixed thereby or shall furnish to the industrial commission a bond, in such an amount and with such sureties as the commission may require, to pay such employee such award in the manner and amount fixed thereby. In the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, or to furnish such bond, within a period of ten days after notification of such award, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, and the commission shall certify the same to the attorney general who shall forthwith institute a civil action against such employer in the name of the state, for the collection of such award." Ohio Gen. Code, § 1465-74.

all respects save the amount of compensation.[2] Whether the full faith and credit clause is applicable to proceedings in this Court in the same manner and to the same extent as to proceedings in the courts of a State and in the lower federal courts, we have no occasion to consider; for we are of opinion that on the facts here presented the rule declared in the *Clapper* case is not applicable.

The following facts were agreed: The employer never had a regular place of business in Ohio; had not qualified to do business there as a foreign corporation; and had not complied with the provisions of the Ohio Workmen's Compensation Law, either by becoming a subscriber to the state insurance fund or by electing to pay compensation direct to injured employees or to their dependents in case of death. Both the company and Tidwell were residents of Tennessee; Tidwell had entered its employ there; it was a term of the employment that he should serve also in other States; and he had been brought to Ohio to erect there the tank which had been fabricated in Tennessee. Both the company and Tidwell had accepted the pro-

[2] *Fassig* v. *State,* 95 Oh. St. 232, 242; 116 N.E. 104; *Pittsburgh Coal Co.* v. *Industrial Commission,* 108 Oh. St. 185, 189-191; 140 N.E. 684; *Slatmeyer* v. *Industrial Commission,* 115 Oh. St. 654, 657, 661; 155 N.E. 484. The claimant, however, has a right of appeal, "if the commission finds that it has no jurisdiction of the claim and has no authority thereby to inquire into the extent of disability or the amount of compensation," and denies the claim for that reason, and if the claimant has sought a rehearing. Ohio General Code, § 1465-90; see 107 Ohio Laws, p. 162; *State ex rel. Gilder* v. *Industrial Commission,* 100 Oh. St. 500; 127 N.E. 595. Such an appeal is heard solely on the record made before the commission. See *Grabler Mfg. Co.* v. *Wrobel,* 125 Oh. St. 265; 181 N.E. 97.

The fact that the employer successfully defends the action by the State for reimbursement does not prejudice the right of the employee to receive payment of the amount theretofore awarded by the commission. *State ex rel. Thompson* v. *Industrial Commission,* 121 Oh. St. 17; 166 N.E. 806; *State ex rel. Croy* v. *Industrial Commission,* 123 Oh. St. 164, 173; 174 N.E. 345.

visions of the Tennessee Workmen's Compensation Act, a law of the elective type; and under that law his widow would have been entitled to recover as compensation about $2200. After Tidwell's death, his widow, who had become a citizen and resident of Georgia, filed her application for compensation with the Industrial Commission of Ohio. The company, appearing specially, challenged the jurisdiction of the Commission. The objection was overruled; the company made no defense before that tribunal; and the Commission found that the company was an employer within the meaning of the Ohio law; that the injury was sustained accidentally in the course of the employment; and that the widow had not before filing the claim begun a court action against the employer on account of the death. Upon failure of the company to pay the award, it was paid from the state insurance fund.

In the *Clapper* case it was held that the Vermont Workmen's Compensation Act was a defense to an action brought in New Hampshire under the New Hampshire Act to recover for the death in that State of a Vermont resident who had been employed by a Vermont company, pursuant to a contract made in Vermont; because: "It clearly was the purpose of the Vermont Act [3] to preclude

[3] The provision is as follows: "*Right to Compensation Exclusive:* The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employees who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement." Vt. Gen. Laws, c. 241, § 5774.

any recovery by proceedings brought in another State for injuries received in the course of a Vermont employment." 286 U.S. at 153.[4] The Tennessee Act is different. It is true that it provides that " when an accident happens while the employe is elsewhere than in this State, which would entitle him or his dependents to compensation had it happened in this State, the employe or his dependents shall be entitled to compensation under this act if the contract of employment was made in this State, unless otherwise expressly provided by said contract," Tenn. Code, § 6870; and that " the rights and remedies herein granted to an employee subject to this Act on account of personal injury or death by accident shall exclude other rights and remedies of such employe, his personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death." *Id.*, § 6859. But, as construed and applied by the highest court of Tennessee, the statute does not preclude recovery under the law of another State. And the full faith and credit clause does not require that greater effect be given the Tennessee statute elsewhere than is given in the courts of that State. Compare *Allen* v. *Alleghany Co.*, 196 U.S. 458, 465; *Robertson* v. *Pickrell*, 109 U.S. 608, 610–611; *Board of Public Works* v. *Columbia College*, 17 Wall. 521, 529.

The decision in *Tidwell* v. *Chattanooga Boiler & Tank Co.*, 163 Tenn. 420, 648; 43 S.W. (2d) 221; 45 *id.*, 528, shows that the provision of the Tennessee law making its remedy an exclusive one is not applicable on the facts here presented. In that case, Mrs. Tidwell brought (while the application in Ohio was pending and before

[4] Had the question been merely the construction of the statute, no issue under the full faith and credit clause would have arisen. *Banholzer* v. *New York Life Ins. Co.*, 178 U.S. 402; *Johnson* v. *New York Life Ins. Co.*, 187 U.S. 491, 495–496; *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U.S. 93, 96–97.

the award) an action in Tennessee to recover compensation under the Tennessee Act. The court held that by bringing the Ohio proceedings the widow had renounced her right under the Tennessee Act; and final judgment was entered for the company shortly before the action at bar was begun. The opinion states that the suit is one upon contract; that "the sole defense interposed is the proceedings in Ohio"; that the institution of the proceedings in Ohio "was a clear renunciation or disaffirmance of the contract"; "that the election thus made was irrevocable, because the petitioner [Mrs. Tidwell] has taken the benefit of the Ohio suit and the defendant [the Company] will doubtless take the detriment of that suit"; and the court added: "Not prejudging another case, but merely by way of answer to argument made in this case, we may observe that defendant's way of escape from the Ohio proceedings and award is not apparent, after the pleading by the defendant of such proceeding and award to defeat its liability herein." In view of this decision, we have no occasion to consider differences in phraseology between the Tennessee statute and that of Vermont.

Judgment for the plaintiff.

EX PARTE LA PRADE.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS.

No. 21, Original. Argued April 17, 18, 1933.—Decided May 22, 1933.

1. A suit against a state officer in a federal court, alleging that a state statute is unconstitutional, that the defendant threatens to enforce it by suing *colori officii* for drastic penalties prescribed by the statute for its violation, and so will subject the plaintiff to irreparable injury unless enjoined, is a suit against the defendant as an individual. *Ex parte Young,* 209 U.S. 123. P. 455.

2. Such a suit abates upon the defendant's retirement from office, unless it can be revived against his successor under authority of a statute. P. 456.
3. Arizona laws do not provide for substitution of the successor. *Irwin* v. *Wright,* 258 U.S. 219. P. 456.
4. Section 780 (b), U.S.C., Title 28, providing for substitution of state officials in suits by or against them in the federal courts "relating to the present or future discharge of official duties," does not authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor individually. P. 458.
5. In construing § 780, *supra,* which relates to substitution of both federal and state officers, it is to be borne in mind that while Congress can direct the conduct of federal officers in proceedings brought by or against them as such and may ordain that they may sue or be sued as representatives of the United States and stand in judgment on its behalf, it is not so empowered as to state officers. P. 458.
6. Wrongs committed or threatened by an officer under an unconstitutional statute do not constitute ground for an injunction against his successor; nor does a declaration of the statute that he shall bring penalty suits to enforce it, since he might hold it unconstitutional and deem himself justified by his official oath in refraining. P. 458.
7. In the absence of statutory authority, the District Court had no jurisdiction to substitute the successor as defendant in this case or to direct that the suit be continued against him. P. 459.
8. The question is reserved whether, or in what circumstances, a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to enforce an unconstitutional statute may be substituted in a pending suit. P. 459.

Mandamus to issue.

Motion for leave to file a petition for a writ of mandamus requiring a circuit and two district judges to dismiss, as to the relator, two suits in which he was made party defendant by orders of substitution. The argument was on the motion for leave to file and the judges' return to an order to show cause. See 2 F.Supp. 855.

Mr. Donald R. Richberg for petitioner.

Mandamus is the proper remedy, and in this case the only remedy. *Los Angeles Brush Mfg. Co.* v. *James,* 272 U.S. 701, and other cases.

The statute, by its terms "permits" a cause to be continued and maintained against the successor when he consents, and when the suit has been brought against the predecessor "as a public officer." It does not authorize the court to compel even a federal officer to consent to substitution, *Union Trust Co.* v. *Wardell,* 258 U.S. 537; *Smietanka* v. *Indiana Steel Co.,* 257 U.S. 1.

It is not to be assumed that the statute was intended to impose obligations on state officers, since no such authority has been delegated to the Federal Government, and it would be an invasion of the reserved power of the States for the Federal Government to impose duties and financial burdens on state officers.

The federal statute could not constitutionally authorize the court to compel La Prade, as a state officer, to accept substitution for Peterson because:

(a) Suit against La Prade as a state officer would be a suit against the State in contravention of the Eleventh Amendment. *Ex parte Ayers,* 123 U.S. 443; *Minnesota* v. *Hitchcock,* 185 U.S. 373; *Fitts* v. *McGhee,* 172 U.S. 516; *In re State of New York,* 256 U.S. 490.

(b) The Federal Government can not exercise the reserved powers of the States by imposing duties and financial burdens on state officers.

(c) The original suits were maintained on the ground that they had been brought against Peterson as an individual and not as a state officer. *Ex parte Young,* 209 U.S. 123, 159; *Poindexter* v. *Greenhow,* 114 U.S. 270; *In re State of New York,* 256 U.S. 490.

There is no privity between Peterson and La Prade. *United States* v. *Boutwell,* 17 Wall. 604; *Gorham Mfg. Co.* v. *Wendell,* 261 U.S. 1.

La Prade can not be made responsible for Peterson's wrongdoing. *Smietanka* v. *Indiana Steel Co.*, 257 U.S. 1; *United States* v. *Boutwell, supra.*

The personal liability of Peterson as an individual defendant can not be shifted to La Prade. *Gorham Mfg. Co.* v. *Wendell,* 261 U.S. 1.

La Prade can not be required to defend himself without a complaint filed against him, a summons issued, or any opportunity to plead or to present evidence in his own behalf. The suit against Peterson can not be transformed by a mere order of substitution into a suit against La Prade. *United States* v. *Boutwell,* 17 Wall. 604; *Richardson* v. *McChesney,* 218 U.S. 487.

It is apparent that La Prade is not only required, by the order in this case, to step into Peterson's shoes, to be charged with the alleged wrongdoing of Peterson, but he must undertake the financial burden of carrying on a suit which, through its conduct by Peterson, carries with it ultimate liability not only for the costs already incurred, but also liability for the costs which the new defendant must incur, or else fail in his defense. Here is a case in which over 8,000 pages of testimony have been taken; the costs of a reference to master, approximating $15,000 have been incurred.

If all costs to the present time were disregarded, it would be necessary for La Prade, as a substitute defendant, to subject himself to enormous costs which would be required for an appeal to the Supreme Court from the decision of the three-judge court.

Such substitution would not be "due process of law." *McVeigh* v. *United States,* 11 Wall. 259; *Windsor* v. *McVeigh,* 93 U.S. 277.

There is an entire lack of jurisdiction in the three-judge court to proceed against petitioner. *Liberty Warehouse Co.* v. *Grannis,* 273 U.S. 70; *Champlin Rfg. Co.* v. *Corporation Comm'n,* 286 U.S. 210, 238.

Messrs. Robert Brennan and *Henley C. Booth,* with whom *Messrs. Homer W. Davis, Guy V. Shoup,* and *E. E. McInnis* were on the brief, for respondents.

Petitioner's remedy was to appeal from the final decree, entered before he filed his petition.

He should have remained and participated in the final hearing, and would not thereby have consented to the substitution, or added in the least to the power and jurisdiction of the District Court over him. *Harkness* v. *Hyde,* 98 U.S. 476, 479; *Southern Pacific Co.* v. *Denton,* 146 U.S. 202, 206; *Merchants H. & L. Co.* v. *Clow & Sons,* 204 U.S. 286, 289.

It would be consistent with the former decisions of this Court to decline, on this application, to consider the jurisdiction of the District Court. *In re Chicago, R. I. & P. Ry. Co.,* 255 U.S. 273.

The substitution statute vested discretionary power in the District Court to make the substitution order, and unless the statute is invalid the order was proper.

Petitioner's contention that the statute only empowers a court to permit and does not authorize a court to compel substitution does violence to its words. If any explanation of legislative intent were necessary, then the statement of Mr. Justice Van Devanter at the hearing before the Senate Committee (Hearing of Subcommittee on Judiciary of Senate, 68th Cong., 1st Sess., on S. 2061, A Bill to Give the Supreme Court Authority to Make and Publish Rules in Common Law Actions—Feb. 2, 1924), that a successor sought to be substituted is "given opportunity to show cause, if he have any, why the substitution should not be made," and the statement in the House Judiciary Report, H.Rep. No. 1075, 68th Cong., p. 7, that under the statute "new state, county, and city officers may be substituted after notice to them and if such substitution is shown not to work them injustice," conclu-

sively negative petitioner's contention. *Union Trust Co.* v. *Wardell,* 258 U.S. 537.

The substitution statute as applied here does not violate the Fifth, Tenth, or Eleventh Amendments. Congress has power by appropriate legislation to prevent the invasion by States of the exclusive and occupied legislative field of Congress under the commerce clause, and to prevent interstate commerce being unduly burdened, and to enforce the Fourteenth Amendment.

Because an action against an individual who is a state officer, and which relates to the present or future discharge of his official duties, can be maintained only so long as he is clothed with official authority to do the act sought to be enjoined, it abates as soon as he ceases to hold such office, unless there is a statute providing for the substitution of his successor. That is the obvious and necessary purpose of the substitution statute. Such a defendant is not, because of that situation, sued in his official capacity or as a representative or agent of the State, within the Eleventh Amendment cases. Nor are the principles applicable that govern abatement of actions against individuals, such as an action to enjoin a threatened trespass tortious in character, personal in nature and not commanded by a state statute authorizing and requiring the trespass.

The purpose is, among other things, to provide for adjudication of constitutional questions in the federal courts in suits against officials relating to the present or future discharge of their duties. Another purpose is to enable the successors of the state officials against whom final decrees have been entered to be substituted and take or carry on appeals.

While judicial power can only be exercised in a case or controversy, its exercise is not confined to the forms of procedure that existed in 1789.

Congress is authorized by appropriate legislation to enforce the Fourteenth Amendment, and to carry into effect the power to regulate interstate commerce. The substitution statute is a valid exercise of that power.

Failure to appear would no more have affected the power of the District Court to adjudicate the controversy than failure of his predecessor to appear in response to the original subpoena would have affected it.

If plaintiffs do not bring suits, and if defendants do not defend suits or have not in advance by their conduct or agreements become liable for costs, no costs can be assessed against them.

The question of petitioner's liability for costs incurred while his predecessor was the defendant of record is moot, because the motion for leave to file petition was made on March 13, 1933, after the filing on March 8, 1933, of final decrees that adjudged that plaintiffs should collect no costs from either petitioner or his predecessor.

In some of the cases holding there could be no substitution without a statute providing therefor, lack of privity is referred to. What this Court meant was that there was not such privity as exists for example between a trustee and his successor; that there was not such privity that the action would survive in the absence of a statute so providing.

There is ample relationship between petitioner and his predecessor to sustain the substitution statute and the action of the District Court thereunder.

The duty of petitioner is precisely the same as that of his predecessor—to enforce the law unless competently restrained. Neither could disclaim that intention; nor is a threat by either necessary to the jurisdiction.

When the official sued is under a statutory duty to prosecute, that is sufficient for jurisdiction. *Pennsylvania* v. *West Virginia,* 262 U.S. 553, 592; *Pierce* v. *Society of Sisters,* 268 U.S. 510; *Williams* v. *Boynton,* 147 N.Y. 426.

Section 3 of the Arizona Act specifically provides that the penalties thereunder "shall be recovered and suits therefor brought by the Attorney General, or under his direction, in the name of the State." No discretion in the matter is entrusted to the Attorney General.

The Legislature and the Attorney General are agents of the State and capable of unlawful action; and the latter is bound to obey the former.

The authorities almost unanimously hold that it is the duty of an executive officer to comply with a state statute until the courts declare it unconstitutional, unless he would be under a personal liability if he complied and the statute were afterwards annulled; and that in the absence of personal liability, the defense of unconstitutionality may not be raised in a mandamus proceeding by any such officer. *State ex rel.* v. *State Board,* 84 Fla. 592; Harv. L. Rev., June, 1929, p. 1071. See *Columbus & Greenville Ry. Co.* v. *Miller,* 283 U.S. 96, 99; *Smith* v. *Indiana,* 191 U.S. 138; *Braxton County Court* v. *West Virginia,* 208 U.S. 192; *Marshall* v. *Dye,* 231 U.S. 250, 258; and *Stewart* v. *Kansas City,* 239 U.S. 14, 15.

The Fifth Amendment is not violated by the substitution.

The Arizona Train Limit Defense Statute and the acts and agreements of the state officials thereunder constituted such a consent by the State to the hearing and adjudication of the suits that petitioner is bound thereby. Act of Mar. 13, 1931 (c. 63, p. 142, Laws, 1931).

Mr. Justice Butler delivered the opinion of the Court.

Arthur T. La Prade, Attorney General of Arizona, applied for leave to file a tendered petition for writ of mandamus requiring Circuit Judge Wilbur and two district judges, constituting a United States district court in that State, to dismiss as to petitioner two suits in equity to which the court, against his opposition, had made him a

party defendant in substitution for his predecessor in office. We directed the judges to show cause why the leave prayed should not be granted, assigned the case for argument, directed briefs to be filed on or before the day set, stayed proceedings against petitioner, and directed the district court to continue its term pending the final determination of petitioner's application. The judges made their return to the rule. On the appointed day, there being no material controversy as to controlling facts, we heard oral arguments upon the merits.

The Act of the Arizona legislature approved by the governor, May 16, 1912, and on referendum by a majority of the voters of the State, November 5, 1912, being § 647, Revised Code, 1928, declares that it shall be unlawful for any company operating a railroad in that State to run over its line any train consisting of more than 70 freight or other cars exclusive of caboose, or any passenger train of more than 14 cars, and provides that any company that shall willfully violate any of the provisions of the Act shall be liable to the State for a penalty of not less than $100 nor more than $1,000 for each offense, and that such penalty shall be recovered, and suits therefor brought, by the attorney general in the name of the State.

July 24, 1929, the Atchison, Topeka and Santa Fe Railway Company and the Southern Pacific Company, respectively, brought suits in the federal court above referred to against K. Berry Peterson, then attorney general of the State. By its complaint each of the plaintiffs shows that it operates a line of railroad and trains for interstate transportation in and through Arizona; sets forth facts on which it claims that enforcement of the statute against it would violate the commerce clause, the due process clause of the Fourteenth Amendment, various provisions of the Interstate Commerce Act and other laws of the United States regulating interstate transportation by railroad; alleges that, if plaintiff shall operate trains con-

sisting of more than the specified number of cars, the defendant unless enjoined will institute numerous prosecutions for recovery of the prescribed penalties; asserts that the damage and injury which it daily sustains by reason of the statute is great and irreparable, and prays that defendant be temporarily and permanently enjoined.

In each case defendant answered and moved to dismiss the bill on the ground that the suit was one against the State prohibited by the Eleventh Amendment. The court consolidated the cases, refused temporary injunctions and denied defendant's motions to dismiss. 43 F. (2d) 198. It then appointed a master, who heard and reported the evidence together with his findings of fact, conclusions of law and recommendations for decrees in favor of plaintiffs. Defendant filed exceptions to, and moved to suppress, the report. The parties filed their briefs; and the court, in accordance with their stipulation, set down the causes for hearing at San Francisco on February 8, 1933. In the meantime, January 3, 1933, defendant's term of office expired and the petitioner, La Prade, then became the attorney general of the State. January 30, the plaintiffs delivered to petitioner a copy of an application to the court for an order substituting him as party defendant and gave notice that the application would be presented to the court at the time and place so fixed.

The applications for substitution were made under 28 U. S. C., § 780.* It provides that, where a suit brought

*(a) Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is

by or against a state officer is pending in a federal court at the time of his separation from his office, the court may permit the cause to be continued and maintained by or against such officer's successor if within six months it be satisfactorily shown that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved. The section requires that the officer, unless expressly consenting thereto, be given reasonable notice of the application and an opportunity to present any objection which he may have. As grounds for the substitution, plaintiffs' application merely stated that each suit relates to the future discharge of the official duties of the Attorney General of Arizona and, following the language of the statute, that there is a substantial need for continuing and maintaining it and obtaining adjudication of the questions involved.

Plaintiffs, at the appointed time and place, applied to the court for the order of substitution. The petitioner appeared specially and objected. He insisted that, each of the suits being against his predecessor individually, the questions involved became moot upon the expiration of the latter's term of office; that, there being no pleading

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pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

charging him with having threatened to enforce the state enactment, there was no cause of action against him; that he could not be held for the costs theretofore incurred, and that the suits should be dismissed. After hearing the parties, the court by an order merely containing a recital in the general words of the statute as to the need for continuing the suits, made the petitioner defendant in each case.

Promptly, upon somewhat amplified grounds, he filed a motion that the cases be dismissed. The court denied the motion. Petitioner and his counsel declined to participate in further proceedings in the case. The court heard plantiffs orally and, March 8, 1933, filed its opinion, findings of fact and conclusions of law, and entered decrees adjudging the statute unconstitutional and enjoining petitioner. It declared that no costs up to and including the entry of the final decree should be assessed against petitioner or his predecessor. The opinion, 2 F. Supp. 855, construes the statute to impose the duty of enforcement upon each succeeding attorney general and declares that, as long as there is an attorney general in the State, the threat of prosecution is always present and the resulting injury, if any, always impends.

The injunctions sought are not aimed at the State or the office of attorney general or to restrain exertion of any authority that belongs to either. Each complaint charges that, because of a void enactment and the purpose of defendant under color of his office to enforce it by means of suits which it purports to authorize, plaintiff is prevented from operating trains that are of suitable size and necessary for the proper conduct of the transportation business, and so continuously suffers great and irreparable injury. The suits were brought against defendant, not as a representative of the State, but to restrain him individually from, as it is alleged, wrongfully subjecting plaintiff to such unauthorized prosecutions. In *Ex parte*

Young, 209 U.S. 123, the court said (p. 159): "The Act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." The principle there stated has since been applied in numerous decisions here. See e.g., *Hopkins* v. *Clemson College*, 221 U.S. 636, 642 *et seq.* *Truax* v. *Raich*, 239 U.S. 33, 37. *Terrace* v. *Thompson*, 263 U.S. 197, 214. *Sterling* v. *Constantin*, 287 U.S. 378, 393.

The laws of Arizona do not authorize substitution of petitioner for his predecessor. See *Irwin* v. *Wright*, 258 U.S. 219, 222. The suits abated when defendant Peterson ceased to be attorney general. And unless empowered by § 780, the district court is without jurisdiction to direct that petitioner be substituted and that the suits be continued and maintained against him. *United States ex rel. Bernardin* v. *Butterworth*, 169 U.S. 600, 605. *Shaffer* v. *Howard*, 249 U.S. 200, 201. *Gorham Mfg. Co.* v. *Wendell*, 261 U.S. 1.

Subdivision (a) of § 780 applies only to proceedings brought by or against officers of the United States or those holding office directly or mediately under the authority of Congress. It is derived from the Act of February 13, 1925, c. 229, § 11 (a), 43 Stat. 941. It enlarges the Act

of February 8, 1899, c. 121, 30 Stat. 822, which was passed after our decision in *United States ex rel. Bernardin* v. *Butterworth, supra.* It was there held that a suit to compel the Commissioner of Patents to issue a patent abated by the death of the Commissioner and could not be revived so as to bring in his successor even upon consent of the latter. At the conclusion of its opinion the court said (p. 605): "In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

Subdivision (b) applies only to proceedings brought by or against those holding office under state authority. As to such, it authorizes "similar proceedings" to those specified in subdivision (a). It was passed after our decision in *Irwin* v. *Wright, supra.* The opinion shows (p. 222) that a suit to enjoin a public officer from enforcing a statute is personal and, in the absence of statutory provision for continuing it against his successor, abates upon his death or retirement from office. The court held that the Act of February 8, 1899, did not authorize the substitution of a county treasurer for his predecessor in a suit against the latter to enjoin collection of taxes. We suggested that it would promote justice if Congress were to enlarge the scope of that Act so as to authorize substitution in suits by or against state officers and said: "Under the present state of the law, an important litigation may be begun and carried through to this court after much effort and expense, only to end in dismissal because, in the necessary time consumed in reaching here, state officials, parties to the action, have retired from office. It is a defect which only legislation can cure."

Subdivision (c) extends to all cases covered by (a) and (b). It merely requires that before substitution a non-consenting officer shall be given notice and opportunity to object. It does not prescribe the showing of facts necessary to warrant an order that the proceeding be continued by or against the successor. When construing the section, it is to be borne in mind that Congress has authority to direct the conduct of federal officers in proceedings brought by or against them as such and may ordain that they may sue or be sued as representatives of the United States and stand in judgment on its behalf (*I.C.C.* v. *Oregon-Washington R. & N. Co.*, 288 U.S. 14, 27), but that Congress is not so empowered as to state officers. The section is merely permissive; it does not require but merely authorizes the court to order substitution in the cases covered. It extends only to suits "relating to the present or future discharge of . . . official duties." At least as to state officers it does not purport to authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor individually.

As shown above, the purpose of the suits was to prevent a wrong about to be committed by defendant acting outside, and in abuse of the powers of, his office. The wrongs threatened or committed by him constitute no ground for injunction against petitioner. Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it. United States Constitution, Art. VI, cl. 3. Arizona Revised Code, 1928, § 63. The statement of Chief Justice Taft writing for the Court in *Gorham Mfg. Co.* v. *Wendell*,

supra, is pertinent. He said (p. 4): "The inherent difficulty in all these cases is not in the liability and suability of the successor in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them, as there is not if the officer sued is injuring or is threatening to injure the complainant, without lawful official authority. There is no legal relation between the wrong committed or about to be committed by the one, and that by the other."

It follows from what has been said that § 780 has no application to the case as presented and that the district court had no jurisdiction to substitute petitioner as a party defendant in place of his predecessor or to direct that the suits be continued and maintained against him. We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved.

Petitioner's application for leave to file is granted, the case will be docketed and respondents' return filed, and a writ of mandamus will issue commanding the respondents to vacate the decrees against petitioner and to dismiss the suits as to him.

It is so ordered.

BEVAN *v.* KRIEGER, SHERIFF.*

APPEALS FROM THE SUPREME COURT OF OHIO.

No. 784. Argued May 8, 9, 1933.—Decided May 22, 1933.

1. Witnesses subpœnaed by a notary public to give depositions, pursuant to § 11529 of the General Code of Ohio, failed to attend; and

* Together with No. 785, *Koehrman* v. *Krieger, Sheriff,* and No. 786, *Stranahan* v. *Krieger, Sheriff.*

when attachments were issued by the notary under § 11511, commanding that they be brought before him to give their testimony or to answer for contempt, they surrendered themselves to the sheriff, who held the process. They then immediately applied to the state court of appeals for writs of *habeas corpus*, with the result that, after hearings, they were remanded by that court to the custody of the sheriff, and the judgments were affirmed by the Supreme Court of the State, from which they appealed here. *Held* that by their conduct they were precluded from asserting that they were denied a hearing by the notary. P. 463.

2. In Ohio, as generally elsewhere, testimony by deposition is taken subject to the right of the parties—not of the witness—to object to its admissibility at the trial. P. 463.
3. A witness in a deposition proceeding (Gen. Code of Ohio, § 11529,) who flatly refuses to answer any further questions is guilty of a patent contempt; and his commitment by the presiding notary (*id.*, § 11512) without further hearing is consistent with due process of law. P. 464.

   So *held* irrespective of whether the notary would have been empowered, by the state law, to pass upon objections, if raised by the witness on the ground of privilege; and without considering whether if he lacked that power the hearing in court afforded by § 11514 of the Code, to review commitment by the notary, would satisfy due process.
4. Commitment of a witness, subject to review by the state courts, because of his refusal to give a deposition before the committing officer, is not lacking in due process because the officer's statutory fees and his charge for extra copies are measured by the folios of testimony taken. *Tumey* v. *Ohio*, 273 U.S. 510, distinguished. P. 465.

126 Oh. St. 126; 184 N.E. 343, affirmed in No. 784.

In Nos. 785 and 786, appeals dismissed for want of a federal question.

Appeals from judgments affirming judgments of the Court of Appeals of Ohio in *habeas corpus* proceedings, whereby the petitioners, Bevan et al., were remanded to the custody of the sheriff. The opinion of the Court of Appeals is reported in 12 Oh. Law Abstract 598. A collateral remedy was sought by *habeas corpus* in a federal court, as to which this Court refused a writ of certiorari, 287 U.S. 665.

Messrs. Crary Davis and *George D. Welles* for appellants.

Mr. Raymond T. Jackson, with whom *Messrs. Newton D. Baker, Harold W. Fraser,* and *John C. Morley* were on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The three judgments from which these separate appeals are prosecuted have a common origin, are founded upon the same Code provisions, in the main present related questions, and may be reviewed in a single opinion.

Suit was instituted in an Ohio court by Clara Sielcken-Schwarz, as widow and sole legatee of Hermann Sielcken, against the Woolson Company (of which the appellant Bevan is secretary and treasurer), Koehrman, Stranahan, and others, to obtain redress for an alleged fraudulent scheme whereby her deceased husband's executor, The Columbia Trust Company, was induced to part with certain capital stock of that corporation. The plaintiff, desiring to take the depositions of the three appellants, proceeded as provided by the General Code of Ohio.[1] Subpoenas *duces tecum* were served upon Bevan and Koehrman, and a subpoena *ad testificandum* on Stranahan. A notary public was named to take the testimony, and at the time and place appointed Bevan appeared before him, was sworn,

[1] Either party may commence taking testimony by deposition at any time after service of process (§ 11526), before a judge or clerk of a court, a justice of the peace, a notary public, and certain other designated persons (§ 11529). Notice of intention to take depositions must be given (§§ 11534-11535). The officer authorized to take the depositions may issue subpoenas, including subpoenas *duces tecum,* and provision is made for service upon the witness (§§ 11502-3-4). A party, or if the party be a corporation, any officer thereof, may be examined as if under cross examination (§ 11497).

answered some questions, declined to answer others, and finally declared that he would answer no more. In each instance he was enjoined by the notary to answer, and in each case stated that he refused on the advice of counsel. He also failed to produce papers and documents called for in his subpoena, although he admitted that he had them in his possession or under his control, and in this matter also gave as his excuse advice of counsel. He did not claim personal privilege or possibility of self-incrimination, but he and his counsel contented themselves with the statement that the questions and the writings were immaterial and irrelevant to any issue in the suit. Koehrman and Stranahan failed to appear in response to the subpoenas served upon them. The notary, upon the plaintiff's request, issued a commitment of Bevan for contempt, and attachments for the other two appellants. These writs were delivered to the sheriff for service. All three appellants surrendered to that official, and applied to the Court of Appeals of Lucas County for writs of habeas corpus. After hearings, that court remanded each to the custody of the sheriff. The Supreme Court affirmed the judgments.

In the courts below, and here, the appellants have insisted that the statutes of Ohio authorizing their arrest and detention deprive them of due process. The sections of the General Code drawn in question are 11510, whereby disobedience of a subpoena and refusal to be sworn, or an unlawful refusal to answer as a witness, may be punished as a contempt of the officer by whom the attendance or testimony of the witness is required; 11511, which authorizes the notary to issue an attachment to arrest and bring before him the person subpoenaed to give his testimony or answer for his contempt; and § 11512 which fixes the penalty for contempt:

"When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over fifty

dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition."

By § 11514 it is provided that a witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him if it appears that his imprisonment is illegal.

The appellants' position is that since the statute requires the witness to answer only lawful questions, and the notary, not being a judicial officer, is not permitted to pass upon the lawfulness of a question, but is bound to commit for refusal to answer, the commitment without a prior judicial hearing, and provision for such a hearing only after commitment (§ 11514), is a denial of due process.

Koehrman and Stranahan fail to present a federal question. Both of them, without excuse, absented themselves from the taking of the depositions. The writs of attachment issued to bring them before the notary for contempt were not served. While the sheriff held the process these appellants sought him out, surrendered to him, and immediately applied for writs of habeas corpus. Their conduct precludes the assertion that they were denied a hearing by the notary. They asked for none, and by their action rendered one impossible.

Bevan's case differs but slightly from those of Koehrman and Stranahan. He refused to answer questions or to produce the writings enumerated in his subpoena. The notary thereupon, after adjourning the hearing until the following day, issued the commitment. Bevan surrendered himself to the sheriff, and by habeas corpus challenged the legality of his detention.

In Ohio, as generally elsewhere, the officer taking a deposition does not rule upon the competency or materi-

ality of the evidence to the issues made by the pleadings. The witness's testimony is taken subject to the reserved right to object to its admissibility at the trial. The right of objection and exclusion belongs to the parties, not to the witness. So far as disclosed, the refusal to answer and produce documents was based solely on the theory that the petition in the suit did not state a cause of action and that the depositions constituted a fishing expedition for evidence. But the appellant now insists that aside from their irrelevancy, which was the ground of refusal to answer, the questions propounded may have been improper as trenching upon the personal privilege of the witness, although he indicates no aspect in which this might be true. He says that it would have been useless for him to raise the issue before the notary because under the decisions of the Ohio courts the latter is not a judicial officer invested with power to pass upon such an issue; that therefore a witness must take the risk that he is correct in his refusal to answer, and may vindicate his action only before a court after commitment, in accordance with § 11514.

In Ohio a notary has been held not to be a judicial officer within the meaning of the state constitution; but we think that he may nevertheless be authorized to pass upon the witness's privilege. We find no decision of the Supreme Court of Ohio holding the notary incompetent to consider and to pass in the first instance upon the propriety of a witness's refusal to answer. No such lack of power appears upon the face of the statutes. The appellant admits this, but asserts that the Code provision has been construed by the courts to prohibit the notary from passing on the witness's reasons for refusal to testify. We are not convinced that the state courts have so interpreted the statute.

But we deem it unnecessary to pursue the inquiry, or to express any view as to the adequacy of the hearing afforded after commitment by § 11514, for the reason that the alleged deprivation of appellant's liberty was consequent upon his sweeping statement that he would answer no further questions. Such conduct by a witness in any court would be sufficient ground for his commitment without further or other hearing. Such an attitude indicates no desire for a hearing upon the propriety of the questions, but on its face constitutes a contempt. Bevan requested no consideration of his rights by the notary, and was denied no hearing by that officer upon the issue whether the questions infringed his personal privileges as a witness. His claim that he was denied due process is therefore without foundation.

The appellant Bevan also advances the contention that the notary had such a pecuniary interest in compelling the testimony as would disqualify him, and deprive his rulings of the impartiality required for due process. Notaries are entitled to fees of twenty-five cents per hundred words for taking and certifying depositions (General Code, §§ 127, 1746–2). These are paid in the first instance by the party taking the depositions, and are taxable as costs in the suit. It appears from the record that it is also customary for the notary if, as in this case, he happens to be a stenographer, to take the testimony stenographically and to furnish additional copies to the parties at a charge somewhat less per hundred words than is provided in the statute. These facts are said to bring the case within the principle announced in *Tumey* v. *Ohio,* 273 U.S. 510. But we think the suggested analogy does not exist. Tumey, as mayor of a city, sat as a magistrate. His judgments were final as to certain offenses, unless wholly unsupported by evidence. The law awarded him a substan-

tial fee if he found an offender guilty, and none in case of acquittal. Tumey's interest was direct and obvious; but the possibility that the extent of the notary's services and the amount of his compensation may be affected by his ruling is too remote and incidental to vitiate his official action. Moreover, his action lacks the finality which attached to the judgment in the *Tumey* case, as it is subject to review in accordance with § 11514.

No. 784, judgment affirmed.
Nos. 785 and 786, appeals dismissed.

QUERCIA v. UNITED STATES.

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

No. 701. Argued May 9, 1933.—Decided May 29, 1933.

1. The right of a trial judge in a federal court to comment upon the evidence and express his opinion of it while making clear to the jury that they are not bound by his opinion and that all matters of fact are submitted to their determination,—is an essential common-law prerogative maintained by the Constitution. P. 469.
2. This privilege, however, does not permit the judge to distort or add to the evidence; and, because of his great influence on the jury, he must use great care to be fair and not mislead, and must studiously avoid deductions and theories not warranted by evidence. P. 470.
3. It is important that hostile comment of the judge in a criminal case should not render vain the privilege of the accused to testify in his own behalf. P. 470.
4. The court charged the jury:

   "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is a rather curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie."

Held error, and not cured by a warning that the judge's opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty.
62 F. (2d) 746, reversed.

CERTIORARI * to review the affirmance of a sentence under the Federal Narcotics Act.

Mr. Essex S. Abbott for petitioner.

The *Solicitor General* did not oppose the granting of the writ of certiorari to determine the question here decided. His position taken at the argument is shown by the following summary.

The function of a federal judge in a criminal case to advise the jury upon the facts and to express his opinions concerning the credibility of witnesses and the guilt or innocence of the accused, can not be questioned. The exercise of this judicial function in a proper case is one of the most important duties which a trial judge has to perform in a federal court, and the concept of trial by jury embodied in the Constitution includes this function as one of its essential elements. The judge may not, however, usurp the functions of the jury; and if his instructions may fairly be said to have been coercive upon the jurors in their consideration of facts determinative of their conclusion upon the question of guilt, the charge is erroneous, even though in form it is an expression of the court's opinion and the jurors are told that, after all, they are to determine the facts.

We think a portion of the charge complained of was improper, and that this Court should determine whether it was unfair and coercive. The question is peculiarly one for the judgment of this Court, in the exercise of its supervisory control over the inferior federal courts. We

* See Table of Cases Reported in this volume.

therefore submit the case without contention either that the judgment should be affirmed or that it should be reversed.

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

Petitioner was convicted of violating the Narcotic Act. 26 U.S.C., 692, 705. The conviction was affirmed by the Circuit Court of Appeals, 62 F. (2d) 746, and this Court granted certiorari.

Reversal is sought upon the ground that the instructions of the trial court to the jury exceeded the bounds of fair comment and constituted prejudicial error. After testimony by agents of the Government in support of the indictment, defendant testified, making a general denial of all charges. His testimony is not set forth in the record. Defendant's motion for a direction of verdict and requests for rulings substantially to the same effect were denied. The court instructed the jury concerning the rules as to presumption of innocence and reasonable doubt, and stated generally that its expression of opinion on the evidence was not binding on the jury and that it was their duty to disregard the court's opinion as to the facts if the jury did not agree with it. The court ruled as matter of law that if the jury believed the evidence for the Government it might find the defendant guilty. The court then charged the jury as follows:

"And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

"Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty."

To this charge the defendant excepted.

In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. *Carver* v. *Jackson*, 4 Pet. 1, 80; *Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U.S. 545, 553; *United States* v. *Philadelphia & Reading R. Co.*, 123 U.S. 113, 114; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13, 14; *Patton* v. *United States*, 281 U.S. 276, 288. Sir Matthew Hale thus described the function of the trial judge at common law: "Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact; which is a great advantage and light to laymen." Hale, History of the Common Law, 291, 292. Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts. *Vicksburg & Meridian R. Co.* v. *Putnam, supra; St. Louis, I. M. & S. Ry. Co.* v. *Vickers*, 122 U.S. 360, 363; *Slocum* v. *New*

York Life Insurance Co., 228 U.S. 364, 397; *Herron* v. *Southern Pacific Co., supra; Gasoline Products Co.* v. *Champlin Co.*, 283 U.S. 494, 498.

This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided." *Starr* v. *United States,* 153 U.S. 614, 626; *Hickory* v. *United States,* 160 U.S. 408, 421–423. He may not charge the jury "upon a supposed or conjectural state of facts, of which no evidence has been offered." *United States* v. *Breitling,* 20 How. 252, 254, 255. It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. *Hicks* v. *United States,* 150 U.S. 442, 452; *Allison* v. *United States,* 160 U.S. 203, 207, 209, 210. Thus, a statement in a charge to the jury that "no one who was conscious of innocence would resort to concealment," was regarded as tantamount to saying "that all men who did so were necessarily guilty," and as magnifying and distorting "the proving power of the facts on the subject of the concealment." *Hickory* v. *United States, supra.*

And the further charge that the proposition that "the wicked flee when no man pursueth, but the innocent are as bold as a lion," was "a self-evident proposition" which the jury could "take as an axiom and apply it" to the case in hand, was virtually an instruction that flight was conclusive proof of guilt. Such a charge "put every deduction which could be drawn against the accused from the proof of concealment and flight, and omitted or obscured the converse aspect"; it "deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth." *Id.* So where the trial judge, in referring to the defendant's story of self-defense, said—"All men would say that. No man created would say otherwise when confronted with such circumstances," this Court held that the comment practically deprived the defendant of the benefit of his testimony. "It was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law." *Allison* v. *United States, supra.* Similarly, where no testimony had been offered as to the previous character of the accused, it was prejudicial error for the trial court to comment unfavorably upon his general character. *Mullen* v. *United States,* 106 Fed. 892, 895, per Day, C. J. See, also, *Parker* v. *United States,* 2 F. (2d) 710, 711; *O'Shaughnessy* v. *United States,* 17 F. (2d) 225, 228; *Cook* v. *United States,* 18 F. (2d) 50; *Malaga* v. *United States,* 57 F. (2d) 822.

In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition. Dealing with a mere mannerism of the accused in giving his testimony, the judge put his own experience, with all the weight that could be attached to it, in the scale against the accused. He told the jury

that " wiping " one's hands while testifying was " almost always an indication of lying." Why it should be so, he was unable to say, but it was " the fact." He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the Government's witnesses. This was error and we cannot doubt that it was highly prejudicial.

Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty. His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn. His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence. *Starr* v. *United States, supra; Mullen* v. *United States, supra; Wallace* v. *United States,* 291 Fed. 972, 974; *Parker* v. *United States, supra; O'Shaughnessy* v. *United States, supra; Leslie* v. *United States,* 43 F. (2d) 288, 289.

The judgment must be

Reversed.

CONRAD, RUBIN & LESSER *v.* PENDER, TRUSTEE IN BANKRUPTCY.

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

No. 718. Argued May 9, 1933.—Decided May 29, 1933

1. Payments made by the debtor in contemplation of bankruptcy " to an attorney and counselor at law, solicitor in equity, or proctor in admiralty," " for services to be rendered," are subject to be sum-

marily reëxamined by the referee as to their reasonableness, under § 60 (d) of the Bankruptcy Act. P. 475.

2. The payments covered by § 60 (d) are to be distinguished from the allowances contemplated by § 64b (3) which are made out of the bankrupt estate for legal services in its administration. P. 476.
3. The jurisdiction to reëxamine under § 60 (d) depends not on the specific nature of the services to be rendered, but upon the state of mind of the debtor—upon whether his thought of bankruptcy was the impelling cause of the transaction. P. 477.
4. The test of jurisdiction under § 60 (d) is not whether the services to be rendered are "germane to the aims of the Bankruptcy Act." P. 478.
5. The payments may well be "in contemplation of bankruptcy" though the purpose was to bring about an arrangement with creditors that would prevent bankruptcy. P. 478.

61 F. (2d) 771, affirmed.

CERTIORARI * to review an order of a court of bankruptcy requiring the present petitioners to turn over to the trustee part of a sum that had been paid to them by the debtor for future legal services shortly before the filing of a bankruptcy petition against him.

Mr. Samuel Rubin argued the cause for petitioners, by permission *pro hac vice,* and with *Mr. David J. Colton* filed a brief on their behalf.

Mr. George C. Levin, with whom *Mr. Sydney Krause* was on the brief, for respondent.

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

By an order made by a referee in bankruptcy under § 60 (d) of the Bankruptcy Act, 11 U.S.C., 96 (d), appellants were directed to turn over to the trustee in bankruptcy the sum of $2,000, which was part of an amount paid to them by the bankrupt corporation for legal serv-

* See Table of Cases Reported in this volume.

ices rendered shortly before the filing of an involuntary petition. The order was sustained by the District Court, *In re David Bell Scarves, Inc.*, 52 F. (2d) 755, and by the Circuit Court of Appeals. 61 F. (2d) 771. This Court granted certiorari.

The only question presented is raised by the appellants' challenge of the jurisdiction of the referee to reëxamine the payment under § 60 (d). The payment was made on November 5, 1930, and the petition in bankruptcy was filed twelve days later. There is no room for controversy as to the facts which are thus stated by the Court of Appeals: The corporation was in financial difficulties and unable to meet its maturing obligations. Prior to retaining the appellants, it had engaged another attorney to negotiate a settlement with its creditors, and a meeting with some of its creditors had been held. Apparently the appellants were retained to supplement the efforts of that attorney, to whom $750 had already been paid upon a promised fee of $2,000. The testimony of one of the appellants, given at an examination under § 21a, was to the effect that he was to negotiate with creditors for a 50 per cent. cash settlement and was to assist the corporation in hypothecating its accounts receivable in order to obtain the necessary money to carry out such a settlement. His affidavit, submitted in opposition to the referee's jurisdiction, stated that the most extreme course which was within the contemplation of himself and David Bell, bankrupt's president, was continuance of the business under an equity receivership, although that course was not contemplated if the business could be continued under the supervision of a committee of creditors or of a representative of the New York Creditors' Adjustment Bureau, Inc. It also appeared that within two weeks prior to November 5th, when the appellants' retainer was paid, David Bell had withdrawn

$1,500 from the corporation, and his brother, an employee, had withdrawn $750. The cash resources of the corporation were so low that appellants' retainer could not be paid until a sale of merchandise was made, and the purchaser's check for $2,500 was then indorsed to appellants.

The District Court concluded that the thought of bankruptcy was the impelling motive of the debtor corporation when its president retained appellants. And the Court of Appeals was of the opinion that in these circumstances the payment was made "in contemplation" of bankruptcy within the meaning of § 60 (d).[1]

That provision has been held to be *sui generis*. It does not contemplate a plenary suit, but a summary proceeding. *In re Wood & Henderson*, 210 U.S. 246, 251–253. The class of cases to which it refers is not that of preferences or of fraudulent conveyances. *Id.* The provision authorizes reëxamination of payments or transfers when made by a debtor (1) "in contemplation of the filing of a petition by or against him," (2) "to an attorney and counselor at law, solicitor in equity, or proctor in admiralty," and (3) "for services to be rendered." Such payments or transfers are only to "be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The language of the provision, and the indicated scope of the legal services embraced within it, distinguish it

[1] Section 60 (d) provides as follows: "(d) If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

from the provision of § 64b (3), 30 Stat. 563; 11 U.S.C. 104 (b) (3),[2] with respect to the priority of a reasonable attorney's fee in the distribution of an estate in bankruptcy.[3] See *Furth* v. *Stahl,* 205 Pa. St. 439, 442; 55 Atl. 29; *Pratt* v. *Bothe,* 130 Fed. 670, 673. Section 60 (d) relates to payments and transfers made by the bankrupt prior to bankruptcy from his own property for services to be rendered to him; § 64b (3) to an allowance to be made for legal services out of the estate under administration. See *In re Rolnick,* 294 Fed. 817, 819. The services within the latter provision are those rendered in aid of the administration of the estate and the carrying out of the provisions of the Act. See *Randolph* v. *Scruggs,* 190 U.S. 533, 539; *In re Kross,* 96 Fed. 816; *In re Mayer,* 101 Fed. 695; *In re Rosenthal & Lehman,* 120 Fed. 848; *In re Christianson,* 175 Fed. 867. Section 60 (d), authorizing a reëxamination of payments and transfers by the bankrupt for services to be rendered, has a broader scope. It contains no intimation of an intention to limit the jurisdiction to reëxamine to a particular sort of legal services for the payment of which the debtor has disposed of his property. The point of the provision conferring jurisdiction for a summary reëxamination is not the specific nature of the legal services to be rendered but that the

[2] Section 64b (3) provides: "(b) The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (3) the cost of administration, . . . and one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases as the court may allow; . . ."

[3] Cf. *In re Kross,* 96 Fed. 816, 818, 819; *In re Habegger,* 139 Fed. 623, 627; *In re Christianson,* 175 Fed. 867, 868; *In re Secord,* 296 Fed. 231, 232.

payment or transfer to provide for them is made "in contemplation" of bankruptcy. The purpose is shown by the sweeping description of payments or transfers "to an attorney and counselor at law, solicitor in equity, or proctor in admiralty."

We agree with the Court of Appeals that the criteria of jurisdiction to reëxamine are distinct from the criteria of the decision on the merits. As to the jurisdiction to reëxamine, the controlling question is with respect to the state of mind of the debtor and whether the thought of bankruptcy was the impelling cause of the transaction. Compare *United States* v. *Wells,* 283 U.S. 102, 117, 118; *Tripp* v. *Mitschrich,* 211 Fed. 424, 427. If the payment or transfer was thus motivated, it may be reëxamined and its reasonableness be determined. Undoubtedly, while the question thus relates to the debtor's motive, the nature of the services which he seeks and for which he pays may be taken into consideration as it may throw light upon his motive. It is not impossible that the services may have been so wholly separate from any exigency of bankruptcy as to indicate that the thought of bankruptcy was in no sense controlling. But, given the fact that the payment or transfer was in contemplation of bankruptcy, the inducement of the transaction affords, from the standpoint of the statute, sufficient ground for authorizing a summary inquiry into its reasonableness. The manifest purpose of the provision is to safeguard the assets of those who are acting in contemplation of bankruptcy, so that these assets may be brought quickly and without unnecessary expense into the hands of the trustee, and to provide a restraint upon opportunities to make an unreasonable disposition of property through arrangement for excessive payments for prospective legal services. *In re Wood & Henderson, supra; Pratt* v. *Bothe, supra.* We said in the case of *Wood & Henderson* that the statute "recognizes

the temptation of a failing debtor to deal too liberally with his property in enabling counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which will strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances the Act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, reëxamine it with a view to a determination of its reasonableness."

In this view, we are unable to conclude that the question whether the services for which the payment or transfer is made are "germane to the aims of the Bankruptcy Act," as suggested in some of the decisions,[4] furnishes the test of the jurisdiction to reëxamine. The test of jurisdiction, we repeat, is given by the express language of the statute. In the exercise of jurisdiction, all questions bearing upon the reasonableness of the transaction, including the purpose and nature of the services, are open to consideration. But it is insisted, in the instant case, that the payment to appellants could not properly be regarded as made in contemplation of bankruptcy, and hence within the jurisdiction to reëxamine, because the payment was for the purpose of engaging appellants to conduct negotiations with creditors in order to arrange for an extension of time, and, if necessary, for the operation of the business under the creditors' supervision, and thus to avoid a forced liquidation and ultimately to restore the business to a sound basis. We find no ground for saying that the fact that such purposes were in view establishes, as matter of law, that the payment was not in contempla-

[4] See *In re Habegger*, 139 Fed. 623; *In re Stolp*, 199 Fed. 488; *In re Rolnick*, 294 Fed. 817; *In re Lang*, 20 F. (2d) 239; *Quinn* v. *Union National Bank*, 32 F. (2d) 762.

tion of bankruptcy. On the contrary, negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment. "A man is usually very much in contemplation of a result which he employs counsel to avoid." *Furth* v. *Stahl, supra.* See, also, *In re Klein-Moffett Co.,* 27 F. (2d) 444; *Slattery* v. *Dillion,* 17 F. (2d) 347; *In re Lang,* 20 F. (2d) 239.

We are of the opinion that the court had jurisdiction to make the order under review.

Affirmed.

JOHNSON v. MANHATTAN RAILWAY CO. ET AL.*

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

No. 711. Argued April 18, 19, 1933.—Decided May 29, 1933.

1. Review under writ of certiorari limited to that sought by petition. P. 494.
2. Parties appearing in an equity suit in the District Court in response to orders therein inviting them to show cause why a temporary receivership should not be continued, are not precluded from objecting to the authority of the judge under an assignment, or to the inconsistency of his action with applicable court rules, or to the unfitness of the receivers; and should the receivership be continued in spite of these objections, they would be entitled to appeal. P. 495.
3. An attack in a suit for a receivership in the District Court upon the appointment of receivers of the same property in an earlier independent suit in the same court, upon the grounds that the judge who made the appointment was incompetent to act and the persons appointed receivers unfit, *held* a collateral attack. P. 495.
4. A collateral attack can be successful only where and to the extent that it discloses a want of power, as distinguished from error in the exertion of power that was possessed. P. 496.

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* Together with No. 721, *Boehm* v. *Manhattan Railway Co. et al.*

5. A collateral attack is not converted into a direct one by consolidating the suit in which it is made with the suit in which the proceeding attacked was taken. P. 496.
6. Under 28 U.S.C., § 734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another. P. 496.
7. Under 28 U.S.C., § 22, providing that the senior circuit judge of a circuit, "if the public interest requires," may designate "any circuit judge" of the circuit to hold a district court therein, and *id.*, § 23, requiring the circuit judge so assigned to discharge all the judicial duties "for which he is so appointed, during the time for which he is so appointed," the senior circuit judge is authorized to assign himself, and also to make the designation selective, for a particular case. Pp. 497–500.
8. This meaning of the words is confirmed by the legislative history of the provision and the practice under it. P. 497.
9. Reënactment of a statutory provision without change implies legislative adoption of the prior practical construction of it. P. 500.
10. The duty of deciding whether the public interest requires an assignment under § 22, *supra*, is on the judge making the assignment, and his decision thereon is not open to a collateral attack. P. 501.
11. An attempt of a private party, by a bill in the District Court seeking a receiver, to set aside orders appointing receivers made by an assigned circuit judge in another suit in the same court, upon the ground that his assignment was invalid, can not be regarded as a proceeding in *quo warranto*, and consequently as a direct attack. P. 502.
12. A rule of the District Court providing that an assigned judge shall "do such work only as may be assigned to him by the senior district judge," is inconsistent with 28 U.S.C., §§ 22 and 23, as applied to a circuit judge assigned, under those sections, to the District Court for a particular case. P. 503.
13. The same is true of a rule of the District Court providing that all applications for the appointment of receivers in equity causes shall be made to the judge holding the motion part of the court, and "to no other judge." P. 503.

14. By 28 U.S.C., § 731, the power of the District Courts to make rules is confined to such as are "not inconsistent with any law of the United States"; and it obviously would be thus limited even without the statute. P. 503.
15. The power of a senior circuit judge to assign himself to sit in a particular case in the District Court is one that should be sparingly exercised and then only with care and discretion; and the occasions are rare in which the matter can not be referred to the Chief Justice or the Circuit Justice. P. 504.
16. The assignment of a judge to take charge through a receivership of immensely valuable property of public carriers, in a case of great public interest involving many diverse claims and difficult problems, is a task to be performed only upon careful consideration and with the utmost impartiality. P. 504.
17. A difference of opinion between the senior circuit judge and the district judges, respecting the relative fitness of individuals and trust companies as equity receivers, *held* not a proper ground for taking the cause away from the district judge before whom it ordinarily would come, and bringing it before the assigning senior circuit judge, in this case. P. 505.
18. As the action of the senior circuit judge in assigning himself to the District Court and appointing receivers in this matter is embarrassing to the receivership, and as by his withdrawal now that embarrassment would be relieved, the Court suggests that he do withdraw and open the way for another judge to conduct the further proceedings. P. 505.

61 F. (2d) 934, affirmed.

CERTIORARI† to review the reversal of a decree of the District Court, in a suit for receivers. The decree was entered by a district judge and purported to vacate certain orders appointing and continuing receivers, etc., made by the senior circuit judge sitting in the District Court, in another suit, under an assignment made by himself. See 1 F.Supp. 809.

Mr. Charles Franklin, with whom *Messrs. Alfred C. B. McNevin* and *Herbert Goldmark* were on the brief, for Johnson, petitioner.

† See Table of Cases Reported in this volume.

Mr. Louis Boehm, with whom *Messrs. Harry Shulman* and *Elliot S. Benedict* were on the brief, for Boehm, petitioner.

Mr. Nathan L. Miller, with whom *Messrs. Cloyd Laporte, William W. Miller, Carl M. Owen,* and *Harold J. Gallagher* were on the brief, for Dowling et al., Receivers of the Interborough Rapid Transit Co., respondents.

Mr. H. C. McCollom, with whom *Mr. Edward Cornell* was on the brief, for the Central Hanover Bank & Trust Co., Trustee, respondent.

Messrs. John W. Davis and *Edwin S. S. Sunderland* submitted for the Committees acting for Interborough Rapid Transit Company 7% Secured Notes et al., respondents.

Mr. Cloyd Laporte submitted for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Co., respondent.

Messrs. Charles E. Hughes, Jr., and *Allen S. Hubbard* submitted for Roberts, Receiver for Manhattan Railway Co., respondent.

Messrs. Paxton Blair, Boykin C. Wright, and *Clifton Murphy* submitted for Merle-Smith et al., constituting the Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds, respondents.

Messrs. James L. Quackenbush and *Louis S. Carpenter* submitted for the Interborough Rapid Transit Co., respondent.

Messrs. Charles H. Tuttle, Paris S. Russell, and *W. K. Petigrue* submitted for The American Brake Shoe & Foundry Co., respondent.

Messrs. Arthur J. W. Hilly, Edgar J. Koehler, and *Frank E. Carstarphen,* by leave of Court, filed a brief on behalf of the City of New York, as *amicus curiae.*

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

These cases exhibit an acute controversy between the Senior Circuit Judge of the Second Circuit and the District Judges of the Southern District of New York respecting the authority of a judge specially assigned to that district—particularly the Senior Circuit Judge when so assigned—to entertain an application for the appointment of receivers in a suit in equity.

Among the rules of the District Court for that district was one whereby a particular trust company was designated as a standing receiver in bankruptcy, and effect was given to that rule in all bankruptcy proceedings. There was no such rule respecting receivers in suits in equity, and the District Judges all regarded themselves as free in appointing such receivers to select any individual or trust company deemed competent and suitable for the particular task. But not infrequently they selected as an equity receiver the trust company which was designated by rule as a standing receiver in bankruptcy proceedings. The nature and importance of the equity receiverships for which a trust company was selected are not clearly disclosed in this record, but it is reasonably apparent that in no instance was the receivership at all comparable in scope or importance with the railroad receivership with which the present litigation is concerned.

In 1930 the Senior Circuit Judge, acting under 28 U.S.C., § 22, and reciting that the public interest required it, assigned himself to hold at any time a session or sessions of the District Court for that district, for the purpose of trying causes and entertaining and disposing of any matter which might come before him.

In June, 1932, at the suggestion of counsel in an intended suit in equity for the appointment of receivers for the Fox Theatres Corporation, the Senior Circuit Judge

sought informally to persuade one or more of the District Judges that a trust company ought not to be selected as receiver, but failed to secure an acceptance of his view. Thereupon, acting under his assignment of 1930, he entertained the application for a receiver and appointed individual receivers.

This action of the Circuit Judge was followed a few days later by the adoption and promulgation by the District Judges of two new rules, known as 1-a and 11-a, effective July 1, 1932, and apparently designed to limit or restrict the action of assigned judges in that district. These rules will be set forth later on.

August 25, 1932, counsel representing the parties in an intended suit in equity by the American Brake Shoe and Foundry Company against the Interborough Rapid Transit Company, informed the Senior Circuit Judge that an application for the appointment of receivers would be made in that suit, and laid before him an affidavit, entitled therein, alleging generally that a trust company or other corporation would not be a suitable receiver, and particularly that the defendant company's complicated and involved daily operations, its enormous staff of operating officials and employees, its contracts and relations with the City of New York, and the use of its facilities by the public, required that the receiver or receivers be a competent individual or individuals who could give constant and undivided attention to the matter. Thereupon the Senior Circuit Judge, conceiving that a District Judge might select a corporate receiver and that this would be unwise and should be prevented,[1] concluded to assign, and did assign, himself to hold a District Court for the Southern District, " particularly to hear and determine all applications and proceedings " in the intended

[1] See *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 1 F.Supp. 820, 825–827.

suit for a period beginning that day and continuing until the suit came to an end. This assignment, like that of 1930, recited that it was made under 28 U.S.C., § 22, and that the public interest required it.

The statute referred to in the two assignments provides:

"Sec. 22. The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit. . . .

"During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, . . . to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)."

The new rules adopted by the District Judges declare:

"1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge."

"11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned [meaning assigned by the District Judges in their division of business] to hold the Bankruptcy and Motion Part of the business of the court and to no other judge."

Immediately after making the assignment last mentioned, the Senior Circuit Judge turned to 28 U.S.C., § 27, which declares:

"In districts having more than one district judge, the judges may agree upon a division of business and assign-

ment of cases for trial in said district; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District";—

and he then made and signed the following order:

"And whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York, as provided in and pursuant to the rules of court for the Southern District of New York, heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

"Ordered, adjudged and decreed that, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the district judge designated to hear such application pursuant to Rule 11-a of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York."

That order was filed and entered in the District Court, and on August 26 the American Brake Shoe and Foundry Company filed therein its bill of complaint against the Interborough Rapid Transit Company, together with the affidavit before mentioned. The bill disclosed that the plaintiff was a simple contract creditor, suing on its own behalf and on behalf of all other creditors who might choose to join in the suit, and that the defendant was en-

gaged as a public carrier in operating an extensive system of transportation within the City of New York and its environs; set forth with much detail that the defendant was in greatly embarrassed financial condition, had made default in the payment of taxes and other claims, and could not avoid making default in the payment of instalments of interest and principal about to fall due upon bonds and other obligations secured by mortgages; alleged that its properties were in danger of being dismembered and largely wasted through competitive efforts by its many creditors to obtain satisfaction of their claims, that such wasteful strife would seriously impair and interfere with the discharge of its duties as a public carrier, that its properties could be preserved for equitable distribution among those entitled thereto only through the intervention of a court of equity, and that such intervention would make for a realization for all of the creditors of a substantially larger amount than if that relief were not granted. The prayer was that receivers be appointed to take charge of and preserve the defendant's properties, continue the operation of its railroad system for the accommodation of the public, and collect and properly appropriate the income until the final decree, and that the court marshal and administer the assets and by its decree ascertain and enforce the rights, liens and equities of the several creditors.

The suit plainly was within the jurisdiction of the District Court as a federal court. The parties were citizens of different states and the amount or value in controversy was in excess of the minimum prescribed in the jurisdictional statute.

Immediately after the bill was filed the defendant appeared and, conformably to a resolution of its board of directors, answered the bill, admitted the allegations therein, joined in the plaintiff's prayer and consented to the appointment of receivers.

Later in the same day, August 26, the parties appeared before the Senior Circuit Judge, sitting under the assignment and order of the day before; and, after examining the bill, affidavit and answer, the judge made an interlocutory order appointing temporary receivers and granting the usual temporary injunction against the institution of suits against the defendant company, except on leave granted in that suit. The order also directed (1) that on September 22, the parties show cause before him, as such assigned Circuit Judge, why the receivership should not be continued during the pendency of the suit, and (2) that at that hearing "any other creditor of the defendant or other party in interest may be heard."

The receivers took possession of the properties and have since been operating them under orders made from time to time by the Senior Circuit Judge in that suit.

September 6, the Manhattan Railway Company petitioned for leave to intervene as a defendant in the Interborough receivership suit and set forth in the petition many facts showing the Manhattan's serious financial embarrassment; and alleged that it owned a substantial part of the property held and operated by the Interborough Company and included in the receivership, and that the same was held and operated by the Interborough Company under a lease from the Manhattan Company. The petition referred to and claimed the benefit of various provisions in the lease defining the obligations of the Interborough Company thereunder, and pointed out that in several particulars the Interborough had made default in the performance of its obligations and that these defaults were admitted by the Interborough's answer. The petition prayed that the Manhattan Company be made a party defendant in the receivership suit for the protection of its interests and those of its creditors; that the receivership be extended so as to embrace the interest of the Manhattan Company, but without prejudicing or impairing

any of its rights against the Interborough Company or the latter's receivers, and that such receivers be required to keep separate accounts in respect of the railroads owned by the Manhattan Company. Upon the presentation of this petition the Senior Circuit Judge made an interlocutory order granting its several prayers, appointing a separate temporary receiver for the Manhattan Company and its assets, and granting the usual injunction. This order also required the parties to show cause on September 22, why the extension of the receivership to the Manhattan Company and its assets should not be continued during the pendency of the suit, and provided that upon such hearing "any other creditor of the defendant or other party in interest may be heard."

Several committees representing different groups of creditors, some of the Interborough Company and others of the Manhattan Company, were permitted to intervene and become parties, and many orders were made relating to the employment of counsel for the receivers and the conduct of the receivership.

On the return day of the rules to show cause the parties and many others in interest appeared and were heard by the Senior Circuit Judge; but Benjamin F. Johnson and Lillian Boehm, to be mentioned presently, were not among those who appeared. Both refrained from participating in the hearing or otherwise appearing in the suit. As a result of the hearing, the Senior Circuit Judge, on September 28, made an order or decree continuing the receiverships of the Interborough and Manhattan during the further pendency of the suit.

In the meantime another separate suit for the appointment of receivers of the Manhattan and Interborough companies was commenced, and that suit needs now to be described.

On September 21, Benjamin F. Johnson, a minority shareholder of the Manhattan Company, filed in the Dis-

trict Court an independent bill against that company and its temporary receiver, the Interborough Company and its temporary receivers, and the American Brake Shoe and Foundry Company. He sued on behalf of himself and all other shareholders in the Manhattan Company who might join; and his right to sue the Manhattan and Interborough companies and their temporary receivers was based upon an order giving him leave so to do, which was made by the District Judge sitting in the motion part of the court, notwithstanding the injunction granted by the Senior Circuit Judge when the temporary receivers were appointed. Johnson in his bill asserted a cause of action on behalf of the Manhattan Company against the Interborough Company arising out of the lease before described, and also a right to an accounting in that connection. He further asserted there was an urgent need for receivers for both companies and prayed for the appointment of separate receivers for each of them. By his bill he also assailed the authority of the Senior Circuit Judge to entertain the suit of the American Brake Shoe Company or to appoint receivers or make any order or decree therein; and asserted that all of the orders and decrees passed by that judge were those of an usurper and wholly void, (1) because there was no public interest requiring the assignment of a Circuit Judge to sit in the suit, and therefore the assignment under which the judge was acting was without lawful basis and void; (2) because the District Judges were not in disagreement, but in full accord, respecting the division of business and therefore the order of the Senior Circuit Judge respecting a division of business, whereby he directed that applications for the appointment of receivers in equity might be made to him, was without lawful basis and void; (3) because he was a designated judge within the meaning of Rule 1-a of the District Court, and under that rule could do "such work only" as might be committed to him by the Senior

District Judge, and none had been so committed; and (4) because Rule 11-a of the District Court required all applications for the appointment of receivers in equity to be made to the judge assigned by the district judges to hold the motion part of the court, and "to no other judge," and not only was the Senior Circuit Judge not assigned to that part of the court but a District Judge duly assigned thereto was sitting therein at the time, and willing and ready to act upon any such application. Upon these grounds Johnson prayed that the Senior Circuit Judge's assignment to the District Court for the purpose of hearing matters in the American Brake Shoe Company's suit, his division-of-business order directing that applications for the appointing of receivers in equity might be made to him, his orders appointing temporary receivers for the Interborough Company and a temporary receiver for the Manhattan Company, and all other orders made by him in the suit, be held void and vacated.

On the same day, September 21, Lillian Boehm was given leave, by the District Judge sitting in the motion part of the court, to intervene as a party plaintiff in Johnson's suit, which she did. She was a stockholder in the Manhattan Company and a secured creditor of the Interborough Company. In her bill of intervention she asserted there was imperative need for the appointment of a receiver to take charge of and to preserve the property of the Interborough Company, continue the operation of its railroad system for the accommodation of the public, and collect and properly appropriate the income thereof until the final decree; assailed the orders of the Senior Circuit Judge in the American Brake Shoe Company's suit upon the same grounds that were set forth in Johnson's bill; and joined in the prayers of his bill.

Johnson and Boehm both subsequently filed petitions supplemental to their original bills and in these supplements the Senior Circuit Judge's order of September 28,

continuing the Interborough and Manhattan receiverships was assailed as void upon the grounds theretofore advanced against the orders appointing temporary receivers. Thenceforth the assault was directed chiefly against the order continuing the receiverships, the orders naming temporary receivers having served their purpose and being superseded.

In their bills and supplements Johnson and Boehm also complained that the receivers appointed for the Interborough and Manhattan companies in the earlier suit of the American Brake Shoe Company had theretofore had, or then had, relations with the Interborough and Manhattan Companies and with particular groups of the creditors of one or the other of those companies which would tend to prevent them from discharging their duties impartially and with due regard to the rights of all who were parties in interest. But there was no claim that either Johnson or Boehm had presented this complaint in the suit wherein the receivers were appointed and in which they were acting.

In the Johnson suit Johnson and Boehm separately procured, from the District Judge sitting in the motion part of the court, rules requiring the defendants in that suit to show cause on October 4 why orders should not be granted vacating (1) the Senior Circuit Judge's assignment of himself to sit in the District Court to hear matters in the American Brake Shoe Company's suit, (2) his division-of-business order directing that applications for the appointment of receivers in equity might be made to him, and (3) his several orders in the American Brake Shoe Company's suit, including those appointing receivers; and why independent receivers for the Manhattan Company, and likewise for the Interborough Company, should not be appointed in the Johnson suit.

On the return day of these rules to show cause the parties appeared before the District Judge sitting in the

motion part of the court, and were heard by him. At that time answers to the bills and supplements had not been filed and as yet were not due. Affidavits were tendered by the defendants to refute the complaint questioning the personal fitness of the receivers for the service for which they were appointed. But the District Judge put this and related questions of fact to one side as being outside the scope of the hearing, which he ruled was confined to the question whether the Senior Circuit Judge could entertain the application for receivers in the suit of the American Brake Shoe Company and make the orders which were assailed.

The outcome of the hearing was that the District Judge held that the Senior Circuit Judge's assignment of himself to the District Court to hear and determine all matters in the American Brake Shoe Company's suit was void, because, even if empowered by § 22 to make a general assignment of himself to hold the District Court, he was without authority to make a selective assignment, as by designating the case which he was to hear or the part of the court in which he was to sit; that his division-of-business order was void, because under § 27 a failure of the District Judges to agree upon the division of business is a condition precedent to action on that subject by the Senior Circuit Judge, and there had been no such failure to agree; that rules 1-a and 11-a of the District Court are valid and operate to limit the jurisdiction of all judges assigned to the District Court, whether they be District Judges or Circuit Judges, and as the orders of the Senior Circuit Judge in the American Brake Shoe Company's suit were all made in contravention of those rules they were void; and that these orders could not be supported on the theory that he was a de facto judge, for he was not such but merely an intruder.[2] The District

[2] *Johnson* v. *Manhattan Ry. Co.*, 1 F.Supp. 809.

Judge accordingly passed a decree, on October 18, vacating all decrees and orders made by the Senior Circuit Judge in the American Brake Shoe Company's suit. But just before giving that decree the District Judge passed another, on his own motion and over the objection of the parties to the suit of the American Brake Shoe Company, consolidating that suit and the Johnson suit. Consolidation was ordered because, as the District Judge said, there was in his mind "a residuum of doubt" whether, so long as the suits remained separate, an order properly could be passed in the Johnson suit vacating the orders made in the other and earlier suit.

On appeals to the Circuit Court of Appeals the consolidating decree and the vacating decree were both reversed.[3] Johnson and Boehm then separately petitioned this Court for a review on certiorari and the petitions were granted.

Counsel for petitioners now assume that in granting the petitions this Court intended to review the decision of the Circuit Court of Appeals on the appeal from the consolidating decree, as well as its decision on the appeal from the vacating decree; but the assumption is without any basis. In the petitions complaint was made of the reversal of the vacating decree, but not of the reversal of the consolidating decree; and the reasons advanced to obtain a review related only to the reversal of the vacating decree. Plainly the petitions sought a review of the latter, and of it only; and obviously the review granted was not intended to be broader than that sought in the petitions.

In turning to the particular questions presented the Circuit Court of Appeals accurately and concisely observed:

"The controversy does not touch the substantial relief asked by any of the parties; all acknowledge that the two

[3] *Johnson* v. *Manhattan Ry. Co.*, 61 F. (2d) 934.

railways are in such financial straits that a court of equity must take over their assets, to prevent their dismemberment by execution, attachment and the like. The plaintiffs, and those who have intervened, [in the Johnson suit] ask for receivers, just as did the parties to the American Brake Shoe Company suit. The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership."

One question claiming attention is whether the attack made in the Johnson suit on the orders in the American Brake Shoe Company suit was direct or collateral. The suits were distinct, although directed to the same main end. Johnson purposely brought his suit as a separate and independent suit and Boehm purposely intervened in it as such. Both were invited by the orders in the other suit to appear therein and show cause, if any they had, why the temporary receivership should not be continued. Had they appeared they would have been entitled to object that the judge sitting at the time was acting without authority or in contravention of applicable court rules, and to object that the persons temporarily named as receivers were not suited to the task and ought not to be continued; and had the receivership been continued without giving effect to these objections they would have been entitled to appeal.[4] In thus seeking a correction of errors claimed to have been committed in continuing the receiverships they would have been engaged in a direct attack. But they chose to make the objections in a distinct receivership suit of their own, not on any recognized equitable ground, such as fraud, imposition or mistake, but on the ground of alleged error. In this they were engaged in a collateral attack. That their suit was brought in the

[4] 28 U.S.C., § 227; *Christian* v. *R. Hoe & Co.*, 63 F. (2d) 218; *Mitchell* v. *Lay*, 48 F. (2d) 79, 84, 85; *Kingsport Press* v. *Brief English Systems*, 54 F. (2d) 497; *Pacific Northwest Packing Co.* v. *Allen*, 109 Fed. 515; *Blake* v. *District Court*, 59 F. (2d) 78.

same court where the other suit was pending did not make the attack any the less collateral.[5] Of course, under equity rule 37, they could not intervene as parties in the other suit, save "in subordination to, and in recognition of, the propriety of the main proceeding"; but this restriction put no obstacle in their way.[5a] They were not objecting to a receivership such as was sought in the other suit, but were themselves asserting its propriety upon the same grounds and to the same general end that were set up in that suit. Their objections went only to the particular judge sitting in the hearing and to the particular receivers. In these circumstances it is plain that the attack was collateral.[6] And, this being so, there was need for heeding the familiar rule that such an attack can be successful only where and to the extent that it discloses a want of power as distinguished from error in the exertion of power that was possessed.[7]

The District Judge, as shown in his opinion, was in doubt whether the attack was direct or collateral, but conceived that the doubt could be removed and the attack made direct by ordering a consolidation of the two suits, which he did on his own motion over objections by the parties to the American Brake Shoe Company suit. The order of consolidation has since been reversed by the Circuit Court of Appeals; but, quite apart from the reversal, the consolidation did not alter the nature of the attack. Under the statute, 28 U.S.C., § 734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a

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[5] *Cohen* v. *Portland Lodge*, 152 Fed. 357, 359.

[5a] *Central Republic Bank* v. *Caldwell*, 58 F. (2d) 721, 729.

[6] 1 Freeman on Judgments, 5th ed., §§ 305–308, 315; Vanfleet on Collateral Attack, §§ 2, 3.

[7] *Dowell* v. *Applegate*, 152 U.S. 327, 337–340; *Fauntleroy* v. *Lum*, 210 U.S. 230, 237; *Ex parte Roe*, 234 U.S. 70, 72; *Marin* v. *Augedahl*, 247 U.S. 142, 149, 152.

single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.[8]

Next in order are the questions respecting the Senior Circuit Judge's assignment of himself to sit in the District Court to hear matters in the American Brake Shoe Company suit. The statute, 28 U.S.C., § 22, provides that the Chief Justice, or the Circuit Justice of the circuit, or the Senior Circuit Judge thereof, may, "if the public interest requires," designate and assign "any circuit judge" of the circuit to hold a district court therein. The same authority to assign that is given to the Chief Justice and the Circuit Justice, respectively, is also given to the Senior Circuit Judge; and that authority is to assign "any circuit judge" of the particular circuit. There are no restrictive words. There can be no doubt that under this section the Chief Justice may assign the Senior Circuit Judge of the circuit, he being one of the Circuit Judges thereof; and equally there can be no doubt that the Circuit Justice may do the same. May the Senior Circuit Judge assign himself? The words of the section, taken literally, mean that he may do so; and only by implying restrictive words which are not there can the section be held to mean otherwise. But the real meaning is not reflected alone in the words of the section, for there are other considerations which point to the literal meaning as the true one.

Section 22 was first enacted as part of the Judicial Code, effective January 1, 1912, which abolished the old Circuit Courts and transferred their jurisdiction to the District Courts. When the proposed code was pending before the Congress differences of opinion arose over the proposed abolition of the Circuit Courts. There was op-

[8] *Toledo, St. L. & K. C. R. Co.* v. *Continental Trust Co.*, 95 Fed. 497, 506; *Taylor* v. *Logan Trust Co.*, 289 Fed. 51, 53; *Nolte* v. *Hudson Navigation Co.*, 11 F. (2d) 680, 682; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285, 293.

position to this on the ground chiefly that it would take Circuit Judges out of work in which they were accustomed to participate, and as to much of which there would be reason for their continued participation. These differences led to the inclusion in the proposed code of the assignment provision now embodied in § 22. Members of the committees having the bill in charge and members of the conference committee to which it ultimately was referred explained in their respective Houses that the provision was intended to establish a liberal and flexible plan under which Circuit Judges could sit in the District Courts; and that under it any Circuit Judge readily could be assigned to hold a District Court within his circuit whenever occasion therefor might arise, whether from a pressure of business in a District Court, from the presence therein of particular cases of special importance, from an absence of business in the Circuit Court of Appeals, or from any other situation, if the Senior Circuit Judge, or the Circuit Justice, or the Chief Justice, deemed the assignment to be in the public interest.[9]

Since the Judicial Code went into effect it has been the practice of most of the Senior Circuit Judges to assign themselves, as well as other Circuit Judges, to sit in District Courts within their circuits whenever they deemed that the public interest required it. The practice was initiated early in 1912 by the then Senior Circuit Judge for the Second Circuit and has been followed by each of his four successors. In the other circuits the Senior Circuit Judges, with a notable exception,[10] adopted that

[9] Congressional Record, Vol. 45, part 4, pp. 3547, 3999, 4000; Vol. 46, part 1, pp. 302, 303; Vol. 46, part 1, p. 840; Vol. 46, part 3, p. 2138; Vol. 46, part 3, pp. 4003, 4004; Vol. 46, part 4, p. 4006.

[10] Circuit Judge Walter H. Sanborn was long the Senior Circuit Judge of the Eighth Circuit and during much of that period the Justice delivering this opinion was the Circuit Justice for that

course of action. Some of the assignments were generally to hold a District Court in a named district; others were to hold a particular division of a District Court, or a term of such court at one of several places fixed by law; and still others were to hold a District Court to hear and determine a designated cause or causes.

Early in 1912 the Senior Circuit Judge of the Second Circuit assigned himself to sit in a District Court to hear matters arising in a specified receivership suit. While he was sitting in that suit an intervener challenged his authority to make the assignment or act under it. A hearing was had on the question, after which the judge in a considered opinion, published at the time,[11] upheld the assignment and denied the motion presenting the chal-

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circuit. The files of this Circuit Justice are the basis for the following statement:

In 1912 Judge Sanborn was requested by the other Circuit Judges in that circuit and by the District Judge who was specially concerned, to take charge of an important railroad receivership suit in one of the districts within the circuit. Judge Sanborn indicated that he would be willing to undertake the service if he were assigned thereto by the Chief Justice or the Circuit Justice, but that he was quite unwilling to assign himself to the District Court for the purpose, because such an assignment would have a personal side approaching impropriety. One of the Circuit Judges and the District Judge of the particular district then applied to the Circuit Justice to make an assignment of Judge Sanborn, which was done. Judge Sanborn's indisposition to assign himself continued; and in like circumstances he was assigned by the Circuit Justice to District Courts in that circuit on twelve different occasions in the years 1912 to 1923, each assignment being limited to a particular year but otherwise general. The receiverships of the Wabash Railroad and the St. Louis & San Francisco Railroad were among the matters which came before Judge Sanborn under those assignments.

Judge Sanborn's successor as Senior Circuit Judge accepted and conformed to the general practice.

[11] *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 221 Fed. 440.

lenge. A review was not sought, nor was the question further agitated.

The practice of the Senior Circuit Judges here described and the decision just mentioned amounted to a practical construction of the provision in question in keeping with its literal meaning. In 1922, after that construction had prevailed and been acted on for several years, the provision was reënacted by the Congress as part of an act dealing with other assignments of judges to the District Courts.[12] The reënactment was without any change indicative of a disapproval of the prior construction by the Senior Circuit Judges. In such circumstances, as this Court often has pointed out, reënactment operates as an implied legislative approval of the prior construction—in other words, as a reënactment of the statute as before construed.[13]

It is said that § 22 gives no authority for making a selective designation, as by designating the case which the assigned judge is to hear or the part of the court in which he is to sit. To this assent cannot be given. It has no support in the words of the section, is contrary to the plain import of the legislative proceedings before noticed, and is opposed to the settled practice of the Senior Circuit Judges. Assignments to hear particular cases have been made in all the circuits. Such an assignment was involved in *United States* v. *Gill,* 292 Fed. 136, and was sustained by the Circuit Court of Appeals for the Fourth Circuit. The earliest assignments in the Second Circuit were thus limited—not only the one assigning the Senior Circuit Judge already noticed, but also those assigning other Circuit Judges. It is easily conceivable that there may be compelling reason in the public interest to make

[12] Act of Sept. 14, 1922, c. 306, 42 Stat. 837.

[13] *Old Colony R. Co.* v. *Commissioner,* 284 U.S. 552, 557; *McCaughn* v. *Hershey Chocolate Co.,* 283 U.S. 488, 493; *Heald* v. *District of Columbia,* 254 U.S. 20, 23.

an assignment for a particular case, or for one of several divisions of the court, or for a limited period such as thirty or sixty days. The section makes the public interest, as found by the assigning authority, the criterion. If that interest is found to require only a limited assignment, it would seem that the action taken should be limited accordingly. The succeeding section (23) requires a Circuit Judge who is assigned under § 22 to discharge all the judicial duties "for which he is so appointed, during the time for which he is so appointed." In this there is a plain implication that the assignment may be for particular duties and for a limited time.

The District Judge did not rule on the part of the attack wherein it was contended that the assignment was invalid because there was no public interest requiring it; but the Circuit Court of Appeals rejected the contention on the ground that the recital or finding in the assignment that public interest required it is conclusive in this proceeding. Plainly the Circuit Court of Appeals was right. By § 22 the decision as to a requiring public interest is left to the one having the power to assign. The duty and the responsibility are with him—as well when he is a Senior Circuit Judge as when he is the Chief Justice or a Circuit Justice. His decision that there is a requiring public interest is not open to a collateral attack such as is here presented.[14] And were it so open, no litigant could with any safety submit any matter to an assigned judge—a situation which would involve intolerable uncertainty and embarrassment to both public and private interests.

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[14] *People* v. *Ballard,* 134 N.Y. 269, 293; 32 N.E. 54; *People ex rel. Saranac L. & T. Co.* v. *Supreme Court,* 220 N.Y. 487, 491; 116 N.E. 384; *State* v. *Lewis,* 107 N.C. 967, 977; 12 S.E. 457; 13 S.E. 247; *Cocke* v. *Halsey,* 16 Pet. 71, 87; *Ex parte American Steel Barrel Co.,* 230 U.S. 35, 45.

In the course of his opinion the District Judge suggested that the assault on the assignment and on the Senior Circuit Judge's authority to act under it "sounded in quo warranto," and so might possibly be regarded as being direct rather than collateral. But the suggestion was ill-grounded. Quo warranto is addressed to preventing a continued exercise of authority unlawfully asserted, not to a correction of what already has been done under it or to a vindication of private rights. It is an extraordinary proceeding, prerogative in nature, and in this instance could have been brought by the United States, and by it only, for there is no statute delegating to an individual the right to resort to it.[15] Besides, such a proceeding, to reach its objective in a situation like that here disclosed, must be brought against the person who is charged with exercising an office or authority without lawful right.[16] The Johnson suit was not against the judge acting under the assignment, but was wholly between others who were private litigants. So, granting that an attack in a quo warranto proceeding would have been direct, and not merely collateral, it must be held that the suit before the District Judge was not such a proceeding.

It follows from the views already expressed that there was no jurisdictional infirmity in the Senior Circuit Judge's orders in the American Brake Shoe Company suit, unless such an infirmity arose from his disregard of rules 1-a and 11-a of the District Court. His status when making the orders was that of a Circuit Judge specially assigned to and sitting in the District Court to hear and determine all applications and proceedings in the suit wherein the orders were made; and his powers and duties

[15] *Wallace* v. *Anderson,* 5 Wheat. 291; *Territory* v. *Lockwood,* 3 Wall. 236; *Newman* v. *U.S. ex rel. Frizzell,* 238 U.S. 537; *First National Bank* v. *Fellows,* 244 U.S. 416, 427–428; *First National Bank* v. *Missouri,* 263 U.S. 640, 660–661.

[16] High on Extraordinary Legal Remedies, 3d ed., § 604.

in that connection were just what they would have been had he been so assigned by the Chief Justice or the Circuit Justice, instead of by himself. No doubt he was under a duty to recognize and respect all valid rules of the District Court which were applicable to the proceedings before him; but he was not under a duty to give effect to rules which were either invalid or inapplicable.

One of the rules disregarded, 1-a, provides that an assigned judge shall "do such work only as may be assigned to him by the senior district judge." In this there is an attempt to invest the senior judge of the district with a discretion to determine what work an assigned judge shall do, and also an attempt to exclude him from any other work. Here the Circuit Judge was sitting in the District Court under an assignment specially designating the work which he was to do. The rule says in effect that this work could not be done by him unless the senior judge of the district approved the special designation; and it means that this judge may either approve or disapprove. In short, it attempts to give him a power of veto over the designation and thus to interfere with the work specified. By statute, 28 U.S.C., § 731, the power of the District Courts to make rules is confined to such as are "not inconsistent with any law of the United States"; and it obviously would be thus limited even without the statute.[17] Not only does § 22 authorize a special assignment such as is shown here, but § 23 requires the assigned judge to discharge the duties for which he is so assigned. It is apparent, therefore, that, as applied to such an assignment, the rule operates as an interference with the discharge of those duties and is in that regard inconsistent with §§ 22 and 23 and invalid.

The other rule which was disregarded, 11-a, provides that all applications for the appointment of receivers in

[17] *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635, and cases cited.

equity causes shall be made to the judge holding the motion part of the court, and "to no other judge." As it is sought to be applied here, this rule is subject to objections like those just assigned for condemning the application sought to be made of rule 1-a. The judge to whom the application for receivers was presented was sitting in the District Court on the equity side. Under § 22 he was specially assigned to that court to hear and determine all proceedings in the suit in which the application was made; and § 23 laid on him a duty to conform to the assignment. The rule forbids him to hear the application notwithstanding his special assignment. Thus the rule conflicts with §§ 22 and 23 and must fall.

What has been said shows that the collateral attack cannot succeed and that the decree of the Circuit Court of Appeals must be affirmed. But in the interest of right judicial administration, and to avoid any misapprehension as to what is here decided, something more needs to be said.

The possession of power is one thing; the propriety of its exercise in particular circumstances is quite a different thing. This is true of the power of a Senior Circuit Judge to assign himself to sit in a particular case in a District Court. In its very nature this power is one which should be sparingly exercised, and then only in special exigencies and with commensurate care and discretion. The occasions are rare in which the matter cannot be referred to the Chief Justice or the Circuit Justice and committed to his consideration and judgment. A receivership is not grantable as of course, but only for reasons strongly appealing to the judge to whom the application is made. When large properties are involved a receivership usually involves widely conflicting interests and presents questions fraught with difficulty and exceptional delicacy. This was true of the receivership here in question. It involved properties, estimated to approximate $500,000,000 in value, which were held and used by a public carrier em-

ploying thousands of persons in its work and carrying hundreds of thousands of passengers each day. The carrier was in greatly embarrassed condition, had thousands of creditors whose interests were divergent, and was confronted with possible forfeiture of some of its franchises. All this shows that the situation was one in which the assignment of a judge to take charge of the receivership, if one was to be assigned, was a task which needed to be performed upon careful consideration and with the utmost impartiality. The difference of opinion between the Senior Circuit Judge and the District Judges, respecting the relative fitness of individuals and trust companies as equity receivers, was not a proper ground for taking the cause away from the District Judge before whom it ordinarily would come, and bringing it before the assigning Senior Circuit Judge.[18] Granting that the latter was most sincere in what he did, there was yet no compelling reason for assigning himself. Had he reflected he probably would not have made such an assignment; but he acted hastily and evidently with questionable wisdom. This action has embarrassed and is embarrassing the receivership. If he were now to withdraw from further participation in the receivership proceedings the embarrassment would be relieved; and the belief is ventured here that, on further reflection, he will recognize the propriety of so doing and, by withdrawing, will open the way for another judge with appropriate authority to conduct the further proceedings.

Decree affirmed.

MR. JUSTICE BUTLER concurs in the result.

The CHIEF JUSTICE and MR. JUSTICE BRANDEIS did not hear the argument or participate in the decision.

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[18] See *Appleton* v. *Smith*, 1 Fed. Cas. No. 498, p. 1075; *Cole Silver Mining Co.* v. *Virginia & G. H. Water Co.*, 6 Fed. Cas. No. 2990, pp. 72, 74; *Hadden* v. *Natchaug Silk Co.*, 84 Fed. 80; *Harkin* v. *Brundage*, 276 U.S. 36, 55.

LEIGHTON ET AL. *v.* UNITED STATES.

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

No. 735. Argued May 11, 1933.—Decided May 29, 1933.

The right of the United States to maintain a suit in equity against stockholders of a corporation to require them to account for distributed corporate assets to the end that such assets may be applied to taxes due from the corporation to the United States and interest thereon from date of assessment against the corporation, was not taken away by § 280 of the Revenue Act of 1926. P. 509.

61 F. (2d) 530, affirmed.

CERTIORARI * to review the affirmance of a decree requiring stockholders to account for assets of the corporation distributed among them, in order that the funds might be applied in satisfaction of taxes owed by the corporation to the United States.

Mr. Herman Weinberger, with whom *Messrs. Walter C. Fox, Jr.,* and *Blair S. Shuman* were on the brief, for petitioners.

Mr. Paul D. Miller, with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *Hayner N. Larson* were on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In 1921 all assets of Leighton and Co., Inc., of California, were sold and the proceeds distributed *pro rata* among stockholders, including petitioners. Nothing remained to satisfy outstanding corporate obligations.

September, 1925, within the time permitted by statute, or written waivers, the Commissioner of Internal Reve-

* See Table of Cases Reported in this volume.

nue notified the corporation of tax deficiencies for 1918, 1919, and 1920; and on January 16, 1926, he assessed these against it. There was no contest. Efforts to enforce payment by distraint were unsuccessful. The present equity suit seeks to compel petitioners severally to account for corporate property in order that it may be applied toward payment of taxes due by the company. No assessment was made against any petitioner.

The District Court ruled that the distributed assets constituted a trust fund and adjudged that each petitioner should account for the amount he received, with interest, from January 16, 1926. The Circuit Court of Appeals affirmed this judgment. [61 F. (2d) 530.] The matter comes here by certiorari.

Pertinent provisions of The Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 59, 61, are in the margin.*

Prior to the Revenue Act of 1926, the United States in an equity proceeding might recover from distributees

* Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Rev. Stats. the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

. . . . . .

Sec. 278. (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,

of corporate assets, without assessment against them, the value of what they received in order to discharge taxes assessed against the corporation. *Phillips* v. *Commissioner*, 283 U.S. 589, 592; *United States* v. *Updike*, 281 U.S. 489. And this right remained unless taken away by the specific words or clear intendment of the 1926 enactment. *United States* v. *Chamberlain*, 219 U.S. 250, 261; *United States* v. *Nashville, C. & St. L. Ry.*, 249 Fed. 678, 681.

Petitioners rely upon § 280 of that Act and maintain that while the words of this standing alone would not suffice to destroy the right, nevertheless when read in connection with §§ 274 (a) and 278 there is enough clearly

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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 any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer (U.S.C.App., Title 26, Sec. 1061).

Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and

to show the purpose of Congress to require an assessment against them before suit for restitution. And, further, that the sole remedy available in the present circumstances is the one prescribed by § 280.

The meaning of the statute is not free from uncertainty. The insistence presented in behalf of the petitioners is at least plausible, but this has been before the courts several times and none has approved it. On the other hand, the right of the United States to proceed against transferees by suit since the Act of 1926 has been definitely recognized. *United States* v. *Updike,* 25 F. (2d) 746 (Dist. Ct.); affirmed, C.C.A. 32 F. (2d) 1. *Phillips* v. *Commissioner,* 42 F. (2d) 177; affirmed, 283 U.S. 589, 593 (Note); *United States* v. *Greenfield Tap & Die Corp.,* 27 F. (2d) 933 (Dist. Ct.); *United States* v. *Garfunkel,* 52 F. (2d) 727 (Dist. Ct.).

Considering the established rule of strict construction, the views expressed in the cases cited, also the possible conflict with other statutory provisions pointed out in those opinions, we cannot accept petitioners' interpretation of the statute. The present suit was properly brought, we think, and the courts below reached the correct conclusion. There was no abuse of discretion in respect of interest.

Affirmed.

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demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

. . . . .

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer.

ICKES, 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. 767. Argued April 21, 1933.—Decided May 29, 1933.

Section 5 of the War Minerals Relief Act of March 2, 1919, authorizing the Secretary of the Interior to pay such net losses "as have been suffered" in producing or preparing to produce certain minerals, etc., does not include interest paid or accrued after the date of the Act. Cf. *Wilbur* v. *United States*, 284 U.S. 231. Pp. 513–515.

61 App. D.C. 324; 62 F (2d) 863, reversed.

CERTIORARI * to review the reversal of a judgment denying a writ of mandamus.

Assistant Attorney General Richardson, with whom *Solicitor General Thacher* and *Mr. Paul D. Miller* were on the brief, for petitioner.

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

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The claim of the Chestatee Pyrites & Chemical Corporation for compensation under the War Minerals Relief Act, March 2, 1919, c. 94, § 5, 40 Stat. 1272, 1274, is here for the fourth time.[1] Before the World War the company

* See Table of Cases Reported in this volume.

[1] See *Work* v. *U.S. ex rel. Chestatee Pyrites & Chemical Corp.*, 267 U.S. 185; *Wilbur* v. *U.S. ex rel. Chestatee Pyrites & Chemical Corp.*, 284 U.S. 231, 237–8; *Wilbur* v. *U.S. ex rel. Chestatee Pyrites & Chemical Corp.*, 288 U.S. 97.

owned a pyrites mine. In 1918, it made extensive enlargements of its plant at the request of the Secretary of the Interior. As hostilities ceased soon thereafter, the undertaking resulted in a large loss. Prior to 1922, it made applications for relief from the losses suffered. These applications resulted in awards aggregating $737,765.24. Of this amount $223,529.17 was paid by the Government on October 25, 1919; $469,784.62 on October 5, 1922; and $44,451.45 on March 14, 1932.[2]

The demand now presented is for the further sum of $514,276.43, alleged to have been due December 31, 1931; and for additional amounts which cannot be stated definitely because they are accruing daily. These sums, claimed as items of loss, represent interest paid or accrued since March 2, 1919, on a contract to repay with interest $645,000 borrowed by the Corporation in 1918, mainly in order to pay for enlarging the plant.[3] In 1922, the Secretary had, in calculating losses suffered, refused to allow any sum paid for interest on borrowed money. The Corporation thereupon sought, by mandamus, to compel the award of interest. In that proceeding this Court held, in 1925, that mandamus must be denied, because the Act made the determination of the Secretary conclusive,[4] *Work* v. *U.S. ex rel. Chestatee Pyrites & Chemical Corp.*,

[2] Since then two additional awards have been made to the Corporation, which are not directly involved in this case. On December 7, 1932, an award of $1,584.76 was made on account of taxes. And on February 23, 1933, a further award of $90,500 was made by the Secretary pursuant to the decision in *Wilbur* v. *U.S. ex rel. Chestatee Pyrites & Chemical Corp.*, 288 U.S. 97. The Corporation has thus received awards aggregating $829,850.

[3] The loans totaled $695,000; but it was found that "$50,000 of the amount was loaned prior to stimulation."

[4] The Act declared in § 5: "The said Secretary shall make such adjustments and payments in each case as he shall determine to be just and equitable; that the decision of said Secretary shall be conclusive and final. . . ." 40 Stat. 1274.

267 U.S. 185. The proceeding at bar is a second petition for mandamus, filed pursuant to an amendment of the Act made February 13, 1929, c. 182, 45 Stat. 1166, which authorized a claimant thereunder to "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 may hereafter arise in the adjustment, liquidation and payment of his claim under said Act."

The Corporation sought in the second petition for mandamus, as in the first, to compel the Secretary to consider, in determining the amount of net losses, interest payable on borrowed money. The trial court denied the mandamus. Its judgment was reversed by the District Court of Appeals, 60 App. D.C. 62; 47 F. (2d) 424; and in sustaining the reversal, in *Wilbur* v. *U.S. ex rel. Chestatee Pyrites & Chemical Corp.*, 284 U.S. 231, 237, 238, we said: "The amount of interest that at the time of the passage of the Relief Act, March 2, 1919, had been paid or incurred by relator for money borrowed and lost in producing and preparing to produce pyrites upon the specified conditions is to be taken into account in determining the amount of its net loss as of that date." Thereupon, the Secretary made an award of $44,451.45, this amount being, as stated by him, "the amount of interest that at the time of the passage of the act of Congress of March 2, 1919, had been paid on the obligations incurred by the relator for money borrowed and lost in producing and preparing to produce pyrites . . . and for which in justice and equity the relator was entitled to receive reimbursement . . . "

The Corporation insists that there should, as stated, be allowed, as part of its net loss, on account of interest payable on borrowed money, the further sum of $524,276.43, and, also, additional amounts which can not be

definitely stated now. The $524,276.43 represents interest paid or accrued between March 2, 1919, and December 31, 1931, growing out of obligations for borrowed money outstanding March 2, 1919. The claim for additional unascertained amounts represents the interest which has accrued on those obligations since December 31, 1931, plus that which will accrue hereafter on such parts thereof as may, from time to time, be outstanding. To enforce this demand, the Corporation secured a rule upon the Secretary to show cause why he had not complied with the decree entered pursuant to our decision in the *Wilbur* case. The Secretary averred that he had fully complied therewith, by allowing all interest paid or accrued to March 2, 1919; and that this was all the interest "for which in justice and equity the relator was entitled to receive reimbursement from the appropriation made by Congress for the payment of such losses." The District Court sustained the position of the Secretary. Its judgment was reversed by the Court of Appeals of the District, 61 App. D.C. 324; 62 F. (2d) 863. This Court granted certiorari, 288 U.S. 590. We think the District Court was right.

First. The Corporation contends that in computing losses which "have been suffered" as of March 2, 1919, no distinction can be drawn between the principal of the loan and the interest thereon; that as the amount of the principal was included without question in ascertaining the loss as of March 2, 1919, although the loan was not then due, the amount of the interest should similarly be included, whether it had been paid or had accrued as of that date or had accrued later. The argument rests upon a misconception.

Congress did not authorize or direct the Secretary of the Interior to pay any loan of a claimant. Section 5 of the War Minerals Relief Act, March 2, 1919, authorized

the Secretary to "adjust, liquidate, and pay such net losses as have been suffered by any person, firm, or corporation, by reason of producing or preparing to produce . . . pyrites . . . in compliance with the request or demand of the Department of the Interior . . . to supply the urgent needs of the Nation in the prosecution of the war." [5] The $645,000 capital raised by the loan, like some other capital of the Corporation, was wiped out by the deficit in operation and the shrinkage of capital assets. And for the loss thus sustained the Corporation was reimbursed by the payments under the award made. The cost to the Corporation of carrying the loan after March 2, 1919, was not part of the net losses which had "been suffered."

The method of determining the net losses in such businesses during a particular period, or in a particular adventure, is well settled.[6] The net losses consist of any deficit from operations plus any shrinkage in value of the plant investment. In calculating the loss for a period it is immaterial whether items entered as operating expense or as investment have been paid or are still owed for. If the capital employed by the Corporation during the period, whether owned or borrowed, was sunk, its loss

[5] The section was amended November 23, 1921, c. 137, 42 Stat. 322, by adding "that all claimants . . . shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said Act"; and "If in claims passed upon under said Act [of March 2, 1919] awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculations, the Secretary of the Interior may award proper amounts or additional amounts."

[6] See, e.g., T. O. McGrath, Mine Accounting and Cost Principles (1921), pp. 147, 178–179; R. B. Kester, Accounting Theory and Practice (1918), pp. 487–488; H. A. Finney, Principles of Accounting (1931), c. 3, pp. 4–7; W. J. Graham and W. G. Katz, Accounting in Law Practice (1932), pp. 27–33.

will necessarily be reflected either in the deficit from operations or in the shrinkage in value of the capital assets. In calculating the operating deficit during the period ending March 2, 1919, interest paid or accrued on the borrowed capital was treated as an operating charge. Interest accruing thereafter on any loan then outstanding is comparable to the cost of caring, after that date, for property retained—or to a lessening, after that date, of the value of that property. Such items enter into the determination of the losses of a later period; and with these the Government has no concern. Hence, the Secretary properly refused to consider interest accrued after March 2, 1919, in calculating losses during the period ending that day.

Second. The Corporation insists that the Act should be construed as requiring the Secretary to include as an item in the loss suffered before March 2, 1919, all interest thereafter accruing on an "obligation incurred" before that date. It argues that a liberal construction of the Act requires this conclusion, *United States* v. *New York*, 160 U.S. 598, 620, particularly in view of related legislation.[7] In support of that construction, it points to provisos of § 5 which declare (1) that "no claims shall be allowed or paid" by the Secretary "unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred were made in good faith" and (2) "that moneys were invested or obligations were incurred subsequent to" April 6, 1917, and

[7] Act of October 5, 1918, c. 181, 40 Stat. 1009, entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply"; and Act of June 7, 1924, c. 327, 43 Stat. 634, which removed the limitation of $8,500,000 as the amount payable in the aggregate on claims under the Act of March 2, 1919.

prior to November 11, 1918.[8] These provisos did not by referring to obligations "incurred" enlarge the Secretary's authority to "pay such net losses as have been suffered." On the contrary, their purpose was to make clear that where expenditures were alleged, the Secretary must be satisfied that payment therefor had actually been made or that there was a valid agreement to pay therefor.

When this Court stated in the *Wilbur* case that in determining the loss as of March 2, 1919, there shall be taken into account "the amount of interest which has been paid or incurred by relator for money borrowed and lost," the word "incurred" was used to mean interest accrued on that date, as well as interest paid. The language of the opinion was correctly construed by the Secretary when he limited the additional award, on account of interest, to $44,451.45.

Reversed.

O'DONOGHUE *v.* UNITED STATES.*

CERTIFICATES FROM THE COURT OF CLAIMS.

No. 729. Argued April 12, 1933.—Decided May 29, 1933.

1. The Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Art. III of the Constitution. Their judges hold their offices during good behavior; and their compensation

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[8] Among the provisos are the following: "And provided further that no claim shall be allowed or paid by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance. *And provided further,* that no claim shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested or obligations were incurred subsequent to April sixth, nineteen hundred and seventeen. . . ."

* Together with No. 730, *Hitz* v. *United States.*

can not, under the Constitution, be diminished during their continuance in office. Pp. 529, 551.

2. The division of powers of government into three separate and distinct departments,—the legislative, the executive, and the judicial—was not for convenience merely, but with the basic and vital object of precluding the commingling of these essentially different powers in the same hands. P. 530.

3. The exceptions found in the Constitution do but emphasize the generally inviolate character of this plan. P. 530.

4. Equally as important as the separation is it that each department shall be kept completely independent, in the sense that its acts shall never be controlled by, or subjected directly or indirectly to the coercive influence of, either of the other two departments. P. 530.

5. The anxiety of the framers of the Constitution to preserve this independence, especially of the judicial department, was manifested by the provision forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States. P. 531.

6. The power to diminish the compensation of the federal judges was explicitly denied by the Constitution, in order, *inter alia,* that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of the department which, as master of the purse, would otherwise hold the power to reduce their means of support. P. 531.

7. There rests upon every federal judge affected a duty to withstand any attempt, directly or indirectly, in contravention of the Constitution, to diminish this compensation, not for his private advantage but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people. P. 533.

8. The judges of the Supreme Court and of the Court of Appeals of the District of Columbia are of equal rank and power with those of the other inferior courts of the federal system, and plainly within the spirit and reason of the compensation provision. P. 534.

9. Indeed, the reasons which impelled the adoption of this constitutional limitation apply with even greater force to the courts of the District than to the inferior courts of the United States located elsewhere, because the judges of the former courts are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction

in matters affecting the operations of the General Government in its various departments. P. 535.

10. Territorial courts are legislative courts, created in virtue of the national sovereignty or under Art. IV, § 3, cl. 2, of the Constitution, vesting in Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"; and their judicial power is not and could not be derived from Art. III of the Constitution. P. 535.

11. The so-called territories were parts of the outlying domain of the United States organized in preparation for their becoming States. The Constitution could not have intended that the judges appointed for such provisional and temporary governments should have permanent tenure and irreducible compensation. P. 536.

12. The District of Columbia, unlike the territories, is a permanent part of the United States—the very heart of the Union—over which Congress, under Art. I, § 8, cl. 17, has permanent and exclusive power of legislation—the combined powers of national and state governments where legislation is possible. P. 538.

13. Possession of the plenary power under Art. I, § 8, cl. 17, does not preclude Congress from exercising in the District other appropriate powers conferred upon it by the Constitution, or authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable. P. 539.

14. It is important to bear in mind that the District was made up of portions of two of the original States, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III. It is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union. P. 540.

15. Because, for the reasons stated, the provisions of Art. III are not applicable to the territories, it does not follow that they are likewise inapplicable to the District where these peculiar reasons do not obtain. P. 541.

16. The Supreme Court and Court of Appeals of the District of Columbia are permanent establishments—federal courts of the United States and parts of the federal judicial system. P. 544.
17. They are vested generally with the same jurisdiction as that possessed by the inferior federal courts located elsewhere in respect of the cases enumerated in § 2 of Art. III; and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is, *ipso facto*, vested in such courts as inferior courts of the United States. P. 545.
18. Subject to the guarantees of personal right in the Amendments and the original Constitution, Congress has as much power to vest courts of the District of Columbia with a variety of jurisdiction and powers as a State has in conferring jurisdiction on its courts. P. 545.
19. Since Congress has the same power under Art. III to ordain and establish federal courts in the District of Columbia as in a State, whether it has done so in any particular instance depends upon whether the judicial power conferred extends to the cases enumerated in that Article. If it does, the judicial power thus conferred is not, and can not be, affected by the additional congressional legislation, enacted under Art. I, § 8, cl. 17, imposing upon such courts other duties which, because that special power is limited to the District, Congress can not impose upon inferior courts elsewhere. P. 546.
20. The conclusion to which the Court has come in this case is in accord with the continuous and unbroken practice of Congress from the beginning of the Government. P. 548.
21. Observations in *Ex parte Bakelite Corp.*, 279 U.S. 438, touching the status of the courts of the District of Columbia, characterized as *obiter; Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, qualified and distinguished. P. 550.
22. General expressions in any opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. P. 550.

RESPONSE to questions certified by the Court of Claims in two actions, one by a Justice of the Supreme Court of the District of Columbia and the other by a Justice of

the Court of Appeals of the District of Columbia, in which the claimants sought to recover sums withheld from their respective salaries by a ruling of the Comptroller General of the United States, based on his construction of an appropriation act which reduced the salaries of all judges except those "whose compensation may not, under the Constitution, be diminished during their continuance in office." This case was argued with *Williams* v. *United States,* reported next after this one.

Messrs. John W. Davis and *John S. Flannery,* with whom *Messrs. George E. Hamilton* and *Daniel W. O'Donoghue, Jr.,* were on the brief, for plaintiffs.

The territory embraced within the District of Columbia, once part of the States of Maryland and Virginia, has never ceased to be a part of the United States. *Downes* v. *Bidwell,* 182 U.S. 244, 261.

When the District was established by the Act of July 16, 1790, and when the seat of the National Government was moved there and circuit courts for the District were created by Congress, they became vested with all of the judicial power under Article III, and, as held in *Kendall* v. *United States,* 12 Pet. 524, they were given not only the same powers exercisable by other circuit courts of the United States but also certain additional powers which the latter courts did not possess.

Aside from provisions of the District of Columbia Code, it has been held repeatedly that the Supreme Court of the District is a Court of the United States. *Embry* v. *Palmer,* 107 U.S. 3; *Callan* v. *Wilson,* 127 U.S. 540; *Benson* v. *Henkle,* 198 U.S. 1; *James* v. *United States,* 202 U.S. 407–8; *Cross* v. *United States,* 145 U.S. 571, 576; *Moss* v. *United States,* 23 App.D.C. 475, 481, 482.

Whether the courts of the District were established under the powers given Congress by Art. I, § 8, "to constitute tribunals inferior to the Supreme Court" or "to

exercise exclusive legislation in all cases whatsoever over such District," etc., or under Art. III, § 1, it can not be denied that they are "tribunals inferior to the Supreme Court" of the United States and repositories of the judicial power under Art. III. They are a part of the Federal Judicial System. *Federal Trade Comm'n* v. *Klesner*, 274 U.S. at p. 145.

These courts possess (1) the jurisdiction appertaining to all of the other federal courts which grows out of the exercise of the judicial powers granted in Art. III; (2) an extensive jurisdiction involving matters of substantive law, controversies arising, and crimes committed, in the District, similar to that exercised by the courts of the several States, and also special administrative supervision over certain bodies like the Utility Commission, which can not be conferred upon the other federal courts of the United States and finds its source in Art. I, § 8; and (3) the novel and peculiar jurisdiction which has been conferred upon them from time to time over controversies which are national in character, and which have no relation to the District other than the fact that the executive and legislative branches of the Government are located in and perform their important functions at the Capital.

This latter very important jurisdiction might be conferred by Congress upon the other federal courts instead of being localized in the District for the convenience of the National Government, as was in fact done by the Act of February 13, 1925, conferring certain appellate jurisdiction in such matters on the Circuit Courts of Appeals. This national jurisdiction relates to the National Government and might be exercised anywhere in the United States.

The granting to the courts of the District of an extensive jurisdiction in purely national matters establishes their status as courts of the United States and their exercise of judicial power under Art. III of the Constitution.

There is a vast distinction between jurisdiction and judicial power. The former may be granted, qualified or taken away at the will of Congress. Congress has frequently increased and diminished the appellate jurisdiction of this Court and created and abolished inferior courts. But after having created an inferior court of the United States and defined the subjects over which it shall have jurisdiction, Congress can not limit the exercise of the judicial power, because that comes directly from the Constitution and is not derived from Congress. Story, J., in *Martin* v. *Hunter's Lessee,* 1 Wheat. 305, 328; Chief Justice Hughes, "The Supreme Court of the United States," p. 133; *Kansas* v. *Colorado,* 206 U.S. 46.

Nor can the fact that Congress has assigned to the courts of the District of Columbia certain administrative functions which can not be given to the other federal courts change their character from judicial to legislative tribunals.

It can not be contended that the power that was conferred upon the courts of the District in the granting of patents has any relation to the government of the District or was granted under the power of exclusive legislation for the District.

The only case in which it was directly decided that the courts of the District are inferior courts of the United States under Art. III of the Constitution was *James* v. *United States,* 38 Ct. Cls. 615; 202 U.S. 401.

The only question before the Court in the *Bakelite* case was the status of the Court of Customs Appeals. The opinion does not assert that the courts of the District of Columbia were established exclusively under the legislative power of Congress over the District. There being no prohibition in the Constitution, Congress has the right to give to the District courts the judicial power under Art. III and to give them the administrative functions under Art. I; in other words, Congress could exercise its dual

powers of a national legislature and of a state legislature in granting jurisdiction to our local courts. *McAllister* v. *United States,* 141 U.S. 174, distinguished. Cf. *Cross* v. *United States,* 145 U.S. 571. See *Pitts* v. *Peak,* 50 F. (2d) 485.

The judicial power granted over places acquired as forts and dockyards is the judicial power under Art. III plus the judicial power of the State in which the property is located; and this latter jurisdiction arises out of the cession by the particular State. The United States, therefore, possesses as to such places a dual power, and it was this dual power that Chief Justice Taft meant in *Keller* v. *Potomac Electric Co.* 261 U.S., at p. 443, in speaking of the power of Congress over the District of Columbia. See *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U.S. 382.

Solicitor General Thacher, with whom *Messrs. Wm. W. Scott, Robert P. Reeder, Erwin N. Griswold,* and *H. Brian Holland* were on the brief, for the United States, in this case and the case next following.

The constitutional provisions in question must be construed in the light of their history and of the development of our institutions, and not without reference to the distinction which has so clearly been drawn between constitutional and legislative courts.

This Court's decision in *Ex parte Bakelite Corp.,* 279 U.S. 438, is a direct and conclusive authority against the contention of the plaintiffs. In that case both the Court of Claims and the Courts of the District of Columbia were considered and expressly held to be legislative courts. Even if that decision is to be regarded as decisive only with respect to the Court of Customs Appeals, with which it was primarily concerned, the reasoning of the opinion leaves no room for the contention made by the plaintiffs here.

It is, of course, well recognized that a constitutional court may not be empowered to determine legislative or administrative questions. *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40; *Gordon* v. *United States,* 2 Wall. 561; 117 U.S. 697; *Federal Radio Comm'n* v. *General Electric Co.,* 281 U.S. 464. Congress has repeatedly conferred such powers upon the Court of Claims, and their exercise by that court has not been questioned. See §§ 12 and 14 of the Act of Mar. 3, 1887, c. 359, 24 Stat. 505, 507; Act of June 25, 1910, c. 409, 36 Stat. 837; Judicial Code, § 151; *In re Sanborn,* 148 U.S. 222; *Widmayer* v. *United States,* 42 Ct. Cls. 519; *Montgomery* v. *United States,* 49 Ct. Cls. 574. Similar powers have been vested in and exercised by the courts of the District of Columbia. *Keller* v. *Potomac Electric Power Co.,* 261 U.S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U.S. 693; *Federal Radio Comm'n* v. *General Electric Co.,* 281 U.S. 464. The advisory power of the District of Columbia Courts in patent cases began as early as the Act of Mar. 3, 1839, c. 88, §§ 11, 13, 5 Stat. 353, 354–355.

Both the majority and minority opinions in the *Crowell* case accept the *Bakelite* case, *supra,* as authoritative in its analysis of the distinctions between legislative and constitutional courts. See 285 U.S. at pp. 57–58, 86–91.

In *Miles* v. *Graham,* 268 U.S. 501, this Court's attention was not drawn to the question whether the Court of Claims is a statutory court or a constitutional court.

This Court has thus repeatedly recognized that the power of Congress, in legislating for the courts of the District of Columbia and for the Court of Claims, is free of the limitations imposed by Art. III of the Constitution. This does not mean that the tribunals in question are not courts, or that they do not exercise judicial power. The exercise of judicial power is common to both legislative and constitutional courts and determines the status of neither. *Ex parte Bakelite Corp.,* 279 U.S. 438, 449.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases are here on certificates from the Court of Claims. They involve the same questions, were argued together at the bar, and may well be disposed of by the same opinion.

Daniel W. O'Donoghue is an associate justice of the Supreme Court of the District of Columbia, having been duly appointed to that position by the President, by and with the advice and consent of the Senate. He duly qualified as such justice on February 29, 1932, and has ever since been engaged in the performance of the duties of the office. At the time of his appointment and entry upon his duties, his salary was fixed by act of Congress (c. 6, 44 Stat. 919) at the rate of $10,000 per year, which was paid to him until June 30, 1932.

William Hitz is an associate justice of the Court of Appeals of the District of Columbia, having been appointed on December 5, 1930, by the President, and later confirmed by the Senate. On February 13, 1931, he duly qualified as such associate justice and has ever since been engaged in performing the duties of his office. By the act of Congress already referred to, his salary was fixed at the rate of $12,500 per year. This amount he received until June 30, 1932.

By the Legislative Appropriation Act of June 30, 1932, (c. 314, 47 Stat. 382, 401) Congress provided as follows:

"Sec. 105. During the fiscal year ending June 30, 1933—

. . . . .

"(d) In the case of the following persons the rate of compensation is reduced as follows: If more than $1,000 per annum but less than $10,000 per annum, 8⅓ per centum; if $10,000 per annum or more, but less than $12,000 per annum, 10 per centum; if $12,000 per annum or more, but less than $15,000 per annum, 12 per centum; if

$15,000 per annum or more, but less than $20,000 per annum, 15 per centum; if $20,000 per annum or more, 20 per centum."

. . . .

"Sec. 106. During the fiscal year ending June 30, 1933, the retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office) and the retired pay of all commissioned and other personnel (except enlisted) of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, Lighthouse Service, and the Public Health Service shall be reduced as follows: If more than $1,000 per annum but less than $10,000 per annum, 8⅓ per centum; if $10,000 per annum or more, but less than $12,000, 10 per centum; if $12,000 per annum or more, but less than $15,000 per annum, 12 per centum; if $15,000 per annum or more, but less than $20,000, 15 per centum; if $20,000 per annum or more, 20 per centum. This section shall not operate so as to reduce any rate of retired pay to less than $1,000 per annum."

"Special Salary Reductions"

Sec. 107. (a) During the fiscal year ending June 30, 1933—

. . . . .

"(5) the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum."

In July, 1932, the Comptroller General of the United States held that the Court of Appeals and the Supreme Court of the District of Columbia are "legislative" courts and not "constitutional" courts whose judges are entitled to the protection of Art. III, § 1, of the Constitution, which provides:

" The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Thereupon, the disbursing officer of the Department of Justice, pursuant to the ruling of the Comptroller General, reduced the annual compensation by 10 per cent. in the case of Justice O'Donoghue, and by 20 per cent. in the case of Justice Hitz, and over their protest paid to them for the months of July to December, 1932, inclusive, their compensation at this reduced rate.

On January 19, 1933, suits were brought in the Court of Claims to recover the amount of the deductions which had been made and enforced up to that time.

These suits are based upon the contention that the ruling of the Comptroller General, and the deductions made in pursuance thereof, are in violation of the provisions of the appropriation act just quoted, because § 107 specifically excepts from their operation " judges whose compensation may not, under the Constitution, be diminished during their continuance in office," and these plaintiffs are such judges. It is averred in the petitions that the ruling of the Comptroller General and the resulting deductions contravene Art. III, § 1, of the Constitution, since plaintiffs were appointed to serve during good behavior and to receive a compensation which constitutionally cannot be diminished during their continuance in office. It is further averred that the Supreme Court and Court of Appeals of the District are vested by acts of Congress with all the jurisdiction and all the power conferred on the United States by the Constitution under Art. III; that such jurisdiction and power have been exercised by the Court of Appeals from its organization

in 1893, and by the Supreme Court of the District and its predecessor courts from the establishment of the government; that, therefore, in the organization of these courts Congress acted in virtue of Art. III, and thereby constituted said courts inferior courts of the United States; that only to the extent that Congress has enlarged and extended the powers of said courts did that body act under any other than Art. III; and that they are none the less such inferior courts because, by reason of their location at the seat of government, Congress, under Art. I, § 8,* has conferred upon them powers and jurisdiction which it may not confer upon other federal courts. Each plaintiff avers a reluctance to institute a suit which may result in personal benefit to himself, but that he feels it a duty to the court, to the bar, to the citizens of the District of Columbia, and to the people of the United States to have the status of these important courts defined and settled as soon as possible.

The Government demurred to the petitions, upon the ground, among others, that the justices of the District Supreme Court and Court of Appeals are not "judges of inferior courts" within the meaning of § 1 of Art. III of the Constitution, and are, therefore, not "judges whose compensation may not, under the Constitution, be diminished during their continuance in office," within the meaning of § 107 of the appropriation act hereinbefore quoted.

Upon this state of the record the Court of Claims certified the following questions upon which it desires instruc-

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*Art. I, § 8, cl. 17: "The Congress shall have power . . . To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

tions, under § 3 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939:

"I. Does Section 1, Article III, of the Constitution of the United States apply to the Supreme Court [and to the Court of Appeals] of the District of Columbia and forbid a reduction of the compensation of the Justices thereof during their continuance in office?"

"II. Can the compensation of a Justice of the Supreme Court [or of the Court of Appeals] of the District of Columbia be lawfully diminished during his continuance in office?"

Before entering upon a consideration of the subject, it is well to observe that Congress has not undertaken by the legislation under review to assume or indicate any view of the meaning of the constitutional provision involved, but has left open the question whether these judges or others are judges "whose compensation may not, under the Constitution, be diminished during their continuance in office." This relieves us from the duty, always a delicate one, of passing upon the constitutionality of the congressional act, and only requires us to ascertain and determine the meaning and application of the constitutional provision, to which determination, by the plain intent of Congress, the act will immediately accommodate itself. That is to say, neither the terms nor intent of the statute, but only the application made of it by the Comptroller General, will be affected by the construction which we shall put upon the constitutional limitation.

The questions propounded by the court below, find no answer in any conclusive adjudication of this court; and it will materially assist us in arriving at a correct determination if we shall first consider the great underlying purpose which the framers of the Constitution had in mind and which led them to incorporate in that instrument the provision in respect of the permanent tenure of office

and the undiminishable character of the compensation of the judges.

The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer* v. *Philippine Islands*, 277 U.S. 189, 201, namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.

If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not coöperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), Vol. 1, p. 367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments

" ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." 1 Story on the Constitution, 4th ed., § 530. To the same effect, The Federalist (Madison) No. 48. And see *Massachusetts* v. *Mellon,* 262 U.S. 447, 488.

The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the provision now under review, forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States. This requirement was foreshadowed, and its vital character attested, by the Declaration of Independence, which, among the injuries and usurpations recited against the King of Great Britain, declared that he had " made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

In framing the Constitution, therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, *inter alia,* that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support. The high importance of the provision, as the contemporary history shows, was definitely pointed out by the leading statesmen of the time. Thus, in The Federalist, No. 78, Hamilton said—" The complete independence of the courts of justice is peculiarly essential in a limited Constitution." And, in No. 79—" Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" (The italics are in the original.)

Chief Justice Marshall, in the course of the debates of the Virginia State Convention of 1829–1830 (pp. 616, 619), used the following strong and frequently quoted language:

"The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

In a very early period of our history, it was said, in words as true today as they were then, that "if they [the people] value and wish to preserve their Constitution, they ought never to surrender the independence of their judges." Rawle on the Constitution, 2d ed., 281.

We need not pursue this phase of the subject further. It is fully discussed in *Evans* v. *Gore,* 253 U.S. 245, where this court (pp. 248–249) said:

"With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office'? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? Does the provision merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective, diminution, such as withholding or calling back a part as a tax on the whole? Or, does it mean that the judge shall have a sure and continuing right to the compensation, whereon he confidently may rely for his support during his continuance in office,

so that he need have no apprehension lest his situation in this regard may be changed to his disadvantage?"

And, after referring to statements from which we have quoted and others, the court added (p. 253):

"These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.

"Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle."

In the light of the foregoing views,—time honored and never discredited—it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people. It was this

motive that impelled Chief Justice Taney to protest against the attempt of the Treasury Department to exact a tax upon the compensation of the judges under an act of Congress passed in 1862, c. 119, § 86, 12 Stat. 472. 157 U.S., App. 701; *Evans* v. *Gore, supra,* pp. 257–259. The judges of the Court of Appeals of Virginia, as far back as 1788, in discharge of the same duty, directed to the members of the state assembly a "respectful remonstrance" against an act which had the effect of reducing their compensation. 4 Call (Va.) 135, 141. In the course of that remonstrance these judges said (pp. 143, 145):

"The propriety and necessity of the independence of the judges is evident in reason and the nature of their office; since they are to decide between government and the people, as well as between contending citizens; and, if they be dependent on either, corrupt influence may be apprehended, sacrificing the innocent to popular prejudice; and subjecting the poor to oppression and persecution by the rich. And this applies more forcibly, to exclude a dependence on the legislature; a branch, of whom, in cases of impeachment, is itself a party. . . . For vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation by reducing salaries to a copper, . . ."

Actuated by like considerations of public duty, as it is averred, these plaintiffs brought the present suits.

The judges of the Supreme Court and of the Court of Appeals of the District of Columbia are of equal rank and power with those of other inferior courts of the federal system, and plainly within the spirit and reason of the compensation provision; and also within its intent, unless there be something in the Constitution, or in the character or organization of the District, or its relations to the

general government, or in the character of the courts themselves which precludes that conclusion. Indeed, the reasons which have been set forth, and which impelled the adoption of the constitutional limitation, apply with even greater force to the courts of the District than to the inferior courts of the United States located elsewhere, because the judges of the former courts are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments.

This court has repeatedly held that the territorial courts are "legislative" courts, created in virtue of the national sovereignty or under Art. IV, § 3, cl. 2, of the Constitution, vesting in Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"; and that they are not invested with any part of the judicial power defined in the third article of the Constitution. And this rule, as it affects the territories, is no longer open to question. Do the courts of the District of Columbia occupy a like situation in virtue of the plenary power of Congress, under Art. I, § 8, cl. 17, "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States . . ."? This inquiry requires a consideration, first, of the reasons upon which rest the decisions in respect of the territorial courts.

The authority upon which all the later cases rest is *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546, where the opinion was delivered by Chief Justice Marshall. The pertinent question there was whether the judicial power of the United States described in Art. III of the Constitution vested in the superior courts of the Territory of

Florida; and it was answered in the negative. "The Judges of the Superior Courts of Florida," the court said, "hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."

This view was accepted and followed in *Benner* v. *Porter,* 9 How. 235, 242–244; *Clinton* v. *Englebrecht,* 13 Wall. 434, 447; *Hornbuckle* v. *Toombs,* 18 Wall. 648, 655; *Good* v. *Martin,* 95 U.S. 90, 98; *Reynolds* v. *United States,* 98 U.S. 145, 154; *The City of Panama,* 101 U.S. 453, 460; *McAllister* v. *United States,* 141 U.S. 174, 180 *et seq.; United States* v. *McMillan,* 165 U.S. 504, 510; and *Romeu* v. *Todd,* 206 U.S. 358, 368.

A sufficient foundation for these decisions in respect of the territorial courts is to be found in the transitory character of the territorial governments. In the *McAllister* case, *supra,* this court, after stating that the Constitution had secured the independence of the judges of courts in which might be vested the judicial power of the United States by an express provision that they should hold office during good behavior and their compensation should not be diminished during their continuance therein, concluded (pp. 187–188)—"The absence from the Constitution of such guaranties for territorial judges was no doubt due to the fact that the organization of govern-

ments for the Territories was but temporary, and would be superseded when the Territories became States of the Union." And in the concurring opinion of Mr. Justice White in *Downes* v. *Bidwell,* 182 U.S. 244, 293, these decisions are said to grow out of the " presumably ephemeral nature of a territorial government."

In this connection, the peculiar language of the territorial clause, Art. IV, § 3, cl. 2, of the Constitution, should be noted. By that clause Congress is given power " to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Literally, the word " territory," as there used, signifies property, since the language is not " territory *or* property," but " territory or *other* property." There thus arises an evident difference between the words " *the* territory " and " *a* territory " of the United States. The former merely designates a particular part or parts of the earth's surface—the imperially extensive real estate holdings of the nation; the latter is a governmental subdivision which happened to be called a " territory," but which quite as well could have been called a " colony " or a " province." " The Territories," it was said in *National Bank* v. *County of Yankton,* 101 U.S. 129, 133, " are but political subdivisions of the outlying dominion of the United States." Since the Constitution provides for the admission by Congress of new states (Art. IV, § 3, cl. 1), it properly may be said that the outlying continental public domain, of which the United States was the proprietor, was, from the beginning, destined for admission as a state or states into the Union; and that as a preliminary step toward that foreordained end—to tide over the period of ineligibility—Congress, from time to time, created territorial governments, the existence of which was necessarily limited to the period of pupilage. In that view it is not unreasonable to conclude that the makers of the Constitution could never have intended to give

permanent tenure of office or irreducible compensation to a judge who was to serve during this limited and sometimes very brief period under a purely provisional government which, in all cases probably and in some cases certainly, would cease to exist during his incumbency of the office.

The impermanent character of these governments has often been noted. Thus, it has been said, "The territorial state is one of pupilage at best," *Nelson* v. *United States,* 30 Fed. 112, 115; "A territory, under the constitution and laws of the United States, is an inchoate state," *Ex parte Morgan,* 20 Fed. 298, 305; "During the term of their pupilage as Territories, they are mere dependencies of the United States." *Snow* v. *United States,* 18 Wall. 317, 320. And in *Pollard's Lessee* v. *Hagan,* 3 How. 212, 224, the court characterizes them as "the temporary territorial governments."

How different are the status and characteristics of the District of Columbia! The pertinent clause of the Constitution (Art. I, § 8, cl. 17) confers the power on Congress to "exercise exclusive legislation . . . over such district . . . as may . . . become the seat of the government of the United States." These are words of permanent governmental power. The District, as the seat of the national government, is as lasting as the States from which it was carved or the union whose permanent capital it became. It could not have been intended otherwise; and it was thus recognized by the act of acceptance in 1790 (§ 1, c. 28, 1 Stat. 130): ". . . the [District] is hereby accepted for the permanent seat of the government of the United States."

In the District clause, unlike the Territorial clause, there is no mere linking of the legislative processes to the disposal and regulation of the public domain—the landed estates of the sovereign—within which transitory governments to tide over the periods of pupilage may be con-

stituted, but an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental. The District is not an "ephemeral" subdivision of the "outlying dominion of the United States," but the capital—the very heart—of the Union itself, to be maintained as the "permanent" abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised for the great and expanding population of forty-eight states, and for a future immeasurable beyond the prophetic vision of those who designed and created it.

Over this District Congress possesses "the combined powers of a general and of a State government in all cases where legislation is possible." *Stoutenburgh* v. *Hennick,* 129 U.S. 141, 147. The power conferred by Art. I, § 8, cl. 17, is plenary; but it does not exclude, in respect of the District, the exercise by Congress of other appropriate powers conferred upon that body by the Constitution, or authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable. Circuit Judge Taft, afterwards Chief Justice of this court, speaking for himself, Judge Lurton, afterwards an associate justice of this court, and Judge Hammond, in *Grether* v. *Wright,* 75 Fed. 742, 756–757, after reciting the foregoing clause and the organization of the District under it, said:

"It was meet that so powerful a sovereignty should have a local habitation the character of which it might absolutely control, and the government of which it should not share with the states in whose territory it exercised but a limited sovereignty, supreme, it is true, in cases where it could be exercised at all, but much restricted in the field of its operation. The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, and the city organized under the

grant became the city, not of a state, not of a district, but of a nation. In the same article which granted the powers of exclusive legislation over its seat of government are conferred all the other great powers which make the nation, including the power to borrow money on the credit of the United States. He would be a strict constructionist, indeed, who should deny to congress the exercise of this latter power in furtherance of that of organizing and maintaining a proper local government at the seat of government. Each is for a national purpose, and the one may be used in aid of the other."

Callan v. *Wilson,* 127 U.S. 540, 550:

" There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—especially of the privilege of trial by jury in criminal cases."

It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III. We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union.

In *Downes* v. *Bidwell, supra,* [162 U.S. 244,] in the opinion delivered by Mr. Justice Brown, at pp. 260–261, it is said:

"This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government."

That the Constitution is in effect in the territories as well as in the District has been so often determined in the affirmative that it is no longer an open question. Whether that instrument became operative in virtue of its own force, or because of its formal extension by acts of Congress, is a consideration which does not affect the present inquiry. It is enough that the Constitution is in force, and the question here, as well as in the case of the territories, is simply whether the provisions of Art. III relied upon are applicable. Because, for the peculiar reasons already stated, they are inapplicable to the terri-

tories, it does not follow that they are likewise inapplicable to the District where these peculiar reasons do not obtain. In the concurring opinion of Mr. Justice White in the *Downes* case, certain principles applicable to the situation with which we are dealing are enumerated. Among them (pp. 289, 292) are these: " Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable. . . . In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises, is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." And then follows, almost immediately, at page 293, the observation already quoted, that the decisions in respect of the inapplicability of the third Article of the Constitution to the territorial courts grow out of the " presumably ephemeral nature of a territorial government."

In the opinion delivered by Mr. Justice Brown, following the quotation which we have already made, it is said (p. 266):

"As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution. . . . It is sufficient to say that this case [*American Insurance Co.* v. *Canter, supra*] has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it."

After an exhaustive review of the prior decisions of this court relating to the matter, the following propositions, among others, were stated as being established:

"1. That the District of Columbia and the territories are not States, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States;

"2. That territories are not States, within the meaning of Revised Statutes, sec. 709, permitting writs of error from this court in cases where the validity of a *state* statute is drawn in question;

"3. That the District of Columbia and the territories are States, as that word is used in treaties with foreign powers, with respect to the ownership, disposition and inheritance of property;

"4. That the territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish."

The significant point to be observed in this enumeration is that the opinion is careful to distinguish between those propositions which relate both to the territories and the District of Columbia, and those which relate to the territories alone; so that when the court in paragraph 4 excepts from the operation of Art. III of the Constitution only the territories, it is equivalent to a determination either that the District was not subject to the same rule, or that the question in respect of the District had not then been decided.

No less significant in this respect is the decision in *Cross* v. *United States,* 145 U.S. 571, 576. In that case it was held that a writ of error would not lie to review a judgment of the Supreme Court of the District, sitting in appellate review of the conviction of a person of a capital crime. The government contended that the writ would

not lie because the Supreme Court of the District was not a court of the United States within the intent and meaning of the act of Congress of February 6, 1889, c. 113, 25 Stat. 655, which provided that in capital cases tried before "any court of the United States" the final judgment could be reviewed by this court upon a writ of error. *McAllister* v. *United States, supra,* was cited in support of that contention, but this court said, ". . . it is to be remembered that that case referred to territorial courts only." And the contention of the government in this respect was rejected, the writ being dismissed on a different ground.

In *American Insurance Co.* v. *Canter, supra,* the Chief Justice gave as a conclusive reason why the territorial courts were not constitutional courts vested with the judicial power designated in Art. III of the Constitution that—"They are incapable of receiving it." It is not hard to justify this observation in respect of courts created for a purely provisional government to serve merely between events; but the District Supreme Court and Court of Appeals are permanent establishments—federal courts of the United States and part of the federal judicial system. *Federal Trade Comm'n* v. *Klesner,* 274 U.S. 145, 154, 156:

"The parallelism between the Supreme Court of the District and the Court of Appeals of the District, on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the States would be regarded as within federal jurisdiction, is complete."

To the same effect, see *Claiborne-Annapolis Ferry* v. *United States,* 285 U.S. 382, 390–391.

In the light of all that has now been said, we are unable to perceive upon what basis of reason it can be said that these courts of the District are *incapable* of receiving the

judicial power under Art. III. In respect of them we take the true rule to be that they are courts of the United States, vested generally with the same jurisdiction as that possessed by the inferior federal courts located elsewhere in respect of the cases enumerated in § 2 of Art. III. The provision of this section of the article is that the " judicial power shall extend " to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is, *ipso facto,* vested in such courts as inferior courts of the United States.

The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state. *Keller* v. *Potomac Elec. Co.,* 261 U.S. 428, 442–443. " In other words," this court there said, " it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a State may confer on her courts. *Kendall* v. *United States,* 12 Pet. 524, 619. Instances in which congressional enactments have been sustained which conferred powers and placed duties on the courts of the District of an exceptional and advisory character are found in *Butterworth* v. *Hoe,* 112 U.S. 50, 60; *United States* v. *Duell,* 172 U.S. 576, and *Baldwin Co.* v. *Howard Co.,* 256 U.S. 35. Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts. In *Prentis* v. *Atlantic Coast Line Co., supra,* we

held that when 'a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned.' (211 U.S. 225.) *Dreyer* v. *Illinois*, 187 U.S. 71, 83, 84."

If, in creating and defining the jurisdiction of the courts of the District, Congress were limited to Art. III, as it is in dealing with the other federal courts, the administrative and other jurisdiction spoken of could not be conferred upon the former. But the clause giving plenary power of legislation over the District enables Congress to confer such jurisdiction in addition to the federal jurisdiction which the District courts exercise under Art. III, notwithstanding that they are recipients of the judicial power of the United States under, and are constituted in virtue of, that article.

Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere. The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable.

The matter has been well stated by Mr. Justice Groner, speaking for the District Court of Appeals, in *Pitts* v.

Peak, 60 App.D.C. 195, 197, 50 F. (2d) 485, 487, a case which we had occasion very recently to cite (*Claiborne-Annapolis Ferry* v. *United States, supra,* at p. 391):

"But it by no means follows that because Congress has seen fit, by virtue of its authority over the District of Columbia, to confer upon the courts of the District administrative functions, which outside the District it may not confer upon courts created solely under article 3, these courts are any the less created under that article of the Constitution, nor do we know of anything in the history of these courts or in the legislation with relation to them which would indicate the contrary. We think a reasonable and correct view of the subject would indicate that, in the creation and organization of the superior courts of the District of Columbia, Congress has availed of its dual constitutional right in the first place to establish courts of law and invest them, as it has, with power and jurisdiction over all cases and controversies [with] which, under the authority of article 3, it has invested the district courts of the United States, and, in the second place, in the exercise of the power of a sovereign state, under the provisions of section 8 of article 1, has further imposed upon them jurisdiction and power which it cannot impose upon other like courts functioning outside the District. There is no inhibition in the Constitution against the exercise by Congress of this dual power, arising as it does out of an express grant in the one case (article 3) and an implied grant in the other (article 1, § 8), nor does its exercise in the one case exhaust its power and prevent its exercise in the other, and therefore we assume, when Congress created the two courts—the District Courts of the United States and the Supreme Court of the District of Columbia—and gave to each, within its own sphere, identical jurisdiction, that it drew its power from the same source, even though it was necessary it should have recourse to another provision of the Constitution in order

to clothe the courts at the seat of government with other and additional authority not permissible under article 3."

And see also *James* v. *United States,* 38 Ct. Cls. 615, 627–631, which this court on appeal disposed of on another ground, saying it was unnecessary to decide the constitutional question. 202 U.S. 401.

The conclusion to which we have come is in accord with the continuous and unbroken practice of Congress from the beginning of the government. In 1801 (c. 15, § 3, 2 Stat. 103, 105) Congress established the Circuit Court of the District of Columbia, the judges thereof to hold office during good behavior, giving the court and the judges the same powers as were vested in the circuit courts of the United States and the judges thereof. In 1863, that court was superseded by, and its jurisdiction conferred upon, the present District Supreme Court (c. 91, 12 Stat. 762), the judges to hold their offices during good behavior. Many acts of Congress refer to these courts as "courts of the United States." In the District Code, passed March 3, 1901 (c. 854, 31 Stat. 1189), it is provided, § 61, that the Supreme Court of the District "shall be deemed a court of the United States." And § 84 provides that it "shall have and exercise the same powers and jurisdiction as the *other* district courts of the United States." In *Swift & Co.* v. *United States,* 276 U.S. 311, 324, it was contended that the District Supreme Court lacked jurisdiction of a case arising under the Sherman Anti-Trust Act, because it was not a district court of the United States within the meaning of that act; but this court held that the contention had been adversely disposed of by *Federal Trade Comm'n* v. *Klesner, supra;* and in a footnote at page 325 attention was called to the fact that suits to enjoin patent infringements under R.S. § 4921 are entertained by the Supreme Court of the District solely by virtue of its general powers as "a District Court of the United States."

The District Court of Appeals was established in 1893 (c. 74, 27 Stat. 434), the judges to hold office during good behavior. Congress invariably has fixed the same salaries for the judges of the Supreme Court of the District as for the judges of the district courts of the United States sitting elsewhere, and the salaries of the judges of the District Court of Appeals the same as for the judges of the United States circuit courts of appeals. When one has been increased, the other has been increased in like amount. Indeed, the congressional practice from the beginning recognizes a complete parallelism between the courts of the District and the district and circuit courts of appeals of the United States. See *Federal Trade Comm'n* v. *Klesner, supra,* generally, and especially the language already quoted.

The protest of Chief Justice Taney apparently did not bear fruit until 1869, at which time Attorney General Hoar delivered an opinion in response to a request of the Secretary of the Treasury, holding that if the act of 1862 imposed a tax upon the salaries of the President and the justices of the Supreme and inferior courts of the United States, it was unconstitutional. 13 Op. Atty. Gen. 161. Upon this authority the taxes which had been paid were refunded, and in 1872 a like refund of taxes was made to the judges of the Supreme Court of the District of Columbia, as shown by the records and files of the Treasury Department.

It is true, of course, that Congress, in conferring the life tenure upon the judges of the courts of the District, and in doing the other things mentioned above, might have done so merely as a matter of legislative discretion, without deeming it to be a matter of constitutional compulsion. Nevertheless, a practice so uniform and continuous indicates, with some degree of persuasive force, that Congress entertained the view that the courts of the District and the inferior courts of the United States sitting

elsewhere, stood upon the same constitutional footing. In any event, it is not without significance that in the acts of Congress from the beginning of the government to the present day, nothing has been brought to our attention that is inconsistent with that view.

The government relies almost entirely upon the decision of this court in *Ex parte Bakelite Corp.,* 279 U.S. 438. In that case we held that the Court of Customs Appeals was a legislative court, not a constitutional court under Art. III of the Constitution. In the course of the opinion attention was called to the decisions in respect of the territorial courts, and it was said that a like view had been taken in respect of the status and jurisdiction of the courts provided by Congress for the District of Columbia. This observation, made incidentally, by way of illustration merely and without discussion or elaboration, was not necessary to the decision, and is not in harmony with the views expressed in the present opinion. "It is a maxim, not to be disregarded," said Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Two cases are cited in support of the *dictum* in the *Bakelite* opinion—*Keller* v. *Potomac Elec. Co., supra,* and *Postum Cereal Co.* v. *Calif. Fig Nut Co.,* 272 U.S. 693, 700. The *Keller* case we have already discussed. It simply holds that in virtue of its dual power over the

District, Congress may vest non-judicial functions in the courts of the District. We find nothing in that decision which cannot be reconciled with what we have here said. In the case of *Postum Cereal Co.*, the court follows the *Keller* case in holding that administrative or legislative functions may be vested in the courts of the District, but adds that this may not be done with any federal court established under Art. III of the Constitution. Taken literally, this seems to negative the view that the superior courts of the District are established under Art. III. But the observation, read in the light of what was said in the *Keller* case in respect of the dual power of Congress in dealing with the courts of the District, should be confined to federal courts in the states as to which no such dual power exists; and thus confined, it is not in conflict with the view that Congress derives from the District clause distinct powers in respect of the constitutional courts of the District which Congress does not possess in respect of such courts outside the District.

We hold that the Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Art. III of the Constitution; that the judges of these courts hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office.

In accordance with that view the questions propounded are answered.

Question No. 1, Yes.
Question No. 2, No.

The CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER, and MR. JUSTICE CARDOZO, dissenting.

We are of the opinion that the courts of the District of Columbia, as this court has repeatedly declared, are

not courts established under § 1 of Article III of the Constitution, but are established under the broad authority conferred upon the Congress for the government of the District of Columbia by paragraph 17 of § 8 of Article I. Hence, the limitations imposed by § 1 of Article III, with respect to tenure and compensation, are not applicable to judges of these courts. The special authority conferred for the government of the District of Columbia necessarily includes the power to establish courts deemed to be appropriate for the District (*Kendall* v. *United States,* 12 Pet. 524, 619), including the power to fix and alter tenure and compensation. It is a power complete in itself and derives nothing from § 1 of Article III. It is a power not less complete, but essentially the same as that which is conferred upon the Congress for the government of territories. *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546; *McAllister* v. *United States,* 141 U.S. 174. It is not a dual power in the sense that it is derived from two sources, that is, both from Article III and also from the constitutional provision for the government of the District, but is dual only in the sense that the latter provision confers an authority so broad that it enables the Congress to invest the courts of the District not only with jurisdiction and powers analogous to those of federal courts within the States but also with jurisdiction and powers analogous to those which States may vest in their own courts. As the courts of the District do not rest for their creation on § 1 of Article III, their creation is not subject to any of the limitations of that provision. Nor would those limitations, if considered to be applicable, be susceptible of division so that some might be deemed obligatory and others might be ignored. If the limitations relating to courts established under § 1 of Article III applied to the courts of the District of Columbia, they would necessarily prevent the attaching to the latter courts of jurisdiction and powers of an adminis-

trative sort. It is only because the Congress, in establishing the courts of the District of Columbia, is free from the limitations imposed by § 1 of Article III that administrative powers can be, and are, conferred upon them. *Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 442, 443; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, 700; *Ex parte Bakelite Corp.*, 279 U.S. 438, 450.

With the question of policy, this court is not concerned, save as policy is determined by the Constitution. The question is one of constitutional interpretation which has hitherto been deemed to be settled.

WILLIAMS v. UNITED STATES.

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 728. Argued April 12, 1933.—Decided May 29, 1933.

1. The judicial power of the Court of Claims is not vested in virtue of Art. III of the Constitution, so as to bring its judges within the protection of that Article as to tenure of office and compensation. *Ex parte Bakelite Corp.*, 279 U.S. 438. Expressions in *United States* v. *Klein*, 13 Wall. 128, and other cases criticized. Pp. 567, 568, 581.
2. The Court of Claims, originally an administrative or advisory body, is, under the existing laws, a court exercising judicial power and capable of rendering final judgments reviewable by this Court. P. 564.
3. Judicial power, apart from that defined by Art. III of the Constitution, may be conferred by Congress upon legislative courts as well as upon constitutional courts; which is exemplified in the instances of territorial courts, and also of state courts when sitting in naturalization proceedings. P. 565.
4. The judicial power of Art. III does not attach to the Court of Claims in virtue of the consent of the United States to be sued therein coupled with the clause of that Article extending the judicial power of the United States to "controversies to which the United States shall be a party." Expressions in *Minnesota* v. *Hitchcock*, 185 U.S. 373, and *Kansas* v. *United States*, 204 U.S. 331, disapproved. Pp. 571, 577.

5. Article III, § 2, cl. 1 of the Constitution declares that the judicial power of the United States shall extend to "all" of some of the classes of cases named therein, but omits the word "all" in naming other classes, including "controversies to which the United States shall be a party." The omission was not accidental, but expresses, *ex industria*, a limitation of meaning. P. 572.
6. In expounding the Constitution, every word must have its due force and appropriate meaning and no word is to be regarded as unnecessarily used or needlessly added. P. 573.
7. In the light of the rule of sovereign immunity from suit, which was well settled and understood when the Constitution was framed, the proposition that Art. III intended to include suits against the United States is inadmissible. *Chisholm* v. *Georgia*, 2 Dall. 419, and *Hans* v. *Louisiana*, 134 U.S. 1, involving suits against States, discussed. P. 573.
8. That clause must be construed in accord with the construction put upon it by the first Judiciary Act, as though it read "controversies to which the United States shall be a party plaintiff or petitioner." Pp. 573, 577.
9. Controversies to which the United States may by statute be made a party defendant, at least as a general rule, lie wholly outside the scope of the judicial power vested by Art. III in the constitutional courts. P. 577.
10. Where a controversy is of such a character as to require the exercise of the judicial power *defined by Art. III*, jurisdiction thereof can be conferred only on courts established in virtue of that Article, and Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since "they are incapable of receiving it." *American Ins. Co.* v. *Canter*, 1 Pet. 511. P. 578.
11. Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, they are matters in respect of which there is no constitutional right to a judicial remedy; and the authority to inquire into and decide them may constitutionally be conferred on a nonjudicial officer or body. P. 579.
12. A power which may be devolved, at the will of Congress, upon any of the three departments, plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers. P. 580.

13. The jurisdiction of the Court of Claims to award compensation for property taken by power of eminent domain, and its jurisdiction to adjudicate set-offs, etc., claimed by the United States, are consistent with its status as a legislative court. P. 581.

14. *Obiter dicta* may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. P. 568.

RESPONSE to questions certified by the Court of Claims, arising in a suit brought in that court by one of its Judges, against the United States, for the purpose of testing the constitutionality of a reduction of his official salary. Cf. the preceding report of *O'Donoghue* v. *United States, ante,* p. 516. This case was argued with that one.

Mr. George A. King, with whom *Messrs. George R. Shields* and *Herman J. Galloway* were on the brief, for plaintiff.

The legislative history of the Court of Claims shows that from 1863 onward it has been invested with power to render judgments against the United States, as a tribunal acting strictly under the constitutional judicial power. Discussing: *Gordon* v. *United States,* 117 U.S. 697; *United States* v. *Jones,* 119 U.S. 477, 478, 479.

The constitutional status of the Court of Claims was early recognized in *United States* v. *Klein,* 13 Wall. 128, 144–146. Cf. *Witkowski* v. *United States,* 7 Ct. Cls. 393.

There has been a continuous growth in classes of cases of which the Court of Claims has cognizance. It was the first court established to hear and determine and render final judgments in cases against the United States. For more than 65 years it has been deciding such cases and has disposed of more than 50,000 of them. The appeals to the Supreme Court from its judgments exceed 1,000 in number.

Claims for the value of property taken by the Government are claims founded upon the Constitution. *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645; *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299; *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106; *Liggett & Myers* v. *United States*, 274 U.S. 215; *Phelps* v. *United States*, 274 U.S. 341.

In this line of cases, the rule of just compensation was strictly enforced, the party was held entitled to compensation as of the time of the taking, and an allowance in the form of interest for delay,—notwithstanding the statute against allowing interest on claims against the United States.

Of course, the District Courts as "constitutional courts" were in cases of taking private property exercising the judicial power of the United States vested in them in accordance with Art. III of the Constitution, and could not have heard cases against the United States except under and in conformity with permissive legislation by Congress. The jurisdiction of the District Courts and the Court of Claims under the Tucker Act must be the same kind of jurisdiction. See *United States* v. *Jones*, 131 U.S. 1.

It would be anomalous to say that a court exercising jurisdiction not limited as to amount is not a constitutional court, while those having concurrent jurisdiction given to them up to a limited amount are courts of superior status. Cf. *United States* v. *Lynah*, 188 U.S. 445; *United States* v. *Williams*, 188 U.S. 485; *Heyward* v. *United States*, 52 Ct. Cls. 87.

It would seem to be a *reductio ad absurdum* to say that where suit is brought in the Court of Claims and may be for any amount without limit in either direction, the

judgment is not in the constitutional sense an adjudication of a controversy arising under the Constitution and laws of the United States, "to which the United States is a party," while if brought in another court the limit of whose jurisdiction has been carefully fixed by Congress at not exceeding $10,000, the judgment is of higher standing and is that of a constitutional court. The mode of enforcing the judgment is the same in either case, and the judgment itself as much the act of a strictly judicial tribunal in one case as in the other.

The advisory jurisdiction of the Court of Claims is distinct from its general jurisdiction to render judgments.

Sections of the Tucker Act involving advisory opinions in no way conflict with the constitutional nature of the court and of its judgments under the first eleven sections of the Act. *In re Sanborn,* 148 U.S. 222; *Sanborn* v. *United States,* 27 Ct. Cls. 484, 490.

The inability of the court to issue execution on the property of the United States is consistent with its status as a "constitutional court." *Gordon* v. *United States,* 117 U.S. 697, distinguished. *Fidelity National Bank* v. *Swope,* 274 U.S. 123; *La Abra Silver Mining Co.* v. *United States,* 175 U.S. 423.

The power of the court to render judgments on set-offs in favor of the United States against claimants is a strictly constitutional power. *McElrath* v. *United States,* 102 U.S. 426. This jurisdiction, enforceable by execution anywhere in the country, should alone settle the status of the court as a constitutional tribunal.

Use of physical force to carry out the judgment is in no case essential to its finality. *Virginia* v. *West Virginia,* 206 U.S. 290; 209 U.S. 514; 220 U.S. 1; 222 U.S. 17; 231 U.S. 89; 234 U.S. 117; 238 U.S. 202; 241 U.S. 531; 246 U.S. 565.

The fact that other duties not in strictness judicial are placed upon the Court of Claims does not impair its constitutional status.

This Court has held the Court of Claims to be a constitutional court. Discussing: *Gordon* v. *United States,* 117 U.S. 697; 7 Ct. Cls. 1; *United States* v. *Jones,* 119 U.S. 477, 478; *Gordon* v. *United States,* 7 Wall. 188; *United States* v. *Louisiana,* 123 U.S. 32; *Hurley* v. *Kincaid,* 285 U.S. 95.

Other cases in which the constitutional character of the Court of Claims as a court invested with jurisdiction of "controversies to which the United States shall be a party" has been either assumed or directly decided, are: *United States* v. *Anderson,* 9 Wall. 56; *United States* v. *O'Grady,* 22 Wall. 641, 647, 648; *United States* v. *Moser,* 266 U.S. 236; *United States* v. *Borcherling,* 185 U.S. 223; *Minnesota* v. *Hitchcock,* 185 U.S. 373; *Miles* v. *Graham,* 268 U.S. 501; *United States* v. *Union Pacific R. Co.,* 98 U.S. 569; *United States* v. *Union Pacific R. Co.,* 91 U.S. 72.

In statutes passed during the World War providing for suits for compensation against the United States there is no suggestion of any difference in effect between the jurisdiction of the Court of Claims and that of the District Courts exercising concurrent or exclusive jurisdiction.

The Court of Claims is thus the recipient of a large share of the judicial power of the United States under Art. III, § 2 of the Constitution.

1. All cases coming before it arise under the Constitution and laws of the United States. They also come within the grant with respect to "controversies to which the United States shall be a party." It has been repeatedly said by high authority beginning with Story's Commentaries in 1833, that this clause includes cases in which the United States is defendant.

2. This view has been repeatedly sanctioned by this Court, not only in the case of *United States* v. *Union*

Pacific R. Co., 98 U.S. 569 (the applicability of which has been questioned on the ground that the remarks made were not essential to a decision of the case), but in such cases as *United States* v. *Louisiana*, 123 U.S. 32, and others above cited.

3. The District Courts, constitutional courts, exercise concurrent jurisdiction with the Court of Claims in a large class of cases against the United States, generally of inferior magnitude and importance. This can not be explained except on the theory that the constitutional status of the Court of Claims is at least equal to that of a District Court.

4. The case of *Miles* v. *Graham*, 268 U.S. 501, is a direct authority in point.

5. The policy of the Constitution respecting judges' salaries applies quite as much to judges deciding between the Government and its citizens as to judges acting largely in cases between citizens.

Solicitor General Thacher, with whom *Messrs. Wm. W. Scott, Robert P. Reeder, Erwin N. Griswold*, and *H. Brian Holland* were on the brief, for the United States. A summary of the Government's position is given in the report of the case next preceding.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Plaintiff is, and since November 11, 1929, has been, a judge of the Court of Claims of the United States. Since his entry upon the duties of his office, and until June 30, 1932, he received a salary at the rate of $12,500 per annum, as fixed by the Act of December 13, 1926, c. 6, § 1, 44 Stat. 919. Since that date he has been paid at the rate of $10,000 per annum under a ruling of the Comptroller General of the United States. Compare *O'Donoghue* v. *United States*, decided this day, *ante*, p. 516.

The Legislative Appropriation Act of June 30, 1932 (c. 314, 47 Stat. 382, 402) in part provides:

"Sec. 107. (a) During the fiscal year ending June 30, 1933—

. . . . . .

"(5) the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum."

The Comptroller General, as the basis for his ruling, took the view that the Court of Claims is a "legislative" court, and not a "constitutional" court created under Art. III, § 1, of the Constitution, which provides:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

On February 8, 1933, this suit was brought in the Court of Claims to recover the amount of the difference between the statutory rate of $12,500, and the smaller amount paid under the ruling of the Comptroller General. The suit was brought by plaintiff in the court of which he is a member, because, as it is averred, no other court or remedy was open to him. Plaintiff's petition rests upon the contention that the Court of Claims is a constitutional court, created in virtue of the power of Congress to constitute tribunals inferior to the Supreme Court, whose judges "shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished

during their continuance in office." The government demurred to the petition, upon the ground that the judges of the Court of Claims are not judges of an "inferior court" within the meaning of that constitutional provision. The Court of Claims, without passing upon the demurrer, certified to this court the following questions, upon which it desires instructions, under § 3 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939:

"I. Does Section 1, Article III, of the Constitution of the United States apply to the Court of Claims and forbid a reduction of the compensation of the Judges thereof during their continuance in office?

"II. Does the provision of Section 2, Article III, of the Constitution, wherein it is stated that 'The Judicial Power shall extend . . . to controversies to which the United States shall be a party,' apply to the Court of Claims, and does this provision authorize the creation and establishment of that Court?

"III. Can the compensation of a Judge of the Court of Claims be lawfully diminished during his continuance in office?"

In the *O'Donoghue* case, *supra,* we have discussed in some detail the purposes which led the framers of the Constitution to incorporate in that instrument the provisions in respect of the permanent tenure of office and the undiminishable character of the compensation of the judges; and have pointed out that the judges of the Supreme Court and Court of Appeals of the District of Columbia plainly come within the spirit and reason of the compensation provision, and must be held to fall within its intent, unless that conclusion is precluded by other considerations. Much of what is there said may also be said in respect of the Court of Claims. It is a court of great importance, dealing with claims against the United States, which, in the aggregate, amount to a vast sum every year. The questions which it considers call for

the exercise of a high order of intelligence, learning and ability. The preservation of its independence is a matter of public concern. The sole function of the court being to decide between the government and private suitors, a condition, on the part of the judges, of entire dependence upon the legislative pleasure for the tenure of their offices and for a continuance of adequate compensation during their service in office, to say the least, is not desirable.

But these considerations, though obvious enough, are not sufficient, standing alone, to support a conclusion that the Court of Claims comes within the reach of the judicial article in respect of tenure of office and compensation. The integrity of such a conclusion must rest not upon its desirability, but upon its conformity with the provisions of the Constitution.

For reasons which are set out in the *O'Donoghue* opinion, the courts of the territories are legislative courts, while the superior courts of the District of Columbia are constitutional courts. The Court of Claims differs so essentially from both, that its status, in respect of the question under consideration, must be determined from an entirely different point of view.

That court was first established by the Act of February 24, 1855, c. 122, 10 Stat. 612, entitled, "An Act to establish a Court for the Investigation of Claims against the United States." It was to consist of three judges, to hold their offices during good behavior. The act provided that the court should hear and determine certain claims against the government of the United States, and also all claims which might be referred to the court by either House of Congress. The court was to keep a record of its proceedings in each case and make a report to Congress for the action of that body. By the Act of March 3, 1863, c. 92, 12 Stat. 765, the court was for the first time authorized to render final judgments, from which an appeal was allowed in certain cases. Section 14 of that act provided:

"That no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury."

Because of that provision, it was held in *Gordon* v. *United States,* 2 Wall. 561, that under the Constitution no appellate jurisdiction could be exercised by this court. The reasons for that conclusion are stated in an undelivered opinion written by Chief Justice Taney and, with approval, published for the first time in 117 U. S. 698. It was there stated that in view of § 14 the power of the Court of Claims and of this court was merely to certify their opinion to the Secretary of the Treasury; and whether the claim was paid in accordance with the opinion depended not on the decision of either court, but upon the future action of the Secretary and of Congress. So far as the Court of Claims is concerned, it was said, there is no objection to these provisions, since Congress undoubtedly may establish tribunals to examine testimony and decide in the first instance upon the validity and justice of any claim against the United States, subject to the supervision and control of Congress or the head of an executive department. Such authority was likened to that of an auditor or comptroller, and the circumstance that the tribunal was called a court and its decisions called judgments could not alter its character or enlarge its power. But in respect of this court different principles were said to apply, since this court is created by the Constitution and represents one of the three great divisions of power in the government, "to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other." The conclusion, therefore, was that Congress could neither

confer nor impose on this court the authority or duty of hearing or determining an appeal from such a tribunal, nor authorize or require this court to express an opinion on a case where its judicial power could not be exercised and where its judgment would not be final and conclusive upon the rights of the parties.

These observations, without adverting to others which have been disavowed, have since met with the uniform approval of this court.

The decision of the *Gordon* case in the 2d of Wallace was announced on March 10, 1865. At the next session of Congress § 14 was repealed. Ch. 19, 14 Stat. 9. Since that time it never has been doubted that Congress may authorize an appeal to this court from a final judgment or decree of the Court of Claims, *United States* v. *Jones,* 119 U.S. 477, 478–479; *In re Sanborn,* 148 U.S. 222, 225; *Luckenbach S.S. Co.* v. *United States,* 272 U.S. 533, 536 *et seq.,* or that the judgment of this court rendered on such appeal constitutes a final determination of the matter. *United States* v. *O'Grady,* 22 Wall. 641, 647. It is equally certain that the judgments of the Court of Claims, where no appeal is taken, under existing laws are absolutely final and conclusive of the rights of the parties unless a new trial be granted by that court as provided by law. *Id.* Indeed, as appears from the cases already cited and others, such finality and conclusiveness must be assumed as a necessary prerequisite to the exercise of appellate jurisdiction by this court.

In 1887 Congress gathered together the preceding acts in respect of suits against the government in what is called the Tucker Act. Ch. 359, 24 Stat. 505. By that act the Court of Claims was given jurisdiction to hear and determine, among other matters, all claims upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, " in respect of which claims

the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." By § 2 of the act, as amended and supplemented by § 24 (20) of the Judicial Code, concurrent jurisdiction was conferred upon the federal district courts in all matters as to which the Court of Claims had jurisdiction, where the amount involved did not exceed $10,000. U.S. Code, Title 28, § 41 (20).

By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained, or *concurrent* jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution.

That judicial power apart from that article may be conferred by Congress upon legislative courts, as well as upon constitutional courts, is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546, dealing with the territorial courts. "The jurisdiction," he said, "with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." That is to say (1) that the courts of the territories (and, of course, other legislative courts) are invested with judicial power, but (2) that this power is not conferred by the third article of the Constitution, but by Congress in the execution of other provisions of that

instrument. The validity of this view is borne out by the fact that the appellate jurisdiction of this court over judgments and decrees of the legislative courts has been upheld and freely exercised under acts of Congress from a very early period, a practice which can be sustained, as already suggested, only upon the theory that the legislative courts possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution.

The authority to naturalize aliens has been vested in the courts from the beginning of the government; and it cannot be doubted that in discharging this function the courts exercise judicial power. But the courts of the states, with the acquiescence of all the departments of the federal government, have also exercised the same jurisdiction during this long period of time, and their authority to do so must be regarded as conclusively established. *Levin* v. *United States,* 128 Fed. 826, 828–831. In that case, Judge Sanborn, in a very carefully drawn opinion, pointed out that Congress cannot vest any portion of the judicial power granted by § 1 and defined by § 2 of the third article of the Constitution in courts not ordained and established by itself; * that the judicial power there granted and defined necessarily extended only to the trial of the classes of cases named in § 2; but that these sections neither expressly nor impliedly prohibited Congress from conferring judicial power upon other courts. " Thus," he says, " the authority granted

* The lack of authority in Congress to devolve any part of the judicial power defined by Art. III upon courts other than those created by itself must not be confused with its authority to vest jurisdiction in respect of some cases in courts whose judicial power is otherwise derived. Compare *Robertson* v. *Baldwin,* 165 U.S. 275, 278–280; *Claflin* v. *Houseman,* 93 U.S. 130, 136, *et seq.; Second Employers' Liability Cases,* 223 U.S. 1, 55, *et seq.*

to territorial courts to hear and determine controversies arising in the territories of the United States is judicial power. But it is not a part of that judicial power granted by section 1, and defined by section 2, of article 3 of the Constitution. Nevertheless, under the constitutional grant to Congress of power to 'make all needful rules and regulations respecting the territory . . . belonging to the United States' (article 4, § 3), that body may create territorial courts not contemplated or authorized by article 3 of the Constitution, and may confer upon them plenary judicial power, because the establishment of such courts and the bestowal of such authority constitute appropriate means by which to exercise the congressional power to make needful rules respecting the territory belonging to the United States . . . The grant by the Congress of the United States of the judicial power to admit aliens to citizenship, and to hear and decide the various questions which do not arise in the cases specified in article 3 of the Constitution, but which a proper exercise of the powers granted by that instrument to the executive or to the legislative department of the Government requires to be judicially decided, was neither expressly nor impliedly prohibited by that article. The congressional power to make such a grant, and to vest judicial authority in state courts and officers, in such cases, exists by virtue of the established rule that the grant of a power to accomplish an object is a grant of the authority to select and use the appropriate means to attain it."

If the power exercised by legislative courts is not *judicial* power, what is it? Certainly it is not legislative, or executive, or administrative power, or any imaginable combination thereof.

With the foregoing principles in mind we come, then, to a consideration of the crucial question here involved—Is the judicial power exercised by the Court of Claims

vested in virtue of the third article of the Constitution so as to bring its judges within the protection of that article as to tenure of office and compensation?

It must be conceded at the threshold that this court in several cases has expressed, more or less irrelevantly, its opinion in the affirmative. Thus, in *United States* v. *Klein,* 13 Wall. 128, 145, after reference to the legislation with respect to the Court of Claims, the view is expressed that such court was thus constituted one of those inferior courts which Congress authorizes. In *United States* v. *Union Pacific R. Co.,* 98 U.S. 569, 603, it was said that under the authority of Art. III Congress had created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution. In *Minnesota* v. *Hitchcock,* 185 U.S. 373, 386, the court, after directing attention to the fact that the United States could not be sued without its consent, said that with its consent it might be sued, in which event the judicial power of the United States extended to such a controversy, and added, "Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition." See also *Kansas* v. *United States,* 204 U.S. 331, 342; *United States* v. *Louisiana,* 123 U.S. 32, 35.

None of these cases involved the question now under consideration, and the expressions referred to were clearly *obiter dicta,* which, as said by Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, 399, "may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

On the other hand, this court, in *Ex parte Bakelite Corp.,* 279 U.S. 438, in a fully considered opinion holding that the Court of Customs Appeals was a legislative court, definitely took the opposite view. The status of the Court of Claims is there discussed at length, and the conclusion reached that it likewise is a legislative court. "It

was created, and has been maintained," we there said, " as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies." The opinion then points out that the Court of Claims is, and always has been, as Congress declared at the outset, " a court for the investigation of claims against the United States "; that none of the matters made cognizable by the court inherently or necessarily requires judicial determination, but on the contrary " all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress." It is noted as significant that the act constituting the court dispenses with trial by jury, a provision which was distinctly upheld in spite of the Seventh Amendment in *McElrath* v. *United States,* 102 U.S. 426. With respect to the status of the court, the opinion concludes (pp. 454–455):

" While what has been said of the creation and special function of the court definitely reflects its status as a legislative court, there is propriety in mentioning the fact that Congress always has treated it as having that status. From the outset Congress has required it to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to be of that nature. Afterwards some were to have effect as binding judgments, but others were still to be merely advisory. This is true at the present time. A duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Article III.

" In *Gordon* v. *United States,* 117 U.S. 697, and again in *In re Sanborn,* 148 U.S. 222, this Court plainly was of

opinion that the Court of Claims is a legislative court specially created to consider claims for money against the United States, and on that basis distinctly recognized that Congress may require it to give advisory decisions. And in *United States* v. *Klein,* 13 Wall. 128, 144–145, this Court described it as having all the functions of a court, but being, as respects its organization and existence, undoubtedly and completely under the control of Congress.

"In the present case the court below regarded the recent decision in *Miles* v. *Graham,* 268 U.S. 501, as disapproving what was said in the cases just cited, and holding that the Court of Claims is a constitutional rather than a legislative court. But in this *Miles* v. *Graham* was taken too broadly. The opinion therein contains no mention of the cases supposed to have been disapproved; nor does it show that this Court's attention was drawn to the question whether that court is a statutory court or a constitutional court. In fact, as appears from the briefs, that question was not mooted. Such as were mooted were considered and determined in the opinion. Certainly the decision is not to be taken in this case as disturbing the earlier rulings or attributing to the Court of Claims a changed status. *Webster* v. *Fall,* 266 U.S. 507, 511.

"That court was said to be a constitutional court in *United States* v. *Union Pacific R.R. Co.,* 98 U.S. 569, 602–603; but this statement was purely an *obiter dictum,* because the question whether the Court of Claims is a constitutional court or a legislative court was in no way involved. And any weight the dictum, as such, might have is more than overcome by what has been said on the question in other cases where there was need for considering it."

It is true that the foregoing views expressed in the *Bakelite* case were likewise not strictly necessary to the

decision; but unlike previous and contrary expressions of opinion on the same subject, they are elucidated and fortified by reasoning and illustration, and, moreover, are the result of a careful review of the entire matter. It is also true that in the *O'Donoghue* case, *supra,* we have rejected the *dictum* in the *Bakelite* case as to the status of the Supreme Court and Court of Appeals of the District of Columbia, but a reference to the discussion in the *O'Donoghue* case will make apparent the difference in force between the *dictum* there involved and the one here involved. In addition to this, whatever may be said in respect of the *obiter* character of the opinion as to the Court of Claims, the status of the Court of Customs Appeals, as a purely legislative court, was definitely adjudged. And neither by brief nor in argument here is any serious attempt made to differentiate, in respect of the question now being considered, between the Court of Claims and the Court of Customs Appeals; and we have been unable to discover any ground for such a differentiation.

Further reflection tends only to confirm the views expressed in the *Bakelite* opinion as to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them. And, giving these views due effect here, we see no escape from the conclusion that if the Court of Customs Appeals is a legislative court, so also is the Court of Claims. We might well rest the present case upon that determination; but must not do so without considering another view of the question, which seems to find support in some expressions of this court, namely, that when the United States consents to be sued, the judicial power of Art. III at once attaches to the court upon which jurisdiction is conferred in virtue of the clause which in comprehensive terms extends the judicial power to "controversies to which the United States shall be a party."

In *Minnesota* v. *Hitchcock, supra,* at pp. 384, 386, it was said:

"This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.

. . . . . .

"While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy."

See also *Kansas* v. *United States, supra,* at p. 342.

This conception of the application of the judicial article of the Constitution, which at first glance seems plausible, will be found upon examination and consideration to be entirely fallacious.

We first direct attention to the carefully chosen words of § 2, cl. 1, Art. III. By that clause the judicial power is extended to *all* cases in law and equity arising under the Constitution, etc.; to *all* cases affecting ambassadors, other public ministers and consuls; and to *all* cases of admiralty and maritime jurisdiction. Then the comprehensive word "all" is dropped, and the enumeration continues in terms to apply to controversies (but not to "all") to which the United States shall be a party; to controversies between two or more states, etc. The use of the word "all" in some cases, and its omission in others, cannot be regarded as accidental, under the rule stated in an early case, *Holmes* v. *Jennison,* 14 Pet. 540, 570–571, and ever since fully accepted, that—"In expounding the

Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood." See also *Myers* v. *United States,* 272 U.S. 52, 151.

The significance of the use of the word "all" in some instances and its omission in others is commented upon by Mr. Justice Story in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 333–336, and it is there suggested that the word "all," which is used in the earlier part of § 2 of the judicial article, was dropped in the latter *ex industria,* and that from this difference of phraseology, perhaps, a difference of constitutional intention may with propriety be inferred. See also 2 Story on the Constitution, (4th ed.), p. 458, § 1674 *et seq.*

We are here immediately concerned only with that provision of Article III which extends the judicial power to "controversies to which the United States shall be a party." Literally, this includes such controversies, whether the United States be party plaintiff or defendant; but in the light of the rule, then well settled and understood, that the sovereign power is immune from suit, the conclusion is inadmissible that the framers of the Constitution intended to include suits or actions brought against the United States. And here the omission to qualify "controversies" by the word "all," as in some other instances, becomes peculiarly suggestive.

The Judiciary Act of 1789 has always been regarded as practically contemporaneous with the Constitution, and as

such, of great value in expounding the meaning of the judicial article of that instrument. *Martin* v. *Hunter's Lessee, supra,* at pp. 351–352; *Cohens* v. *Virginia, supra,* at p. 420; *Börs* v. *Preston,* 111 U.S. 252, 256–257; *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. 265, 297. Section 11 of that act, c. 20, 1 Stat. 73, 78, confers jurisdiction on the circuit courts, under specified conditions, of suits "where . . . the United States are plaintiffs, or petitioners; . . ." And in *Cohens* v. *Virginia, supra,* at pp. 411–412, Chief Justice Marshall said, "The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."

The judicial clause also extends the judicial power (again omitting the word "all") to controversies "between a State and citizens of another State." The question as to whether this authorized a suit *against* a state by a citizen of another state was considered in *Chisholm* v. *Georgia,* 2 Dall. 419. Opinions were delivered *seriatim,* four justices, then constituting a majority, agreeing that such a suit could be maintained. Justice Iredell dissented in a vigorous opinion. He pointed out that prior to the adoption of the Constitution a sovereign state, without its consent, was not amenable to suit at the hands of an individual, and concluded that this rule had not been abrogated by the constitutional provision, in spite of the generality of its language. The immediate response to this decision was the submission and adoption of the Eleventh Amendment, which provides:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

In terms this amendment includes only citizens or subjects of another or of a foreign state, not citizens of the

state called to account. And in December, 1884, a suit was brought in a federal circuit court against the State of Louisiana by a citizen of that state to recover the amount of certain unpaid coupons annexed to an issue of state bonds. *Hans* v. *Louisiana,* 24 Fed. 55. The circuit court dismissed the suit upon the ground that the state could not be sued without its consent. The case then came to this court on error, and the judgment was affirmed. *Hans* v. *Louisiana,* 134 U.S. 1. The precise question considered and determined was—Does the judicial power of the United States extend to a case arising under the Constitution or laws thereof, brought against a state by one of its own citizens? Mr. Justice Bradley delivered the opinion of the court. Plaintiff in error contended that, being a citizen of Louisiana, the Eleventh Amendment presented no obstacle to his suit, since that amendment prohibits suits against a state only when brought by citizens of another state, or by citizens or subjects of a foreign state. This court, conceding that the amendment so reads, said that if there were no other reason or ground for abating the suit it might be maintainable, with the anomalous result that a state might be sued in the federal courts by its own citizens, though it could not be sued for a like cause of action by citizens or subjects of another or foreign state. But, it said, such a result would be no less startling and unexpected than was the decision in *Chisholm* v. *Georgia,* which in effect had been overruled by the Eleventh Amendment; and the dissenting opinion of Mr. Justice Iredell, which was characterized as able, was distinctly approved. As opposed to the decision in *Chisholm* v. *Georgia,* attention also was called to the utterances of Hamilton and others, pending the adoption of the Constitution, to the precise contrary. Hamilton repudiated the suggestion that the citizens of one State would be enabled, under the original draft of

the Constitution, to prosecute suits against another state in the federal courts. He said (p. 13):

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will."

The words of Madison and of Marshall in the Virginia Convention were quoted, the former to the effect that the only operation which the provision of the judicial clause then under discussion could have was that "if a State should wish to bring a suit against a citizen [of another state], it must be brought before the federal court"; and those of Marshall: "I hope that no gentleman will think that a State will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States . . . I see a difficulty in making a State defendant which does not prevent its being plaintiff." This court then declared (p. 14) that "looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right"; and that the views expressed by them applied as well to the then pending case as to that of *Chisholm* v. *Georgia*. Refusing to adhere to the mere letter of the Eleventh Amendment, the court said that to do so would be to strain

the Constitution to a construction never imagined or dreamed of, and then added, "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, [that is to say, as applied to the present case, of suits *against* the United States] was not contemplated by the Constitution when establishing the judicial power of the United States."

This language applies with equal force to suits against a state and those brought against the United States. The doctrine of sovereign immunity is fully discussed in *Hans* v. *Louisiana,* and in the dissenting opinion of Mr. Justice Iredell in *Chisholm* v. *Georgia.* We need not repeat that discussion here. Mr. Justice Holmes, speaking for the court in *Kawananakoa* v. *Polyblank,* 205 U.S. 349, 353, tersely said, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." It is enough to say that in the light of the settled and unvarying rule upon that subject it is not reasonably possible to assume that it was within the contemplation of the framers of the Constitution that the words, "controversies to which the United States shall be a party," should include controversies to which the United States shall be a party *defendant.* That clause must be construed, in accordance with the practical construction put upon it by the first Judiciary Act, as though it read, "controversies to which the United States shall be a party plaintiff or petitioner"; and, thus read, controversies to which the United States may by statute be made a party defendant, at least as a general rule, lie wholly outside the scope of the judicial power vested by Art. III in the constitutional courts. See *United States* v. *Texas,* 143 U.S. 621, 645–646.

The view, therefore, that when congressional consent has been given to the maintenance of suits against the

United States, it *ipso facto* becomes a matter of indifference whether the United States is a party plaintiff or defendant, because the judicial power as defined in Art. III immediately and automatically extends to such suits, must be rejected. It cannot be reconciled with the settled principle that where a controversy is of such a character as to require the exercise of the judicial power *defined by Art. III,* jurisdiction thereof can be conferred only on courts established in virtue of that article, and that Congress is without power to vest *that* judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since, to repeat the language of Chief Justice Marshall in *American Insurance Co.* v. *Canter, supra,* " they are incapable of receiving it."

The rule is stated in *Ex parte Randolph,* 2 Brock. 447, 20 Fed. Cas. (No. 11,558) 242, 254, by Chief Justice Marshall, sitting on the circuit. That case involved the legality of an arrest by virtue of a distress warrant issued from the Treasury Department, under an act of Congress which provided for the issuing of such a warrant by the agent of the Treasury against all military and naval officers, etc., charged with the disbursement of the public moneys, who should fail to pay and settle their accounts with the Treasury Department. Under the act the Treasury Department had settled the account and ascertained the sum due to the government. The act was attacked as unconstitutional on the ground that it violated the first section of the third article of the Constitution. As preliminary to the determination of the question, Chief Justice Marshall said:

" If this ascertainment of the sum due to the government, and this issuing of process to levy the sum so ascertained to be due, be the exercise of any part of the judicial power of the United States, the law which directs it, is plainly a violation of the first section of the third article of the constitution, which declares, that 'the judicial power

of the United States shall be vested in one supreme court, and in such inferior courts as congress shall from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour.' The judicial power extends to 'controversies to which the United States shall be a party.' The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and established by congress, nor do they hold offices during good behaviour. Their offices are held at the pleasure of the President of the United States. They are, consequently, incapable of exercising any portion of the judicial power, and the act which attempts to confer it, is absolutely void."

In *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 284, it was declared to be beyond the power of Congress either to "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty"; or, on the other hand, to "bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." See also *United States* v. *Duell,* 172 U.S. 576, 582, 589.

Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, *Bakelite* case, *supra,* pp. 452, 458, they are, of course, matters in respect of which there is no constitutional right to a judicial remedy, *United States* v. *Babcock,* 250 U.S. 328, 331; and the authority to inquire

into and decide them may constitutionally be conferred on a nonjudicial officer or body. In *United States* v. *Ferreira,* 13 How. 40, 48, this court, referring to an act of Congress (passed in pursuance of a treaty), directing that judges of the territorial courts of Florida should examine and adjudge certain claims against the United States for losses suffered as the result of military operations, with power of review reserved to the Secretary of the Treasury, held that the power conferred, although judicial in nature, was nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims under a treaty. "A power of this description," it was said, " may constitutionally be conferred on a Secretary as well as on a commissioner. But [it] is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

The view under discussion—that Congress having consented that the United States may be sued, the judicial power defined in Art. III at once attaches to the court authorized to hear and determine the suits—must, then, be rejected, for the further reason, or, perhaps, what comes to the same reason differently stated, that it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer* v. *Philippine Islands,* 277 U.S. 189, 201–202. And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no

part of the judicial power vested in the constitutional courts by the third article. That is to say, a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers. Compare *Kilbourn* v. *Thompson,* 103 U.S. 168, 190–191.

We find nothing which militates against the foregoing views in the requirement that the Court of Claims, in cases properly brought before it in respect of property expropriated in the exercise of the power of eminent domain, must award just compensation under the Fifth Amendment, or in the provision of the Tucker Act (U.S. Code, Title 28, § 252) requiring the court in cases brought against the government also to consider and decide set-offs and other claims made by the government against the petitioner and award judgment accordingly. In the former case the requirement is one imposed by the Constitution and equally applicable whether jurisdiction be exercised by a legislative court or a constitutional court; and the latter is simply a provision which the claimant must accept as a condition upon which he may avail himself of the privilege of suing the government in the special court organized for that purpose. *McElrath* v. *United States, supra* at p. 440.

From whatever point of view the question be regarded, the conclusion is inevitable that the Court of Claims receives no authority and its judges no rights from the judicial article of the Constitution, but that the court derives its being and its powers and the judges their rights from the acts of Congress passed in pursuance of other and distinct constitutional provisions. The questions propounded will be answered accordingly.

Question No. 1, No.
Question No. 2, No.
Question No. 3, Yes.

ROGERS *v.* HILL ET AL.

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

No. 732. Argued May 11, 1933.—Decided May 29, 1933.

1. In a stockholder's suit to compel corporate officers to account for money received as extra compensation and to enjoin further payments, the plaintiff moved on the pleadings for judgment or, in the alternative, that payments be enjoined *pendente lite*. The District Court without passing on the merits, granted the temporary injunction. On appeal from the order, the Court of Appeals dealt with the merits adversely to the plaintiff in its opinion, but its decree merely reversed the injunction order and directed that mandate issue in accordance with "this decree"; and the mandate directed further proceedings in accordance with "the decision" of the court. Upon receiving the mandate, the District Court entered a decree dismissing the bill on the merits, which was affirmed by decree of the Circuit Court of Appeals on a second appeal. *Held:*

   (1) That the mandate did not direct the dismissal; and that the decree on the second appeal was the final decree on the merits, reviewable in this Court by certiorari. P. 586.

   (2) A court's "decision" of a case is its judgment. Its "opinion" is its statement of reasons for the judgment. P. 587.

   (3) The Judicial Code, §§ 128 and 238, uses "decision" as the equivalent of "judgment" and "decree." *Id.*

   (4) Even if the mandate on the first appeal were deemed to have included the opinion, the District Court, in its sound discretion, might still have allowed the plaintiff, on adequate showing, to file additional pleadings, vary or expand the issues and take other proceedings to enforce the accounting sought. *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175. *Id.*

2. Section 11 of c. 185, General Corporation Act of New Jersey, provides: "The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors; by-laws made by the directors under power so conferred may be altered or repealed by the stockholders." *Held*, that stockholders are not divested

of power to make or alter by-laws by delegation of that power to the directors in their charter. P. 588.

3. Compensation of an officer of a corporation, whether by fixed salary or by a percentage of profits, is part of the operating expenses deductible from earnings in ascertaining net profits. P. 590.
4. Extra compensation to officers of a corporation from a profit-sharing arrangement, though allowed by a standing by-law enacted at a stockholders' meeting, and though reasonable and legal at the beginning, may become so great in later years, due to increases in the business and profits of the corporation, as to warrant investigation in equity in the interest of the company. P. 591.
5. Such a by-law is supported by the presumptions of regularity and continuity and much weight is to be given the action of the stockholders in adopting it; but the rule prescribed by it can not, against the protest of a shareholder, be used to justify payments so large as in substance and effect to amount to spoliation or waste of corporate property. P. 591.

62 F. (2d) 1079, reversed.

CERTIORARI* to review the affirmance of a decree of the District Court, which, after an interlocutory appeal from an injunction order, dismissed two consolidated suits brought by a stockholder of the American Tobacco Company against its president and some of its vice-presidents to require them to account to the corporation for payments of compensation, alleged to have been excessive, from the company's profits. For other phases, see *Rogers* v. *American Tobacco Co.*, 53 F. (2d) 395 and *Rogers* v. *American Tobacco Co.*, 143 Misc. (N.Y.) 306, 309; 233 App. Div. 708; 60 F. (2d) 109.

Mr. Richard Reid Rogers, with whom *Mr. Evan Shelby* was on the brief, for petitioner.

Mr. Nathan L. Miller, with whom *Messrs. Wm. M. Parke* and *J. Arthur Leve* were on the brief, for respondents.

* See Table of Cases Reported in this volume.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The American Tobacco Company is a corporation organized under the laws of New Jersey. The petitioner, plaintiff below, acquired in 1916 and has since been the owner of 200 shares of its common stock. He also has 400 shares of common stock B. In accordance with by-law XII,[1] adopted by the stockholders at their annual meeting, March 13, 1912, the company for many years has annually paid its president and vice-president large

[1] Section 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: One-fourth thereof, or 2½ per cent of such amount, to the President; one-fifth of the remainder thereof or 1½ per cent of such amount, to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers. . . .

Section 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent dividends on $52,459,400 of its 6 per cent preferred stock, to which profits shall be added, or from which profits shall be deducted, as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco, Limited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), limited. . . .

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors.

amounts in addition to their fixed salaries and other sums allowed them as compensation for services.[2]

Plaintiff maintains that the by-law is invalid and that, even if valid, the amounts paid under it are unreasonably large and therefore subject to revision by the courts. In March, 1931, he demanded that the company bring suit against the officers who have received such payments to compel them to account to the company for all or such part thereof as the court may hold illegal. The company, insisting that such a suit would be without basis in law or fact, refused to comply with his demand. He brought suit in the supreme court of New York against the president and some of the vice-presidents to require them so to account, and joined the company as defendant. The case was removed to the federal court for the southern district of New York. In May, 1931, plaintiff brought suit in that court against Taylor, a vice-president, not a

[2] The statement below shows for the years specified the amounts alleged to have been paid by the company to the named defendants as salary, credits, and under by-law XII.

	Salary	Cash Credits	By-Law	
Hill				
1921	----------	----------	$89, 833. 94	Vice President
1922	----------	----------	82, 902. 61	
1923	----------	----------	77, 336. 54	
1924	----------	----------	88, 894. 26	
1925	----------	----------	97, 059. 38	
1926	$75, 000	----------	188, 643. 45	President
1927	75, 000	----------	268, 761. 45	
1928	75, 000	----------	280, 203. 68	
1929	144, 500	$136, 507. 71	447, 870. 30	
1930	168, 000	273, 470. 76	842, 507. 72	
Neiley				
1929	$33, 333. 32	$44, 897. 89	$115, 141. 87	
1930	50, 000. 00	89, 945. 52	409, 495. 25	
Riggio				
1929	$33, 333. 32	$45, 351. 40	$115, 141. 86	
1930	50, 000. 00	90, 854. 06	409, 495. 25	

defendant in the earlier suit, to require him to account and made the company defendant. The cases were consolidated, plaintiff filed an amended complaint and defendants answered. The officers of the company now before the court are Hill, the president, Neiley, Riggio and Taylor, vice-presidents. The answer, after admissions, denials and explanations asserts several separate defenses.

Plaintiff made a motion on the pleadings for judgment that the separate defenses be stricken, the by-law be adjudged invalid and defendants Hill, Neiley and Riggio be required to account for amounts so paid them and that further payments be enjoined; and in the alternative that such payments be restrained *pendente lite*. After argument upon the motion, the court, without decision upon any other question, granted a temporary injunction. Defendants appealed, the Circuit Court of Appeals reversed the interlocutory order and directed that a mandate issue to the District Court "in accordance with this decree." See 60 F. (2d) 109. The mandate directed further proceedings in accordance with "the decision." On the coming down of the mandate, the district court vacated the temporary injunction and dismissed the bills of complaint upon the merits. Plaintiff appealed, the Circuit Court of Appeals affirmed, 62 F. (2d) 1079, citing its opinion on the former appeal, and this court granted plaintiff's petition for writ of certiorari.

Defendants, renewing a contention made in opposition to the petition for certiorari, assert that the appellate court on the first appeal determined in favor of defendants all the issues presented by the complaint, and maintain that, no application for certiorari having been made within three months after that decision, the only question that this court now has power to decide is whether the mandate directed dismissal.

We are of opinion that the mandate did not direct dismissal. The granting of temporary injunction involved

no determination of the merits. Such a decree will not be disturbed on appeal except for improvident allowance, violation of the rules of equity or abuse of discretion. *National Fire Ins. Co.* v. *Thompson,* 281 U.S. 331, 338. *Meccano, Ltd.* v. *John Wanamaker,* 253 U.S. 136, 141. *Smith* v. *Vulcan Iron Works,* 165 U.S. 518, 526. The opinion of the Circuit Court of Appeals did indeed deal with matters affecting the merits, but the decree did not extend beyond mere reversal of the order from which the appeal was taken. It directed that mandate issue in accordance with " this decree." The mandate commanded proceedings in accordance with " the decision." A direction for proceedings in accordance with " the opinion " makes it a part of the mandate. *Gulf Refining Co.* v. *United States,* 269 U.S. 125, 136. Here the mandate was to proceed not in accordance with the " opinion " but with the " decision." These words, while often loosely used interchangeably, are not equivalents. The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests. *Houston* v. *Williams,* 13 Cal. 24, 27. *Adams* v. *Yazoo & M. V. R. Co.,* 77 Miss. 194, 304; 24 So. 200, 317; 28 So. 596. *Craig* v. *Bennett,* 158 Ind. 9, 13; 62 N.E. 273. *Coffey* v. *Gamble,* 117 Iowa 545, 548; 91 N.W. 813. The Judicial Code uses " decision " as the equivalent of " judgment " and " decree." §§ 128, 238. As a mandate in the words of the decree was unquestionably sufficient to give effect to the ruling of the appellate court, " decision " may not reasonably be held to have been used for " opinion."

Moreover, if the court intended to direct dismissal, it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose. But, assuming it included the opinion, the mandate would not prevent the district court in the exercise of a sound dis-

cretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues and take other proceedings to enforce the accounting sought by his bills of complaint. *Wells Fargo & Co.* v. *Taylor,* 254 U.S. 175, 182. *Metropolitan Water Co.* v. *Kaw Valley District,* 223 U.S. 519, 523. *Mutual Life Insurance Co.* v. *Hill,* 193 U.S. 551, 553. *Smith* v. *Adams,* 130 U.S. 167, 177. In any view of the matter, it is clear that the decree of the appellate court was not final and that plaintiff, in order to have the validity of the payments considered here, was not bound within three months after entry to petition this court for a writ of certiorari.

Plaintiff contends that the stockholders were not authorized to adopt the by-law under which the payments were made.

Section 11, General Corporation Act, Laws, 1896, c. 185, provides: "The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors; by-laws made by the directors under power so conferred may be altered or repealed by the stockholders." The charter empowers the directors to make and alter by-laws. But plaintiff argues that the stockholders having delegated to the directors authority to adopt by-laws lost the power to adopt the one in question. That is inconsistent with the purpose of the statute. Power to prescribe rules for the government of business corporations reasonably is deemed an incident of ownership and the voting power of the shares. It is quite generally conferred by statute or charter provisions upon the stockholders. Here the statutory grant to them is plenary. The charter provision is subordinate and not inconsistent. There are many thousand holders of shares of this corporation. Their annual meetings are the only regular

ones, but the directors meet frequently. The company's business is extensive and complex and considerations of convenience may have suggested delegation to directors of authority to make and alter by-laws.

That the statute did not intend to divest stockholders is clear; for it expressly makes by-laws passed by directors subject to alteration and repeal by the stockholders. In the absence of statutory provision definitely and clearly disclosing that intention, a charter provision, or by-law adopted by incorporators or shareholders, delegating power to directors, may not reasonably be held to take from the stockholders any of the power conferred upon them by the statute. Plaintiff's contention would leave the stockholders full power to alter and repeal by-laws made by directors, but would deny them power to originate or adopt any by-law or to amend or repeal those made by themselves. We find no reason in support of that construction. Moreover, it seems in direct conflict with the decision of the highest court of New Jersey. In the case of *Griffing Iron Co.*, 63 N.J.L. 168; 41 Atl. 931, affirmed in the Court of Errors and Appeals on the opinion below, 63 N.J.L. 357; 46 Atl. 1097, the court declared (p. 171): ". . . That the stockholders had delegated to the directors power to amend the by-laws did not curtail their own power to amend them, and of course the later statute [Revision, 1896] removed all possible restriction on such power . . . It would be preposterous to leave the real owners of the corporate property at the mercy of their agents, and the law has not done so." The plaintiff cites and quotes from *Scott* v. *P. Lorillard Co.*, 108 N.J.Eq. 153; 154 Atl. 515, affirmed 109 N.J.Eq. 417; 157 Atl. 388. But, when regard is had to the questions considered in that case, there is nothing in the opinion that lends support to his contention. It cannot be sustained.

Plaintiff suggests that, because the by-law purports to direct payments out of profits, it violates charter provisions which he construes to require the directors to apply all profits to the acquisition of property and the payment of dividends. We need not examine the charter, for the contention rests upon a misapprehension of the meaning of "profits" as used in the by-law. As there defined it includes the sums to be paid to the president and vice-presidents. Compensation to an officer for his services constitutes a part of operating expenses deductible from earnings in order to ascertain net profits. It is immaterial whether such compensation is a fixed salary or depends in whole or in part upon earnings. There is no conflict between the charter and the by-law. *Bennett* v. *Millville Improvement Co.,* 67 N.J.L. 320, 323; 51 Atl. 706. *Booth* v. *Beattie,* 95 N.J.Eq. 776; 118 Atl. 257; 123 Atl. 925.

It follows from what has been shown that when adopted the by-law was valid. But plaintiff alleges that the measure of compensation fixed by it is not now equitable or fair. And he prays that the court fix and determine the fair and reasonable compensation of the individual defendants, respectively, for each of the years in question. But the allegations of the complaint are not sufficient to permit consideration by the court of the validity or reasonableness of any of the payments on account of fixed salaries, or of special credits, or of the allotments of stock therein mentioned. Indeed, plaintiff alleges that other proceedings have been instituted for the restoration of special credits, and his suits to invalidate the stock allotments were recently considered here. *Rogers* v. *Guaranty Trust Co.,* 288 U.S. 123. The only payments that plaintiff by this suit seeks to have restored to the company are the payments made to the individual defendants under the by-law.

We come to consider whether these amounts are subject to examination and revision in the district court. As the amounts payable depend upon the gains of the business, the specified percentages are not *per se* unreasonable. The by-law was adopted in 1912 by an almost unanimous vote of the shares represented at the annual meeting and presumably the stockholders supporting the measure acted in good faith and according to their best judgment. The tabular statement in the margin shows the payments to individual defendants under the by-law. Plaintiff does not complain of any made prior to 1921. Regard is to be had to the enormous increase of the company's profits in recent years. The 2½ per cent. yielded President Hill $447,870.30 in 1929 and $842,507.72 in 1930. The 1½ per cent. yielded to each of the vice-presidents, Neiley and Riggio, $115,141.86 in 1929 and $409,495.25 in 1930 and for these years payments under the by-law were in addition to the cash credits and fixed salaries shown in the statement.

While the amounts produced by the application of the prescribed percentages give rise to no inference of actual or constructive fraud, the payments under the by-law have by reason of increase of profits become so large as to warrant investigation in equity in the interest of the company. Much weight is to be given to the action of the stockholders, and the by-law is supported by the presumption of regularity and continuity. But the rule prescribed by it cannot, against the protest of a shareholder, be used to justify payments of sums as salaries so large as in substance and effect to amount to spoliation or waste of corporate property. The dissenting opinion of Judge Swan indicates the applicable rule: " If a bonus payment has no relation to the value of services for which it is given, it is in reality a gift in part and the majority stockholders have no power to give away corporate prop-

erty against the protest of the minority." 60 F. (2d) 109, 113. The facts alleged by plaintiff are sufficient to require that the district court, upon a consideration of all the relevant facts brought forward by the parties, determine whether and to what extent payments to the individual defendants under the by-law constitute misuse and waste of the money of the corporation. *Booth* v. *Beattie,* 95 N.J.Eq. 776; 118 Atl. 257; 123 Atl. 925. *Scott* v. *P. Lorillard Co.,* 108 N.J.Eq. 153, 156; 154 Atl. 515; affirmed 109 N.J.Eq. 417; 157 Atl. 388. *Nichols* v. *Olympic Veneer Co.,* 139 Wash. 305, 311; 246 Pac. 941. *Collins* v. *Hite,* 109 W.Va. 79, 84; 153 S.E. 240. *Putnam* v. *Juvenile Shoe Corp.,* 307 Mo. 74, 91 *et seq.;* 269 S.W. 593. *Stratis* v. *Andreson,* 254 Mass. 536, 539; 150 N.E. 832. *Lillard* v. *Oil, Paint & Drug Co.,* 70 N.J.Eq. 197, 206–209; 56 Atl. 254; 58 Atl. 188. *Wight* v. *Heublein,* 238 Fed. 321, 324. *Seitz* v. *Union Brass & Metal Mfg. Co.,* 152 Minn. 460, 464; 189 N.W. 586. *Sotter* v. *Coatesville Boiler Works,* 257 Pa. 411, 422–423; 101 Atl. 744.

The separate defenses set up in the answer to the amended complaint are: failure of plaintiff to comply with Equity Rule 27, ratification, forum *non conveniens,* laches, and that the payments were justified. As they were not passed on below, we refrain from expressing opinion concerning them. The decree of the Circuit Court of Appeals is reversed, the decree of the district court dismissing the bills on the merits is vacated, and the case is remanded to the district court with directions to reinstate its decree granting injunction *pendente lite* and for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice Roberts took no part in the consideration or decision of this case.

Syllabus.

VERMONT *v.* NEW HAMPSHIRE.

HEARING UPON EXCEPTIONS TO REPORT OF THE SPECIAL MASTER.

No. 2, Original. Argued April 20, 21, 1933.—Decided May 29, 1933.

1. The boundary between the States of Vermont and New Hampshire is the low-water mark, on the western side of the Connecticut River,—not the top or westerly margin of the bank as claimed by New Hampshire; and the low-water mark for this purpose is taken to be (as found by the Special Master and not challenged by the parties) the line to which the river recedes at its lowest stage, without reference to extreme droughts. Pp. 596, 619.
2. Vermont's failure to file exceptions to the Special Master's report, eliminates her claim to the thread of the channel, which the master rejected. P. 597.
3. In determining the boundary the Court considers the history of the subject from the creation of New York and New Hampshire as adjoining Royal Provinces to the admission of Vermont into the Union as an independent State, and also the subsequent acts and claims of Vermont and New Hampshire respecting the subject down to the present time, and finds and decides:

   (1) That the boundary of New York and New Hampshire originally was the river on its westerly side, and not a line on the bank above low water. P. 598.

   (2) That the Order-in-Council of July 20, 1764, declaring the boundary between New York and New Hampshire to be "the western banks of the River Connecticut" reaffirmed the original river boundary. P. 600.

   (3) In view of the nature of the controversy before the King-in-Council, which was settled by this Order—a dispute between the two Provinces, not as to whether the line dividing their respective jurisdictions ran higher or lower on the Connecticut River bank, but as to whether it was located near the Hudson River, as in the cases of Connecticut and Massachusetts,—there is no ground to suppose that a shifting of the line from low-water to the top of the bank of the Connecticut was the intent of the Order. P. 600.

   (4) The presumption is against any intention to cut off New York from access to the river. Pp. 603, 605.

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(5) In this respect, the Order, like a treaty or grant fixing the boundary between two States, is to be construed with a view to public convenience and avoidance of controversy. P. 606.

(6) Decisions of this Court establishing a "bank" boundary in other circumstances, *held* inapplicable. P. 604.

(7) This construction of the Order-in-Council is confirmed by the construction put upon it subsequently by the Governors of the two Provinces and the Lords of Trade. P. 603.

(8) That the east boundary of Vermont, upon her admission as a State of the Union in 1791, was the low-water mark of the Connecticut River, and not on the bank above the shore, is equally manifest whether the State be considered as carved out of New York territory pursuant to the formal consent given by that State, or as an independent revolutionary State set up by the inhabitants of the "New Hampshire Grants"; for, in the one case, she took the New York boundary declared by the Order-in-Council of 1764; and in the other case that same boundary was established by conditions laid down by Congress in 1781, during the negotiations for statehood, and by Vermont's assent thereto and New Hampshire's acquiescence. Pp. 606, 608.

(9) The acceptance by the Vermont Legislature on February 22, 1782, of the resolutions of Congress of August 20, 21, 1781, requiring the relinquishment by the inhabitants of Vermont of "all demands of lands or jurisdiction on the east side of the west bank of the Connecticut River," operated to relinquish any claim on the part of Vermont to jurisdiction extending to the thread of the river in the territory of the New Hampshire Grants as defined by their declaration of independence; also to confirm the eastern boundary of Vermont as a boundary extending to the river as it had been fixed by the Order-in-Council of 1764. P. 611.

(10) In the negotiations with Congress the controversy respecting this boundary was whether Vermont had extended her boundary eastward beyond the line fixed by the Order-in-Council. It is not to be supposed that her acceptance of the "west bank" was intended to relinquish more than the resolutions of Congress, *supra*, required. P. 612.

(11) Considerations of practical convenience fortify the conclusion that Vermont, upon her admission as a State, took a boundary to normal low-water mark. P. 612.

(12) The conclusion here reached as to the construction of the Order-in-Council and the resolution of Congress under which Vermont was admitted to statehood finds support in the practical con-

struction given by both States to the boundary, thus defined, in the long continued failure of New Hampshire to assert any dominion over the west bank of the river, and in her long acquiescence in the dominion asserted there by Vermont. P. 613.

(13) Further important confirmation is found in the location of a monument at low-water mark, fixing the southeast corner of Vermont and the southwest corner of New Hampshire, under authority from the two States. P. 616.

The bill in this boundary suit was filed on December 18, 1915, and the answer on July 11, 1916. There were several amendments of the pleadings, some before and some after issue joined. On October 13, 1930, Edmund F. Trabue, Esquire, of Kentucky, was appointed Special Master. (282 U.S. 796.) His report was filed on February 6, 1933. The case was heard upon exceptions to the report taken by New Hampshire.

Mr. Warren R. Austin, with whom *Messrs. Lawrence C. Jones,* Attorney General of Vermont, and *Warren R. Austin, Jr.,* were on the brief, for plaintiff.

Mr. Charles E. Hughes, Jr., with whom *Messrs. Francis W. Johnston,* Attorney General of New Hampshire, *Jeremy R. Waldron, John Fletcher Caskey,* and *Charles A. Wallace* were on the brief, for defendant.

Mr. Justice Stone delivered the opinion of the Court.

This is an original suit, brought by the State of Vermont December 18, 1915, for the determination of the boundary line between that state and the State of New Hampshire. By the amended bill of complaint Vermont alleged that the boundary is " the thread of the channel " of the Connecticut River for its entire course, except for that part from the northerly limits of the town of Vernon, Vermont, south to the Massachusetts line where it " is the west bank of Connecticut River at low-water mark." In the original bill of complaint there was an alternative

claim that if this Court should be of the opinion that the boundary is not the thread, but is "the west bank of the Connecticut River," then, "such line is the westerly edge of the waters of the Connecticut River at its average and mean stage during the entire year without reference to the extraordinary freshets or extreme droughts." New Hampshire, by its amended answer, asserts that the boundary is "at the top or westerly margin of the westerly bank of the Connecticut River and the east branch thereof."

Vermont's claim of a boundary at the thread of the channel was based upon the following propositions: Township grants made by the Governor of the Province of New Hampshire, by royal authority, between 1741 and 1764, on the west side of the Connecticut River in the territory now Vermont, were bounded by the river, which was non-tidal, and carried title to its thread by virtue of the common law of England; an order of the King-in-Council of July 20, 1764, fixing the boundary between the Provinces of New York and New Hampshire at the "western banks of the River Connecticut," thus including the territory now Vermont in the Province of New York, was nullified by the successful revolution of the inhabitants of the New Hampshire Grants; hence the eastern boundary of the revolutionary state of Vermont was the same as the eastern limits of the township grants, namely, the thread of the river; Vermont was admitted to the Union as a sovereign independent state with her boundaries those established by her revolution. Her eastern boundary was therefore the thread of the Connecticut River.

The Special Master sustained all these contentions except the last one. With respect to it he found that Vermont had, by resolution of her legislature of February 22, 1782, relinquished any claim to jurisdiction east of the west side of the river, at low-water mark, in conform-

ity to a Congressional resolution of August 20, 21, 1781 prescribing terms upon which Congress would consider the admission of Vermont to the Union. In addition to the findings already indicated the Special Master also concluded that the order of the King-in-Council of July 20, 1764, even if not rendered ineffective by the revolution of Vermont, was not intended to recognize any rights of New Hampshire west of the west side of the river at low water; that Vermont's claim of a boundary at the thread of the river would be defeated by her acquiescence in New Hampshire's exercise of dominion over the waters of the river even if it had not been relinquished by acceptance of the resolutions of Congress of August, 1781, and finally that by practical construction of the two states by long usage and acquiescence, the boundary of Vermont was fixed at the low-water mark on the west side of the river.

Accordingly the Special Master found that:

"The eastern boundary of the State of Vermont upon her admission to the Union was that stated in the resolutions of Congress of August 20, and 21, 1781, and in the resolution of the Vermont legislature of February 22, 1782, and this I find to be the low-water mark on the west side of the Connecticut River."

The line of low-water mark thus specified was further defined as "the point to which the river recedes at its lowest stage without reference to extreme droughts," and no exception has been taken to this definition.

Vermont's claim of a boundary to the thread of the channel is no longer before us as New Hampshire alone has filed exceptions to the report of the Special Master. Those exceptions narrow the issue to the single question whether the boundary line is at low-water mark on the west side of the river as the Master found or at the top or westerly margin of the bank as contended by New Hampshire; in other words, whether New Hampshire acquired and retained jurisdiction of a narrow ribbon of land

of varying width on the west side of the Connecticut River, extending along the entire eastern boundary of Vermont, which at some stages of the river is submerged and at others left uncovered by the water. In support of this contention New Hampshire relies on the order of the King-in-Council of 1764, which it is argued established the eastern boundary of Vermont at the west bank of the Connecticut River, not at low-water mark, but at the top of the bank or the line upon it where vegetation ceases.

The Order-in-Council must be considered in the light of the colonial history out of which it grew, which is elaborately reviewed in the Special Master's report. The royal Province of New Hampshire was established on September 18, 1679, by commission of Charles II, establishing the president and council of that province. On July 3, 1741, Benning Wentworth was appointed Governor by George II. His commission, like that later issued to him by George III in 1760, defined the western boundary of the province only by the provision that its south line and its north line should extend westward "till it meets with our other governments." The government on the west of New Hampshire was the Province of New York, originating in the grant of June 29, 1674, by Charles II to his brother James, Duke of York, which included "all the lands from the west side of Connecticut river to the east side of Delaware Bay." This grant merged in the Crown when James, Duke of York, became King James II in 1685.

Despite the language of the New York grant fixing its eastern boundary as the west side of the Connecticut River, that province did not assert jurisdiction as far east as the Connecticut River at any point south of the New Hampshire line. The western boundary of the Province of Connecticut was fixed about 1684 with the acquiescence of New York as a line, approximately north and south, twenty miles east of the Hudson River, and before 1750

Massachusetts had settled westerly to about the same line and New York had made no attempt to disturb those settlements.

Governor Wentworth, construing his commission as extending the Province of New Hampshire westwardly at least to this line east of the Hudson River, acting under authority of a royal commission, made, from about 1752 to 1764, numerous grants of townships in the territory west of the Connecticut River, now a part of Vermont. Each of these grants comprised a territory six miles square and conferred on the inhabitants authority to organize town governments. Twenty-three of the towns were adjacent to the Connecticut River, and with the exception of Vernon, which extended across the river at the southeastern corner of the present State of Vermont, the boundary line of these townships was described expressly or by implication as extending to or beginning at a tree or other designated monument standing on the westerly side or the west bank of the river and extending "thence up the river" or "thence down the river." At the time of these grants the river was extensively used by the inhabitants on both sides for hunting and fishing.

The Special Master, upon an exhaustive examination of the evidence and the law, concluded that these boundaries were on the river and, with the exception of the town of Vernon, carried the boundary of the townships to the thread of the river. Although this conclusion is challenged by the exceptions filed in behalf of New Hampshire, it is not denied that the boundary in the description of the New Hampshire township grants carried at least to the river.

In 1749, before the township grants before us were made, a controversy had arisen between the Royal Governors of New Hampshire and New York over their respective authority to make grants in the territory between the Hudson and Connecticut rivers. Although sus-

pended during the French and Indian wars, the conflict was renewed at the end of 1763 and in 1764 was submitted to the King-in-Council for determination. New York asserted that under the grant to the Duke of York, that province included "all the lands from the west side of Connecticut River." New Hampshire claimed that its boundary extended to the line approximately twenty miles east of the Hudson corresponding roughly to a prolongation northerly of the westerly boundaries of Massachusetts and Connecticut. The controversy was referred to the Lords of Trade, who made their report of July 10, 1764. Their recommendation was approved by the order of the King-in-Council, on July 20, 1764, which fixed the boundary in the following language:

"His Majesty, . . . doth accordingly, hereby order and declare the western banks of the River Connecticut, from where it enters the Province of the Massachusetts Bay, as far north as the forty-fifth degree of northern latitude, to be the boundary line between the said two Provinces of New Hampshire and New York."

As it is conceded that the King-in-Council had authority to fix the boundary between the two royal provinces, the meaning and effect of the order of 1764, must first be considered. The Special Master concluded that the purpose and effect of the order were to leave undisturbed the boundary of New York as established by the grant to the Duke of York of all the lands from the west side of the Connecticut River; that the boundary fixed was therefore at the river and not at some point upon its bank. We think this conclusion correct.

New Hampshire contends that the designation of the "western banks" of the river as the boundary established a "bank" boundary above low-water mark as distinguished from one upon the river which admittedly would carry at least to low water. But the language of the order was adopted to express a judgment upon conflicting

claims, each clearly defined, neither of which involved the question whether the line was to be drawn at low water or at some point above. New York, relying on the Duke of York's grant, contended that its jurisdiction extended to the Connecticut River and not, as New Hampshire argued, to the line about twenty miles east of the Hudson, continuing that which marked the boundary of Massachusetts and Connecticut. In the entire history of the controversy there appears to have been no suggestion that the jurisdiction of New York would not extend to the Connecticut River if it were found to extend east of the western boundary of Connecticut and Massachusetts. Thus the written statement of January 20, 1764, presenting the claims of New York to the Lords of Trade stated that "This Province is bounded eastward by Connecticut River" and the Lords of Trade in their report informed the Crown that "Your Majesty's Lieutenant Governor of New York contends that . . . 'the Province of New York does, both by the words and construction of the grant to the Duke of York, extend eastward as far as Connecticut River.'" This was the claim in favor of which the Lords of Trade decided.[1] True, they recom-

[1] In the Report of the Lords of Trade of 1764 the arguments said to have been advanced by the Governor of New York in support of his boundary claim are, in addition to the language of the Duke of York's Grant, that "the River Connecticut is in all respects the most certain and proper boundary; that it will be more convenient that the lands to the Westward of that river should be included in New York, because Hudson's River being navigable by Vessels of considerable Burthen to Albany, the Trade of that part of the Country will probably center there, to which place the Transportation or Carriage will be much easier, than to the Ports of New Hampshire, and where the Inhabitants are likely to meet with a better Market for their produce; that as the Quit Rent in New Hampshire is but one shilling the hundred Acres, and that of New York, two shillings and six pence, the revenue to your Majesty, if the Lands are settled under New York, will be greater than if granted under New Hampshire; and that there is another Circumstance of great weight at this Juncture, and operat-

mended that "The western banks of the River Connecticut from where it enters the Province of the Massachusetts Bay as far north as the forty-fifth degree of northern latitude should be declared to be the boundary line between the two Provinces." But the evidence is conclusive that there was no thought that the designation of the banks as the boundary would have a different effect than the designation of the river itself. A communication from the Lords of Trade to Lieutenant Governor Colden of New York with respect to the boundary dispute, July 13, 1764, three days after their report to the Crown, advised him that "as the reasons you assign for making Connecticut River the boundary line between the two provinces appear to us to have great weight, we have adopted and recommended that proposition." In adopting the reference to the banks of the river contained in the recommendation of the Lords of Trade the Order-in-Council did not give it any different meaning.[2]

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ing in favor of this proposition, which is, that a great number of reduced Officers have located their Claims to Lands under Your Majesty's Proclamation in this part of the Country, and were willing to take out Grants for the same under the Province of New York, but absolutely decline any application to the Government of New Hampshire." The Lords of Trade advised that these "arguments urged by the Lieutenant Governor of New York in support of his proposition, appear to us to have great weight, if not absolutely to decide upon the Question; and the only probable inconvenience, that is stated to arise from making the River Connecticut the boundary line between the two Provinces, is the effect which the limitation of New Hampshire, to narrower Limits than is contended for, may have to disable them from making such a provision for its establishment as may be necessary to support it as a separate Government; But as we humbly apprehend, that the great extent of this Province to the Northward leaves sufficient room for much further improvement and Settlement, this objection does not appear to us to be of sufficient weight to counterbalance the convenience and advantage that seems to attend the other proposition; . . ."

[2] Compare the Proclamation of Lt.-Gov. Colden of New York of December 28, 1763 declaring "that the province of New York is

Subsequent events attest the validity of this conclusion. After the receipt of the order by the Governors of New Hampshire and New York, and the publication of its terms, it was interpreted by three governors of New York, Moore, the Earl of Dunmore and Tryon,[3] to establish the river as the eastern boundary of the province and, except for a petition of New Hampshire to the Crown in 1771 for a rescission of the order, the royal governments of both provinces recognized its validity up to the time of the revolution. In reporting to the Crown December 3, 1772, upon New Hampshire's petition for rescission, the Lords of Trade recommended adherence to "those principles of true policy and sound wisdom which appear to have dictated the proposition of making the River Connecticut the boundary between the two colonies." And the response of the Governor of New Hampshire to a questionnaire sent out by the Lords of Trade in 1774, recited that "The River Connecticut from Hinsdale runs through this Province, and is its boundary to the 45° of north latitude. . . ."

As we have said, New Hampshire admits that a boundary on the river or including lands west of the river would normally carry at least to low-water mark. *Handly's Lessee* v. *Anthony,* 5 Wheat. 374; *Thomas* v. *Hatch,* 3 Sumner 170; see *Oklahoma* v. *Texas,* 260 U.S. 606, 627; *Massachusetts* v. *New York,* 271 U.S. 65, 93. But she contends, relying upon the rule said to have been laid down in *Howard* v. *Ingersoll,* 13 How. 381, and followed

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bounded to the eastward by the River Connecticut" and commanding "all judges, justices and other civil officers within the same, to continue to exercise jurisdiction in their respective functions as far as to the banks of Connecticut River, the undoubted eastern limits of that part of the province of New York, notwithstanding any contrariety of jurisdiction claimed by the Government of New Hampshire."

[3] See letters of Governor Moore to the Earl of Shelbourne, June 9, 1767, the Earl of Dunmore to the Earl of Hillsborough, July 20, 1764, Governor Tryon to the Rev. Mr. Dewey, May 19, 1772.

in *Oklahoma* v. *Texas, supra,* that the designation of the banks of the river as the boundary rather than the river itself necessarily implies that the line is higher upon the bank than low-water mark, stated in brief and argument to be the place where vegetation ceases.

Obviously the meaning of the words of the order could not be established by a rule of law declared long after its promulgation; and nothing in the decisions relied upon by New Hampshire admonishes us to disregard that meaning when, as here, it is clearly established. In the *Ingersoll* case the court held that lands ceded by Georgia to the United States, situated "west of a line beginning on the western bank of the Chattahoochie River" and "running . . . along the western bank thereof" were bounded by a line governed by the "permanent fast land bank" and not by low-water mark. The court emphasized the fact that uncertainty which might be created by the use of the word bank alone, as in the order before us, was removed by the additional phrase running "along the bank" which was thought to have a popular significance excluding "the idea that a line was to be traced at the edge of the water as that may be at one or another time or at low water or at the lowest low water." (pp. 415, 417.) See also *Alabama* v. *Georgia,* 23 How. 505. *Oklahoma* v. *Texas, supra,* held that a treaty, interpreted to designate a boundary "along the south bank" of the Red River, (260 U.S. pp. 624, 626), fixed the line at a point on and along the bank rather than at low-water mark.[4]

[4] Upon the argument of the present case it was conceded that the flow of the Connecticut River, always of substantial volume, is confined by precipitous banks extending to or near the water at all normal stages of the river, except for relatively small stretches where the banks are low and overflowed at high water. It does not appear that there are flats of any substantial area lying between the precipitous banks and the water at its lowest stage or that the river has shifted its bed to any material extent at any time. In all these respects the physical characteristics of the Connecticut River differ from those of the Red River, described in *Oklahoma* v. *Texas, supra,* 634, 635.

At most the decision may be thought to establish a rule of interpretation which must govern in the absence of affirmative evidence that the language used was intended to have a different meaning, for the Court was careful to say that the conclusion reached "has full confirmation in available historical data respecting the negotiations which attended the framing and signing of the treaty." (p. 632.) Here, it is apparent on the face of the documents that the language of the order was not used with the intention of fixing a line upon the bank above low-water mark; and the history of the controversy clearly establishes that the intention of the order was to confirm and not to change the boundary as fixed by the grant to the Duke of York of "all the lands on the west side of Connecticut River."

We cannot disregard this history without disregarding decisions of this Court, which establish either expressly or by example that in the interpretation of a treaty or grant between two states for the settlement of boundary dispute the nature and history of the controversy must be considered. *Massachusetts* v. *New York, supra; Martin* v. *Waddell,* 16 Pet. 367, 411. Upon considerations of this nature we held in *Massachusetts* v. *New York, supra,* that the words "shore" and "lake" used in the treaty of Hartford of 1786 in defining the boundary of New York and Massachusetts, were synonymous and the boundary upon the shore was fixed at low-water mark on Lake Ontario.

Moreover, in the present case, it must be remembered that the governors of New Hampshire and New York were contesting each other's authority to grant land west of the Connecticut River and jurisdiction over the lands already granted there. It would be difficult to conclude that in settling that dispute it was intended to deny to New York or the grantees lawful access to the river at any of its usual seasonal states; and inasmuch as there are no public rights in the shores of non-tidal waters,

the abutting owner, on the view insisted upon by New Hampshire, could not cross the bank to the water without trespass. Compare *Massachusetts* v. *New York, supra,* 93. Like a treaty or grant fixing the boundary between states the Order-in-Council is to be construed "with a view to public convenience and the avoidance of controversy." *Handly's Lessee* v. *Anthony, supra,* 383. As was said by Chief Justice Marshall in *Handly's Lessee* v. *Anthony, supra,* 380:

"Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes the boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark."

It is true that a different rule has been applied in the case of grants bounded by tidal waters, which carry only to high-water mark. *Shively* v. *Bowlby,* 152 U.S. 1; *Maryland* v. *West Va.,* 217 U.S. 577; *Smoot Sand & Gravel Corp.* v. *Washington Airport,* 283 U.S. 348. But as was pointed out in *Massachusetts* v. *New York, supra,* 93, such grants, since they carry to tidal water, and since the public has rights in the foreshore, do not deny access to the sea, and even grants of this class may, by construction, be deemed to carry to low-water mark where the surrounding circumstances show that such was the boundary intended.

Our conclusion as to the meaning and effect of the Order-in-Council of 1764 would be decisive of the boundary of Vermont upon her admission to the Union were it not for the history of Vermont as a revolutionary govern-

ment and the consequent uncertainty whether she was admitted under the second clause of Article IV, § 3, of the Constitution as a new state formed out of the territory of New York, with her boundary accordingly determined by that of New York, or whether she was admitted under the first clause of Article IV, § 3, as an independent revolutionary state with self-constituted boundaries.

The Special Master found that attempts by the New York authorities after 1764 to interfere with the possession of the holders of the New Hampshire Grants made prior to the Order-in-Council led to protest and forcible resistance which assumed the proportions of a revolutionary movement. This movement culminated in 1777 in the Declaration of Independence by the towns comprising the New Hampshire Grants on both sides of the Green Mountains, which proclaimed that the jurisdiction granted by the Crown "to New York government over the people of the New Hampshire Grants is totally dissolved" and that a free and independent government is set up within the territory now Vermont, bounded "east on Connecticut River . . . as far as the New Hampshire Grants extends." From that time until the admission of Vermont into the Union in 1791 an independent government was maintained with defined geographical limits extending on the east to the Connecticut River. In view of these facts the Special Master concluded that the Order-in-Council was nullified by successful revolution, and Vermont was admitted as an independent state with self-constituted boundaries. But he also found, as we have said, that Vermont's claims of jurisdiction to the thread of the river were restricted to the low-water mark on the western side by resolutions of Congress of August 20, 21, 1781, and their acceptance by resolution of the Vermont Legislature, February 22, 1782. In addition, he found that Vermont was not recognized as an independent state by Congress either under

the Articles of Confederation or under the Constitution, but that her independence was recognized by New Hampshire in 1777, by Massachusetts in 1781, and by New York in 1790. The latter finding is contested by New Hampshire as is his conclusion of law that even if Vermont was not recognized as an independent state prior to her admission to the Union, her status as a revolutionary state may be determined by this Court where necessary to the settlement of a boundary dispute between two states.

Under the circumstances of the present case the questions raised by these conclusions of the Special Master and the contentions of New Hampshire with respect to them need not be decided. For New York, by Commissioners acting under a resolution of her legislature of March 6, 1790, gave formal consent to the admission of Vermont into the Union, and if Vermont was admitted as a state carved out of the territory of New York her boundaries on the east were those of New York, as fixed by the Order-in-Council. If admitted as a free and independent state her boundaries were those fixed by her own declaration of independence as limited by her acceptance of the conditions of the Congressional resolution of August 20, 21, 1781. That boundary we conclude was also one carrying to the river and to low-water mark.

Following Vermont's declaration of independence, and until her admission to statehood in 1791 she, from time to time, sent representatives to Congress seeking admission to the Union and published to the world numerous appeals, vindications and arguments to develop public opinion in favor of her admission. During that period New York, at times, made formal assertion of jurisdiction over the territory now Vermont. A committee report to the New Hampshire legislature of April 2, 1779, adopted by the legislature June 24, recommended that New Hampshire make claim to the whole of the New Hampshire

Grants, with the qualification that if the Continental Congress should recognize Vermont as an independent state New Hampshire would acquiesce and until Congress settled the dispute would exercise jurisdiction "as far west as the western banks of Connecticut River and no further." Vermont, on her part, attempted to annex towns in New Hampshire on the east side of the river.

After various efforts to enlist the interest of the Continental Congress in a settlement of the controversy, the Vermont legislature on June 22, 1781, adopted a report of a committee recommending the appointment of delegates to propose to Congress and receive from it terms for a union with the United States. The matter was also brought to the attention of Congress by a letter from the President of New Hampshire of June 30, 1781.

On July 31, a committee of Congress to which the matter had been referred, recommended that Congress guaranty to New York and New Hampshire their respective territory lying outside the New Hampshire Grants "in case the said states shall relinquish their respective claims to said districts called the New Hampshire Grants or the State of Vermont, bounded east by Connecticut River . . . formerly granted by the Governor of New Hampshire," a recommendation which was renewed in a further report of August 2. Congress, by resolution of August 7, reciting that New Hampshire and New York have submitted to it the decision of the disputes between them and "the people inhabiting the New Hampshire Grants on the west side of Connecticut River called the State of Vermont, concerning their respective claims of jurisdiction over the said territory" and that the parties "have been heard thereon," declared that in case Congress should recognize the independence of the people of Vermont, it would "consider all the lands belonging to New Hampshire and New York respectively without the limits of Vermont aforesaid, as coming within the mutual

guaranty of territory contained in the Articles of Confederation." And, in pursuance of the same resolution, Congress, on August 8, appointed a committee of five to confer with persons representing the New Hampshire Grants "on the west side of Connecticut River," with respect to their claim to be an independent state and the terms upon which they should be admitted to the Union, in case Congress should recognize their independence. On August 18, Vermont's representatives proposed that Vermont be recognized as an independent state with a boundary extending eastward "to the west bank of the Connecticut River; thence up the river as it tends to the 45th degree of north latitude." The same day, answering written interrogatories of the Committee of Congress, they stated that the boundaries of Vermont specified in their proposal were the same as those contained in the resolution of Congress of August 7th, in which the New Hampshire Grants were described as being "on the west side of Connecticut River."

The Congressional resolutions of August 20, 21, on which the Special Master relied, provided, in final form, "that it be an indispensible preliminary to the recognition of the independence of the people inhabiting the territory called Vermont, and their admission into the federal union, that they explicitly relinquish all demands of lands or jurisdiction on the east side of the west bank of Connecticut River. . . ." On February 19, 1782, the Vermont Assembly, in Committee of the Whole, after considering the resolutions of Congress of August 7, 20 and 21, 1781, recommended that the Assembly of the State "pass resolutions, declaring their acquiescence in, and accession to, the determination made by Congress of the said boundary lines, between the states of New Hampshire and New York, respectively, and this state, as they are, in said resolutions, defined and described, and also, expressly relinquishing all claim to and jurisdiction of, and

over, the said districts of territory without said boundary lines." On February 22, 1782, the Legislature, after reciting the quoted recommendation of the Committee of the Whole, resolved that it be complied with and " that the west bank of Connecticut River " and a specified boundary on the New York side of the state " shall be considered as the east and west boundaries of this state "; any claim to jurisdiction over all territory " without said boundary lines " was formally relinquished. On April 17, 1782, a committee of Congress to which the matter had been submitted reported that the Congressional resolutions of the 20th and 21st of August had been fully complied with, and recommended that the territory of Vermont as defined in these resolutions be recognized and admitted to the Union, as a free and independent state.

But action by Congress was postponed and no further progress was made towards the admission of Vermont until July 16, 1789, when the New York legislature passed an act, reaffirmed March 6, 1790, authorizing the appointment of commissioners with power to declare, upon such terms as they might think proper, the consent of New York to her admission. Vermont in turn appointed commissioners to treat with the representatives of New York. Their negotiations resulted in agreement between the two states as to the eastern boundary of New York and payment by Vermont to New York of the sum of $30,000 for the relinquishment of all claims of sovereignty by New York, and for the confirmation of the New Hampshire township grants. In 1791 the matter of admission was again presented to Congress by commissioners selected for the purpose under resolution of the Vermont legislature of January 20, 1791, and the admission of Vermont followed by Act of Congress of February 18, 1791.

The acceptance by the Vermont Legislature on February 22, 1782, of the resolutions of Congress of August 20, 21, 1781, requiring the relinquishment by the inhabitants

of Vermont of "all demands of lands or jurisdiction on the east side of the west bank of Connecticut River," operated to relinquish any claim on the part of Vermont to jurisdiction to the thread of the river in the territory of the New Hampshire Grants as defined by their declaration of independence. We think it also operated to confirm the eastern boundary of Vermont as a boundary extending to the river as it had been fixed by the Order-in-Council of 1764. It is true that the resolution of acceptance of the Vermont Legislature named "the west bank of Connecticut River" as the boundary, but it cannot be supposed that it was intended by this language to relinquish any greater jurisdiction than Congress required Vermont to surrender—that "on the east side of the west bank." And the terms of the Congressional resolution cannot be interpreted without regard to the previous negotiations including the proposal of the Vermont representatives of 1781 designating the west bank as the boundary and their statement of the same date that the boundary intended was the same as that contained in the Congressional resolution of August 7th in which the New Hampshire Grants were described as being "on the west side" of the river. When the negotiations are considered as a whole, the conclusion is irresistible that the sole controversy with respect to the boundary line was whether Vermont had extended her boundary eastward beyond the line at the river established less than a generation earlier [5] by the Order-in-Council of 1764. Congress required the relinquishment of any claims to such an extension but we cannot say that it required more without ignoring the language of the negotiations as well as the history of the Order-in-Council, already detailed. Moreover, the con-

[5] The Order-in-Council was specifically referred to in the resolution of Congress of August 7, as having "superseded the pretensions of New Hampshire in favor of New York" and having been "assented to on part of the former."

siderations of practical convenience which fortify the conclusion that the boundary fixed by the order carried to the river lead to the like conclusion that the boundary intended by the resolutions of Congress and of the Vermont Legislature to be that of Vermont upon her admission into the Union, was a boundary on the river carrying to normal low-water mark.

New Hampshire does not appear to have assented formally to the resolutions of Congress of August 20, 21, 1781, but she was represented by agents before the Congressional Committee on whose reports of July 31 and August 2, the resolution was, in part, based. Both they and the New Hampshire representatives in Congress were familiar with the terms of the resolutions and could not have been unaware of the fact that in all the formal representations made to Congress in behalf of Vermont and in the various reports and resolutions of committees and the resolutions of Congress itself, the eastern boundary of Vermont was described interchangeably as the west side of the Connecticut River or as not extending east of the west banks of the river. Although these were public acts of notoriety, New Hampshire does not appear ever to have made any objection to these definitions of the boundary line.

The conclusion we have reached as to the correct construction of the Order-in-Council of 1764 and the resolution of Congress under which Vermont was admitted to statehood finds support in the practical construction given by both states to the boundary, thus defined, in the long continued failure of New Hampshire to assert any dominion over the west bank of the river, and in her long acquiescence in the dominion asserted there by Vermont. See *Michigan* v. *Wisconsin,* 270 U.S. 295, 308; *Indiana* v. *Kentucky,* 136 U.S. 479, 509, 511; *Maryland* v. *West Virginia,* 217 U.S. 1, 17; *Rhode Island* v. *Massachusetts,* 4 How. 591, 639. Vermont, it is true, made several

attempts to revive its ancient claim to dominion over the river to its thread, by invitations to New Hampshire to join in the appointment of commissioners to settle the boundary (Resolution of Vermont Legislature of November 6, 1792, as amended October 20, 1794; Resolution of October 25, 1830; Resolution of November 6, 1830). None of these efforts except the last appears to have provoked any formal action in behalf of New Hampshire, but in response to the resolution of November 6, 1830, the New Hampshire Legislature adopted a resolution of July 1, 1831, declining to appoint commissioners as requested, and declaring that no doubt had hitherto been entertained or suggested in relation to the boundary and that "the river Connecticut for the whole extent of the line between the two states" was "conceded to be within the limits and exclusive jurisdiction of the State of New Hampshire." No jurisdiction over the west bank was asserted.

A large amount of evidence, thought to have some bearing on the practical construction given to the boundary by the two states, has been introduced in the present suit. Most of it, when examined in detail, is of such slight weight and so inconclusive as to make unnecessary any extensive review of it here. Of some, but by no means controlling significance, are instances of action by towns in New Hampshire recognizing low-water mark on the west bank as the boundary of the towns and of the state,[6] and numerous deeds or other formal documents introduced in evidence affecting titles in each of the towns on the west bank of the river by which the property conveyed was extended to the river or included the privilege

[6] Authorization of the town of Stratford, New Hampshire, October 1, 1893, for laying out a highway between Stratford and Bloomfield, Vermont; Contract of April 24, 1896, between Lyme, New Hampshire, and Thetford, Vermont, for the erection of a bridge across the river between the two towns.

of the use of the water. In the absence of evidence of like character showing the assertion of title or jurisdiction in New Hampshire above the low-water line, these facts have some persuasive force in showing that inhabitants along the questioned boundary considered that it extended along the river at low-water mark. See *Handly's Lessee* v. *Anthony, supra,* 384.

Voluminous evidence was given with respect to the history of taxation by the two states of property along the contested boundary line. New Hampshire taxed thirty bridges and several dams, all structures extending across the river, but the tax records give no clear indication of any purpose or intention to tax property above low-water mark on the west bank or to do more than tax so much of it as was within the state, without reference to any defined boundary. Vermont taxed five of the bridges in varying years, the property taxed being the "abutment" to the bridge on the Vermont side, or the "end of the bridge with abutment," in several instances a fractional part of a bridge and, in one, the "end of bridge abutment to low water mark." Only in this last instance does it definitely appear that the property taxed extended to low water, although it seems probable that the abutment or the fractional part of the bridges taxed may in some other cases have extended to that point.

Of persuasive force is the fact found by the Special Master that New Hampshire appears never to have asserted definitely any right to tax land or structures located on the west side of the river before 1909 or 1912. From 1909 to 1927, New Hampshire taxed structures on the west side of the river belonging to the Connecticut River Power Company at Vernon, the property of which appears also to have been taxed by Vermont from 1916 to 1927. While it may be inferred that the property taxed by both states included structures on the west bank of the river between the high and low-water marks, the Special Master did

not so find and the fact does not clearly appear. In 1912 the New Hampshire taxing authorities taxed seven corporations, three partnerships and persons unknown having structures located on the Vermont bank of the river near Bellows Falls, at a valuation in excess of $1,000,000. The same property appears to have been taxed by Vermont, the record of taxation of some of it belonging to the Bellows Falls Canal Company, going back to a date as early as 1820. It is conceded that the property taxed included structures extending on the bank below the line of vegetation. The Special Master's finding that it was this " unprecedented " taxation by New Hampshire which precipitated the present suit is unchallenged. The fact that in the period of over a century following Vermont's admission to statehood this is the first well authenticated instance of an effort on the part of the New Hampshire authorities to tax property located on the west bank of the river is of substantial weight in indicating acquiescence by New Hampshire in the boundary line restricting her jurisdiction to the river at the low-water mark.

An important practical confirmation of this boundary line was the location in 1897 of the monument fixing the southeast corner of Vermont and the southwest corner of New Hampshire by Commissioners of the States of Vermont, New Hampshire and Massachusetts, pursuant to agreement between the three states of October 26, 1894. By the agreement it was stipulated that: " The southwest corner of the State of New Hampshire and the southeast corner of the State of Vermont on the northerly line of Massachusetts is at a point on the west bank of the Connecticut River, about two hundred and sixty-five feet northerly of the mouth of Little Meadow Brook, so called, near South Vernon Railroad Station, and directly east of a point designated on the maps of said engineers as ' Belding '; and that a substantial monument be erected as near to said corner on the westerly bank of the Con-

necticut River as is practicable, having reference to its stability." It is shown by the evidence that the point designated as "Belding" or sometimes as "Belden" was at a marker located on the line between Massachusetts and Vermont at the top of the west bank of the river. The point designated as the corner by the agreement between the states was therefore east of the top of the bank.

The monument was placed in position under the supervision of the commissioners in 1897. Its location was approved in identical language by the Legislature of Vermont on November 15, 1900, and by the Legislature of New Hampshire on March 22, 1901, as follows: "The southwest corner of New Hampshire and southeast corner of Vermont are marked by a copper bolt in the apex of a granite block set upon a stone pier and sunk in the shore of the western bank of the Connecticut River, and its location designated by a large polished granite monument five hundred and eighty-two feet distant on the western bank of the river above high water mark." The Special Master found, upon voluminous testimony that the granite block marking the boundary was set at the low-water mark. Its location was described by the person who erected it, who testified that it was placed in position at a point marked by the Commissioners and in accordance with specifications furnished to the witness by them calling for its erection "at low water line between Vermont and New Hampshire." The monument was buried eight feet deep with the apex level with the surface of the sand so as to avoid ice and other things "running down the river." It was set at an opportune time when the river was "very low"; at that time, it was eight feet east of the shore line, and about ten or twelve feet west of the water line. This testimony is neither contradicted nor impeached. It is corroborated by a second witness and by surrounding circumstances, as well as by evidence that the monument is submerged by the water at higher stages of

the river. The monument is shown by other testimony to be seventeen feet below and 36.5 feet east of the Belding marker referred to in the agreement between the states for establishing the corner. This marker, as already mentioned, is shown to be located at the top of the bank. It is so located in New Hampshire's amended answer of October 6, 1930, which alleges that the boundary "from the ancient 'Belden' bound, so called, on the west bank of the Connecticut River . . . is at said top or westerly margin of said [westerly] bank."

The evidence fully supports the conclusion that the monument was intended to be located at low-water mark and was in fact placed below the shore line at a point near the water's edge when the river was "very low."

After the monument had been located the Commissioners of New Hampshire filed their report to the Governor of the State. The report is undated but refers "to the action of the commissions and the boundary line and state corner established by them" as having "received the legislative sanction of the three states." In this report the following statement appears:

"The position of the southwest corner of New Hampshire having been agreed upon, as before stated, the commissioners of New Hampshire and Vermont, after careful deliberation and consultation with experts competent to advise in such matters, proceeded to mark the same in this manner. The corner is situate on the west bank of the Connecticut River, at the line where vegetation ceases, and it was difficult to place a suitable monument, that should always be visible, at this precise point, owing to the great variations in the level of the river at different seasons of the year, without incurring a large and useless expense."

New Hampshire places reliance on this language and a statement in the report of the Vermont Commissioners of July 26, 1900 that the monument was placed "at a

point where the vegetation ceases to grow" as showing that the monument was erroneously located.

In the entire history of the boundary between these two states, this appears to be the first occasion when any reference to the boundary as being "the line where vegetation ceases" is to be found in any official document. Aside from the location of the monument at such a point being inconsistent with the statement in the New Hampshire report itself that it was difficult, owing to variation in the level of the river, to place a suitable monument there, where it would be visible, this pronouncement of the Commissioners is plainly insufficient to impeach the formal declaration of the legislatures of both states that the monument had been "sunk in the shore of the western bank of the Connecticut River" or the conclusion of the Special Master that it had been placed at the point chosen and intended by the Commissioners, and that that point was at the low-water line.

It is significant, also, that no definite and certain location of the boundary has ever been continuously claimed by New Hampshire either by her public acts or by her pleadings in this suit. Her claim as originally stated in her answer that the boundary was at high-water mark was changed by amendments to a line at the top of the west bank. In brief and argument here, the contention is that the line is to be fixed at the point where vegetation ceases.

We think that the practical construction of the boundary by the acts of the two states and of their inhabitants tends to support our interpretation of the Order-in-Council of 1764, and of the resolutions of Congress and of the Vermont legislature, preceding the admission of Vermont to the Union. We conclude that the true boundary is at the low-water mark on the western side of the Connecticut River, as the Special Master has found. We adopt his definition of low-water mark, which is not challenged here,

as the line drawn at the point to which the river recedes at its lowest stage without reference to extreme droughts. The costs will be divided between the parties in accordance with the general rule in cases of this kind. *Michigan* v. *Wisconsin, supra,* 319; *North Dakota* v. *Minnesota,* 263 U.S. 583. The parties, or either of them, if so advised, may, within thirty days, submit the form of decree to carry this opinion into effect, failing which the Court will prepare and enter the decree.

It is so ordered.

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

TAIT, COLLECTOR OF INTERNAL REVENUE, *v.* WESTERN MARYLAND RAILWAY CO.

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

No. 842. Argued May 12, 1933.—Decided May 29, 1933.

1. In computing income tax, the Commissioner of Internal Revenue and Board of Tax Appeals denied the right of a corporation to deduct from gross income an amortized proportion of the discount on sales of bonds by its predecessors. On appeal to the Circuit Court of Appeals the right was sustained. *Held* that the judgment worked an estoppel against the United States and the Collector in later litigation with the corporation, as to its right to make like deductions for subsequent years under the same statutory provisions and Treasury regulations. Pp. 623, 625.
2. It will not be inferred that Congress, merely by adopting the scheme of annual tax periods, and without express declaration of purpose, intended to abolish the doctrine of *res judicata* in tax cases and thus to deprive Government and taxpayer of relief from redundant litigation of identical questions as to the liability of the same taxpayer under the same taxing provisions. *United States* v. *Stone & Downer,* 274 U.S. 225, respecting *res judicata* in tariff cases, distinguished. P. 624.

3. The effect of *res judicata* can not be avoided by showing that an inadvertent or erroneous concession was made at the former trial as to the materiality, bearing or significance of the facts or questions then before the court. P. 626.
4. Where a question has been adjudged as between a taxpayer and the Government or its official agent, the Commissioner of Internal Revenue, the Collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment. P. 627.

62 F. (2d) 933, affirmed.

CERTIORARI* to review the affirmance of a judgment for the plaintiff—the respondent here—in a consolidation of actions for the recovery of excess tax payments. See also 53 F. (2d) 211 (District Court in this case), and 33 F. (2d) 695 (Circuit Court of Appeals in an earlier case).

Mr. Whitney North Seymour, with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for petitioner.

Messrs. Eugene S. Williams and *Wm. C. Purnell* for respondent.

By leave of Court, *Mr. John J. Finnorn* filed a brief as amicus curiæ.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Between the years 1902 and 1908 The Western Maryland Rail Road Company, a Maryland corporation, sold and issued at a discount, large amounts of its first mortgage bonds. In foreclosure proceedings under a second mortgage its entire property was sold to a reorganization committee representing second mortgage bondholders, and a new company formed under the name The Western

* See Table of Cases Reported in this volume.

Maryland Railway Company took title to all the assets and operated the railroad. In 1911 the latter issued and sold at a discount additional bonds secured by the first mortgage of the original corporation.

In 1917 The Western Maryland Railway Company was consolidated, pursuant to Maryland statutes, with some seven subsidiaries. The new corporation so formed, named Western Maryland Railway Company, recognized as its own obligations the outstanding first mortgage bonds issued by its two predecessors. In computing this company's income tax for the years 1918 and 1919 the Commissioner of Internal Revenue refused to allow as a deduction from gross income an amortized proportion of the discount on the sales of bonds by the first and second companies. The Board of Tax Appeals sustained the ruling.[1] The Circuit Court of Appeals for the Fourth Circuit reversed the decision of the Board.[2]

In returns for 1920, 1921 and 1922 the company neglected to take any deduction for amortization of the bond discount in question. It made timely claim for refund for all three years, and, upon denial, brought a suit for the amount claimed against the petitioner, as collector; and also sued the United States for refund of the alleged overpayment for 1920. Deductions taken on the same ground for 1923, 1924 and 1925 were disallowed by the Commissioner, the resulting deficiencies in tax were paid under protest, claims for refund filed and disallowed, and suit brought against the petitioner as collector. The District Court consolidated the cases and tried them without a jury on an agreed stipulation. That court found that no facts were presented which had not been before the Board of Tax Appeals in the litigation over the 1918 and 1919 taxes, that the parties were concluded by the

[1] 12 B.T.A. 889. [2] 33 F. (2d) 695.

former decision, and rendered judgment for the respondent,[3] which the Circuit Court of Appeals affirmed.[4]

The petitioner seeks a reversal on the merits, asserting that a judgment in a suit concerning income tax for a given year cannot estop either of the parties in a later action touching liability for taxes of another year. He urges further, that, if this position is not well taken, he is not concluded by the former judgment because neither the proofs nor the parties are the same as in the prior proceeding.

1. The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac,* 94 U.S. 351, 352–353; *Southern Pacific R. Co.* v. *United States,* 168 U.S. 1, 48; *United States* v. *Moser,* 266 U.S. 236, 241. Since the claim in the first suit concerned taxes for 1918 and 1919 and the demands in the present actions embraced taxes for 1920–1925, the case at bar falls within the second class. The courts below held the lawfulness of the respondent's deduction of amortized discount on the bonds of the predecessor companies was adjudicated in the earlier suit. The petitioner, admitting the question was in issue and decided in respect of the bonds issued by the second company, and denying, for reasons presently to be stated, that this is true as to the bonds of the first company, contends that as to both the decision of the Court of Appeals is erroneous, for the reason that the thing adjudged in a

[3] 53 F. (2d) 211. [4] 62 F. (2d) 933.

suit for one year's tax cannot affect the rights of the parties in an action for taxes of another year.

As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.

This court has repeatedly applied the doctrine of *res judicata* in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. *New Orleans* v. *Citizens' Bank,* 167 U.S. 371; *Third National Bank* v. *Stone,* 174 U.S. 432; *Baldwin* v. *Maryland,* 179 U.S. 220; *Deposit Bank* v. *Frankfort,* 191 U.S. 499. Compare *United States* v. *Stone & Downer Co.,* 274 U.S. 225, 230–231. The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law-making body rather than the courts. *New Orleans* v. *Citizens' Bank,* 398–9. It cannot be supposed that Congress was oblivious of the scope of the doctrine, and in the absence of a clear declaration of such purpose, we will not infer from the annual nature of the exaction an intent to abolish the rule in this class of cases.

We are not persuaded that the operation of the principle of the thing adjudged in tax cases will, as petitioner insists, produce serious inequalities, or result in great confusion; but any adverse consequence in the administration of the law furnishes no sufficient reason for the abandonment of a rule founded in sound policy, to the enforcement of which suitors are in justice entitled.

We cannot agree that the decision in *United States* v. *Stone & Downer* requires a reversal of the judgment. The Court of Customs Appeals had from its organization consistently held the rule of *res judicata* inapplicable to its decisions as to the classification of imported commodities for the imposition of tariff duties. For some years that court's jurisdiction of customs cases was exclusive and final, and its practice, in this respect, had come to be settled. After Congress granted a right of review we were urged to overturn the practice and to apply the doctrine of estoppel by judgment in this class of litigation. The court refused to do so, not only because of the settled practice, but also on account of the unique character of the questions presented under the tariff acts. The ruling was justified by considerations which are absent in tax litigation; and the court mentioned and recognized the authority of the precedents for estoppel by judgment in the latter.

2. Is the question or right here in issue the same as that adjudicated in the former action? The pertinent language of the Revenue Acts is identical;[5] the regulations issued by the Treasury remained unchanged,[6] and of course the facts with respect to the sale of the bonds and the successive ownership of the railroad property were the same at the time of both trials. The petitioner suggests, however, that significant facts were stipulated in the present case which were not made to appear in the former proceeding. He shows that in the earlier case the Commissioner inadvertently stipulated that the first company "may be taken as identical" with the second,

[5] Revenue Act of 1918, § 234 (a) (2), 40 Stat. 1057, 1077; Revenue Act of 1921, § 234 (a) (2), 42 Stat. 227, 254; Revenue Act of 1924, § 234 (a) (2), 43 Stat. 253, 283; U.S.C., Tit. 26, § 986.

[6] Regulations 45 (1920 ed.), Art. 544 (a) (3); Art. 563. Regulations 62 and 65, Art. 545 (a) (3); Art. 563.

whereas in the present suit the exact devolution of title from the first to the second through the foreclosure and reorganization is definitely exhibited by the stipulation of the parties. From this he concludes that the Circuit Court of Appeals might well have reached a different result on the merits, if the former case had been more fully and accurately presented. But the Circuit Court of Appeals has found that all the facts stipulated in the present cause were before it in the former one, and we accept this finding. It holds also that the former decision was based on a view of the law quite as pertinent to the bonds sold by the first company as to those marketed by the second. The petitioner may not escape the effect of the earlier judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment. Compare *Deposit Bank* v. *Frankfort,* 191 U.S. 499, 510–511. The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding.

3. As we have seen, the demand for refund of 1918–1919 taxes was against the Commissioner of Internal Revenue. The present suits are against the United States and the Collector. Are the parties the same or in such privity that the claimed estoppel binds them? The petitioner concedes that the former judgment is, so far as identity of parties is concerned, conclusive in the suits in which the United States is now the defendant, since the Commissioner acted in the earlier suit in his official capacity and as representative of the Government. This leaves for consideration the question whether the Commissioner and the Collector are for purposes of application of the rule of estoppel, to be regarded as different parties.

In a suit for unlawful exaction the liability of a collector is not official but personal. *Sage* v. *United States,* 250 U.S. 33; *Smietanka* v. *Indiana Steel Co.,* 257 U.S. 1; *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 430. And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. *Bankers Pocahontas Coal Co.* v. *Burnet,* 287 U.S. 308, 311. We think, however, that where a question has been adjudged as between a taxpayer and the Government or its official agent, the Commissioner, the Collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment. See *Second National Bank of Saginaw* v. *Woodworth,* 54 F. (2d) 672; *Bertelsen* v. *White,* 58 F. (2d) 792.

4. These views render unnecessary any consideration of the merits of the controversy.

Judgment affirmed.

TEXAS & PACIFIC RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 1. Argued October 12, 13, 1931.—Reargued October 11, 12, 1932.—Decided May 29, 1933.

1. Carriers reaching the port of New Orleans with their own rails and reaching Texas ports through connections with which they maintained through routes and joint rates, made the same, or substantially the same, rates on export, import and coastwise traffic between New Orleans and inland points as were charged between those points and the Texas ports, although the rail haul to and from New Orleans was longer. Ocean freights were the same for all of these ports; and the object of the rail carriers in equalizing their rates was to protect their business, of the classes named, from the competition of other railroads whose lines tapped the Texas ports. The charges were neither unreasonably high nor so

low as to be non-compensatory. The Interstate Commerce Commission, upon findings of undue preference to New Orleans and undue prejudice to the Texas ports, entered orders which prescribed minimum differentials in favor of the latter where the New Orleans haul was by more than 25 per cent. the longer. *Held* that the orders should be set aside.

2. The provision of § 3 (1) of the Interstate Commerce Act forbidding any carrier to give any undue or unreasonable preference or advantage to any particular "locality" or to subject any particular "locality" to any undue or unreasonable prejudice or disadvantage, does not apply to seaports in respect of import, export and coastwise traffic in relation to which they are in no sense points of origin or destination but are merely gateways through which the traffic passes from rail to water carrier and *vice versa*. Pp. 638, 644.
3. Carriers in competition for export and import business, may, within the zone of reasonableness prescribed by the statute, adjust their rates so as to retain the desired traffic for their own lines, and in so doing may transport such shipments, although not made on through bills, at rates below those charged for domestic traffic between the same points. P. 636.
4. The Act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of the general welfare. P. 638.
5. The word "localities," therefore, has its proper office as denoting the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers. The term was, however, not intended to cover a junction, a way station, a gateway, or a port, as respects traffic passing through it. P. 638.
6. The Interstate Commerce Commission has no authority to readjust rates and prescribe differentials for the purpose of building up one gateway or port to the injury of another. Pp. 639, 646.
7. The legislative history of the Act to Regulate Commerce, 1887, and of the Hepburn Act, 1906, shows that it was not the intention of Congress to cover ports as such among the "localities" given regulatory protection. Pp. 639, 641.
8. Administrative construction of § 3 before and since the passage of the Transportation Act is found not to justify the assertion that Congress, by not amending the section, had acquiesced in adjustment of rates on exports and imports in the interest of ports as such. P. 641.

9. Where a statutory body such as the Interstate Commerce Commission assumes a power plainly not granted, no amount of such interpretation is binding on the courts. P. 640.
10. A carrier may not be held responsible for undue prejudice or preference to a locality in respect of rates unless both of the localities affected are upon its lines or it effectively participates in rates to both so that it may have the choice of raising one rate, lowering the other, or altering both. Earlier decisions distinguished. Pp. 646, 651.

42 F. (2d) 281, reversed.

APPEAL from a decree of the District Court (three judges) dismissing bills brought by two railroad companies to enjoin enforcement of orders of the Interstate Commerce Commission.

Mr. T. J. Freeman, with whom *Messrs. T. D. Gresham, Esmond Phelps* and *Robert L. W. Thompson* were on the brief, for the Texas & Pacific Ry. Co. et al., appellants, on the original argument. *Mr. Charles M. Spence,* with whom *Messrs. T. J. Freeman, T. D. Gresham, Esmond Phelps, A. L. Burford, R. E. Milling, Jr.,* and *Robert L. W. Thompson* were on the brief, for the Texas & Pacific Ry. Co., on reargument.

Mr. Luther M. Walter, with whom *Messrs. John S. Burchmore* and *Nuel D. Belnap* were on the brief, for the New Orleans Joint Traffic Bureau et al., appellants.

Mr. Wylie M. Barrow, Special Assistant to the Attorney General of Louisiana, with whom *Mr. Percy Saint,* Attorney General, was on the brief, for the State of Louisiana, intervener-appellant, on the original argument. *Mr. Barrow* also reargued the cause, and with *Mr. Gaston L. Porterie,* the then Attorney General of Louisiana, filed a brief on behalf of the State.

Mr. Edward R. Schowalter filed a brief on behalf of the Louisiana Public Service Commission, intervener-appellant.

Mr. John St. Paul, Jr., with whom *Messrs. Wm. C. Dufour* and *Leonard B. Levy* were on the brief, for the Board of Commissioners of the Port of New Orleans, intervener-appellant.

Mr. Daniel W. Knowlton, with whom *Solicitor General Thacher* and *Assistant to the Attorney General O'Brian* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. R. S. Outlaw, with whom *Messrs. C. S. Burg, Fred L. Wallace, G. B. Ross, E. E. McInnis,* and *Joseph M. Bryson* were on the brief, for the Missouri-Kansas-Texas R. Co. et al., appellees.

Mr. R. C. Fulbright, with whom *Messrs. James V. Allred,* Attorney General of Texas, *Elbert Hooper,* Assistant Attorney General, *Mart Royston, Fred N. Oliver,* and *John C. White* were on the brief, for the Galveston Chamber of Commerce and the State of Texas et al., intervener-appellees.

By leave of Court, *Messrs. Samuel Silverman* and *A. Henry Walter* filed a brief on behalf of the City and Port of Boston, as *amici curiae*.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Galveston Commercial Association complained to the Interstate Commerce Commission that carload commodity rates on import, export and coastwise traffic between a portion of western classification territory and Galveston were unreasonable, and their relationship with those to and from Houston, Texas City, Beaumont, Port Arthur, and Orange, Texas, and New Orleans, La., was unduly prejudical to Galveston.[1] The claim of unreason-

[1] The complaint also attacked rates to and from a portion of the State of Illinois and the port of Mobile, Ala. The Commission, how-

ableness was abandoned as was also the assertion of discrimination in favor of the other Texas ports. The latter intervened and prayed the same relief as might be accorded Galveston in respect of rate relationship with New Orleans. The issue was therefore narrowed to one of prejudice to them and preference of New Orleans. Railroads serving the Texas ports and various shippers and commercial bodies intervened in support of the complaint; interests connected with the port of New Orleans and shippers intervened in opposition.

The Commission found that export and import rates on fourteen commodities from or to points in Arkansas, Texas, Oklahoma, southern Kansas, and Louisiana west of the Mississippi River, were unduly prejudicial to Galveston and unduly preferential of New Orleans. In all instances where the distance to Galveston is less than the distance to New Orleans by not over one hundred miles it permitted equal rates; but for differences in distance exceeding one hundred miles it prescribed certain named minimum differentials in favor of Galveston.[2]

On rehearing the prior decision was modified by including the other Texas ports with Galveston in the finding of undue prejudice; substituting a twenty-five per cent. difference in distance for the 100-mile basis; exempting from the scope of the order rates to or from points on the Texas & Pacific and the Louisiana Railroad & Navigation Company; [3] exempting rates on petroleum

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ever, did not deal with these, and the averments of the complaint in this respect are immaterial to the decision of the case.

[2] 100 I.C.C. 110.

[3] The Louisiana Railroad & Navigation Company was at the time of the earlier hearings operated under a single ownership with the Louisiana Railway and Navigation Company of Texas; and the two are referred to by the Commission as the L. R. & N. System. Prior to the institution of suit in the court below both lines were acquired by the Louisiana & Arkansas Railway Company. The latter joined with the other two as plaintiffs in the District Court. In the opinion the System will for convenience be called the L. R. & N.

and its products; and making certain other changes not here material.[4]

The proceeding was later reopened for the purpose of deciding whether the Texas & Pacific and the L. R. & N. should continue to be exempted. The Commission reversed its previous finding and included them within its orders.[5] Both carriers filed bills in the District Court to enjoin the enforcement of all the orders except in so far as the second exempted them from the finding of preference and prejudice. The cases were consolidated, and upon final hearing before three judges the bills were dismissed.[6] The plaintiffs, Texas & Pacific and L. R. & N., and also the State of Louisiana, the New Orleans Traffic Bureau and other intervenors appealed.

The Texas ports are served by some half dozen lines which either themselves or through their connections reach the areas of origin or destination embraced in the Commission's order. Generally speaking their routes trend north rather than east of Galveston. The Southern Pacific is the only carrier serving both Galveston and New Orleans. Texas is also connected with New Orleans by the Gulf Coast Lines, by the Texas & Pacific, extending east from El Paso through Dallas and Fort Worth to Shreveport, La., and thence southeast to New Orleans, and by the L. R. & N., which connects eastern Texas and western Louisiana with that port. Several other lines extend between New Orleans and western Louisiana, Arkansas, Kansas, and Oklahoma.

With minor and immaterial exceptions the carriers serving the Texas ports and New Orleans have for many years equalized the import and export commodity car-load rates between the territory embraced in the Commission's orders and Galveston and New Orleans. The gravamen

[4] 128 I.C.C. 349.

[5] 160 I.C.C. 345.

[6] 42 F. (2d) 281.

of the complaint is that in many instances the distance to New Orleans is so much greater than that to the Texas ports, and the increased haul so important a part of the service rendered, that this factor should be reflected in a fixed differential in rates. The Commission's order prescribing differentials is challenged only in so far as it compels the Texas & Pacific and the L. R. & N. to establish rates to New Orleans higher by the amount of the fixed differentials than those charged between the same interior points and the Texas ports. Inasmuch as the assertion of unreasonableness was withdrawn and the Commission made no finding that the Galveston rates were unreasonable, the prohibitions of § 1 of the Act to regulate commerce, as amended, are not involved.[7] The evidence failed to show that the rates of the Texas & Pacific and the L. R. & N. on export and import shipments to and from New Orleans were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was therefore no basis for an order fixing minimum reasonable rates under § 15 (1) of the Act.[8] The parties agree that authority for the order must be found in § 3 (1), which is:

"It shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[9]

The appellants contend that in the circumstances disclosed the ports as such are not localities preferred or

[7] U.S.C. Tit. 49, § 1.

[8] U.S.C. Tit. 49, § 15 (1).

[9] U.S.C. Tit. 49, § 3 (1).

prejudiced, but that if they may be so denominated the Texas & Pacific and the L. R. & N. can not be held responsible for any undue prejudice to the Texas ports, since they do not reach those ports with their own lines or control the rates to or from them. They also assert that the orders violate Article I, § 9, of the Constitution, which prohibits any regulation of commerce giving preference to ports of one State over those of another; are without support in the evidence, and arbitrary.

The cause has been twice argued; it was first presented at the October Term, 1931, and on account of the importance of the questions involved a reargument was ordered and was had at the October Term, 1932.[10] Statement of certain facts and settled principles will tend to clarify and define the issues presented.

The traffic with which we are concerned does not move on through bills of lading, but the movement is, nevertheless, from points of origin to a foreign or coastal destination, or vice versa, and is, therefore, essentially through transportation. Compare *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 309. As the Commission said in this case, "A port is neither the destination nor the origin of traffic passing through it. It levies toll on the traffic, in substantially the same manner as do common carriers, in its charges for the use of its facilities in the transfer of traffic between the rail and water carriers."

[10] "This cause is restored to the docket for reargument upon all questions involved, and the attention of counsel is invited to the question whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected, and to the rates condemned, by the orders in controversy are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of sections 3 (1) and 15 (1) of the interstate commerce act and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections." Journal, October Term, 1931, p. 342.

Although the shipper in the first instance consigns the commodity to the port and a separate contract is made for ocean carriage, the through rate none the less consists of the rail rate to the port, plus the ocean freight, which is the same from all Gulf ports.[11]

The choice of route is determined solely by the rail rates from or to the ports. If these are equalized the shipper has an option; but if they are disparate the route through the port taking the higher rate is necessarily excluded. A very slight differential in the rail rate, in some instances as little as a fraction of a cent per hundred pounds, will divert the traffic through the port so advantaged. The application of a distance scale to the rail rate automatically precludes shipment through the more distant port.

Long prior to the passage of the Act to regulate commerce the railroads, recognizing this situation, and desiring to hold to their own lines the traffic running to ports which they served, equalized rates through the ports reached by their own lines with those maintained by their rivals to other ports, or established differentials in favor of their own ports in order to retain a portion of the competitive export business. And a carrier serving two ports has for like reason fixed an equal or lower rate to the more distant of the two, solely to meet the competition of rivals who reached it by more direct routes. These practices have not been indulged either to aid or to harm a port as such, but solely to obtain or retain business for the carrier's own line.[12] With the abstract fairness of such ad-

[11] The evidence shows that the regular steamship lines make the same rates to foreign destinations from all Gulf ports. Tramp steamers occasionally cut the conventional rate, but this may happen at any port, and the opportunity to obtain such a reduced rate does not depend upon the choice of port through which shipment shall be made.

[12] New York Produce Exchange *v.* B. & O. R. Co., 7 I.C.C. 612; In re Differential Rates, 11 I.C.C. 13.

justment neither the Commission nor the courts have any concern. This is not to say, however, that the rates promulgated are beyond the Commission's jurisdiction. While that body has no control over the ocean rate, it has power to compel a reasonable charge for the rail haul. Compare *Armour Packing Co.* v. *United States,* 153 Fed. 1; *News Syndicate Co.* v. *New York Central R. Co.,* 275 U. S. 179, 186–7.[13] As the carriers are in competition for the business they may, within the zone of reasonableness,[14] prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. *Interstate Commerce Comm'n* v. *Alabama Midland Ry. Co.,* 74 Fed. 715, 723–4; 168 U.S. 144, 172–3; *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 564; *United States* v. *Illinois Central R. Co.,* 263 U.S. 515, 522.

The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Comm'n,* 162 U.S. 197. There the charging of rates on import traffic moving from a port on through bills of lading, much lower than those fixed for domestic transportation, was held not to amount as matter of law to discrimination forbidden by § 3. The carrier showed, in justification of the lower rates on import traffic, that unless these were permitted water and rail-and-water competition would divert the traffic away from the port of New Orleans and the carrier's lines extending from that

[13] In Chamber of Commerce of New York *v.* N. Y. C. & H. R.R. Co., 24 I.C.C. 55, 74, the Commission said: "We have no jurisdiction of the ocean rates and must deal with this question as though the ports were destinations instead of gateways."

[14] Since 1887, § 1 has forbidden that an export or import rate be unreasonably high; and since the Transportation Act, 1920, the Commission has been charged to see that the rate be not so low as to render the receipts of the business unremunerative.

port. Since that decision it has been recognized that export and import shipments, although not made on through bills, might lawfully be transported at rates below those charged for domestic traffic between the same points.[15] The same purpose not to stifle competition justifies relief under § 4 from the prohibition against charging the same or less for a longer than for a shorter haul. *Interstate Commerce Comm'n* v. *Baltimore & Ohio R. Co.,* 145 U.S. 263, 276; *Interstate Commerce Comm'n* v. *Alabama Midland Ry. Co.,* 168 U.S. 144, 164; *Louisville & N. R. Co.* v. *Behlmer,* 175 U.S. 648, 671; *Intermountain Rate Cases,* 234 U.S. 476, 483–485. And relief under the Fourth Section has been granted on this ground in respect of export and import rates. Export and Import Rates, 169 I.C.C. 13.

While the carriers may, therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel. *Southern Pac. Co.* v. *Interstate Commerce Comm'n,* 219 U.S. 433, 444; *Interstate Commerce Comm'n* v. *Diffenbaugh,* 222 U.S. 42, 46; *Ellis* v. *Interstate Commerce Comm'n,* 237 U.S. 434, 445; *United States* v. *Illinois Central R. Co.,* 263 U.S. 515, 524; *At-*

[15] New Orleans Board of Trade *v.* Illinois Cent. R. Co., 23 I.C.C. 465; In re Import and Domestic Rates, 36 I.C.C. 389; In re Import and Domestic Rates—Clay, 39 I.C.C. 132.

chison T. & S. F. Ry. v. *Interstate Commerce Comm'n*, 190 Fed. 591; *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 471.[16]

1. In the light of the facts exhibited by the record and the principles underlying the Act, are ports, in respect of export, import and coastwise traffic, localities susceptible of undue preference or prejudice within the meaning of § 3? The purpose of §§ 2, 3 and 4, as exhibited by committee reports and explained by those in charge of the bill in Congress, was to prevent unjust discrimination resulting from existing practices. Similar commodities were, without reason or excuse, carried at different rates. Shippers similarly situated were put on unequal terms. Producers and consumers at points of origin and destination were prejudiced by unequal treatment in the matter of rates or service. Obviously localities of origin or destination might also be prejudiced by undue discrimination. One of the most prevalent and reprehensible practices at which the Act was aimed was the charging of a less or an equal rate for a longer haul upon the same line or route. The Act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare. The word "localities," therefore, has its proper office as denoting the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers. The term was, however, not intended to cover a junction, a way station, a gateway, or a port, as respects traffic passing through it.

Considered as points of origin or destination any or all of these are localities within the purview of the section.

[16] The Commission has recognized the same principle. Ashland Fire Brick Co. *v.* Southern Ry. Co., 22 I.C.C. 115, 121; Chamber of Commerce of New York *v.* N. Y. C. & H. R.R. Co., 24 I.C.C. 55, 63, 70, 75; Maritime Assn. of Boston *v.* Ann Arbor R. Co., 95 I.C.C. 539, 565.

All of them may, moreover, though not considered as localities served, be involved in acts of discrimination. The situation here presented furnishes a close analogy to proportional rates or combination rates, and with respect to either of these the charge on shipments through a given gateway or port may discriminate against traffic passing through another so as to deprive a shipper of his right of choice of route through either.[17] In such case, however, the discrimination operates upon the shipper, not upon the port. There are through rates, proportional rates, and combination rates, applicable to traffic routed through river crossings and gateways. It seems too plain for argument that the Commission has no authority, upon a showing by a gateway that under an existing tariff too much traffic passes through another, or too little through it, to readjust the rates and prescribe differentials so as to divert traffic through the complaining gateway. The interests and industries of a gateway are not entitled thus to obtain a benefit reflected from additional traffic which would be diverted by such action of the Commission. We perceive no difference in principle as to export or import traffic routed through ports.

The legislative history of the Act demonstrates that Congress did not intend to forbid the equalization of export or import rates by lines serving several ports in order to meet competition. These rates, it was said, were not to be proportioned to the respective distances between inland origins or destinations and the ports.[18] Both

[17] Mobile Chamber of Commerce *v.* Mobile & Ohio R. Co., 32 I.C.C. 272; Astoria *v.* Spokane, Portland & Seattle Ry. Co., 38 I.C.C. 16.

[18] See the explanation of Senator Cullom, chairman of the Committee having charge of the original bill, Cong. Rec., 49th Cong., 1st Sess., Vol. 17, Part 4, pp. 3471, 3472. House proceedings, Cong. Rec., Vol. 17, Part 7, pp. 7277, 7294, 7298. And see the Report of the Committee of the Senate, Report No. 46, 49th Cong., 1st Sess.,

equalizations and differentials had for some time been maintained in the rates to various Atlantic ports. Congress was aware of this, and had no intention of interfering with the maintenance of these rate adjustments.

Appellees say, however, that the Commission has always treated ports as localities within the meaning of § 3, and exercised the power to abate discrimination by prescribing differentials in export rates. They add that though the Act has been several times amended, this section has been retained in its original form and Congress has thus sanctioned the Commission's interpretation. Where a statutory body has assumed a power plainly not granted, no amount of such interpretation is binding upon the courts. *Interstate Commerce Comm'n* v. *C., N. O. & T. P. Ry. Co.*, 167 U.S. 479, 510. This we think is the situation here presented, for, as we have said, the word localities is used with reference to places of origin and

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p. 57, referring to the investigation by a committee of the British Parliament:

"Other important conclusions were reached by the Committee as follows:

"'That a system of equal mileage rates, or charges in proportion to distance, was inexpedient and impracticable for the following reasons:

"'(a) It would prevent railway companies from lowering their fares and rates, so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit.

. . . . .

"'In short, to impose equal mileage on companies would be to deprive the public of the benefit of much of the competition which now exists, or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those rates and places which are nearest or least expensive where the varying charges of the companies now create competition.'"

destination; its employment is not intended to permit the Commission, in its discretion, to favor or hamper a community having no such relation to the service of transportation.

Moreover we do not find that any such settled construction had been adopted or that Congress intended to sanction it. With few and occasional exceptions the Commission has not until a recent date essayed to prescribe differentials in export rates. Prior to the Hepburn Amendment in 1906, port differentials were considered in three cases.[19] In the first certain carriers applied for leave to equalize their export rates to Boston with those charged to New York. The petitions were dismissed on the ground that the Commission should not authorize what the carriers might lawfully do without permission. In the second, a New York trade association complained that the maintenance of differentials in export rates to Philadelphia and Baltimore voluntarily established by the carriers worked undue prejudice against New York. The Commission found they did not result in undue prejudice; though it treated the ports as localities which would be entitled to relief under a proper showing. In the third case shippers and carriers serving north Atlantic ports submitted to the Commission the question of the fairness of the current differentials, and that body acted merely as an arbitrator and not in its official capacity.

The legislative history of the Hepburn amendment discloses a clear intent not to confer power to circumscribe the adjustment of export and import rates by the carriers to meet competition.[20] The expressions used disclose

[19] Export Trade of Boston, 1 I.C.C. 24 (1887); New York Produce Exchange *v.* B. & O. R. Co., 7 I.C.C. 612 (1898); In the Matter of Differential Rates, 11 I.C.C. 13 (1905).

[20] Cong. Rec., 59th Cong., 1st Sess., Vol. 40, Part 2, pp. 1777, 1788; Part 3, pp. 2084, 2085, 2086, 2247, 2248; Part 4, p. 3792; Part 5, p. 4111; Part 7, p. 6683. Representative Mann, a member of the

no thought that the Commission had held the contrary.[21]

Between the dates of the Hepburn amendment and the Transportation Act, 1920, the Commission had before it two cases relevant to the power to prescribe port differentials.[22] In the first the Commission recognized its lack of power to deal with the relationship of the rates.[23] In

committee, said, in explaining the purposes of the bill before the House (Cong. Rec., Vol. 40, Part 3, p. 2247): ". . . We do not give them the power to say which port shall be built up, which city shall be preferred; we leave open the competitive forces of the railways. The old bills which we had sought to stifle competition; we leave competition in force. The railroads running south, west of the Mississippi, and the railroads runing east, north of the Ohio, will have to fight out the question as to which road shall carry the grain for export abroad."

And again: "It will not give the Commission the power to determine differentials, the power to say whether grain from the Northwest shall be shipped for export by way of the Gulf ports or the north Atlantic ports, the power to destroy the law of competition. . . ."

There is much more to the same effect.

[21] Report No. 591, 59th Cong., 1st Sess., p. 3: "As but little complaint has been made to the committee concerning classification, it was not deemed wise at this time to suggest new legislation upon that subject. So, too, with the question of the relation of rates. The committee has not deemed it wise at this time to suggest new legislation to change existing law upon that subject. It is one of very great importance—interesting, however, as a rule, to certain particular communities rather than to the public at large. It involves conflicts between towns and cities rather than the public generally, and it relates more to the building up of certain local interests of a local nature rather than to the interests of the people of the whole country."

[22] Chamber of Commerce of N. Y. *v.* N. Y. C. & H. R.R. Co., 24 I.C.C. 55; Astoria *v.* S. P. & S. Ry. Co., 38 I.C.C. 16.

[23] It said (24 I.C.C. 75): ". . . the Boston interests join in the contention that the railroads should so adjust their rates as to insure movement of a certain or substantial part of the traffic through those ports. Neither the carriers nor the Commission has any right to undertake to so apportion the traffic between rival ports or cities.

the second the complaint was that Astoria was prejudiced by exaction of higher export rates from origin territory than those to Seattle and Tacoma. Though the haul to Astoria was longer, the Commission required equalization. The Commission in this case asserted its authority to deal with export rate relationship solely in the interests of the affected ports. Whether the order made was within the competence of that body or not, the important fact is that it did not prescribe differentials, but in the interest of competition opened the three ports to export shipment on equal terms.[24]

We think that at the date of the passage of the Transportation Act, no such administrative practice had been established as to require the conclusion that in failing to amend § 3 the Congress approved any asserted power to adjust export and import rates in the interests of the ports alone.

It remains to determine whether since 1920 there has been such a uniform and repeated assertion of this authority as would constrain us to adopt the principle. The instances in which the Commission has considered export and import traffic fall into several classes: First, where shippers' complaints concerning port differentials established by carriers were dismissed,[25] or were found justified and prejudice ordered removed;[26] secondly, where, on

. . . the Pennsylvania and the Baltimore & Ohio have the lawful right to maintain lower rates to and from Baltimore and Philadelphia than they contemporaneously maintain to and from New York. They would probably also have the right to make these rates the same to and from all of those ports if they chose to do so. The Boston lines have an undoubted right to make such rates to and from Boston as their interests demand, subject only to the limitations that the rates must be reasonable; . . ."

[24] Compare, however, Galveston Commercial Assn. *v.* A. & S. Ry. Co., 109 I.C.C. 114, 125.

[25] Cotton and Cotton Linters to Pacific Coast Ports, 69 I.C.C. 735; Sugar Cases, 1922, 81 I.C.C. 448.

[26] Canned Goods, Iron & Steel from Gulf Ports, 91 I.C.C. 623.

shippers' complaint against differentials, equalization of rates was ordered;[27] thirdly, where on complaint by a port differentials voluntarily established by the carriers were altered.[28] These are not relevant to the present controversy. In two decisions rendered prior to the instant one the Commission, on complaint of port interests, exercised the supposed power to compel the establishment of differentials as between ports.[29] But we are not persuaded these rulings form a body of administrative action sufficient to overthrow the evident purpose of § 3.

We conclude that ports as such are not localities with respect to export and import traffic routed through them, susceptible of undue preference or prejudice within the intent of the Act.

While the Commission's jurisdiction of port rate relation was fully argued, the appellees seek to support the orders under the power to abate discrimination between persons and shippers. The argument is based upon averments of the complaint as to prejudice of persons at Galveston. There is, however, no allegation that shippers or consignees in the interior, are prejudiced or preferred by the equalization of the New Orleans rates with those to the Texas ports, and the Commission made no finding of preference or prejudice of shippers or consignees, or localities of origin and destination.[30] It compared at great

[27] Inland Empire Shippers League *v.* Director General, 59 I.C.C. 321.

[28] Maritime Assn. *v.* Ann Arbor R. Co., 95 I.C.C. 539; 126 I.C.C. 199.

[29] Coffee from Galveston and other Gulf Ports, 58 I.C.C. 716; 64 I.C.C. 26; Charleston Traffic Bureau *v.* Alabama G. S. R. Co., 89 I.C.C. 501. In a number of other cases the Commission has indicated a belief that it possessed such authority.

[30] In a dissenting opinion Commissioner Hall said (128 I.C.C. 399): "In deciding this strife between Texas ports and Louisiana ports, confined as it is to import, export, and coastwise rates, the producers and shippers who pay those rates seem to have been lost from sight."

length the facilities of the ports, their volume of traffic, the relative growth of their export and import business, their respective steamship facilities, and reached the conclusion that though relative distance is not conclusive and competitive conditions are to be regarded, the Texas ports are entitled to an advantage in rate consequent upon the shorter haul to and from the interior territory. The Commission's three reports abound with statements that a differential in favor of the Texas ports will divert traffic running to New Orleans and send it through the Texas ports. Petroleum is one of the commodities as to which complaint was made. There is no transportation difference discoverable in the record between this traffic and that of the other freights affected by the order. But the Commission concluded that New Orleans was not receiving more than its fair share of this business, and that a differential advantage would be of little benefit to the Texas ports by diverting this commodity to them, and therefore refused to make any order respecting the rates on petroleum and its products.[31] It has since, apparently upon similar considerations, refused to prescribe differentials in the rates on blackstrap molasses.[32] The actual basis of the decision is, moreover, avowed by the Commission. In the first report it said:

"We find that the present relationships of the assailed rates on export, import, and coastwise traffic, . . . are unduly prejudicial to Galveston and unduly preferential of New Orleans." (100 I.C.C. 122.)

In its second report it stated:

"We find that the present parity of rates as between the Texas and Louisiana ports . . . does not result in substantial injury to the Texas ports in respect of

[31] See the Commission's findings, 128 I.C.C. 366, 372, 374–376 and the opinions of Commissioners McManamy and Taylor, 128 I.C.C. 399.

[32] Blackstrap Molasses from Louisiana Points and Ports, 171 I.C.C. 583, 591.

petroleum and its products, but does result in substantial injury to and prejudice against the Texas ports in respect of the other commodities considered." (128 I.C.C. 388.)

And finally:

"Upon further consideration we now find . . . that the present relationships of the assailed carload rates on export, import and coastwise traffic . . . are, and for the future will be, unduly prejudicial to Galveston and the other Texas ports taking the same rates, and unduly preferential of New Orleans." (160 I.C.C. 359.)

The action of the Commission cannot be justified upon any theory that it was protecting shippers and consignees, who would naturally desire all possible routes for foreign shipment. On the contrary, the orders prohibited a practice born of competition, and not proved to involve a loss of revenue to the appellants. The plain purpose of the orders was to build up the Texas ports by diverting export and import traffic to them. As we have shown, § 3 grants no such power.

2. The Commission's action is challenged for another, and wholly independent reason, which, if sustained, also requires a reversal of the decree. By its second order the Commission excluded the Texas & Pacific and the L. R. & N. from its findings of undue preference and prejudice and exempted them from the requirement as to differentials. The Texas & Pacific had been included by the first order on the theory that it was part of the Missouri Pacific system which served both New Orleans and the Texas ports. Upon rehearing the conclusion was that the line was independently operated. Exemption was thereupon granted both appellants pursuant to a rule which the Commission had consistently followed since its organization: namely, that a carrier may not be held responsible for undue prejudice or preference unless both of the localities affected are upon its lines, or it effectively participates in the rates to both. In the final report these roads were

denied exemption under the belief that this court had held the principle inapplicable in the circumstances here disclosed. The appellants insist the rule is a reasonable one, consonant with the purposes of the Act, and that our decisions have not narrowed it so as to exclude this case from its scope.

The line of the Texas & Pacific in Texas is intersected at intervals of about 40 miles by north-and-south lines directly or indirectly serving the Texas ports. The population of these junction points is over ten times as great as that of all other open stations on this appellant's line in Texas, and the greater volume of export and import traffic originates and terminates at the junctions.[33] Thus the question is whether the Texas & Pacific may continue to participate in the handling of the traffic moving through the ports to and from points on its own rails, on an equality of rates with competing lines which extend to the Texas ports, or may be forbidden so to do because it is a party with the competing carriers to joint rates from stations on its own line to the Texas ports. The same issue is presented with respect to the L. R. & N. Neither of the appellants controls the rates to the Texas ports and the Commission so finds.[34] Though the Texas port lines can reduce their rates to and from those ports without the concurrence of the New Orleans lines, no reductions can be made in those rates by the New Orleans lines,

[33] The conditions on the L. R. & N., while differing in fact from those affecting the T. & P., present the same question and need not be separately stated.

[34] The finding is: "The New Orleans carriers participate in a full line of joint commodity rates to and from Gulf ports from and to both the junction and local points on their lines. While, under the rules governing the southwestern carriers and their tariff-publishing agents, the New Orleans carriers have the power to increase the rates from points served by them to the Texas ports without concurrence of their connections, a reduction in such rates would require the consent and concurrence of the participating Texas lines." (160 I.C.C. 356.)

even from or to their local stations, without the concurrence of one or more lines reaching the Texas ports. Clearly the New Orleans carriers have no effective control over the rates between their junction points and the Texas ports. As respects local stations, their participation in joint rates with the lines to Texas ports is required by § 1 (4) of the Act; but such rates may not be higher than reasonable maxima fixed by national or state authority nor lower than the amount agreed to by their connections to the Texas ports. The appellants insist that their compulsory participation in rates to and from the Texas ports has no legal significance, and the question remains whether they in fact exercise effective control over those rates.

The classical case of discrimination in rates is presented where a single carrier serving two points approximately equidistant from a common origin on the carrier's line, exacts unequal rates for the two hauls. Not only is the prejudice obvious, but equally so the ability of the carrier to abate it by raising the rates to the point enjoying the lower rates, or decreasing those to the point subject to the higher charge. The principle comprehends, as well, instances of joint rates where the same carriers participate in the rates to both points,[35] and where the originating (or delivering) carriers are different, but the delivering (or originating) carriers are the same.[36] So, too, a carrier may be responsible for preference or prejudice where it participates in one of several through routes between point of origin and the prejudiced destinations, although its own line may reach only one or neither of the latter, *St. Louis S. W. Ry.* v. *United States,* 245 U.S. 136, for the discrim-

[35] *Southern Ry. Co.* v. *United States,* 204 Fed. 465; *Chicago, I. & L. Ry.* v. *United States,* 270 U.S. 287; Rates on Grain Milled in Transit, 35 I.C.C. 27.

[36] Lake Dock Coal Cases, 89 I.C.C. 170; Seneca Wire & Mfg. Co. *v.* B. & O. R. Co., 112 I.C.C. 95.

ination is brought about by the disparity of rates, and the order requiring its abatement necessarily runs against all the carriers parties to them. If one or more of the railroads whose lines make up the through route should refuse, upon an order to equalize rates, to afford one of the others a proper division of the rate, the latter may obtain redress from the Commission under § 15 (6). Where, however, a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other but cannot make or control the latter rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue—it cannot be held responsible, nor can any order to remove the prejudice run against it.[37] This rule has been consistently applied in respect of export and import rates to the ports.[38] The reason for the doctrine is that preference or prejudice can be found only by a comparison of two rates. If these are the rate of one

[37] This doctrine has been applied by the Commission in at least forty-five cases, under varying circumstances containing one or more of the elements mentioned. It was first announced soon after the organization of the Commission in Eau Claire Board of Trade *v.* C. M. & St. P. R. Co., 5 I.C.C. 264, was elaborated in Ashland Fire Brick Co. *v.* Southern Ry. Co., 22 I.C.C. 115, and has been referred to as the doctrine of the Ashland Fire Brick case since that time. For a reference to some of the decisions applying the rule see the dissenting opinion of Commissioner Porter in Duluth Chamber of Commerce *v.* C. & N. W. Ry. Co., 156 I.C.C. 156, 173.

[38] Chamber of Commerce of New York *v.* N. Y. C. & H. R.R. Co., 24 I.C.C. 55, 75; Molasses from Mobile, 28 I.C.C. 666, 669; Sugar Cases of 1922, 81 I.C.C. 448, 471; Valley Camp Coal Co. *v.* B. & O. R. Co., 88 I.C.C. 682, 686; Maritime Assn. of Boston *v.* Ann Arbor R. Co., 95 I.C.C. 539, 565, 572–3, 574, 575; *id.*, 126 I.C.C. 215; Lake Cargo Coal Rates, 1925, 101 I.C.C. 513, 545; Mobile Chamber of Commerce *v.* M. S. B. & P. R. Co., 129 I.C.C. 419, 422; Bananas from Gulf Ports, 140 I.C.C. 682 (Eastman, Commissioner, concurring, at p. 684); Lake Charles Harbor & T. Dist. *v.* Brimstone R. & C. Co., 157 I.C.C. 720, 723.

carrier to point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under § 3 an alternative must be afforded.[39] The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. Compare *American Express Co.* v. *Caldwell,* 244 U.S. 617, 624; *United States* v. *Penna. R. Co.,* 266 U.S. 191; *Chicago, I. & L. Ry. Co.* v. *United States,* 270 U.S. 287, 292; *Minneapolis & St. L. R. Co.* v. *Peoria & Pekin U. R. Co.,* 270 U.S. 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative.

The principle has been approved in decisions of this court with respect to practices, *Interstate Commerce Comm'n* v. *Diffenbaugh,* 222 U.S. 42; *Central Railroad of New Jersey* v. *United States,* 257 U.S. 247, and rates, *East Tenn. V. & G. Ry. Co.* v. *Interstate Commerce Comm'n,* 181 U.S. 1; *Penn Refining Co.* v. *Western N.Y. & P. R. Co.,* 208 U.S. 208, 221.

In the *Central Railroad* case it was said (p. 259): "But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is

[39] This is not true of an order pursuant to § 15 (1), prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section.

given to one locality than to another similarly situated. (Citing cases.) If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers . . . What Congress sought to prevent by that section [3], as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers." While this language was used with respect to circumstances differing from those here disclosed, it applies to the situation of appellants, who are by the Commission's order held responsible for what is not and cannot be the result of their own acts,—the level of the rates to the Texas ports.

In the *East Tennessee* case the court said (p. 18):

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

The appellees contend, however, and the Commission concluded that in later cases the court has held the principle inapplicable in circumstances so like those here exhibited that it should not control our decision in the instant case. One of these is *St. Louis S. W. Ry. Co.* v. *United States,* 245 U.S. 136, cited for the proposition that the Commission has power to prevent carriers which participate in rates from blanket territory from discriminating against a particular destination, although one of them does not with its own lines reach such destination, but bills through traffic to it over connecting lines. The order there under review was for the establishment of a reasonable joint rate, or in the alternative new through routes with joint rates, under § 15 of the Act, and was held by

this court to be primarily an order under that section, and not under § 3. The statement with respect to the possibility of unjust discrimination by all the participating carriers, even though the rails of some did not reach the locality prejudiced, is clearly sound, but is beside the point here in issue; for in that case no question as to the control of the rate to both points by any carrier affected by the order was raised or decided.

Chicago, I. & L. Ry. Co. v. *United States,* 270 U.S. 287, is relied upon because of the statement in the opinion [p. 293] that "Wherever discrimination is, in fact, practiced, an order to remove it may issue; and the order may extend to every carrier who participates in inflicting the injury." This was said with respect to a mandate to three carriers serving Michigan City, each of which had refused to enter into interchange arrangements with an electric railroad. Their lines did not connect directly with the electric line, but required for interchange the service of an intermediate switching carrier. The order of the Commission was held proper because each defendant railroad was solely responsible for the prejudice resulting from its own refusal to maintain interchange arrangements with the electric line, and for the preference of maintaining such arrangements with other carriers at Michigan City. Each could, without reference to the conduct of any other, correct the unjust discrimination which it individually practiced. The very question here is whether the New Orleans lines in fact control the rates to the Texas ports and the Commission has answered it in the negative.

Principal reliance is placed upon *United States* v. *Illinois Central R. Co.,* and *Wyoming Ry. Co.* v. *United States,* 263 U.S. 515. In the first it appeared that the Illinois Central equalized rates on lumber to certain destinations from all its main and branch line points in blanket origin territory, and from points on certain independent short lines within the blanket area, but refused

to extend similar blanket rates to producing points on the Fernwood & Gulf, an independent short line serving the same area. The Illinois Central's excuse was that it could not afford to shrink its earnings by larger divisions to the Fernwood & Gulf. The complaint before the Commission was against both carriers and the Commission required that both should abate the unjust discrimination.[40]

In the second case it was shown that the Burlington published a blanket rate on lumber to destinations on a portion of its main line and to points located on its branch lines, but refused to join in an equal rate to a point on an independent branch line connected with the blanketed portion of the main line. The service to the latter point at the higher combination rate was less than was rendered to points on the Burlington's branch lines. The Commission ordered both carriers to abolish the undue preference and prejudice.[41]

It will be noted that in the one case the Illinois Central and in the other the Burlington made the one rate and was a party to the other. Not only so, but in each case the trunk line carrier controlled the joint or combination rate to or from the prejudiced locality. Quite clearly the independent line could not equalize that rate with the one in force to the preferred locality without the concurrence of the trunk line. Both railroads joined in the bill to enjoin enforcement of the order in the *Illinois Central* case, but only the independent carrier filed the bill in the *Burlington* case.

The appellees insist that as the orders ran against the independent road as well as the trunk line, and this court refused to set them aside, it necessarily follows that a carrier may be liable for unjust discrimination by virtue of its mere participation in one of the rates whether or

[40] Swift Lumber Co. *v.* F. & G. R. Co., 61 I.C.C. 485.

[41] Pioneer Lumber Co. *v.* Director General, 64 I.C.C. 485.

not it controls that rate. The argument ignores the substance and basis of the decision. The trunk line controlled both rates, and by its action alone could the disparity be corrected. But the short line was a party to one of the rates which created the illegal relation; and was therefore properly joined in the order. Compare *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 665. The fact, however, that the order included the short line is entirely insignificant on the question whether the same carrier in fact controlled both rates and was, in fact, responsible for the undue preference and prejudice. The contention of the short line that it did not participate in the discrimination because it did not join in the lower rates to the preferred locality maintained by the Illinois Central, and could not, therefore, by its own act, remove the discrimination, was properly overruled. As said by the court, that carrier, in joining the Illinois Central in establishing the prejudicial through rate, was as much a party to the discrimination as if it had also joined in the lower rates to the other points alleged to be unduly preferred. If Fernwood & Gulf could not persuade the Illinois Central to join in a new non-discriminatory rate and accord it a proper division, it had a plain remedy under § 15 of the Act. To make the decision a precedent for the instant case it would have to be found that the New Orleans carriers effectively controlled both the rates to New Orleans and those to the Texas ports. If they did, obviously an order might run not only against the New Orleans carriers but against their connections to the Texas ports, albeit the latter did not control those rates.

We find nothing in any of the decisions which renders inapplicable the principle upon which the Commission has acted, with the approval of this court, for more than forty years in the administration of § 3, and conclude that the New Orleans lines could not properly be held guilty of unjust discrimination against the Texas ports in the ab-

sence of a finding of effective participation in the rates to them.

3. The conclusions announced render it unnecessary to consider the other questions pressed by the appellants.

The judgment must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE STONE, dissenting.

The Interstate Commerce Commission, acting under § 3 (1) and § 15 (1), of the Interstate Commerce Act, 24 Stat. 379, as amended by Transportation Act, 1920, 41 Stat. 456, after extensive investigation, has found that the rates of rail carriers on commodities moving in import, export and coastwise transportation from or to points in Texas, Oklahoma and southern Kansas, and in Louisiana west of the Mississippi River were unduly prejudicial to Galveston and other Texas gulf ports and unduly preferential of New Orleans. Its order, framed to restrict, but not to remove entirely the discrimination, sustained by the District Court of three judges below, is now held void and set aside by this Court. I think that the order is within the competency of the Commission, is supported by the evidence, and should in all respects be upheld.

Stated generally, the discrimination complained of is the maintenance of rates by the rail carriers which give no recognition to the proximity of Galveston and other Texas ports to the interior points involved. The rates thus deprive the Texas ports of the natural advantage of their geographical position over that of a rival port, New Orleans; and as the commercial advantages of New Orleans exceed those of the Texas ports, the rates result in the diversion of traffic to the former from territory normally tributary to the latter. The Commission found that although the length of haul from the interior shipping

points to the Texas ports is less than that to New Orleans, the difference varying from 162 to 213 miles from typical points,[1] the carriers have long maintained the same, and in many instances substantially lower rates to New Orleans. In territory nearer to New Orleans than to the Texas ports, the lesser service has, on the other hand, been given recognition by correspondingly lower rates. The Commission has found, and it is not questioned, that transportation costs and conditions throughout the southwest territory are substantially the same; that the rates established by the carriers disregard generally and materially the amounts and costs of service; that the discrimination has deprived and will continue to deprive the Texas ports of the natural advantage of their more favorable geographical position, and has resulted and will continue to result in building up the port of New Orleans to their detriment and at their expense. The order assailed seeks to curtail this discrimination and the injury which it inflicts. It leaves undisturbed the lower rates in force to New Orleans from points nearer that city than Galveston and permits parity of rates where the distance to New Orleans does not exceed that to Galveston by more than 25%, but for differences in distance exceeding 25% it has named minimum differentials under the rates maintained to New Orleans.

In holding that the Commission is without power to make the order, the Court does not deny that a discrimination which is produced by charging equal rates for unequal service is prohibited by the statute as much as one resulting from unequal rates for equal service. Compare *The Shreveport Case,* 234 U.S. 342, 346. Nor does the Court consider material, in this respect, the findings

[1] The distances range from 162 miles from typical points in southern Kansas and 174 miles from typical points in Oklahoma to 213 miles from typical points in northern Texas. Waco is 233, Dallas 291, and Fort Worth 308 miles nearer Galveston than New Orleans.

of the Commission that the rates to Texas ports and New Orleans are both reasonable to shippers, in that the former are not too high, or the latter so low as to cast a burden on other traffic. For it is not denied that the Commission may remove a discrimination effected by rates which are within the zone of reasonableness if the discrimination is one forbidden by § 3 (1) of the Act. *American Express Co.* v. *Caldwell,* 244 U.S. 617; *United States* v. *Illinois Central Ry. Co.,* 263 U.S. 515, 524. It is not suggested that a discrimination effected by reasonable rates may not result in gross injury to the locality discriminated against; and the opinion does not question the correctness of the findings here that such injury is inflicted on the Texas ports by the prohibited rates. The issue is thus narrowed to two questions, first, whether the acts of Congress giving broad powers to the Commission to remove discriminations resulting in undue or unreasonable prejudice to a "locality," have conferred any power on the Commission to curtail an unduly prejudicial discrimination against a port, and second, whether, assuming that the Commission has such power, it may order the removal of the discrimination by the appellant carriers who participate in the discriminatory rates, although their rails reach only New Orleans, and not the Texas ports.

First. The Court holds that this power is lacking because the locality injured by the discrimination, a port, is neither the origin nor the ultimate destination of the traffic involved, but a gateway through which it passes, albeit it is arrested there pending its transshipment upon a new and independent contract for ocean transportation. It is said that a gateway is not a "locality" within the meaning of the Act because it was never intended that the statute should forbid discrimination against localities which are not points of origin or ultimate destination, however unreasonable and unjust the discrimination may be.

The words of the statute neither state nor suggest such an exception.

Section 3 (1) of the Interstate Commerce Act declares: "It shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 15 (1) gives to the Commission plenary power to remove any such "unjustly discriminatory or unduly preferential" individual or joint rate, by ordering the carrier or carriers to cease and desist from the violation, and by prescribing a just and reasonable individual or joint rate to be observed by the carrier or carriers concerned. On its face the prohibition of any undue and unreasonable prejudice to "any particular locality," "in any respect whatsoever," would seem so plainly to include a port as to leave no room for construction. Compare *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77; *Crooks* v. *Harrelson*, 282 U.S. 55; *Van Camp & Sons* v. *American Can Co.*, 278 U.S. 245, 253.

I can find nothing in the purpose or history of the statute which suggests that it means any less than it says. This Court has often declared that the purpose of the all-embracing language of the statute was to suppress every form of unreasonable discrimination which it was within the power of Congress to condemn. *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 512; *Louisville & Nashville R. Co.* v. *United States*, 282 U.S. 740, 749–750; *The Shreveport Case, supra*, 356; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U.S. 467. It has said that discrimination was the principal thing aimed at and "the

purpose of Congress was to cut up by the roots every form of discrimination, favoritism and inequality." *Louisville & Nashville R. Co.* v. *Mottley, supra,* 478.

Statutory language so unambiguous and a purpose so comprehensive do not readily yield to the conclusion that a locality which is a port is not a "locality" within the meaning of the Act. The bare fact that a port is a gateway and not the ultimate destination of the traffic, does not support that conclusion, for the commercial interests of a port, always of great magnitude, may suffer the same destruction from discriminatory rates as do shippers or other industrial interests at points of origin or destination. A rate structure which diverts from one port to another a portion of the ocean-borne traffic, which would otherwise naturally pass through the former, sufficient to destroy the business of banks, marine insurance companies, freight forwarders, freight and ship brokers, stevedores, tonnage companies, pilots, dry docks, ship supply and bunker coal merchants, customs brokers, export and import commission houses, centered there, would seem to have an effect upon the commerce and general welfare of the country of precisely the kind which the act was intended to prohibit and the Commission empowered to prevent. So the Commission has concluded in a series of cases dealing with discrimination against ports, going back to the first years of its existence. See N. Y. Produce Exch. *v.* B. & O. R. Co., 7 I.C.C. 612, 658, 660; In re Export and Domestic Rates, 8 I.C.C. 214; In re Differential Rates, 11 I.C.C. 13; Chamber of Commerce of N.Y. *v.* New York Central, 24 I.C.C. 55, 27 I.C.C. 238; Astoria *v.* S. P. & S. R. Co., 38 I.C.C. 16; In re Import Rates, 24 I.C.C. 78; New York Harbor Case, 47 I.C.C. 643; Mobile Chamber of Commerce *v.* Mobile & O. R. Co., 57 I.C.C. 554; Coffee from Galveston and other Gulf Ports, 58 I.C.C. 716; 64 I.C.C. 26; Charleston Traffic Bureau *v.* Ala. &

G. S. R. Co., 89 I.C.C. 501; Maritime Assn. of Boston *v.* Ann Arbor R. Co., 95 I.C.C. 539; Oswego *v.* B. & O. R. Co., 151 I.C.C. 717.

This administrative practice and construction cannot be dismissed with the observation that where "a statutory body has assumed a power plainly not granted no amount of such interpretation is binding upon the court," for the question obviously is whether or not a power was granted which the language of the statute plainly embraces and which certainly was not plainly denied. In determining that question when the meaning of the statute is doubtful on its face, we have often said that administrative construction is of persuasive force, see *United States* v. *Chicago North Shore & Milwaukee R. Co.*, 288 U.S. 1; *N.Y., N.H. & H.R. Co.* v. *Interstate Commerce Comm'n,* 200 U.S. 361, 401, particularly where, as here, the statute has been frequently amended and the provision relied upon retained in identical form. Compare *Brewster* v. *Gage,* 280 U.S. 327, 336; *National Lead Co.* v. *United States,* 252 U.S. 140, 147. This construction certainly cannot be summarily disregarded in favor of another which departs both from the plain meaning of the words and from the policy which has hitherto been thought to have inspired their use.

To support such a departure it is said that as the railroads, before the enactment of the statute, had in some instances attempted to equalize competing ports by setting up a rate structure which did not conform wholly to the carrier service involved, and as Congress, in the Interstate Commerce Act evinced no intention to prevent competition for business between rail carriers, it could not have intended by this legislation forbidding discrimination prejudicial to localities to forbid discriminations between rival ports, however unreasonable and injurious.

The port differentials and equalizations maintained prior to the passage of the original act, in order to secure

a fair distribution of traffic among the Atlantic ports and the carriers serving them, were very different in quality and prejudicial effect upon the localities concerned from the rate structure resulting in the discrimination disclosed here.[2] The existence of those equalizations before 1887 and the fact that in some instances since that date they have been regarded as innocuous even by the Commission itself, can hardly lend support to the supposition that the statute was not intended to forbid destructive discriminations in that form as well as in any other. The argument seems to be that the statute cannot be deemed to forbid unjust discriminations against ports since if it did all rates to competing ports not measured by mileage or carrier service would be forbidden whether unjust or not. With equal plausibility it was argued that because competition between carriers was an established practice before the enactment of § 3 and is not forbidden by the Act, no discrimination induced by carrier competition was forbidden. But that construction was rejected by this Court, *Wight* v. *United States,* 167 U.S. 512, 517; *United States* v. *Illinois Central R. Co., supra; Merchants Warehouse Co.* v. *United States, supra,* for the same reason that the present construction should be rejected—that although carrier competition was not destroyed by the Interstate Commerce Act, it was limited by the prohibition of § 3 of those discriminations which, in the light of all the circumstances, are found to be undue or unreasonable.

[2] Differentials were adopted by voluntary agreement of the carriers to eliminate competitive rate wars, ruinous to the railroads, and to the localities concerned. Their effect was to preserve rather than to destroy a fair distribution of the traffic from the west to the Atlantic Seaboard. See John B. Daish, Atlantic Port Differentials (1918); Preferential Transportation Rates, Report of the United States Tariff Commission, 1922, p. 279; cf. Commissioner Prouty, In the Matter of Differential Rates, 11 I.C.C. 13, 61 ff. and the briefs in the same case reprinted in the appendix to the hearings on the Hepburn Amendment before the Senate Committee on Interstate Commerce (1905), Vol. V, p. 407.

The statute does not purport to prohibit all discriminations. It reaches only those against either localities or shippers which result in prejudice which is "undue or unreasonable." Cf. *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U.S. 318, 322. Hence, in determining whether a discrimination involved in a port equalization is "undue or unreasonable," competition is a factor which may not be ignored (see *Interstate Commerce Comm'n* v. *Alabama Midland Ry.,* 168 U.S. 144, 170); the Commission is not to leave out of account either past history or practical experience, or the effect of the discrimination on the ports concerned. But even though the exigencies of competition may be entitled to greater consideration in a case of discrimination between ports than in one of discrimination between shippers, the weight which is given to it and to the other relevant facts, in determining whether the discrimination is so unjust as to be forbidden, does not go to the Commission's power but to the propriety of its exercise. *United States* v. *Illinois Central R. Co., supra,* 525; *Interstate Commerce Comm'n* v. *Alabama Midland Ry., supra.* That the Commission so conceives its powers and function in considering a rate adjustment equalizing ports, is apparent from its statement of the problem in the present case:

"Such an adjustment necessarily disregards distance and commercial instead of natural advantages control. We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but where, as here, it builds up one port at the expense of another equally favored by natural advantages from the origin territory here considered, a line must be found beyond which distance may not be disregarded."

This language of the Commission appears to me to suggest the only reasonable interpretation of the statute consonant with its language, its history and its background. The statute does not command or the Commission's order

direct that the rates shall be measured exclusively by mileage or carrier service; carrier competition for business passing through gateways or elsewhere is not forbidden; but when the discrimination goes so far beyond the line of reasonableness as to result in the commercial destruction of a locality, the Commission may declare it "undue or unreasonable" and, therefore, forbidden by the statute, whether aimed at ports or points of shipment or destination. Nothing that this Court has ever said is inconsistent with this conclusion. The legislative history of the statute seems to support, rather than to deny it.

Close scrutiny of the legislative history of the original act and of the Hepburn Amendment fails to disclose any intention to except from the forbidden discriminations against localities, undue or unreasonable discriminations against ports. Senator Cullom, who was in charge of the earlier bill, made no reference to the present question in his explanatory statement,[3] cited in the opinion of the

[3] With respect to § 3 Senator Cullom said: "The third section . . . contains a general prohibition of every variety of unjust discrimination. The section covers two subjects. The first paragraph prohibits the giving of any undue or unreasonable preference to any particular person or locality, or any particular description of traffic, in any respect whatever, and declares such a preference unlawful. . . . This covers in general terms, though by no means so completely, the provision of section 2 as to discriminations against persons, but goes further and includes discriminations against localities or particular descriptions of traffic. The language adopted in this paragraph is substantially that of the English statute on the subject which has been repeatedly construed by the English courts, so that its meaning has already been judicially established . . ." (Cong. Rec., 49th Cong., 1st Sess., vol. 17, p. 3472). It may not be without significance that the English antecedents of § 3, The Railway and Canal Traffic Act of 1854 (17 & 18 Vict., c. 31, § 2) and the Act of 1873, amending it (36 & 37 Vict., c. 48, § 11) failed to include preference of localities.

See also Senator Cullom's final answer to Senator Hoar's question whether the effect of § 4 of the proposed act, prohibiting the charging

Court,[4] and none is to be found in the House proceedings to which reference is also made.[5] Senator Cullom emphasized the fact that the discriminations forbidden included those against localities and nowhere suggested any exceptions. Mention in the Report of the Senate Committee of the investigation of a committee of the British Parliament and the quotation of its conclusions,[6] are without significance here. Those conclusions were not endorsed by the Senate Committee and did not deal with undue discriminations produced by railroad competition. It is true that in the debates in Congress on the Hepburn Amendment it was pointed out in several instances that the bill did not confer on the Commission the general

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of more for a shorter than a longer distance over the same line under substantially similar conditions, would not eliminate port differentials, then in existence, favoring Boston: ". . . if we are going to regulate these corporations at all, if we are going to stop unjust discriminations and the secret rebates by which towns are built up and towns are destroyed, by which individuals are destroyed and individuals are built up, we must have something in the bill which will mean something, or else we might as well lay the bill on the table and go at other business." (Cong. Rec., 49th Cong., 2d Sess., vol. 18, pp. 485, 486.) Compare his statement in discussing the conference report: "It has been said over and over again here that the railroad companies would build up one man and crush another; that their policy has been to destroy one locality or city and build up another. Here we have undertaken to so regulate them as to prevent them from doing those things so far as we can do so." (Cong. Rec., 49th Cong., 2d Sess., vol. 18, p. 660.)

[4] See the opinion of the Court, note 18.

[5] See Cong. Rec., 49th Cong., 1st Sess., vol. 17, pp. 7277, 7294, 7298.

[6] Report No. 46, 49th Cong., 1st Sess., p. 57. Compare the Committee's statement of the fundamental theory and purpose of the bill (p. 215): "The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation systems of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations. . . ."

power to fix differentials to ports or to any other points,[7] but it was also pointed out that "Section 3 of the original act applies just the same. We have not undertaken to amend, limit, or extend Section 3. Whatever is unjust and discriminatory under Section 3 is unjust under the provisions of this bill and such will be prohibited . . ."[8] Moreover the basis for this want of power to fix differentials was not that a port is not a "locality" within the meaning of § 3, but that differential rates on different roads cannot be fully controlled without the fixing of a minimum rate.[9] And it was recognized in the decisions of

[7] See Cong. Rec., 59th Cong., 1st Sess., vol. 40, pp. 1788, 2084-5, 2247, 2248, 3792, 6683.

[8] For the full quotation, see note 9, *infra*.

[9] Compare the statement of Mr. Stevens, a member of the House Committee: "My people are just as much interested that there should not be any undue control of differential rates. . . . But it is just as clear to us and to the whole committee that there is no such power in this bill. . . . The situation presented by the bill and the reasons why differentials are not covered are very simple. Under this bill the Commission would have authority to fix what, in its judgment, would be a just, reasonable, and fairly remunerative rate or rates as the maximum to be charged. It would have no authority to fix an absolute rate, which must be observed by the carrier, and no authority to fix a minimum rate, below which the carrier cannot go; and a preferential cannot be controlled without there is authority to control absolutely both legs of the differential. In this case the Commission cannot control either. It must fix a rate which shall be just and reasonable and fairly remunerative as the maximum to be charged. This leaves the carrier to charge anything it pleases below the maximum. And since there is no power to fix any absolute rate and no minimum rate, there is no power in the Commission to control the relation of rates, and so no power to control the differential." Mr. Olmsted then asked whether "under this bill the railroads may make as many unjust discriminations as they please and the Commission would be powerless to correct them." Mr. Stevens answered: "Oh, no; . . . Section 3 of the original act applies just the same. We have not undertaken to amend, limit, or extend section 3. Whatever is unjust and discriminatory under sec-

this Court prior to the enactment of Transportation Act, 1920, conferring the power to fix minimum rates, that unjust discriminations produced by the relation of rates charged or participated in by the same carrier might be forbidden by the Commission by lowering the higher rate, (compare *St. Louis S. W. Ry. Co.* v. *United States,* 245 U.S. 136, 144) or by an order which left the carrier free to raise or continue the lower rate; " the compulsion being that if the low rate is retained the rate applicable to the locality or article discriminated against must be reduced." *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 566.

Second. The Court also holds that even if a port is a " locality " within the meaning of the statute, and prejudicial discriminations against it are forbidden, still the Commission is without power to order the Texas & Pacific R.R. Co. and the Louisiana Railroad & Navigation Com-

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tion 3 is unjust under the provisions of this bill, and such will be prohibited; but we will not allow the making of a minimum or absolute rate, which is the only adequate way of controlling a differential." Cong. Rec., vol. 40, p. 2085. It does not appear that Mr. Mann's statement (Cong. Rec., vol. 40, p. 2247) quoted by the Court (note 20) was intended to have any different meaning. Indeed his reference to ports and to " cities " would seem to indicate that he did not believe that ports were in any different position with reference to differentials than points of origin or destination. See also Cong. Rec., vol. 40, p. 3792, and compare the remarks of Senator Lodge, Cong. Rec., vol. 40, p. 4111, which indicate, if anything, his belief that the differentials between Boston and other Atlantic ports were within the control of the Commission.

It was also pointed out that relative rates on *different* roads were not within the control of the Commission. In discussing differentials, Senator Raynor pointed out that the provisions of the bill " are limited to discriminations upon the same roads. The words ' unjustly discriminatory ' or ' unduly preferential ' or ' prejudicial ' apply to rates and regulations and practices upon the same road, because there can be no such thing as an unjust discrimination or an undue preference between different roads supplying different territory and terminating at different points. . . . If one road charges an un-

pany to remove the discrimination. Both these lines reach New Orleans with their own rails and both participate in through rates and a full line of joint rates between local and junction points on their own lines and the Texas ports. They thus control the rate to New Orleans and are parties to rates to the Texas ports and to the prejudicial discrimination. Nevertheless, it is said that the Commission is without power to make an order removing the discrimination which does not afford to the carriers an alternative method of removing it, either by lowering the rates to the Texas ports or raising those to New Orleans, and that the present order does not afford such an alternative because of the appellants' inability to control the rates to the Texas ports.

The Commission may, in directing the removal of a discriminatory rate or practice, not otherwise objection-

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reasonable rate or a discriminating rate, that would surely not justify the Commission's adjusting the rate between this road and some other road *that has no connection with it by law or privity of contract. . . .*" (Cong. Rec., vol. 40, p. 6683.) Read in the light of this statement, there is nothing to support the conclusion of the Court in the other statement of Senator Raynor referred to in the opinion (note 20) that there is no "power whatever in the Commission to adjust relative rates and strike the proper proportions between them. The ports of the United States, therefore, are not within the jurisdiction of the Hepburn Act. If there is a differential between different ports upon different lines of railroads, there is no provision in this measure that invests the Commission with the right to change it. It has a perfect right, of course, where discrimination exists upon the same line, as if a rate to an inland point compared with a rate to a terminal point is unreasonable or unjustly discriminatory, to prescribe a maximum rate; but it has no right to bring competitive roads struggling for competitive markets within its jurisdiction, and I deny in its entirety the proposition that the Commission could by any exercise of its power, direct or inferential, take away from any railroad its right to charge its own rates, unless the rate is unreasonable or unduly preferential or discriminatory upon its own line." (Cong. Rec., vol. 40, p. 3792.)

able, allow to the carrier a choice of methods of removing the discrimination by the modification of one rate or practice or the other. By the present order the two carriers are left free to remove the discrimination by raising the New Orleans rate which they control, or by entering into lower joint or through rates with the connecting carriers to the Texas ports—a latitude which may serve the interest of the carriers better than would an order specifically directing them to raise the New Orleans rates. Beyond question these roads can remove the discrimination by raising the New Orleans rates and it neither appears, nor is it argued, that they cannot remove it by lowering the rates to the Texas ports by agreement with their connecting carriers or, in default of agreement, by reducing their own division and securing a corresponding reduction of the joint rate on application to the Commission under § 15 (6). See *St. Louis Southwestern R. Co.* v. *United States,* 245 U.S. 136, 139, note 2; compare *United States* v. *Illinois Central R. Co., supra,* 521.

But the statute does not compel the Commission to afford such an alternative or permit an offending carrier to avoid its salutary provisions merely for the reason that, although participating in both the offending rates, it can with certainty control only one. It is true that in cases arising before the enactment of Transportation Act, 1920, by which power was given to the Commission to fix a minimum rate, it could not remove a discrimination by prescribing a minimum rate to one of the competing localities. But it could remove the discrimination by imposing a lower maximum rate, even though a joint rate participated in by the carrier whose rails did not reach the locality discriminated against, (compare *St. Louis Southwestern Ry. Co.* v. *United States, supra*) or, as already mentioned, it could leave the carriers free to remove the discrimination by raising one or lowering the other. See *American Express Co.* v. *Caldwell, supra,* 624; *United*

States v. *Pennsylvania R. Co.*, 266 U.S. 191. And now that the Commission has power under § 15 (1) to fix a minimum rate it may equally command the removal of the discrimination by directing a rate to be raised, just as where the carrier maintains discriminatory practices the Commission may direct the modification of one and not the other, and is not bound to allow the carrier a choice. *Merchants Warehouse Co.* v. *United States, supra,* 513; *New York, New Haven & Hartford R. Co.* v. *Interstate Commerce Comm'n, supra,* 404. The fact that the Commission has given to the carrier an option to remove the discrimination by arrangement with the connecting carriers, through which the traffic reaches the Texas ports, does not afford to the carrier any ground for complaint or impair the power of the Commission to make the order.

The situation here appears to be identical with that presented to this Court in *United States* v. *Illinois Central R. Co., supra,* and in *St. Louis Southwestern Ry. Co.* v. *United States, supra.* In both cases the carriers' rails reached one of the competing points only through its connections. In the first the order leaving the carrier free to remove the discrimination by raising one rate or lowering the other, and in the second an order requiring the carrier to remove the discrimination by establishing a lower joint rate with its connections, was upheld by this Court. In *St. Louis Southwestern Ry. Co.* v. *United States,* this Court said, page 144:

"Carriers insist also that the order is void on the ground that, since their 'rails do not reach Paducah, they cannot be guilty of discrimination against that city.' They, however, bill traffic via Cairo or Memphis through to Paducah in connection with the Illinois Central, thus reaching Paducah, although not on their own rails. And, thereby, they become effective instruments of discrimination. Localities require protection as much from combinations of connecting carriers as from single carriers whose 'rails'

reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it."

The judgment should be affirmed.

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO concur in this opinion.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* WELLS.

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

No. 792. Argued May 10, 1933.—Decided May 29, 1933.

1. Under § 219 (h) of the Revenue Acts of 1924 and 1926, where an irrevocable trust is established to pay for insurance on the settlor's life, collect the policy upon his death, and hold or apply the proceeds, under the trust, for the benefit of his dependents, income of the trust fund used by the trustee in paying the premiums, is taxable to the settlor as part of his own income. P. 675.
2. This tax is constitutional as applied to income accruing since the enactment of the legislation from trusts created earlier. Pp. 677, 682.
3. Refinements of title are without controlling force in determining whether a statute arbitrarily attributes to one person a taxable interest in the income of another. The question is not whether the concept of ownership reflected in the statute squares with common-law traditions, but rather whether that concept could reasonably be adopted because of privilege enjoyed or benefit derived by the taxpayer, some regard being had also to administrative convenience and the practical necessities of an efficient taxing system. P. 678.
4. To overcome this statute the taxpayer must show that in attributing to him the ownership of the income of the trusts, or something fairly to be dealt with as equivalent to ownership, the lawmakers have done a wholly arbitrary thing, have found equivalence where there was none nor anything approaching it, and laid a burden unrelated to privilege or benefit. P. 679.

5. Income permanently applied by the act of the taxpayer to the maintenance of contracts of insurance made in his name for the support of his dependents is income used for his benefit in such a sense and to such a degree that there is nothing arbitrary or tyrannical in taxing it as his. P. 679.

63 F. (2d) 425, reversed.

CERTIORARI* to review the reversal, in part, of a ruling of the Board of Tax Appeals, 19 B.T.A. 1213, upholding certain assessments of income.

Mr. Erwin N. Griswold, with whom *Solicitor General Thacher, Miss Helen R. Carloss,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. J. S. Y. Ivins, with whom *Messrs. Kingman Brewster, Percy W. Phillips,* and *Richard B. Barker* were on the brief, for respondent.

Mr. Wells, throughout the taxable years involved, had no interest in the corpus or income of the trusts nor in the life insurance policies. Section 219 (h) of the Revenue Acts of 1924 and 1926 is unconstitutional in attempting to tax him upon the income of the trusts, for Congress is limited by the Fifth Amendment in the same manner that state legislatures are limited by the Fourteenth Amendment. *Heiner* v. *Donnan,* 285 U.S. 312. And a State can not tax one person on the income of another. *Hoeper* v. *Wisconsin Tax Comm'n,* 284 U.S. 206. The situation is entirely different from that in *Reinecke* v. *Smith,* 289 U.S. 172, and *Porter* v. *Commissioner,* 288 U.S. 436, where the settlor retained power to revoke the trust or to completely revise it and make different disposition of the property, but is similar to *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339, where, the title having been put beyond the control of the settlor, the property was no longer a part of his estate.

* See Table of Cases Reported in this Volume.

The capriciousness of the tax is demonstrated in the Revenue Act of 1932, under which a gift tax is imposed in cases such as this in addition to the income tax.

The trusts were in no sense testamentary. *Nichols* v. *Coolidge,* 274 U.S. 531, 540. And the trust property could not have been taxed as a part of Wells's estate. *Coolidge* v. *Long,* 282 U.S. 582; *Lewellyn* v. *Frick,* 268 U.S. 238. The fact that the purposes served by the trusts were the settlor's purposes does not render him taxable.

A gift from B to A is not taxable as income to A, whether paid directly to A or in discharge of A's obligation to C. Distinguishing: *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716; Adams v. Commissioner, 18 B.T.A. 381; and Danforth v. Commissioner, 18 B.T.A. 1221; *United States* v. *Boston & Maine R. Co.,* 279 U.S. 732; *United States* v. *Mahoning Coal R. Co.,* 51 F. (2d) 208.

The fact that the settlor discharged a moral obligation does not render him taxable on the income any more than if he had discharged it by a direct gift to the beneficiaries.

There is no evasion in electing a method of managing one's affairs which will result in no tax liability. Congress is not at liberty to violate the Constitution in its effort to prevent such avoidance.

Since these trusts were created irrevocably before the effective date of the first statute, the subject thereof was no part of the estate of Mr. Wells. *Nichols* v. *Coolidge,* 274 U.S. 531, 542–3. And "the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income." *Reinecke* v. *Smith,* 289 U.S. 172.

Mr. Justice Cardozo delivered the opinion of the Court.

Income of a trust has been reckoned by the taxing officers of the Government as income to be attributed to

the creator of the trust in so far as it has been applied to the maintenance of insurance on his life. Section 219 (h) of the Revenue Acts of 1924 and 1926 permits this to be done. The question is whether as applied to this case the acts are constitutional.

On December 30, 1922, the respondent, Frederick B. Wells, created three trusts, referred to in the record as numbers 1, 2 and 3, and on August 6, 1923, two additional ones, numbers 4 and 5, all five being irrevocable.

By trust number 1, he assigned certain shares of stock of the par value of $100,000 to the Minneapolis Trust Company as trustee. The income of the trust was to be used to pay the annual premiums upon a policy of insurance for $100,000 on the life of the grantor. After the payment of the premiums, the excess income, if any, was to be accumulated until an amount sufficient to pay an additional annual premium had been reserved. Any additional income was, in the discretion of the trustee, to be paid to a daughter. Upon the death of the grantor, the trustee was to collect the policy, and with the proceeds was to buy securities belonging to the Wells estate amounting to $100,000 at their appraised value. The securities so purchased, which were a substitute for the cash proceeds of the policy, were to be held as part of the trust during the life of the daughter, who was to receive the income. On her death the trust was to end, and the corpus was to be divided as she might appoint by her will, and, in default of appointment or issue, to the grantor's sons.

The other trusts carried out very similar plans, though for the use of other beneficiaries. Thus, trust number 2 had in view the preservation of a policy of life insurance which was to be held when collected for the use of one Lindstrom, said to be a kinswoman. Trust number 3 was directed to the maintenance of four policies of insurance for named beneficiaries, three of them relatives of the

grantor and one a valued employee, who later became his wife. Trust number 4 kept alive seven policies of life insurance which had been taken out by the grantor for the use of sons and daughter, and three accident policies for his own use. Trust number 5 kept alive nine life policies for his sons and daughter, and two accident policies for himself. Several of the deeds made provision for contingent limitations for the benefit of charities.

The grantor in making the returns of his own income for the years 1924, 1925, and 1926, did not include any part of the income belonging to the trusts. Upon an audit of the returns the Commissioner of Internal Revenue assessed a deficiency to the extent that the income of the trusts had been applied to the payment of premiums on the policies of insurance. There was no attempt to charge against the taxpayer the whole income of the trusts, to charge him with the excess applied to other uses than the preservation of the policies. The deficiency assessment was limited to that part of the income which had kept the policies alive. The Board of Tax Appeals upheld the Commissioner. 19 B.T.A. 1213. The Circuit Court of Appeals reversed except as to the premiums on the policies of accident insurance, those policies, in the event of loss thereunder, being payable to the insured himself. As to the income applied to the maintenance of the policies of life insurance, payable, as they were, to persons other than the insured or his estate, the Court of Appeals held that an assessment could not be made against the creator of the trust without an arbitrary taking of his property in violation of the Fifth Amendment. 63 F. (2d) 425. Section 219 (h) of the Revenue Acts of 1924 and 1926, permitting such an assessment, was adjudged to be void. The court drew no distinction between the validity of the statute in its application to trusts in existence at the time of its enactment and its validity in

application to trusts to be created afterwards. A writ of certiorari brings the case here.

The meaning of the statute is not doubtful, whatever may be said of its validity. "Where any part of the income of a trust is or may be applied to the payment of premiums upon policies on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214 [the exception having relation to trusts for charities]), such part of the income of the trust shall be included in computing the net income of the grantor." Section 219 (h), Revenue Act of 1924, c. 234; 43 Stat. 253; 26 U.S. Code, § 960; Revenue Act of 1926, c. 27, 44 Stat. 9; 26 U.S. Code App., § 960.

The purpose of the law is disclosed by its legislative history, and indeed is clear upon the surface. When the bill which became the Revenue Act of 1924 was introduced in the House of Representatives, the Report of the Committee on Ways and Means made an explanatory statement. Referring to § 219 (h) it said: "Trusts have been used to evade taxes by means of provisions allowing the distribution of the income to the grantor or its use for his benefit. The purpose of this subdivision of the bill is to stop this evasion." House Report, No. 179, 68th Congress, 1st Session, p. 21. There is a like statement in the Report of the Senate Committee on Finance. Senate Report, No. 398, 68th Congress, 1st Session, pp. 25, 26. By the creation of trusts, incomes had been so divided and subdivided as to withdraw from the Government the benefit of the graduated taxes and surtaxes applicable to income when concentrated in a single ownership. Like methods of evasion, or, to speak more accurately, of avoidance (*Bullen* v. *Wisconsin,* 240 U.S. 625, 630), had been used to diminish the transfer or succession taxes payable at death. One can read in the revisions of the revenue

acts the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens.

A method, much in vogue until an amendment made it worthless, was the creation of a trust with a power of revocation. This device was adopted to escape the burdens of the tax upon incomes and the tax upon estates. To neutralize the effect of the device in its application to incomes, Congress made provision by § 219 (g) of the Revenue Act of 1924 that "where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." The validity of this provision was assailed by taxpayers. It was upheld by this court in *Corliss* v. *Bowers,* 281 U.S. 376, as applied to a trust in existence at the enactment of the statute, the power of revocation in that case being reserved to the grantor alone, and recently, at the present term, was upheld where the power of revocation had been reserved to the grantor in conjunction with some one else. *Reinecke* v. *Smith, ante,* p. 172. Cf. *Burnet* v. *Guggenheim,* 288 U.S. 280. Other amendments of the statute were directed to the trust as an instrument for the avoidance of the tax upon estates. By § 302 (d) of the Revenue Act of 1924, 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." The validity of this provision as to trusts both past and future is no longer open to debate. *Porter* v. *Commissioner,* 288 U.S. 436. Cf. *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339; *Chase National Bank* v. *United States,* 278 U.S. 327; *Saltonstall* v. *Saltonstall,* 276 U.S. 260. Through the devices thus neutralized as well as through many others there runs a common thread of purpose. The solidarity of the family is to make it possible for the taxpayer to surrender title to another and to keep dominion for himself, or if not technical dominion, at least the substance of enjoyment. At times escape has been blocked by the resources of the judicial process without the aid of legislation. Thus, *Lucas* v. *Earl,* 281 U.S. 111, held that the salary earned by a husband was taxable to him, though he had bound himself by a valid contract to assign it to his wife. *Burnet* v. *Leininger,* 285 U.S. 136, laid down a like rule where there had been an assignment by a partner of his interest in the future profits of a partnership. *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, and *United States* v. *Boston & Maine R. Co.,* 279 U.S. 732, held that income was received by a taxpayer when pursuant to a contract a debt or other obligation was discharged by another for his benefit, the transaction being the same in substance as if the money had been paid to the debtor and then transmitted to the creditor. Cf. *United States* v. *Mahoning Coal R. Co.,* 51 F. (2d) 208. In these and other cases there has been a progressive endeavor by the Congress and the courts to bring about a correspondence between the legal concept of ownership and the economic realities of enjoyment or fruition. Of a piece with that endeavor is the statute now assailed.

The controversy is one as to the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedanti-

cally, in slavery to forms or phrases. "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, supra,* p. 378. Cf. *Burnet* v. *Guggenheim, supra,* p. 283. Refinements of title have at times supplied the rule when the question has been one of construction and nothing more, a question as to the meaning of a taxing act to be read in favor of the taxpayer. Refinements of title are without controlling force when a statute, unmistakable in meaning, is assailed by a taxpayer as overpassing the bounds of reason, an exercise by the lawmakers of arbitrary power. In such circumstances the question is no longer whether the concept of ownership reflected in the statute is to be squared with the concept embodied, more or less vaguely, in common law traditions. The question is whether it is one that an enlightened legislator might act upon without affront to justice. Even administrative convenience, the practical necessities of an efficient system of taxation, will have heed and recognition within reasonable limits. *Milliken* v. *United States,* 283 U.S. 15, 24, 25; *Reinecke* v. *Smith, supra.* Liability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most favored owner at a given time or place. *Corliss* v. *Bowers, supra; Reinecke* v. *Smith, supra.* Government in casting about for proper subjects of taxation is not confined by the traditional classification of interests or estates. It may tax not only ownership, but any right or privilege that is a constituent of ownership. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249, 268; *Bromley* v. *McCaughn,* 280 U.S. 124, 136. Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis. A margin must be allowed for the play of legisla-

tive judgment. To overcome this statute the taxpayer must show that in attributing to him the ownership of the income of the trusts, or something fairly to be dealt with as equivalent to ownership, the lawmakers have done a wholly arbitrary thing, have found equivalence where there was none nor anything approaching it, and laid a burden unrelated to privilege or benefit. *Purity Extract & Tonic Co.* v. *Lynch,* 226 U.S. 192, 204; *Hebe Co.* v. *Shaw,* 248 U.S. 297, 303; *Milliken* v. *United States, supra.* The statute, as we view it, is not subject to that reproach.*

A policy of life insurance is a contract susceptible of ownership like any other chose in action. It "is not an assurance for a single year with a privilege of renewal from year to year by paying the annual premium." It is "an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums." *N.Y. Life Insurance Co.* v. *Statham,* 93 U.S. 24, 30; Vance on Insurance, pp. 260, 262, and cases there cited. One who takes out a policy on his own life, after application in his own name accepted by the company, becomes in so doing a party to a contract, though the benefits of the insurance are to accrue to some one else. *Mutual Life Ins. Co.* v. *Hurni Packing Co.,* 263 U.S. 167, 177; Vance on Insurance, pp. 90, 91 and 108. The rights and interests thereby generated do not inhere solely in those who are to receive the proceeds. They inhere also in the insured who in coöperation with the insurer has brought the contract into being. If the Minneapolis Trust Company, the trustee, were to refuse to apply the income to the preservation of the insurance,

* The trusts, having been created in 1922 and 1923, were not subject to the gift tax of 1924, 43 Stat. 253, 313, c. 234, §§ 319, 320; 26 U.S. Code, §§ 1131, 1132. Whether they would have been subject to that tax if they had been created at a later date is a question not before us. There is no inconsistency between a gift to take effect in enjoyment upon the death of a grantor and the reservation of benefits to be enjoyed during his life.

the insured might maintain a suit to hold it to its duty. If the insurer without cause were to repudiate the policies, the insured would have such an interest in the preservation of the contracts that he might maintain a suit in equity to declare them still in being. *Cohen* v. *N.Y. Mut. L. Ins. Co.*, 50 N.Y. 610, 624; *Meyer* v. *Knickerbocker L. Ins. Co.*, 73 N.Y. 516, 524; *Fidelity National Bank* v. *Swope*, 274 U.S. 123, 132; cf. *Croker* v. *N.Y. Trust Co.*, 245 N.Y. 17, 18, 20; 156 N.E. 81; *Johnson Service Co.* v. *Monin, Inc.*, 253 N.Y. 417, 421; 171 N.E. 692; American Law Institute, Restatement of the Law of Contracts, §§ 135, 138; Williston, Contracts, §§ 358, 359. The contracts remain his, or his at least in part, though the fruits when they are gathered are to go to some one else. American Law Institute, Restatement of the Law of Contracts, *supra*.

With the aid of this analysis the path is cleared to a conclusion. Wells, by the creation of these trusts, did more than devote his income to the benefit of relatives. He devoted it at the same time to the preservation of his own contracts, to the protection of an interest which he wished to keep alive. The ends to be attained must be viewed in combination. True he would have been at liberty, if the trusts had not been made, to put an end to his interest in the policies through nonpayment of the premiums, to stamp the contracts out. The chance that economic changes might force him to that choice was a motive, along with others, for the foundation of the trusts. In effect he said to the trustee that for the rest of his life he would dedicate a part of his income to the preservation of these contracts, so much did they mean for his peace of mind and happiness. Income permanently applied by the act of the taxpayer to the maintenance of contracts of insurance made in his name for the support of his dependents is income used for his benefit in such a sense and to

such a degree that there is nothing arbitrary or tyrannical in taxing it as his.

Insurance for dependents is today in the thought of many a pressing social duty. Even if not a duty, it is a common item in the family budget, kept up very often at the cost of painful sacrifice, and abandoned only under dire compulsion. It will be a vain effort at persuasion to argue to the average man that a trust created by a father to pay premiums on life policies for the use of sons and daughters is not a benefit to the one who will have to pay the premiums if the policies are not to lapse. Only by closing our minds to common modes of thought, to every-day realities, shall we find it in our power to form another judgment. The case is not helped by imagining exceptional conditions in which the advantage to the creator of the trust would be slender or remote. By and large the purpose of trusts for the maintenance of policies is to make provision for dependents, or so at least the law-makers might not unreasonably assume. Trusts to give insurance to creditors are beneficial to the grantor by reducing his indebtedness. Trusts for charities are expressly excepted from the operation of the tax. § 219 (h); § 214 (a)(10). If other classes of life policies exist, they must be relatively few. The line of division between the rational and the arbitrary in legislation is not to be drawn with an eye to remote possibilities. What the law looks for in establishing its standards is a probability or tendency of general validity. If this is attained, the formula will serve, though there are imperfections here and there. The exceptional, if it arises, may have its special rule. *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282, 289.

Trusts for the preservation of policies of insurance involve a continuing exercise by the settlor of a power to direct the application of the income along predetermined

channels. In this they are to be distinguished from trusts where the income of a fund, though payable to wife or kin, may be expended by the beneficiaries without restraint, may be given away or squandered, the founder of the trust doing nothing to impose his will upon the use. There is no occasion at this time to mark the applicable principle for those and other cases. The relation between the parties, the tendency of the transfer to give relief from obligations that are recognized as binding by normal men and women, will be facts to be considered. Cf. *Reinecke* v. *Smith, supra,* distinguishing *Hoeper* v. *Tax Commission,* 284 U.S. 206. We do not go into their bearing now. Here the use to be made of the income of the trust was subject, from first to last, to the will of the grantor announced at the beginning. A particular expense, which for millions of men and women has become a fixed charge, as it doubtless was for Wells, an expense which would have to be continued if he was to preserve a contract right, was to be met in a particular way. He might have created a blanket trust for the payment of all the items of his own and the family budget, classifying the proposed expenses by adequate description. If the transaction had taken such a form, one can hardly doubt the validity of a legislative declaration that income so applied should be deemed to be devoted to his use. Instead of shaping the transaction thus, he picked out of the total budget an item or class of items, the cost of continuing his contracts of insurance, and created a source of income to preserve them against lapse.

Congress does not play the despot in ordaining that trusts for such uses, if created in the future, shall be treated for the purpose of taxation as if the income of the trust had been retained by the grantor.

It does not play the despot in ordaining a like rule as to trusts created in the past, at all events when in so doing it does not cast the burden backward beyond the income

of the current year. *Reinecke* v. *Smith, supra; Corliss* v. *Bowers, supra; Brushaber* v. *Union Pacific R. Co.,* 240 U.S. 1; *Cooper* v. *United States,* 280 U.S. 409, 411; *Milliken* v. *United States, supra.*

The judgment is

Reversed.

MR. JUSTICE SUTHERLAND, dissenting.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and I think otherwise.

The powers of taxation are broad, but the distinction between taxation and confiscation must still be observed. So long as the Fifth Amendment remains unrepealed and is permitted to control, Congress may not tax the property of A as the property of B, or the income of A as the income of B.

The facts here show that Wells created certain irrevocable trusts. He retained no vestige of title to, interest in, or control over, the property transferred to the trustee. The result was a present, executed, outright gift, which could then have been taxed to the settlor. *Burnet* v. *Guggenheim,* 288 U.S. 280. That the property which was the subject of the gift could never thereafter, without a change of title, be taxed to the settlor is, of course, too plain for argument. To establish the contention that the income from such property, the application of which for the benefit of others had been irrevocably fixed, is nevertheless the income of the settlor and may lawfully be taxed as his property, requires something more tangible than a purpose to perform a social duty, or the recognition of a moral claim as distinguished from a legal obligation, which, we think, is not supplied by an assumption of his desire thereby to secure his own peace of mind and happiness or relieve himself from further concern in the matter. If the trusts in question had irrevocably devoted the income

to charitable purposes, to the cause of scientific research, or to the promotion of the spread of religion among the heathen, and the statute had authorized its taxation, probably no thoughtful person would have insisted that the relation of the settlor to the benefaction was such as constitutionally to justify the tax against him. And yet in each of these supposed cases it would not be hard to find a purpose to discharge a social duty, or unreasonable to assume the desire of the settlor thereby to enjoy the mental comfort which is supposed to follow the voluntary performance of righteous deeds.

If there be any difference between the cases supposed and the present one, it is a difference without real substance. In each the motive of the taxpayer is immaterial. The material question is, what has he done?—not, why has he done it?—however pertinent the latter query might be in a different case. Obviously, as it seems to us, the distinction to be observed is between the devotion of income to payments which the settlor is bound to make, and to those which he is free to make or not make, as he may see fit. In the former case the payments have the substantial elements of income to the settlor. In the latter, whatever may be said of the moral influence which induced the settlor to direct the payments, they are income of the trustee for the benefit of others than the settlor.

It is not accurate, we think, to say that these trusts involve the continuing exercise by the settlor of a power to direct the application of the income along predetermined channels. The exertion of power on the part of the settlor to direct such application begins and ends with the creation of the irrevocable trusts. Thereafter, the power is to be exercised automatically by the trustee under a grant which neither he nor the settlor can recall or abridge. The income, of course, is taxable, but to the trustee, not to the settlor. The well reasoned opinion of

the court below, which fully sustains respondent's contention here, renders it unnecessary to discuss the matter at greater length. We think that opinion should be sustained. It finds ample support in *Hoeper* v. *Tax Commission,* 284 U.S. 206, 215; *Heiner* v. *Donnan,* 285 U.S. 312, 326; and other decisions of this court.

DuPONT *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 791. Argued May 10, 1933.—Decided May 29, 1933.

1. Section 219 (h) of the Revenue Acts of 1924 and 1926, taxing incomes of trust funds as income of the settlor, when applied to payment of premiums on policies insuring his life for the benefit of the trust beneficiaries,—held valid under *Burnet* v. *Wells, ante,* p. 670. P. 687.
2. One who conveys securities in trust to keep up insurance on his life for the benefit of others, but reserves the right to retake the securities at the end of a stated period if he survives, retains such an interest in the securities, apart from his interest in having the premiums paid, that the income from the securities applied to the premiums during the trust period may constitutionally be taxed as his own. P. 688.

63 F. (2d) 44, affirmed.

CERTIORARI* to review a judgment which affirmed a decision, 20 B.T.A. 482, sustaining an assessment on income.

Mr. J. S. Y. Ivins, with whom *Messrs. Kingman Brewster, Percy W. Phillips,* and *Richard B. Barker* were on the brief, for petitioner.

Petitioner, at the time of the enactment of the Revenue Act of 1924, and throughout the taxable years in-

* See Table of Cases Reported in this Volume.

volved, had no interest in the corpus or income of the trusts, and had no interest in the life insurance policies. The transfer of the policies was not temporary, but permanent and absolute. *Coolidge* v. *Long,* 282 U.S. 582, 602.

The collection of the tax would be unconstitutional. *Hoeper* v. *Tax Comm'n,* 284 U.S. 206; *Heiner* v. *Donnan,* 285 U.S. 312; *Knowlton* v. *Moore,* 178 U.S. 41; *Hartman* v. *Greenhow,* 106 U.S. 642.

Petitioner relieved himself from a moral obligation to carry insurance for the beneficiaries; but he did this by making a gift and parting with the beneficial ownership of the policies (permanently) and of the corpus of the trust fund (for the period of the trust). The fallacy of the argument that relief from a moral obligation constitutes taxable income can be readily seen by applying it to other situations.

Hoeper v. *Wisconsin Tax Comm'n,* 284 U.S. 206, was not decided upon the ground that the principal which yielded Mrs. Hoeper's income had never been the property of Mr. Hoeper, but upon the ground that it was not his property at the time when it yielded the income which was the subject of the tax. Present ownership of the corpus (or a power of disposition thereof equivalent to ownership) may be a basis for the taxation of income, but past ownership of a corpus is not more a proper basis for taxation of income than it would be for the inclusion of the corpus in the taxable estate of a decedent.

The fact that the settlor had a reversion in the corpus does not render him taxable on the income during the prior term. Nail *v.* Commissioner, 27 B.T.A. 33. The trustee was, for the term of the trust, unquestionably the owner of both corpus and income for the uses mentioned in the trust agreement. *United States* v. *Looney,* 29 F. (2d) 884, 885.

The extension of the trust from December 18, 1926, was similar to the creation of a new trust.

Mr. Erwin N. Griswold, with whom *Solicitor General Thacher, Miss Helen R. Carloss,* and *Mr. Sewall Key* were on the brief, for respondent.

Mr. Justice Cardozo delivered the opinion of the Court.

This case, like *Burnet* v. *Wells,* decided today, *ante,* p. 670, requires us to determine whether § 219 (h) of the Revenue Acts of 1924 and 1926 is consistent with the Fifth Amendment in its application to trusts for the payment of premiums on policies of insurance.

On September 18, 1923, the petitioner, Du Pont, created nine trusts for the benefit of his wife and children, transferring to the trustee thereby two policies of insurance on his life, and shares of stock in a corporation, the income to be used to keep the policies in force. The trusts were to last for three years, during which term they were to be irrevocable. At the end of the term, they might be extended for a like period at the option of the settlor, and successively thereafter. Two such notices were given, with the result that in 1924, 1925, and 1926, the taxable years involved in this proceeding, the trusts were still in being.

The deeds make provision for the disposition of the policies and separate provision for the disposition of the shares.

As to the policies, the provision is that if the trusts shall be terminated before the petitioner's death, all interest in the policies shall vest in certain named beneficiaries. The petitioner is not one of these, nor has he any power to change them. If the petitioner shall die while the trusts are still in force, the trustee is to collect the insurance, and to hold the proceeds in trust for the use of the beneficiaries named in the agreements.

As to the shares of stock, the provision is that if the trusts shall be terminated before the petitioner's death, the shares and any income not paid out shall be transferred to the petitioner. If, however, he shall die while the trusts are still in force, the shares are to be divided among the children or their issue.

The Commissioner of Internal Revenue, following the command of § 219 (h) of the applicable statutes (Revenue Acts of 1924 and 1926; c. 234, 43 Stat. 253; 26 U.S. Code, § 960; c. 27, 44 Stat. 9; 26 U.S. Code App., § 960) made a deficiency assessment by adding to the taxpayer's income the amount expended by the trustee in the preservation of the policies. The Board of Tax Appeals sustained the assessment, 20 B.T.A. 482, and the Court of Appeals for the Third Circuit affirmed. 63 F. (2d) 44. A writ of certiorari was granted by this court.

The case is ruled by our judgment in *Burnet* v. *Wells, ante,* p. 670, upholding the validity of the contested statute. If the income of such a trust may be taxed to the grantor though he has retained to himself no reversionary interest in the principal of the trust, *a fortiori* that result must follow where he has made a grant of the estate for a short term of years, reserving the reversion when the term is at an end.

The provisions of these deeds would require a determination in favor of the Government, though *Burnet* v. *Wells* had been decided the other way. "A statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282, 289. Here the grantor did not divest himself of title in any permanent or definitive way, did not strip himself of every interest in the subject matter of the trust estate. During a term of three years, the trustee was to apply the income to the preservation of the policies, and while thus applying the income was to hold the prin-

cipal intact for return to the grantor unless instructed to retain it longer. The situation in its legal effect would not be greatly different if the trusts had been created for a month or from day to day. One who retains for himself so many of the attributes of ownership is not the victim of despotic power when for the purpose of taxation he is treated as owner altogether.

The judgment is *Affirmed.*

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concur upon the reasons stated in the last paragraph.

SINCLAIR REFINING CO. *v.* JENKINS PETROLEUM PROCESS CO.

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

No. 752. Argued May 11, 12, 1933.—Decided May 29, 1933.

1. A bill of discovery will lie in a federal court to aid in proving damages of the plaintiff in an action on the law side, if the complication of accounts or other practical impediments make it necessary that the evidence be sifted in advance of the jury trial. P. 693.
2. Granting of this remedy is discretionary; and the party against whom it is sought will be protected from impertinent intrusion into his business affairs. P. 696.
3. In the present case discovery was sought in good faith and on probable cause, and the defendant was properly protected by a decree limiting the discovery in advance of trial to general facts, but providing that the bill be retained for fuller inspection of records, etc., without delay, in case of need. P. 697.
4. In an action at law to recover the damages resulting from the breach of a contract to assign an application for a patent, the use made by the defendant of the patented device, after the breach of contract, may be considered in appraising the value of the invention as of the time of the breach. P. 697.

62 F. (2d) 663, affirmed.

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CERTIORARI* to review the reversal of a decree, 56 F. (2d) 272, dismissing a bill of discovery in aid of an action at law to recover damages for breach of a contract to assign an application for a patent. For earlier phases, see 32 F. (2d) 247; *id.*, 252.

Mr. Dean S. Edmonds, with whom *Mr. Frank E. Barrows* was on the brief, for petitioner.

Mr. C. Stanley Thompson, with whom *Mr. Frederick Schafer* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A bill of discovery in aid of an action at law was dismissed by the District Court, 56 F. (2d) 272, but upheld upon appeal by the Circuit Court of Appeals. 62 F. (2d) 663. The question is whether the bill is good upon its face.

The respondent, Jenkins Petroleum Process Company, loaned to the petitioner, Sinclair Refining Company, then known as the Cudahy Refining Company, an experimental still for cracking petroleum oils to produce gasoline. By written agreement, any improvements developed as the result of the work of the petitioner's engineers and experts in making themselves familiar with the Jenkins apparatus or process were to belong to the respondent. The petitioner, or its predecessor, undertook, so far as it was able, to cause its employees to execute applications for patents in the United States and elsewhere in order to protect such improvements, and to assign the applications to the petitioner together with the improvements affected thereby.

In January, 1921, the respondent filed a bill in equity for specific performance. Isom, an employee of the peti-

* See Table of Cases Reported in this Volume.

tioner, applied for a patent on September 10, 1917, and when the patent was issued on November 19, 1918, assigned it to his employer. The respondent made claim to the patent on the ground that it was an improvement of the Jenkins invention. After a trial upon the merits, the bill for specific performance was dismissed, the court holding that there was doubt whether Isom's invention was the outcome of his use of the Jenkins apparatus, or of independent thought and knowledge. 32 F. (2d) 247. There was an appeal from the decree to the Circuit Court of Appeals for the First Circuit. That court invoked the principle that to uphold a decree for specific performance there must be clear and convincing evidence, and not merely such evidence as would sustain a recovery at law. In that view the decree was affirmed in so far as it dismissed the prayer for equitable relief, but the dismissal was coupled with a direction that the cause be transferred to the law side of the court, the plaintiff to have leave to amend by turning his cause of action into one for the recovery of damages. 32 F. (2d) 252.

The action at law is now at issue, and the plaintiff prays for a discovery. It alleges in its bill that the evidence of the facts to be discovered is contained in voluminous books and documents which could not be inspected or proved upon a trial at law for damages without confusion and delay. Discovery is demanded as to the number of cracking stills constructed by the defendant under the Isom patent; as to the extent and time of operation; and as to the amount of gasoline and other petroleum products yielded thereby, with an inspection of the relevant designs and drawings. The District Court granted a motion to dismiss the bill, placing its decision upon two grounds, (1) that a bill of discovery will not lie when the facts to be discovered relate to damages only, and (2) that the value of the patents has no relation to the sales of the patented device, and that evidence of such sales

would be inadmissible if offered. The Court of Appeals reversed, one judge dissenting. In the view of the majority of the court, the damages to be recovered in an action at law may be proved by resort to a discovery in equity, if the ancillary remedy is reasonably necessary to advance the ends of justice. *Munger* v. *Firestone Tire & Rubber Co.*, 261 Fed. 921, and *Loose* v. *Bellows Falls Pulp Plaster Co.*, 266 Fed. 81, were disapproved to the extent that they involve a ruling to the contrary. As to the measure of damages, and the evidence pertinent thereto, the court held that the plaintiff was not concerned with the defendant's profits, since it was suing for breach of contract, and not as equitable owner. Even so, in ascertaining the value of the patent at the time of the breach, the triers of the facts would be at liberty to consider the commercial use that had been made of the patented device. The court went on to indicate restrictions as to the order of proof which were thought to be appropriate. At first and as part of the case in chief, the plaintiff was to be confined within rather narrow limits. It might show "the general facts about the Isom invention, not specific instances of profitable use by this person or that." The need for greater detail, however, might develop with the trial. "If . . . the defendant should deny the utility and commercial success of the invention, evidence of the defendant's use of it might be highly significant; and under those circumstances the plaintiff would be entitled to discovery of them." The information to be exacted of the defendant was thus, in the view of the court, to be adjusted to the need. To permit that adjustment the bill was to be retained until the trial, and prompt discovery would then be ordered if the situation thus developed should call for that relief. A writ of certiorari prayed for by the defendant, has brought the case here.

1. The remedy of discovery is as appropriate for proof of a plaintiff's damages as it is for proof of other facts essential to his case.

Help for the solution of problems of this order is not to be looked for in restrictive formulas. Procedure must have the capacity of flexible adjustment to changing groups of facts. The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger rôle. The rationale of the remedy, when used as an auxiliary process in aid of trials at law, is simplicity itself. At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance. When this necessity is made out with reasonable certainty, a bill in equity is maintainable to give him what he needs. Equity Rule 58. There were other reasons in times past, when parties were not permitted to be witnesses, and when there was no compulsory process for the production of books or documents. *Carpenter* v. *Winn,* 221 U.S. 533; *Pressed Steel Car Co.* v. *Union Pacific R. Co.,* 240 Fed. 135, 136. Today the remedy survives, chiefly, if not wholly, to give facility to proof. In the practice of many states there is a summary substitute by an order for examination before trial or for the inspection of books and papers. The substitute has never found its way into the procedure of the federal courts. *Ex parte Fisk,* 113 U.S. 713. The remedy in those courts is still by bill in equity as in days before the codes. *Colgate* v. *Compagnie Francaise,* 23 Fed. 82; *Pressed Steel Car Co.* v. *Union Pacific R. Co., supra.*

To state the function of the remedy is to give the password to its use. There are times when a suit is triable in separate parts, one affecting the right or liability, and the other affecting the measure of recovery. In suits of

that order a discovery as to damages will commonly be postponed till the right or liability has been established or declared. *Schrieber* v. *Heyman,* 63 L.J.Rep. 749 (1894); *Elkin* v. *Clarke,* 21 W.R. 447 (1873); *Parker* v. *Wells,* L.R. 18 Ch. Div. 477; *Fennessy* v. *Clark,* L.R. 37 Ch. Div. 184; *De la Rue* v. *Dickinson,* 3 K. & J. 388; Peile, The Law and Practice of Discovery, pp. 26–29; Bray, Principles and Practice of Discovery, pp. 14, 15; Wigram, Points in the Law of Discovery, § 45. As a general thing it will be useless to decree it any earlier, and may even be oppressive. "The principle of judicial parsimony" (L. Hand, J., in *Pressed Steel Car Co.* v. *Union Pacific R. Co., supra*), if nothing more, condemns a useless remedy. This division of the trial into stages or instalments will happen oftenest in suits in equity, though it is not unknown in actions at law where a jury has been waived. In equity it is common practice. Thus, a suit to establish a partnership or to restrain the infringement of a patent culminates, if successful, in an interlocutory decree, which will be followed by an accounting and a discovery of documents. In these and like cases, the accounts will not be probed until the right has been adjudged.

A different situation is presented where the action is at law and is triable by judge and jury. There interlocutory judgments are unknown, at all events where the defendant has answered generally and not by special plea, and the verdict establishing the right establishes at the same time the amount to be recovered. The answer being general, the case according to common law practice must be tried as a unit and not broken into parts. In such circumstances damages may be proved with the aid of a discovery, if the complication of accounts or other practical impediments make it necessary that the evidence be sifted in advance. *Pape* v. *Lister,* L.R. 6 Q.B. 242; *Saunders* v. *Jones,* L.R. 7 Ch. Div. 435, 452; *Elkin* v.

Clarke, supra; Sherwood Bros. v. *Yellow Cab Co.,* 283 Pa. St. 488, 491, 492; 129 Atl. 563; *Wells* v. *Holman,* 115 S.C. 443; 106 S.E. 224; *McKinnon Young Co.* v. *Stockton,* 55 Fla. 708; 46 So. 87; *Burns* v. *Lipson,* 204 App. Div. (N.Y.) 643; 198 N.Y.S. 810; *Webb* v. *Homer W. Hedge Co.,* 133 App. Div. (N.Y.) 420; 117 N.Y.S. 643; *Iroquois Hotel & Apartment Co.* v. *Iroquois Realty Co.,* 126 App. Div. 814; 111 N.Y.S. 172; *Harbaugh* v. *Middlesex Securities Co.,* 110 App. Div. 633; 97 N.Y.S. 350; Peile, *supra,* p. 112; Bray, *supra,* p. 21. "I have consulted my learned Brothers," said Lush, J., in *Pape* v. *Lister, supra,* "and the conclusion at which we have arrived is that this rule must be made absolute. I do not agree with Mr. Wills's contention that 'relating to such action' means relating to the issues raised. I think if documents relate to the amount of damages, that is quite sufficient."

Munger v. *Firestone Tire & Rubber Co.,* 261 Fed. 921, is cited by the petitioner as supporting a general rule that the necessity of proving damages is never a sufficient ground for a discovery in equity. If confined to its special facts, the decision may not be wrong. Very likely the bill was insufficient to make out a *prima facie* showing of right or liability. If the case stands for more than that, as the opinion indicates it does, it does not have our approval. The point is made in it that damages are not part of the "issues" in a lawsuit, and that the interrogatories to be answered by a defendant under a bill of discovery are to be directed to the issues and not to anything else. There is indeed a rule of common law pleading that the statement of general damages in the *ad damnum* clause of a complaint is not an issuable allegation. *McClelland* v. *Climax Hosiery Mills,* 252 N.Y. 347, 356; 169 N.E. 605; *Howell* v. *Bennett,* 74 Hun 555, 558; 26 N.Y.S. 627. This does not mean, however, that the plaintiff will not have to prove his damages if he wishes to get more than a nominal verdict. Quite to the con-

trary, it means that he will have to prove them though the defendant has omitted to deny them in the answer. It is a *non sequitur* to argue from this that the quantum of the damages is not a part of the case to be proved through the aid of a discovery if proof upon the trial will be burdensome or difficult. To this it must be added that interrogatories today are no longer any part of the pleadings, whatever they may once have been. Equity Rule 58 has taken that quality away from them. *Luten* v. *Camp,* 221 Fed. 424. They are not instruments in any technical sense for the joinder of issue. They are forms of examination preliminary to trial.

The petitioner is not helped by our decision in *United States* v. *Bitter Root Development Co.,* 200 U.S. 451, 472. The complainant in that suit did not seek a discovery in aid of an action at law for the recovery of damages. The suit was for general relief as well as for discovery, the prayer for discovery being merely incidental. The complainant was attempting to transfer to a court of equity the control of a suit that was triable at law. Cf. *Colgate* v. *Compagnie Francaise, supra,* p. 85; *Whittemore* v. *Patten,* 81 Fed. 527; Wigram, *supra,* § 10. The incident fell with the fall of the principal.

Loose v. *Bellows Falls Pulp Plaster Co., supra,* also cited by the petitioner, has a *dictum* approving the decision in *Munger* v. *Firestone Tire & Rubber Co., supra,* but the point was not involved, for the plaintiff was not asking for discovery as an auxiliary remedy in furtherance of his remedy at law, but was attempting, like the complainant in the *Bitter Root* case, to subject the entire suit to the jurisdiction of equity.

To hold that the plaintiff in an action at law may have discovery of damages is not to say that the remedy will be granted as of course, or that protection will not be given to his adversary against impertinent intrusion. Wigram, *supra,* § 115. The court may decline to open

the defendant's records to the scrutiny of a competitor posing as a suitor, if the suit has been begun without probable cause or as an instrument of malice. It is all a matter of discretion. Good faith and probable cause were here abundantly established. The remedy of specific performance had been refused, but the very court that refused it had found sufficient merit in the suit to call for an amendment of the pleadings that would give the plaintiff an opportunity to maintain a remedy at law.

The decree under review protects the petitioner with sedulous forethought against an oppressive inquisition. Only the most general facts are to be discovered in advance of trial. The bill is to be retained, however, to be available in case of need. If the occasion for fuller scrutiny shall afterwards develop, there may thus be an inspection of the records without the delay that would be inevitable if a new bill had to be filed with a new opportunity to the defendant to answer or demur. Presumably the jury could be held together in the interval, and the trial at law adjourned. This relief may have been less than the plaintiff should have had. It was certainly not more.

2. The use that has been made of the patented device is a legitimate aid to the appraisal of the value of the patent at the time of the breach.

This is not a case where the recovery can be measured by the current prices of a market. A patent is a thing unique. There can be no contemporaneous sales to express the market value of an invention that derives from its novelty its patentable quality. Cf. *United States* v. *Swift & Co.,* 270 U.S. 124; *Todd* v. *Gamble,* 148 N.Y. 382; 42 N.E. 982. But the absence of market value does not mean that the offender shall go quit of liability altogether. The law will make the best appraisal that it can, summoning to its service whatever aids it can command. *United States* v. *Swift & Co., supra; U.S. Frumentum*

Co. v. *Lauhoff,* 216 Fed. 610; *Industrial & General Trust, Ltd.* v. *Tod,* 180 N.Y. 215, 232; 73 N.E. 7; Sedgwick, Damages, 9th ed., vol. 1, pp. 491, 504. At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of efficiency or saving of expense. *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.,* 235 U.S. 641, 648, 649; *Suffolk Co.* v. *Hayden,* 3 Wall. 315, 320; *U.S. Frumentum Co.* v. *Lauhoff, supra.* This will generally be the case if the trial follows quickly after the issue of the patent. But a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within.

Ithaca Trust Co. v. *United States,* 279 U.S. 151, does not commit us to a different holding. The problem there before the court was one as to the appraisal of a life estate for the purpose of the assessment of a tax. The intention of the lawmakers was held to be that the computation of the tax should be made as of the death of the testator on the basis of a law of averages. Cf. *Matter of Wagner* v. *Wilson & Co.,* 251 N.Y. 67, 71; 167 N.E. 174. A different question would have been here with a different result if we had been measuring the damages for a breach of contract or a tort. To correct uncertain prophecies in such circumstances is not to charge the offender with elements of value non-existent at the time of his offense. It is to bring out and expose to light the elements of value that were there from the beginning. *Brightson* v. *Claflin Co.,* 180 N.Y. 76, 83, 84; 72 N.E. 920; *Wakeman* v. *Wheeler & Wilson Mfg. Co.,* 101 N.Y. 205, 217; 4 N.E. 264; cf. *City of New York* v. *Sage,* 239 U.S. 57; *Cincin-*

nati Siemens Lungren Gas Co. v. *Western Siemens Lungren Co.,* 152 U.S. 200; *Henry* v. *North American Railway Construction Co.,* 158 Fed. 79, 80, 81; Williston, Contracts, Vol. III, p. 2394.

Value for exchange is not the only value known to the law of damages. There are times when heed must be given to value for use, if reparation is to be adequate. *Barker* v. *Lewis Storage & Transportation Co.,* 78 Conn. 198; 61 Atl. 363; *Green* v. *Boston & Lowell R. Co.,* 128 Mass. 221; *Citizens Bank* v. *Fitchburg Fire Ins. Co.,* 86 Vt. 267; 84 Atl. 970; *McAnarney* v. *Newark Fire Ins. Co.,* 247 N.Y. 176, 184, 185; 159 N.E. 902; Sedgwick, *supra,* pp. 504–507. An imaginary bid by an imaginary buyer, acting upon the information available at the moment of the breach, is not the limit of recovery where the subject of the bargain is an undeveloped patent. Information at such a time might be so scanty and imperfect that the offer would be nominal. The promisee of the patent has less than fair compensation if the criterion of value is the price that he would have received if he had disposed of it at once, irrespective of the value that would have been uncovered if he had kept it as his own. Formulas of measurement declared *alio intuitu* may be misleading if wrested from their setting and applied to new conditions. See, e.g., *Standard Oil Co.* v. *So. Pac. Co.,* 268 U.S. 146, 155. The market test failing, there must be reference to the values inherent in the thing itself, whether for use or for exchange. *Industrial General & Trust Co.* v. *Tod, supra.* These will not be known by first imagining a forced sale, and then accepting as a measure its probable results. The law is not so tender to sellers in default.

3. Section 724 of the Revised Statutes permitting the use of a subpoena *duces tecum* for the production of books and papers has not superseded the remedy of dis-

covery in cases where inspection during the trial and in the presence of the jury will produce delay or inconvenience. *Carpenter* v. *Winn, supra; Pressed Steel Car Co.* v. *Union Pacific R. Co., supra.*

The court did not exceed the bounds of a legitimate discretion in holding that these embarrassments might reasonably be expected to follow if discovery were refused.

The decree should be

Affirmed.

DECISIONS PER CURIAM, FROM MARCH 14, 1933, TO AND INCLUDING MAY 29, 1933 *

No. 669. HEALY, CHIEF OF POLICE, *v.* RATTA. Appeal from the District Court of the United States for the District of New Hampshire. Argued March 14, 1933. Decided March 20, 1933. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction, as it appears from the supplemental record and was admitted at the bar that the application for interlocutory injunction was not pressed but was waived, and there is therefore no ground for an appeal to this Court. *Smith* v. *Wilson,* 273 U.S. 388, 391; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U.S. 10, 15. *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.

No. —, original. EX PARTE LA PRADE. March 20, 1933. A rule is directed to issue to the Hon. Curtis D. Wilbur, Judge of the Circuit Court of Appeals for the Ninth Circuit, to the Hon. Fred C. Jacobs, Judge of the District Court of the United States for the District of Arizona, and to the Hon. Adolphus F. St. Sure, Judge of the District Court of the United States for the Northern District of California, sitting as a specially constituted District Court of the United States for the District of Arizona, directing them to show cause, by printed return on or before Monday, April 10 next, why leave to file the petition for writ of prohibition and writ of mandamus

* For decisions on applications for certiorari, see *post,* pp. 713, 723.

should not be granted in the above-entitled matter as prayed. The cause is assigned for argument on Monday, April 17 next; briefs for the parties shall be filed on or before the day of the argument. It is further ordered that all proceedings against the above-named petitioner in the specially constituted District Court be, and they are hereby, stayed; and that the respondents be, and they are hereby, directed to continue the term of the said District Court pending final determination of this application in this Court.

No. 260. COYNE, SECRETARY OF STATE, ET AL. *v.* PROUTY ET AL. Appeal from the District Court of the United States for the District of South Dakota. March 20, 1933. A rule is directed to issue to the appellants in this case to show cause, on or before Monday, April 17 next, why the decree of the specially constituted District Court entered herein should not be vacated and the cause remanded to that court with directions to dismiss the case as moot.

No. 589. MORTENSEN, COMMISSIONER OF INSURANCE, *v.* SECURITY INSURANCE CO. Appeal from the District Court of the United States for the Western District of Wisconsin. Argued March 22, 1933. Decided March 27, 1933. *Per Curiam:* Decree affirmed. *Terral* v. *Burke Construction Co.*, 257 U.S. 529; *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 544; *National Fire Insurance Co.* v. *Wanberg*, 260 U.S. 71, 75; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434; *Hanover Fire Insurance Co.* v. *Harding*, 272 U.S. 494, 507.

MR. JUSTICE BRANDEIS dissents upon the authority of *Doyle* v. *Continental Insurance Co.*, 94 U.S. 535, and *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U.S. 246.

Mr. J. E. Messerschmidt, Assistant Attorney General of

Wisconsin, with whom *Mr. James E. Finnegan,* Attorney General, was on the brief, for appellant. *Messrs. Samuel Levin* and *Wm. Marshall Bullitt* were on the brief for appellee.

No. 733. PUBLIC SERVICE COMMISSION OF INDIANA ET AL. *v.* NORTHERN INDIANA PUBLIC SERVICE CO. Appeal from the District Court of the United States for the Northern District of Indiana. Jurisdictional statement submitted March 18, 1933. Decided March 27, 1933. *Per Curiam:* The decree of the District Court granting interlocutory injunction herein is vacated and the cause is remanded to the District Court, as specially constituted, for findings and conclusions appropriate to a decision upon the application for an interlocutory injunction, the temporary restraining order to remain in force pending that determination. *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co., ante,* p. 67. *Mr. George W. Hufsmith* for appellants. *Messrs. Wm. A. McInerny* and *John C. Lawyer* for appellee. Reported below: 1 F. Supp. 296.

No. 780. ANTONOPLOS *v.* JOHN EICHLEAY, JR., CO. ET AL. Appeal from the Supreme Court of Pennsylvania. Jurisdictional statement submitted March 18, 1933. Decided March 27, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 550; *Gunn* v. *Barry,* 15 Wall. 610, 623; *Hendrickson* v. *Apperson,* 245 U.S. 105, 112; *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311; *Wabash Ry. Co.* v. *Flannigan,* 192 U.S. 29; *Wick* v. *Chelan Electric Co.,* 280 U.S. 108, 111. *Mr. Harry F. Stambaugh* for appellant. No appearance for appellees. Reported below: 309 Pa. 411; 164 Atl. 343.

No. 537. ARTHUR C. HARVEY CO. *v.* MALLEY, ET AL., FORMER COLLECTORS. Certiorari to the Circuit Court of Appeals for the First Circuit. April 17, 1933. The motion to amend the judgment herein is denied. 288 U.S. 415.

No. 260. COYNE, SECRETARY OF STATE, ET AL. *v.* PROUTY ET AL. Appeal from the District Court of the United States for the District of South Dakota. Return to rule to show cause presented April 17, 1933. Decided April 24, 1933. *Per Curiam:* Decree reversed and cause remanded with directions to dismiss the bill of complaint upon the ground that the cause is moot. *Brownlow* v. *Schwartz,* 261 U.S. 216; *Alejandrino* v. *Quezon,* 271 U.S. 528, 535, 536; *U.S. ex rel. Norwegian Nitrogen Products Co.* v. *Tariff Commission,* 274 U.S. 106, 112; *Railroad Commission of Texas* v. *MacMillan,* 287 U.S. 576. *Mr. Edward E. Wagner* for appellants. *Mr. A. B. Fairbank* for appellees. Reported below: 55 F. (2d) 289.

No. 805. HAWKINS *v.* CITY OF RED CLOUD ET AL. Appeal from the Supreme Court of Nebraska. Jurisdictional statement submitted April 15, 1933. Decided April 24, 1933. *Per Curiam:* The appeal herein is dismissed for want of a substantial federal question. *Gant* v. *Oklahoma City, ante,* 98, 102; *Standard Oil Co.* v. *Marysville,* 279 U.S. 582, 583; *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311. *Mr. Jesse G. Hawkins, pro se.* No appearance for appellees. Reported below: 123 Neb. 487; 243 N.W. 431.

No. —. IN THE MATTER OF RALPH C. DAVIS. April 24, 1933. The clerk of this Court having reported that the costs taxed against the Greek Catholic Union, respondent, in the case of *American Surety Co. of New York* v. *Greek Catholic Union,* 284 U.S. 563, a bill for which

was rendered on March 31, 1932, to Ralph C. Davis, a member of the Bar of this Court, counsel for the said respondent, had not been paid; and it appearing to the Court that the said Davis had failed to answer or respond to three letters sent him by the clerk of this Court under dates of August 8, 1932, November 29, 1932, and February 7, 1933, with respect to the payment of the said costs; and a rule having issued April 10, 1933, directing the said Davis to show cause why he should not be disbarred from the practice of the law in this Court for conduct unbecoming a member of the Bar of this Court; and said Davis having made return to such rule, and the costs in the above-mentioned case having been paid,

It is ordered that the respondent, Ralph C. Davis, be, and he is hereby, reprimanded for unjustified failure in a duty owed by him as a member of the Bar of this Court to respond to communications addressed to him by the clerk of this Court pertaining to the business of the Court;

And it is further ordered that the rule to show cause aforesaid be, and it is hereby, discharged.

No. 691. C. M. PATTEN & CO. ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. May 8, 1933. *Per Curiam:* The petition for writ of certiorari in this case is granted. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with directions to vacate its decree and to dismiss the proceeding upon the ground that the cause is moot. *Brownlow* v. *Schwartz,* 261 U.S. 216; *Alejandrino* v. *Quezon,* 271 *U.S.* 528, 535, 536; *U.S. ex rel. Norwegian Nitrogen Products Co.* v. *Tariff Commission,* 274 U.S. 106, 112; *Railroad Commission of Texas* v. *MacMillan,* 287 U.S. 576. *Mr. Frank P. Doherty* for petitioners. *Solicitor General Thacher* for the United States. Reported below: 61 F. (2d) 970.

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No. 906. SWARZ *v.* LOEFFLER. Appeal from the Appellate Court of Illinois. Jurisdictional statement submitted April 29, 1933. Decided May 8, 1933. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. The appeal is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). *Mr. August Swarz, pro se.* No appearance for appellee. Reported below: 265 Ill. App. 602.

Nos. 316, 317, and 318. UNITED STATES *v.* DUBILIER CONDENSER CORP. May 8, 1933. Ordered that the opinion in this case be amended as follows:

By striking out the following paragraph:

"Moreover no court could, however clear the proof of such a contract, order the execution of an assignment. No act of Congress has been called to our attention authorizing the United States to take a patent or to hold one by assignment. No statutory authority exists for the transfer of a patent to any department or officer of the Government, or for the administration of patents, or the issuance of licenses on behalf of the United States. In these circumstances no public policy requires us to deprive the inventor of his exclusive rights as respects the general public and to lodge them in a dead hand incapable of turning the patent to account for the benefit of the public."

The opinion is reported without this paragraph, *ante*, pp. 178, 196.

No. 932 (October Term, 1930). ART METAL CONSTRUCTION CO. *v.* UNITED STATES; and

No. 933 (October Term, 1930). ZELLER ET AL. *v.* SAME. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit. May 8, 1933. The mo-

tions for leave to file petitions for rehearing in the above-entitled causes are severally denied. *Bronson* v. *Schulten,* 104 U.S. 410, 415; *United States* v. *Mayer,* 235 U.S. 55, 67. *Messrs. Dana B. Hellings, Frederick C. Slee,* and *Ralph Ulsh* for the applicants. For previous decisions, see 283 U.S. 863; 47 F. (2d) 558; and 46 F. (2d) 1023.

No. 810. Larabee Flour Mills Co. *v.* First National Bank of Dublin. On certificate from the Circuit Court of Appeals for the Fifth Circuit. May 9, 1933. *Per Curiam:* The motion to bring up the whole record and cause is denied. The certificate is dismissed. *United States* v. *Bailey,* 9 Pet. 267, 272; *Chicago, B. & Q. Ry.* v. *Williams,* 205 U.S. 444, 451–454; *The Folmina,* 212 U.S. 354, 363; *United States* v. *Mayer,* 235 U.S. 55, 66; *Biddle* v. *Luvisch,* 266 U.S. 173, 174, 175; *News Syndicate Co.* v. *New York Central R. Co.,* 275 U.S. 179, 188. *Messrs. W. W. Larsen* and *C. C. Crockett* for Larabee Flour Mills Co. *Messrs. Maynard Ramsey, Kenneth I. McKay, H. E. Hackney, G. P. Barse,* and *J. F. Anderson* for the First National Bank of Dublin.

No. 811. First National Bank of St. Petersburg *v.* Miami. On certificate from the Circuit Court of Appeals for the Fifth Circuit. May 9, 1933. *Per Curiam:* The certificate is dismissed. *United States* v. *Bailey,* 9 Pet. 267, 272, 274; *Chicago, B. & Q. Ry.* v. *Williams,* 205 U.S. 444, 451–454; *The Folmina,* 212 U.S. 354, 363; *United States* v. *Mayer,* 235 U.S. 55, 66; *Biddle* v. *Luvisch,* 266 U.S. 173, 174, 175; *News Syndicate Co.* v. *New York Central R. Co.* 275 U.S. 179, 188. *Messrs. Kenneth I. McKay, Maynard Ramsey, H. E. Hackney, G. P. Barse,* and *J. F. Anderson* for the First National Bank of St. Petersburg. *Mr. C. I. Carey* for Miami.

For an amendment to the General Orders in Bankruptcy, promulgated May 15, 1933, see 288 U.S. 655.

No. 834. ALLEN ET AL. *v.* GALVESTON TRUCK LINE CORP. Appeal from the District Court of the United States for the Southern District of Texas. Argued May 9, 1933. Decided May 15, 1933. *Per Curiam:* Decree affirmed. (1) *Texas & New Orleans R. Co.* v. *Sabine Tram Co.,* 227 U.S. 111; *Baltimore & Ohio S. W. R. Co.* v. *Settle,* 260 U.S. 166, 170, 173, 174; *United States* v. *Erie R. Co.,* 280 U.S. 98, 101, 102; (2) *Buck* v. *Kuykendall,* 267 U.S. 307, 315, 316; *Bush Co.* v. *Maloy,* 267 U.S. 317, 324, 325; *Sprout* v. *South Bend,* 277 U.S. 163, 169–171; *Bradley* v. *Public Utilities Comm'n, ante,* 92, 95. *Mr. Elbert Hooper,* Assistant Attorney General of Texas, with whom *Messrs. James V. Allred,* Attorney General, and *Claude Pollard* were on the brief, for appellants. *Mr. Mart H. Royston,* with whom *Mr. J. Newton Rayzor* was on the brief, for appellee. Reported below: 2 F. Supp. 488.

No. 927. CHEWNING *v.* VIRGINIA. Appeal from the Supreme Court of Appeals of Virginia. Jurisdictional statement submitted May 6, 1933. Decided May 15, 1933. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *State Board of Tax Commissioners v. Jackson,* 283 U.S. 527, 537; *Castillo* v. *McConnico,* 168 U.S. 674, 683; *Moffitt* v. *Kelley,* 218 U.S. 400, 404, 405; *Nickel* v. *Cole,* 256 U.S. 222, 226; *Glenn* v. *Doyall,* 285 U.S. 526; *Long* v. *Kelley,* 288 U.S. 591. *Mr. David Meade White* for appellant. No appearance for appellee.

No. 922. BOARD OF SUPERVISORS OF HARRISON COUNTY, IOWA, ET AL. *v.* BOARD OF SUPERVISORS OF POTTAWATTAMIE COUNTY, IOWA, ET AL. Appeal from the Supreme Court of

Iowa. May 15, 1933. Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits. The attention of counsel is directed to the question of the right of the appellants to raise the questions presented under the Federal Constitution. *Hunter* v. *Pittsburgh,* 207 U.S. 161, 178–181; *Pawhuska* v. *Pawhuska Oil & Gas Co.,* 250 U.S. 394; *Trenton* v. *New Jersey,* 262 U.S. 182, 185, 188, 191, 192; *Railroad Commission* v. *Los Angeles R. Co.,* 280 U.S. 145, 156; *Chicago* v. *Chicago Rapid Transit Co.,* 284 U.S. 577, 578; *Greenville* v. *Query,* 286 U.S. 472, 482.

No. 890. Lewis *v.* New York. Appeal from the Childrens Court of Broome County, New York. Jurisdictional statement submitted May 9, 1933. Decided May 22, 1933. *Per Curiam:* The motion for leave to file amended statement as to jurisdiction is granted. 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); *Citizens National Bank* v. *Durr,* 257 U.S. 99, 106; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U.S. 1, 4, 5, 6; *Indian Territory Co.* v. *Board of Equalization,* 287 U.S. 573. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, § 237(c) Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Joseph E. North* for appellant. No appearance for appellee. Reported below: 260 N.Y. 171; 183 N.E. 353.

No. 919. Western Public Service Co. *v.* City of Mitchell. Appeal from the Supreme Court of Nebraska. Jurisdictional statement submitted May 13, 1933. Decided May 22, 1933. *Per Curiam:* The motion to dismiss the appeal herein is granted and the appeal is dismissed for the want of a final judgment. *Grays Harbor Co.* v.

Coats-Fordney Co., 243 U.S. 251, 255, 256; *Ornstein* v. *Chesapeake & Ohio Ry. Co.*, 284 U.S. 572; *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611; *California National Bank* v. *Statler*, 171 U.S. 447, 449; *Cotton* v. *Hawaii*, 211 U.S. 162, 170, 171; *Bruce* v. *Tobin*, 245 U.S. 18. *Messrs. William Morrow, Thomas M. Morrow, Roscoe T. York,* and *J. G. Mothersead* for appellant. *Messrs. Floyd E. Wright* and *Fred A. Wright* for appellee. Reported below: 124 Neb. 248; 246 N.W. 484.

No. 5, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 8, original. MICHIGAN *v.* SAME; and

No. 9, original. NEW YORK *v.* SAME. On application of the complainant States, Wisconsin, Minnesota, Ohio, and Michigan for the appointment of a commissioner or special officer to execute the decree of April 21, 1930, (281 U.S. 696) on behalf and at the expense of defendants. May 22, 1933. These causes came on to be heard on the Report of the Special Master, Edward F. McClennen, under order entered December 19, 1932, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered by this Court that the decree of April 21, 1930 (281 U.S. 696), be, and the same is hereby, enlarged by the addition of the following provision:

That the State of Illinois is hereby required to take all necessary steps, including whatever authorizations or requirements, or provisions for the raising, appropriation and application of moneys, may be needed in order to cause and secure the completion of adequate sewage treatment or sewage disposal plants and sewers, together with controlling works to prevent reversals of the Chicago River if such works are necessary, and all other incidental facilities, for the disposition of the sewage of the area embraced within the Sanitary District of Chicago so as to preclude any ground of objection on the part of

the State or of any of its municipalities to the reduction of the diversion of the waters of the Great Lakes-St. Lawrence system or watershed to the extent, and at the times and in the manner, provided in this decree.

And the State of Illinois is hereby required to file in the office of the Clerk of this Court, on or before October 2, 1933, a report to this Court of its action in compliance with this provision.

And It Is Further Ordered that, except as above provided, the application of the complainant States herein be, and the same is hereby, denied. Costs, including the expenses incurred by the Special Master and his compensation, to be fixed by the Court, shall be taxable against the defendants. (Entered May 22, 1933. See 289 U.S. 395.)

No. 941. Mueller *v.* Illinois. Appeal from the Supreme Court of Illinois. Jurisdictional statement submitted May 22, 1933. Decided May 29, 1933. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86, 108–111; *Fox* v. *Washington,* 236 U.S. 273, 277; *Miller* v. *Strahl,* 239 U.S. 426, 434; *Omaechevarria* v. *Idaho,* 246 U.S. 343, 348; *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 501–503; *Bandini* v. *Superior Court,* 284 U.S. 8, 18; *Sproles* v. *Binford,* 286 U.S. 374, 393; *Lavine* v. *California,* 286 U.S. 528; *Leach* v. *California,* 287 U.S. 579, 580. *Messrs. Benjamin C. Bachrach* and *Chester E. Cleveland* for appellant. *Mr. Montgomery S. Winning* for appellee. Reported below: 352 Ill. 124; 185 N.E. 239.

No. —, original. Ex parte Lansdown et al. May 29, 1933. The motion for leave to file petition for writ of mandamus is denied without prejudice to application to the Circuit Court of Appeals. *Messrs. Samuel A. Ettelson* and *Leonard B. Ettelson* for petitioners.

No. 13, original. NEW JERSEY *v.* CITY OF NEW YORK. May 29, 1933. May 8, 1933, complainant filed its petition representing that the defendant has failed to take action necessary to comply with our decree entered December 7, 1931, (284 U. S. 585) and praying an order that defendant show cause why it should not be adjudged in contempt. On the same day defendant filed an application asserting its inability to comply with the decree within the time limited, and praying that the time for the taking effect of the injunction be extended from June 1, 1933, to April 1, 1934. It is ordered:

These applications will be heard November 6, 1933.

Edward K. Campbell is appointed Special Master, empowered to issue subpoenas for witnesses and to take the evidence that may be offered by the respective parties, and also such as he may deem necessary, to show: (1) What shall have been done by defendant, up to September 15, 1933, and the time reasonably required to enable it to comply with the decree; (2) The amounts that shall have been expended, subsequent to June 1, 1933, by New Jersey and its political subdivisions to prevent or lessen the defilement or pollution of the waters, shores or beaches within that State and the damages respectively sustained by them as a result of defendant's failure to comply with the decree.

The evidence shall be taken at such times and places as the Master, by notice to counsel, shall fix. And he is directed to report to the Court, not later than October 20, 1933, the evidence so taken together with his findings of fact thereon. His findings will be subject to consideration, revision or approval by the Court. When the report of the Special Master is filed the Clerk of the Court shall cause the same to be printed and the Court, without the filing of exceptions, will hear the parties thereon.

[The order makes provision also for the compensation and expenses of the Master; apportionment of the cost of

printing the report; and for a new appointment by the Chief Justice if this one be not accepted or become vacant during the recess of the Court.]

No. 693. FACTOR *v.* LAUBENHEIMER, U.S. MARSHAL, ET AL. Certiorari to the Circuit Court of Appeals for the Seventh Circuit. Argued April 18, 1933. Restored to docket May 29, 1933. This case is restored to the docket and assigned for reargument on Monday, October 9 next, upon all questions involved, including the question whether the offense charged is an extraditable offense under the Treaty of 1889, even if the offense does not constitute a crime under the law of the State of Illinois or under any acts of Congress. The attention of counsel is directed to the interpretation placed upon Article X of the treaty of 1842 by the Secretary of State of the United States, John C. Calhoun, shortly after the ratification of the Treaty (August 7, 1844, January 28, 1845, MSS. Inst. Gr. Br.), and also to the available diplomatic correspondence relating to Article X of the Treaty of 1842 and the Treaty of 1889. *Mr. Newton D. Baker,* with whom *Messrs. Rush C. Butler, S. O. Levinson,* and *G. Gale Gilbert, Jr.,* were on the brief, for petitioner. *Mr. Franklin R. Overmyer* for respondents. Reported below: 61 F. (2d) 626.

DECISIONS GRANTING CERTIORARI, FROM MARCH 14, 1933, TO AND INCLUDING MAY 29, 1933

No. 693. FACTOR *v.* LAUBENHEIMER, U.S. MARSHAL, ET AL. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Newton D. Baker, Rush C. Butler, S. O. Levinson,* and *G. Gale Gilbert, Jr.,* for petitioner. *Mr. Franklin Overmyer* for respondents. Reported below: 61 F. (2d) 626.

No. 711. JOHNSON *v.* MANHATTAN RAILWAY CO. ET AL.; and

No. 721. BOEHM *v.* SAME. March 20, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Alfred C. B. McNevin, Herbert Goldman,* and *Charles Franklin* for Johnson, petitioner. *Messrs. Elliot S. Benedict, Harry Shulman,* and *Louis Boehm* for Boehm, petitioner. *Messrs. Paxton Blair, James L. Quackenbush, Nathan L. Miller, Cloyd Laporte, Allen S. Hubbard, Edwin S. S. Sunderland, Charles H. Tuttle,* and *John W. Davis* for respondents. Reported below: 61 F. (2d) 934.

No. 675. GEORGE MOORE ICE CREAM CO., INC. *v.* ROSE, COLLECTOR OF INTERNAL REVENUE. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. J. C. Murphy* for petitioner. *Solicitor General Thacher* for respondent. Reported below: 61 F. (2d) 605.

No. 748. INTERSTATE COMMERCE COMMISSION *v.* UNITED STATES EX REL. CAMPBELL ET AL. March 20, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Daniel W. Knowlton* and *Edward M. Reidy* for petitioner. *Messrs. Johnston B. Campbell* and *A. Henry Walter* for respondents. Reported below: 61 App. D.C. 382; 63 F. (2d) 358.

No. 685. SOUTH CAROLINA *v.* BAILEY. March 27, 1933. Petition for writ of certiorari to the Supreme Court of North Carolina granted. *Messrs. John M. Daniel, William C. Wolfe,* and *J. Ivey Humphrey* for petitioner. *Mr. Clyde R. Hoey* for respondent. Reported below: 203 N.C. 362; 166 S.E. 165.

No. 701. QUERCIA *v.* UNITED STATES. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Essex S. Abbott* for petitioner. *Solicitor General Thacher* for the United States. Reported below: 62 F. (2d) 746.

No. 718. CONRAD, RUBIN & LESSER *v.* PENDER, TRUSTEE IN BANKRUPTCY. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. David J. Colton* and *Samuel Rubin* for petitioners. *Messrs. George C. Levin* and *Sydney Krause* for respondent. Reported below: 61 F. (2d) 771.

No. 724. UNITED STATES EX REL. VOLPE *v.* SMITH, DISTRICT DIRECTOR OF IMMIGRATION. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Frank R. Reid* for petitioner. *Solicitor General Thacher* and *Mr. W. Marvin Smith* for respondent. Reported below: 62 F. (2d) 808.

No. 767. ICKES, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. CHESTATEE PYRITES & CHEMICAL CORP. March 27, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Thacher* for petitioner. *Messrs. Edgar Watkins, Mac Asbill, Edgar Watkins, Jr.,* and *Marion Smith* for respondent. Reported below: 61 App. D.C. 212; 59 F. (2d) 887.

No. 791. DU PONT *v.* COMMISSIONER OF INTERNAL REVENUE. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. J. S. Y. Ivins, Richard B. Barker, King-*

man Brewster, and *Percy W. Phillips* for petitioner. *Solicitor General Thacher* for respondent. Reported below: 63 F. (2d) 44.

No. 792. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* WELLS. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. J. S. Y. Ivins, Kingman Brewster, Percy W. Phillips,* and *Richard B. Barker* for respondent. Reported below: 63 F. (2d) 425.

No. 732. ROGERS *v.* HILL ET AL. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Richard Reid Rogers* and *Evan Shelby* for petitioner. *Messrs. Nathan L. Miller* and *William M. Parke* for respondents. Reported below: 62 F. (2d) 1079.

No. 734. KRAUSS BROS. LUMBER CO. *v.* DIMON STEAMSHIP CORP. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Lane Summers, W. H. Hayden,* and *F. F. Merritt* for petitioner. *Mr. Cassius E. Gates* for respondent. Reported below: 61 F. (2d) 187.

No. 735. LEIGHTON ET AL. *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Walter C. Fox, Jr.,* and *Blair S. Shuman* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Francis H. Horan* for the United States. Reported below: 61 F (2d) 530.

No. 736. OAKES *v.* LAKE, SHERIFF. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. James G. Wilson, John F. Reilly,* and *George B. Guthrie* for petitioner. No appearance for respondent. Reported below: 62 F. (2d) 728.

No. 752. SINCLAIR REFINING CO. *v.* JENKINS PETROLEUM PROCESS CO. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Dean S. Edmonds* and *Frank E. Barrows* for petitioner. *Messrs. Frederick Schafer* and *C. Stanley Thompson* for respondent. Reported below: 62 F. (2d) 663.

No. 764. MINNESOTA *v.* BLASIUS. April 17, 1933. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Mr. Harry H. Peterson* for petitioner. *Mr. D. L. Grannis* for respondent. Reported below: 187 Minn. 420; 245 N.W. 612.

No. 768. BUTTE, ANACONDA & PACIFIC RY. CO. *v.* UNITED STATES. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. D. M. Kelly* for petitioner. *Solicitor General Thacher* for the United States. Reported below: 61 F. (2d) 587.

No. 772. CULLEN FUEL CO., INC. *v.* W. E. HEDGER, INC. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Horace L. Cheyney* for petitioner. *Mr. Forrest E. Single* for respondent. Reported below: 62 F. (2d) 68.

No. 774. BULLARD ET AL. *v.* CISCO. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Lawrence C. McBride* and *Dexter Hamilton* for petitioners. No appearance for respondent. Reported below: 62 F. (2d) 313.

No. 797. TRAINOR CO. *v.* AETNA CASUALTY & SURETY CO. April 24, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Joseph J. Brown* for petitioner. *Mr. Joseph W. Henderson* for respondent. Reported below: 62 F. (2d) 487.

No. 842. TAIT, COLLECTOR OF INTERNAL REVENUE, *v.* WESTERN MARYLAND RY. CO. April 24, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. William C. Purnell* and *Eugene S. Williams* for respondent. Reported below: 62 F. (2d) 933.

No. 691. C. M. PATTEN & CO. ET AL. *v.* UNITED STATES. See same case, *ante*, p. 705.

No. 832. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* U. S. REFRACTORIES CORP. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. Robert P. Smith* and *W. W. Montgomery, Jr.*, for respondent. Reported below: 64 F. (2d) 69.

No. 802. YARBOROUGH *v.* YARBOROUGH. May 8, 1933. Petition for writ of certiorari to the Supreme Court of

South Carolina granted. *Mr. R. E. Whiting* for petitioner. No appearance for respondent. Reported below: 168 S.C. 46; 166 S.E. 877.

No. 806. JACOBS ET AL. *v.* UNITED STATES. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Charles C. Moore* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. W. Scott,* and *Wm. S. Ward* for the United States. Reported below: 63 F. (2d) 326.

No. 830. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTHERN COAL CO.; and

No. 831. SAME *v.* C. H. SPRAGUE & SONS CO. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. Paul F. Myers* and *Edmund B. Quiggle* for respondents. Reported below: 62 F. (2d) 742.

No. 851. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* DUKE ET AL. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. John D. Davis, William R. Perkins, Harry H. Shelton,* and *Forrest J. Hyde* for respondents. Reported below: 62 F. (2d) 1057.

No. 815. MISSOURI STATE LIFE INSURANCE CO. ET AL. *v.* JOHNSON. May 8, 1933. Petition for writ of certiorari to the Supreme Court of Arkansas granted. *Messrs. Paul B. Cromelin, Bolitha J. Laws,* and *A. F. House* for petitioners. No appearance for respondent. Reported below: 186 Ark. 519.

No. 833. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* OSWEGO & SYRACUSE R. Co. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher* for petitioner. *Mr. Douglas Swift* for respondent. Reported below: 62 F. (2d) 518.

No. 873. MISSOURI ET AL. *v.* FISKE ET AL. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Gilbert Lamb* for petitioners. No appearance for respondents. Reported below: 62 F. (2d) 150.

No. 888. COOPER, TRUSTEE IN BANKRUPTCY, *v.* DASHER. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. C. Edmund Worth* for petitioner. *Mr. W. K. Zewadski, Jr.,* for respondent. Reported below: 63 F. (2d) 749.

No. 905. WELCH *v.* COMMISSIONER OF INTERNAL REVENUE. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Thomas D. O'Brien, Alexander E. Horn,* and *Edward S. Stringer* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Sewall Key, John G. Remey,* and *William H. Riley, Jr.,* for respondent. Reported below: 63 F. (2d) 976.

No. 915. NATHANSON *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Frederic M. P. Pearse* for petitioner. *Solicitor General Biggs* and *Messrs. Norman J. Morrisson, Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 937.

No. 942. SHEPARD *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Harry W. Colmery* and *C. L. Kagey* for petitioner. No appearance for the United States. Reported below: 62 F. (2d) 683; 64 F. (2d) 641.

No. 874. UNITED STATES, TRUSTEE, ET AL. *v.* MCGOWAN ET AL.; and

No. 875. SAME *v.* BAKERS BAY FISH CO. ET AL. May 29, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Thacher* for petitioners. *Mr. Guy E. Kelly* for respondents. Reported below: 62 F. (2d) 955.

No. 900. UNITED STATES *v.* REILY. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Thacher* for the United States. *Mr. F. H. Reily, pro se.* Reported below: 62 F. (2d) 621.

No. 903. JOHN K. & CATHERINE S. MULLEN BENEVOLENT CORP. *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. W. G. Bissell* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Wm. W. Scott, Wm. H. Riley, Jr.,* and *Wm. S. Ward* for the United States. Reported below: 63 F. (2d) 48.

Nos. 908 and 909. KEYSTONE DRILLER CO. *v.* GENERAL EXCAVATOR CO.; and

Nos. 910 and 911. SAME *v.* OSGOOD CO. May 29, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. F. O. Richey*

and *Wm. H. Boyd* for petitioner. *Mr. Lloyd T. Williams* for respondents. Reported below: 62 F. (2d) 48; 64 F. (2d) 39.

No. 912. GRISWOLD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Walter T. Fisher* for petitioners. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Sewall Key, Wm. C. Thompson,* and *Erwin N. Griswold* for respondent. Reported below: 62 F. (2d) 591.

Nos. 962 and 963. FIRST NATIONAL BANK OF CINCINNATI ET AL. *v.* FLERSHEM ET AL.; and

No. 964. ARZT ET AL. *v.* SAME. May 29, 1933. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Ralph Royall* and *Horace F. Baker* for petitioners. *Messrs. Maynard Teall* and *Grandin Tracy Vought* for respondents. Reported below: 64 F. (2d) 847.

No. 965. CLAPIER *v.* FLERSHEM ET AL. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Charles H. Sachs* for petitioner. *Mr. Maynard Teall* for respondents. Reported below: 64 F. (2d) 847.

No. 930. DAKIN, RECEIVER, *v.* BAYLY, LIQUIDATOR. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Donald C. McMullen* for petitioner. *Mr. Thomas Hamilton* for respondent. Reported below: 63 F. (2d) 592.

No. 976. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* BUTTERWORTH ET AL. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for

the Third Circuit granted. *Solicitor General Biggs* for petitioner. No appearance for respondents. Reported below: 63 F. (2d) 944.

No. 977. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biggs* for petitioner. No appearance for respondent. Reported below: 63 F. (2d) 949.

No. 978. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* PARDEE ET AL. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Biggs* for petitioner. No appearance for respondents. Reported below: 63 F. (2d) 948.

No. 979. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* TITLE GUARANTEE LOAN & TRUST CO., TRUSTEE. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. E. J. Smyer, Oscar W. Underwood, Jr.,* and *H. C. Kilpatrick* for respondent. Reported below: 63 F. (2d) 621.

DECISIONS DENYING CERTIORARI, FROM MARCH 14, 1933, TO AND INCLUDING MAY 29, 1933

No. 592. STANDARD LUMBER CO. ET AL. *v.* FLORIDA INDUSTRIAL CO. March 20, 1933. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Thomas B. Adams* for petitioners. *Messrs. E. J. L'Engle* and *J. W. Shands* for respondents. Reported below: 141 So. 729

No. 615. J. JACOB KRAUSE *v.* UNITED STATES;

No. 616. J. HENRY KRAUSE *v.* SAME; and

No. 617. JOHN O. KRAUSE *v.* SAME. March 20, 1933. Petition for writs of certiorari to the Court of Claims denied. *Mr. Clarence Goodwin* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. W. Scott, Wm. H. Riley, Jr.,* and *Ralph C. Williamson* for the United States. Reported below: 75 Ct. Cls. 486; 59 F. (2d) 121.

No. 676. TOLMAN ET AL. *v.* CLARK COUNTY DRAINAGE DISTRICT ET AL. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Carl B. Nusbaum* and *John E. Bennett* for petitioners. *Messrs. Charles E. Buell* and *Frank W. Lucas* for respondents. Reported below: 62 F. (2d) 226.

No. 678. TURNER ET AL. *v.* KIRKWOOD. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. R. W. Stoutz, Samuel W. Hayes,* and *David A. Richardson* for petitioners. No appearance for respondent. Reported below: 62 F. (2d) 256. See also 49 F. (2d) 590.

No. 689. POTTORFF, RECEIVER, *v.* UNDERWRITERS AT LLOYDS, AMERICA, ET AL. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Thornton Hardie, Ben R. Howell,* and *A. H. Goldstein* for petitioner. No appearance for respondents. Reported below: 62 F. (2d) 498.

No. 690. CHICAGO & WESTERN INDIANA R. CO. ET AL. *v.* ARMSTRONG, ADMINISTRATRIX. March 20, 1933. Petition for writ of certiorari to the Supreme Court of Illinois

denied. *Mr. Edward W. Rawlins* for petitioners. *Mr. Joseph D. Ryan* for respondent. Reported below: 350 Ill. 426; 183 N. E. 478.

No. 692. UNITED STATES EX REL. CLIFTON MFG. CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. March 20, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. W. A. Sutherland, Joseph B. Brennan, Frederick O. Graves,* and *Ward Loveless* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Andrew D. Sharpe* for respondent. Reported below: 61 App. D.C. 275; 61 F. (2d) 916.

No. 696. CHESSIN *v.* ROBERTSON, COMMISSIONER OF PATENTS. March 20, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Alexander Chessin, pro se. Solicitor General Thacher* and *Messrs. Whitney North Seymour, Erwin N. Griswold,* and *T. A. Hostetler* for respondent. Reported below: 61 App. D.C. 376; 63 F. (2d) 267.

No. 699. RICHTER ET AL. *v.* LAREDO NATIONAL BANK ET AL. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George C. Mann* for petitioners. *Mr. S. J. Brooks* for respondents. Reported below: 62 F. (2d) 289.

No. 700. SULLIVAN *v.* KOHN. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Guernsey Price* for petitioner. *Mr. Eph A. Karelsen* for respondent. Reported below: 62 F. (2d) 245.

No. 702. J. K. HUGHES OIL CO. *v.* BASS, COLLECTOR OF INTERNAL REVENUE. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry C. Weeks* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Andrew D. Sharpe* for respondent. Reported below: 62 F. (2d) 176.

No. 704. AYER ET AL. *v.* WHITE, COLLECTOR OF INTERNAL REVENUE. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. LaRue Brown* and *Joseph A. Locke* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Wm. Cutler Thompson* for respondent. Reported below: 62 F. (2d) 921.

No. 709. CLEARY *v.* UNITED STATES; and

No. 710. CHAVEZ *v.* SAME. March 20, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. W. B. O'Connell* for petitioners. *Solicitor General Thacher* and *Messrs. Frank M. Parrish, Paul D. Miller, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 824.

No. 715. AMERICAN SAFETY RAZOR CORP. *v.* FRINGS BROTHERS CO. March 20, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Samuel E. Darby, Jr.,* and *Thomas G. Haight* for petitioner. *Mr. Geore E. Middleton* for respondent. Reported below: 62 F. (2d) 416.

No. 727. LAREDO NATIONAL BANK *v.* GORDON. March 20, 1933. Petition for writ of certiorari to the Circuit

Court of Appeals for the Fifth Circuit denied. *Mr. James B. Lewright* for petitioner. *Mr. Mark McMahon* for respondent. Reported below: 61 F. (2d) 906.

No. 754. DUNKELL, ADMINISTRATRIX, *v.* PENNSYLVANIA R. Co. March 27, 1933. Petition for writ of certiorari to the Court of Common Pleas of Philadelphia County, Pennsylvania, and motion for leave to proceed further *in forma pauperis,* denied. *Ida Dunkell, pro se. Mr. John H. Cunningham* for respondent. Reported below: 106 Pa. Super. Ct. 356; 163 Atl. 70.

No. 775. HENDERSON *v.* MARYLAND CASUALTY Co. March 27, 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. J. Q. Mahaffey* for petitioner. No appearance for respondent. Reported below: 62 F. (2d) 107.

No. 787. MANLEY *v.* FISHER, U.S. ATTORNEY. March 27, 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. Wesley D. Manley, pro se.* No appearance for respondent. Reported below: 63 F. (2d) 256.

No. 788. WILLIAMS *v.* NEW YORK CENTRAL R. Co. March 27, 1933. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Francis K. Remington* for petitioner. No appearance for respondent. Reported below: 236 App. Div. 773; 259 N.Y.S. 964.

No. 686. REVENUE OIL CO. *v.* UNITED STATES. March 27, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Louis B. Montfort* and *John W. Townsend* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. W. Scott,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 75 Ct. Cls. 692.

No. 688. LUCHESSI *v.* WEEDIN, COMMISSIONER OF IMMIGRATION. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John J. Sullivan* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Frank M. Parrish, Harry S. Ridgely,* and *W. Marvin Smith* for respondent. Reported below: 61 F. (2d) 656.

No. 695. PLEVA ET AL. *v.* MEDALIE, U.S. ATTORNEY. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin F. Spellman* for petitioners. *Solicitor General Thacher* and *Messrs. Paul D. Miller* and *W. Marvin Smith* for respondent. Reported below: 63 F. (2d) 1012.

No. 705. STANOLIND OIL & GAS CO. *v.* BROWN. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Clay Tallman* for petitioner. *Mr. R. N. Grisham* for respondent. Reported below: 62 F. (2d) 398.

No. 706. BUTTRAM *v.* GRAY COUNTY, TEXAS, ET AL. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Crawford B. Reeder* for petitioner. *Mr. Charles C. Cook* for respondents. Reported below: 62 F. (2d) 44.

No. 707. STEINBERG *v.* UNITED STATES. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David P. Siegel* for petitioner. *Solicitor General Thacher,* and *Messrs. Frank M. Parrish, Harry S. Ridgely, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 77.

No. 712. ERIE R. Co. *v.* LINE, EXECUTRIX. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. E. A. Foote* for petitioner. *Mr. Charles H. Brady* for respondent. Reported below: 62 F. (2d) 657.

No. 713. WORM *v.* COMMISSIONER OF INTERNAL REVENUE. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Forney Johnston* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key, Wm. C. Thompson,* and *Erwin N. Griswold* for respondent. Reported below: 61 F. (2d) 868.

No. 717. HAUSSERMANN *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. March 27, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Frederick C. Fisher, Hugh Satterlee, Alfred S. Weill, Walter C. Blakely,* and *Albert S. Lisenby* for petitioner. *Solicitor General Thacher, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 61 App. D.C. 347; 63 F. (2d) 124.

No. 719. MISSOURI PACIFIC R. Co. *v.* MCMAHEN. March 27, 1933. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Edward J.*

White and *Robert E. Wiley* for petitioner. *Messrs. Paul Jones* and *Heartsill Ragon* for respondent. Reported below: 186 Ark. 399; 53 S.W. (2d) 998.

No. 720. Lloyd Royal Belge Societe Anonyme *v.* Elting, Collector of Customs. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Delbert M. Tibbetts* and *Richard L. Sullivan* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Wm. W. Scott,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 61 F. (2d) 745.

No. 723. Direction Der Discoto Gesellschaft et al. *v.* Sprunt et al. March 27, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Otto C. Sommerich* and *Edwin M. Borchard* for petitioners. *Messrs. Robert H. Montgomery, J. Marvin Haynes, F. Eberhart Haynes,* and *Herman J. Galloway* for respondents. Reported below: 61 App. D.C. 350; 63 F. (2d) 127.

No. 725. Louviers *v.* United States. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Therrett Towles* for petitioner. *Solicitor General Thacher* and *Messrs. Martin A. Morrison, Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 163.

No. 726. Burr Creamery Corp. *v.* Commissioner of Internal Revenue. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ralph W. Smith* for petitioner.

Solicitor General Thacher and *Messrs. Whitney North Seymour, Sewall Key,* and *Morton K. Rothschild* for respondent. Reported below: 62 F. (2d) 407.

No. 737. HOWARD ET AL., EXECUTORS, *v.* HOWE. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Daniel N. Kirby, John W. Davis, Delos G. Haynes,* and *Cornelius Lynde* for petitioners. *Messrs. Joseph T. Davis, Bruce A. Campbell,* and *Lawrence C. Kingsland* for respondent. Reported below: 61 F. (2d) 577.

No. 743. GARDINER *v.* WASHINGTON LOAN & TRUST CO. ET AL. March 27, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Edward S. Duvall, Jr.,* for petitioner. *Messrs. Arthur Peter* and *George P. Hoover* for respondents. Reported below: 61 App. D.C. 330; 62 F. (2d) 869.

No. 744. COMMERCIAL CASUALTY INSURANCE CO. *v.* LAWHEAD, RECEIVER. March 27, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. B. Mason Ambler, James S. McCluer,* and *Mason G. Ambler* for petitioner. *Messrs. George M. Hoffheimer* and *James M. Guiher* for respondent. Reported below: 62 F. (2d) 928.

No. 703. PORTO RICO RAILWAY, LIGHT & POWER CO. *v.* MIRANDA. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied, upon the ground that the question presented is one of local law of Puerto Rico. *Cardona v. Quinones,* 240 U.S. 83, 88; *Diaz v. Gonzalez,* 261 U.S. 102, 105, 106; *Cami v. Central Victoria, Ltd.,* 268 U.S. 469, 470; *Ameri-*

can Trading Co. v. Heacock Co., 285 U.S. 247, 261. *Mr. Carroll G. Walter* for petitioner. *Mr. Miguel Guerra-Mondrazon* for respondent. Reported below: 62 F. (2d) 479.

No. 781. SALMON *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied, upon the ground that the application for the writ was not made within the time provided by law. Section 8 (a), Act of February 13, 1925, 43 Stat. 936, 940 (U.S. Code, Title 28, § 350). *Mr. Winifield P. Jones* for petitioner. *Solicitor General Thacher* for the United States. Reported below: 61 F. (2d) 1038.

No. 741. RALSTON PURINA CO. *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John E. Hughes* and *William Cogger* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. W. Scott,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 75 Ct. Cls. 525; 58 F. (2d) 1065.

No. 714. RICKER *v.* SHURTER ET AL. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. O. Harris* for petitioner. No appearance for respondents. Reported below: 62 F. (2d) 489.

No. 722. SINGLES *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George A. King* and *George R. Shields* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. W. Scott,* and *Heber H. Rice* for the United States. Reported below: 75 Ct. Cls. 871.

No. 731. ROOT ET AL. *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Albert B. Hall* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Norman D. Keller* for the United States. Reported below: 62 F. (2d) 385.

No. 738. CRAVENS *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry S. Conrad* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Frank M. Parrish,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 261.

No. 739. FIDELITY STORAGE CO. ET AL. *v.* JAQUES. April 10, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles H. Merillat* for petitioners. *Messrs. W. W. Millan* and *Godfrey L. Munter* for respondent. Reported below: 61 App. D.C. 337; 62 F. (2d) 876.

No. 740. COUDON *v.* TAIT, COLLECTOR OF INTERNAL REVENUE. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. William A. Seifert* and *Frank C. Miller* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *John Mac C. Hudson* for respondent. Reported below: 61 F. (2d) 904.

No. 745. SMITH ENGINEERING CO. ET AL. *v.* PRAY, DISTRICT JUDGE, ET AL. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth

Circuit denied. *Mr. Sterling M. Wood* for petitioners. *Messrs. W. M. Johnston* and *M. S. Gunn* for respondents. Reported below: 58 F. (2d) 926; 61 F. (2d) 687.

No. 746. WEST VIRGINIA NORTHERN R. Co. *v.* CARLETON MINING & POWER Co. April 10, 1933. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Messrs. R. Granville Curry* and *C. C. McChord* for petitioner. *Mr. F. E. Parrack* for respondent. Reported below: 113 W.Va. 20; 166 S.E. 536. See also, 110 W.Va. 631; 159 S.E. 44.

No. 749. LEHIGH VALLEY R. Co. *v.* FEDDOCK. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clifton P. Williamson* for petitioner. *Mr. Thomas J. O'Neill* for respondent. Reported below: 62 F. (2d) 1071.

No. 750. FERGUSON *v.* SABO ET AL. April 10, 1933. Petition for writ of certiorari to the Supreme Court of Errors of Connecticut denied. *Mr. Robert J. Woodruff* for petitioner. *Mr. Morris M. Wilder* for respondents. Reported below: 115 Conn. 619; 162 Atl. 844.

No. 751. AYCOCK ET AL. *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Daniel N. Dougherty* for petitioners. *Solicitor General Thacher* and *Messrs. Paul D. Miller, Frank M. Parrish, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 612.

No. 753. UNITED STATES FIDELITY & GUARANTY Co. *v.* COMMERCIAL NATIONAL BANK OF BRADY, TEXAS. April 10, 1933. Petition for writ of certiorari to the Circuit

Court of Appeals for the Fifth Circuit denied. *Mr. Arthur W. Seeligson* for petitioner. *Mr. John H. Cunningham* for respondent. Reported below: 62 F. (2d) 718.

No. 769. DENT *v.* CHESAPEAKE & OHIO RY. CO. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. B. Newcomb* for petitioner. *Mr. James P. Wood* for respondent. Reported below: 63 F. (2d) 999.

No. 757. RICH ET AL. *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Essex S. Abbott* for petitioners. *Solicitor General Thacher,* and *Messrs. Norman J. Morrisson, Paul D. Miller, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 638.

No. 761. AMERICAN CYANAMID CO. *v.* WILSON & TOOMER FERTILIZER CO. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Thomas B. Adams, William R. Perkins,* and *Charles Caldwell* for petitioner. *Messrs. Robert R. Milan, George C. Bedell, A. Y. Milan,* and *E. T. McElvaine* for respondent. Reported below: 62 F. (2d) 1018.

No. 762. HIRSCH *v.* UNITED STATES. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. J. S. Y. Ivins, Kingman Brewster, Allen G. Wright, Percy W. Phillips,* and *F. E. Youngman* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Norman D. Keller* for the United States. Reported below: 62 F. (2d) 128.

No. 765. American Mutual Liability Insurance Co. *v.* Cooper. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John London, George W. Yancey,* and *Walter Brower* for petitioner. *Mr. J. T. Stokely* for respondent. Reported below: 61 F. (2d) 446.

No. 766. Finder *v.* Smith, Trustee. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward Vogel* for petitioner. *Mr. Timothy Newell Pfeiffer* for respondent. Reported below: 61 F. (2d) 960.

No. 778. Chicago Bank of Commerce *v.* McPherson et al., Executors. April 10, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edwin B. Mayer* for petitioner. *Mr. Mark Norris* for respondents. Reported below: 62 F. (2d) 393.

No. 825. Rowlette *v.* Rothstein Dental Laboratories, Inc. April 17, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *New York Central R. Co.* v. *White,* 243 U.S 188, 200, 202; *Mountain Timber Co.* v. *Washington,* 243 U.S. 219, 234, 235–240; *Voehl* v. *Indemnity Ins. Co.,* 288 U.S. 162, 166. *Mr. Herbert S. Ward* for petitioner. No appearance for respondent. Reported below: 61 App. D.C. 373; 63 F. (2d) 150.

No. 836. Middleton *v.* Southern Pacific Co. April 17, 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. J. W. Morrow for petitioner. No appearance for respondent. Reported below: 61 F. (2d) 929.

No. 756. BOGLE *v.* WHITE, U.S. MARSHAL, ET AL. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. O. Terrell* for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, W. Clifton Stone,* and *Wm. H. Riley, Jr.,* for respondents. Reported below: 61 F. (2d) 930.

No. 758. MARTIN *v.* COMMISSIONER OF INTERNAL REVENUE. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Frank J. Maguire* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key, J. Louis Monarch* and *F. Edward Mitchell* for respondent. Reported below: 61 F. (2d) 942.

No. 763. WEATHERSBEE *v.* UNITED STATES. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Thomas W. Hardwick* for petitioner. *Solicitor General Thacher* and *Messrs. Martin A. Morrison, F. Cadmus Damrell, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 62 F. (2d) 822.

No. 770. HUGHES, ADMINISTRATOR, *v.* GASTON, RECEIVER, ET AL. April 17, 1933. Petition for writ of certiorari to the Superior Court in and for the County of Hampden, Commonwealth of Massachusetts, denied. *Mr. William E. Leahy* for petitioner. *Mr. J. W. Redmond* for respondents. Reported below: 281 Mass. 292; 183 N.E. 752.

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No. 771. MANNING *v.* PENNSYLVANIA R. Co. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Thomas Hoffman* for petitioner. *Messrs. Robert D. Dalzell, F. D. McKenney, J. S. Flannery,* and *G. B. Craighill* for respondent. Reported below: 62 F. (2d) 293.

No. 773. TODARO *v.* MUNSTER, DISTRICT DIRECTOR OF IMMIGRATION, ET AL. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. W. J. Waguespack* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour* and *W. Marvin Smith* for respondents. Reported below: 62 F. (2d) 963.

Nos. 782 and 783. JOHN WANAMAKER, PHILADELPHIA, *v.* COMMISSIONER OF INTERNAL REVENUE. April 17, 1933. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight, Robert H. Montgomery,* and *J. Marvin Haynes* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key, Andrew D. Sharpe,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 62 F. (2d) 401.

No. 795. KANE, TRUSTEE IN BANKRUPTCY, *v.* MANUFACTURERS' FINANCE CORP. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert A. B. Cook* for petitioner. *Mr. Harrison J. Barrett* for respondent. Reported below: 62 F. (2d) 625.

No. 822. GUYTON ET AL. *v.* DENNEY, EXECUTOR. April 17, 1933. Petition for writ of certiorari to the Supreme

Court of Missouri denied. *Messrs. Paul R. Stinson, Edward J. White, Walter P. Armstrong,* and *J. E. McCadden* for petitioners. No appearance for respondent. Reported below: 331 Mo. 1115; 57 S.W. (2d) 415. See also, 40 S.W. (2d) 562.

No. 846. ALUMINUM COMPANY OF AMERICA *v.* BAUSH MACHINE TOOL CO. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward F. McClennen* for petitioner. *Mr. Walter N. Maguire* for respondent. Reported below: 63 F. (2d) 778.

No. 759. DOMENECH *v.* UNITED PORTO RICAN SUGAR CO. April 17, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Wm. Cattron Rigby, Fred W. Llewellyn, Charles E. Winter,* and *Blanton Winship* for petitioner. *Mr. Henri Brown* for respondent. Reported below: 62 F. (2d) 552.

No. 853. CAPARROTTA *v.* UNITED STATES. April 24, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jesse C. Duke* for petitioner. No appearance for the United States. Reported below: 62 App. D.C. 65; 64 F. (2d) 703.

No. 863. GOLDMAN ET AL. *v.* UNITED STATES. April 24, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Joseph G. M. Browne* for petitioners. No appearance for the United States. Reported below: 64 F. (2d) 1021.

No. 742. MURREY *v.* MURREY. April 24, 1933. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. J. D. Skeen* for petitioner. No appearance for respondent. Reported below: 216 Cal. 707; 16 P. (2d) 741.

No. 755. MOLTZ, EXECUTRIX, ET AL. *v.* UNITED STATES. April 24, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. Robert Ash* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. W. Scott,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 75 Ct. Cls. 251; 2 F. Supp. 683.

No. 789. HARVEY *v.* BONDY. April 24, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles A. Boston* and *Fred R. Wright* for petitioner. *Mr. David L. Podell* for respondent. Reported below: 62 F. (2d) 521.

No. 794. GANS ET AL. *v.* FARIS, U.S. DISTRICT JUDGE, ET AL. April 24, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward B. Levy* for petitioners. *Messrs. Edward T. Miller, Alexander P. Stewart,* and *Harold R. Small* for respondents. Reported below: 64 F. (2d) 1013.

No. 796. BERENSON ET AL. *v.* WOODBURY ET AL. April 24, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Lawrence Berenson* and *Arthur Berenson* for petitioners. *Mr. Martin Conboy* for respondents. Reported below: 61 F. (2d) 736.

No. 798. UNITED STATES EX REL. FREY *v.* ROBERTSON, COMMISSIONER OF PATENTS. April 24, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. J. Howard Flint* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour* and *T. A. Hostetler* for respondent. Reported below: 63 F. (2d) 457.

No. 799. ELGIN, JOLIET & EASTERN RY. CO. *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. April 24, 1933. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied. *Messrs. Kemper K. Knapp, William Beye,* and *Paul R. Conaghan* for petitioner. *Mr. Frank J. Jones* for respondents.

No. 800. NEW YORK WATER SERVICE CORP. *v.* TITLE GUARANTEE & TRUST CO. ET AL. April 24, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Thomas Ware Maires* for petitioner. *Messrs. C. Elmer Spedick* and *Harold L. Turk* for respondents. Reported below: 260 N.Y. 119; 183 N.E. 198.

No. 804. MERRILL, TRUSTEE IN BANKRUPTCY, *v.* DAY. April 24, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Earle A. Merrill* for petitioner. *Mr. Samuel J. Kaufman* for respondent. Reported below: 63 F. (2d) 888.

No. 885. MCGREGOR *v.* ZERBST, WARDEN. May 8, 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. James McGregor, pro se.* No appearance for respondent. Reported below: 63 F. (2d) 1008.

No. 886. RYAN ET AL. *v.* CITY OF DALLAS ET AL. May 8, 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. George Sergeant* for petitioners. No appearance for respondents. Reported below: 62 F. (2d) 959.

No. 894. MCGRORY *v.* UNITED STATES. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Henry P. Blair* for petitioner. No appearance for the United States. Reported below: 63 F. (2d) 697.

No. 776. SNARE & TRIEST CO. *v.* UNITED STATES. May 8, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Clarence W. DeKnight, George A. King,* and *George R. Shields* for petitioner. *Solicitor General Thacher,* and *Messrs. Whitney North Seymour* and *Wm. W. Scott* for the United States. Reported below: 75 Ct. Cls. 326.

No. 793. RISSMAN *v.* UNITED STATES. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harry A. Chamberlin* for petitioner. *Solicitor General Thacher* and *Messrs. Martin A. Morrison, John J. Byrne,* and *Erwin N. Griswold* for the United States. Reported below: 62 F. (2d) 164.

No. 801. WESTERN CANAL CO. ET AL. *v.* RAILROAD COMMISSION OF CALIFORNIA. May 8, 1933. Petition for writ of certiorari to the Supreme Court of California denied.

Messrs. Garret W. McEnerney, Andrew F. Burke, and *Frederic D. McKenney* for petitioners. *Messrs. Arthur T. George* and *Ira H. Rowell* for respondent. Reported below: 216 Cal. 639; 15 P. (2d) 853.

No. 803. AMERICAN FIDELITY & CASUALTY CO. *v.* FENTRESS. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. L. Matthews* for petitioner. *Mr. Nat Louis Hardy* for respondent. Reported below: 61 F. (2d) 999.

No. 816. MOBILE & OHIO R. CO. *v.* ARMSTRONG, ADMINISTRATRIX. May 8, 1933. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Carl Fox* for petitioner. *Mr. John S. Marsalek* for respondent. Reported below: 330 Mo. 918; 55 S.W. (2d) 460.

No. 820. CONSOLIDATED CUT STONE CO. *v.* HARTFORD ACCIDENT & INDEMNITY CO. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Joseph L. Hull* for petitioner. *Mr. Randolph W. Branch* for respondent. Reported below: 62 F. (2d) 975.

No. 821. MOSES ET AL., EXECUTORS, *v.* UNITED STATES. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Maurice Kay* and *Daniel A. Shirk* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Hayner N. Larson* for the United States. Reported below: 61 F. (2d) 791.

No. 867. CORNELL STEAMBOAT CO. *v.* LAVENDER ET AL.; and

No. 868. SAME *v.* ROSOFF SAND & GRAVEL CORP. ET AL. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Erskine* for petitioner. *Mr. E. Curtis Rouse* for respondents. Reported below: 63 F. (2d) 788.

No. 777. SMITH *v.* UNITED STATES. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Joseph L. Stern* for petitioner. *Solicitor General Thacher* and *Messrs. Norman J. Morrisson, Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 1015.

No. 807. GRANT ET AL. *v.* GUERNSEY. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. William C. Ralston* and *Roland Boynton* for petitioners. *Mr. Austin M. Cowan* for respondent. Reported below: 63 F. (2d) 163.

No. 808. GRAY *v.* CRAIG ET AL. May 8, 1933. Petition for writ of certiorari to the Third District Court of Appeal, of California, denied. *Mr. John Gray, pro se.* No appearance for respondents. Reported below: 127 Cal. App. 374; 15 P. (2d) 762; 16 P. (2d) 798.

No. 809. ADDIS ET AL. *v.* UNITED STATES. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Eustace Smith* for petitioners. *Solicitor General Thacher* and

Messrs. Norman J. Morrisson, Paul D. Miller, Mahlon D. Kiefer, and *Wm. H. Riley, Jr.,* for the United States. Reported below: 62 F. (2d) 329.

No. 812. Schusters Wholesale Produce Co. *v.* Texas & Pacific Ry. Co. May 8, 1933. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. Robert A. Hunter* and *Alex F. Smith* for petitioner. No appearance for respondent. Reported below: 176 La. 167; 145 So. 368.

No. 813. Frank Grocery Co. *v.* Texas & Pacific Ry. Co. May 8, 1933. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. Robert A. Hunter* and *Alex F. Smith* for petitioner. No appearance for respondent. Reported below: 176 La. 180; 145 So. 372.

No. 814. The Maskinonge et al. *v.* United States. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Daniel T. Hagan* for petitioners. *Solicitor General Thacher* and *Messrs. Norman J. Morrisson, A. W. Henderson, Paul D. Miller,* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 311.

No. 817. Lowry *v.* American Insurance Union. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Dick O. Terrell* for petitioner. No appearance for respondent. Reported below: 62 F. (2d) 209.

No. 823. FERROCARRILES NACIONALES DE MEXICO *v.* RUTLEDGE, JUDGE, ET AL. May 8, 1933. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Harold R. Small* for petitioner. *Messrs. Lee W. Grant* and *Barton N. Grant* for respondents. Reported below: 331 Mo. 1015; 56 S.W. (2d) 28.

No. 826. MEDEIROS *v.* KEVILLE, U. S. MARSHAL. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. William H. Lewis* for petitioner. *Solicitor General Thacher* and *Messrs. Paul D. Miller* and *W. Marvin Smith* for respondent. Reported below: 63 F. (2d) 187.

No. 827. TANNER *v.* JOHNSON, JUDGE, ET AL. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Lindsay R. Rogers* for petitioner. *Solicitor General Thacher* and *Mr. Paul D. Miller* for respondents. Reported below: 62 F. (2d) 601.

No. 828. WALKER *v.* COMMISSIONER OF INTERNAL REVENUE. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. J. G. Korner, Jr.,* and *Henry T. Dorrance* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *J. P. Jackson* for respondent. Reported below: 63 F. (2d) 351.

No. 835. SPENCER *v.* STATE LIFE INSURANCE CO. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Homer Hendricks* for petitioner. *Messrs. Milton W. Mangus* and *Mark McMahon* for respondent. Reported below: 62 F. (2d) 640.

No. 837. STRAUSS ET AL. *v.* U.S. FIDELITY & GUARANTY Co. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. R. D. Epps* and *R. O. Purdy* for petitioners. *Messrs. Irvine F. Belser* and *Shepard K. Nash* for respondent. Reported below: 63 F. (2d) 174.

No. 838. MISSOURI PACIFIC R. CO. ET AL. *v.* MONTGOMERY. May 8, 1933. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Edward J. White, Harry L. Ponder,* and *Thomas B. Pryor* for petitioners. *Messrs. Frank Pace* and *R. W. Robins* for respondent. Reported below: 186 Ark. 537; 55 S.W. (2d) 68.

No. 839. THE LIBERTY *v.* UNITED STATES. May 8, 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* and *Messrs. Norman J. Morrisson, A. W. Henderson, Paul D. Miller,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 62 F. (2d) 1054.

No. 840. STONE *v.* HIRSCH ET AL. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George A. Smoot* for petitioner. *Messrs. Orville Bullington, Leslie Humphrey, John B. King, Harry McCall, Victor Leovy, Henry H. Chaffe,* and *James Henry Bruns* for respondents. Reported below: 62 F. (2d) 120.

No. 841. IRVING TRUST CO. *v.* FARRACY, TRUSTEE IN BANKRUPTCY. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Cir-

cuit denied. *Mr. Michael H. Cardozo, Jr.*, for petitioner. *Mr. John Davis* for respondent. Reported below: 62 F. (2d) 353.

No. 850. THRASHER ET AL. *v.* WILLIAMS ET AL. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Robert F. Higgins, F. D. McKenney, John S. Flannery,* and *G. B. Craighill* for petitioners. *Messrs. J. Q. Mahaffey* and *John J. King* for respondents. Reported below: 62 F. (2d) 944.

No. 855. RADFORD IRON CO. *v.* APPALACHIAN ELECTRIC POWER CO. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Howard C. Gilmer* for petitioner. *Messrs. John L. Abbot, Newton D. Baker, Raymond T. Jackson,* and *A. Henry Mosle* for respondent. Reported below: 62 F. (2d) 940.

No. 864. HOOKER *v.* AETNA LIFE INSURANCE CO. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles M. Bryan* for petitioner. *Messrs. Walter P. Armstrong* and *Julian C. Wilson* for respondent. Reported below: 62 F. (2d) 805.

No. 865. AMERICAN CASUALTY CO. *v.* CHURCH. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. DeVoe Tomlinson* for petitioner. *Mr. Israel B. Greene* for respondent. Reported below: 64 F. (2d) 266.

No. 866. PITTSBURGH TERMINAL COAL CORP. *v.* WILLIAMS. May 8, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. H. H. Hoppe* for petitioner. *Messrs. Harvey A. Miller* and *G. C. Ladner* for respondent. Reported below: 62 F. (2d) 924.

No. 891. WILLIAMS *v.* FOSTER ET AL. May 8, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Edward Stafford* for petitioner. *Mr. Dwight E. Rorer* for respondents. Reported below: 62 App. D.C. 14; 63 F. (2d) 893.

No. 932. LAYTON ET AL. *v.* UNITED STATES. May 15, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Cedric F. Johnson* for petitioners. No appearance for the United States. Reported below: 61 App. D.C. 370; 63 F. (2d) 147.

No. 818. NAUMKEAG STEAM COTTON CO. *v.* UNITED STATES. May 15, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. James S. Y. Ivins* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Wm. S. Scott,* and *Lisle A. Smith* for the United States. Reported below: 76 Ct. Cls. 687; 2 F. Supp. 126.

No. 824. TOLL *v.* CASEY ET AL. May 15, 1933. Petition for writ of certiorari to the Supreme Court of Colorado denied. *Mr. Oliver W. Toll, pro se. Mr. John A. Ewing* for respondents. Reported below: 92 Colo. 12; 18 P. (2d) 310.

No. 829. NEW YORK DOCK RY. ET AL. *v.* PENNSYLVANIA R. Co. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John F. Finerty, Charles E. Cotterill, Henry B. Closson,* and *Edwin A. Lucas* for petitioners. *Messrs. Henry Wolf Biklé, F. D. McKenney, John S. Flannery,* and *George B. Craighill* for respondent. Reported below: 62 F. (2d) 1010.

No. 847. DANIEL *v.* FLORIDA INDUSTRIAL Co. May 15, 1933. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Henry Roberts* for petitioner. *Mr. Robert L. Pennington* for respondent. Reported below: 159 Va. 472; 166 S.E. 712.

No. 849. J. H. COTTMAN & Co. *v.* UNITED STATES. May 15, 1933. Petition for writ of certiorari to the Court of Customs and Patents Appeals denied. *Messrs. John W. Davis* and *Stuart S. Janney* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Mr. Whitney North Seymour* for the United States. Reported below: 20 C.C.P.A. (Cust.) 344.

No. 852. HAAS, TRUSTEE IN BANKRUPTCY, *v.* RENDLEMAN, RECEIVER. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph W. Little* for petitioner. *Mr. Louis M. Bourne* for respondent. Reported below: 62 F. (2d) 701.

No. 854. RUSHING ET AL. *v.* MAYFIELD Co. ET AL. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. N.*

Saye for petitioners. *Messrs. Edward H. Chandler, Summers Hardy, John E. Green, Jr.,* and *Tom L. Beauchamp* for respondents. Reported below: 62 F. (2d) 318.

No. 856. LAMPE *v.* SMITH. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John A. Cline* for petitioner. *Mr. George Wm. Cottrell* for respondent. Reported below: 64 F. (2d) 201.

No. 857. SIMMONS MANUFACTURING CO. *v.* ROUTZAHN, COLLECTOR OF INTERNAL REVENUE. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James H. Griswold* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Norman D. Keller* for respondent. Reported below: 62 F. (2d) 947.

No. 858. NEW YORK EDISON CO. *v.* KOSCH, RECEIVER, ET AL. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William L. Ransom* for petitioner. *Messrs. Henry M. Wise* and *Joseph M. Proskauer* for respondents. Reported below: 63 F. (2d) 754.

No. 859. GORDON ET AL. *v.* EMPIRE FUEL & GAS CO. ET AL. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Gordon* for petitioners. *Messrs. David B. Trammell, Will E. Orgain,* and *James W. Finley* for respondents. Reported below: 63 F. (2d) 487.

No. 869. AYER ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James Craig Peacock* and *John W. Townsend* for petitioners. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key, John H. McEvers,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 63 F. (2d) 231.

No. 870. ALL RUSSIAN TEXTILE SYNDICATE *v.* COMMISSIONER OF INTERNAL REVENUE. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Connick* for petitioner. *Attorney General Cummings* and *Messrs. Sewall Key, John G. Remey, Paul D. Miller,* and *Erwin N. Griswold* for respondent. Reported below: 62 F. (2d) 614.

No. 887. NEW ENGLAND FIBRE BLANKET CO. *v.* THE PORTLAND TELEGRAM ET AL. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Theodore J. Geisler* for petitioner. No appearance for respondents. Reported below: 61 F. (2d) 648.

No. 892. WALLACE *v.* COMMISSIONER OF INTERNAL REVENUE. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George H. Koster* and *L. A. Luce* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *Morton K. Rothschild* for respondent. Reported below: 62 F. (2d) 826.

No. 897. THE WAALHAVEN ET AL. *v.* POTASH IMPORTING CORP. May 15, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit

denied. *Mr. John W. Crandall* for petitioners. *Mr. Forrest E. Single* for respondent. Reported below: 64 F. (2d) 25.

No. 890. LEWIS *v.* NEW YORK. See same case, *ante*, p. 709.

No. 848. GOODWIN *v.* UNITED STATES. May 22, 1933. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Harry Friedman* and *Elton Watkins* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Wm. W. Scott, H. Brian Holland,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 76 Ct. Cls. 218.

No. 860. NEW YORK, CHICAGO & ST. LOUIS R. Co. *v.* BOULDEN. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Russell P. Harker* for petitioner. *Mr. Herbert H. Patterson* for respondent. Reported below: 63 F. (2d) 917.

No. 861. BRYAN, GOVERNOR, ET AL. *v.* HUBBELL BANK ET AL. May 22, 1933. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Messrs. George W. Ayers* and *Paul F. Good* for petitioners. *Mr. C. Petrus Peterson* for respondents. Reported below: 124 Neb. 51; 245 N.W. 20.

No. 862. VICTORIA MATERIALS & GRAVEL CO. ET AL. *v.* SAUERMAN BROS., INC. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Henry S. Paulus* and *Charles C. Carsner* for petitioners. *Messrs. Paul Carrington* and *S. M. Leftwich* for respondent. Reported below: 61 F. (2d) 850.

No. 871. GLENMORE SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Ravenel* and *Lawrence A. Baker* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Sewall Key,* and *Hayner N. Larson* for respondent. Reported below: 62 F. (2d) 780.

No. 876. CROMWELL *v.* SKINNER ET AL. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Roy St. Lewis, B. B. Blakeney, Hubert Ambrister,* and *W. R. Wallace* for petitioner. *Messrs. Robert Stone, Emmet H. Gamble,* and *Joseph C. Stone* for respondents. Reported below: 62 F. (2d) 432.

No. 877. LASCOFF ET AL. *v.* PRATTER. May 22, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Henry Epstein* for petitioners. No appearance for respondent. Reported below: 261 N.Y. 509; 185 N.E. 716.

No. 878. THOMASTON COTTON MILLS *v.* ROSE, COLLECTOR OF INTERNAL REVENUE. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. C. Murphy* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 62 F. (2d) 982.

No. 879. CINCINNATI UNDERWRITERS AGENCY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 22, 1933. Petition for writ of certiorari to the Circuit Court of

Appeals for the Sixth Circuit denied. *Mr. Arlington C. Harvey* for petitioner. *Solicitor General Biggs, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 63 F. (2d) 309.

No. 881. WILLIAMS *v.* UNITED STATES. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George Moore Brady* for petitioner. *Solicitor General Biggs* and *Messrs. Norman J. Morrisson, Paul D. Miller, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 1022.

No. 883. BARTON *v.* AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONNECTICUT. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Bernard J. Gallagher, Eugene F. Bogan,* and *Charles E. Shreve* for petitioner. *Mr. John G. Palfrey* for respondent. Reported below: 63 F. (2d) 631.

No. 884. SOUTHERN TRANSPORTATION CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION. May 22, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Karl Knox Gartner* for petitioners. *Messrs. Nelson Thomas* and *Daniel W. Knowlton* for respondent. Reported below: 61 App. D.C. 284; 61 F. (2d) 925.

No. 893. AETNA LIFE INSURANCE CO. *v.* WHARTON. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Wm. Marshall Bullitt, S. Lasker Ehrman,* and

Byron K. Elliott for petitioner. *Messrs. Elbert E. Godwin, Henry Marshall Armistead,* and *Wm. Henry Rector* for respondent. Reported below: 63 F. (2d) 378.

No. 895. ELY NORRIS SAFE CO. *v.* MOSLER SAFE CO. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. F. P. Warfield* for petitioner. *Messrs. Drury W. Cooper, Alexander Pfeiffer,* and *Allan C. Bakewell* for respondent. Reported below: 62 F. (2d) 524.

No. 896. VOIGT *v.* REMICK ET AL. May 22, 1933. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Donald A. Wallace* and *S. E. Bracegirdle* for petitioner. *Mr. Rockwell T. Gust* for respondents. Reported below: 260 Mich. 198; 244 N.W. 446.

No. 898. DISTRICT OF COLUMBIA *v.* FRANK GLADSON LEYS; and

No. 899. SAME *v.* ROBERT H. LEYS. May 22, 1933. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wm. W. Bride, Vernon E. West,* and *Robert E. Lynch* for petitioner. *Mr. Alvin L. Newmyer* for respondents. Reported below: 62 App.D.C. 3, 5; 63 F. (2d) 646, 648.

No. 904. CHAPMAN *v.* MEMPHIS PRESS-SCIMITAR CO. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Julian C. Wilson* and *Lester G. Fant* for petitioner. *Mr. Marion G. Evans* for respondent. Reported below: 62 F. (2d) 565.

No. 913. H. WAGNER & ADLER CO. *v.* SOCIETE ANONYME IWAN SIMONIS. May 22, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Ward Beer* for petitioner. *Mr. Selden Bacon* for respondent. Reported below: 62 F. (2d) 1073.

No. 917. SOUTHERN HOLDING & SECURITIES CORP. ET AL. *v.* KENTUCKY. May 22, 1933. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Messrs. Cleon K. Calvert* and *Kent V. Kay* for petitioners. *Mr. P. T. Wheeler* for respondent. Reported below: 245 Ky. 602; 53 S.W. (2d) 974.

No. 943. SCHROEDER *v.* WISCONSIN. May 29, 1933. The motion to diminish the record is denied. Petition for writ of certiorari to the Supreme Court of Wisconsin is also denied. *Mr. William L. Tibbs* for petitioner. *Mr. C. Stanley Perry* for respondent. Reported below: 210 Wis. 366; 244 N.W. 599.

No. 687. FRANCE AND CANADA CIE. FRANCAISE DE NAVIGATION *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Court of Claims denied. *Mr. F. E. Scott* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour* and *Wm. W. Scott* for the United States. Reported below: 75 Ct. Cls. 1.

No. 880. RICHARDS *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Roscoe Walsworth* for petitioner. *Solicitor General Biggs* and *Messrs. Paul D. Miller* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 63 F. (2d) 338.

No. 882. ROBINSON, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Abraham J. Levin* and *Frederick L. Pearce* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Sewall Key, J. Louis Monarch,* and *Wm. C. Thompson* for respondent. Reported below: 63 F. (2d) 652.

No. 889. CARNAHAN *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Bruce Barnett* for petitioner. *Solicitor General Biggs* and *Messrs. Norman J. Morrisson, Paul D. Miller, Mahlon D. Kiefer,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 64 F. (2d) 1010.

No. 901. CHANDLER *v.* FIELD, COLLECTOR OF INTERNAL REVENUE. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harris H. Gilman* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Sewall Key,* and *Wm. C. Thompson* for respondent. Reported below: 63 F. (2d) 13.

No. 902. THOMPSON *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. Chapman Revercomb* for petitioner. *Solicitor General Biggs, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, W. Clifton Stone,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 63 F. (2d) 111.

No. 907. GULF, MOBILE & NORTHERN R. CO. ET AL. *v.* WOOD, ADMINISTRATRIX. May 29, 1933. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. Ellis B. Cooper* and *Walter S. Welch* for petitioners. *Mr. J. E. Holmes* for respondent. Reported below: 164 Miss. 765; 146 So. 298.

No. 914. COMMERFORD *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles H. Tuttle* for petitioner. *Solicitor General Biggs* and *Messrs. Sewall Key, John H. McEvers,* and *Paul D. Miller* for the United States. Reported below: 64 F. (2d) 28.

No. 918. MISSOURI PACIFIC R. CO. *v.* MORRISON. May 29, 1933. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Edward J. White* and *Robert E. Wiley* for petitioner. *Mr. Tom J. Terral* for respondent. Reported below: 186 Ark. 689; 55 S.W. (2d) 933.

No. 920. FRICKE *v.* LEVIN, TRUSTEE IN BANKRUPTCY. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John V. Lee* for petitioner. *Mr. Wilder Lucas* for respondent. Reported below: 64 F. (2d) 1013.

No. 921. SOCIETA ANONIMA CANTIERE OLIVO *v.* FEDERAL INSURANCE CO. ET AL. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Homer L. Loomis* for petitioner. *Messrs. D. Roger Englar* and *T. Catesby Jones* for respondents. Reported below: 62 F. (2d) 769.

No. 923. MARTIN ET AL. *v.* H. C. MILLER CO. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Benton Baker* for petitioners. *Messrs. Ira Milton Jones* and *George A. Chritton* for respondent. Reported below: 63 F. (2d) 5.

No. 925. HORWITZ ET AL. *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George S. Ward* for petitioners. *Solicitor General Biggs* and *Messrs. Paul D. Miller* and *W. Marvin Smith* for the United States. Reported below: 63 F. (2d) 706.

No. 928. GREYLOCK MILLS *v.* WHITE, COLLECTOR OF INTERNAL REVENUE. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Sanford Robinson* for petitioner. *Solicitor General Biggs* and *Messrs. Whitney North Seymour, Sewall Key, Hayner N. Larson,* and *Erwin N. Griswold* for respondent. Reported below: 63 F. (2d) 866.

No. 933. ALEXANDER FILM CO. *v.* LIGON. May 29, 1933. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. E. L. Klett* for petitioner. No appearance for respondent. Reported below: 36 S.W. (2d) 313; 55 S.W. (2d) 1030.

No. 937. ILLINOIS EX REL. KOESTER *v.* BOARD OF APPEALS OF COOK COUNTY. May 29, 1933. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Perry J. Ten Hoor* for petitioner. *Mr. Montgomery S. Winning* for respondent. Reported below: 351 Ill. 301; 184 N.E. 325.

No. 938. KOESTER *v.* MCDONOUGH, COUNTY TREASURER. May 29, 1933. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Perry J. Ten Hoor* for petitioner. *Mr. Montgomery S. Winning* for respondent. Reported below: 351 Ill. 492; 184 N.E. 826.

No. 944. BALDWIN ET AL. *v.* TEXAS & NEW ORLEANS R. Co. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. L. Reed* for petitioners. No appearance for respondent. Reported below: 63 F. (2d) 328.

No. 945. SAFE CABINET CO. *v.* GLOBE-WERNICKE CO. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Harrison M. Brooks* and *George I. Haight* for petitioner. *Mr. Wallace R. Lane* for respondent. Reported below: 63 F. (2d) 492.

No. 947. TEXAS & PACIFIC RY. CO. ET AL. *v.* SMITH BROTHERS, INC. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Robert L. W. Thompson, Silas H. Strawn, Carl Fox,* and *T. D. Gresham* for petitioners. *Mr. A. L. Reed* for respondent. Reported below: 63 F. (2d) 747.

No. 952. UNION RAILWAY CO. *v.* JENSEN. May 29, 1933. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Alfred T. Davison* for petitioner. *Mr. Louis W. Arnold, Jr.,* for respondent. Reported below: 237 App. Div. 655; 262 N.Y.S. 465.

No. 958. SOUTHERN RY. CO. *v.* COLONNA, ADMINISTRATRIX. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Thomas B. Gay, S. R. Prince, Sidney S. Alderman,* and *James H. Corbitt* for petitioner. *Mr. John W. Oast, Jr.,* for respondent. Reported below: 64 F. (2d) 237.

No. 961. FIDELITY-PHENIX FIRE INSURANCE CO. ET AL. *v.* BENEDICT COAL CORP. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Alexander H. Sands* for petitioners. *Messrs. John W. Price* and *Paul Dulaney* for respondent. Reported below: 64 F. (2d) 347.

No. 973. FOLEY *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Aron Abbott* for petitioner. No appearance for the United States. Reported below: 64 F. (2d) 1.

No. 981. YENKICHI ITO *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wm. H. Wylie* for petitioner. No appearance for the United States. Reported below: 64 F. (2d) 73.

No. 984. FRISCIA ET AL. *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. N. B. K. Pettingill* for petitioners. No appearance for the United States. Reported below: 63 F. (2d) 977.

No. 926. NEW YORK LIFE INSURANCE CO. *v.* KWETKAUSKAS. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit

denied. *Messrs. A. G. Dickson* and *Louis H. Cooke* for petitioner. *Mr. Horace Michener Schell* for respondent. Reported below: 63 F. (2d) 890.

No. 953. SUN LIFE ASSURANCE COMPANY OF CANADA ET AL. *v.* JENSMA. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. G. Graves* for petitioners. *Mr. Oliver O. Haga* for respondent. Reported below: 64 F. (2d) 457.

No. 980. FINANCE SERVICE CO. *v.* IRVING TRUST CO., TRUSTEE. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Griffin* for petitioner. *Mr. Henry Gale* for respondent. Reported below: 63 F. (2d) 694.

No. 988. DOLFF ET AL. *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Willis Melville* for petitioners. No appearance for the United States. Reported below: 61 F. (2d) 881.

No. 1002. JEZNIS ET AL. *v.* UNITED STATES. May 29, 1933. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Warren H. Van Kirk* for petitioners. No appearance for the United States. Reported below: 63 F. (2d) 531.

No. 931. KAUFMAN *v.* PENN MUTUAL LIFE INSURANCE CO. May 29, 1933. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George E. Edelin* and *Theodore D. Peyser* for petitioner. *Mr. Vincent A. Sheehy* for respondent. Reported below: 62 App. D.C. 37; 64 F. (2d) 160.

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No. 697. HUNT *v.* UNITED STATES. April 17, 1933. Petition for writ of certiorari to the Court of Claims. Dismissed on motion of *Messrs. Wm. J. Byrne, Thomas J. Reilly,* and *Josephus C. Trimble* for petitioner. Reported below: 75 Ct.Cls. 621; 59 F. (2d) 1014.

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS, FOR THE OCTOBER TERMS 1930, 1931, AND 1932

	ORIGINAL			APPELLATE			TOTALS		
Terms	1930	1931	1932	1930	1931	1932	1930	1931	1932
Total cases on dockets	24	20	21	1, 015	1, 003	1, 016	1, 039	1, 023	1, 037
Cases disposed of during terms	8	1	4	892	883	906	900	884	910
Cases remaining on dockets	16	19	17	123	120	110	139	139	127

	TERMS		
	1930	1931	1932
Distribution of cases disposed of during terms:			
Original cases	8	1	4
Appellate cases on merits	326	282	261
Petitions for certiorari	566	601	649
Cases remaining on dockets:			
Original cases	16	19	17
Appellate cases on merits	76	61	56
Petitions for certiorari	47	59	54

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