UNITED STATES REPORTS

VOLUME 292

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1933

FROM MARCH 20, 1934 TO AND INCLUDING JUNE 4, 1934

ERNEST KNAEBEL

REPORTER

UNITED STATES

GOVERNMENT PRINTING OFFICE

WASHINGTON : 1934

For sale by the Superintendent of Documents, Washington, D.C. - Price $1.50 (Buckram)

Erratum.—291 U. S. 363, line 12, "1934" should read 1933.

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.
J. CRAWFORD BIGGS, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

For the First Circuit, 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, 1933.

FLORIDA ET AL. *v.* UNITED STATES ET AL.

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

No. 342. Argued February 13, 1934.—Decided April 2, 1934.

1. By § 13 (4) of the Interstate Commerce Act, the Interstate Commerce Commission is empowered to increase intrastate rates under which the intrastate traffic fails to contribute its fair share to the revenue of the interstate carrier, and which thus cause an unjust discrimination against interstate commerce. P. 4.
2. This power was not withdrawn or diminished by the changes made in § 15a of that Act by the Emergency Railroad Transportation Act of 1933. P 5.
3. Findings of the Commission preliminary to an order increasing intrastate rates on logs in Florida to remove unjust discrimination against interstate commerce with respect to the carrier's revenue, *held* sufficient and in conformity with the principles laid down in *Florida* v. *United States*, 282 U.S. 194. P. 8.
4. The evidence supported the findings. P. 13.
5. The authority of the Commission with respect to the removal of discrimination against interstate commerce caused by inadequacy of the intrastate rates of an interstate carrier, rests upon the constitutional power of Congress, extending to such carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and provide for the execution of that power through a subordinate body. P. 12.
6. In relation to such discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as pre-

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scribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. P. 12.

4 F.Supp. 477, affirmed.

APPEALS from a decree of the District Court, of three judges, sustaining an order of the Interstate Commerce Commission. There were originally three suits, against the United States and the Interstate Commerce Commission, viz., a bill by the State of Florida and the Florida Railroad Commission, another by Wilson Cypress Co. and Wilson Lumber Co., and the third by F. S. Buffum & Co., Inc. The Atlantic Coast Line R. Co. intervened as a defendant. The several suits were consolidated below and were heard and decided as one case.

Messrs. Theodore T. Turnbull, Henry P. Adair, and *J. V. Norman,* with whom *Mr. Cary D. Landis,* Attorney General of Florida, and *Messrs. C. G. Ashby, August G. Gutheim,* and *F. C. Hillyer* were on the brief, for appellants.

Mr. J. Stanley Payne, with whom *Solicitor General Biggs* and *Messrs. Elmer B. Collins, Harold M. Stephens,* and *Daniel W. Knowlton* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. Robert C. Alston, with whom *Messrs. Carl H. Davis, W. E. Kay, Wm. Hart Sibley,* and *Alfred P. Thom* were on the briefs, for the Atlantic Coast Line R. Co., appellee.

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

This appeal presents the question of the validity of an order made by the Interstate Commerce Commission on July 5, 1932, requiring the Atlantic Coast Line Railroad Company to desist from an unjust discrimination

found to exist in the relation of intrastate and interstate rates and to maintain certain rates for the intrastate transportation of logs, as described, within and throughout the State of Florida for distances of 170 miles or less. 186 I.C.C. 157; 190 I.C.C. 588. The order was sustained by the District Court, three judges sitting. 4 F.Supp. 477.

By an order of August 2, 1928, the Commission prescribed interstate rates on logs on the lines of the Atlantic Coast Line Railroad Company from points in northern Florida to destinations in Georgia for distances not exceeding 170 miles. Finding that the Florida intrastate rates on similar logs for similar hauls, generally described as the Cummer scale, resulted in unjust discrimination, the Commission also established rates for intrastate application within Florida which would correspond with the rates fixed for interstate transportation. 146 I.C.C. 717. The order in the latter respect was assailed and the decree of the District Court sustaining it was reversed by this Court. *Florida* v. *United States,* 282 U.S. 194. We decided that the order could not be upheld on the ground of undue prejudice against persons and localities in interstate commerce, and that it could not be sustained on the ground of unjust discrimination against interstate commerce from the standpoint of revenue losses due to intrastate rates as the order in that aspect was not supported by appropriate findings.

Meanwhile, in February, 1929, both the interstate rates and intrastate rates, as prescribed, had been put into effect. After the mandate of this Court, the Cummer scale of intrastate rates was restored and became effective on April 10, 1931. The Interstate Commerce Commission reopened the proceedings and, after hearing, found that the Cummer scale of intrastate rates caused unjust discrimination against interstate commerce from a revenue standpoint. The Commission made no finding with respect to undue prejudice against persons and localities

in interstate commerce. The Commission accordingly entered the order of July 5, 1932, now under review. While bills were pending in the District Court to enjoin this order, the Commission granted a further hearing in view of the representation that a number of southern railroads had reduced their log rates, and on January 9, 1933, the Commission made an additional report which affirmed the findings previously made and restored the order of July 5, 1932, to be effective February 25, 1933. 190 I.C.C. p. 600. Supplemental bills were filed in the District Court, and on February 24, 1933, the decree was entered upholding the Commission's action.

The order of the Commission is attacked upon the grounds (1) that under Emergency Railroad Transportation Act, 1933 (c. 91, 48 Stat. 211), the Commission was without power to make the order; (2) that the findings of the Commission are inadequate to sustain the order; and (3) that if the findings can be deemed to be adequate, they are not supported by the evidence.

First. The power of the Commission. By Transportation Act, 1920 (41 Stat. 484), the Congress granted specific authority to the Commission to remove discriminations against interstate commerce caused by intrastate rates. The Congress amended § 13 of the Act to Regulate Commerce so as to empower the Commission to confer with state authorities " with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission." § 13 (3). And, whenever in the course of its authorized investigations, the Commission, after full hearing, finds that any rate, regulation, or practice " made or imposed by authority of any State " causes " any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrim-

ination against interstate or foreign commerce," the Commission is required to prescribe the rate thereafter to be charged, or the regulation or practice thereafter to be observed, in such manner as in its judgment will remove the discrimination. The order of the Commission is to bind the carriers, parties to the proceeding, " the law of any State or the decision or order of any State authority to the contrary notwithstanding." § 13 (4).

In *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563, 585–587, we reached the conclusion that the provision of § 13 (4) for the removal of " any undue, unreasonable, or unjust discrimination against interstate commerce " was not to be regarded as referring only to discrimination as between persons and localities. We held that Transportation Act, 1920, imposed an affirmative duty on the Commission " to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." Intrastate rates, we said, must play a most important part in maintaining such an adequate system. If there was interference with the achievement of that purpose because of a disparity of intrastate rates as compared with interstate rates, the Commission was authorized to end that disparity. It was to be ended because it constituted an " unjust discrimination against interstate commerce." We concluded that these words in § 13 (4) were not tautological, but had the necessary effect of conferring authority upon the Commission to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. *United States* v. *Louisiana*, 290 U.S. 70, 75.

Appellants insist that this result was reached because of what was described as the " dovetail relation " between

§ 13 (4) and § 15a, and that the amendment of the latter section by Emergency Railroad Transportation Act, 1933, has effected a radical change. They contend that the Commission no longer has authority to remove an unjust discrimination against interstate commerce caused by a disparity of intrastate rates viewed from a revenue standpoint. We are unable to accept that view. Section 13 (4) was not amended by Emergency Railroad Transportation Act, 1933. The authority conferred by § 13 (4) to prescribe intrastate rates for the purpose of removing an unjust discrimination against interstate commerce was not withdrawn. The Congress had knowledge of the construction given to § 13 (4) by this Court and of the important effect of that construction in relation to intrastate rates found to be inadequate. The conclusion is not lightly to be reached that the Congress would have undertaken to change a policy of such great importance without explicit language indicating that purpose.

The purpose of the changes in § 15a is not left in doubt. They were made with the manifest object of eliminating the provisions for the recapture of excess income of carriers and of revising the rule as to rate making.[1] The requirement imposed by Transportation Act, 1920, for the adjustment of rates according to rate groups was abolished and in substitution the Commission was directed to give due consideration to the factors which are specified in the section as amended.[2] Thus the Commission is to consider,

[1] See report of the Committee on Interstate and Foreign Commerce of the House of Representatives, H.R. No. 193, 73d Cong., 1st sess., pp. 28–30.

[2] Section 15a in its amended form is as follows:

"Section 15a. (1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need,

among other factors, " the effect of rates on the movement of traffic"; " the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service "; and " the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service." [3]

Neither the elimination of the group method of rate making, nor the substituted rule, suggests an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce. On the contrary, the substituted rule of rate making by

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in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

[3] As to the substituted rule of rate making, the House Committee said in its report: " The rule of rate making as rewritten in the proposed paragraph (2), found in section 205 of the bill, directed the Commission to give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service. It is difficult to conceive of a reasonable rate which would ignore any one of these considerations. The Commission as a fair and impartial body acting for the Congress will continue to give consideration to these factors. In the case of the power given to the Commission to prescribe just and reasonable rates the committee does not believe that it is necessary to encumber the statutes with further language which might be mandatory in terms, but which could add nothing further to the plain duty of the Commission under the law, and which might be interpreted to imply a distrust of the Commission in prescribing just and reasonable rates. The Commission will and must give consideration to all facts developed on the record and see to it that the record is enlightening as to such factors as are mentioned in the first section of this bill." H.R. No. 193, 73d Cong., 1st sess., p. 30.

its express terms emphasizes the carriers' need of adequate revenues. The Congress had provided authority to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce. The Commission had exercised that authority. The Commission had not proposed the diminution of that authority. The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that the new rule of rate making left the power of the Commission under § 13 (4) intact.

Second. The Commission's findings. On the former appeal we pointed out that if the action of the Commission was not simply for the removal of undue prejudice against interstate commerce as between persons or localities, and the Commission undertook to prescribe a statewide level of intrastate rates in order to avoid an undue burden, from a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence to support an order directed to that end. We observed that in dealing with unjust discrimination as between persons and localities the question was one of the relation of rates to each other; but that in considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question was that of the relation of rates to income. But to support the order then under review, the Commission had made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an

adequate transportation service. *Florida* v. *United States, supra,* pp. 212, 214, 215.

On the new hearing, the Commission made comprehensive findings to supply what had thus been found to be lacking. The findings set forth at length transportation conditions, traffic and revenues. 186 I.C.C., pp. 160–189. Appellants' criticisms proceed upon an unwarranted assumption. The requirement of essential findings as to revenues did not demand an impracticable exactness. Losses through inadequate rates could be shown satisfactorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made.

Reviewing the history of the Cummer scale of intrastate rates on logs, and considering comparable interstate and intrastate rates, the Commission found that the Cummer scale was abnormally low and less than reasonably compensatory; that the defendants' revenue under the Cummer scale was "insufficient under all the circumstances and conditions to cover the full cost of the service." *Id.,* pp. 165, 187. The Commission was able to go further. In considering the effect of the Cummer scale upon interstate commerce, the Commission was aided by evidence of actual operations during the period from February 8, 1929, to January 31, 1931, when the increased intrastate rates prescribed by the former order were in effect. The Commission, in its summary, found (*id.,* pp. 188, 189):

"The record shows that during the period of approximately two years following the increase in the rates the total movement amounted to 18,602 cars. This total included 3,740 cars transported to Eastport, Lacoochee and Otter Creek in trainload movements that have ceased and will not be resumed. Under normal economic conditions it seems probable that the annual volume of the Florida log movement under rates the same as those previously

prescribed will not be less than the average of this 2-year period minus the number of cars included in the discontinued trainload movements. This average is 7,431 cars. That the movement will not be less than this under normal conditions is confirmed by the fact during the five months immediately preceding the last hearing in this case, February to June, 1931, when conditions were abnormal, there were shipped over defendant's lines in Florida a total of 2,765 cars of logs. This movement was at the rate of 6,636 cars a year. We believe that the movement of logs intrastate in Florida over defendant's lines will not be materially curtailed under the rates which we here prescribe, which are the same or substantially the same as the rates generally in effect and under which logs freely move throughout the South.

" The freight charges collected on the 18,602 cars above referred to aggregated $571,508.94, and if the Cummer scale had applied the charges would have been $281,-225.75. The freight charges collected on the 3,740 cars referred to were $100,439.06, and if the Cummer scale had applied they would have been $48,286.75. On the 14,862 cars remaining after deducting the 3,740 cars from the total movement of 18,602, the freight charges collected were $471,069.88 ($571,508.94 minus $100,439.06) and if the Cummer scale had been applicable they would have been $232,939 ($281,225.75 minus $48,286.75) or $238,-130.88 less than those actually collected. Accordingly, on the basis of an average of 7,431 cars a year under normal economic conditions, which basis we believe conservative, the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer scale, now in effect. The application of the Cummer scale, therefore, places a substantial burden upon defendant's interstate revenues. If the revenues yielded by the Cummer scale are not sufficient to cover the cost of the service, as the cost evidence

indicates, it would follow that part of the above-stated amount would constitute a dead loss in net revenue.

"We find that the circumstances and conditions surrounding the transportation of these logs intrastate in Florida are not on the whole as favorable as the circumstances and conditions surrounding the interstate movement of logs over defendant's lines. . . .

"We further find that the intrastate rates on logs over 6 feet in length, except walnut, cherry, and cedar, applicable between points on the Atlantic Coast Line in Florida for distances of 170 miles and less are, and for the future will be, unjustly discriminatory against interstate commerce, and that such unjust discrimination can be and should be removed by the establishment between all points on the Atlantic Coast Line in Florida for distances of 170 miles or less of rates not less than the rates shown for such distances in Appendix F hereto, which are the rates found reasonable for interstate application from northern Florida to Georgia."

On the second rehearing, with respect to changes made by southern rail carriers in their log rates—which appeared to have been made largely for the purpose of meeting truck competition—the Commission found that in Florida the movement of logs had "not been shown to have gone to the trucks to any substantial extent where the hauls are over 25 miles"; that "truck-competitive rates for distances under 25 miles would regain little, if any, traffic"; and that the maintenance of the Cummer scale to meet what little truck competition could be met in that way would greatly decrease the revenues of the Atlantic Coast Line Railroad Company and would not be warranted. 190 I.C.C. p. 599.

We perceive no ground for the contention that the Commission has failed to make the basic findings necessary to support its ultimate conclusion.

Third. The evidence before the Commission. The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by § 13 (4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *Shreveport Case,* 234 U.S. 342, 351, 354, 355; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co., supra.* The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States* v. *Louisville & Nashville R. Co.,* 235 U.S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U.S. 88, 100; *Western Chemical Co.* v. *United States,* 271 U.S. 268, 271; *Virginian Railway Co.* v. *United States,* 272 U.S. 658, 663; *Assigned Car Cases,* 274 U.S. 564, 580; *Merchants Warehouse Co.* v. *United States,* 283 U.S. 501, 508; *Crowell* v. *Benson,* 285 U.S. 22, 50, 51.

We agree with the conclusion of the District Court that there was no lack of substantial evidence to support the Commission's findings.

The Commission's determinations were "without prejudice to the right of the authorities of the State of Florida or of any other interested party to apply in the proper manner for a modification of its (our) findings and order as to any specified intrastate rate on the ground that it is not related to interstate rates in such a way as to contravene the provisions of the Interstate Commerce Act." 190 I.C.C. p. 600.

Decree affirmed.

MISSOURI *v.* MISSOURI PACIFIC RAILWAY CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 824. Jurisdictional statement submitted February 28, 1934.—Decided April 2, 1934.

1. Under the Act of February 13, 1925, this Court can not entertain a direct appeal from a decree of the District Court denying preference to a money claim of a State against a railway company in a receivership proceeding. P. 15.
2. The provision of the Judiciary Act of 1891, § 5, for direct appeal to this Court from the Circuit (later District) Court in cases involving the Constitution was deleted by the Act of 1925; and direct appeal in the cases of that class covered by Jud. Code, § 266, as amended, lies only where hearing in the District Court was before three judges, as provided in that section. P. 15.

Appeal dismissed.

The State in this case sought to support the appeal upon the ground that enforcement of its claim was supplementary to a decree in an earlier case, directed by this Court in the exercise of the jurisdiction by direct appeal then allowed by the Act of 1891.

Messrs. C. B. Allen and *Lee B. Ewing* filed the jurisdictional statement for appellant.

No appearance for appellees.

PER CURIAM.

This is a direct appeal to this Court from a decree of the District Court of the United States for the Eastern District of Missouri, entered May 6, 1933, in receivership proceedings, and allowing a claim of the State of Missouri for $7,000, as an unsecured obligation. The preference sought by the State was denied. The claim is founded upon alleged overcharges in railway passenger fares, exacted of the State of Missouri by the Missouri Pacific Railway Company during the years 1907 to 1913 inclusive, contrary to the provisions of the Missouri statute of 1907. In a suit to enjoin the enforcement of that statute, an interlocutory injunction was granted by the Circuit Court of the United States for the Western District of Missouri, and later a final decree made the injunction permanent. 168 Fed. 317. In 1913, on a direct appeal to this Court under authority of § 5 of the Judiciary Act of March 3, 1891 (c. 517, 26 Stat. 826, 827, 828; Jud. Code, 1911, § 238), the constitutional validity of the Missouri statute was sustained and the parties to the suit which embraced the Missouri Pacific Railway Company were directed to apply to the court below for the entry of an appropriate decree. *Missouri Rate Cases,* 230 U.S. 474; *Knott* v. *Missouri Pacific Ry. Co.*, 230 U.S. 509, 511. Thereafter, the District Court of the United States for the Western District of Missouri entered a decree dissolving the injunction and dismissing the bill, and appointing a master to hear claims for *ad interim* overcharges. No such claim appears to have been filed in that court by this appellant.

In 1915, in a suit in the District Court of the United States for the Eastern District of Missouri, a receiver was

appointed for the Missouri Pacific Railway Company, and, in 1916, the State of Missouri intervened in that suit and presented the claim which resulted in the decree from which the present appeal is taken.

Appellant contends that the decree should be treated as supplementary to that directed by this Court in *Knott* v. *Missouri Pacific Ry. Co., supra,* and as appealable directly to this Court because the decree in the *Knott* case was so appealable. *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U.S. 134, 142.

The Court is of the opinion that it lacks statutory authority to entertain the appeal. The appeals in the *Missouri Rate Cases* and *Knott* v. *Missouri Pacific Ry. Co., supra,* were taken from decrees of the United States Circuit Court entered in 1909 and were authorized by those provisions of § 5 of the Judiciary Act of 1891, *supra,* providing for a direct appeal to this Court from the circuit (later, district) courts " in any case that involves the construction or application of the Constitution of the United States . . . and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." By the Act of February 13, 1925 (c. 229, § 1, 43 Stat. 938), the provision for a direct appeal to this Court from the decree of a District Court in cases involving the construction or application of the Constitution of the United States, was deleted. While provision was retained for a direct review in this Court in cases involving an application for interlocutory injunction to prevent state officers from enforcing a state statute in violation of the Federal Constitution, this provision obtained only where the hearing in the District Court was before three judges, as provided by § 266 of the Judicial Code.

The appeal is dismissed for the want of jurisdiction. *Durousseau* v. *United States,* 6 Cranch 307, 314; *Ex parte McCardle,* 7 Wall. 506, 513; *Murdock* v. *Memphis,* 20

Wall. 590, 620; *The Francis Wright,* 105 U.S. 381, 384–386; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U.S. 281, 292; *Luckenbach S.S. Co.* v *United States,* 272 U.S. 533, 536, 537.

Dismissed.

GULLY, STATE TAX COLLECTOR, ET AL. *v.* INTERSTATE NATURAL GAS CO.

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

No. 651. Argued March 15, 1934.—Decided April 2, 1934.

1. A contract of tax exemption is not impaired by a later statute authorizing assessments of back taxes on taxable property and not specifying the property in question. P. 18.
2. A mere assessment for taxation is not a statute or an order of an administrative board or commission within the meaning of § 266, Judicial Code. P. 18.
3. A decree rendered by a District Court erroneously constituted of three judges in a case not covered by § 266, Jud. Code, is not reviewable on the merits by direct appeal to this Court; but such appeal having been taken, this Court has jurisdiction to enforce the limitations of that section; and, the time for appeal to the Circuit Court of Appeals having expired, this Court will reverse the decree and remand to the District Court for further proceedings to be taken independently of § 266. P. 19.

4 F.Supp. 697, reversed.

APPEAL by the State Tax Collector and State Tax Commission of Mississippi from a final decree of the District Court, constituted of three judges. The decree made permanent a preliminary injunction enjoining the appellants from making assessments of taxes.

Mr. Edward W. Smith, with whom *Mr. Greek L. Rice,* Attorney General of Mississippi, and *Mr. J. A. Lauderdale,* Assistant Attorney General, were on the brief, for the Tax Collector, appellant.

Mr. Weaver E. Gore filed a brief on behalf of the Tax Commission of Mississippi, appellant.

Messrs. David Clay Bramlette and *Garner W. Green,* with whom *Messrs. William A. Dougherty, Marcellus Green, Walter P. Armstrong,* and *Thomas A. McEachern* were on the brief, for appellee.

PER CURIAM.

Appellee brought this suit in the District Court of the United States for the Southern District of Mississippi seeking to enjoin state officers from proceedings to assess its property for the years 1927 to 1931, inclusive, upon the ground that the proposed assessments would impair the obligation of a contract by which the Company had secured an exemption from taxation. Chapter 138, Laws of Mississippi of 1922, and Chapter 172, Laws of 1926. The challenged proceedings were taken pursuant to a statute which authorized assessments in cases where it was ascertained that in past years property had escaped taxation. See Chapter 214, Laws of 1928; Chapter 291, Laws of 1932; Mississippi Code of 1930, §§ 3226 and 6992; Code Supp., 1933, §§ 3204, 3208. It appeared that on April 14, 1933, at the instance of the State Tax Collector, the State Tax Commission had made assessments of appellee's property for prior years, subject, however, to objections to be made and filed with the Commission on or before May 23, 1933. Appellee, instead of availing itself of that opportunity, filed its bill in this suit on May 16, 1933.

The District Judge, on an application for an interlocutory injunction, considering § 266 of the Judicial Code to be applicable, called to his assistance two other judges; and the District Court, as thus composed, granted an injunction restraining defendants from approving and enforcing the proposed assessments. Motions to dismiss

the bill for want of equity were denied. An agreed statement of facts was filed and on final hearing the District Court of three judges made the injunction permanent. The court stated in its findings that it had been agreed that the assessment order would certainly be made final.

No substantial question was presented as to the validity of the statute authorizing assessments of property which had escaped taxation. The statute did not specify the property of appellee and it authorized assessments only of property that was taxable.

A mere assessment is not a statute or an order of an administrative board or commission within the meaning of § 266 of the Judicial Code. *Ex parte Williams,* 277 U.S. 267, 272. The decision in *City Bank Farmers' Trust Co.* v. *Schnader,* 291 U.S. 24, is not to the contrary. Hence, there was no occasion for constituting a court of three judges. As the case was not one within § 266, the merits cannot be brought to this Court by a direct appeal. Compare *Smith* v. *Wilson,* 273 U.S. 388, 389, 391; *Healy* v. *Ratta,* 289 U.S. 701. But, although the merits cannot be reviewed here in such a case, this Court by virtue of its appellate jurisdiction in cases of decrees purporting to be entered pursuant to § 266, necessarily has jurisdiction to determine whether the court below has acted within the authority conferred by that section and to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes. The case is analogous to those in which this Court, finding that the court below has acted without jurisdiction, exercises its appellate jurisdiction to correct the improper action. *Assessors* v. *Osborne,* 9 Wall. 567, 575; *Mansfield, C. & L. M. Ry. Co.* v. *Swan,* 111 U.S. 379, 387–389; *Union & Planters' Bank* v. *Memphis,* 189 U.S. 71, 73, 74; *Shawnee Sewerage Co.* v. *Stearns,* 220 U.S. 462, 471, 472; *Piedmont & Northern Ry. Co.* v. *United States,* 280 U.S. 469, 477, 478; *Stratton* v. *St. Louis S. W. Ry. Co.,* 282 U.S. 10, 18.

In this instance, relief cannot be afforded by treating the decree of the District Court as appealable to the Circuit Court of Appeals, notwithstanding the participation of three judges (cf. *Healy* v. *Ratta,* 67 F. (2d) 554, 556), as the time for appeal to that Court has expired. In these circumstances, without passing upon the merits, the appropriate action is to reverse the decree below and to remand the cause to the District Court for further proceedings to be taken independently of § 266 of the Judicial Code.

Reversed.

McGARRITY, ADMINISTRATOR, *v.* DELAWARE RIVER BRIDGE COMMISSION ET AL.

APPEAL FROM THE COURT OF COMMON PLEAS, NO. 1, PHILADELPHIA COUNTY, PENNSYLVANIA.

No. 635. Argued March 13, 1934.—Decided April 2, 1934.

Appeal dismissed for want of a substantial federal question properly presented to the state court, in a suit for damage caused by a change of street grade to a lessee of abutting property.

The appeal was from a judgment of the Supreme Court of Pennsylvania, 311 Pa. 436, affirming a judgment of the Court of Common Pleas, to which latter court the record had been remitted when the appeal to this Court was taken.

Mr. John Robert Jones for appellant.

Mr. Harold D. Saylor, Deputy Attorney General of Pennsylvania, with whom *Mr. Wm. A. Schnader,* Attorney General, was on the brief, for appellees.

PER CURIAM.

This action was brought to recover damages alleged to have been caused by a change in the grade of a street which prevented access to appellant's leasehold. The au-

thority of the State Commission which directed the change of grade was conferred by the state statute of July 9, 1919, P.L. 814. The state court held that the damage in question was merely consequential, that the allowance of recovery therefor was a matter of legislative grace and not of right, and that the statute as invoked by appellant was invalid as it did not conform to the requirements of the state constitution. 311 Pa. 436; 166 Atl. 895. No federal question was raised prior to a petition for rehearing in the Supreme Court of the State, which was denied without more. Appellant insists that questions under the Fourteenth Amendment were thus raised at the first opportunity. The petition for rehearing does not appear in the record. Nor does the record contain the pleadings, the evidence, or any findings by the state court upon the questions of fact involved. Appellant relies upon statements in the opinion of the state court but these fail to support appellant's contentions.

The appeal is dismissed for the want of a properly presented substantial federal question. *Whitney* v. *California,* 274 U.S. 357, 360, 362, 363; *Dewey* v. *Des Moines,* 173 U.S. 193, 199, 200; *Transportation Co.* v. *Chicago,* 99 U.S. 635, 641–643; *Wabash R. Co.* v. *Defiance,* 167 U.S. 88, 101.

Dismissed.

LARSEN *v.* NORTHLAND TRANSPORTATION CO.

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

No. 614. Argued March 14, 1934.—Decided April 2, 1934.

1. When sued for damages in a state court, a shipowner is not obliged to submit to that court his claim for limitation of liability even when there is only one owner and one claim against him. P. 23.
2. The right to limit liability is not waived by failing to set it up in a state court. *Id.*

3. Statutory provisions for limitation of liability should be construed liberally to effectuate their purpose. P. 24.
4. A judgment is not conclusive of those matters as to which a party had the option to litigate but did not in fact do so. P. 25.

66 F. (2d) 651, affirmed.

CERTIORARI, 290 U.S. 624, to review the reversal of a decree dismissing a petition to limit liability.

Mr. Samuel B. Bassett for petitioner.

Mr. Edward G. Dobrin, with whom *Messrs. Cassius E. Gates* and *Claude E. Wakefield* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

For personal injuries, negligently inflicted, petitioner Larsen sought judgment in the Superior Court, King County, Washington, against respondent Transportation Company, alleged owner and operator of motor ship Norco. The complaint contained no reference to other claimants or creditors. The company made general denial; also set up contributory negligence and assumption of risk. It said nothing concerning any other creditor or claimant or desire to limit liability.

After verdict, September 22, 1932, judgment for $12,500 against the Company followed, October 1. It then petitioned the United States District Court for limitation of liability. The petition recited the circumstances leading to the judgment, prayed for an appraisement of the Company's interest as charterer and the pending freight, monition against all persons claiming damages, and appropriate decree.

Larsen moved to dismiss this petition because:—The facts alleged are not sufficient. " There is only one possible claimant and one charterer of the motor vessel Norco and, therefore, the petitioner might have claimed and ob-

tained the advantage and benefit of the limitation of liability statute by proper pleading in the action which has been determined in the Superior Court of the State of Washington for King County." "The petitioner failed and refused to claim the advantage and benefit of the limitation of liability statute, in said Superior Court of the State of Washington, and thereby waived its right to claim and obtain the advantage and benefit of said statute."

The trial court sustained this motion and dismissed the petition; the Circuit Court of Appeals reversed. The cause is here by certiorari granted upon Larsen's application, which set out the following specifications of error:—

Langnes v. *Green,* 282 U.S. 531, and *Ex parte Green,* 286 U.S. 437, were misconstrued; it was wrongly held that the District Court sitting in admiralty has exclusive jurisdiction to determine all questions involved in a proceeding for the limitation of liability where there is only one claimant and only one owner, and where the owner's right to limit liability is not disputed. It was wrongly held that the state court had no jurisdiction to entertain the claim of the shipowner for limitation of liability where there is only one claimant and only one owner, and where the owner's right to limit liability was not disputed. Also, that in such cases, the shipowner was under no obligation to submit his claim to limited liability to the state court, and the judgment of the state court was not *res judicata* as to all issues which might have been submitted for its decision.

In substance the argument here presented for petitioner is this: Prior to *Langnes* v. *Green* and *Ex parte Green,* decisions by inferior federal courts undoubtedly sustained the view that, while the state court might have determined the value of respondent's interest in vessel and pending freight and limited liability thereto, it was not

obligatory upon it to claim such limitation there, and after judgment for damages the right remained to institute limitation proceedings in the federal court. But, those opinions have affirmed another view, and clearly establish that the state court had jurisdiction and was competent finally to consider all necessary facts and limit the liability. Consequently, after the adverse judgment respondent could not seek limitation elsewhere—it was bound to present the whole matter to the state court.

We think it true to say that before *Langnes* v. *Green* and *Ex parte Green* the commonly approved doctrine permitted a shipowner, even when there was only one claimant, to seek limitation of liability in a federal court after judgment against him for damages by a state court. And, unless those cases are to the contrary, that rule must apply here. *White* v. *Island Transp. Co.,* 233 U.S. 346; *In re East River Co.,* 266 U.S. 355; *The S. A. McCaulley,* 99 Fed. 302; *Re Old Dominion S.S. Co.,* 115 Fed. 845; *Gleason* v. *Duffy,* 116 Fed. 298; *The Ocean Spray,* 117 Fed. 971; *Re Starin,* 124 Fed. 101; *The City of Boston,* 159 Fed. 257; *The Hoffmans,* 171 Fed. 455; *Re P. Sanford Ross, Inc.,* 196 Fed. 921; *Monongahela River Consol. Co.* v. *Hurst,* 200 Fed. 711; Hughes on Admiralty, § 172; Benedict on Admiralty (4th ed.) § 520.

In *Langnes* v. *Green* the injured employe brought an action for damages in the state court. Pending that, the employer instituted proceedings in the federal court to limit liability. The injured man was the only claimant and cause existed for regarding the limitation proceeding as intended to defeat trial by jury. This Court held, in the circumstances, the federal court should not have enjoined the state court proceeding; but that it should have retained jurisdiction. When thereafter it appeared—*Ex parte Green*—that in the state court the injured party insisted on denying the owner's right to limitation, we said

the federal court properly enjoined further proceedings. Neither of these causes supports the suggestion that when sued for damages in a state court a shipowner must at his peril claim limitation of liability in that suit.

Carlisle Packing Co. v. *Sandanger,* 259 U.S. 255, replying to alleged error because the trial court refused to charge as requested, said—

"Petitioner asked an instruction that § 4283 of the Revised Statutes applied, and that under it the verdict could not exceed the value of the vessel. In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading. *The Lotta,* 150 Fed. 219, 222; *Delaware River Ferry Co.* v. *Amos,* 179 Fed. 756. Here the privilege was not set up or claimed in the answer, and it could not be first presented upon request for a charge to the jury." [p. 260.]

This lends no support to the view that, sued in a state court for damages, the shipowner must set up his claim for limitation; otherwise, it is waived.

Statutory provisions for limitation of liability should be construed liberally in order to effectuate their beneficent purposes. *Providence & N. Y. S.S. Co.* v. *Hill Mfg. Co.,* 109 U.S. 578, 588; *Butler* v. *Boston & Savannah S.S. Co.,* 130 U.S. 527, 549, 550; *LaBourgogne,* 210 U.S. 95, 121; *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U.S. 334; *Evansville & B. G. Packet Co.* v. *Chero Cola Bottling Co.,* 271 U.S. 19, 21; *Hartford Accident & Ind. Co.* v. *Southern Pacific Co.,* 273 U.S. 207, 214; *Flink* v. *Paladini,* 279 U.S. 59. This view does not harmonize with the suggestion that to obtain limitation a shipowner must initiate steps to that end before any liability has been made to appear. *The Benefactor,* 103 U.S. 239. While in certain circumstances the shipowner may ask limitation in the state court, he is not compelled so to do.

Here the shipowner recognized the judgment; said nothing against its validity. The proceedings in the two courts looked towards entirely different ends.

The established rule in this Court is that if, in a second action between the same parties, a claim or demand different from the one sued upon in the prior action is presented, then the judgment in the former cause is an estoppel "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Bates* v. *Bodie,* 245 U.S. 520, 526; *United States* v. *Moser,* 266 U.S. 236, 241; *United Shoe Machinery Corp.* v. *United States,* 258 U.S. 451, 458. "While a defendant must bring forward all purely defensive matter, he is not barred by a former judgment against him as to any matter which he was not bound to present and which was not in fact litigated. A judgment is not conclusive of those matters as to which a party had the option to but did not in fact put in litigation in the action." Freeman on Judgments, 5th ed., § 786.

The judgment of the Circuit Court of Appeals is

Affirmed.

GAY, RECEIVER, *v.* RUFF.

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

No. 663. Argued February 12, 13, 1934.—Decided April 2, 1934.

1. A judgment of the Circuit Court of Appeals directing that a case be remanded by the District Court to a state court from which it was removed, is reviewable in this Court by certiorari. P. 28.
2. When a reading of a statutory amendment with the old context and with other statutes bearing on the subject raises a doubt as to whether its literal meaning was intended, resort may be had to the legislative history. P. 31.
3. Section 33 of the Judicial Code, providing for removal before trial or final hearing from state to federal courts of civil and crimi-

nal actions commenced against revenue officers on account of acts done by them under color of their office or under any revenue law, etc., or commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, was amended in 1916 to include any civil or criminal action against "any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer."—*Held:*

That the amendment does not embrace an action against the receiver of a railroad appointed by a federal court, where the purpose of the action is merely to recover damages for personal injuries resulting from negligence of the defendant's employees in operating a train. *Barnette* v. *Wells Fargo Bank*, 270 U.S. 438, distinguished. Pp. 32–39.

4. Prior to 1916, § 33 was applicable only when the person defending caused it to appear that his defense was that in doing the acts charged he was doing no more than his duty under the revenue laws or the orders of Congress. The amendment of 1916 is to be construed *in pari materia*. Pp. 33, 35.
5. If the amendment were construed as authorizing removal in the case at bar it would introduce into § 33 a wholly different ground of jurisdiction; would in effect repeal by implication legislation which deals expressly with suits against receivers; and depart from the established trend of legislation limiting the jurisdiction of the federal courts. P. 35.

67 F. (2d) 684, affirmed.

CERTIORARI, 291 U.S. 654, to review a judgment reversing a judgment recovered in the District Court, 3 F.Supp. 264, against the receiver of a railroad in an action for personal injuries, and directing that the cause be remanded to a state court from which the receiver had removed it.

Mr. Archibald B. Lovett, with whom *Mr. Robert M. Hitch* was on the brief, for petitioner.

Mr. Thomas W. Hardwick for respondent.

By leave of Court, *Messrs. W. R. C. Cocke* and *James F. Wright* filed a brief on behalf of the Receivers of the Seaboard Air Line Railway Company, as *amici curiae.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Ruff brought in a state court of Georgia this suit against Gay, as receiver of the Savannah & Atlanta Railway, appointed by the federal court for southern Georgia sitting in equity. The cause of action alleged is the homicide of plaintiff's minor son as a result of the negligent operation of a train by employees of the receiver. Before trial in the state court, the receiver duly filed in the appropriate federal court a petition for removal and certiorari, under the amendment made by Act of August 23, 1916, c. 399, 39 Stat. 532 to Judicial Code § 33, which inserted therein the clause:

" or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer." [1]

The federal court denied a motion to remand, 3 F. Supp. 264; and thereafter dismissed the suit, entering a

[1] The section as so amended reads: " When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against *any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer,* or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court in the following manner: " [The amendment of 1916 is indicated by the italics.]

final judgment for want of prosecution. The Circuit Court of Appeals for the Fifth Circuit reversed that judgment, with direction to set aside the dismissal and remand the cause to the state court. 67 F. (2d) 684. Because of conflict of decisions,[2] certiorari was granted to determine whether the amendment to Judicial Code § 33 authorizes a receiver of a railroad appointed by a federal court sitting in equity to remove from a state court an action brought against him as receiver for damages resulting from the negligent operation of a train by his employees.

First. The respondent raises the preliminary question whether this Court has jurisdiction to review the action of the Circuit Court of Appeals. The contention is that this Court lacks jurisdiction to review a judgment directing the remand to a state court, because Judicial Code § 28, declares:

"Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: . . ."[3]

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[2] *Newell* v. *Byram,* 26 F. (2d) 200, 202 (C.C.A. 8th); and following cases in district courts: *Matarazzo* v. *Hustis,* 256 Fed. 882, 887 (N.D.N.Y.); *American Locomotive Co.* v. *Histed,* 18 F. (2d) 656 (W.D.Mo.); *Berens* v. *Byram,* 26 F. (2d) 953 (D.So.Dak.); *Elliott* v. *Wheelock,* 34 F. (2d) 213. Compare *Jones* v. *McGill,* 46 F. (2d) 334 (D.N.H.); *Snider* v. *Sand Springs Ry.,* 62 F. (2d) 635, 636 (C.C.A. 10th); *Knapp* v. *Byram,* 21 F. (2d) 226 (D.Minn.). See also *Barnette* v. *Wells Fargo Bank,* 270 U.S. 438, 441.

[3] Prior to the Act of March 3, 1875, c. 137, § 5, 18 Stat. 470, 472, an order of the circuit court remanding a cause to the state court could not be reviewed by this court on appeal or writ of error because it was not a final judgment; but it could be reviewed by mandamus. *Chicago & Alton R. Co.* v. *Wiswall,* 23 Wall. 507. By the Act of

This provision, enacted in 1887, was broadly construed by this Court as prohibiting review of an order of remand, directly or indirectly, by any proceeding. The prohibition was applied to appeals from, and writs of error to, the federal circuit [and later district] court; to writs of error to a state court after final judgment there; and to mandamus in this Court.[4] In *German National Bank* v. *Speckert,* 181 U.S. 405, 409, where the trial court had refused to remand the case to the state court and the Circuit Court of Appeals had reversed that judgment and ordered a remand, this Court held that it was without jurisdiction to review the latter's action. While adverting in support of its conclusion to the broad construction which had been given to the above-quoted prohibition, the Court ruled there that the fact that an order of remand is not a final judgment precluded its review by writ of error.[5]

1875, express provision was made to review the remand by appeal or writ of error. That provision was repealed by Act of March 3, 1887, c. 373, § 2, 24 Stat. 552, 553 (corrected by Act of August 13, 1888, c. 866, § 2, 25 Stat. 433, 435), which enacted the provision embodied in Judicial Code § 28.

[4] *Morey* v. *Lockhart,* 123 U.S. 56, 58; *In re Pennsylvania Co.,* 137 U.S. 451; *McLaughlin Bros.* v. *Hallowell,* 228 U.S. 278; *Yankaus* v. *Feltenstein,* 244 U.S. 127; *Ex parte Matthew Addy S.S. Corp.,* 256 U.S. 417. Compare *Pickwick-Greyhound Lines, Inc.* v. *Shattuck,* 61 F. (2d) 485.

[5] The contention made that the prohibition in § 28 does not extend to cases under § 33, because of the saving clause in § 5 of the Acts of 1887 and 1888, appears to be unfounded. See *Cole* v. *Garland,* 107 Fed. 759; dismissed on appeal, 183 U.S. 693. Compare *Kentucky* v. *Powers,* 139 Fed. 452. Moreover, the saving clause of § 5 of the Acts of 1887 and 1888 was in terms applicable to Revised Statutes §§ 641, 642, 643; and those sections were repealed expressly by the Judicial Code. Their substance was carried into §§ 31, 32, 33, respectively, of the Judicial Code; but § 5, though not expressly repealed, was nowhere carried into the Judicial Code. See, also, Index of Federal Statutes (1934), p. 1297, Footnote 44, which states

But by reason of the extensive power to issue writs of certiorari which the Circuit Court of Appeals Act of 1891 [6] thereafter gave to this Court, it may now review the action of the circuit court of appeals in directing the remand of a cause to the state court. That Act provided that in any case in which the judgment of the circuit court of appeals is made final, "it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." In *Forsyth* v. *Hammond,* 166 U.S. 506, 512, it was held that the power given was unaffected by the condition of the case as it exists in the circuit court of appeals; that the power may be exercised before, as well as after, any decision by that court and irrespective of any ruling or determination therein; and that the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals. The jurisdiction to review interlocutory orders was exercised in *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.,* 148 U.S. 372; *Denver* v. *New York Trust Co.,* 229 U.S. 123, 133; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U.S. 117, 121; and *Du Pont Powder Co.* v. *Masland,* 244 U.S. 100. And in *The Three Friends,* 166 U.S. 1, 49, it was held that this Court could review a case pending in, and not yet decided by, the circuit court of appeals, with the same power and authority as if it had been carried here by appeal or writ of error "that is, as if it had been brought directly from the District or Circuit Court." In *Chicago, B. & Q. Ry. Co.* v. *Willard,* 220 U.S. 413, decided under the

that by reason of the express repeal of §§ 1–4, 6, 7, of the Act of 1887 by the Judicial Code, "Sec. 5 can have no force independent of the remainder of the act."

[6] March 3, 1891, c. 517, § 6, 26 Stat. 826, 828.

Act of 1891, this Court, without questioning its power, reviewed the judgment of the circuit court of appeals reversing a judgment of dismissal and ordering a remand. Nor has the existence of the power been questioned by the Court since.[7]

Second. The contention that the removal is authorized rests upon the amendment made by the Act of 1916 to Judicial Code § 33. The argument for removal is that, since the receiver is an "officer" of the federal court and an action for damages resulting from the negligent operation of a train by his employees is a suit "for or on account of" an "act done in the performance of his duties as such officer," the removal here in question is directed in such plain words that there is no room for any other construction of the statute. But the amendment may not be isolated from its context. It must be read in the light of the then existing provisions of § 33; of the then existing statute conferring the right to bring in a state court suits against receivers; of the statute denying removal from state to federal courts of a large class of cases similar in character to that before us; and of other legislation restricting the jurisdiction of federal trial courts. When the clause is so read, there arises at least a doubt whether Congress intended to give to the words inserted in § 33 the comprehensive meaning attributed to them. That doubt makes it appropriate to examine the history of the amendment, *Binns* v. *United States,* 194 U.S. 486, 495; *United States* v. *St. Paul, M. & M. Ry.,* 247 U.S. 310, 318. And such examination makes it clear that Congress did not authorize the removal of this case.

[7] The Act of February 13, 1925, c. 229, § 1, 43 Stat. 938, amending § 240 (a) of the Judicial Code, gives in terms the power to review by writ of certiorari "either before or after a judgment or decree" of the lower court, "with the same power and authority and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Judicial Code § 33 enables a defendant in a state court to remove the case before trial or final hearing there, and thus secure an adjudication by a federal court of first instance of the issues of fact as well as law involved in his justification under the federal statutes. *Tennessee* v. *Davis,* 100 U.S. 257, 263. The origin of that section is § 3 of the "Force Act," March 2, 1833, c. 57, 4 Stat. 632, 633—the nation's reply to South Carolina's threat of "nullification." The purpose of the Force Act was to prevent paralysis of operations of the federal government. The special aim of § 3 was to protect those engaged in the enforcement of the federal revenue law from attack by means of prosecutions and suits in a state court for violation of state law. This removal provision was extended by Act of March 3, 1875, c. 130, § 8, 18 Stat. 371, 401, to suits against "any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House." These provisions only are embodied in Judicial Code § 33.[8] The scope of the section was thus

[8] There had been several other acts amending § 3 of the Force Act and § 643 of the Revised Statutes which embodied it. While § 3 of the Act of 1833 provided in terms for removal where the suit is against "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof," the title of the Act referred only to collection of duties on imports. Doubtless for this reason, it was deemed desirable in the Internal Revenue Act of June 30, 1864, c. 173, § 50, 13 Stat. 241, to extend the operation of the 1833 Act in terms to internal revenue officers and those acting under the internal revenue laws. Compare *Hornthall* v. *Collector,* 9 Wall. 560, 561. By Act of July 13, 1866, c. 184, § 68, 14 Stat. 98, 171, that provision was repealed; and by § 67 of the same Act this removal provision was made available to any officer acting under the internal revenue laws or "against any person acting under or by authority of such officer." By Act of February 28, 1871, c. 99, § 16, 16 Stat. 433, 438, the provision was extended to those engaged in enforcing laws for the protection of the elective franchise. In Revised Statutes § 643 this

limited to cases arising out of the enforcement of the revenue laws or of some order of either House of Congress. And it applied in those cases only when the person defending caused it to appear that his defense was that in doing the acts charged he was doing no more than his duty under those laws or orders.[9]

To appreciate the exceptional character of the removal privilege conferred by § 33, that section should be compared with § 28. Of the two, § 33 alone provides for removal of a criminal case. Removal of civil causes is provided for in both § 33 and § 28 of the Judicial Code. But the civil cases to which § 33 is applicable are few, while § 28 applies to many. Under the latter, any officer of a federal court can remove a suit brought against him on account of any act done under color of his office or in the performance of his duties as such officer, because § 28 applies to "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, . . . of which the district courts of the United States are given original jurisdiction." But in order to avail of the removal privilege conferred by § 28 in respect of a suit arising under the Constitution or laws of the United States, the facts showing that the suit is of

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provision appears; but by Act of February 8, 1894, c. 25, 28 Stat. 36, most of Title XXVI of the Revised Statutes relating to elective franchises was repealed and with it that part of § 643 relating to the elective franchise.

It was held in *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, that by the National Prohibition Act, October 28, 1919, c. 85, Title II, § 28, 41 Stat. 316, this removal provision was extended to prohibition officers or agents engaged in the enforcement of that act. See also *Colorado* v. *Symes*, 286 U.S. 510, 517.

[9] *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, 34; *Maryland* v. *Soper* (*No. 2*), 270 U.S. 36; *Salem & L. Co.* v. *Boston & L. Co.*, Fed. Cas. No. 12249; *People's Bank* v. *Goodwin*, 162 Fed. 937; *Application of Shumpka*, 268 Fed. 686; *Florida* v. *Huston*, 283 Fed. 637; *Ford Motor Co.* v. *Automobile Ins. Co.*, 13 F. (2d) 415.

that class must appear by the complaint in the state court;[10] the amount in controversy must exceed $3000, except in those cases where jurisdiction is conferred regardless of amount;[11] the petition for removal must be filed in the state court before the time fixed for answer there; and it must be accompanied by a bond. On the other hand, where § 33 is applicable, the conditions for removal are much more liberal. Removal may be had of the civil suit, at any time before trial or final hearing [12] in the state court, regardless of the amount involved and without giving any bond, by filing the appropriate papers in the federal court.[13] And the facts showing that the suit is of a removable class need not appear by the complaint in the state court.

Third. The case here sought to be removed has none of the characteristics of those which were removable under Judicial Code § 33 before the 1916 amendment. This suit is under the law of Georgia; and was brought as of right in the state court. *Erb* v. *Morasch,* 177 U.S. 584. It does not relate to any operation of the federal government. The defendant receiver does not justify under any judgment or order of a federal court. Nor does the suit present otherwise any federal question. Its only relation to the federal law is that the receiver sued was appointed by a federal court, in the exercise of its diversity of citizenship jurisdiction. The fact that the defendant is a federal receiver does not make the cause removable "upon the ground that it was a case arising under the Constitution and laws of the United States." *Gableman* v. *Peoria, D. & E. Ry.,* 179 U.S. 335.

[10] *Walker* v. *Collins,* 167 U.S. 57; *Mayo* v. *Dockery,* 108 Fed. 897.

[11] Compare *Bock* v. *Perkins,* 139 U.S. 628; *Feibelman* v. *Packard,* 109 U.S. 421; *Lawrence* v. *Norton,* 13 Fed. 1; *Eighmy* v. *Poucher,* 83 Fed. 855.

[12] *In re Duane,* 261 Fed. 242.

[13] *Virginia* v. *Paul,* 148 U.S. 107, 115.

If the amendment of 1916 is construed as merely affording the protection of removal to officers of the court engaged in executing its judgments or orders, it is strictly *in pari materia* with the other removal provisions of § 33. If it is construed so as to authorize removal of the case at bar, it introduces a wholly different ground of jurisdiction; in effect, repeals by implication legislation which deals expressly with suits against receivers; and departs from the established trend of legislation limiting the jurisdiction of the federal trial courts.

I. Congress provided in 1887 that the fact that the defendant was a federal receiver should not preclude the maintenance of an action against him in a state court.[14] That provision had recently been embodied in § 66 of the Judicial Code which declares:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; . . ."

In the thirty-nine years since its enactment there had not been, so far as appears, any attempt to repeal that law. It is in harmony with the trend of legislation providing that the federal character of the litigant should not alone confer jurisdiction upon a federal court—a policy acted upon in case of national banks as early as 1882[15] and which had been extended in 1915 to railroads having federal charters.[16]

[14] Act of March 3, 1887, c. 373, § 3, 24 Stat. 552, as corrected by Act of August 13, 1888, c. 866, § 3, 25 Stat. 433, 436.

[15] Act of July 12, 1882, c. 290, § 4, 22 Stat. 162, 163; Act of March 3, 1887, c. 373, § 4, 24 Stat. 552, 554; Act of August 13, 1888, c. 866, § 4, 25 Stat. 433, 436.

[16] Act of January 28, 1915, c. 22, § 5, 38 Stat. 803, 804. This policy has persisted since. By Act of February 13, 1925, c. 229, § 12, 43

II. Congress had by the Federal Employers' Liability Act [17] provided that suits for injuries resulting from negligence in the operation of a railroad, although arising under a federal statute, could be brought in a state court, and if so brought, could not be removed to the federal court.

III. Congress had by recent legislation manifested its adherence to the policy, inaugurated in 1887, of restricting the jurisdiction of the federal trial court. Thus, the prescribed jurisdictional amount, which, after standing for nearly a century at $500 had been raised to $2,000 in 1887,[18] and was increased to $3,000 in 1911.[19] Moreover, in 1914 the requirement of this jurisdictional amount was

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Stat. 936, 941, federal incorporation as a ground of federal jurisdiction is abolished except where the United States holds more than one-half of the stock.

[17] Act of April 22, 1908, c. 149, § 6, 35 Stat. 65, 66, as amended by Act of April 5, 1910, c. 143, § 1, 36 Stat. 291. The policy of abridging the jurisdictions has persisted since. Actions against the Director General of Railroads under § 10 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, 456, or against the Agent designated by the President pursuant to § 206a of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 461, for injuries, whether the cause of action is based on the Federal Employers Liability Act, or a state statute or the common law, may not be removed even if there is diversity of citizenship. *Davis* v. *Slocomb*, 263 U.S. 158, 160. The lower courts have divided on whether the 1916 amendment repeals this provision by the Employers Liability Act *pro tanto*. That it has: *Elliott* v. *Wheelock*, 34 F. (2d) 213; *contra*, *Knapp* v. *Byram*, 21 F. (2d) 226.

Likewise, removal is prohibited of actions by seamen under § 33 of the Merchant Marine Act of June 20, 1920, c. 250, 41 Stat. 988, *Engel* v. *Davenport*, 271 U.S. 33, 38; *Herrera* v. *Pan-American Petroleum & Transport Co.*, 300 Fed. 563. And by Act of May 27, 1933, c. 38, § 22 (a), 48 Stat. 74, 86, suits brought in a state court under the Securities Act may not be removed.

[18] Compare Judiciary Act of September 24, 1789, c. 20, § 12, 1 Stat. 79; Act of March 3, 1887, c. 373, § 1, 24 Stat. 552; Act of August 13, 1888, c. 866, § 1, 25 Stat. 433.

[19] Act of March 3, 1911, c. 231, § 24 (1), 36 Stat. 1087, 1091.

applied to the removal of actions under the Interstate Commerce Act against railroads for injury to or loss of property, although theretofore federal courts had jurisdiction regardless of the amount in controversy.[20]

Fourth. There is no expression in the Act of 1916, or in the proceedings which led to its enactment, of an intention to repeal any existing law or to depart from the long-existing policy of restricting the federal jurisdiction. Whether there was any special occasion for the amendment does not appear. The bill was passed in each House as introduced, without amendment, without debate and without a record vote.[21] The legislation was not required in order to assure to officers of the federal courts when engaged in enforcing the laws or orders to which § 33 related the same protection which it then afforded to other persons. Marshals executing revenue laws had, for more than fifty-eight years, repeatedly availed themselves of this removal provision.[22] But an extension of the removal

[20] Act of January 20, 1914, c. 11, 38 Stat. 278, amending § 28 of the Judicial Code.

[21] The amendment was introduced in the House on April 6, 1916, as H.R. No. 14299. It was referred to the House Committee on the Judiciary, which in turn referred it to a subcommittee. The latter reported it favorably to the full Committee, which in turn reported it favorably to the House. (64th Cong., 1st Sess., H.Rept. No. 776.) As far as appears there were no hearings before the subcommittee or the committee. It was placed on the Calendar For Unanimous Consent and passed without debate or record vote. 53 Cong.R. 9442. In the Senate it went through substantially the same course. The calendar of the Judiciary Committee of the Senate shows no record of a hearing. It was reported out favorably without a printed report; was considered in the Senate sitting as a Committee of the Whole; was reported by it without amendment; and was passed without debate or record vote. 53 Cong.R. 12167–12168. No reference to the legislation, either as proposed or as enacted, appears in the Annual Reports of the Attorney General.

[22] See *Davis* v. *South Carolina,* 107 U.S. 597; *Georgia* v. *O'Grady,* 3 Woods 496; *Georgia* v. *Bolton,* 11 Fed. 217; *North Carolina* v. *Gosnell,* 74 Fed. 734; *Carico* v. *Wilmore,* 51 Fed. 196; *Delaware* v. *Emerson,* 8 Fed. 411.

provision might have been desired so as to make it apply to those engaged in executing any judgment or order of a federal court. For any order of the court might arouse opposition to those engaged in enforcing it and result in retaliation by means of proceedings instituted in a state court. The only method of securing in such other cases an adjudication in the federal court before trial in the state court was then by habeas corpus; and that remedy was not always adequate.[23]

The report of the Judiciary Committee of the House which recommended the adoption of the 1916 amendment establishes that such was the sole purpose of Congress. It states:[24]

"The purpose of the proposed amendment is to extend the provisions of section 33 uniformly to officers of the courts of the United States, not only in cases arising under the revenue laws, but in all cases, giving to them the same protection in all cases now given to officers acting under the revenue laws, and to officers of Congress. The omission of such a provision from the original act gives rise to certain incongruities and creates a want of uniformity in the application of the law; for example: a United States

[23]Among other reasons, because the relief on habeas corpus is to some extent discretionary. Since the officer if successful upon habeas corpus may be released unconditionally without a jury trial, the federal court may be unwilling to give relief unless the justification is clear upon the preliminary showing. Compare *United States* v. *Lewis*, 200 U.S. 1; *Whitten* v. *Tomlinson*, 160 U.S. 231, 240; *In re Miller*, 42 Fed. 307; *Walker* v. *Lea*, 47 Fed. 645; *In re Marsh*, 51 Fed. 277; *In re Matthews*, 122 Fed. 248.

[24] H.R. No. 776, 64th Cong., 1st Session. The rest of the report is devoted to an elaboration of these propositions. As indicating a lack of intention to extend broadly the right of removal in civil suits against an officer of the court, it states: "In a civil suit against a Federal marshal on account of acts done by him as such marshal, such suit is now removable to the federal courts though no revenue law is involved (*Bock* v. *Perkins*, 139 U.S. 628 (1891) and *Wood* v. *Drake*, 70 Fed. 881 (1895))."

marshal engaged in the execution of a warrant or other process of the United States court, in a case which involves the prosecution of a violation of the revenue laws, is entitled to the right of removal, now conferred by this statute. *Davis* v. *South Carolina,* 107 U.S. 597 (1882). The same marshal engaged in executing process of the same court in which the revenue law is not involved is not entitled to the right of removal. This creates an anomalous condition which cannot be justified upon any line of reasoning.

" The statute, with the proposed amendment, does not extend in any degree the jurisdiction or the powers of the courts of the United States. It merely provides a more orderly method of procedure, which enures as much, in fact more, to the benefit of the States than to the benefit of the United States, because it substitutes for the writ of habeas corpus the right of removal, so that instead of a summary discharge under the habeas corpus proceedings the amendment provides for trial before a court and jury."

The action of the Circuit Court of Appeals in reversing the judgment of the District Court and directing that the cause be remanded to the state court was proper. A suit for damages for an injury resulting from negligent operation of a train is not, within the meaning of Judicial Code § 33 as amended, a suit " for or on account of any act done under color of his [the receiver's] office." The receiver here sued, although an officer of the court operating the railroad pursuant to the order appointing him, is not an officer engaged in enforcing an order of a court. The operation of trains through his employees is a duty imposed upon the receiver; but he is not entrusted in his capacity as receiver with the service or execution of any process of the court. Nor is there reason to assume that he will in this case rest his defense on his duty to cause the train to be operated.

In *Barnette* v. *Wells Fargo Bank,* 270 U.S. 438, 441, the record does not disclose on what ground removal was sought and allowed in the District Court or the jurisdiction was sustained by the Circuit Court of Appeals. Enough appears, however, to show that the case was wholly unlike that now before us.

Affirmed.

A. MAGNANO CO. *v.* HAMILTON, ATTORNEY GENERAL OF WASHINGTON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 589. Argued March 7, 1934.—Decided April 2, 1934.

A statute of the State of Washington lays a tax of fifteen cents per pound on all butter substitutes, including oleomargarine, sold within the State. *Held:*

1. In respect of the equal protection clause it is obvious that the differences between butter and oleomargarine are sufficient to justify their separate classification for purposes of taxation. P. 43.

2. The requirement that a tax shall be for a public purpose has regard to the use to be made of the revenue derived from the tax. Its purpose may be public, although the motive behind it may have been to benefit one industry (dairying) by burdening another (oleomargarine). P. 43.

3. The statute in question imposes no burden on interstate commerce. P. 43.

4. The effect on an individual of an interference with federal taxing power, caused by destruction of a potential source of federal taxes through excessive state taxation, is too speculative, indirect and remote to afford the individual any equitable standing in a suit to enjoin the state tax on the ground of such interference. P. 43.

5. In general, the due process clause of the Fourteenth Amendment, applied to the States, like the due process clause of the Fifth Amendment, applied to Congress, is not a limitation upon the taxing power. P. 44.

6. The due process clause applies if the Act be so arbitrary as to compel the conclusion that it does not involve an exertion of

the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. P. 44.

7. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. P. 44.

8. A tax otherwise within the lawful power of a State can not be adjudged contrary to due process merely because its enforcement may or will result in restricting or even destroying particular occupations or businesses. P. 44.

2 F. Supp. 414, 417, affirmed.

APPEAL from a decree dismissing the bill in a suit to enjoin collection of an excise tax on the business of selling oleomargarine within the State.

Mr. Otto B. Rupp, with whom *Messrs. Alfred J. Schweppe, A. M. Davis,* and *W. R. Brown* were on the brief, for appellant.

Mr. E. P. Donnelly, Assistant Attorney General of Washington, and *Mr. Philip D. Macbride,* with whom *Mr. G. W. Hamilton,* Attorney General, was on the brief, for appellees.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Appellant assails as invalid a statute of the State of Washington which levies an excise tax of fifteen cents per pound on all butter substitutes sold within the state. Every distributor of such butter substitutes is required to file a duly acknowledged certificate with the Director of Agriculture, containing the name under which the distributor is transacting business within the state and other specified information. Sale of any butter substitute is forbidden until such certificate is furnished. The distributor must render to the Director of Agriculture, on the fifteenth day of each month, a sworn statement of the

number of pounds of butter substitutes sold during the preceding calendar month. Section 10 of the act provides that the tax shall not be imposed on butter substitutes when sold for exportation to any other state, territory, or nation; and any payment or the doing of any act which would constitute an unlawful burden upon the sale or distribution of butter substitutes in violation of the Constitution or laws of the United States is by § 13 excluded from the operation of the act. Violation of any provision of the act is denounced as a gross misdemeanor.

Appellant is a Washington corporation, and has for many years been engaged in importing and selling "Nucoa," a form of oleomargarine. Prior to the passage of the act, it had derived a large annual net profit from sales made within the state. Since then, claiming the tax to be prohibitive, it has made no intrastate sales and no effort to do so. "Nucoa" is a nutritious and pure article of food, with a well established place in the dietary.

Suit was brought to enjoin the enforcement of the act, on the ground that it violates the Federal Constitution in the following particulars: (1) that the imposition of the tax has the effect of depriving complainant of its property without due process of law and of denying to it the equal protection of the laws, in violation of the Fourteenth Amendment; (2) that the tax is not levied for a public purpose, but for the sole purpose of burdening or prohibiting the manufacture, importation and sale of oleomargarine, in aid of the dairy industry; (3) that the act imposes an unjust and discriminatory burden upon interstate commerce; and (4) that it interferes with the power of Congress to levy and collect taxes, imposts and excises, in violation of Art. I, § 8.

The case came before a statutory court of three judges, under § 266 of the Judicial Code, as amended, 28 U.S.C., § 380, first upon an application for an interlocutory injunction, which was denied, 2 F.Supp. 414, and subse-

quently for final hearing, at the conclusion of which that court made written findings of fact and conclusions of law, as required by Equity Rule 70½, and entered a final decree dismissing the bill. 2 F.Supp. 417.

First. We put aside at once all of the foregoing contentions, except the one relating to due process of law, as being plainly without merit. 1. In respect of the equal protection clause it is obvious that the differences between butter and oleomargarine are sufficient to justify their separate classification for purposes of taxation. 2. That the tax is for a public purpose is equally clear, since that requirement has regard to the use which is to be made of the revenue derived from the tax, and not to any ulterior motive or purpose which may have influenced the legislature in passing the act. And a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class. 3. The act, considered as a whole, clearly negatives the idea that a burden is imposed upon interstate commerce, as the court below held. The tax is confined to sales within the state, and (§§ 10 and 13, *supra*) has no application to sales of oleomargarine to be either imported or exported in interstate commerce. 4. The contention that the act interferes with the taxing power of the United States seems to be based upon the supposition that the state tax is so great that it will put an end to the sale of oleomargarine within the State of Washington, and thereby destroy a potential subject of federal taxation. Assuming such a consequence and putting other questions aside, the effect of it upon appellant would be so remote, speculative and indirect as to afford appellant no basis for invoking the powers of a court of equity. Compare *Massachusetts* v. *Mellon,* 262 U.S. 447, 487; *Florida* v. *Mellon,* 273 U.S. 12, 17–18.

Second. Except in rare and special instances,* the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber* v. *Union Pac. R. Co.,* 240 U.S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French* v. *Barber Asphalt Paving Co.,* 181 U.S. 324, 329; *Heiner* v. *Donnan,* 285 U.S. 312, 326. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *McCulloch* v. *Maryland,* 4 Wheat. 316, 423; *Child Labor Tax Case,* 259 U.S. 20, 37 *et seq.; McCray* v. *United States,* 195 U.S. 27, 60; *Brushaber* v. *Union Pac. R. Co., supra,* 24–25; *Henderson Bridge Co.* v. *Henderson City,* 173 U.S. 592, 614–615; *Nichols* v. *Coolidge,* 274 U.S. 531, 542. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray* v. *United States, supra,* 56–59. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Loan Association* v. *Topeka,* 20 Wall. 655, 663–664; *McCray* v. *United States, supra,* 56–58, and authorities cited; *Alaska Fish Co.* v. *Smith,* 255 U.S. 44, 48–49; *Child Labor Tax Case, supra,* 38, 40–43), unless, indeed, as already indicated, its neces-

* See *Brushaber* v. *Union Pacific R. Co. Co.,* 240 U.S. 1, 24–25; *Nichols* v. *Coolidge,* 274 U.S. 531, 542–543; *Heiner* v. *Donnan,* 285 U.S. 312, 325–328. Compare *Schlesinger* v. *Wisconsin,* 270 U.S. 230, 239–240.

sary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the ten per cent. tax imposed upon the notes of state banks involved in *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." Again, in the *McCray* case, *supra,* answering a like contention, this court said (p. 59) that the argument rested upon the proposition "that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority." And it was held that if a tax be within the lawful power of the legislature, the exertion of the power may not be restrained because of the results to arise from its exercise.

In *Alaska Fish Co.* v. *Smith, supra,* 48–49, a statute of Alaska levying a heavy license tax upon persons manufacturing fish oil, etc., was upheld as constitutional against the contention that it would prohibit and confiscate plain-

tiff's business. "Even if the tax," the court said, "should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. . . . The acts must be judged by their contents not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation."

In the *Child Labor Tax Case, supra,* this court, in holding unconstitutional the provisions of the Revenue Act of February 24, 1919, imposing a tax upon the employment of child labor, fully recognized the foregoing limitations upon the judicial authority; but declared that the act constituted an attempt to regulate a matter exclusively within the control of the state, and that, although the exaction was called a tax, it was, in fact, not a tax but a penalty exacted for the violation of the regulation. "Taxes are occasionally imposed," it was said (p. 38), "in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us."

The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the legislature ascertained, from the language of the act, and the words used therein

are to be given their ordinary meaning unless the context shows that they are differently used. *Child Labor Tax Case, supra,* 36. If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. As we have already seen, it was definitely rejected in the *Veazie Bank* case, where it was urged that the tax was " so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank "; in the *McCray* case, where it was said that the discretion of Congress could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive; in the *Alaska Fish* case, from which we have just quoted; and in the *Child Labor Tax Case,* where it was held that the intent of Congress must be derived from the language of the act, and that a prohibition instead of a tax was intended might not be inferred solely from its heavy burden.

From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment. Those decisions, as the foregoing discussion discloses, rule the present case.

Decree affirmed.

MINNICH *v.* GARDNER ET AL.

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

No. 669. Argued March 15, 16, 1934.—Decided April 2, 1934.

1. If the object of a judgment creditor in having an execution levied on goods of the debtor is merely to obtain a lien, the lien will be postponed in favor of subsequent purchasers and execution creditors; but, a subsequent direction to the sheriff to proceed with the the sale has the effect of reviving the priority of the lien as against all other liens or rights acquired after such direction. P. 50.
2. This is the general rule and the rule in Pennsylvania. P. 51.
3. Petition in involuntary bankruptcy was filed seventeen months after levy of execution on personal property of the bankrupt, and nine days after the execution creditor had directed the sheriff to sell. *Held,* that the lien of the creditor was good. P. 52.

66 F. (2d) 561, reversed.

CERTIORARI, 291 U.S. 654, to review the affirmance of an order denying preference to an execution creditor's lien on a fund resulting from a sale of the goods by the debtor's trustee in bankruptcy. The order overruled an allowance of the priority by the referee.

Mr. John A. Minnich, pro se.

Mr. A. E. Kountz, with whom *Messrs. Clarence A. Fry* and *J. Colvin Wright* were on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner, on March 21, 1929, recovered two judgments in a Pennsylvania state court against the King Motor Company, the larger one being for something over $6,000. March 26 following, execution was issued thereon, and on March 27 the sheriff levied under the execution upon the personal property of the motor company, endorsing his

levy upon the writ. On April 15 the sheriff returned "goods on hand not sold." Subsequently, on various dates, a writ, an alias writ, and pluries writs of *venditioni exponas* were issued, upon each of which the sheriff made return to the effect that goods on hand were not sold or writ not executed for want of time. On August 21, 1930, nearly seventeen months after the levy of execution, petitioner directed the sheriff in writing that he must advertise all the goods taken under the original levy and sell them immediately. On the same day the sheriff advertised the goods for sale to be held August 29 following. August 25 a Pennsylvania state court of equity appointed a receiver for the King Motor Company and ordered a stay of the execution until final determination of the matter. August 30 an involuntary petition in bankruptcy was filed against the motor company, upon which an adjudication of bankruptcy was made on September 19. All the personal property of the motor company having been sold by the trustee, it was agreed that $1,776.17, being fifty per cent, of the proceeds of such sale, represented the value of the goods levied upon in behalf of petitioner on March 27, 1929, and included in the trustee's sale. The referee in bankruptcy, after deducting for the costs which would have been incurred if the goods had been sold by the sheriff, awarded that sum to petitioner.

The referee found, among other things, that petitioner had issued the writ of execution with an intention to collect his money, which he never relinquished or interrupted; that he had no intention to refrain from exacting payment or helping the debtor to hinder other creditors; that the indulgence was good business policy when it is considered that petitioner realized less than one-third of the amount called for by the execution. The referee concluded that petitioner had acted in good faith.

On review the federal district court, sitting in bankruptcy, held that petitioner had no valid lien against the

fund and was not entitled to any distribution ahead of certain priority wage claims. The circuit court of appeals affirmed, holding that petitioner had made his levy solely for the purpose of acquiring a lien without a genuine intention of proceeding promptly for the collection of his debt, that he had not met the test of good faith, and, therefore, had failed to establish his lien upon the fund. 66 F. (2d) 561.

Conceding that petitioner intended not to proceed promptly for the collection of his debt, and that his levy was made solely for the purpose of acquiring a lien, we think the conclusion drawn therefrom by the lower court—that he had failed to establish his lien upon the fund—does not follow, since it fails to give effect to the positive order of the petitioner, made nine days before the bankruptcy proceedings were begun, directing the sheriff to proceed at once under the original levy to advertise for sale and sell the goods. The effect of the intention and purpose ascribed to petitioner would be to destroy the priority of the lien obtained by his levy and thereby expose him to the risk of having his execution postponed in favor of purchasers and subsequent execution creditors. It, nevertheless, would continue good against the judgment debtor and all others not acquiring rights or liens. This, undoubtedly, is the general rule (e.g., *In re Zeis,* 245 Fed. 737, 739; *In re Schwab Printing Co.,* 59 F. (2d) 726, 728; *Keel* v. *Larkin,* 72 Ala. 493, 502–503), and is fully recognized by the Pennsylvania decisions. *Kent, Santee & Co.'s Appeal,* 87 Pa. 165, 167; *McLaughlin* v. *McLaughlin,* 85 Pa. 317, 322; *Mentz* v. *Hamman,* 5 Whart. (Pa.) 150, 153; *Fletcher's Appeal,* 17 Leg. Int. (Phila. 1860) 300. In *Eberle* v. *Mayer,* 1 Rawle (Pa.) 366, it was held that an order given by an execution creditor to stay proceedings on his execution until further directions was a waiver of his priority in favor of a second execution received by the sheriff during the pendency of the stay. By

such order, it was said (p. 369), " the plaintiff's execution must be considered as dormant, and constructively fraudulent, as against the subsequent execution."

The general rule is equally well established that in the absence of any intervening rights or liens a direction to the sheriff to proceed with the sale has the effect of reviving the rights obtained by the original levy, that is to say, of reviving not the lien, but the priority of the lien as against all other liens and rights acquired after such direction. *In re Zeis, supra; In re Schwab Printing Co., supra; Miller* v. *Kosch,* 74 Hun (N.Y.) 50, 52; 26 N.Y.S. 183; *Sweetser* v. *Matson,* 153 Ill. 568, 584; 39 N.E. 1086. We are of opinion that this general rule obtains in Pennsylvania. It was recognized as applicable to a Pennsylvania judgment as early as 1811 in *Berry* v. *Smith,* 3 Wash.C.C. 60, Fed. Cas. No. 1359. The judgment considered in that case had been rendered by the Supreme Court of Pennsylvania, and a *fieri facias* had issued with direction to the sheriff not to levy it until further instructions. A few days later the sheriff was directed to proceed with the levy. It was held that a second execution levied in the meantime, if pursued, would take preference, but otherwise if the second execution were issued after the countermand. Mr. Justice Washington, delivering the opinion, said: " The order of suspension deprives the act of the officer, in pursuance of it, of all its force and effect, until it is restored by a countermand; and if, in the meantime, a second execution is taken out and levied, the former must be postponed;—not so, if the second execution issues subsequent to such countermand; and upon this distinction, the decision of the case of *Huber* v. *Schnell,* [1 Browne, 16] in the common pleas of this state, seems to be entirely correct."

In *Freeburger's Appeal,* 40 Pa. 244, it was held that an execution issued only for the purpose of a lien will be postponed to a subsequent execution issued in good faith. It

appeared there that the sheriff had been instructed, when the execution was placed in his hands, not to proceed until further orders, and thereafter to make a levy but not sell. Subsequently the sheriff was told to go on and sell; but the evidence did not make clear that the last order was given prior to the issue of the second execution. The court, therefore, sustained the lien of the second execution, saying, "All this," referring to the evidence, "leaves it quite uncertain whether the orders to sell under the first execution were prior or subsequent to the issue of the second. But as it is clearly established that the first was used merely as a security until those orders were given, it is incumbent upon Cameron & Billmeyer [first judgment creditors] to prove affirmatively that they were given before the sheriff received the second writ. This they failed to do, and their execution, therefore, has lost its priority." This decision clearly imports the converse of the proposition, namely, that if it had been shown that the orders to sell were given before the receipt of the second execution, the first execution would not have lost its priority. See 2 Freeman on Executions, § 206, p. 1043, n. 138. Our attention has been called to no Pennsylvania decision, and our examination discloses none, which conflicts with that conclusion. In the present case, the proof establishes and the court below concedes that an order to sell, which antedated by nine days the filing of the involuntary petition in bankruptcy, was in fact given.

Since the effect of that order was to revive the priority of the lien, not to create a new one, and since that lien had attached long prior to the beginning of the four months' period preceding the filing of the petition in bankruptcy, it was not affected by the provisions of § 67 (f) of the Bankruptcy Act, which declare all liens obtained, etc., within such period null and void. *In re Zeis, supra,* 740–741; *In re Schwab Printing Co., supra,* 728, and cases cited.

Respondents suggest that, in any event, the case involves the further question whether, as wage claimants, each of them is entitled under a designated Pennsylvania statute to priority to the extent of $200 over the execution creditor. So far as the record discloses, that question is raised here for the first time. The report of the referee recites that a preference for the claims, not to exceed $600 to each claimant, was sought under § 64 (b) (5) of the Bankruptcy Act. That subdivision has no relation to claims arising under state law, and no mention of any such claims is made in the referee's report or in the decision of either of the courts below or in the record. In no view of the matter is the question properly before us for consideration.

Decree reversed.

FEDERAL LAND BANK OF BERKELEY *v.* WARNER ET UX.

CERTIORARI TO THE SUPREME COURT OF ARIZONA.

No. 498. Argued February 16, 1934.—Decided April 2, 1934.

1. A stipulation in a Farm Loan Mortgage that, in case of suit to foreclose, the mortgagor shall pay a reasonable attorney's fee to be fixed by the court, is valid under the Federal Farm Loan Act if valid under the state law. P. 54.
2. The purpose of the Farm Loan Act is to enable farmers, by mortgaging their lands, to obtain loans at low cost; and this purpose is to be observed in determining what is a reasonable attorney's fee, in a foreclosure proceeding. P. 57.

42 Ariz. —; 23 P. (2d) 563, reversed.

CERTIORARI, 290 U.S. 620, to review the affirmance of a decree foreclosing a farm loan mortgage in which the trial court had refused to enforce a stipulation for an attorney's fee.

Mr. Peyton R. Evans, with whom *Messrs. Richard W. Young* and *Scott W. Hovey,* and *Miss May T. Bigelow* were on the brief, for petitioner.

No appearance for respondents.

By leave of Court, *Mr. Irving P. Whitehead* filed a brief on behalf of numerous Federal Land Banks, as *amicus curiae.*

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondents gave petitioner a mortgage on their farm lands in Arizona to secure a loan of $7,200 made in accordance with the Farm Loan Act.[1] The mortgage provides that in case of suit to foreclose the mortgagors shall pay a reasonable attorney's fee to be fixed by the court. And that clause is valid under Arizona law.[2] The borrowers having failed to pay according to their promise, petitioner brought this suit to foreclose the mortgage and prayed that an attorney's fee of $125 be included in the judgment. Respondents objected to the allowance of any amount on account of that item, the trial court sustained their contention, and the supreme court upheld that part of the decree upon the ground that the collection of such a fee is forbidden by the following part of § 31: "No land bank . . . shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized." 12 U.S.C., § 983.

That construction cannot be sustained. The Act establishes coöperation between borrowers on farm mortgages and investors in the bonds secured by them. The requirement, by means of the mortgage provision, that a mortgagor shall bear the expense put upon the bank by his default is reasonable and in harmony with that principle.

[1] Federal Farm Loan Act of July 17, 1916, 39 Stat. 360, as amended. 12 U.S.C., § 636, *et seq.*

[2] This case, 42 Ariz. —. *McClintock* v. *Bolton* (1899) 6 Ariz. 370, 377; 57 Pac. 611. See *Estate of Amirault* (1921) 22 Ariz. 122; 194 Pac. 1099. *Maxey* v. *Somerton State Bank* (1921) 22 Ariz. 371; 197 Pac. 894. *O. S. Stapley Co.* v. *Rogers* (1923) 25 Ariz. 308; 216 Pac. 1072. § 3840, R.C., 1928.

In the absence of a plain expression to that effect, it may not be held that Congress intended to put upon non-defaulting borrowers any part of the expense of foreclosure of mortgages made by others. The Act does not prescribe proceedings for foreclosure but indicates that state laws are to govern. Section 30 directs the land bank commissioner to examine the laws of each State and to report, among other things, whether in his opinion they are such as to safeguard against loss in case of default. Code, § 971. It provides that, if examination shall show that the laws of any do not afford sufficient protection, the Farm Credit Administration may declare mortgages on land in that State ineligible. Code, § 972. And the petition for this writ indicates that, except in a few States where local law prohibits such contracts, all the mortgages taken by the Federal land banks contain stipulations for attorney's fees for foreclosure.[3] From this it appears that officers charged by law with the administration of the banks have always construed the Act to permit state laws to control. Our attention has not been called to any case in which that construction has been questioned. It is entitled to great weight. *United States* v. *Mo. Pac. R. Co.*, 278 U.S. 269, 280.

And we are of opinion that the decision of the Arizona supreme court in this case is not supported by the language it quotes from § 31 or by any other part of the Act. The paragraph containing this language[4] defines

[3] The petition indicates: Federal land banks hold mortgages amounting to approximately $1,120,000,000. Joint stock land banks hold mortgages amounting approximately to $500,000,000. Under the Emergency Farm Mortgage Act of May 12, 1933, Federal land banks are authorized immediately to expand their activities to the extent of $2,000,000,000 in additional farm mortgage financing operations. Mortgages taken under that Act will contain stipulations for attorney's fees for foreclosures.

[4] "Other than the usual salary or director's fee paid to any officer, director, or employee of a national farm loan association, a Federal

criminal offenses and prescribes punishments. The first sentence holds officers, directors and employees to their usual salaries and directors' fees, and limits each of them, and as well every attorney for a bank, to "a reasonable fee . . . for services rendered." The second sentence contains the provision relied on. Its sole purpose is to limit banks to the charges, fees, etc., that are specifically authorized. Then, after restricting disclosure of names of borrowers, the paragraph makes violations of its provisions punishable by fine or imprisonment or both. Other than the counsel fee in question, the judgment below does not exclude any expense of foreclosure that is permitted by Arizona law. But plainly the compensation of attorneys engaged to foreclose a mortgage is as necessary as the payment of charges for advertisement, the service of process or the sale of the property. The items last mentioned are generally, if not indeed everywhere, chargeable to defaulting mortgagors. There is nothing in the Act to suggest purpose to denounce the one and permit the others. Moreover, the quoted clause is in harmony with the restrictions put upon loans by § 12, Code, § 771, and is undoubtedly intended to emphasize and strictly to enforce limitations set by § 13, Code, § 781 (9), upon fees for appraisal and examination of title, legal fees,

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land bank, or a joint-stock land bank, and other than a reasonable fee paid by such association or bank to any officer, director, attorney, or employee for services rendered, no officer, director, attorney, or employee of an association or bank organized under this Act shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of such association or bank. No land bank or national farm loan association organized under this Act shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized. . . . Any person violating any provision of this paragraph shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or both." 12 U.S.C., § 983.

recording charges and the like that are included in the preliminary costs of negotiating and carrying the mortgage loans. Undoubtedly Congress intended that state laws are to govern in respect of counsel fees for foreclosure of mortgages given under the Act.

But what is said above is not to be taken to approve the collection of a substantial attorney's fee for foreclosure in every case where stipulations such as the one before us are valid under state law. Uncontested foreclosures generally follow established routine and undoubtedly many of them may be made, without much if any cost to the banks, by their regularly employed salaried lawyers. In any such case the employment of another attorney or the exaction of any substantial charge for legal services cannot be justified as reasonable. In all cases—whether foreclosure is obtained by default or after contest—the mortgagor's promise to pay the mortgagee a reasonable attorney's fee is to be construed having regard to the purpose of Congress to enable farmers, by means of mortgages on their lands, to obtain loans at low cost.

Reversed.

GILVARY *v.* CUYAHOGA VALLEY RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 575. Argued March 8, 1934.—Decided April 2, 1934.

1. Although the duty to supply all of its cars with automatic couplers laid upon an interstate railroad by the Federal Safety Appliance Acts extends to vehicles used exclusively in such carrier's intrastate commerce, nevertheless where a breach of this duty results in injuries to the carrier's employee while he is engaged exclusively in intrastate commerce, his right to collect damages from the carrier does not spring from these federal acts, but from the law of the State. P. 61.
2. Where a carrier and employee had elected, in case of any injury to the employee while engaged in intrastate commerce, to have

their respective rights and liabilities governed by the provisions of the Ohio elective workmen's compensation law, *held* that the agreement was applicable, and consistent with the Federal Safety Appliance Acts, in a case of injury alleged to have been caused by the carrier's failure to equip cars with automatic couplers as those acts required. P. 59.

127 Ohio St. 402, affirmed.

CERTIORARI, 290 U.S. 622, to review the affirmance (by equal division) of a judgment of the Court of Appeals of Ohio, which had reversed a recovery of damages from the Railway Company in an action based on personal injuries.

Mr. M. L. Bernsteen, with whom *Mr. Glen A. Boone* was on the brief, for petitioner.

Mr. W. T. Kinder for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is an action brought by petitioner to recover for personal injuries sustained by him in April, 1929, while employed by respondent as a switchman at Cleveland, Ohio. Respondent is a common carrier by railroad wholly within that State engaged in intrastate and interstate commerce. And the Safety Appliance Acts make it unlawful for it to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact.[1] In accordance with the Ohio workmen's compensation act,[2] petitioner and respondent had

[1] § 2, Act of March 2, 1893, 27 Stat. 531, 45 U.S.C., § 2. § 1, Act of March 2, 1903, 32 Stat. 943, 45 U.S.C., § 8.

[2] "The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any

theretofore notified the industrial commission that they elected, in case of any injury sustained by petitioner while engaged in intrastate commerce, to have their respective rights and liabilities governed by the provisions of that Act. The commission had approved the agreement, respondent paid the premiums necessary to keep it in force and in all respects complied with the law. Petitioner was injured while he and respondent were engaged in intrastate commerce.

The complaint alleges that his injuries were caused by respondent's failure to comply with the Safety Appliance Acts in that cars which he, with other members of his crew, was attempting to couple were not equipped with couplers that would couple automatically by impact, thereby making it necessary for him to go between the ends of the cars where he was caught and injured. In addition to a denial of the violation of the statutes, respondent's answer sets up the election to be bound by the state compensation act. The court held that the agreement was not sufficient to constitute a defense and struck out that part of the answer. The trial resulted in a verdict and judgment for petitioner. The court of appeals reversed and gave final judgment in favor of the respondent " for the reason that the acceptance and notice of election by the employee contract approved by the Industrial Commission of Ohio is a complete bar to a right

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of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid." G.C., § 1465–98.

of recovery in this action." In the state supreme court, the judges being equally divided in opinion, the judgment of the court of appeals was affirmed.

As the petitioner when injured was not engaged in interstate commerce, the Federal Employers Liability Act does not apply, and the question is whether the agreement of the parties, in pursuance of the Ohio statute, is repugnant to the Federal Safety Appliance Acts.

Unless excluded by congressional enactment under the commerce clause, state law governs the respective liabilities and rights of railroad carriers and their employees growing out of injuries suffered by the latter whether in interstate or intrastate commerce. *Second Employers' Liability Cases,* 223 U.S. 1, 54. The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. *Atlantic Coast Line* v. *Georgia,* 234 U.S. 280, 290. Cf. *Napier* v. *Atlantic Coast Line,* 272 U.S. 605. The purpose exclusively to regulate need not be specifically declared. *New York Central R. Co.* v. *Winfield,* 244 U.S. 147. But, ordinarily such intention will not be implied unless, when fairly interpreted, the federal measure is plainly inconsistent with state regulation of the same matter. *Illinois Cent. R. Co.* v. *Public Utilities Comm'n,* 245 U.S. 493, 510.

The Safety Appliance Acts govern common carriers by railroad engaged in interstate commerce. The Act of 1893 applied only to vehicles used by them in moving interstate traffic. 45 U.S.C., § 2. Its requirements were by the Act of 1903 extended to all their vehicles. *Id.,* § 8. *Southern Ry. Co.* v. *United States,* 222 U.S. 20, 26. *Moore* v. *Chesapeake & Ohio Ry. Co.,* 291 U.S. 205, 213. So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state regulation whether consistent,

complementary, additional or otherwise. *Prigg* v. *Pennsylvania,* 16 Pet. 539, 617. *Southern Ry. Co.* v. *Railroad Comm'n,* 236 U.S. 439, 446. *Internat. Shoe Co.* v. *Pinkus,* 278 U.S. 261, 265. The imposition of penalties (*id.,* § 6) and abrogation of assumption of risk (*id.,* § 7) are measures for enforcement.

A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or in intrastate commerce. And by abolishing assumption of risk the Acts impliedly recognize the right to recover for injuries resulting therefrom. But the absence of a declaration similar to that in the Federal Employers Liability Act, which denounces contracts and other arrangements made for the purpose of exempting carriers from liability created by that Act (45 U.S.C., § 55), strongly suggests a lack of legislative purpose to create any cause of action therefor. Moreover, if there had been such purpose, Congress probably would have included provisions in respect of venue, jurisdiction of courts, limitations, measure of damages, and beneficiaries in case of death.

Petitioner cites language in *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U.S. 33, 41. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these Acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach " sprang from the principle of the common law " and was left to be enforced accordingly, or in case of death " according to the applicable statute." *Moore* v. *Chesapeake & Ohio Ry. Co., supra,* 215. *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Popplar,* 237 U.S. 369, 372. These Acts do not create,

prescribe the measure or govern the enforcement of, the liability arising from the breach. They do not extend to the field occupied by the state compensation Act. There is nothing in the agreement repugnant to them.

Affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concur in the result.

CHARLES ILFELD CO. *v.* HERNANDEZ, COLLECTOR OF INTERNAL REVENUE.

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

No. 579. Argued March 8, 1934.—Decided April 2, 1934.

Section 141 (a) of the Revenue Act of 1928 gives groups of affiliated corporations the privilege of making consolidated returns, in lieu of separate ones, for 1929 and subsequent years, upon condition that all members consent to the regulations prescribed prior to the return. Section 141 (b) authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make regulations for determining the tax liability of an affiliated group and of each member in such manner as clearly to reflect the income and prevent avoidance of tax liability. *Held:*

1. The making of a consolidated return of income on the part of affiliated corporations, was a "consent" to the regulations prescribed prior to the return. P. 65.

2. Deduction of a loss, in an income tax return, is not allowable unless the relevant act and regulations fairly may be read to authorize it. P. 66.

3. Where a parent company during a consolidated return period caused the property of two affiliates, of which it held all the stock, to be sold to outsiders, received a distribution of the net proceeds after payment of their outside debts, and then dissolved the affiliated corporations, the losses represented by the difference between the amount of the distribution and what it had lent the affiliates and paid for their stock in prior years were losses upon a distribution within the consolidated return period and arising from intercompany transactions, and not from a sale of stock, within

the meaning of Regulations 75, adopted pursuant to the above cited Act, and, under those Regulations they were not deductible in the consolidated return. Pp. 66–67.

4. The Act and Regulations are not to be construed as permitting double deduction of the same losses, first as subsidiary company losses in consolidated returns for earlier years, and again in stating the eventual loss to the parent company from its investment in the subsidiaries. P. 68.

66 F. (2d) 236; 67 *id.* 236, affirmed.

CERTIORARI, 290 U.S. 624, to review the reversal of a judgment awarded the plaintiff by the district court, sitting without a jury, in an action on a claim of excessive payment of taxes.

Mr. A. T. Hannett for petitioner.

Mr. Erwin N. Griswold, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Norman D. Keller* were on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed as follows: by *Messrs. Robert H. Montgomery, Thomas G. Haight,* and *J. Marvin Haynes* on behalf of the American Tobacco Co.; and by *Messrs. Theodore Benson, Oscar W. Underwood, Jr., H. C. Kilpatrick, John G. Buchanan,* and *Walter C. Mylander,* on behalf of The Apartment Corporation.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In 1917 petitioner purchased all the capital stock of the Springer Trading Company for $40,000 and in 1920 all that of the Roy Trading Company for $50,000. It held these shares until late in 1929 when both companies were dissolved. In that period it advanced the Springer Company sums amounting to $69,030.27, and the Roy Company $9,782.22. Nothing having been paid it on account of these advances, petitioner had an investment in the

former of $109,030.27 and in the latter of $59,782.22. It made consolidated returns which took into account the gains and losses of each subsidiary. Operations of the Springer Company resulted in losses in all but two of the years and those of the Roy Company in all but four. The losses of the former exceeded its gains by $118,510.53, and those of the latter by $57,127.85. In 1929, before the end of November, the subsidiaries sold all their property to outside interests. After paying debts to others, each had a balance—the Springer Company, $22,914.22, and the Roy Company, $15,106.16—which it paid petitioner on December 23. Both subsidiaries were dissolved December 30 in that year.

Petitioner made a consolidated return for 1929 based on the results of operation and the liquidation of each subsidiary but made no deduction of losses resulting to itself from the liquidations. The return showed a tax of $20,836.20 which was duly paid. In May, 1931, petitioner filed an amended return and claimed a refund of $14,406.43. This return does not take into account profits or losses of subsidiaries in that year but deducts the losses above shown to have resulted to petitioner from its investments in them.* The commissioner rejected the claim. Petitioner brought this action in the federal district court for New Mexico against the collector to recover the amount of its claim. A jury was waived, the court made special findings of fact, stated its conclusions of law

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* Operating losses claimed and deducted prior to 1929:

	Springer Co.	*Roy Co.*	*Combined*
Operating losses claimed and deducted prior to 1929	$131,424.41	$59,007.25	$190,431.66
Investment loss claimed for 1929	86,116.05	44,676.06	130,792.11
Total losses claimed	217,540.46	103,683.31	321,223.77
Investment (stock plus advances)	109,030.27	59,782.22	168,812.49

and gave petitioner judgment as prayed. The Circuit Court of Appeals reversed. 66 F. (2d) 236. 67 F. (2d) 236.

The question is whether petitioner is entitled to deduct from its 1929 income any part of the losses resulting from its investments in the subsidiaries.

The Revenue Act of 1928 and Regulations 75 made under § 141 (b) govern. Section 141 (a) gives to groups of affiliated corporations the privilege of making consolidated returns, in lieu of separate ones, for 1929 or in subsequent years upon condition that all members consent to the regulations prescribed prior to the return. And, in view of the many difficult problems arising in the administration of earlier provisions authorizing consolidated returns, the Congress deemed it desirable to delegate by § 141 (b) the power "to prescribe regulations legislative in character." Senate Report No. 960, 70th Cong., 1st Sess., p. 15. That subsection authorizes the Commissioner, with the approval of the Secretary, to make such regulations as he may deem necessary in order that the tax liability of an affiliated group and of each member "may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability."

The making of the consolidated return constituted acceptance by petitioner and its subsidiaries of the regulations that had been prescribed. No question as to validity is raised. The brief substance of the regulations here involved follows:

Article 37 (a) provides: Gains or losses shall not be recognized upon a distribution *during* a consolidated return period by one member to another in cancellation or redemption of its stock; "and any such distribution shall be considered an intercompany transaction." And subdivision (b) requires that any such distribution *after* a

consolidated return period shall be treated as a sale, and directs adjustments to be made in accordance with articles 34, 35 and 36.

Article 34 (a) prescribes the basis for determination of gain or loss upon a sale by a member of stock issued by another member and "during any part of the consolidated return period" held by the seller. Subdivision (c) applies to sales which break affiliation and which are made during the period that the selling corporation is a member of the affiliated group.

Article 40 (a) directs that intercompany accounts receivable or other obligations which are the result of intercompany transactions during a consolidated return period shall not "during a consolidated return period" be deducted as bad debts. Subdivision (c) governs deductions after the consolidated return period on account of such transactions during the period.

1. In the absence of a provision in the Act or regulations that fairly may be read to authorize it, the deduction claimed is not allowable. *Brown* v. *Helvering,* 291 U.S. 193, 199, 205. *Burnet* v. *Houston,* 283 U.S. 223, 227. Cf. *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 326. Petitioner contends that Articles 37 (b) and 34 (c) cover the case. We are unable so to construe them. Article 37 relates to dissolutions. Subdivision (b) deals with distributions made after a consolidated return period. The record conclusively shows that each subsidiary handed over the balance before the dissolution was consummated and during the consolidated return period. Article 34 relates exclusively to the sale of stock. No sale of stock was involved. The parent and subsidiary corporations were the only parties. Neither subsidiary acquired stock of the other or that issued by itself. The petitioner retained all the shares of each and at the end voted dissolutions that operated to cancel them.

2. Respondent, relying on Articles 37 (a) and 40 (a), maintains that the losses petitioner seeks to deduct arose from intercompany transactions during the consolidated return period and therefore may not be allowed.

Article 37 (a) forbids the recognition of losses upon distribution during the consolidated return period and declares that such distributions shall be considered intercompany transactions. Article 40 (a) forbids during that period the deduction as bad debts of obligations which are the result of intercompany transactions. The payment of the liquidating dividends was made during the return period and was the last step leading up to the action of directors and stockholders for the dissolution of the subsidiaries. The amount handed over by the Springer Company was less than petitioner's advances to it, but the amount paid by the Roy Company was greater than the advances to it. Undoubtedly the obligation of the subsidiaries in respect of the advances would be held to be intercompany accounts receivable quite independently of the regulations.

But a word is necessary as to the subsidiaries' obligations to the petitioner as stockholder. The record does not disclose whether the latter obtained the stock directly from the issuing corporations or purchased from others. Without regard to the manner of acquisition, the amount paid constituted investment in the subsidiaries. And, as it was the owner of all the shares of the subsidiaries, petitioner will be deemed to have directed all their activities in the unitary business and as well the steps taken for their liquidation and dissolution. They were liable to it alone for the balances remaining after payment of the amounts owed others, and it was equally entitled whether claiming as lender or shareholder. Under the circumstances, it reasonably may be held that their obligation in respect of petitioner's stock ownership resulted

from intercompany transactions within the meaning of Article 40 (a). Petitioner rightly says, as does respondent, that the amounts paid for the stock and the advances later made to the subsidiaries stand on the same footing. But its contention that the transactions out of which the claimed losses arose did not occur during the consolidated return period cannot be sustained. Petitioner is therefore not entitled to deduct them from its 1929 income.

3. The allowance claimed would permit petitioner twice to use the subsidiaries' losses for the reduction of its taxable income. By means of the consolidated returns in earlier years it was enabled to deduct them. And now it claims for 1929 deductions for diminution of assets resulting from the same losses. If allowed, this would be the practical equivalent of double deduction. In the absence of a provision of the Act definitely requiring it, a purpose so opposed to precedent and equality of treatment of taxpayers will not be attributed to lawmakers. Cf. *Burnet* v. *Aluminum Goods Co.*, 287 U.S. 544, 551. *United States* v. *Ludey*, 274 U.S. 295, 301. There is nothing in the Act that purports to authorize double deduction of losses or in the regulations to suggest that the commissioner construed any of its provisions to empower him to prescribe a regulation that would permit consolidated returns to be made on the basis now claimed by petitioner.

In *Remington Rand, Inc.* v. *Commissioner*, 33 F. (2d) 77, the Circuit Court of Appeals for the Second Circuit held a subsidiary company's accumulated earnings on stock sold to a parent company could not be added to the cost of the stock in determining taxable gain arising on the latter's sale to outsiders. In *United Publishers' Corp.* v. *Anderson*, 42 F. (2d) 781, a district court in the same circuit, deeming the *Remington Rand* case applicable, held that a parent corporation filing consolidated returns showing losses of a subsidiary during earlier years could nevertheless deduct loss on the sale of the subsidiary's stock.

Petitioner insists that same principle governs both decisions and that therefore the deduction should be allowed. But the analogy is not good. Where all the members gain, total taxable income is the same on a consolidated return as upon separate ones. But where as in the case before us the subsidiaries lose and the parent gains, the losses of the former go in reduction of the taxable income of the latter. Considerations that justify inclusion of the profits made by all the members do not support the double deduction claimed.

The weight of authority is against petitioner's contention. *Burnet* v. *Riggs Nat. Bank,* 57 F. (2d) 980. *Commissioner* v. *Apartment Corp.,* 67 F. (2d) 3. *Summerfield Co.* v. *Commissioner,* 29 B.T.A. 77. *National Casket Co.* v. *Commissioner,* 29 B.T.A. 139. No decision other than that of the district court in *United Publishers' Corp.* v. *Anderson, supra,* gives any support to its claim. Cf. *Burnet* v. *Imperial Elevator Co.,* 66 F. (2d) 643. *McLaughlin* v. *Pacific Lumber Co.,* 66 F. (2d) 895.

Affirmed.

ELECTRIC CABLE JOINT CO. *v.* BROOKLYN EDISON CO., INC.

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

No. 611. Argued March 15, 1934.—Decided April 2, 1934.

1. Claim 4 of Patent No. 1,172,322, to Torchio, February 23, 1916, for an improvement in protective devices for electric cable joints, *held* invalid because of the prior art and for want of invention.
2. The claim is for a device, in combination, for improving insulation at joints of high-tension metal-sheathed cables. The conductors in such cables are insulated from the sheath and from the metal sleeves by which the sheathing is continued at their junctions, by wrappings of pervious material saturated with an insulating oily substance. Migration and loss of this substance, caused by cutting

a cable and, more especially, by its contractions and expansions, or "breathing," when in operation at high voltages, result in air spaces within the insulation through which damaging leakages of current take place. The elements in the combination claimed to be new are: (1) the use of an insulating liquid (oil) which is fluid at ordinary working temperatures of such cables, in lieu of compounds of higher melting point; and (2) a reservoir holding a supply of such liquid and communicating with the interior of the joint.

The Court finds (1) That use in the combination of the more fluid insulating permeant was anticipated in the prior art and fully disclosed in publications; (2) that the addition of the reservoir was also anticipated, besides being a mere mechanical adaptation. Pp. 72–79.

3. Invention may consist in adding a new element to an old combination; but the addition must be the result of invention, not the mere exercise of the skill of the calling, and not one plainly indicated by the prior art. P. 79.

66 F. (2d) 739, affirmed.

CERTIORARI, 290 U.S. 624, to review the affirmance of a decree denying the validity of a patent in a suit by an assignee claiming infringement.

Messrs. Melville Church and *D. Anthony Usina* for petitioner.

Mr. Charles Neave, with whom *Mr. John D. Monroe* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Certiorari was granted to review a decree of the Court of Appeals for the Second Circuit, affirming a decree of a district court holding invalid, for want of invention, the Torchio patent, No. 1,172,322, of February 23, 1916, applied for March 15, 1915, for "an improvement in protective devices for electric cable joints." 66 F. (2d) 739. The Court of Appeals for the Sixth Circuit had previously held the patent valid and infringed. *Metropolitan Devices Corp.* v. *Cleveland Electric Illuminating Co.,* 36 F. (2d) 477.

Correct appreciation of the contentions made requires at the outset some discussion of the structure of electric cables for the transmission of high tension (voltage) electric currents and, more particularly, the causes of leakage or wastage of current at the joints of such cables, for the prevention of which the patented device is said to be useful. Cables for the transmission of high tension currents comprise a plurality of copper conductors, usually three in number, each covered with an insulating tape of paper or fabric, enclosed in an outer insulating wrapping, and all in turn surrounded by pervious insulating material filling the interstices between the conductors and saturated with oil. The whole is enclosed in a lead tube or sheath, which constitutes the outer surface or cover of the cable. In practice the cables are spliced or connected by forming a joint at the connecting ends. This is accomplished by cutting back the lead sheath for a suitable distance, bringing the ends of the conductors together and joining them, usually by a connecting copper sleeve, and covering or surrounding them with successive wrappings or layers of insulating material, impregnated with an insulating compound such as an oil, long recognized as a desirable insulating material. A cylindrical lead sleeve is then placed over the joint and soldered at its ends to the lead sheath of the cable so as to surround and hermetically enclose the joint. Through openings made in the sleeve insulating compounds may be introduced.

Leakage of current at the joint results from imperfect insulation. Deterioration in the insulation may result from the drying out of the insulating material, particularly through loss or " bleeding " of the insulating fluid at the ends, or when the cable is cut. Also, high tension currents, ranging upwards from 15,000 volts, develop heat in the conductors and adjacent material, with consequent expansion and corresponding contraction when cooling, known as " breathing." This causes migration of the in-

sulating compound within the cable and to some extent its extrusion, and produces cracks and voids in it, with resulting ionization of the interstitial air at high tensions, and the lowering of the dielectric strength or resistance of the cable at the joint.

The patent claimed is for a device, in combination, to prevent current leakage by improving the insulation. Claim 4, upon which alone the petitioner relies, reads:

"4. An electric cable, comprising a sheath, a line conductor having a joint, a body of pervious insulating material inclosing said joint, the said sheath being removed for a distance sufficient to expose said pervious body, a sleeve of impervious material of greater diameter than said body, inclosing the same and hermetically united at its ends to said cable sheath, a receptacle communicating with the interior of said sleeve, and an insulating fluid adapted to permeate said pervious body contained in said receptacle and the space between said body and said sleeve."

On February 11, 1927, before either the present suit or that in the Sixth Circuit was begun, an assignee of the patent and petitioner's predecessor in interest filed a disclaimer of the improvement,

"except for electric cables which comprise a line conductor, insulating wrapping permeated with insulating compound and a sheath of flexible, inelastic metal constituting a unitary product of manufacture and commerce which is portable and capable of being drawn through conduits; and except as to an insulating liquid which is fluid at ordinary working temperatures of such cables and in quantity sufficient to supply at all times the demands made by the cable in use, and by the joint."

Petitioner's expert testified at the trial, as the prior art shows, that Torchio was not the first to discover that oil is an insulating material; that he was not the first to provide a cable with conductors enclosed in insulating ma-

terial permeated with oil, or the first to make joints in a cable or to use pervious insulated wrappings of joints, or to show a sleeve enclosing the joint larger than the sheath of the cable, hermetically closed and connected to the metal sheath of the cable. The only elements enumerated in the claim, asserted to be new, are the receptacle communicating with the interior of the sleeve, and the insulating oil or liquid, fluid at low temperatures, contained in the receptacle and in the space between the sleeve and the pervious insulating material surrounding the joint.

The issue for decision is whether the addition of these elements, in combination with the others enumerated in the claim, involve invention.

In the earlier case the Court of Appeals for the Sixth Circuit held Claims 3 and 4 valid. Claim 3 embraces all the elements of Claim 4, except the communicating reservoir containing the described insulating fluid. That court did not discuss the reservoir or pass upon its effect as adding anything patentable to the combination. It concluded on the evidence before it that Torchio had substituted, in a combination which was old, a liquid insulating compound for a compound not soft enough to flow; that this was new and was enough "beyond the skill of an expert" to amount to invention. and that the patent was there infringed by the use in the combination of a joint-insulating compound "normally of the consistency of vaseline or jelly." In the present case both courts below found that the use of oil or an insulating liquid, fluid at ordinary working temperatures, within the sleeve enclosing the joint, had been disclosed in printed publications before the alleged invention by Torchio, and they held that the addition of the reservoir or receptacle containing the fluid and communicating with the interior of the sleeve did not involve invention and was known before Torchio.

Brief reference will be made to the prior art, shown by the present record, which was not before the Court of Appeals for the Sixth Circuit in the earlier case.

The British patent of Geipel, No. 11,280, of December 8, 1894, disclosed an electric cable joint box "filled with a suitable insulating material, as for example oil, wax, bitumen, or any combination of any of these according to the nature of the insulation used for the conductor . . . with paper or jute insulated conductors oil may be used." The patent states "with paper, jute, hemp, flax, cotton or other suitable insulating material the joints . . . are best surrounded by oil."

The Lemp patent, No. 534,802, of February 26, 1895, speaks of the use of oil in electric transformers in which the conductors forming the primary are insulated with asbestos "loosely wound to allow the asbestos to take up the oil." The space containing the primary "is filled with oil connected with a reservoir or supply pipe being maintained to allow for expansion under increase of temperature."

In 1907 de Gelder published at The Hague a description of the electric cable system of the city of Amsterdam. He described "high tension cables for 3,000 volts" having paper insulation impregnated "with a rather thin liquid, oily and not too resinous mass" with cable joints bound with linen tape first boiled in oil so that it is completely saturated, with the wrapped joint enclosed in a lead sleeve, soldered to the lead sheath of the cable. Through a hole cut in the top of the sleeve or socket "hot insulating mass is poured into the socket. For this purpose the same mass or rather the same oil is used as for impregnating the cable. It is a kind of resin oil." The paper also points out that the impregnating mass used with the high tension, paper insulated cables supplied by a British firm is thinner than that used in other types, that in the British cables being

"a rather thin resinous oil at 15° Centigrade, 59° Fahrenheit."

Since 1911 the Consolidated Gas Electric Light & Power Company in Baltimore has used oil in insulating its cables carrying a current of 13,000 volts or more, the cables consisting of three paper-wrapped conductors, insulated with oil impregnated jute, enclosed in a lead sheath. To avoid the draining out of the cables and the consequent defective insulation in sections extending vertically from the subterranean conduits to the power houses, the cables were passed into enlarged containers or potheads containing oil, which, flowing downward in the cables, replenished the oil in the jute insulation for distances as great as 1200 feet. Paraffin, solid at ordinary temperatures, which had originally been placed in the potheads, was found unsatisfactory. Defective insulation resulted from drying out of the cables, and in 1911 paraffin was replaced by an oil which was fluid at ordinary temperature.

Vernier, in an article on "The Laying and Maintenance of High Tension Cables," published in the journal of the Institution of Electrical Engineers in 1911 and in summarized form in "The Electrician" of March 10, 1911, discussed in detail the insulation of joints in electric cables carrying currents up to 20,000 volts. He described a cable consisting of three paper insulated conductors enclosed in a lead sheath or tube. He pointed out the dangers of voids in joint insulating material and ensuing gas ionization which result in reduced "breakdown pressure" or dielectric strength and described a method of insulating the joint by wrapping the conductors with oil impregnated tape surrounded with insulating material, all enclosed in a lead sleeve, soldered to the lead sheath of the cable. This sleeve, he stated, was then filled with an insulating compound of either "an oil or a viscous joint box compound, preferably the latter, which can run into the tubes

and all parts of the joint box." Again "Such a compound must be viscous of about the consistency of thick cream at ordinary temperatures. When heated it should run as freely as heated oil so as to penetrate all crevices and it must retain these features through its life . . ." The tendency of solid compounds to form air voids was pointed out and the author's preference for a joint filled with oil or a compound viscous at ordinary temperatures was stated. Vernier's teaching of "a viscous compound which never sets" is referred to in connection with his name in Pender's American Handbook of Electrical Engineers, 1914, a standard work of authority.

Torchio himself, in a written report to his employers, in 1914, on the Berlin cable system, transmitting currents of 30,000 volts, described the cables as having joints enclosed in a lead sleeve soldered to the lead sheathing of the cable by means of "wiped joints," and as being insulated with a compound which "at normal temperature is semi-liquid and is similar to the compound used for saturation of cables." In August, 1914, an associate, in reporting to him in writing upon the underground cable system in Boston carrying from 13,000 to 25,000 volts, described cables in use there as consisting of three conductors, paper wrapped and sheathed in lead. He described a joint box in use enclosing the insulated conductors and filled with an insulating compound which "at ordinary temperature is about the viscosity of molasses."

The prior art thus briefly outlined shows that an insulating fluid, described in Torchio's fourth claim as "adapted to permeate the pervious material surrounding the conductors," used with the other elements of the joint sleeve combination embraced in his third claim, was not new and was fully described in publications before Torchio. Its advantages in such use over non-fluid compounds had been recognized and pointed out. Hence, petitioner's claim to patentable invention must rest on the

addition of the other elements enumerated in Claim 4, the receptacle containing the described insulating fluid and communicating with the sleeve.

The combination thus effected, it is said, is especially adapted to insulating the joint and is useful in replacing the loss of insulating oil, in connection with the "breathing" which takes place in the cable, particularly at the joints when in use. The expansion of the interior cable parts and insulating material, accompanying the rise in temperature, forces the oil from the joints along the cable and also causes it to exude at the joints. As the cable cools, the fluid insulation, particularly at the joint, may not be sufficient to fill it and voids result. This occurs the more readily if the insulating compound tends to solidify at cooling temperatures. These consequences are avoided by the use, in conjunction with the reservoir, of oil which is sufficiently fluid to flow freely at ordinary cable temperatures. The breathing accompanying the alternate expansion and contraction of the cable through the creation of partial vacua within the insulating material facilitates the migration of the oil within the cable. The reservoir provides for sufficient excess of reserve oil to restore the losses of oil from the joint and thus to prevent formation of the voids or to fill them.

Breathing is a natural phenomenon. The expansion and contraction of materials used in cables under the influence of changing temperatures are within the range of ordinary scientific knowledge. Breathing is readily observable and known by those having the skill of the art. Torchio did not invent it, nor was he the first to observe it. Publications before Torchio did not make use of the term, but they disclosed knowledge of the effect of temperature changes upon the cable and the insulating fluid. In 1907, de Gelder, in recommending the use of oil in joint boxes, mentioned the fact that the heating of the cable would cause the insulating mass to flow from the

joints, and called attention to the probability that if the oil was pressed out by overheating " when contraction takes place water will be sucked in even though the junction box may be well sealed." He also spoke of the downward shifting or draining out of the oil in cables if elevated at or near their terminals, as had been observed in the lines of the Baltimore light and power system. The potheads used as oil reservoirs in the Baltimore installation, when full of a free flowing oil, were observed to overflow when the cables were heated, and the migration of the oil along the cables for considerable distances was also noted. Vernier noted the shrinkage of joint box insulating compounds on cooling and their tendency in the process to form vacua, and " if of a solid nature, to form blow holes or air pockets." In recommending that the joint sleeve be filled with oil he pointed out the tendency of the insulating oil to run out of the cable when cut and recommended the construction of the joint by the use of insulating tape " so as to allow the greatest possible freedom of access to the oil which will keep the insulating tapes constantly impregnated." The oil or joint box compound used, he said, " must be viscous and of about the consistency of thick cream at ordinary temperatures," and he stated that impregnation " will be greatly assisted by the constant temperature changes which the cable undergoes under changes of load." This was a clear recognition of the phenomenon of breathing and the adaptability to it of an oil which, with the heat developed in high tension cables, would flow freely " so as to penetrate all crevices."

Thus the use in cable joints of an oil, free flowing at prevailing cable temperatures, by introducing it into the joint sleeve combination of petitioner's third claim, was not only old, but before Torchio the special adaptability of that combination to the need because of the expansion and contraction of the cable structure in use had been recognized and described by publication.

To this the petitioner added the oil reservoir. The fact that the combination, without it, was old does not preclude invention by the addition of a new and useful element. *Parks* v. *Booth,* 102 U.S. 96, 104. But the addition must be the result of invention, not the mere exercise of the skill of the calling and not one plainly indicated by the prior art. Figure 1 of the patent shows the receptacle claimed, a reservoir connecting with the lead sleeve. Figure 6 shows the sleeve without the connecting reservoir, protruding upward above the wrapped joint so as to form a dome affording an increased interior oil space. The patent states "Instead of making the reservoir 10 in the form of a separate chamber communicating with the sleeve as shown in Figure 1, I may dispose the sleeve eccentrically on the joint so that the greatest clearance will be uppermost as shown at 12 in Figure 6. In this way I produce an additional holding space for the oil within the sleeve itself." This additional holding space is thus described as the equivalent of the reservoir in the form of a separate chamber or receptacle, enumerated in Claim 4. Vernier showed a like enlargement in the sleeve in sketches in his published article. He does not refer to this protuberance or dome as a reservoir, but examined in the light of the text its function is unmistakable. See *In re Bager,* 47 F. (2d) 951, 953.

The prior art had also foreshadowed the enlargement in the form of a receptacle or reservoir. Such were the potheads used by the Baltimore Power and Light Company for oil impregnation of cable insulation. Lemp showed and described an additional holding space in the form of a connecting receptacle for the oil insulation of transformers. But in any case enlargement of the oil space in the sleeve in an existing combination, so as to increase the oil supply, would clearly not involve any special skill, to say nothing of invention. It was not invention to bring into the combination its equivalent, a further enlargement

and extension of the holding space in the form of the familiar device of a connecting oil cup or reservoir, so as to increase the oil supply. No more than the skill of the calling was involved. *Concrete Appliances Co.* v. *Gomery,* 269 U.S. 177; *Saranac Automatic Machine Corp.* v. *Wirebounds Patents Co.,* 282 U.S. 704, 713; *DeForest Radio Co.* v. *General Electric Co.,* 283 U.S. 664, 685. Neither the means employed nor the result obtained was novel. See *Hailes* v. *Van Wormer,* 20 Wall. 353; *Smith* v. *Nichols,* 21 Wall. 112; *Machine Co.* v. *Murphy,* 97 U.S. 120; *Pickering* v. *McCullough,* 104 U.S. 310; *Westinghouse Electric & Mfg. Co.* v. *Pittsburgh Transformer Co.,* 10 F. (2d) 593; *D. J. Murray Mfg. Co.* v. *Sumner Iron Works,* 300 Fed. 911, 912; compare *R. Herschel Mfg. Co.* v. *Great States Corp.,* 26 F. (2d) 362, 363.

We conclude that Claim 4 is invalid, and that the decree below must be

Affirmed.

ASCHENBRENNER *v.* UNITED STATES FIDELITY & GUARANTY CO.

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

No. 578. Argued March 8, 1934.—Decided April 2, 1934.

1. If the language of an accident insurance policy is open to two constructions, that more favorable to the insured will be adopted. P. 84.
2. Words in an accident insurance policy, when not obviously intended to be used in their technical connotation, will be given the meaning that common speech imports. P. 85.
3. An accident policy provided for double indemnity if injury were sustained by insured "while a passenger in or on a public conveyance (including the platform, steps or running-board thereof) provided by a common carrier for passenger service." Insured, at a proper station, had boarded the steps of a moving train and

was standing there, holding on, when his body, projecting out, struck some obstacle and he was brushed off and killed. *Held:*

(1) That the question whether he was a "passenger" at the time did not depend upon the meaning of that word in the terminology applied in negligence suits against common carriers. P. 83.

(2) The insured was a "passenger" within the meaning of the policy, construing it liberally in his favor and giving its words their common meaning. P. 85.

(3) The fact that the stipulation construed was one for double indemnity was not a reason for construing it more strictly than other provisions of the policy. P. 85.

65 F. (2d) 976, reversed.

CERTIORARI, 290 U.S. 622, to review a judgment directing that a recovery of double indemnity on a policy of accident insurance be reduced one-half.

Mr. Randell Larson, with whom *Mr. Allen G. Wright* was on the brief, for petitioner.

Mr. George A. Work, with whom *Mr. Edwin C. Brandenburg* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner, a beneficiary of a policy of accident insurance issued to her husband by respondent, brought this suit in the District Court for Northern California to recover under the double indemnity provisions of the policy. At the trial liability was conceded for the single amount stipulated to be paid in the event of the insured's death by accident, but double liability was contested on the ground that the insured, at the time of the accident, was not a passenger on a common carrier within the meaning of the double indemnity provisions of the policy. A judgment entered upon a verdict for the petitioner for the double liability was reversed by the Court of Appeals for the Ninth Circuit, which directed that judgment be reduced by one-half. 65 F. (2d) 976. Certiorari was

granted to resolve an alleged conflict of the decision below with those in other circuits. See *London Guarantee & Accident Co.* v. *Ladd; Preferred Accident Ins. Co.* v. *Ladd,* 299 Fed. 562, 565 (C.C.A. 6th); *Aetna Life Ins. Co.* v. *Davis,* 191 Fed. 343 (C.C.A. 8th); *Preferred Accident Ins. Co.* v. *Muir,* 126 Fed. 926 (C.C.A. 3d); compare *Fidelity & Casualty Co.* v. *Morrison,* 129 Ill. App. 360.

The policy provided for payment of a specified amount in case of loss of life of the insured resulting from accidental bodily injury and for payment of double that amount "if such injury is sustained by the insured (1) while a passenger in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for passenger service." The insured, who had in his possession a ticket entitling him to transportation, arrived at the railroad station platform just as the train started to move out of the station. There was testimony from which the jury might have found that, while the train was moving at a speed of seven to ten miles an hour but was still within the station and opposite the platform, with vestibule doors open, the insured jumped onto the lower step of a car, his hand grasping the handrail, and that he continued for a brief time, while the train moved about twenty feet, to stand with both feet upon the step but with a small part of his body or clothing projecting beyond or outside the vestibule until it brushed against a bystander on the platform in a manner causing the insured to lose his hold and fall to his death.

The trial judge instructed the jury that if the insured held a ticket entitling him to ride as a passenger, and in attempting to board the train while in motion he stood with both feet upon the step, he was a passenger and entitled to recover under the double indemnity clause. The only question which it is necessary to decide here is whether the insured was a "passenger" at the time of the accident within the meaning of the policy. The Court of

Appeals ruled that he was not; it reached this conclusion by applying the term as it was said to be defined in the law of common carriers.

In personal injury suits against common carriers, brought by persons who, intending to be passengers, were injured while endeavoring to mount the steps of a moving train, courts have sometimes said that the implied invitation to board the train is withdrawn when it begins to move and that the duty of the carrier to exercise a high degree of care toward its passengers does not attach in such circumstances because one seeking to board a moving train does not become a passenger until he reaches a place of safety. *Trapnell* v. *Hines,* 268 Fed. 504, 506; *Illinois Central R. Co.* v. *Cotter,* 31 Ky. Law Rep. 679; 103 S.W. 279; *Kentucky Highlands R. Co.* v. *Creal,* 166 Ky. 469; 179 S.W. 417; *Mathews* v. *Metropolitan Street Ry. Co.,* 156 Mo. App. 715; 137 S.W. 1003; *Schepers* v. *Union Depot R. Co.,* 126 Mo. 665, 675; 29 S.W. 712; *Tompkins* v. *Portland Ry. Co.,* 77 Ore. 174, 179; 150 Pac. 758; *Palmer* v. *Willamette Valley Southern Ry. Co.,* 88 Ore. 322, 330; 171 Pac. 1169. The Court of Appeals thought that the evidence here would have made no case for the jury in a suit against the carrier, and therefore concluded that the trial judge should have directed a verdict for the insurer on the issue of double indemnity.

No doubt intending passengers who are injured in attempting to board a moving train, unless they were invited to do so, are not usually entitled to recover from the carrier. But it is not clear that such cases turn on the existence or non-existence of the passenger-carrier relationship. See *Atchison, T. & S. F. Ry. Co.* v. *Holloway,* 71 Kan. 1; 80 Pac. 31. It has often been recognized that the relationship of carrier and passenger may arise and the duty of the carrier to the passenger attach when the latter comes upon the station platform and before boarding the train. See *Warner* v. *Baltimore & Ohio R. Co.,*

168 U.S. 339; *Atchison, T. & S. F. Ry. Co.* v. *Holloway, supra; Wabash, St. L. & P. R. Co.* v. *Rector,* 104 Ill. 296; *Chicago & E. I. R. Co.* v. *Jennings,* 190 Ill. 478, 483; 60 N.E. 818; Michie, Carriers (1915), §§ 2126, *et seq.* Yet the negligence of a passenger in going into a known place of danger without the inducement or invitation of the carrier may bar his recovery for the resulting injury, even though the passenger-carrier relationship has begun and continues. See *Warner* v. *Baltimore & Ohio R. Co., supra; Daley* v. *Boston, R. B. & L. R. Co.,* 241 Mass. 78; 134 N.E. 376. And in the case of the insured, who had come upon the station platform intending to be a passenger, it may be that negligence in jumping uninvited onto the moving train would bar his recovery from the carrier without resort to the artificial assumption of a hiatus in that relationship during the brief interval required for boarding the train. The notion of such a suspension of the passenger-carrier relationship has been rejected in allowing recovery upon policies insuring against injury while travelling as a " passenger " on a railway train, both where the passenger alighted from the train at an intermediate stop and was injured in attempting to return to the train after it started to move again, *Wharton* v. *New York Life Ins. Co.,* 178 N.C. 135, 138; 100 S.E. 266, and where the insured, in beginning his journey, was injured in attempting to board a moving train. *Fidelity & Casualty Co.* v. *Morrison,* 129 Ill. App. 360.

But it is unnecessary here to follow the niceties of legal reasoning and terminology applied in negligence suits against common carriers, for we are interpreting a contract and are concerned only with the sense in which its words were used. *Farber* v. *Mutual Life Ins. Co.,* 250 Mass. 250, 254; 145 N.E. 535; *Boyd* v. *Royal Indemnity Co.,* 120 Oh. St. 515, 517; 166 N.E. 580. The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and

who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted, *Stipcich* v. *Metropolitan Life Ins. Co.,* 277 U.S. 311, 322; *Mutual Life Ins. Co.* v. *Hurni Packing Co.,* 263 U.S. 167, 174; and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports. *Neighbors* v. *Life & Casualty Ins. Co.,* 182 Ark. 356; 31 S.W. (2d) 418; *Tupper* v. *Massachusetts Bonding & Ins. Co.,* 156 Minn. 65; 194 N.W. 99; *Anderson* v. *Fidelity & Casualty Co.,* 228 N.Y. 475, 483; 127 N.E. 584.

We think the word " passenger " can not be restricted to the technical meaning which may be assigned to it by the law of common carriers, for it also has a common or popular meaning which would at least include the insured who, with a ticket in his possession, was riding on the steps of the train. In its usual popular significance the term, when applied to one riding a train, indicates a traveller, intending to be transported for hire or upon contract with the carrier, and distinguishes him from those employed to render service in connection with the journey. See *Wood* v. *General Accident Ins. Co.,* 160 Fed. 926; *Travelers Ins. Co.* v. *Austin,* 116 Ga. 264; 42 S.E. 522; *Ward* v. *North American Accident Ins. Co.,* 182 Ill. App. 317; compare *Continental Life Ins. Co.* v. *Newman,* 219 Ala. 311; 123 So. 93; *U.S. Casualty Co.* v. *Ellison,* 65 Colo. 252; 176 Pac. 279. None of the standard dictionaries defines the term in a fashion suggesting that its meaning is to be limited in terms of the legal liability of the carrier. While for the purposes of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common.

That the stipulation to be construed is one for double indemnity calls for no different conclusion. It has been

argued that such a provision contemplates a risk which is comparatively slight and that therefore it should be strictly construed. It may be that the insurer assumes little additional risk; but the terms of the clause disclose an inducement to insure set forth in attractive detail.[1] The policy contains no exceptions exempting the insurer from liability if the injury is caused by negligence of the insured, or restricting the liability to accidents occurring only after a point of safety has been reached, and the steps of a car are specifically included in the place where injury insured against may occur. Nothing in the policy gives any hint that words in this clause are used more narrowly than those in any other. The insurer has chosen the terms, and it must be held to their full measure in this clause, as in any other, whether its promise be for more or less. *London Guarantee & Accident Co.* v. *Ladd,* 299 Fed. 562, 564; *Cedergren* v. *Massachusetts Bonding & Ins. Co.,* 292 Fed. 5, 8; *Dolge* v. *Commercial Casualty Ins. Co.,* 211 App. Div. 112; 207 N.Y.S. 42; *Stewart* v. *North American Acc. Ins. Co.,* 33 S.W. (2d) 1005 (Mo. App.).

Reversed.

MONAMOTOR OIL CO. *v.* JOHNSON, TREASURER OF IOWA, ET AL.

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

No. 555. Argued March 7, 8, 1934.—Decided April 2, 1934.

1. Laws of Iowa, 42 General Assembly, c. 103, § 1, imposing an additional tax per gallon on motor vehicle fuel imported and used

[1] Discussion of the double indemnity provisions from the standpoint of risk and sales value may be found in Sommer, Manual of Accident and Health Insurance, 16, 84 et seq.; Hutcheson, Note on Double Indemnity Clauses, 19 Transactions, Actuarial Society of America, 332.

within the State, *held* consistent with provisions of the Iowa constitution respecting title and substance of taxing laws. P. 93.

2. A State may impose a tax on the local use of gasoline imported from without and collect it by requiring the importing distributor to report the amounts of his importations, account to the State for the corresponding taxes, as collecting agent of the State, and pass on the tax burden to consumers by adding it to the selling price. P. 93.
3. No unlawful burden on interstate commerce results from the circumstance that, in the application of this method of collection, the distributor may make preliminary payments in respect of imported gasoline which he intends at the time to export, or which he may afterwards in fact export, from the State, where, as in this case, he is entitled to a refund of such payments. P. 94.
4. The Iowa statute here involved obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa; and the requirement that the distributor as the shipper into Iowa shall, as agent of the State, report and pay the tax on the gasoline thus coming into the State for use by others on whom the tax falls, imposes no unconstitutional burden either upon interstate commerce or upon the distributor. P. 95.
5. A distributor of gasoline, in being required to prepay to the State the taxes that are ultimately to be passed on to and paid by those who buy the gasoline for local consumption as motor vehicle fuel, is not himself taxed but is merely made a collecting agency, and has no ground for alleging that he is deprived of equal protection of the laws by a statutory provision under which the tax, when paid on gasoline consumed for other uses, not taxed, is refunded to the consumer by the State. P. 95.
6. Code of Iowa, c. 241–B1, § 4755–b38, laying an additional tax on all motor fuel imported and used within the State, applies to gasoline manufactured within the State as well as to that which is imported. P. 96.
7. One who has not sustained and is not threatened with injury from a statute can not complain of an alleged discrimination arising from it. P. 96.
8. Revocation without notice or hearing of a license to distribute gasoline, required by the Iowa law, *held* not a taking of property, in the absence of any penalty for doing business unlicensed, and of any threat of other injury to the licensee. P. 97.

9. In a suit to restrain state officers from enforcing a taxing statute, a federal court has no jurisdiction to enjoin the prosecution of a prior action in a state court, for collection of taxes under such statute. Jud. Code, § 265. P. 97.

3 F.Supp. 189, affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing a bill seeking to restrain the Treasurer, Attorney General, and other officials of the State of Iowa. Questions under the State and Federal Constitutions were involved and diverse citizenship was alleged.

Messrs. Paul E. Roadifer and *M. D. Kirk,* with whom *Messrs. George S. Wright* and *Addison G. Kistle* were on the brief, for appellant.

Mr. L. W. Powers, Special Assistant Attorney General of Iowa, for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellant filed a bill in the District Court for Southern Iowa, seeking a declaration that the laws of Iowa laying a tax on motor vehicle fuel violate state and federal constitutional provisions, and an injunction against their enforcement by state officers. A temporary injunction issued, but a court of three judges, upon final hearing, dismissed the suit.[1] The case is here on direct appeal.

The general assembly of the State, in order to raise revenue for the improvement of highways, imposed a license fee of two cents per gallon on all motor vehicle fuel "used or otherwise disposed of in this state for any purpose whatsoever"; and directed that "Any person using motor vehicle fuel within the state shall be liable for the fee herein provided for unless the same shall have

[1] 3 F.Supp. 189.

been previously paid." [2] By a later statute an additional license fee of one cent per gallon was imposed.[3] The law defines "distributor" as "any person who brings into the state or who produces, refines, manufactures or compounds within the state any motor vehicle fuel to be used within the state or sold or otherwise disposed of by him within the state for use in the state." "Person" is defined to include partnerships, corporations and associations. One who sells at retail is required to keep posted in a public place a placard showing the total sale price per gallon, including license fee, and to have printed on the placard the words "state license fee included." It is declared unlawful to conduct the business of a distributor unless a certificate giving certain information is filed with the state treasurer and a license is procured permitting the conduct of that business. Every distributor is required on or before the twentieth day of each calendar month to file with the state treasurer a report showing the total number of gallons imported by him during the preceding calendar month, with details as to each shipment, and at the same time to remit to the treasurer the amount of the license fee for such preceding month; he may, however, deduct three per cent. of the gallonage for evaporation and loss. If after the fee is remitted the fuel is destroyed by casualty not due to the fault of the distributor, before being sold or used, a refund of the tax paid

[2] Laws of the 41st General Assembly, Chapter 6, § 1, as amended by laws of 42d General Assembly, Chapter 248, § 1; Code of Iowa of 1931, Chapter 251–A1, § 5093–a1.

[3] "There is hereby levied on all motor vehicle fuel imported and used within this state a license fee of one cent per gallon, which shall be in addition to the license fee levied by chapter 251–A1. All of the provisions and conditions of said chapter 251–A1 relating to the levy, collection or payment of the license fee on motor vehicle fuel shall apply with equal force to the license fee levied herein. . . ." Laws of the 42d General Assembly, Ch. 103, § 1; Code of Iowa, 1931, Chapter 241–B1, § 4755–b38.

thereon is to be made by the state treasurer. The act declares that its provisions are not to apply to foreign or interstate commerce. As distributors import gasoline into Iowa for reshipment to other states, the state treasurer has, in the administration of the acts, permitted a deduction in the monthly reports of any gasoline so sold and reshipped to points outside the state.

There is provision that one using fuel purchased for a purpose other than for a motor vehicle may, upon making claim upon the state treasurer in proper form and in due time, obtain a refund of the amount of the tax paid in respect of it.

A penalty of ten per cent. of the amount of the tax is imposed upon a distributor who fails to remit on or before the twentieth of the month following the importation. The attorney general is empowered to bring action on behalf of the state against any distributor who is in default for thirty days in payment of tax. The state treasurer is authorized to revoke the license of a distributor who fails to render the prescribed reports, or renders a false report, or fails to pay the license fee when due, and he need not renew the license until satisfied that the applicant will in future comply with the law. Distributors are required to permit inspection of their books, records, papers, invoices and equipment. It is made a misdemeanor for a distributor or any principal officer to refuse to submit the prescribed reports and certificates to the treasurer, or to refuse an examination of books, records and equipment by the treasurer or his representatives, or to violate other provisions.[4]

The appellant is an Arizona corporation whose business is the buying, manufacturing, blending and selling of gasoline and kindred products, including the importation into Iowa of gasoline by tank cars, trucks and other con-

[4] Code of Iowa, 1931, Chapter 251–A1. See also § 4755–b38.

tainers, for resale to consumers and to dealers who sell to consumers, and the exportation of gasoline to other states; the maintenance of storage facilities in Iowa, from which deliveries are made in that and other states, and the maintenance of a refinery at Carter Lake, Iowa, where gasoline is blended and compounded and shipped to points in Iowa and other states. Prior to April, 1932, gasoline was refined at this plant. The corporation maintains numerous service stations in Iowa which sell to consumers. Upon the filing of a certificate with the state treasurer the company received a distributor's license; and between May, 1927, and May, 1932, paid to the state treasurer monthly, in accordance with the reports rendered, many thousands of dollars as license fees. There was included in the amount so reported and paid a tax at the rate of three cents per gallon on gasoline imported into Iowa and gasoline refined and manufactured at the refinery at Carter Lake. No question seems to have been raised as to the applicability and validity of the statute until about May, 1932. At that time a controversy arose out of the following facts:

Carter Lake, Iowa, where the appellant's refinery is located, now lies on the west shore of the Missouri River, not far from Omaha, Nebraska. It was originally on the east side of the river, the interstate boundary. By an avulsion the stream changed its course to the east of Carter Lake, but the old bed remained the interstate boundary. The refinery ships large quantities of gasoline to points in Nebraska and also to points in Iowa. The question arising whether the appellant should report gasoline which was ultimately distributed in Iowa upon its arrival at Carter Lake, or its manufacture there, or when it was shipped from Carter Lake to other points in Iowa, the state treasurer and the appellant agreed that importations into Carter Lake need not be treated as im-

portations into Iowa, but when gasoline arriving at Carter Lake or there manufactured should be shipped to other points in Iowa, it should be treated as then imported into the state for the purpose of report and payment of the tax by the appellant. This arrangement was made for the convenience of the parties.

Prior to May, 1932, the appellant shipped forty tank cars of gasoline from the refinery at Carter Lake to destinations in Iowa, for sale and use there. Its employees and agents altered the invoices and waybills on these shipments so as to show "gas-oil" instead of gasoline and omitted to report them to the state treasurer, or to pay tax upon them, as should have been done in accordance with the arrangement mentioned. When the state treasurer called appellant's attention to the falsification of its reports the representatives of the company for the first time asserted that as gasoline moving from Carter Lake to other points in Iowa had to pass through Nebraska the shipments were interstate, and a tax on them would be a burden upon interstate commerce. The state treasurer, having confirmed the facts by an audit of the company's books, caused the appellant and certain of its officers to be indicted for making a false return, procured the attorney general to bring a civil action against the appellant by attachment to recover the unpaid tax on gasoline imported and used within the state, and notified the appellant that he had revoked its license as a distributor. The individual defendants pleaded guilty and were fined, and the indictment was dismissed, as to the company. The civil suit was pending when the present bill was filed, asserting the invalidity of the law, and praying that the state treasurer and other officials be enjoined from interfering with the conduct of appellant's business as a distributor, from collecting the taxes imposed by the statutes, and from prosecuting the civil action in the state court.

The district court, whose jurisdiction was invoked by reason of diversity of citizenship as well as the alleged conflict of the state statutes and the federal constitution, dismissed the bill. The decision is challenged for several reasons, but we are of opinion that it was proper.

1. The amendatory act by which an additional tax of one cent per gallon was imposed is said to violate provisions of the Iowa constitution respecting the title and the substance of taxing laws. The district court examined these contentions and found them without merit. We concur in its conclusions.

2. There is no substance in the claim that the statutes impose a burden upon interstate commerce, contrary to the prohibition of Article I, § 8 of the Federal Constitution. The appellant insists that the tax is a direct tax on motor vehicle fuel imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property. *Altitude Oil Co.* v. *People,* 70 Colo. 452; 202 Pac. 180; *Standard Oil Co.* v. *Brodie,* 153 Ark. 114; 293 S.W. 753. It is not laid upon the importer for the privilege of importing (compare *Brown* v. *Maryland,* 12 Wheat. 419; *Bowman* v. *Continental Oil Co.,* 256 U.S. 642, 647), but falls on the local use after interstate commerce has ended. Compare *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249; *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249. The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. *Cit-*

izens National Bank v. *Kentucky,* 217 U.S. 443, 454; *Pierce Oil Corp.* v. *Hopkins,* 264 U.S. 137; *Standard Oil Co.* v. *Brodie, supra; Standard Oil Co.* v. *Jones,* 48 S.D. 482; 205 N.W. 72. The distributor who reports the gasoline and pays the tax is required to pass the burden on to the consumer, who is advised that in addition to the price of the gasoline he is paying a license fee to the state. To prevent evasion the distributor must pay and pass on the tax on all gasoline imported or distributed, irrespective of its ultimate use; but as some purchasers employ the gasoline for a purpose other than the propulsion of a motor vehicle, and as the burden of the tax has been passed on to them as well as those who desire a motor fuel, provision is made for a refund to the former. Since the law declares that the levy is only upon use of motor vehicle fuel in the state, and the intent is not to affect interstate commerce, the state treasurer properly permits distributors to deduct as a credit from the gasoline returned as imported into the state in any calendar month, that which has been exported from the state by the distributor. Thus gasoline passing through the state to reach its ultimate destination is exempt. It is of course true that as the report is required on the twentieth of the calendar month for transactions of the preceding month, there may at times be gasoline received in the month covered by the report which has not been exported by the twentieth of the succeeding month; but the distributor is entitled to a credit for such exportation in his report made in the next month, and the mere fact that he cannot claim an anticipatory credit for gasoline not yet exported, but intended so to be, seems to us to be too slight a burden to be of any moment, or to raise a substantial constitutional question.

The appellant, however, says that the state officials have required it to report and to pay tax on shipments made from Oklahoma direct to dealers in Iowa who are

appellant's customers, and that in respect of such transactions the burden on interstate commerce is obvious. But if the gasoline so imported is intended to be used in Iowa for motor vehicle fuel it is subject to the tax. If it is not so used by the appellant's customer, or by the purchaser at retail, either may obtain a refund of the tax collected by the appellant and remitted to the state. The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

3. The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the XIV Amendment. Complaint is made of several features of the law which are said to create arbitrary discriminations. Appellant first says that as it must pay to the state a tax of three cents on every gallon of gasoline imported, whereas the user who employs the gasoline purchased for some other purpose than motor fuel may obtain a refund of the tax paid in respect of the fluid so used, the law attempts to impose a tax on the distributor for the benefit of persons who buy or use gasoline for some purpose other than the operation of a motor vehicle on the highways, and that the result is the imposition on the distributor of a tax for the benefit of this other class of persons.

The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distribu-

tor does not pay the tax; the user does. It cannot therefore be said that any tax is laid upon the appellant in ease of another class of taxpayers.

The amendatory act, levying an additional cent per gallon, is said to discriminate against the appellant because if gasoline were distilled or manufactured in Iowa it would escape taxation, since the amendatory statute refers only to gasoline "imported and used" within the state. This statute is, however, an amendment or supplement to the earlier act taxing use and disposition of gasoline for motor fuel (see *State* v. *Northern Iowa Oil Co.*, 209 Iowa 980; 229 N.W. 214), embodies by reference provisions of the earlier law (see Note 3, *supra*) and, as the District Court held, is, therefore, to be construed to cover gasoline whether imported or manufactured within the state. It appears, moreover, that no gasoline is or has been distilled or manufactured in Iowa except that which was distilled or manufactured by appellant prior to April 1, 1932. Since that date the appellant has not distilled or manufactured gasoline within the state. The appellant is not in a position to complain of any alleged discrimination arising from the terms of the statute, since it has not sustained injury and none is threatened which can affect it.

It is asserted that naphtha imported into Iowa and blended may escape the tax on the ground that it is not motor vehicle fuel imported into Iowa. The evidence, however, discloses that the officers charged with the administration of the law are insisting that the tax should be paid on naphtha so imported and blended and in fact are now prosecuting a suit against another defendant on this theory. No reason appears why, even if such naphtha were held free of tax, this would constitute an unfair discrimination against appellant, which is required to collect from users the tax on gasoline.

4. The revocation of the appellant's license by the state treasurer without notice and hearing did not deprive it of property without due process in violation of the XIV Amendment. Whether in other circumstances the license contemplated by the statutes under consideration might be considered property within the protection of the due process clause we need not determine. It is sufficient in this case to advert to the undisputed facts disclosed by the record. The law imposes no penalty for conducting the business of a distributor without a license; the only penalties mentioned are for failure to report gasoline intended for use in the state, and to pay the tax. The state officers have not sought to prevent the appellant from continuing its business as a distributor, and have in this proceeding, both by answer and by evidence, avowed their purpose to take no further action against the appellant, either criminal or civil, until the conclusion of the civil suit now pending in a state court to recover the tax, the failure to pay which was the ground of revocation of the appellant's license. The State's officials are prosecuting the action as a test suit. There is therefore no threat of immediate harm as a result of the revocation of the license, and the action of the state treasurer in revoking it cannot affect the pending civil suit or any other action civil or criminal which may hereafter be brought.

5. By its bill the appellant asked an injunction against the further prosecution of the action at law in the state court for the failure to report and to pay tax on certain gasoline. The court below pointed out that § 265 of the Judicial Code (U.S.C. Tit. 28, § 379) forbids the granting of this prayer, and the appellant admitted at the bar that it could not have such relief and did not insist upon it.

We find no error in the decision of the district court, and its judgment must be

Affirmed.

POKORA *v.* WABASH RAILWAY CO.

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

No. 585. Argued March 8, 9, 1934.—Decided April 2, 1934.

1. The burden of establishing the defense of contributory negligence in a personal injuries case is on the defendant. P. 100.
2. Upon a motion by the defendant for a directed verdict, made at the close of the plaintiff's case in chief, and based upon the ground of contributory negligence, the evidence must be viewed in the light most favorable to the plaintiff and all inferences from it which the jury might reasonably draw in his favor are to be assumed. P. 100.
3. The proposition that a driver of an automobile, before crossing a railroad of which his view is obstructed, must get out of his vehicle and inspect the track if he can not otherwise be sure that a train is not dangerously near, can not be accepted as a general rule of law. *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U.S. 66, limited. Pp. 102, 106.
4. The driver of an automobile truck, pursuing his way in a line of auto traffic along a busy city thoroughfare in the day time, attempted to cross another street traversed by a railroad switch track and, beyond that and close to it, by a main line for passenger trains. Before entering the street intersection, he had stopped his vehicle, and, before proceeding, he looked for trains, but a string of box cars on the switch cut off his view. He listened, but heard neither bell nor whistle. Still listening, he drove across the switch and, reaching the main line, was struck by a train coming at the unlawful speed of 25 or 30 miles per hour. The evidence would support a finding that, owing to the presence of the box cars and the proximity of the two tracks, the train was not visible from his seat while there was still time to stop. In an action for resulting injuries, *held:*

(1) That the question whether, in the circumstances, it was negligence to go forward in reliance on the sense of hearing unaided by sight, was a question for the jury. P. 101.

(2) The driver was not bound as a matter of law to leave his truck either on the switch track or at the curb, in order to make visual observations which might turn out worthless by the time he had returned to the vehicle and driven it forward. Pp. 104 *et seq.*

5. A standard of prudent conduct declared by courts as a rule of law must be taken over from the facts of life and must be such that a failure to conform to it is negligence so obvious and certain that rational and candid minds could not deem it otherwise. P. 104.

66 F. (2d) 166, reversed.

CERTIORARI, 290 U.S. 624, to review the affirmance of a judgment for the Railway Company, entered on a directed verdict in Pokora's action for personal injuries.

Mr. W. St. John Wines for petitioner.

Mr. Homer Hall, with whom *Mr. Walter M. Allen* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

John Pokora, driving his truck across a railway grade crossing in the city of Springfield, Illinois, was struck by a train and injured. Upon the trial of his suit for damages, the District Court held that he had been guilty of contributory negligence, and directed a verdict for the defendant. The Circuit Court of Appeals (one judge dissenting) affirmed, 66 F. (2d) 166, resting its judgment on the opinion of this court in *B. & O. R. Co.* v. *Goodman,* 275 U.S. 66. A writ of certiorari brings the case here.

Pokora was an ice dealer, and had come to the crossing to load his truck with ice. The tracks of the Wabash Railway are laid along Tenth Street, which runs north and south. There is a crossing at Edwards Street running east and west. Two ice depots are on opposite corners of Tenth and Edward Streets, one at the northeast corner, the other at the southwest. Pokora, driving west along Edwards Street, stopped at the first of these corners to get his load of ice, but found so many trucks ahead of him that he decided to try the depot on the other side of the way. In this crossing of the railway, the accident occurred.

The defendant has four tracks on Tenth Street, a switch track on the east, then the main track, and then two switches. Pokora, as he left the northeast corner where his truck had been stopped, looked to the north for approaching trains. He did this at a point about ten or fifteen feet east of the switch ahead of him. A string of box cars standing on the switch, about five to ten feet from the north line of Edwards Street, cut off his view of the tracks beyond him to the north. At the same time he listened. There was neither bell nor whistle. Still listening, he crossed the switch, and reaching the main track was struck by a passenger train coming from the north at a speed of twenty-five to thirty miles an hour.

The burden of proof was on the defendant to make out the defense of contributory negligence. *Miller* v. *Union Pacific R. Co.*, 290 U.S. 227, 232. The record does not show in any conclusive way that the train was visible to Pokora while there was still time to stop. A space of eight feet lay between the west rail of the switch and the east rail of the main track, but there was an overhang of the locomotive (perhaps two and a half or three feet), as well as an overhang of the box cars, which brought the zone of danger even nearer. When the front of the truck had come within this zone, Pokora was on his seat, and so was farther back (perhaps five feet or even more), just how far we do not know, for the defendant has omitted to make proof of the dimensions. Nice calculations are submitted in an effort to make out that there was a glimpse of the main track before the switch was fully cleared. Two feet farther back the track was visible, it is said, for about 130 or 140 feet. But the view from that position does not tell us anything of significance unless we know also the position of the train. Pokora was not protected by his glimpse of 130 feet if the train at the same moment was 150 feet away or farther. For all that appears he had no view of the main track northward, or none for

a substantial distance, till the train was so near that escape had been cut off. Cf. *Dobson* v. *St. Louis S. F. Ry. Co.*, 223 Mo. App. 812, 822; 10 S.W. (2d) 528; *Turner* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 164 Minn. 335, 341; 205 N.W. 213.

In such circumstances the question, we think, was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight. No doubt it was his duty to look along the track from his seat, if looking would avail to warn him of the danger. This does not mean, however, that if vision was cut off by obstacles, there was negligence in going on, any more than there would have been in trusting to his ears if vision had been cut off by the darkness of the night. Cf. *Norfolk & W. Ry.* v. *Holbrook,* 27 F. (2d) 326. Pokora made his crossing in the day time, but like the traveler by night he used the faculties available to one in his position. *Johnson* v. *Seaboard Air Line R. Co.*, 163 N.C. 431; 79 S.E. 690; *Parsons* v. *Syracuse, B. & N. Y. R. Co.*, 205 N.Y. 226, 228; 98 N.E. 331. A jury, but not the court, might say that with faculties thus limited, he should have found some other means of assuring himself of safety before venturing to cross The crossing was a frequented highway in a populous city. Behind him was a line of other cars, making ready to follow him. To some extent, at least, there was assurance in the thought that the defendant would not run its train at such a time and place without sounding bell or whistle. *L. & N. R. Co.* v. *Summers,* 125 Fed. 719, 721; Illinois Revised Statutes, (1933 ed.), c. 114, ¶ 84.[1] Indeed, the

[1] The Illinois Act provides: "Every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman, at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached."

statutory signals did not exhaust the defendant's duty when to its knowledge there was special danger to the traveler through obstructions on the roadbed narrowing the field of vision. *Wright* v. *St. Louis S. F. Ry. Co.*, 327 Mo. 557, 566; 37 S.W. (2d) 591; *Hires* v. *Atlantic City R. Co.*, 66 N.J.L. 30; 48 Atl. 1002; *Cordell* v. *N. Y. C. & H. R. R. Co.*, 70 N.Y. 119. All this the plaintiff, like any other reasonable traveler, might fairly take into account. All this must be taken into account by us in comparing what he did with the conduct reasonably to be expected of reasonable men. *Grand Trunk R. Co.* v. *Ives*, 144 U.S. 408, 417; *Flannelly* v. *Delaware & Hudson Co.*, 225 U.S. 597.

The argument is made, however, that our decision in *B. & O. R. Co.* v. *Goodman, supra,* is a barrier in the plaintiff's path, irrespective of the conclusion that might commend itself if the question were at large. There is no doubt that the opinion in that case is correct in its result. Goodman, the driver, traveling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet within which the train was plainly visible.[2] With that opportunity, he fell short of the legal standard of duty established for a traveler when he failed to look and see. This was decisive of the case. But the court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy. "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look."

There is need at this stage to clear the ground of brushwood that may obscure the point at issue. We do

[2] For a full statement of the facts, see the opinion of the Circuit Court of Appeals, 10 F. (2d) 58, 59.

not now inquire into the existence of a duty to stop, disconnected from a duty to get out and reconnoitre. The inquiry, if pursued, would lead us into the thickets of conflicting judgments.[3] Some courts apply what is often spoken of as the Pennsylvania rule, and impose an unyielding duty to stop, as well as to look and listen, no matter how clear the crossing or the tracks on either side. See, e.g., *Benner* v. *Philadelphia & Reading R. Co.,* 262 Pa. 307; 105 Atl. 283; *Thompson* v. *Pennsylvania R. Co.,* 215 Pa. 113; 64 Atl. 323; *Hines* v. *Cooper,* 205 Ala. 70; 88 So. 133; cf. *Pennsylvania R. Co.* v. *Yingling,* 148 Md. 169; 129 Atl. 36. Other courts, the majority, adopt the rule that the traveler must look and listen, but that the existence of a duty to stop depends upon the circumstances, and hence generally, even if not invariably, upon the judgment of the jury. See, e.g., *Judson* v. *Central Vermont R. Co.,* 158 N.Y. 597, 605, 606; 53 N.E. 514, and cases cited; *Love* v. *Fort Dodge R. Co.,* 207 Iowa 1278, 1286; 224 N.W. 815; *Turner* v. *Minneapolis R. Co., supra; Wisconsin & Arkansas Lumber Co.* v. *Brady,* 157 Ark. 449, 454; 248 S.W. 278; cf. *Metcalf* v. *Central Vermont R. Co.,* 78 Conn. 614; 63 Atl. 633; *Gills* v. *N. Y. C. & St. L. R. Co.,* 342 Ill. 455; 174 N.E. 523. The subject has been less considered in this court, but in none of its opinions is there a suggestion that at any and every crossing the duty to stop is absolute, irrespective of the danger. Not even in *B. & O. R. Co.* v. *Goodman, supra,* which goes farther than the earlier cases, is there support for such a rule. To the contrary, the opinion makes it clear that the duty is conditioned upon the presence of impediments whereby sight and hearing become inadequate for the traveler's protection. Cf. *Murray* v. *So. Pacific Co.,* 177 Cal. 1, 10; 169 Pac. 675 *Williams* v. *Iola Electric R. Co.,* 102 Kan. 268, 271; 170 Pac. 397.

[3] The cases are collected in 1 A.L.R. 203 and 41 A.L.R. 405.

Choice between these diversities of doctrine is unnecessary for the decision of the case at hand. Here the fact is not disputed that the plaintiff did stop before he started to cross the tracks. If we assume that by reason of the box cars, there was a duty to stop again when the obstructions had been cleared, that duty did not arise unless a stop could be made safely after the point of clearance had been reached. See, e.g., *Dobson* v. *St. Louis S. F. Ry. Co., supra.* For reasons already stated, the testimony permits the inference that the truck was in the zone of danger by the time the field of vision was enlarged. No stop would then have helped the plaintiff if he remained seated on his truck, or so the triers of the facts might find. His case was for the jury unless as a matter of law he was subject to a duty to get out of the vehicle before it crossed the switch, walk forward to the front, and then, afoot, survey the scene. We must say whether his failure to do this was negligence so obvious and certain that one conclusion and one only is permissible for rational and candid minds. *Grand Trunk Ry. Co.* v. *Ives, supra.*

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him. See, e.g., *Torgeson* v. *Missouri-K.-T. R. Co.,* 124 Kan. 798, 800, 801; 262 Pac. 564; *Dobson* v. *St. Louis S. F. R. Co., supra; Key* v. *Carolina & N. W. R. Co.,* 150 S.C. 29, 35; 147 S.E. 625; *Georgia Railroad & Banking Co.* v. *Stanley,* 38 Ga. App. 773, 778; 145 S.E. 530. Often the added safeguard will be dubious though the track happens to be straight, as

it seems that this one was, at all events as far as the station, about five blocks to the north. A train traveling at a speed of thirty miles an hour will cover a quarter of a mile in the space of thirty seconds. It may thus emerge out of obscurity as the driver turns his back to regain the waiting car, and may then descend upon him suddenly when his car is on the track. Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction. At times the course of safety may be different. One can figure to oneself a roadbed so level and unbroken that getting out will be a gain. Even then the balance of advantage depends on many circumstances and can be easily disturbed. Where was Pokora to leave his truck after getting out to reconnoitre? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat. The defendant did not show whether there was a locomotive at the forward end, or whether the cars were so few that a locomotive could be seen. If he was to leave his vehicle near the curb, there was even stronger reason to believe that the space to be covered in going back and forth would make his observations worthless. One must remember that while the traveler turns his eyes in one direction, a train or a loose engine may be approaching from the other.

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to

tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury. *Dolan* v. *D. & H. C. Co.*, 71 N.Y. 285, 288, 289; *Davis* v. *N. Y. C. & H. R. R. Co.*, 47 N.Y. 400, 402. The opinion in *Goodman's* case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states.[4] We limit it accordingly.

The judgment should be reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

UTLEY ET AL. *v.* ST. PETERSBURG.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 627. Argued March 12, 1934.—Decided April 2, 1934.

1. A lot owner has no constitutional privilege to be heard in opposition to the adoption of a project of street improvement which may end in an assessment of his lot. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land, or in proceedings for collection afterwards. P. 109.

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[4] Many cases are collected in 43 Harvard Law Review 926, 929, 930, and in 56 A.L.R. 647.

See also: *Dobson* v. *St. Louis S. F. R. Co., supra; Key* v. *Carolina & N. W. R. Co., supra; Gills* v. *N. Y. C. & St. L. R. Co., supra; Georgia Railroad & Banking Co.* v. *Stanley, supra; Miller* v. *N. Y. C. R. Co.*, 226 App. Div. 205, 208, 234 N.Y.S. 560; 252 N.Y. 546, 170 N.E. 137; *Schrader* v. *N. Y. C. & St. L. R. Co.*, 254 N.Y. 148, 151; 172 N.E. 272; *Dolan* v. *D. & H. C. Co., supra; Huckshold* v. *St. L., I. M. & S. R. Co.*, 90 Mo. 548; 2 S.W. 794. Contra: *Koster* v. *Southern Pacific Co.*, 207 Cal. 753, 762; 279 Pac. 788; *Vaca* v. *Southern Pacific Co.*, 91 Cal. App. 470, 475; 267 Pac. 346; *Davis* v. *Pere Marquette R. Co.*, 241 Mich. 166, 169; 216 N.W. 424; cf. *Torgeson* v. *Missouri-K.-T. R. Co., supra.*

2. Objection that a special assessment was laid in an arbitrary manner will not be heard when an administrative remedy for correction of defects or inequalities was given by state statute and ignored by the objector. P. 109.
3. Upon appeal from a judgment of a state court sustaining a special assessment in a suit to set it aside as arbitrary, the contention that statutory means provided for correcting such assessments were unavailable because in conflict with the state constitution is concluded by the judgment if the point was made or passed upon below, and if not raised in the suit or the tax proceedings, it was waived. P. 110.
4. A general tax to make up a deficiency in a fund raised by special assessments of abutting land to pay special improvement bonds, is not invalid under the Fourteenth Amendment because the bonds were issued without notice to taxpayers. P. 111.
5. An appeal from a state court must be dismissed for want of jurisdiction if no substantial federal question is presented and the judgment rests upon an independent basis of state law adequate to support it—in this case laches and estoppel. P. 111.

Appeal from 111 Fla. 844; 149 So. 806, dismissed.

APPEAL from the affirmance of a decree dismissing a suit to set aside a special assessment and the lien of a general tax.

Mr. Lloyd D. Martin for appellants.

Mr. Wm. F. Way, with whom *Messrs. F. P. Fleming, E. J. L'Engle,* and *J. W. Shands* were on the brief, for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The appellants complain that assessments have been so laid upon their lands as to constitute a denial of due process of law. United States Constitution, Amendment XIV.

On April 20, 1925, the City Commission of St. Petersburg, Florida, adopted a resolution for the grading and paving of certain streets and alleys, including First Ave-

nue north from 46th Street to Dusston, the abutting property to be assessed for the expense of the improvement " in accordance with the benefits derived therefrom."

On August 16, 1926, the city accepted the work on First Avenue, which had been completed by the contractor, and directed that the cost ($40,937.46) be spread over the abutting parcels in proportion to the frontage.

On September 6, 1926, the Commission, pursuant to notice duly published, met for the purpose of receiving complaints in respect of the assessments, and no complaints being received, the assessments were confirmed. The applicable statute provides that " all persons who fail to object to the proposed assessments in the manner herein provided, shall be deemed to have consented to and approved the same." Chap. 9914, Acts of 1923, § 13.

The Commission before confirming the assessments had voted an issue of bonds, which were general obligations of the city, the proceeds to be used to make payments to contractors during the progress of the work. Chap. 9914, Acts of 1923, § 17. The amount of the issue was seventy per cent of the estimated cost of the improvement of all the streets, First Avenue and others. The bonds were to be met at their maturity out of the proceeds of the special assessments, which were set apart as a separate fund. §§ 2, 17. If the fund turned out to be inadequate, the deficiency due upon the bonds was to be collected through general taxes like other city obligations. § 2.

On August 11, 1930, the city authorities levied an *ad valorem* tax on all the taxable property in the city to make good a deficiency which had then been ascertained, the tax being at the rate of 14½ mills on each dollar of assessed valuation of property of every kind.

In 1929 and again in 1931, statutes were enacted confirming the assessments and curing any irregularities in the process of laying them. Chap. 14392, Acts of 1929; c. 15511, Acts of 1931.

The appellants, who are property owners on First Avenue within the area of the improvement, brought this suit in or about April, 1931, to set aside the special assessment and also the lien of the general tax. A demurrer to the complaint was sustained, and the suit dismissed. The Supreme Court of Florida affirmed the decree, holding in its opinion that the applicable statutes did not infringe the immunities secured by the Fourteenth Amendment, and further that through laches and acquiescence as well as through a failure to take advantage of other statutory remedies, the appellants were "estopped" from maintaining the suit. 111 Fla. 844; 149 So. 806. Upon an appeal to this court the question of jurisdiction was postponed to the hearing on the merits.

1. The appellants contend that the special assessment is invalid under the Constitution of the United States for the reason that the resolution voting the improvement was adopted without an opportunity to landowners to be heard in opposition. This does not present a substantial federal question. Cf. *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 108; *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *C. L. Merrick Co.,* 254 U.S. 376. There is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land (*Chicago, M., St. P. & P. Ry. Co.* v. *Risty,* 276 U.S. 567; *Londoner* v. *Denver,* 210 U.S. 373, 378; *Goodrich* v. *Detroit,* 184 U. S. 432, 437), or in proceedings for collection afterwards. *Hagar* v. *Reclamation District No. 108,* 111 U.S. 701; *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U.S. 526, 537; *Wells, Fargo & Co.* v. *Nevada,* 248 U.S. 165.

This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector.

Milheim v. *Moffat Tunnel District,* 262 U.S. 710, 723; *Farncomb* v. *Denver,* 252 U.S. 7; *Porter* v. *Investors Syndicate,* 286 U.S. 461.

2. On the assumption that a hearing was unnecessary in advance of the improvement, the appellants, none the less, contend that the later hearing provided for in advance of the assessment is so restricted in its scope as to be an illusory protection. There would be difficulty in framing a remedy more comprehensive than that given by the statute if it is to be taken at its face value. The owner "may appear at the time and place fixed for the said hearing and object to the proposed assessment against the property or to the amount thereof." § 13. "The Governing Authority of the Municipality shall hear and determine all objections and protests to the proposed assessments under such reasonable rules and regulations as it may adopt." § 13. If the protest is overruled, the owner within thirty days thereafter may contest "the legality" of the assessment by action in the courts. § 15. On its face, the remedy thus supplied is plenary and adequate. What the appellants really claim is this, that the remedy, though adequate on its face, is made inadequate by provisions of the Florida constitution, which are said to condemn it. We do not elaborate the argument, for the conflict, if there is any, between the statute regulating this improvement and the local constitution must be adjudged, not by us, but by the courts of the locality. The landowners have had abundant opportunity to bring the conflict to a test. They have let the hour go by. They did not appear before the Commission and either affirm or deny its jurisdiction. They stayed out of the proceeding altogether. When the assessment had been laid and they were suing to set it aside, they did not challenge the validity of the administrative remedy by the allegations of their bill. So far as the record shows, they did not even challenge it in argument when the case was heard

upon appeal. If the point was made, it was not accepted. If omitted, it was waived.

The supposed defects in the scope of the administrative remedy do not present a substantial question within the federal jurisdiction.

3. The appellants do not confine themselves to a challenge of the special assessment in their assault upon the statute: they urge the objection also that the levy of a general tax to make up the deficiency in the fund for the payment of the bonds is invalid under the Fourteenth Amendment because the bonds were issued without notice to the taxpayers. But notice was unnecessary. The argument to the contrary goes counter to so many decisions that it must be condemned as unsubstantial. The distinction is fundamental between the incurring of the indebtedness and the imposition of the lien. *Roberts* v. *Richland Irrigation District,* 289 U.S. 71; *St. L. & S. W. Ry. Co.* v. *Nattin,* 277 U.S. 157, 159; *French* v. *Barber Asphalt Paving Co.,* 181 U.S. 324; *Webster* v. *Fargo,* 181 U.S. 394; *Chicago, M., St. P. & P. Ry. Co.* v. *Risty, supra.*

4. Finally, the appellants are barred, or so the Supreme Court of Florida has held, by laches and estoppel. They stood by without opposition while the property was improved. They refrained from making use of remedies, both administrative and judicial, that were ready to their call. For nearly five years they held aloof without word or act of protest, and then invoked the aid of equity. Following *Abell* v. *Boynton,* 95 Fla. 984; 117 So. 507, and other state decisions, the Supreme Court of Florida withheld an equitable remedy from suitors who had slept upon their rights. By force of that ruling, the decree of the state court rests upon a non-federal ground broad enough to support it. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U.S. 157, 164. Our jurisdiction therefore fails. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co., supra; Pierce* v. *Somerset Ry. Co.,*

171 U.S. 641; *Leonard* v. *Vicksburg, S. & P. R. Co.*, 198 U.S. 416; *McCoy* v. *Shaw*, 277 U.S. 302.

The federal questions are unsubstantial; the non-federal question is genuine and adequate. *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 282; *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773.

The appeal is

Dismissed.

CLARK, RECEIVER, *v.* WILLIARD ET AL., TRUSTEES, ET AL.

CERTIORARI TO THE SUPREME COURT OF MONTANA.

No. 449. Argued February 15, 1934.—Decided April 2, 1934.

1. Where a judgment reverses the cause and remands it for further proceedings in accordance with the court's opinion, the opinion is incorporated in the judgment and may be considered in determining whether the judgment is final. P. 118.
2. A judgment of a state supreme court in a liquidation proceeding which sustains the validity and priority of an execution levied by an intervening creditor on property of the insolvent, leaving no discretion to the trial court with respect to the matter and fully disposing of the intervention, is a final judgment for the purposes of appeal to this Court. P. 117.
3. Under the laws of Iowa, the official liquidator appointed by statute upon the dissolution of an insolvent Iowa insurance company in a suit by the State, is the statutory successor of the corporation. P. 120.
4. In holding that such a liquidator was not the successor to the corporate personality with title derived from the statutes of the domicile but a chancery receiver with title (if any) created by the Iowa decree in the dissolution proceeding, the Supreme Court of Montana denied full faith and credit to the statutes and judicial proceedings of Iowa. P. 121.
5. Whether there is any law or policy prevailing in Montana whereby the local creditors of an insolvent foreign insurance company are entitled to enforce their full claims, by executions upon its property in Montana, not merely as against a chancery receiver but as against the domiciliary successor of the corporation seeking to

devote all of its assets to *pro rata* distribution among all of its creditors, is a question for determination by the Supreme Court of that State. P. 123.

6. When the decision of a state supreme court, due to an error in applying the Federal Constitution, leaves unanswered a question of state law that may be determinative of the case, this Court will vacate the judgment and remand for further proceedings. P. 128.

94 Mont. 508; 23 P. (2d) 959, reversed.

The District Court of Montana entered a final decree adjudging that Clark, the Iowa liquidator of a dissolved Iowa insurance company, was the successor to the personality and title of the corporation; that the assets should be liquidated and ratably distributed subject only to liens existing at the date of dissolution; that a local ancillary receiver should be retained to assist the foreign liquidator; that assets in Montana should be retained in that State until local creditors had received their ratable proportion of the assets there and elsewhere, and that an execution upon a judgment which had been recovered against the corporation by the present respondents should be set aside and canceled. Upon appeal by the judgment creditors to the Supreme Court of Montana, the decree was reversed and their execution reinstated.

Messrs. Reuel B. Cook and *Edmond M. Cook,* with whom *Mr. M. S. Gunn* was on the brief, for petitioner.

Mr. H. Leonard DeKalb, with whom *Mr. Louis P. Donovan* was on the brief, for respondents.

By leave of Court, *Mr. Louis H. Pink* filed a brief on behalf of Mr. George S. Van Schaick, Superintendent of Insurance of the State of New York, as *amicus curiae.*

Mr. Justice Cardozo delivered the opinion of the Court.

The question is whether full faith and credit has been given by the courts of Montana to the statutes and judi-

cial proceedings of the State of Iowa. United States Constitution, Art. IV, § 1.

The petitioner, the official liquidator of an Iowa insurance company, declares himself the universal successor of the corporation (*Keatley* v. *Furey,* 226 U.S. 399, 403, 404), the representative of its personality and powers after its life has been extinguished. *Relfe* v. *Rundle,* 103 U.S. 222; *Martyne* v. *American Union Fire Ins. Co.,* 216 N.Y. 183; 110 N.E. 502; *Deschenes* v. *Tallman,* 248 N.Y. 33, 37; 161 N.E. 321. The Supreme Court of Montana has held that his title to the assets, if he has any, is derived, not from any statute, but from an involuntary assignment under a judgment of a foreign court. A title traced to such a source is subject in Montana to attachment and execution at the suit of local creditors. The question has been left unanswered whether attachments and executions are enforcible to the same extent in derogation of the title of a statutory successor.

Federal Surety Company was organized as an insurance corporation under the laws of Iowa, and thereafter received authority to do business in Montana. In September, 1931, the State of Iowa sued it, alleging its insolvency and praying for a decree of dissolution and the distribution of the assets. A statute of Iowa provides that "the commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership." Code of Iowa, 1931, § 8613–c1. See also Code of Iowa, 1931, §§ 8402, 8964. On September 25, 1931, a decree in favor of the state was entered by default, and an amended decree on December 22 of the same year. By these decrees the corporation was adjudged to have been dissolved on September 25, 1931;

the Commissioner of Insurance, E. W. Clark, was adjudged to be "the successor to said corporation," and as such to hold "title to all property owned by Federal Surety Company at the time it so ceased to exist"; and liquidation was decreed in accordance with the statute.

We have said that the corporation had authority to do business in Montana. The grant was subject to conditions. A statute of Montana provides that the dissolution of a corporation does not "take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred." § 6013, Montana Revised Codes of 1921. The preservation of existing remedies is not confined to domestic corporations. It applies to foreign corporations also. This results, in the view of the Montana court, from a provision of the state constitution as well as from a supplementary statute. By Article XV, § 11, of the Montana constitution, "no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the law of the state." And by a supplementary statute (§ 6659, Revised Codes, 1921): "All foreign corporations licensed to do business in the state of Montana shall be subject to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers." Construing that statute, the Supreme Court of Montana has written in the case now under review: "Suits against domestic corporations do not abate upon the entry of a decree of dissolution, and the same rule, by virtue of this statutory provision, must apply to a foreign corporation."

Long before the dissolution of the Federal Surety Company the respondents Williard and Wheaton, as trustees

of a syndicate, brought suit in a Montana court to recover from the surety company the damages due upon a bond. The first trial resulted in a nonsuit, which was reversed upon appeal. 91 Mont. 465; 8 P. (2d) 633. After the decree of dissolution the case came on for a second trial, and on May 10, 1932, judgment in favor of the plaintiffs was entered by default. The Supreme Court of Montana has held that the dissolution of the surety company did not abate the suit. There was thus a final judgment, valid under the Montana practice and effective according to that practice to liquidate the claim.

To say that there was such a judgment is not to dispose of the whole case. A judgment existing, the remedies available to enforce it are still to be determined. Before the respondents were in a position to issue execution, the situation had been complicated by a suit for the appointment of a receiver begun in a Montana District Court. On March 25, 1932, Mieyr, a simple contract creditor, brought suit against the surety company and Clark, the foreign liquidator, praying an ancillary receivership to preserve the local assets. A temporary receiver (Crichton) was appointed the same day. While that suit was pending, the respondents filed a petition on May 24, 1932, for leave to issue an execution against securities and moneys which had been discovered in Montana, the levy to have the same effect as if no receiver had been appointed. An order to that effect was granted, subject, however, to a later motion to vacate it. Within due time thereafter, Clark filed a cross petition and an answer, asserting his title as successor to the dissolved corporation, opposing the demands of the judgment creditors, and setting up his rights and privileges under Art. IV, § 1, of the Federal Constitution. On August 25, 1932, the District Court of Montana entered a final decree adjudging that Clark was the successor to the personality and title of the Iowa corporation, that the assets should be liqui-

dated and ratably distributed subject only to the liens existing at the date of dissolution, that Crichton should be continued as an ancillary receiver to assist the foreign liquidator, that the assets in Montana should be retained in that state until local creditors had received their ratable proportion of assets there and elsewhere, and that the execution upon the respondents' judgment and any preference thereby created, as well as the earlier order sanctioning the levy, should be set aside and cancelled.

From that decree, and from an order denying a motion to vacate or modify it, the judgment creditors, who are the respondents in this court, appealed to the Supreme Court of Montana. After argument and reargument, the decree and order were there reversed, two members of the court dissenting. *Mieyr* v. *Federal Surety Co.*, 94 Mont. 508; 23 P. (2d) 959. The court held that the respondents' judgment had been lawfully recovered though the defendant was dissolved; that the ancillary receivership was void for the reason that a simple contract creditor (Mieyr) was without standing to maintain the suit; that Clark, the foreign liquidator, was not the successor to the corporate personality with a title derived from the statutes of the domicile, but was a chancery receiver with a title (if any) created by the Iowa decree; that as against such a receiver, creditors in Montana were at liberty to levy attachments and executions, irrespective of their right to enforce such a levy against a statutory successor; and hence that the respondents' execution should be reinstated, and the cause remanded for further proceedings in accord with the opinion. A writ of certiorari brings the case here.

Our jurisdiction to issue the writ is challenged on the ground that the decree to be reviewed is without the requisite finality. Judicial Code, § 237; 28 U.S.C., § 344. The challenge should not prevail. The decree of the Montana court is final to the extent that it confirms the respondents'

execution and permits a levy that will override the liquidator's title. A final order results where a court denies a petition by an intervening creditor to establish a prior lien (*Gumbel* v. *Pitkin,* 113 U.S. 545, 548), or a petition by a municipal corporation intervening in a foreclosure suit to enforce a lien for taxes superior to the mortgage (*Savannah* v. *Jesup,* 106 U.S. 563, 564, 565), or one by a chancery receiver appointed by a state court for the delivery of property in the possession of another court. *Ex parte Tiffany,* 252 U.S. 32, 36. Cf. *Hovey* v. *McDonald,* 109 U.S. 150, 155; *Williams* v. *Morgan,* 111 U.S. 684, 689; *United States* v. *River Rouge Co.,* 269 U.S. 411, 414; *Dexter Horton National Bank* v. *Hawkins,* 190 Fed. 924, 927. The doctrine of those cases is applicable here. Further judicial proceedings may be necessary between the liquidator and others not before us. As between the liquidator and the respondents claiming as judgment creditors the suit is at an end. They came into court *pro interesse suo* with a petition to establish the priority of their judgment. The petition has been granted and priority decreed. Not only that, but an order vacating the execution has been reversed, and the levy reinstated. So far as these respondents are concerned, there is nothing more to be decided. "The property of the Federal Surety Company within the state of Montana at the time of the levy of the execution by Williard et al., not being in possession of the Iowa receiver, was subject to levy, and the levy made under the execution in May, 1932, is good and valid." By that opinion, which by reference was incorporated in the judgment (*Metropolitan Water Co.* v. *Kaw Valley District,* 223 U.S. 519, 523; *Gulf Refining Co.* v. *United States,* 269 U.S. 125, 135), nothing was left to the discretion of the trial court in respect of the priority of the execution or of the respondents' rights thereunder. The intervening petition has been finally disposed of, and no longer is a pending proceeding, whatever may be said

of the suit in which the claimants intervened. Cf. *Forgay* v. *Conrad,* 6 How. 201, 202, 203; *United States* v. *River Rouge Co., supra.*

Jurisdiction being here, the case will be considered on the merits.

We assume in accordance with the decision of the Montana court that the respondents' action against the surety company did not abate on dissolution, but was lawfully pursued to judgment. *McGoon* v. *Scales,* 9 Wall. 23; cf. *Sinnott* v. *Hanan,* 214 N.Y. 454, 458, 459; 108 N.E. 858; *Marstaller* v. *Mills,* 143 N.Y. 398, 400; 38 N.E. 370. Cases such as *Remington & Sons* v. *Samana Bay Co.,* 140 Mass. 494; 5 N.E. 292, and others cited in the margin [1] are not at war with this conclusion. They express the rule to be applied when there is no statute or public policy to the contrary in the state where the foreign corporation has been licensed to do business. They do not delimit the capacity of a state, when granting such a license, to subject it to conditions. Complications might exist if there had been no one within the state upon whom process could be served. Here the action was begun, and the company had appeared and answered, before the date of dissolution. Moreover, a power of attorney was on file, pursuant to the Montana law (Revised Codes, 1921, § 6212), whereby process might be served on the Insurance Commissioner of the state, the power to remain in force so long as any policy or liability of the company was outstanding in Montana. Cf. *American Railway Express Co.* v. *Kentucky,* 273 U.S. 269, 274; *Washington* v. *Superior Court,* 289 U.S. 361, 364, 365. Complications also might exist if there were no one

[1] *National Surety Co.* v. *Cobb,* 66 F. (2d) 323; *Marion Phosphate Co.* v. *Perry,* 74 Fed. 425; *Fitts* v. *National Life Assn.,* 130 Ala. 413; 30 So. 374; *Riddell* v. *Rochester German Ins. Co.,* 35 R.I. 45; 85 Atl. 273; *Morgan* v. *New York National Building & Loan Assn.,* 73 Conn. 151; 46 Atl. 877.

in being with authority to continue the defense. Here there had been the designation of a liquidator who was competent to represent the corporation if he had chosen to intervene. Cf. *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U.S. 257. We are not to be understood as intimating that such complications would be fatal if they existed, but merely to exclude them. In such circumstances the judgment is at least effectual to liquidate the claim as a charge upon the local assets. But this, as we have seen, is only a partial statement of the problem. To ascertain the procedure by which the charge is to be enforced, whether by the levy of execution or by a ratable division, other considerations must be weighed. In particular it must be known whether superior interests or titles have developed between the summons and the judgment, and whether the quality or operation of those interests affects the method of distribution. Something did intervene here, the appointment of a liquidator under the statutes of the domicile. That much is undisputed. Did the Supreme Court of Montana misjudge the quality and operation of this intervening interest, and in so doing did it deny to the statutes and decrees of Iowa the faith and credit owing to them under the Constitution of the United States?

In our judgment the statutes of Iowa have made the official liquidator the successor to the corporation, and not a mere receiver. *State ex rel. Attorney-General* v. *Fidelity Loan & Trust Co.,* 113 Iowa 439; 85 N.W. 638. His title is not the consequence of a decree of a court whereby a corporation still in being has made a compulsory assignment of its assets with a view to liquidation. *Sterrett* v. *Second National Bank,* 248 U.S. 73; [2] *Lion Bonding Co.* v.

[2] The insolvent corporation in *Sterrett* v. *Second National Bank, supra,* was not to be dissolved until there had been a final settlement of the business. Pp. 74, 75.

Karatz, 262 U.S. 77, 88; *Great Western Mining Co.* v. *Harris,* 198 U.S. 561, 575; *Booth* v. *Clark,* 17 How. 322. His title is the consequence of a succession established for the corporation by the law of its creation. *Relfe* v. *Rundle, supra*; *Keatley* v. *Furey, supra; Sterrett* v. *Second National Bank, supra,* p. 77; cf. *Bockover* v. *Life Assn. of America,* 77 Va. 85; *Converse* v. *Hamilton,* 224 U.S. 243, 257; *Bernheimer* v. *Converse,* 206 U.S. 516, 534. So the lawmakers have plainly said. So the Iowa court adjudged in decreeing dissolution.

We think the Supreme Court of Montana denied full faith and credit to the statutes and judicial proceedings of Iowa in holding, as it did, that the petitioner was a receiver deriving title through a judicial proceeding, and not through the charter of its being and the succession there prescribed. "When the transfer of a debtor's property," said the court, "is the result of a judicial proceeding there is no provision of the constitution which requires the courts of another state to carry it into effect and as a general rule no state court will do this to the prejudice of the citizens of its own state," citing *Reynolds* v. *Adden,* 136 U.S. 348, a case of insolvency proceedings *in invitum* against a natural person, and *Zacher* v. *Fidelity Trust Co.,* 106 Fed. 593, an enforced assignment to the receiver of a corporation which retained its corporate life. Bankruptcy or insolvency proceedings, whether the debtor is a natural or a juristic person, confer upon the receiver or assignee a title which, generally speaking, is without recognition outside of the state of his appointment except in subordination to the claims of local creditors. *Security Trust Co.* v. *Dodd, Mead & Co.,* 173 U.S. 624; *Cole* v. *Cunningham,* 133 U.S. 107; *Oakey* v. *Bennett,* 11 How. 33, 44; *Barth* v. *Backus,* 140 N.Y. 230; 35 N.E. 425; *Ward* v. *Connecticut Pipe Mfg. Co.,* 71 Conn. 345; 41 Atl. 1057; *Gilbert* v. *Hewetson,* 79 Minn. 326; 82 N.W.

655. Upon the strength of these and like decisions the Montana court has refused recognition to a receiver or liquidator who in truth is a statutory successor. Whether it would have favored that conclusion if it had correctly interpreted his standing, its opinion does not tell us. The case should go back to the end that the priority of the execution may be determined with understanding of the title displaced and overridden.

In thus holding we do not say that there is an invariable rule by which the title of a statutory liquidator must prevail over executions and attachments outside of the state of his appointment. The subject is involved in confusion, with decisions *pro* and *con*. There are cases which lay down the rule that the title of such a liquidator will have recognition and enforcement everywhere without affirming or denying the possibility of exceptions. *Kinsler* v. *Casualty Co.*, 103 Neb. 382; 172 N.W. 33; *U.S. Truck Co.* v. *Pennsylvania Surety Co.*, 259 Mich. 422; 243 N.W. 311; *Bockover* v. *Life Assn., supra; Parsons* v. *Charter Oak Life Ins. Co.*, 31 Fed. 305; *Fry* v. *Charter Oak Life Insurance Co.* 31 Fed. 197; cf. *Taylor* v. *Life Assn. of America*, 13 Fed. 493; *Smith* v. *Taggart*, 87 Fed. 94; *Southern Building & Loan Assn.* v. *Miller*, 118 Fed. 369. Other cases add a *dictum* (*Martyne* v. *American Union Fire Ins. Co., supra*) that the state in which the title is assailed may declare a contrary policy by statute or decision. Cf. *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570, 579, 580. Still others take the view that the claims of local creditors are entitled to precedence. *Schloss* v. *Surety Co.*, 149 Ia. 382; 128 N.W. 384; *Lackmann* v. *Supreme Council*, 142 Cal. 22; 75 Pac. 583. The position of a claimant who has the standing of a statutory successor is more closely analogous to that of a trustee under a voluntary general assignment for the benefit of creditors (*Ockerman* v. *Cross*, 54 N.Y. 29; *Warner* v. *Jaffray*, 96 N.Y. 248, 255; *Hervey* v. *R. I. Locomotive Works*, 93 U.S.

664) than to one deriving title under a decree in insolvency proceedings (*Security Trust Co.* v. *Dodd, Mead & Co., supra,* p. 628), yet it is stronger than either in that for many purposes the corporation under which he claims has passed out of existence.

Whether there is in Montana a local policy, expressed in statute or decision, whereby judgments and attachments have a preference over the title of a charter liquidator is a question as to which the Supreme Court of that state will speak with ultimate authority. It has not spoken yet. The tendency in most of the states is to give priority to the title unless a contrary policy is expressed with reasonable clarity. *Martyne* v. *American Union Fire Ins. Co., supra; Kinsler* v. *Casualty Co., supra; Bockover* v. *Life Assn. of America, supra;* cf. *Cogliano* v. *Ferguson,* 245 Mass. 364; 139 N.E. 527. No statute or decision brought to our notice from Montana removes the question from the field of doubt. True there are the statutes heretofore referred to whereby suit may be maintained against foreign corporations after dissolution on the same basis as against domestic ones. Nothing in those provisions declares the existence of a policy to allow the assets of an insolvent corporation to be torn to pieces at the suit of rival creditors when they could be distributed equally and without sacrifice at the hands of a receiver. At all events the policy, if it exists, is indicated too obscurely to permit us to accept it until so instructed by the Montana court. The drastic consequences of acceptance attest the need of caution. Partnerships and individuals, if hard pressed, may resort to a court of bankruptcy and thus conserve their assets. Business corporations may have their assets equally distributed through involuntary proceedings. But insurance corporations, like banks, are excluded from bankruptcy altogether (11 U.S.C. § 22b), and must submit to dismemberment, however great the waste or inequality, unless receivers are

appointed. The respondents would have us say that submission to such consequences is exacted by an unbending rule of law.

We have no thought to impose our reading of the local statutes and decisions upon the courts of the locality. What we are about to say as to their meaning does no more than explain the grounds for our understanding that the courts of Montana have left the question open. If the law were clear beyond debate, as counsel for the respondents has contended that it is, our duty might be to dispose of the entire controversy now instead of remanding it to the state court for further action there. We are mindful of the practice whereby domestic corporations dissolved by the Montana law may be wound up by the directors as trustees in dissolution. Revised Codes, § 6011; formerly Civil Code, § 561. We understand also that while the assets are so held, claims may be reduced to judgment, and attachments and executions levied. This is doubtless the prevailing practice when the corporation is solvent, or when insolvency is not so gross as to lead to sacrifice or hardship. Inability to discharge liabilities as they mature, or even impairment of the capital prescribed by the articles of association, may not mean that the assets will be insufficient when put up at public sale. But administration by the directors, subject to attachment and execution, is not the only form of distribution that is known to the local law. In appropriate cases a dissolved corporation may be wound up by a receiver as an officer of the court. By § 9303 of the Revised Codes of 1921, a creditor of a dissolved corporation (presumably a judgment creditor) may apply for a receiver to liquidate the assets,[3] and after

[3] § 9303. "Upon the dissolution of any corporation the district court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof may appoint one or more persons to be receivers or trustees of the corpo-

such appointment executions are forbidden. *Gardner* v *Caldwell,* 16 Mont. 221; 40 Pac. 590; cf. *Barker* v. *Edwards,* 259 Fed. 484, 488; *Rohr* v. *Stanton Trust & Savings Bank,* 76 Mont. 248, 251, 253; 245 Pac. 947; *Berryman* v. *Billings Mutual Heating Co.,* 44 Mont. 517, 521; 121 Pac. 280. The decisions are obscure as to the circumstances in which that statute will be applied. The vast majority of the Montana cases on the subject of receivers are grounded on another section (9301), under which the tests are very different. There is hardly a word in any of them as to the meaning of § 9303 and the remedy there-

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ration, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members."

Another section dealing with the appointment of receivers is 9301, subd. 5.

"A receiver may be appointed by the court in which an action is pending, or by the judge thereof: . . .

"In cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights."

By construction, that section has been limited to receivers appointed *pendente lite.*

"It is a well settled rule of law that there cannot be such a thing as an action brought distinctively and solely for the appointment of a receiver." *State* v. *District Court,* 50 Mont. 259, 263; 146 Pac. 539. A receivership is a provisional remedy. "An action must be pending before a receiver can be appointed." *State* v. *District Court, supra.*

All this according to our understanding has no relation to an application under § 9303, where the appointment of a receiver is the end and aim of the proceeding.

Compare the decisions in California under statutes identical in form: *Henderson* v. *Palmer Union Oil Co.,* 29 Cal. App. 451; 156 Pac. 65; *French Bank Case,* 53 Cal. 495, 553; *Havemeyer* v. *Superior Court,* 84 Cal. 327, 365; 24 Pac. 121; *State I. & I. Co.* v. *San Francisco,* 101 Cal. 135, 147, 148; 35 Pac. 549; *Elliott* v. *Superior Court,* 168 Cal. 727; 145 Pac. 101.

under. Thus, in *Forsell* v. *Pittsburgh & Montana Copper Co.*, 42 Mont. 412; 113 Pac. 479, a creditor obtained a judgment against a foreign corporation, not dissolved, and execution was issued and returned unsatisfied. The creditor then applied for a receiver, but without alleging that there was any property within the state. The court held that no case was made out by the allegations of the bill. In *Berryman* v. *Billings Heating Co.*, 44 Mont. 517, 525; 121 Pac. 280, a temporary receiver was appointed in an action against a domestic corporation not dissolved. In aid of this appointment the plaintiff, a simple contract creditor, alleged that the defendant was insolvent. On appeal the court held that this without more did not make the appointment necessary, and vacated the receivership. In *Prudential Securities Co.* v. *Three Forks H. & M. V. Ry. Co.*, 49 Mont. 567, 572; 144 Pac. 158, and again in *Scholefield* v. *Merrill Mortuaries, Inc.*, 93 Mont. 192; 17 P. (2d) 1081, the situation was the same as in the suit by *Berryman, supra,* the applicants for the receiver being simple contract creditors suing to collect a debt. What was said as to the trust fund doctrine when invoked by a creditor so situated (49 Mont. at p. 572) is in full accord with the doctrine prevailing in this court. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U.S. 371. The case at hand is barely grazed by *Ferrell* v. *Evans*, 25 Mont. 444, 454; 65 Pac. 714. There the suit was for the appointment of a receiver to wind up a building and loan company whose charter had expired. The court held that there was no need of superseding the directors who were statutory trustees under § 6011 of the Revised Codes. The opinion states: "No exception is made in case of insolvency," but this is supplemented by the statement that in fact "the association was not insolvent." The *dictum* quoted does not amount to a decision that a receiver will never be appointed under § 9303 in a case where a corporation has been dissolved and multiplying executions threaten a dispersion of the assets. No such question was involved.

The situation was much the same in *Merges* v. *Altenbrand,* 45 Mont. 355; 123 Pac. 21. The charter of a solvent corporation had expired, and there was no sufficient ground for superseding the directors through the appointment of receivers.[4]

We do not read these decisions as holding in any clear or final way that the directors of a dissolved corporation will never be required to give place to a receiver, no matter how great the danger of inequality or waste. Indeed, it is uncertain whether such a holding would be possible without denying any function to § 9303 of the Montana Code. Inequality and waste are to be avoided in special measure when banks or insurance companies, unable, as we have seen, to have the protection of courts of bankruptcy, are in course of liquidation. The Supreme Court of Montana has been mindful of this need, at all events in respect of banks, and has stated it with force and clarity. Thus, in *Rohr* v. *Stanton Trust & Savings Bank, supra,* a creditor brought suit in the hope of gaining a preference for his deposit out of the assets of a bank in the hands of a receiver. The court said (p. 251), "the general principle of equity that the assets of an insolvent are to be distributed ratably among general creditors applies with full force to the distribution of the assets of a bank," and again (p. 253), "The available assets" are to be "so

[4] *Gilna* v. *Barker,* 78 Mont. 357; 254 Pac. 174, it would seem, is even farther from the case at hand. A creditor brought suit against a domestic corporation for the liquidation of a debt. The trial court dismissed the complaint on the ground that suit was unnecessary after the corporation had been dissolved. That judgment was reversed. The court did not hold that there would be no occasion for a receivership thereafter. It left that question open. "Counsel for defendants argue that plaintiff should have intervened in the case in which the court decreed a sale of the property of the defunct corporation and should have asked for a receiver. He may have been entitled to that privilege, but, if so, it did not deprive him of the right to institute the instant case, reduce his claim to judgment and take the chance of realizing on it." P. 367.

conserved that each depositor or other creditor shall receive payment or dividend according to the amount of his debt, and that none of equal class shall receive any advantage or preference over another." Cf. *Aetna Accident & Liability Co.* v. *Miller,* 54 Mont. 377, 389; 170 Pac. 760. It would seem that conservation of assets and equality of distribution are goods no less important in the winding up of insurance companies and of other moneyed corporations than in the winding up of banks.

From this survey of the decisions in Montana there results this truth, if nothing more, that there has been no definitive pronouncement as to the circumstances justifying a receivership for an insolvent corporation, and that the question is left open whether receivers of such a corporation will be appointed after dissolution to prevent waste or inequality. If that is so, it results also that the question is still open whether executions may be subordinated to the title of a foreign liquidator without a forbidden discrimination between corporations organized in Montana and those from other states. A statute preserving remedies after a decree of dissolution does not mean that for every purpose a corporation, though dissolved, is still a juristic person, or that equity is indifferent as to the mode of marshalling the assets. All that it means is that suits shall not abate, but may be prosecuted to judgment as if the corporation were in being. What will be done afterwards in the enforcement of a judgment will vary with the circumstances. When a charter liquidator whose standing is recognized in Montana, is decreed to have an interest superior to the lien of later executions, as if his position were that of a receiver appointed by the local courts, there is no resulting inequality between foreign and domestic corporations, no favoring of the one class in hostility to the other. So, at least, the Montana court may not unreasonably decide. By hypothesis the domestic corporation after dissolution may be placed,

upon a proper showing, in the hands of a receiver, and its assets ratably distributed. The foreign corporation, represented by a foreign liquidator, may be subjected to the same restraints. If supplementary directions are thought to be appropriate to the end that local assets may be kept within Montana till local creditors are paid their share of all the assets everywhere, there is power in a court of equity to assure the requisite equality. *Sands* v. *E. S. Greeley Co.*, 88 Fed. 130; *Receivers Middlesex Banking Co.* v. *Realty Investment Co.*, 104 Conn. 206; 132 Atl. 390; *Buswell* v. *Supreme Sitting of Order of Iron Hall*, 161 Mass. 224; 36 N.E. 1065; *Fawcett* v. *Supreme Sitting of Order of Iron Hall*, 64 Conn. 170; 29 Atl. 614; *People* v. *Granite State Provident Assn.*, 161 N.Y. 492; 55 N.E. 1053.

To resume: The Supreme Court of Montana will determine whether there is any local policy whereby an insolvent foreign corporation in the hands of a liquidator with title must submit to the sacrifice of its assets or to their unequal distribution by writs of execution.

If such a policy exists and the foreign liquidator is thus displaced, other questions may remain as to the power of the state which there is no occasion to consider in advance of the event.

The decree should be vacated in so far as it adjudges the validity and priority of the respondents' execution (cf. *Dorchy* v. *Kansas*, 264 U.S. 286, 291; *Missouri* v. *Public Service Comm'n*, 273 U.S. 126, 131), and the cause remanded to the Supreme Court of Montana for further proceedings not inconsistent with this opinion.

Reversed.

Separate opinion by MR. JUSTICE McREYNOLDS.

This cause has been much obscured by verbiage. The practical problems incident to administering the affairs of insolvent insurance companies are often complex; but

the issues presently presented for determination are narrow and ought to cabin our discussion.

In 1931 an Iowa court, proceeding under local statutes, adjudged that the corporate existence of the Federal Surety Company organized in that State had terminated; that E. W. Clark, receiver and liquidating officer, is its successor and holds title to all corporate property for the purposes of liquidation, etc.

January 31, 1928, the Surety Company being then authorized to transact business in Montana, respondents here—Williard, Wheaton and Hay—duly asked for judgment against it in the District Court of Fergus County. May 20, 1932, judgment went in their favor. Clark, the Iowa receiver, did not enter his appearance in the cause, made no effort to prevent the judgment. Execution issued and was levied, May —, 1932, upon property of the Company found in Montana.

In March, 1932, one John Mieyr brought suit against the Federal Surety Company in the District Court, Cascade County, Montana. He alleged indebtedness to himself upon an unliquidated claim, also indebtedness to other citizens of Montana for considerable sums, and that the company had much property within the State. He described the Iowa court proceedings wherein the Corporation was declared dissolved and Clark designated as Receiver and averred that Clark was then attempting to obtain possession of the Company's property within Montana with intent to remove it. He asked for judgment for the amount of his claim; and that a local receiver be appointed to take possession of the company's assets in Montana and hold them subject to further order, &c. Thereupon, the court appointed D. A. Crichton receiver of the Montana assets, with powers as prayed: he duly qualified. Clark appeared specially and asked that Crichton's appointment be annulled because the court lacked jurisdiction. This motion was denied May 24th.

On the same day Williard, Wheaton and Hay appearing by petition asked and received approval of their action in procuring levy of the Fergus County execution upon the corporation's property.

July 25, 1932, Receiver Crichton moved to annul the order of May 24, 1932, which approved the levy of the Fergus County execution.

August 3, 1932, Clark appeared and answered Mieyr's complaint. He set out proceedings in the Iowa court and his designation as receiver; he asked an order confirming his title to the Company's assets, also for confirmation of Crichton's appointment as ancillary receiver.

August 25th the court authorized an order reciting that the corporate existence of the Surety Company was terminated by the Iowa proceedings and that title to all of its property passed to Clark as receiver. This order also confirmed the appointment of Crichton as receiver of Montana assets; directed all creditors in that State to file their claims, and that corporate assets should be delivered to him. And further that the order of May 24th permitting the Fergus County execution be set aside.

August 31, 1932, Williard, Wheaton and Hay asked the Cascade County District Court to vacate the order of August 25th upon the ground that the facts disclosed were not sufficient to justify appointment of the receiver; also because the court acted without jurisdiction. In the alternative, they asked that the order be so modified as to release all property seized under any Montana execution or attachment. This motion was denied the same day.

On September 18, 1932, Williard, Wheaton and Hay appealed from the judgment and order of August 25th confirming Crichton's appointment as receiver, &c. and revoking the May 24th order which granted permission for levy of the Fergus County execution. Also, from the order of August 31st which denied their motion to vacate the one entered August 25th. The issues were thus lim-

ited. The opinion of the Supreme Court came down April 1, 1933. It said—

"The appeal presents the question whether appellants have the right to be paid the amount of their claim from the Montana property before any part of such property is transmitted to the Iowa receiver for administration through the Iowa receivership, when, as shown, their claim has been reduced to judgment and execution levied after the proceedings in the Iowa court designed to accomplish the dissolution of the corporation. Solution of the problem presented makes it necessary to determine the effect of the proceedings in the Iowa court upon the corporate life of the surety company." [94 Mont. 508, 518; 23 P. (2d) 959, 961.]

Upon review of the Montana statutes, the Court declared that the suit against the Surety Company in Fergus County did not abate upon entry of the Iowa decree and that the judgment of May 20th therein was valid. It then came to consider whether levy under the Fergus County execution was good and said this "depends upon the effect of the order appointing Crichton receiver." It ultimately and definitely declared: "The petition of Mieyr for the appointment of a receiver was insufficient, in that he, being a general creditor, had no right to the appointment of a receiver and had an adequate remedy by which he could be fully protected, namely, the issuance and levy of a writ of attachment. The property of the Federal Surety Company within the state of Montana at the time of the levy of the execution by Williard, et al., not being in possession of the Iowa receiver, was subject to levy, and the levy made under the execution in May, 1932, is good and valid. The judgment and orders appealed from are reversed and the cause remanded for further proceedings in the district court in accordance with the views herein expressed."

The opinion definitely approved the claim of the appellants that the District Court of Cascade County was acting without authority and beyond its jurisdiction.

Upon the sole petition of Clark, Receiver, a writ of certiorari issued from this Court. We have no jurisdiction unless the judgment of the state court was final; and only federal questions are open for our consideration.

The formal judgment of the Supreme Court directed—"For reasons stated in the opinion the judgment and orders appealed from are reversed and the cause remanded for further proceedings in accordance with the views expressed in the opinion." Upon its face this is not final within the meaning of the statute governing our jurisdiction. And "in matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So to do probably would lead to much confusion and uncertainty." *Hartford Accident & Ind. Co.* v. *Bunn,* 285 U.S. 169, 178. *McComb* v. *Commissioners,* 91 U.S. 1; *Bostwick* v. *Brinkerhoff,* 106 U.S. 3, 4; *Haseltine* v. *Central Bank,* 183 U.S. 130; *Schlosser* v. *Hemphill,* 198 U.S. 173, 175; *Norfolk Turnpike Co.* v. *Virginia,* 225 U.S. 264, 268; *Louisiana Navigation Co.* v. *Oyster Comm'n,* 226 U.S. 99, 101; *Georgia Ry. Co.* v. *Decatur,* 262 U.S. 432, 437; *Gulf Refining Co.* v. *United States,* 269 U.S. 125, 135, 136.

Bostwick v. *Brinkerhoff.* "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. . . . If the judgment is not one which disposes of the whole case on its merits, it is not final. Con-

sequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error."

Haseltine v. *Central Bank.* "We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. . . . While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher* [114 U.S. 127] they might have sued out a writ of error at once."

Schlosser v. *Hemphill*—an action in equity to quiet title. "By its judgment the Supreme Court of Iowa reversed the decree of the trial court and remanded the cause 'for further proceedings in harmony with the opinion of the court.' We have heretofore held that a judgment couched in such terms is not final in such a sense as to sustain a writ of error from this court. . . . Doubtless the conclusions arrived at by the state Supreme Court,

and expressed in its opinion, furnish the grounds on which the court below must proceed, when the case goes to a decree there, if no change in pleadings or proof takes place, but we cannot say what action might nevertheless be taken, and as no decree was entered in the Supreme Court, and no specific instruction was given to the court below, we think the writ of error cannot be maintained. Assuming, without deciding, that a Federal question was so raised as otherwise to have justified the exercise of our jurisdiction, we can but repeat what we said in *Haseltine's* case: 'The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher*, they might have sued out a writ of error at once.'"

Louisiana Navigation Co. v. *Oyster Comm'n.* Writ of error to Louisiana Supreme Court dismissed, judgment not final. "The contention, however, is that the judgment below is final for the purpose of review by this court, because when the opinion of the Supreme Court of Louisiana is carefully weighed it will be found that that court practically finally disposed adversely to the title of the plaintiff of the substantial part of the lands involved in the suit and hence that the court in remanding the cause for further proceedings did so only as to other lands. But conceding this to be true, it does not justify the claim based on it. In the first place it is settled that this court may not be called upon to review by piecemeal the action of a state court which otherwise would be within its jurisdiction, and in the second place the rule established by the authorities to which we have referred is that on the question of finality the form of the judgment is controlling, and hence that this court cannot for the purpose of determining whether its reviewing

power exists be called upon to disregard the form of the judgment in order to ascertain whether a judgment which is in form not final might by applying the state law be treated as final in character. Indeed it has been pointed out that the confusion and contradiction which inevitably arose from resorting to the state law for the purpose of converting a judgment not on its face final into one final in character was the dominating reason leading to the establishment of the principle that the form of the judgment was controlling for the purpose of ascertaining its finality."

Georgia Ry. Co. v. *Decatur*—error to Georgia Supreme Court, in proceeding for injunction. "The rule is established that in order to give this Court appellate jurisdiction the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.'"

Gulf Refining Co. v. *United States*—appeal from Circuit Court of Appeals. The challenged judgment was held final. "The general rule established by many decisions, of which *Haseltine* v. *Central Bank of Springfield* (No. 1), 183 U.S. 130, is an example, is that the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final. But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. *Metropolitan Co.* v. *Kaw Valley District,* 223 U.S. 519, 523. Under the stipulations above recited, the trial court was bound to enter decrees for the government for the stated sums of money if that court found that the government was entitled to

recover the net value of the oil produced. The trial court found that the government was not so entitled and the decrees went accordingly. Turning to the opinion, it will be seen that the circuit court of appeals decided that the trial court erred 'in entering the decrees denying the complainant the right to recover the net value of the oil, etc.' The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value—that is, for the exact sums set forth in the stipulations. See *Moody* v. *Century Bank,* 239 U.S. 374, 376; *Chesapeake & Potomac Tel. Co.* v. *Manning,* 186 U.S. 238, 241. There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit."

The judgment of the Supreme Court now before us is not final in form and I think inspection of the opinion does not definitely indicate the action which the District Court of Cascade County would have been bound to take. In his original petition against the Surety Company as sole defendant Mieyr prayed for judgment upon his claim, for appointment of a local receiver to take charge of Company assets, etc. And during the progress of the cause sundry questions were interposed by interveners. Others may appear and amendments may be offered. We have no jurisdiction.

If, however, the judgment below be treated as final, then we must ascertain, if possible, what was actually determined. Our function is to review adjudications, not mere expressions of opinion or unnecessary statements.

Apparently, the Supreme Court definitely adjudged that the trial court lacked power to appoint a receiver for the corporate assets within the State at the instance

of Mieyr, a mere general creditor. Consequently the particular orders complained of by Williard and others were invalid as they had claimed. Determination of that question of state law gave adequate basis for disposition of the cause. It is enough to support the judgment and is not reviewable here. Discussion of federal questions was unnecessary and views of the court in respect of them are not presently important.

In any event, it seems reasonably clear that the only federal question before the Supreme Court of Montana which may be open for our consideration concerns the effect of the Iowa statutes and court decree under which Clark became Receiver. It accepted the view that his appointment or designation did not operate to vest him with adequate title to the property of the defunct Company wherever situated, that "such [an] involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved, if the receiver has not obtained possession of the property and where the creditors have obtained rights or liens upon the property even after the appointment in the foreign jurisdiction." Probably this conclusion was erroneous. It involved a federal question. At the most we should announce the correct rule with the reasons therefor and send the cause back to the Supreme Court of Montana for further proceedings not in conflict with our determination. But this Court is neither called upon nor can it, without impropriety, discuss mere questions of state law which may hereafter be presented for decision by the courts of Montana. It is not our function to suggest to state courts how they should interpret their own laws. Theirs is the duty of deciding such matters; ours requires forbearance from tendering advice in that regard.

The writ of certiorari should be dismissed.

ELLIOT ET AL. *v.* LOMBARD.

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

No. 463. Argued March 6, 1934.—Decided April 9, 1934.

Read in connection with 28 U.S.C. § 754, and Admiralty Rules 5, 6, 11 and 12, under which a stipulation with surety was given by a claimant to release and stand as substitute for an attached vessel, a decree which awards damages to the libelant against the claimant alone, grants execution against both the claimant and surety if the award is not satisfied or an appeal taken within a time specified, and dismisses a cross-libel filed by the claimant,—*held* not a joint decree against the claimant and surety within the spirit of the rule requiring that, to appeal from a decree that is joint on the face of the record, both parties must join in the appeal or there must be a summons and severance. *Hartford Accident & Ind. Co.* v. *Bunn*, 285 U.S. 169, distinguished.
66 F. (2d) 662, reversed.

CERTIORARI, 290 U.S. 619, to review a decree dismissing an appeal in a suit in admiralty. The decree of the trial court was against claimant and surety. The court below had declined to permit the surety to join in the claimant's appeal after the time for appeal had expired.

Mr. Wm. H. McClendon, Jr., with whom *Messrs. Wm. A. Van Siclen* and *J. Zach. Spearing* were on the brief, for petitioners.

Mr. Purnell M. Milner for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

Respondent Lombard, owner of motor ship "Lucky Girl" and a sand barge, presented to the District Court, Canal Zone, a libel in rem against the "Real" and in personam against her owner, Elliot, to recover damages resulting from a collision between those vessels—July,

1930. The "Real" was seized under admiralty process; her owner claimed and secured her release under a stipulation, whereon the United States Fidelity & Guaranty Company was surety, which contained the following clause.

"Now, therefore, the condition of this stipulation is such that if the stipulators undersigned, shall at any time, upon the interlocutory or final order or decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and upon notice of such order or decree to Van Siclen and Boggs, Esquires, Proctors for the Claimant of the said Motorship Real, abide by and pay the money awarded by the final decree rendered by the Court or the Appellate Court if any appeal intervene, then this stipulation to be void otherwise to remain in full force and virtue."

The stipulation also contained the further clause—
"and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or their surety, execution for the above amount may issue against their goods, chattels and lands."

Elliot filed an answer, also a cross libel against the "Lucky Girl."

After a hearing in open court, Lombard prevailed and had a decree—August 27, 1932, the presently important portions of which follow—

"Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with the libelant's costs taxed in the sum of $117.20, with interest thereon until paid; and it is further

"Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against

Hans Elliot, respondent, and the United States Fidelity and Guaranty Co., his stipulators for costs and value, their goods, chattels and lands to satisfy this decree; and it is further

"Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libelant's cost."

Notice of the entry of this decree was duly served on the proctor August 31, 1932.

September 10, 1932, Elliot alone, without notice to the surety or severance, secured an appeal to the Circuit Court of Appeals, Fifth Circuit. In April, 1933, Lombard moved to dismiss the appeal upon the grounds that the decree was against the claimant Elliot and the surety jointly, that the surety was a necessary party to the appeal but had not been made such, and that the period limited therefor had expired. By way of avoiding that motion the surety then asked to join with Elliot in the prosecution of the appeal and Elliot moved for leave to amend so as to include the surety as party appellant.

The Circuit Court of Appeals regarded the matter thus presented as of uncertain solution but concluded, with some division in opinion, that the decree was joint and in that view regarded our decision in *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U.S. 169, as controlling, and accordingly dismissed the appeal. The case so relied upon was a suit in equity which was brought to this Court on appeal from the Supreme Court of Mississippi which had awarded a joint judgment for the payment of money against a litigant and his surety. We there said (pp. 178, 182):

"The judgment is joint in form and no reason appears why either or both of the parties defendant therein might not have appealed to this Court and submitted claims of error for our determination. In matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So

to do probably would lead to much confusion and uncertainty."

"We cannot undertake to explore the record to ascertain what issues were relied upon in courts below. So to do would lead to uncertainty and unfortunate confusion. We must accept the terms of the judgment as entered. As pointed out above, this is the approved practice when it becomes necessary to determine whether a judgment is final or to what court a writ of error should run. Like reasons apply and control here."

If the decree in the present admiralty suit were joint, as the judgment in that equity suit was, we should regard the rule there announced and applied as controlling here. But we think the decree in the present suit is not joint within the spirit of that rule. The release stipulation was given by the claimant Elliot under 28 U.S.C. § 754 (Rev. Stat. § 941), and Admiralty Rules 5, 6, 11 and 12 (254 U.S. Appendix), and its purpose was to secure the release to him of the vessel then held under admiralty process. Under the statute and the admiralty rules the stipulation was thereby substituted for the vessel and the latter was released. Had the vessel not been released execution on the decree subsequently rendered would have run against the vessel. By the terms of the stipulation the claimant and his surety consented and agreed that the execution might run against their goods, chattels and lands, instead of against the vessel.

The decree which was rendered is in three parts. By the first the libelant is awarded a recovery of damages in a stated sum, with interest and costs, against the claimant, there called respondent; by the second, execution is awarded against the claimant and his surety "unless this decree be satisfied or an appeal taken within ten days after service of a copy"; and by the third the claimant's cross-libel is dismissed.

The decree is in a form long recognized as admissible in such an admiralty proceeding. The principal part—that which awards a recovery in damages for the collision—is directed only against the claimant Elliot, not against him and the surety. The only mention of the surety is in the dependent and contingent part relating to the issue of execution, and this part of the decree is based upon provisions in Admiralty Rules 5, 12 and 20, under which, where a release stipulation is given and the libelant obtains a decree for the payment of money, summary process of execution may be issued against the principal and sureties for the purpose of enforcing the decree.

We think the decree is to be read in connection with the applicable statute and admiralty rules and that when so read it is not joint. That it might have been made joint is not of present importance. There was no requirement that it be so made, and in fact it was not so made. So, giving effect to the face of the record, as the rule in the *Bunn* case requires, we are of opinion that the Circuit Court of Appeals erred in holding that the claimant's appeal, without the surety joining therein, could not be entertained. The decree of that court is accordingly reversed, and the cause is remanded to it for consideration and disposal on the merits.

Decree reversed.

HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* DELTA & PINE LAND CO.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 650. Argued March 15, 1934.—Decided April 9, 1934.

1. A contract between a Connecticut and a Mississippi corporation, whereby the former insured the latter against loss through dishonesty of one of its employees "in any position anywhere," was made in Tennessee, where both parties and the employee were

present, and contained a condition that any claim under the contract must be made within 15 months from the termination of the suretyship. In an action for defalcations committed in Mississippi, where also both corporations did business, the courts of Mississippi held that the condition was contrary to the policy and law of that State, and awarded judgment against the insurer—although the condition had not been complied with. *Held* that such extension of the Mississippi law was beyond the jurisdiction of the State and void under the due process clause of the Fourteenth Amendment. P. 149.

2. Obligations of a contract lawfully made in another jurisdiction may not be enlarged by a State to accord with all its own statutory policies upon the ground that one of the parties is its own citizen. P. 149.

3. A legislative policy which attempts to draw to the State of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. P. 150.

169 Miss. 196, reversed.

APPEAL from a judgment sustaining a recovery from the Indemnity Company in an action on an indemnity bond.

Mr. Wm. M. Hall submitted for appellants.

Mr. Garner W. Green, with whom *Messrs. Oscar Johnston* and *Marcellus Green* were on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This was an action instituted in a circuit court of Mississippi by Delta & Pine Land Company, a corporation of that state with its principal place of business therein, against Hartford Accident & Indemnity Company, a corporation of Connecticut, having its principal place of business in Hartford in that state. The declaration alleges that on or about January 1, 1928, the plaintiff ap-

plied to the defendant for a fidelity bond and paid the agreed premiums therefor, and the defendant executed and delivered to the plaintiff such a bond, whereby it bound itself to pay the plaintiff, within sixty days after satisfactory proof, pecuniary loss sustained by the plaintiff through fraud or dishonesty or wilful misapplication by any employee " in any position, anywhere," from the time that the name of such employee should be placed upon a schedule attached to the bond to and including the termination of the suretyship for such employee by his dismissal, retirement from service, discovery of loss, or cancellation of the bond by the parties. It is alleged that the name of H. H. Harris, as treasurer of the plaintiff appears upon the schedule, and that the amount of coverage for him is $25,000. Sundry defalcations by Harris between May 9, 1929, and December 20, 1929, totaling $2703.79, are set forth, all of which and the resulting loss occurred in the first judicial district of Bolivar county, Mississippi. The further material matters charged are that the defendant throughout all the times mentioned in the declaration, and ever since, was and now is duly qualified and licensed to do business in Mississippi; that the dishonest acts of Harris were discovered on or about May 20, 1931, immediate notice given to the defendant at its home office, and affirmative proof of loss under oath, with full particulars, filed with the defendant at its home office within three months after the discovery. The declaration in conclusion asserts compliance by plaintiff with all the terms of the bond, and refusal of the defendant, though requested, to make payment of the sum demanded. Annexed to the declaration are copies of the bond and the supplementary schedules forming part of it.

The defendant's plea was, in substance: the plaintiff, before and at the date of the contract of suretyship, was doing business in Tennessee, with its principal office at Memphis in that state, and defendant also was then and

is now doing business in Tennessee, having an agency at Memphis; plaintiff, through its office at Memphis, applied to defendant through its agency there for the bond, rider and schedules containing the name of the defaulting employee, Harris, constituting the contract of suretyship; defendant through its agency at Memphis executed and delivered the bond and schedules to plaintiff at its office in that city; the contract is a Tennessee contract and governed by the laws of Tennessee, and full faith and credit must be given to it in the courts of Mississippi in accordance with the requirements of Article IV, § 1, Article I, § 10, and § 1 of the 14th Amendment of the Constitution of the United States; there was not at the time of delivery of the contract, and is not now, any statute in Tennessee prohibiting or invalidating the condition or limitation in the contract to the effect that any claim thereunder must be duly made upon the defendant as surety within fifteen months after the termination of the suretyship for the defaulting employee, and the plaintiff did not make claim upon the defendant for the loss within fifteen months after the termination of the suretyship for Harris, as the contract was cancelled and terminated December 31, 1929, and the plaintiff made no claim until June 22, 1931.

To this plea the plaintiff demurred, assigning these causes of demurrer: (1) the construction and validity of the provision of the contract relied upon in the plea is to be determined by the laws of Mississippi, and not by the laws of Tennessee; (2) the statute of limitations of the state where suit is brought is the statute which governs the time for bringing this action, and the provision in the contract requiring that any claim thereunder must be made upon the defendant within fifteen months after the termination of the suretyship for the defaulting employee is in violation of § 2294 of the Mississippi Code of 1930, and in violation of the public policy of Mississippi, and

its courts are not required to give full faith and credit to this provision of the contract by Article IV, § 1, Article I, § 10, or § 1 of the 14th Amendment of the Constitution.

The cause came on for hearing upon the pleadings, and the court sustained the demurrer. The defendant declined to plead further; whereupon judgment was entered by default in favor of the plaintiff, a jury was impaneled and assessed damages at the amount claimed, and final judgment was accordingly entered.

Upon appeal by the defendant the Supreme Court of Mississippi affirmed the judgment. Conceding that under the decisions of the Supreme Court of Tennessee the provision for notice within fifteen months of the termination of the suretyship is a valid limitation of liability and not a limitation of action, the court said the converse is true in Mississippi. Although the bond was executed and delivered and the agreement consummated in Tennessee, where the plaintiff and the defendant's agent had their respective offices, and where, in the absence of proof of a contrary intent, the contract was to be performed, the court concluded that the statutes of Mississippi made the instrument a Mississippi contract, and annulled the contractual limitation of the time for giving of notice of claim.

The Mississippi statutes relied upon were the following:

"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss or injury of something in which the assured or other party has an interest, as an indemnity therefor; and it shall be unlawful for any company to make any contract of insurance upon, or concerning any property or interest or lives in this state, or with any resident thereof; or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance unless and

except as authorized under the provisions of this chapter. All contracts of insurance on property, lives or interests in this state shall be deemed to be made therein." (§ 5131, Mississippi Code, 1930.)

"The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulation whatsoever shall be absolutely null and void; the object of this statute being to make the period of limitations for the various causes of action the same for all litigants." (§ 2294, Mississippi Code, 1930.)

The state Supreme Court said:

"But clearly under section 5131, Code 1930, defining insurance, this indemnity bond is a contract of insurance within the purview of that statute; and, further, it being expressly provided therein that all contracts of insurance on property, lives, or interests in this state shall be deemed to be made therein, in our judgment, makes the contract herein under review a Mississippi contract and solvable under the laws of this state. The contract here provided or stipulated that the appellee should be indemnified from loss by the defalcation of H. H. Harris in any position anywhere, and when he, the employee and the insured herein, removed to Mississippi and there defaulted, so far as the appellee is concerned its interest was insured or indemnified by the appellant in Mississippi, and, under the provision quoted from the above statute, became operative, and this state is obligated to enforce it, as a Mississippi contract, although it contained all the elements necessary to make it a Tennessee contract, but for the statute."

. . . . . .

"When the statute declares that such a contract shall be deemed to be made in this state, it means that the conflict of law between the two states is eliminated, and

thereby, . . . a contract for fifteen months' notice was a limitation of the action unenforceable as such in this state."

The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (*Hooper* v. *California,* 155 U.S. 648; *Orient Insurance Co.* v. *Daggs,* 172 U.S. 557, 565–6; *New York Life Ins. Co.* v. *Cravens,* 178 U.S. 389, 398–9); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. *New York Life Ins. Co.* v. *Head,* 234 U.S. 149; *Aetna Life Ins. Co.* v. *Dunken,* 266 U.S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 407–8.

It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract be-

ing a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Co.* v. *Dick, supra,* p. 408), it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. *Aetna Life Ins. Co.* v. *Dunken, supra; Home Insurance Co.* v. *Dick, supra.* Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare *Bond* v. *Hume,* 243 U.S. 15, 22. But clearly this is not such a case.

Our conclusion renders unnecessary a consideration of the claims made under the full faith and credit and contract clauses of the federal constitution.

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

Reversed.

LINDHEIMER ET AL. *v.* ILLINOIS BELL TELEPHONE CO.*

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

No. 440. Argued January 15, 16, 1934.—Decided April 30, 1934.

1. Findings of a District Court, purporting to show the value of the property of a telephone company in its intrastate business, its net income therefrom and the fair rate of return, for each of a long series of years during which the State sought to impose a decrease of rates, can not be accepted as a basis for deciding whether the decrease would result in confiscation, when, tested by the same findings, the existing rates, clearly adequate and under which the company operated with outstanding success throughout the same period and before, were themselves grossly inadequate. P. 160.
2. Elaborate calculations which are at war with realities revealed by the financial history of the business are of no avail in determining the adequacy of rates prescribed for a public utility corporation. P. 164.
3. To sustain its attack on a decrease of its rates as contrary to due process, a public utility must establish clearly and definitely that the decrease will bring about confiscation. P. 164.
4. Charges to operating expenses may be as important as valuations of its property in determining the adequacy of a public utility's rate. P. 164.
5. In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital, in order to maintain the integrity of the investment in the service rendered. P. 167.
6. Broadly speaking, the term depreciation, as applied to the property of a public utility company, means the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property; these factors include wear and tear, decay, inadequacy and obsolescence. Annual depreciation is the loss which takes place in a year. P. 167.

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* Together with No. 548, *Illinois Bell Telephone Co.* v. *Lindheimer et al.*

7. While depreciation is defined as the expense occasioned by the using up of physical property employed as fixed capital, and current maintenance as the expense occasioned in keeping the physical property in the condition required for continued use during its service life, it is evident that the distinction is a difficult one to observe in practice with scientific precision, and that outlays charged to current expenses may involve many substitutions of new for old parts which tend to keep down the accrued depreciation. P. 173.
8. Where the amounts which a telephone company annually charges to operating expenses for depreciation and invests in plant and equipment are excessive, the telephone subscribers are, to the extent of such excess, required to provide capital contributions, not to make good losses incurred by the company in the service rendered and thus keep its investment unimpaired, but to secure additional plant and equipment upon which the company expects a return. P. 169.
9. Confiscation being the issue in this case, the telephone company has the burden of making a convincing showing that the amounts it has charged for depreciation to operating expenses have not been excessive; and that burden is not sustained by proof that its general accounting system has been correct, since, though the calculations are mathematical, the underlying predictions of life of plant and salvage are essentially matters of opinion, involving many perplexing problems and the examination of many variable elements, in which opportunities for excessive allowances for depreciation, even under a correct system of accounting, are always present; the predictions must be checked by and meet the test of experience. P. 169.
10. Giving full weight to the proposition that a reserve for depreciation built up by a telephone company according to the "straight line" method does not represent in any given year the amount of actual depreciation at that time, especially in a rapidly growing plant, such considerations fail to explain the great excess of depreciation reserve over actual depreciation in each of the many years involved in this case. P. 171.
11. The evidence showed the amounts by which the reduction of rate in question would have diminished the company's income in each of a long series of years; also, for each year, the amounts charged to operation for depreciation and for expenses of maintenance, and the amount of actual depreciation. The company had maintained its plant at a very high and constant level of

efficiency by strict standards, replacements in anticipation of inadequacy or obsolescence, and expenditures for maintenance, including substitutions of parts, and yet in each year the depreciation reserve was greatly in excess of the depreciation actually accrued. *Held:*

That the company has not established that the reserve merely represents consumption of capital in the service rendered; rather, it appears that the depreciation reserve to a large extent represents provision for capital additions, over and above the amount required to cover capital consumption; and the questionable amounts so annually charged to operating expenses for depreciation are large enough to destroy any basis for holding that it has been convincingly shown that the reduction in income through the rates in suit would produce confiscation. P. 174.

12. Where a public utility has had abundant opportunity to prove that a rate is confiscatory but adduces only elaborate estimates and computations which fail of their intended effect, and do not justify the decree of the court below in its favor, it is not the function of this Court to construct independent calculations out of a voluminous record to invalidate the rate, but the decree should be reversed with directions to dissolve the interlocutory injunction, provide for refunding under the injunction bonds of amounts charged *pendente lite* in excess of the rate in question, and to dismiss the bill. P. 175.

13. A party has no right to appeal from a decree in his favor to procure a review of the findings. P. 176.

3 F.Supp. 595, reversed.

Appeal in No. 548 dismissed.

APPEAL and cross-appeal from a decree permanently enjoining the Illinois Commerce Commission from enforcing a reduction of the rates of the Telephone Company for intrastate service in the City of Chicago. The decree below also released the company from obligation to refund moneys collected by it during the suit. For other phases of this protracted litigation, see: 269 U.S. 531; 282 U.S. 133; 283 U.S. 794; 283 U.S. 808.

Messrs. George I. Haight and *Benjamin F. Goldstein,* with whom *Messrs. William H. Sexton* and *Edmund D. Adcock* were on the brief, for Lindheimer et al.

Messrs. William H. Thompson and *Charles M. Bracelen,* with whom *Messrs. Edward L. Blackman, Kenneth F. Burgess, Leslie N. Jones, John H. Ray,* and *John W. Davis* were on the brief, for the Illinois Bell Telephone Co.

By leave of Court, *Mr. Patrick H. O'Brien,* Attorney General of Michigan, and *Mr. Harold Goodman* filed a brief on behalf of the State of Michigan, as *amicus curiae.*

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

This case comes here for the second time. It presents the question of the validity under the Fourteenth Amendment of rates prescribed by the Illinois Commerce Commission for telephone service in the City of Chicago. The Commission's order, made on August 16, 1923, to be effective October 1, 1923, reduced rates applicable to a large part of the intrastate service of the appellee, Illinois Bell Telephone Company.[1] In this suit, brought by that Company in September, 1923, an interlocutory injunction was granted upon the condition that if the injunction were dissolved the Company should refund the amounts charged in excess of the challenged rates. We affirmed that order. 269 U.S. 531. The final hearing was not had until April, 1929,—a delay found to be attributable to the City of Chicago. On that hearing, the District Court, composed of three judges, entered a final decree making the injunction permanent. 38 F. (2d) 77. We reversed that decree and remanded the case for further proceedings. *Smith* v. *Illinois Bell Telephone Co.,* 282 U.S. 133. Further evidence was then taken and the District Court made

[1] The order reduced rates for four classes of coin box service. Otherwise it kept in force the rates which were fixed by an order of December 20, 1920. The coin boxes are in private residences and places of business and are not public pay stations.

new findings and entered a final decree which permanently restrained the enforcement of the Commission's order and released the Company from obligation to refund the moneys which had been collected pending the suit. 3 F.Supp. 595. The state authorities and the city bring this direct appeal. Jud. Code, § 266. The Company brings a cross-appeal to review the findings below, insisting that its property has been undervalued and that substantial amounts of its operating expenses have been disallowed.

No. 440.—The appeal of the state officers and the City of Chicago. On the former appeal, it appeared that no distinction had been made by the Commission or by the District Court between the intrastate and the interstate property and business of the Company. We found that separation was essential to the appropriate recognition of the competent governmental authority in each field of regulation. Accordingly, we directed that as to the value of the property employed in the intrastate business in Chicago and as to the amounts of revenue and expenses incident to that business, separately considered, there should be specific findings. And as a rate order which is confiscatory when made may cease to be confiscatory, and one which is valid when made may become confiscatory at a later period, we held that there should be appropriate findings for each of the years since the date of the Commission's order. 282 U.S. pp. 149, 162. On the further hearing, that difficult task was so well performed that no question is now raised as to the allocation of property to the intrastate and interstate services, respectively, in the Chicago area, the allocation being made on the basis of use.[2] Nor is there dispute with respect to the

[2] It appears that in 1923 there was used in the intrastate service approximately 95 per cent. of appellee's total property in the Chicago area. This percentage progressively decreased in the succeeding years, and in 1931 was somewhat less than 91 per cent.

separation of expenses. Appellants object to the separation of revenues, insisting that certain revenues were improperly assigned to the interstate, instead of the intrastate, business.[3]

Considering the fact that ninety-nine per cent. of the stock of appellee is owned by the American Telephone & Telegraph Company, which also owns substantially the same proportion of the stock of the Western Electric Company, we directed that there should be further examination of the purchases made by appellee from the Western Electric Company and of the payments made by appellee to the American Company. As it appeared that the Western Electric Company, through the organization and control of the American Company, was virtually the manufacturing department for the Bell system, we directed specific findings to be made as to the net earnings of the Western Electric Company in that department and as to the extent to which, if at all, such profit figured in the estimates upon which the charge of confiscation was predicated. We also held that there should be specific findings with regard to the cost to the American Company of the services which it rendered to appellee and the reasonable amount which should be allocated in that respect to the operating expenses of appellee's intrastate business. *Id.*, pp. 153, 157. The District Court entered into an exhaustive examination of these questions and made detailed findings. The court found that the equipment and supplies furnished by the Western Electric Company had been sold to appellee at fair and reasonable prices, and that the earnings of the Western Electric Company on its investment allocated to the business done

[3] The amounts of net revenue thus involved, which appellants contend should not have been allocated (under the rates in suit) to the interstate service for the respective years, are as follows: 1923, $245,042; 1924, $262,398; 1925, $309,505; 1926, $317,915; 1927, $354,372; 1928, $427,655; 1929, $486,875; 1930, $472,469; 1931, $431,580.

with appellee, and its profits on sales, had been fair and reasonable, with the exception of an advance in prices of 10.2 per cent. effective on November 1, 1930. That advance the court disapproved, and, in determining the reasonable outlays to be allowed to appellee after that date, the court made a reduction of 10 per cent. from the prices charged by the Western Electric Company.[4] Appellee contests this reduction, and appellants object to the amounts allowed.

The District Court made specific findings as to the character of the services rendered by the American Company under its license contracts with appellee and the amounts of the cost of these services which should be allocated to the operating expenses of the latter's intrastate business. In the years 1923 to 1928, inclusive, when the court found that the payments under the license contracts charged on appellee's books exceeded the cost as thus determined and allocated, only the cost was held to be chargeable to operating expenses, but in the years 1929 to 1931, inclusive, when the license payments as so charged were less than the cost, only the amount of the license payments was allowed as an operating expense.[5] Appellants raise many questions in opposition to these determinations of costs and allocations, while appellee contends that the costs as found were less than the true costs and that the full amounts paid under the license contracts should have been allowed.

[4] Appellee states that this effected a reduction in the operating expenses of appellee of $67,167 for the last two months of 1930, $332,470 for 1931, and an equal amount for 1932.

[5] The amounts of the license payments thus disallowed by the Court, as being in excess of the cost of the service, for the years 1923 to 1928, inclusive, are as follows: 1923, $573,819; 1924, $631,549; 1925, $531,233; 1926, $432,704; 1927, $558,011; 1928, $31,553. The amounts by which the cost to the American Company exceeded the license payments, for the years 1929 to 1931, are as follows: 1929, $206,253; 1930, $327,751; 1931, $234,104.

The evidence with respect to the value of appellee's property employed in its intrastate business at Chicago is voluminous. The evidence shows the original or book cost of this property, the market value of land, and estimates of the cost of reproduction new of the other physical property constituting appellee's telephone plant. There was also evidence of the condition of the property, together with estimates of accrued depreciation. Appellants submitted no valuations since one made by the Commission in 1923,[6] but presented detailed criticisms of appellee's estimates. The District Court found that the method adopted by appellee's witness in ascertaining the cost of reproduction new was reliable and that appellee's estimates were substantially correct. The court encountered difficulties in making its valuations for the years 1931 and 1932. It took notice of the general fall in values which had accompanied the depression in business. And for that reason, the court fixed values for 1931 and 1932 which in its opinion "gave due consideration to the element of the present decline." The court found that the fair rate of depreciation to be applied to reproduction cost new was 16 per cent. for the years 1923 to 1928, inclusive, and 15 per cent. for the succeeding years; and that the amount to be added to reproduction cost new on account of going value was 8 per cent. of that cost. The court also made findings as to the appellee's working cash capital, the amounts invested in materials and supplies and in property in course of construction, and as to these three items there is no controversy.

The court's findings, for each year, of the fair value of appellee's property, used and useful in its intrastate business in the Chicago area, including working cash capital, materials and supplies, construction work in progress and going value, taking the average amount for the year, and

[6] See 38 F. (2d) p. 86; 282 U.S. pp. 144, 145.

the court's findings as to the original or average book cost of the same property, but without going value, are as follows:

	Fair Value	*Book Cost*
1923	$124,200,000	$95,074,135
1924	136,500,000	105,291,980
1925	148,500,000	117,730,536
1926	151,500,000	130,857,355
1927	167,000,000	146,173,197
1928	173,000,000	159,622,212
1929	184,000,000	168,988,816
1930	187,120,000	178,157,620
1931	179,100,000	181,925,963
1932	166,500,000	181,925,963

Appellants contend that the findings as to fair value are excessive. Appellee insists that they are too low. In particular, appellee says that the property was undervalued through excessive deductions for existing depreciation. Appellee maintains that the evidence shows a maximum depreciation of 9 per cent. for the years 1923 to 1928, and of 8 per cent. thereafter, instead of the 16 per cent. and 15 per cent. deducted by the court.

In computing the net revenue from the intrastate business in Chicago, the court made adjustments in operating expenses with respect to the payments to the Western Electric Company and the American Company, as above stated, and also reduced to some extent the annual charges for depreciation. By these adjustments, the amount of the net revenue as found by the court largely exceeded that shown by appellee's books. For example, the amount available for return in the year 1923 under the existing rates appears to have been $5,347,533 according to appellee's books, while the amount found by the court to have been available for return in that year is $6,646,183. We shall presently refer to the comparison for the other years.

The court found that, if the rates in suit had been effective, appellee's net earnings on its intrastate business

would have thereby been reduced to the extent of $1,541,-668 for 1923, and by somewhat greater amounts in later years except in 1931 and 1932. As thus estimated, the net revenue available for return from the intrastate business in Chicago under the rates in suit would have been as follows: 1923, $5,104,515; 1924, $5,932,959; 1925, $6,297,-890; 1926, $6,402,128; 1927, $6,686,503; 1928, $6,914,459; 1929, $8,939,602; 1930, $8,492,385; 1931, $8,392,555; 1932, $6,750,000.

The court found that the fair rate of return on the average fair value of the intrastate property was 7½ per cent. for each of the years 1923 to 1927, inclusive, 7 per cent. for each of the years 1928, 1929 and 1930, 6½ per cent. for 1931, and 5½ per cent. for 1932. On the basis of these findings of fact, the court concluded that the rates in suit were confiscatory at all times from the date of the Commission's order.

1. *The experience of the Company under the existing rates.* The effect of the decision below, and of the findings upon which it is based, strikingly appears if we put aside for the moment the rates in suit and consider that effect in relation to the existing rates under which the Illinois Company has conducted its business since 1920. That is, if we compare the amounts available for return—the net intrastate income in Chicago under existing rates—as shown (1) by appellee's statement from its books and (2) by the court's adjustments, with (3) the amount of the net income which, under the findings of fair value, income, expenses, and rate of return, would be necessary to avoid confiscation. The following table—with columns correspondingly designated—gives the comparison: [7]

[7] Column (1) gives the net intrastate income in Chicago as shown by the Company from its books; column (2) the amount as adjusted by the District Court; and column (3) the amount required by the court's findings.

	(1)	(2)	(3)
1923	$5,347,533	$6,646,183	$9,315,000
1924	6,230,178	7,483,954	10,237,500
1925	6,650,718	7,880,451	11,137,500
1926	6,887,012	8,052,698	11,362,500
1927	6,877,089	8,363,580	12,525,000
1928	7,601,567	8,627,760	12,110,000
1929	9,490,091	10,679,602	12,880,000
1930	9,152,490	10,138,263	13,098,400
1931	8,494,616	9,826,299	11,641,500
1932		8,000,000	9,157,500

On this showing, the findings if accepted would compel the conclusion that when the Commission's order was made in 1923, not only the new rates, but the existing rates as well were grossly confiscatory; that appellee was receiving under the existing rates, according to its books, a net return of $5,347,533 when it was entitled to nearly $4,000,000 more, or $9,315,000, to prevent its property from being confiscated. The table shows a similar situation in the succeeding years. Again, the inference would be irresistible that the existing rates were confiscatory when they were prescribed by the Public Utilities Commission of Illinois (the predecessor of the present Commission) in December, 1920, to be effective January 1, 1921. In the comprehensive disclosure of appellee's financial condition there is nothing to permit an inference of any radical change which would have made rates, compensatory in 1921, confiscatory in 1923.

But, instead of challenging the existing rates as constituting an invasion of constitutional right, appellee when summoned by the Commission, in September, 1921, in the proceeding which led to the order now under review, asserted that the existing rates were just and reasonable. In its answer to the Commission, appellee alleged " that its rates and charges heretofore approved and authorized by the aforesaid order of the Public Utilities Commission

of Illinois, entered on the 20th day of December, 1920, and now in full force and effect, are just and reasonable, and that the burden of proof is upon whomsoever avers, or seeks to show, that said rates and charges are unjust or unreasonable." And when this suit was brought in September, 1923, to prevent the enforcement of the new rates, appellee did not seek to enjoin the existing rates.

The financial history of the Illinois Company repels the suggestion that during all these years it was suffering from confiscatory rates. Its capital stock rose from $9,000,000 in 1901, to $70,000,000 in 1923, $80,000,000 in 1925, $110,000,000 in 1927, $130,000,000 in 1929, and $150,000,000 in 1930. Its funded debt, which was somewhat less than $50,000,000 in 1923, continued at about the same amount until 1930. During this period appellee paid the interest on its debt and 8 per cent. dividends on its stock. Its "fixed capital reserves," [8] which embraced the depreciation reserve presently to be mentioned, rose from $37,575,004 in 1923, to $63,966,748 in 1930, and to $69,242,667 in 1931. The Company's surplus and undivided profits over and above these capital reserves increased from $5,600,326 in 1923, to $22,907,654 in 1930, and to $23,767,381 in 1931. Its "fixed capital," that is, the book cost of "total plant and general equipment," which was $145,984,084 at the end of 1923, increased to $288,381,090 at the end of 1930, and to $291,259,580 at the end of 1931.[9] We do not lose sight of the fact that this showing embraces the entire business of the Illinois Company, both interstate and intrastate. But it appears that the intrastate investment in the Chicago area ap-

[8] The "fixed capital reserves" are the depreciation reserve and the reserve for amortization of intangible capital. The latter reserve ranged from $182,041.50, in the year 1923, to $274,086.36 in 1930, and to $289,018.77 in 1931.

[9] This is according to the Company's "Plant and General Equipment Accounts for the Chicago and State Areas."

proximated 60 per cent. of the entire investment of appellee in the State. The book cost of the plant in service and general equipment in intrastate business in Chicago increased from $95,582,266 at the end of 1923 to $174,160,314 at the end of 1930, and to $177,384,652 at the end of 1931.[10] "The gross additions" to the Company's property in the Chicago area, the Company states, "were spread fairly evenly over the period."—"The business expanded with great rapidity. The number of telephones in Chicago increased from 690,000 at the end of 1923 to 940,000 at the end of 1931, and was 987,000 at the peak in 1929." During the nine years "a greater amount of plant was added new to the property than was in service at the beginning of the term." The Company informs us that the property was kept "at a high and even standard of maintenance throughout the years involved" and "was at all times capable of giving adequate telephone service abreast of the art." The property has been efficiently and economically operated and the Company has enjoyed excellent credit.

This actual experience of the Company is more convincing than tabulations of estimates. In the face of that experience, we are unable to conclude that the Company has been operating under confiscatory intrastate rates. Yet, as we have said, the conclusion that the existing rates have been confiscatory—and grossly confiscatory—would be inescapable if the findings below were accepted. In that event, the Company would not only be entitled to resist reduction through the rates in suit, but to demand, as a constitutional right, a large increase over the rates which have enabled it to operate with out-

[10] The book cost of the "Plant in Service and General Equipment" for the Chicago area, including both interstate and intrastate business, rose from $100,040,051 at the end of 1923 to $191,286,165 at the end of 1930 and to $195,422,113 at the end of 1931.

standing success. Elaborate calculations which are at war with realities are of no avail. The glaring incongruity between the effect of the findings below, as to the amounts of return that must be available in order to avoid confiscation, and the actual results of the Company's business, makes it impossible to accept those findings as a basis of decision.

2. *The effect of the reduction through the rates in suit.* The foregoing considerations limit our inquiry. It is not necessary to traverse the wide field of controversy to which we are invited and to review the host of contested points presented by counsel. In the view that the existing rates cannot be regarded as inadequate, the question is simply as to the effect of the reduction in net income by the rates in suit. The question is whether the Company has established, with the clarity and definiteness befitting the cause, that this reduction would bring about confiscation. *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U.S. 287, 304, 305. The amounts of the reduction for the respective years are not in dispute.[11] It would have been $1,541,668 for 1923, would have been greatest, at $1,740,000, for 1929, and least, at $1,270,000, for 1932.

Operating expenses. In determining the effect of these reductions, and what amounts would still be available to the Company for net return, we come to the questions raised by the Company's charges to operating expenses. Charges to operating expenses may be as important as valuations of property. Thus, excessive charges of $1,500,000 to operating expenses would be the equivalent of 6 per cent. on $25,000,000 in a rate base. In this in-

[11] The amounts of the reduction in intrastate income in Chicago, if the rates in suit had been effective, as shown by the Company and found by the District Court, are as follows: 1923, $1,541,668; 1924, $1,550,995; 1925, $1,582,561; 1926, $1,650,570; 1927, $1,677,077; 1928, $1,713,301; 1929, $1,740,000; 1930, $1,645,878; 1931, $1,433,044; 1932, $1,270,000.

stance, against the reductions which the rates in suit would have effected, are the considerable sums which would be added to the amounts available for return by the adjustments in operating expenses made by the District Court.[12] These adjustments embraced overpayments found to have been made by the Illinois Company in its transactions with the American Telegraph and Telephone Company and the Western Electric Company. In 1923, the overpayment to the former Company, treating its outlay, or the cost of its service to its subsidiary, as the measure of the operating expense, was found to be $573,819; the average of the annual overpayments, as found for the years 1923 to 1927, inclusive, amounted to $545,443.[13] It should be noted that on the same basis of adjustment there would have been an increase (averaging $256,036) in operating expenses for the years 1929 to 1931, when the cost of the service exceeded the license payments.[14] The court below found overpayments to the Western Electric Company of $332,470 in 1931 and 1932, respectively.[15] There are numerous contentions presented by each of the parties in relation to these adjustments—by appellants, to decrease, and by appellee, to increase, the amounts of expense allowed—but we shall not undertake to pass upon them in view of the determinative nature, for the present purpose, of the remaining question as to the sums which the Company has annually charged to operating expenses for depreciation.

Annual allowances for depreciation. The Commission, in the order under review, concluded that the depreciation reserve (amounting, at the end of 1922, for the Chi-

[12] See comparison of the amounts of net return as shown by the Company with the amounts as adjusted by the District Court, in table, *supra*, p. 161.

[13] *Supra*, p. 157, Note 5.

[14] *Id.*

[15] *Supra*, p. 157, Note 4.

cago property, interstate and intrastate, to about $26,000,000) had been built up by annual additions that were in excess of the amounts required. The Commission provided for "a combined maintenance and replacement allowance" which it considered sufficient to protect the investment in the property and to permit the Company "to accrue a reserve in the anticipation of property retirements." On the first hearing, the District Court considered that the effect of that ruling was to reduce the amount charged for depreciation to the operating expenses in 1923 to the extent of about $1,800,000.[16] The Company did not comply with the Commission's requirement but continued its own method of computing the annual allowances. We adverted to this question on the former appeal. We said that the recognition of the ownership of the property represented by the depreciation reserve did not justify the continuance of excessive charges to operating expenses. We thought that the experience of the Illinois Company, together with a careful analysis of the results shown under comparable conditions, by other companies which are part of the Bell system, should afford a sound basis for judgment as to the amount which in fairness both to public and private interest should be allowed as an annual charge. 282 U.S. pp. 157–159. The District Court in making its findings stated that it had considered the data to which we referred, but we are not advised as to the precise method of its calculations.[17] The annual amounts allowed by the court for depreciation, as compared with those which appellee charged on its books to operating expenses,[18] are as follows:

[16] 38 F. (2d) pp. 86, 87.

[17] 3 F. Supp. p. 605.

[18] The Company's charges on its books were based on original cost. The Company claims considerably larger amounts as the result of recomputations for each class of property according to its replacement value new.

	Court's Allowances	*Book Charges*
1923	$4,000,000	$4,222,000
1924	4,250,000	4,470,000
1925	4,750,000	5,048,000
1926	5,400,000	5,767,000
1927	6,000,000	6,335,000
1928	6,650,000	7,009,000
1929	7,000,000	7,436,000
1930	7,200,000	7,865,000
1931	7,400,000	8,133,000

Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence.[19] Annual depreciation is the loss which takes place in a year. In determining reasonable rates for supplying public service, it is proper to include in the operating expenses, that is, in the cost of producing the service, an allowance for consumption of capital in order to maintain the integrity of the investment in the service rendered.[20] The amount necessary to be provided annually for this purpose is the subject of estimate and computation. In this instance, the Company has used the "straight line" method of computation, a method ap-

[19] Depreciation, as defined by the Interstate Commerce Commission, "is the loss in service value not restored by current maintenance and incurred in connection with the consumption or prospective retirement of property in the course of service from causes against which the carrier is not protected by insurance, which are known to be in current operation, and whose effect can be forecast with a reasonable approach to accuracy." 177 I.C.C. p. 422.

[20] See *Knoxville* v. *Knoxville Water Co.*, 212 U.S. 1, 13, 14; *Kansas City Southern Ry. Co.* v. *United States*, 231 U.S. 423, 448; *Denver* v. *Denver Union Water Co.*, 246 U.S. 178, 191; *Southwestern Bell Telephone Co.* v. *Public Service Comm'n*, 262 U.S. 276, 278; *Georgia Railway & Power Co.* v. *Railroad Comm'n*, 262 U.S. 625, 633; *United Railways* v. *West*, 280 U.S. 234, 253, 260; *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133, 158; *Clark's Ferry Bridge Co.* v. *Public Service Comm'n*, 291 U.S. 227.

proved by the Interstate Commerce Commission. 177 I.C.C. pp. 408, 413. By this method the annual depreciation charge is obtained by dividing the estimated service value by the number of years of estimated service life. The method is designed to spread evenly over the service life of the property the loss which is realized when the property is ultimately retired from service. According to the principle of this accounting practice, the loss is computed upon the actual cost of the property as entered upon the books, less the expected salvage, and the amount charged each year is one year's pro rata share of the total amount.[21] Because of the many different classes of plant, some with long and some with short lives, some having large salvage and others little salvage or no salvage, and because of the large number of units of a class, the Company employs averages, that is, average service life, average salvage of poles, of telephones, etc.

While property remains in the plant, the estimated depreciation rate is applied to the book cost and the resulting amounts are charged currently as expenses of operation. The same amounts are credited to the account for depreciation reserve, the "Reserve for Accrued Depreciation." When property is retired, its cost is taken out of the capital accounts, and its cost, less salvage, is taken out of the depreciation reserve account. According to the practice of the Company, the depreciation reserve is not held as a separate fund but is invested in plant and equipment. As the allowances for depreciation, credited to the depreciation reserve account, are charged to operating expenses, the depreciation reserve invested in the property thus represents, at a given time, the amount of the investment which has been made out of the proceeds of telephone rates for the ostensible purpose of replacing capital consumed. If the predictions of service life were entirely accurate and retirements were made when and as these predictions were

[21] See 177 I.C.C. pp. 431, *et seq.*

precisely fulfilled, the depreciation reserve would represent the consumption of capital, on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return.

Confiscation being the issue, the Company has the burden of making a convincing showing that the amounts it has charged to operating expenses for depreciation have not been excessive. That burden is not sustained by proof that its general accounting system has been correct. The calculations are mathematical but the predictions underlying them are essentially matters of opinion.[22] They proceed from studies of the "behavior of large groups" of items. These studies are beset with a host of perplexing problems. Their determination involves the examination of many variable elements, and oppor-

[22] In the exposition in evidence, to which the Company's counsel refer in their argument, of the "Straight Line Depreciation Practice" of the companies in the Bell system, it is said: "The proper interpretation of the data regarding plant life and salvage obtainable from accounts, records and statistics is of equal importance with the integrity of the data themselves. It would seem that we should have first: investigations of past service life and salvage through sound accounting and statistical methods; second: investigations of the conditions surrounding the employment of such plant in the past and of the extent to which such conditions still prevail; third: the best possible forecast of conditions looming in the future which should exert a modifying influence upon either life or salvage. And then, the active judgment which fuses the experience of the past, so far as it is still pertinent, and the expectation for the future, so far as it is presently pertinent, into a just and reasonable determination of the current rate of depreciation for the time being."

tunities for excessive allowances, even under a correct system of accounting, are always present. The necessity of checking the results is not questioned. The predictions must meet the controlling test of experience.

In this instance, the evidence of expert computations of the amounts required for annual allowances does not stand alone. In striking contrast is the proof of the actual condition of the plant as maintained—proof which the Company strongly emphasizes as complete and indisputable in its sharp criticism of the amount of accrued depreciation found by the District Court in valuing the property. The Company insists that "the existing depreciation in the property, physical and functional, does not exceed 9 per cent. in the years 1923 to 1928 and 8 per cent. thereafter." The existing depreciation as thus asserted by the Company, and the amounts it shows as the depreciation reserve allocated to the intrastate business in Chicago (taking in each case the average amounts per year) are as follows:

Years.	*Existing depreciation.*	*Depreciation reserve.*[23]
1923	$11,992,000	$26,797,000
1924	12,865,000	29,316,000
1925	13,775,000	32,155,000
1926	14,621,000	35,572,000
1927	15,360,000	39,352,000
1928	16,241,000	42,769,000
1929	15,300,000	44,515,000
1930	15,863,000	45,829,000
1931	15,828,000	48,362,000

In explanation of this large difference, the Company urges that the depreciation reserve in a given year does

[23] The Company obtains these average amounts from the total Chicago depreciation reserve at the end of each year, multiplied by the percentage found to be applicable to the intrastate business, with a deduction of one-half of the increase during the year in order to obtain the average. The balance in the depreciation reserve for the entire Chicago property, interstate and intrastate, increased from $4,384,828 at the end of 1911 to $29,306,122 at the end of 1923.

not purport to measure the actual depreciation at that time; that there is no regularity in the development of depreciation; that it does not proceed in accordance with any fixed rule; that as to a very large part of the property there is no way of predicting the extent to which there will be impairment in a particular year. Many different causes operating differently at different times with respect to different sorts of property produce the ultimate loss against which protection is sought. As the accruals to the depreciation reserve are the result of calculations which are designed evenly to distribute the loss over estimated service life, the accounting reserve will ordinarily be in excess of the actual depreciation. Further, there are the special conditions of a growing plant,—"there are new plant groups in operation on which depreciation is accruing but which are not yet represented, or are but slightly represented, in the retirement losses." Where, as in this instance, there has been a rapid growth, retirements at one point of time will relate for the most part to the smaller preceding plant, while the depreciation reserve account is currently building up to meet the "increased eventual retirement liability" of the enlarged plant.

Giving full weight to these considerations, we are not persuaded that they are adequate to explain the great disparity which the evidence reveals. As the Company's counsel say: "The reserve balance and the actual depreciation at any time can be compared only after examining the property to ascertain its condition; the depreciation, physical and functional, thus found can be measured in dollars and the amount compared with the reserve." Here, we are dealing not simply with a particular year but with a period of many years—a fairly long range of experience—and with careful and detailed examinations made both at the beginning and near the end of that period. The showing of the condition of the property, and

of the way in which it has been maintained, puts the matter in a strong light. In substance, the Company tells us: The property in Chicago is a modern Bell system plant. Through the process of current maintenance, worn, damaged or otherwise defective parts were being constantly removed before their impairment affected the telephone service. The factors of "inadequacy" and "obsolescence" were continuously anticipated by the Company, so that the telephone service might not be impaired, "and no depreciation of that character was ever present in the plant, except to the slight extent that obsolete items of plant were found" as stated by the Company's witnesses. One of these witnesses testified that, in his examination of the plant to determine existing depreciation, he understood "that anything that was obsolete or inadequate was to be depreciated accordingly." We are told by the Company that in that investigation—"Condition new was assumed to be free from defects or impairment of any kind, that is, perfect or 100% condition, and the thing as it stood in actual use in the plant was compared with the same thing new." "All existing depreciation, both physical and functional, was reduced to a percentage, and subtracted from 100 per cent." The service measured up to the standards of the telephone art at all times. The plant capable of giving such service "was not functionally deficient, in any practical sense. This is not to say that parts of the plant did not from time to time become inadequate or obsolete, but that the Company continuously anticipates and forestalls inadequacy and obsolescence. Before a thing becomes inadequate or obsolete it is removed from the plant." But little variation was found in the percentage of existing depreciation during the years 1923 to 1931.[24] The Com-

[24] Referring to the period 1923 to 1931, and to the Company's exhibit, the Company's counsel state—that "the percentage of depreciation in the various classes of plant did not vary materially

pany points out that the Commission found, in its order of 1923, that the property was then "in at least 90 per cent. condition." "The weighted total or overall condition," the Company shows, "is 91 per cent. for the years 1923–1928 and 92 per cent. for subsequent years."

This condition, kept at a nearly constant level, directs attention to the amounts expended for current maintenance. In the process of current maintenance, "new parts" are "installed to replace old parts" in units of property not retired. Such "substitutions or 'repairs'" are separate from the amounts which figure in the depreciation reserve. The distinction between expenses for current maintenance and depreciation is theoretically clear. Depreciation is defined as the expense occasioned by the using up of physical property employed as fixed capital; current maintenance, as the expense occasioned in keeping the physical property in the condition required for continued use during its service life. But it is evident that the distinction is a difficult one to observe in practice with scientific precision, and that outlays for maintenance charged to current expenses may involve many substitutions of new for old parts which tend to keep down the

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during the period, with the exception of three classes, namely, central office equipment, private branch exchanges and booths and special fittings. In the case of central office equipment, there were large installations of new equipment in 1929 which had the effect of raising the per cent. condition for the entire class from 92 per cent. for prior years to 93 per cent. for 1929 and subsequent years. In the case of private branch exchanges, the percentage condition improved gradually from 88 per cent. in 1923 to 94 per cent. in 1930 due to the large proportion of new installations and correspondingly large retirements of the old. In the case of booths and special fittings, the percentage condition gradually improved from 78 per cent. in 1923 to 85 per cent. at the end of the period, in this case also because of abnormally large changes of booths at pay stations. These are the changes which in the main account for the fact that the overall condition of the plant rose from 91 per cent. for the years 1923–1928 to 92 per cent. thereafter."

accrued depreciation. The amounts charged by the Company to current maintenance year by year, the amounts credited to the depreciation reserve, and the total of the two sets of charges to operating expenses for the intrastate property in Chicago are as follows:

	Current maintenance.	*Depreciation.*	*Total.*
1923	$5,643,623	$4,222,000	$9,865,623
1924	6,043,737	4,470,000	10,513,737
1925	6,563,193	5,048,000	11,611,193
1926	7,714,364	5,767,000	13,481,364
1927	8,849,550	6,335,000	15,184,550
1928	9,941,143	7,009,000	16,950,143
1929	10,671,576	7,436,000	18,107,576
1930	11,372,858	7,865,000	19,237,858
1931	10,842,053	8,133,000	18,975,053

These aggregate amounts range from over 30 per cent. to nearly 40 per cent. of the total amounts charged by the Company to operating expenses.[25]

In the light of the evidence as to the expenditures for current maintenance and the proved condition of the property—in the face of the disparity between the actual extent of depreciation, as ascertained according to the comprehensive standards used by the Company's witnesses, and the amount of the depreciation reserve—it cannot be said that the Company has established that the reserve merely represents the consumption of capital in the service rendered. Rather it appears that the depreciation reserve to a large extent represents provision for capital additions, over and above the amount required to cover capital consumption. This excess in the balance of the reserve account has been built up by excessive

[25] The total amounts charged by the Company for operating expenses in the intrastate business at Chicago appear to be as follows: 1923, $31,550,286; 1924, $33,275,574; 1925, $35,649,160; 1926, $38,893,042; 1927, $42,142,649; 1928, $45,704,899; 1929, $48,489,647; 1930, $49,319,993; 1931, $47,904,196.

annual allowances for depreciation charged to operating expenses.

In answer to appellants' criticism, the Company suggests that an adjustment might be made by giving credit in favor of the telephone users "in an amount equal to 3½ per cent. upon the difference between the depreciation reserve and the amount deducted from the valuation for existing depreciation." The suggestion is beside the point. The point is as to the necessity for the annual charges for depreciation, as made or claimed by the Company, in order to avoid confiscation through the rates in suit. On that point the Company has the burden of proof. We find that this burden has not been sustained. Nor is the result changed by figuring the allowances at the somewhat reduced amounts fixed by the court below.[26]

We find this point to be a critical one. The questionable amounts annually charged to operating expenses for depreciation are large enough to destroy any basis for holding that it has been convincingly shown that the reduction in income through the rates in suit would produce confiscation.

The case has long been pending and should be brought to an end. The Company has had abundant opportunity to establish its contentions. In seeking to do so, the Company has submitted elaborate estimates and computations, but these have overshot the mark. Proving too much, they fail of the intended effect. It is not the function of the court to attempt to construct out of this voluminous record independent calculations to invalidate the challenged rates. It is enough that the rates have been established by competent authority and that their invalidity has not been satisfactorily proved.

The decree below is reversed and the cause is remanded with direction to dissolve the interlocutory injunction, to

[26] See, *supra*, p. 167.

provide for the refunding, in accordance with the terms of that injunction and of the bonds given pursuant thereto, of the amounts charged by the Company in excess of the rates in suit, and to dismiss the bill of complaint.

No. 548.—The appeal of the Company. The Company was successful in the District Court and has no right of appeal from the decree in its favor. The Company is not entitled to prosecute such an appeal for the purpose of procuring a review of the findings of the court below with respect to the value of the Company's property or the other findings of which it complains. Its contentions in these respects have been considered in connection with the appeal of the state authorities and the city. The appeal of the Company is dismissed. *New York Telephone Co.* v. *Maltbie,* 291 U.S. 645.

Decree in No. 440 reversed.
Appeal in No. 548 dismissed.

MR. JUSTICE BUTLER, concurring.

The evidence does not show that the amounts taken by the company from revenue and charged to the depreciation reserve were required for the maintenance of the property or that the amounts allowed by the lower court for that purpose were needed. The ruling in condemnation of the charges to the depreciation reserve is so important that, even at the risk of duplication, emphasis should be laid upon some facts and reasons that may be cited in its support.

The court's opinion discloses the principle followed for the ascertainment of the amounts annually so charged. It is the straight line method calculated on cost less salvage.[1] That method was prescribed by the Interstate

[1] This is not in harmony with the principle of our decision in *United Railways* v. *West,* 280 U.S. 234, 253–254, which requires replacement cost to be taken as the basis of calculation.

Commerce Commission by an order effective January 1, 1913, establishing the uniform system of accounts for telephone companies.[2] The evidence requires a finding that the company faithfully followed the prescribed system. The state commission continuously watched over the

[2] The following is § 23, Uniform System of Accounts for Telephone Companies, promulgated by the Interstate Commerce Commission, effective January 1, 1913. It will serve to disclose the underlying principle on which the reserve charges are made.

"Depreciation of Plant and Equipment.—Telephone companies should include in operating expenses depreciation charges for the purpose of creating proper and adequate reserves to cover the expenses of depreciation currently accruing in the tangible fixed capital. By *expense of depreciation* is meant—

(a) The losses suffered through the current lessening in value of tangible property from wear and tear (not covered by current repairs).

(b) Obsolescence or inadequacy resulting from age, physical change, or supersession by reason of new inventions and discoveries, changes in popular demand, or public requirements, and

(c) Losses suffered through destruction of property by extraordinary casualties.

The amount charged as expense of depreciation should be based upon rules determined by the accounting company. Such rules may be derived from a consideration of the company's history and experience. Companies should be prepared to furnish the Commission, upon demand, the rules and a sworn statement of the facts, expert opinions, and estimates upon which they are based.

The estimate for depreciation of physical property should take into account—

(a) The gradual deterioration and ultimate retirement of units of property which may be satisfactorily individualized, such as buildings, machines, valuable instruments, etc., to the end that by the time such units of property go out of service there shall have been accumulated a reserve equal to the original money cost of such property plus expenses incident to retirement less the value of any salvage.

(b) The depreciation accruing in property which cannot be readily individualized, such as pole lines, wires, cables, or other continuous structures, where expenditures for repairs or replacements of individual parts ordinarily are not actually made until the

company's handling of the depreciation reserve account.

The table next below shows by years in column (1) the intrastate reserve balances, in (2) the intrastate book cost of the property and in (3) percentages that the balances are of the cost.

TABLE I.

	(1)	(2)	(3)
1923	$26,797,000	$95,074,135	28.1%
1924	29,316,000	105,291,980	27.8
1925	32,155,000	117,730,536	27.3
1926	35,572,000	130,857,355	27.1
1927	39,352,000	146,173,197	26.9
1928	42,769,000	159,622,212	26.7
1929	44,515,000	168,988,816	26.2
1930	45,829,000	178,157,620	25.9
1931	48,362,000	181,925,963	26.

The cost of the property includes from $2,000,000 to $3,000,000 paid for land which is not depreciable, and $13,000,000 to $18,000,000 paid for buildings having a long service life. There are other important and relatively permanent plant elements. These facts suggest that the percentages shown in the table are considerably lower than the actual relation of reserve balances to cost of depreciable parts of the property. While much of the plant is new, the reserve was piled up at about the rate that the cost of plant increased. The balances held in respect of all property, interstate and intrastate, increased from about $4,000,000 in 1911 to about $26,000,-

later years of the life in service of such property, and when made may, therefore, be classed as extraordinary repairs.

The rate of depreciation should be fixed so as to distribute, as nearly as may be, evenly throughout the life of the depreciating property the burden of repairs and the cost of capital consumed in operations during a given month or year, and should be based upon the average life of the units comprised in the respective classes of property. . . ."

000 in 1922. The amounts attributable to the intrastate property alone show an average annual increase of more than $2,300,000. That amount is greatly in excess of the reduction of revenue that would have resulted if the rate order had been enforced.

The table below shows by years in column (1) the amounts actually expended for current maintenance, in column (2) the amounts charged to depreciation reserve, in column (3) the total of both.

TABLE II.

	(1)	(2)	(3)
1923	$5,643,623	$4,222,000	$9,865,623
1924	6,043,737	4,470,000	10,513,737
1925	6,563,193	5,048,000	11,611,193
1926	7,714,364	5,767,000	13,481,364
1927	8,849,550	6,335,000	15,184,550
1928	9,941,143	7,009,000	16,950,143
1929	10,671,526	7,436,000	18,107,526
1930	11,372,858	7,865,000	19,237,858
1931	10,842,053	8,133,000	18,975,053

The importance of the amounts involved is illustrated by the following table which shows by years (1) expenditures for current maintenance plus charges to depreciation reserve, in (2) revenues, in (3) the percentages that the former are of the latter.

TABLE III.

	(1)	(2)	(3)
1923	$9,865,623	$37,146,181	26.5%
1924	10,513,737	39,353,954	26.5
1925	11,611,193	42,560,451	27.2
1926	13,481,364	45,932,698	29.3
1927	15,184,550	49,163,580	30.8
1928	16,950,143	53,677,760	31.5
1929	18,107,526	58,279,602	31
1930	19,237,858	58,698,263	32.7
1931	18,975,053	56,496,299	33.5

The next table gives similar information. It shows by years in column (1) actual expenditures for maintenance plus charges to the reserve, in (2) the total of all operating expenses and in (3) the percentages that the former are of the latter.

TABLE IV.

	(1)	(2)	(3)
1923	$9,865,623	$31,550,286	31.2%
1924	10,513,737	33,275,574	31.5
1925	11,611,193	35,649,160	32.5
1926	13,481,364	38,893,042	34.6
1927	15,184,550	42,142,649	36
1928	16,950,143	45,704,899	37
1929	18,107,526	48,489,647	39.4
1930	19,237,858	49,319,993	39
1931	18,975,053	47,904,196	39.5

The actual annual expenditures to keep the plant in proper condition for service are made up of the amounts included in current maintenance and those taken from the depreciation reserve. The table next below is illustrative and is intended to show by years in column (1) that total, in column (2) the revenue, in (3) the percentage that the former is of the latter.

TABLE V.

	(1)	(2)	(3)
1924	$7,994,737	$39,653,954	20.1%
1925	8,772,193	42,560,451	20.6
1926	10,064,364	45,163,580	21.8
1927	11,404,550	49,163,580	23.1
1928	13,533,143	53,677,760	25.2
1929	16,361,526	58,279,602	28
1930	17,923,858	58,698,263	30.5
1931	16,442,053	56,496,299	29.1

The purpose of this table is to compare the percentage in each year with the percentage in each of the other years. It is to be observed that the lowest is 20.1% (1924) and the highest 30.5% (1930). This comparison

serves to test the claim that the depreciation reserve is needed in order to equalize annual cost of upkeep in relation to revenue. If the period covered is typical, the last statement strongly suggests that no reserve account is necessary for that purpose. And that impression is confirmed by a similar comparison of the percentages in Table IV. It shows the relation of current maintenance plus depreciation reserve charges to revenue. Comparing the percentage in each year (during the period covered by Table V) with the percentage in each of the other years, the lowest is 31.5% (1924), the highest is 39.5 (1931).

From the foregoing it justly may be inferred that charges made according to the principle followed by the company create reserves much in excess of what is needed for maintenance. The balances carried by the company include large amounts that never can be used for the purposes for which the reserve was created. In the long run the amounts thus unnecessarily taken from revenue will reach about one-half the total cost of all depreciable parts of the plant. The only legitimate purpose of the reserve is to equalize expenditures for maintenance so as to take from the revenue earned in each year its fair share of the burden. To the extent that the annual charges include amounts that will not be required for that purpose, the account misrepresents the cost of the service.

The company's properties constitute a complex and highly developed instrumentality containing many classes of items that require renewal from time to time. But, taken as a whole, the plant must be deemed to be permanent. It never was intended to be new in all its parts. It would be impossible to make it so. Expenditures in an attempt to accomplish that would be wasteful. Amounts sufficient to create a reserve balance that is the same percentage of total cost of depreciable items as their age is of their total service life cannot be accepted as legitimate

additions to operating expenses. In the absence of proof definitely establishing what annual deductions from revenues were necessary for adequate maintenance of the property, the company is not entitled to have the rate order set aside as confiscatory.

SPRING CITY FOUNDRY CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

Nos. 727 and 728. Argued April 3, 1934.—Decided April 30, 1934.

1. Where accounts and income tax returns are on the accrual basis, a debt owing the taxpayer for goods sold in the tax year is returnable as gross income of that year even though ascertained in that year to be partly worthless. Art. 35 of Regs. 45, under Revenue Act of 1918, construed. P. 184.
2. Section 234 (a)(5) of the Revenue Act of 1918 authorized the deduction of a debt ascertained to be worthless and charged off within the taxable year; it did not authorize the deduction of the whole or a part of a debt which was not then ascertained to be worthless but was recoverable in part, the amount that was recoverable being still uncertain. P. 185.
3. Section 234 (a)(4) of the Revenue Act of 1918, providing for deduction of "losses sustained during the taxable year," and subdivision (5) of the same section providing for deduction of debts ascertained to be worthless within the taxable year, are mutually exclusive; and a debt excluded from deduction under (5) can not be deducted as a loss under (4). P. 189.
4. If a statute is ambiguous, administrative construction followed since its enactment is of great weight. P. 189.

67 F. (2d) 385, 387, affirmed.

CERTIORARI, 291 U.S. 656, to review judgments reversing an order of the Board of Tax Appeals, 25 B.T.A. 822, allowing deduction of part of a debt in an income tax assessment for the year 1920. Both the taxpayer and the Commissioner appealed to the court below.

Messrs. Richard H. Tyrrell and *Edgar L. Wood* for petitioner.

Mr. Erwin N. Griswold, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Carlton Fox* were on the brief, for respondent.

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

Petitions for writs of certiorari were granted, "limited to the question whether a debt ascertained to be partially worthless in 1920 was deductible in that year under either § 234 (a) (4) or § 234 (a) (5) [of the Revenue Act of 1918] and to the question whether the debt was returnable as taxable income in that year to the extent that it was then ascertained to be worthless." 291 U.S. 656.

Petitioner kept its books during the year 1920 and filed its income tax return for that year on the accrual basis. From March, 1920, to September, 1920, petitioner sold goods to the Cotta Transmission Company for which the latter became indebted in the amount of $39,983.27, represented by open account and unsecured notes. In the latter part of 1920 the Cotta Company found itself in financial straits. Efforts at settlement having failed, a petition in bankruptcy was filed against the Company on December 23, 1920, and a receiver was appointed. In the spring of 1922 the receiver paid to creditors, including petitioner, a dividend of 15 per cent. and, in 1923, a second and final dividend of 12½ per cent.

Petitioner charged off on its books the entire debt on December 28, 1920, and claimed this amount as a deduction in its income tax return for that year. It included as income in its returns for 1922 and 1923 the dividends received in those years. The Commissioner disallowed the amount claimed as a deduction in 1920 but allowed a

deduction in 1923 of $28,715.76, the difference between the full amount of the debt and the two dividends.

On review of the deficiency assessed by the Commissioner for 1920, the Board of Tax Appeals found that the debt was not entirely worthless at the time it was charged off. An offer had been made in November, 1920, to purchase the assets of the debtor at 33⅓ per cent. of the creditors' claims and the offer had been declined. The Board concluded that in view of all the circumstances, including the probable expense of the receivership, the debt could be regarded as uncollectible, at the time of the charge-off, to the extent of $28,715.76, and allowed a deduction for 1920 of that amount. 25 B.T.A. 822. This ruling, contested by both the Commissioner and the taxpayer, was reversed by the Circuit Court of Appeals upon the ground that "there was in 1920 no authority for a debt deduction unless the debt were worthless." 67 F. (2d) 385, 387. In view of the conflict of decisions upon this point,[1] this Court granted writs of certiorari limited as above stated.

1. Petitioner first contends that the debt, to the extent that it was ascertained in 1920 to be worthless, was not returnable as gross income in that year, that is, apart from any question of deductions, it was not to be regarded as taxable income at all. We see no merit in this contention. Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the *right* to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes

[1] See *Sherman & Bryan, Inc.* v. *Commissioner*, C.C.A. 2d, 35 F. (2d) 713, 716; *Davidson Grocery Co.* v. *Lucas*, 59 App.D.C. 176; 37 F. (2d) 806; *Murchison National Bank* v. *Grissom*, C.C.A. 4th, 50 F. (2d) 1056. Compare *Minnehaha National Bank* v. *Commissioner*, C.C.A. 8th, 28 F. (2d) 763; *Collin County National Bank* v. *Commissioner*, C.C.A. 5th, 48 F. (2d) 207, 208.

fixed, the right accrues. When a merchandising concern makes sales, its inventory is reduced and a claim for the purchase price arises. Article 35 of Regulations 45 under the Revenue Act of 1918 provided: "In the case of a manufacturing, merchandising, or mining business 'gross income' means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources." [2]

On an accrual basis, the "total sales," to which the regulation refers, are manifestly the accounts receivable arising from the sales, and these accounts receivable, less the cost of the goods sold, figure in the statement of gross income. If such accounts receivable become uncollectible, in whole or part, the question is one of the deduction which may be taken according to the applicable statute. See *United States* v. *Anderson,* 269 U.S. 422, 440, 441; *American National Co.* v. *United States,* 274 U.S. 99, 102, 103; *Brown* v. *Helvering,* 291 U.S. 193, 199; *Rouss* v. *Bowers,* 30 F. (2d) 628, 629. That is the question here. It is not altered by the fact that the claim of loss relates to an item of gross income which had accrued in the same year.

2. Section 234 (a) (5) of the Revenue Act of 1918 provided for the deduction of worthless debts, in computing net income, as follows:—"Debts ascertained to be worthless and charged off within the taxable year." Under this provision, the taxpayer could not establish a right to the deduction simply by charging off the debt. It must be ascertained to be worthless within the taxable year. In this instance, in 1920, the debt was in suspense by reason of the bankruptcy of the debtor but it was not a total loss. What eventually might be recovered upon it was uncertain, but recovery to some extent was reasonably to be

[2] This provision has been carried forward in the regulations under the later revenue acts. See Regulations 77, Article 55.

expected. The receiver continued the business and substantial amounts were subsequently realized for the creditors. In this view, the Board of Tax Appeals decided that the petitioner did not sustain a loss in 1920 "equal to the total amount of the debt" and hence that the entire debt was not deductible in that year.

The question, then, is whether petitioner was entitled to a deduction in 1920 for the portion of the debt which ultimately—on the winding up in bankruptcy—proved to be uncollectible. Such a deduction of a part of the debt, the Government contends and the Circuit Court of Appeals held, the Act of 1918 did not authorize. The Government points to the literal meaning of the words of the statute, to the established administrative construction, and to the action of the Congress in recognition of that construction. "Worthless," says the Government, means destitute of worth, of no value or use. This was the interpretation of the statute by the Treasury Department. Article 151 of Regulations 45 (made applicable to corporations by Article 561) provided that "An account merely written down" is not deductible.[3] To the same effect was the corresponding provision of the regulations under the Revenue Act of 1916.[4]

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[3] Article 151 of Regulations 45 provided: "*Bad debts.*—An account merely written down or a debt recognized as worthless prior to the beginning of the taxable year is not deductible. Where all the surrounding and attendant circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for the purpose of deduction. Bankruptcy may or may not be an indication of the worthlessness of a debt, and actual determination of worthlessness in such a case is sometimes possible before and at other times only when a settlement in bankruptcy shall have been had. . . ."

See, also, Article 151 of Regulations 45 (Revised) promulgated January 28, 1921.

[4] Regulations 33 (Revised), Article 151.

The right to charge off and deduct a *portion* of a debt where during the taxable year the debt was found to be recoverable only in part, was granted by the Act of 1921. By that Act, § 234 (a) (5) was changed so as to read: "Debts ascertained to be worthless and charged off within the taxable year (or in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part." We think that the fair import of this provision, as contrasted with the earlier one, is that the Congress, recognizing the significance of the existing provision and its appropriate construction by the Treasury Department, deliberately intended a change in the law. *Shwab* v. *Doyle,* 258 U.S. 529, 536; *Russell* v. *United States,* 278 U.S. 181, 188.

This intent is shown clearly by the statement in the report of the Committee on Ways and Means of the House of Representatives in relation to the new provision. The Committee said explicitly—"Under the present law worthless debts are deductible in full or not at all." [5] While the change was struck out by the Finance Committee of the Senate, the provision was restored on the floor of the Senate and became a law as proposed by the House.[6] Regulations 62 issued by the Treasury Depart-

[5] H.Rep. No. 350, 67th Cong., 1st sess., p. 11. The statement of the Committee is: "Under the present law worthless debts are deductible in full or not at all, but Section 214 would authorize the Commissioner to permit a deduction for debts recoverable only in part, or in his discretion to recognize a reserve for bad debts—a method of providing for bad debts much less subject to abuse than the method of writing off bad debts required by the present law." Section 214 related to deductions by individuals and contained the same new provision as that inserted in § 234 (a) (5), quoted in the text, with respect to deductions by corporations.

[6] S.Rep. No. 275, 67th Cong., 1st sess., p. 14; Cong. Rec., vol. 61, pt. 6, pp. 5814, 5939–5941, 6109, 6110; pt. 7, p. 6727.

ment under the Act of 1921 made a corresponding change in Article 151. The Treasury Department consistently adhered to the former rule in dealing with deductions sought under the Act of 1918.[7]

In numerous decisions the Board of Tax Appeals has taken the same view of the provision of the Act of 1918.[8] See *e.g.*, Appeal of Steele Cotton Mill Co., 1 B.T.A. 299, 302; Western Casket Co. *v.* Commissioner, 12 B.T.A. 792, 797; Toccoa Furniture Co. *v.* Commissioner, 12 B.T.A. 804, 805. The contrary result in the instant case was reached in deference to the opinions expressed by the Circuit Court of Appeals of the Second Circuit in *Sherman & Bryan, Inc.* v. *Commissioner,* 35 F. (2d) 713, 716, and by the Court of Appeals of the District of Columbia in *Davidson Grocery Co.* v. *Lucas,* 59 App.D.C. 176; 37 F. (2d) 806, 808,—views which are opposed to those of the Circuit Courts of Appeals of the Eighth Circuit in *Minnehaha National Bank* v. *Commissioner,* 28 F. (2d) 763, 764, and of the Fifth Circuit in *Collin County National Bank* v. *Commissioner,* 48 F. (2d) 207, 208.

We are of opinion that § 234 (a) (5) of the Act of 1918 authorized only the deduction of a debt ascertained to be worthless and charged off within the taxable year; that it

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[7] In Treasury decision 3262, I–1, Cumulative Bulletin, January–June, 1922, 152, 153, it was said: " No deduction shall be allowed for the part of a debt ascertained to be worthless and charged off prior to January 1, 1921, unless and until the debt is ascertained to be totally worthless and is finally charged off or charged down to a nominal amount, or the loss is determined in some other manner by a closed and completed transaction." See, also, A.R.R. 7895, III–2, Cumulative Bulletin, July–December, 1924, 114, 115; A.R.R. 8226, III–2, Cumulative Bulletin, 116, 119–121.

[8] The members of the Board of Tax Appeals who dissented in the instant case pointed out that the Board had " consistently held in at least twenty-three cases that under the Revenue Act of 1918 no deduction may be taken where a taxpayer ascertains that a debt is recoverable only in part." 25 B.T.A., p. 834.

did not authorize the deduction of a debt which was not then ascertained to be worthless but was recoverable in part, the amount that was not recoverable being still uncertain. Here, in 1923, on the winding up, the debt that then remained unpaid, after deducting the dividends received, was ascertained to be worthless and the Commissioner allowed deduction accordingly in that year.

3. Petitioner also claims the right of deduction under § 234 (a) (4) of the Act of 1918 providing for the deduction of " Losses sustained during the taxable year and not compensated for by insurance or otherwise." We agree with the decision below that this subdivision and the following subdivision (5) relating to debts are mutually exclusive. We so assumed, without deciding the point, in *Lewellyn* v. *Electric Reduction Co.*, 275 U.S. 243, 246. The making of the specific provision as to debts indicates that these were to be considered as a special class and that losses on debts were not to be regarded as falling under the preceding general provision. What was excluded from deduction under subdivision (5) cannot be regarded as allowed under subdivision (4). If subdivision (4) could be considered as ambiguous in this respect, the administrative construction which has been followed from the enactment of the statute—that subdivision (4) did not refer to debts—would be entitled to great weight.[9] We see no reason for disturbing that construction.

Petitioner insists that " good business practice " forbade the inclusion in the taxpayer's assets of the account receivable in question or at least the part of it which was subsequently found to be uncollectible. But that is not the question here. Questions relating to allowable deductions under the income tax act are quite distinct from matters which pertain to an appropriate showing upon

[9] See Regulations 45, Articles 141 to 145; compare Articles 151 to 154.

which credit is sought. It would have been proper for the taxpayer to carry the debt in question in a suspense account awaiting the ultimate determination of the amount that could be realized upon it, and thus to indicate the status of the debt in financial statements of the taxpayer's condition. But that proper practice, in order to advise those from whom credit might be sought of uncertainties in the realization of assets, does not affect the construction of the statute, or make the debt deductible in 1920, when the entire debt was not worthless, when the amount which would prove uncollectible was not yet ascertained, rather than in 1923 when that amount was ascertained and its deduction allowed.

We conclude that the ruling of the Circuit Court of Appeals was correct.

Judgment affirmed.

SANDERS *v.* ARMOUR FERTILIZER WORKS ET AL.

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

No. 106. Submitted February 5, 1934.—Decided April 30, 1934.

1. Two claimants of a fund due by a fire insurance company, one claiming it as insurance money due under a policy and the other claiming it as a creditor of the first who had attached the fund by garnishing the insurance company, are adverse claimants within the intendment of the Interpleader Act of May 8, 1926; 28 U.S.C., § 41 (26). P. 199.
2. The purpose of the Interpleader Act of May 8, 1926; 28 U.S.C., § 41 (26) is to protect the stakeholder, and to determine the claims according to equity, weighing the right or title of each claimant under the law of the State in which his claim arose. Full faith and credit must be given by the forum to judicial proceedings in other States upon which claims are founded. Pp. 199, 204.
3. Under this Act, the fund paid into court by the applicant for interpleader does not come under the domination of the law of the particular State in which the suit is brought, and the rights of

claimants can not be varied by the applicant's choice of forum. Pp. 200, 205.

4. Under the law of Illinois a garnishment, with judgment by default against the debtor after service on him by publication, gives the plaintiff in the garnishment proceeding at least an inchoate lien upon the fund or debt attached, which may be perfected by a final judgment against the garnishee. P. 203.
5. An exemption from execution extended by statutes of Texas to proceeds of fire insurance on property appertaining to a homestead in that State is not recognized by the laws of Illinois when the insured is sued there on a debt and the insurance money is attached by garnishment served on the insurance company. P. 203.
6. A fire insurance company owing money to a resident of Texas on account of the burning of his homestead property in that State, was garnished in Illinois in an action on a debt against the insured in which he suffered judgment by default. The company then interpleaded the garnishor-plaintiff and the insured by a suit in the federal court in Texas, under 28 U.S.C., § 41 (26); paid the insurance money into the registry; and prosecution of the Illinois action was enjoined. *Held* that the Illinois claimant was entitled to the fund as against the insured, who claimed that it was exempt under the Texas homestead exemption statutes. P. 204.

63 F. (2d) 902, affirmed.

CERTIORARI, 290 U.S. 623, to review the reversal of a judgment recovered by Sanders in a case of interpleader in the federal court. See also 33 F. (2d) 157; 38 *id.* 212, on the question of the District Court's jurisdiction.

Mr. Thomas D. Gresham submitted for petitioner.

The judicial proceeding instituted by Armour in Illinois, which under the laws and practice of that State merely gave rise to an inchoate and defeasible claim upon the debt sought to be garnished, in an indeterminate amount so far as a garnishing plaintiff was concerned, need not be honored in Texas as a definite and final judgment awarding the entire debt sought to be garnished to the satisfaction of Armour's claim.

The full faith and credit clause of the Federal Constitution, after prescribing in general terms that full faith

and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, leaves the specific enforcement of the clause to statutory enactment by Congress. This power has been exercised by Congress, and the statute on this point (28 U.S.C., § 687) is clear. The judicial proceeding relied upon by Armour is to be given only such faith and credit as it would be entitled to by law or usage in the courts of Illinois. *Lancashire Ins. Co.* v. *Corbetts,* 165 Ill. 592; *Becker* v. *Illinois Central R. Co.,* 250 Ill. 40; 28 C.J. 252; *Bigelow* v. *Andress,* 31 Ill. 322; *McElwee* v. *Wilce,* 80 Ill. App. 338; *Robertson* v. *Pickrell,* 109 U.S. 608; *Union & Planters Bank* v. *Memphis,* 189 U.S. 71; *Covington* v. *First Nat. Bank,* 198 U.S. 100; *Free* v. *Western Union,* 158 Wis. 36; *Bruce* v. *Ackroyd,* 95 Conn. 167; *Aldrich* v. *Kinney,* 4 Conn. 380; *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* 174 U.S. 170; *Harris* v. *Balk,* 198 U.S. 215; *Kline* v. *Burke Construction Co.,* 260 U.S. 226; *Cole* v. *Cunningham,* 133 U.S. 107; *National Bank* v. *Indiana Banking Co.,* 114 Ill. 483; *Reeve* v. *Smith,* 113 Ill. 477; *Martin* v. *Dryden,* 6 Ill. 187; *Corbin* v. *Graves,* 27 Fed. 644; *Walker* v. *Garland,* 235 S.W. 1078; *Lears* v. *Seaboard Air Line Ry.,* 3 Ga. App. 614; Rood on Garnishment, § 11; Black on Judgments, p. 1039; 34 C.J. 1105; 15 R.C.L. 900; 1 Lewis's Sutherland on Statutory Construction, p. 283; *State Bank of Chicago* v. *Thweatt,* 111 Ill. App. 599; U.S. Constitution, Art. 4, § 1; Illinois Attachment Act, § 37.

All matters of procedure, including the remedies of garnishment and exemption, in all kinds of actions, are to be governed wholly by the law of the forum. The idea that in interpleader suits the courts of the forum are free to disregard its procedural law and to follow such procedural law, domestic or foreign, as may appeal to them as reaching the most equitable result under the circumstances, is fallacious. Story, Conflict of Laws, 8th ed., §§ 556, 558; Wharton, Conflict of Laws, Vol. 2, p.

1433; Dicey, Conflict of Laws, 2d ed., p. 708; *Scudder* v. *Union Nat. Bank,* 91 U.S. 406; *Lanahan* v. *Sears,* 102 U.S. 318; *Bronson* v. *Kinzie,* 1 How. 311; *Mason* v. *United States,* 260 U.S. 545; *Bank of U.S.* v. *Donnally,* 8 Pet. 361; *Pritchard* v. *Norton,* 106 U.S. 134; *Vogel* v. *Thiesing,* 55 F. (2d) 205; *Logan* v. *Goodwin,* 104 Fed. 490; *Thompson* v. *McConnell,* 107 Fed. 33; *Cameron* v. *Fay,* 55 Tex. 58; *Cole* v. *Cunningham,* 133 U.S. 107; *Chase* v. *Swayne,* 88 Tex. 218; *Sorenson* v. *City Nat. Bank,* 121 Tex. 478; 28 U.S.C., §§ 41 (26), 725, 726, 727; U.S. Equity Rule 23; Art. 16, § 50, Constitution of Texas; Art. 3832, Rev. Civ. Stats. of Texas.

The court below erred in holding it the policy of the United States to aid a creditor to collect his claim against a debtor in violation of the exemption laws of the State of the debtor's domicile, and especially so in a United States District Court sitting within the confines of the State whose exemption laws the creditor is seeking to evade. *Holden* v. *Stratton,* 198 U.S. 214; *Chase* v. *Swayne,* 88 Tex. 218; *Ketcham* v. *Ketcham,* 269 Ill. 584; *Reames* v. *Morrow,* 193 Ill. App. 155; *Singer Mfg. Co.* v. *Fleming,* 39 Neb. 679; *Strawn Mercantile Co.* v. *First Nat. Bank,* 279 S.W. 473; *Jackson* v. *Republic,* 141 Ill. App. 453; *Baltimore & Ohio R. Co.* v. *McDonald,* 112 Ill. App. 391; *Steele* v. *Buel,* 104 Fed. 972.

We believe that the majority decision of the Circuit Court of Appeals is plainly in violation of the provisions of 28 U.S.C., § 687, in that the decision expressly gave to the incomplete garnishment proceeding in Illinois a greater effect than was given to it by the established law and usage of that State, on the plea that the Supreme Court of Illinois had incorrectly interpreted the law of that State, and that the court below had the right to place its own interpretation upon the law of Illinois in preference to accepting the interpretation of the Illinois Supreme Court. In its holding that the

institution of a garnishment suit is the equivalent of a final judgment awarding to the garnishing plaintiff all the relief sought by him in such suit, and that it must be recognized and enforced as such in the courts of a sister State, even though it be in violation of the public policy and laws of such sister State, the decision is squarely in conflict with the prior decision of this Court in *Cole* v. *Cunningham,* 133 U.S. 107.

In the right asserted by the majority of the Circuit Court of Appeals to disregard the sovereign laws of the State in which the district court is sitting, whenever the individual judge sitting as such court may consider such sovereign laws to be inequitable, the decision is revolutionary, wholly without precedent, and dangerous in the extreme.

Messrs. Charles J. Faulkner, Jr., and *Mark McMahon* submitted for Armour Fertilizer Works, respondent.

Mr. George S. Wright submitted for National Fire Insurance Co., respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

New York Life Ins. Co. v. *Dunlevy* (1916), 241 U.S. 518, exhibited the serious problems encountered by insurance companies when conflicting demands are made by residents of different States. There two individuals, residents of California and Pennsylvania, claimed the surrender value of a life policy. The insurer unsuccessfully sought through interpleader proceedings in Pennsylvania to secure release from all liability.

In order to mitigate the difficulties, Congress, by the Act of February 27, 1917, 39 Stat. 929, authorized insurance companies to file bills of interpleader in District Courts of the United States. An amendment followed

February 25, 1925, 43 Stat. 976, U.S.C.A. 28, § 41 (26). And the Act of May 8, 1926, 44 Stat. 416, U.S.C.A. 28, Supp., § 41 (26) (in the margin [1]), rewrote and amplified the provisions of the earlier enactments.

[1] Act approved May 8, 1926, 44 Stat. 416. Chap. 273—" The district courts of the United States shall have original jurisdiction to entertain and determine suits in equity begun by bills of interpleader duly verified, filed by any casualty company, surety company, insurance company or association or fraternal or beneficial society, and averring that one or more persons who are bona fide claimants against such company, association, or society resides or reside within the territorial jurisdiction of said court; that such company, association, or society has in its custody or possession money or property of the value of $500 or more, or has issued a bond or a policy of insurance or certificate of membership providing for the payment of $500 or more to the obligee or obligees in such bond or as insurance, indemnity, or benefits to a beneficiary, beneficiaries, or the heirs, next of kin, legal representatives, or assignee of the person insured or member; that two or more adverse claimants, citizens of different States, are claiming to be entitled to such money or property or the penalty of such bond, or to such insurance, indemnity, or benefits; that such company, association, or society has deposited such money or property or has paid the amount of such bond or policy into the registry of the court, there to abide the judgment of the court.

" Sec. 2. In all such cases if the policy or certificate is drawn payable to the estate of the insured and has not been assigned in accordance with the terms of the policy or certificate the district court of the district of the residence of the personal representative of the insured shall have jurisdiction of such suit. In case the policy or certificate has been assigned during the life of the insured in accordance with the terms of the policy or certificate, the district court of the district of the residence of the assignee or of his personal representative shall have jurisdiction. In case the policy or certificate is drawn payable to a beneficiary or beneficiaries and there has been no such assignment as aforesaid the jurisdiction shall be in the district court of the district in which the beneficiary or beneficiaries or their personal representatives reside. In case there are claimants of such money or property, or in case there are beneficiaries under any such bond or policy resident in more districts than one, then jurisdiction shall be in the district court in any district in which a

National Fire Insurance Company and Hartford Fire Insurance Company, Connecticut corporations, under policies issued to him, became indebted to W. D. Sanders, resident of the Eastern District of Texas, for loss by fire (July 3, 1927) of property located therein and part of his homestead. Texas statutes exempt from execution the proceeds of such insurance. The indebtedness of the two insurers respectively was adjusted at $3400.00 and $4250.00; these sums they agreed to pay. Both Companies were garnished in a foreign attachment proceeding against Sanders instituted July 18, 1927, in an Illinois court by Armour Fertilizer Works, a corporation of that State. This proceeding was based upon his notes which undertook to waive homestead and exemption rights. The garnishees admitted liability to Sanders but gave notice of his claim that the proceeds of the policies were exempt from garnishment under Texas laws. He did not appear. After proper publication, judgment was entered against him September 19, 1927. This sustained the attachment and awarded recovery against him in favor of

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beneficiary or the personal representative of a claimant [*sic*] or a deceased claimant or beneficiary resides. Notwithstanding any provision of Part I of this title to the contrary, said court shall have power to issue its process for all such claimants and to issue an order of injunction against each of them, enjoining them from instituting or prosecuting any suit or proceeding in any State court or in any other Federal court on account of such money or property or on such bond or on such policy or certificate of membership until the further order of the court; which process and order of injunction shall be returnable at such time as the said court or a judge thereof shall determine and shall be addressed to and served by the United States marshals for the respective districts wherein said claimants reside or may be found.

"Sec. 3. Said court shall hear and determine the cause and shall discharge the complainant from further liability; and shall make the injunction permanent and enter all such other orders and decrees as may be suitable and proper, and issue all such customary writs as may be necessary or convenient to carry out and enforce the same."

the Fertilizer Works for the amount due upon the notes—$7,589.81; also directed execution. It is in the margin.[2]

Before final trial in the Illinois court under their answers, as permitted by the Act of May 8, 1926, the Insurance Companies, claiming to be mere stakeholders, filed separate interpleader proceedings in the District Court, Eastern District of Texas—June 12, 1928. Sanders and Armour Fertilizer Works, alleged adverse claimants, were made defendants. The sums admitted to be

[2] "On motion of the plaintiff herein, the defendant, W. D. Sanders, is ruled to appear herein instanter, and thereupon said defendant being called in open court comes not, nor does anyone for said defendant, but herein said defendant makes default, and it appearing to the court that said defendant was duly notified by publication of notice according to law duly notifying said defendant of the pendency of this suit and of the time required of said defendant to appear herein, all of which was a sufficient number of days prior to the time required of said defendant to appear as aforesaid to now require of said defendant that said defendant either appear in this cause at this time or that said defendant suffer judgment by default for want of such appearance, and it further appearing to the court that said defendant is still in default of an appearance herein, it is, on motion of the plaintiff, ordered by the court that default be entered herein against said defendant for want of an appearance.

"And as to the damages sustained by the plaintiff herein, the court hears the evidence contained in the affidavit of plaintiff's claim filed herein and finds therefrom that there is due to the plaintiff the sum of money shown in said affidavit of claim to be due, and assessed the plaintiff's damages at the sum of seven thousand, five hundred eighty-nine and 81/100 dollars ($7,589.81).

"This cause coming on for further proceedings herein, it is considered by the court that the attachment herein be and it hereby is sustained, that the plaintiff have judgment on the default and assessment of damages herein, and that the plaintiff have and recover of and from the defendant, W. D. Sanders, the damages of the plaintiff amounting to the sum of seven thousand, five hundred eighty-nine and 81/100 ($7,589.81) in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor."

due under the fire policies were paid into court. An injunction restrained the Armour Fertilizer Works from proceeding further in the Illinois court. Answers by both defendants followed. The causes were consolidated. The District Court awarded the fund to Sanders; the Circuit Court of Appeals held that it should go to Armour Fertilizer Works and reversed the trial court. *National Fire Ins. Co.* v. *Sanders,* 33 F. (2d) 157; *National Fire Ins. Co.* v. *Sanders,* 38 F. (2d) 213. Certiorari, granted upon Sanders's petition, brings the matter here.

The facts are not in dispute. The parties agree that the proceedings in Illinois were according to her statutes; and that under the settled law there Sanders's claim of exemption would have been denied and judgment given against the garnishees if the cause had followed the ordinary course.

The Circuit Court of Appeals overruled objections to the jurisdiction of the District Court and affirmed the latter's authority to consider and determine the rights of the claimants.

It concluded that the Texas statutes did not control; that the Act of May 8, 1926, was intended to afford protection to stakeholders, not to alter the rights of adverse claimants; that the rights of each claimant under the law of the State where they arose should be considered; and that equitable principles commonly accepted in federal courts should be applied.

It held that by the Illinois garnishment the money payable by the Companies to Sanders was sequestrated and that this was good against his claim of exemption; that the lien so obtained followed the fund paid into court. And it directed that the Illinois judgment against him should be satisfied. Upon the first hearing the District Court dismissed the bill for lack of jurisdiction; the Circuit Court of Appeals reversed. Judgment went for San-

ders on the second trial; the Circuit Court of Appeals again reversed.

Objection to jurisdiction of the District Court is now made upon the theory that the defendants are not adverse claimants within the intendment of the interpleader Act since one admits the attached debt is payable primarily to the other and seeks to recover because of his indebtedness to it. The court below adequately answered this contention—

"We think that the facts in this case show that the District Court is mistaken in concluding that the claims of Armour and Sanders are not adverse. Each is claiming the proceeds of the policies to the exclusion of the other. Armour claims by virtue of its Illinois judgment against Sanders and the attachment, and Sanders, while not disputing his obligation to Armour, claims the proceeds, notwithstanding, by virtue of the exemption under the laws of Texas. The statute is remedial and to be liberally construed. It is broad enough to cover any adverse claims against the proceeds of the policies, no matter on what grounds urged. Its terms are not to be interpreted as meaning only adverse claims of those pretending to be beneficiaries of the insured." [38 F. (2d) 214.]

The general purpose and effect of the Act of March 8, 1926, were also well stated below—

"Suits for interpleader in which actions in other courts are enjoined were familiar to equity when the Constitution was adopted [see *Spring* v. *South Carolina Ins. Co.*, 8 Wheat. 268] and are one of the forms of controversy to which, when arising between citizens of different States, the federal judicial power was extended. The Act enlarges the processes of the District Court to cover a broad territory, but otherwise authorizes only an ordinary form of equitable relief. . . . The District Court, of course, is bound on an interpleader to give full faith and credit to

the garnishment proceedings in Illinois. *Cooper* v. *Newell,* 173 U.S. 567. . . . [63 F. (2d) 903.]

"We do not think the filing of the federal interpleader and the payment thereunder of the money into the District Court in Texas operated to bring it under the dominion of Texas law. The applicant for interpleader often has a choice of forum, and he cannot at his will subject the rights of the contesting claimants to one set of laws rather than another. The purpose of the interpleader statute was to give the stakeholder protection, but in no-wise to change the rights of the claimants by its operation. The interpleader is a suit in equity, and equitable principles and procedure are the same throughout the federal jurisdiction. The court is to weigh the right or title of each claimant under the law of the State in which it arose, and determine which according to equity is the better. The decision should be the same whether the interpleader is filed in Illinois or in Texas. No one's rights are intended to be altered by paying the fund into the court, which as an impartial neutral is to determine them." [63 F. (2d) 906.]

Assertion by the complainant of entire disinterestedness is essential to a bill of interpleader. *Groves* v. *Sentell,* 153 U.S. 465, 485. "In such a bill it is necessary to aver that the complainant has no interest in the subject-matter of the suit; he must admit title in the claimants and aver that he is indifferent between them, and he cannot seek relief in the premises against either of them." *Killian* v. *Ebbinghaus,* 110 U.S. 568, 571.

The situation here is unlike that presented where one voluntarily subjects himself to its jurisdiction and seeks the aid of a court to enforce his claim. See Story on Conflict of Laws (8th ed.) § 598. The Armour Fertilizer Works asks nothing under any Texas law. Brought into the District Court against its will it was held there against its protest and enjoined from proceeding further in Illinois.

It now claims priority of right and only asks what it would have secured but for the injunction. Under such circumstances, to hold that the statutes of Texas control would destroy rights duly obtained in Illinois; would permit the Insurance Companies by interpleader proceedings to change the positions of defendants; and, in effect, seriously interfere with the impartial adjustment of existing equities. We think Congress had no intention to permit such destruction of acquired rights, if indeed it had power so to do.

By his answer Sanders thus stated his claim to the fund in court—

"That by reason of the fact that the property which was the subject of insurance covered by said insurance policy was the homestead of the defendant, W. D. Sanders, the proceeds of the same which have been tendered into court by the plaintiff herein are exempt to the defendant, W. D. Sanders, under the laws and Constitution of the State of Texas, and his rights therein are superior and prior to the rights of the defendant, Armour Fertilizer Works."

Armour Fertilizer Works asserted—

"On or about the 18th day of July, 1927, it filed a suit in the Municipal Court of Chicago, Cook County, Illinois, styled Armour Fertilizer Works, a corporation, trading as the Planters Fertilizer and Chemical Company, versus W. D. Sanders, being numbered 1,413,423. Said suit was based upon eight promissory notes upon which there was due at that time, including principal, interest and attorney's fees, the sum of $7,589.81. That in connection with said proceedings a writ of attachment and garnishment was issued out of said court, and was, on the 19th day of July, 1927, served upon the plaintiff herein. That the defendant W. D. Sanders was duly cited by publication, in accordance with the laws of the State of Illinois, to appear and answer said suit. Judgment was taken

against the said W. D. Sanders in said suit on September 19, 1927, for the sum of $7,589.81. That said case has not been dismissed as between this defendant and the plaintiff herein, garnishee in that suit. The judgment rendered in said suit is a valid and binding judgment and was procured in accordance with the laws of the State of Illinois, and is a valid judgment against the defendant W. D. Sanders to the extent of the funds impounded by said garnishment. That under the terms of said judgment the said attachment and garnishment against the plaintiff herein and against the defendant W. D. Sanders was sustained and all matters in dispute and with reference to the funds involved herein, were and have been judicially determined by said judgment."

We are not now primarily concerned with rights of a garnishee. The Insurance Companies have paid their debts and obtained complete discharge. Only Sanders and the Armour Fertilizer Works are interested.

He presented claims against Connecticut corporations arising under insurance contracts which he had not undertaken to enforce. These were free from execution in Texas. He might have sued upon them in Illinois; there they were subject to valid attachment.

The Armour Fertilizer Works, an Illinois corporation, presented the judgment against Sanders duly rendered by a court of that State in a proceeding properly begun and prosecuted. It had secured a lien upon the claims against the Insurance Companies. There is no ground for any claim of fraud. True, no final judgment had gone against the garnishees; but as between Sanders and the Fertilizer Works judgment stood against him; also, sequestration of the debts. The precise effect which would be given this preliminary judgment, as against the garnishees, in proceedings involving their rights may be doubtful, but opinions by the Supreme Court of Illinois clearly indicate that Armour Ferlitizer Works secured a lien

upon the Sanders claims; and that, but for the injunction, final valid judgment would have gone against the Insurance Companies, accompanied by a lien good against all the world.

The effect of the proceedings in Illinois as against one occupying the position of Sanders is plain enough under her statutes and decisions. The Illinois courts would have rejected his claim of exemption under the laws of Texas. This view is affirmed here by agreement.

The Illinois rule is that garnishment imposes an inchoate lien subject to defeat by certain subsequent events, none of which are present here. Also, that final judgment in Illinois against the garnishee prior to one in another jurisdiction is conclusive of the rights of the parties. *Lancashire Ins. Co.* v. *Corbetts,* 165 Ill. 592; 46 N.E. 631; *Becker* v. *Illinois Central R. Co.,* 250 Ill. 40; 95 N.E. 42. Also, "that property, real and personal, attached, and funds in the hands of the garnishee, are placed on the same footing,—that is, when attached, such property or funds are appropriated from that time to the payment of a certain class of judgment creditors specifically enumerated." Accordingly, the principal debtor may not assign his claim against the garnished one after the writ has been served upon the latter. *National Bank of America* v. *Indiana Banking Co.,* 114 Ill. 483, 489; 2 N.E. 401. *Martin* v. *Dryden,* 6 Ill. 187, declares—

"Without a levy of the attachment, or the service of a garnishee, the court has no jurisdiction to proceed, by publication of notice, to render any judgment. But, by the seizure of any estate or property of the defendant, or the service by garnishment upon any having estate, property, or effects of his in their hands, the law has laid hold of a fund, which it may condemn, and appropriate to the satisfaction of whatever judgment it may render against the defendant, and thereupon the court proceeds to hear as to the indebtedness. [p. 212] . . .

"These remarks and views apply also to the question of lien. This specific appropriation of property must amount to something as to those who may deal in relation to it; else the defendant could, at any time before judgment, defeat the object of the party by a sale, and possibly, even the jurisdiction of the court. We are of opinion, that the attachment is a lien from the date of the levy, when followed by a judgment, and which will have relation back to it. This doctrine is sanctioned by numerous authorities, which I will not review." [p. 213]

In the circumstances presented the proceedings in Illinois gave to Armour Fertilizer Works a paramount right or superior equity to the proceeds of the policies. To hold that the District Court in Texas could enjoin the Fertilizer Works from proceeding further and then declare that because the last step in the Illinois suit had not been taken Sanders, in some way, became entitled to priority, plainly would be inequitable. Moreover, it would deny to the garnishment proceedings the credit and effect accorded them in the State where taken.

It is unnecessary to enter upon discussion of vexed questions arising out of garnishment proceedings in different jurisdictions. The different views are well stated in Minor on Conflict of Laws, §§ 125, 126, 209. This Court has had occasion to consider the general subject in *Cole* v. *Cunningham,* 133 U.S. 107; *Chicago, R. I. & P. Ry.* v. *Sturm,* 174 U.S. 710; *King* v. *Cross,* 175 U.S. 396; *Harris* v. *Balk,* 198 U.S. 215, 223. The latter says—

"Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the State where the attachment is laid. His obligation to pay to his creditor is thereby arrested and a lien created upon the debt itself. *Cahoon* v. *Morgan,* 38 Vermont 234, 236; *National Fire Ins. Co.* v. *Chambers,* 53 N.J.Eq. 468, 483.

We can see no reason why the attachment could not be thus laid, provided the creditor of the garnishee could himself sue in that State and its laws permitted the attachment."

Petitioner's argument proceeds upon the erroneous assumption that the money paid into court came under the dominion of Texas law—especially her exemption statutes. This view is not in harmony with the settled law of Illinois that an attachment when levied on the debtor fixes a lien upon the claim and prevents subsequent transfer by the creditor; also, with the reasoning and conclusion in *Chicago, R. I. & P. Ry.* v. *Sturm, supra.*

The latter case—approved in *King* v. *Cross, supra,* and *Harris* v. *Balk, supra*—held that garnishment proceedings pending in Iowa against a claim for wages due by the Railway to a resident of Kansas, and there exempt from execution, constituted good defense when the wage-earner subsequently sued the Railway in Kansas. It approved the doctrine that debts accompany the debtor and may be attached wherever he can be sued by his creditor. Among others, it cited with approval, *National Fire Ins. Co.* v. *Chambers,* 53 N.J.Eq. 468; 32 Atl. 663. It declared that the exemption law was no part of the contract of employment and disapproved the notion that when debts are exempt from execution in the State where created this privilege follows as an incident into other jurisdictions.

In *National Fire Ins. Co.* v. *Chambers, supra,* (an interpleader proceeding—1895) Vice Chancellor Pitney elaborately discussed a situation substantially similar to the one before us. After full review of the authorities, he held that a pending garnishment proceeding properly instituted under the laws of Pennsylvania against indebtedness due to a resident of New Jersey created a lien thereon and gave the attaching creditor superior equity

to one who claimed by transfer from the New Jersey creditor. He applied the familiar principle that he who is first in time is best in right. See also *American Bank* v. *Rollins,* 99 Mass. 313, and *Garity* v. *Gigie,* 130 Mass. 184.

The record does not indicate that any other creditor was interested in the fund impounded in Illinois. The court below rightly gave precedence to the claim of the Fertilizer Works; also properly ruled that the controversy should be terminated by a decree devoting the fund in court to the Illinois judgment against Sanders.

Affirmed.

MR. JUSTICE CARDOZO, dissenting.

The federal court in Texas is under a duty, prescribed by statute (R.S. § 905; 28 U.S.C. § 687; *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 166), to give full faith and credit to judicial proceedings in Illinois, including proceedings under writs of garnishment or attachment. *Green* v. *Van Buskirk,* 7 Wall. 139. This does not mean that the proceedings are to have any greater effect than they have by law or usage in the courts of Illinois. *Robertson* v. *Pickrell,* 109 U.S. 608, 610, 611; *Ohio* v. *Chattanooga Boiler Co.,* 289 U.S. 439, 443. The duty is fulfilled if the force and efficacy are the same.

Garnishment in Illinois does not create a lien upon the debt or chose in action subjected to the writ. *Bigelow* v. *Andress,* 31 Ill. 322, 330, 332 (distinguishing *Brashear* v. *West,* 7 Pet. 608, which was based upon a different statute); *Gregg* v. *Savage,* 51 Ill. App. 281, 284, aff'd, 150 Ill. 161; 37 N.E. 312; *McElwee* v. *Wilce,* 80 Ill. App. 338, 342. In substance it is a monition whereby the defendant is apprised that he will be acting at his peril if he makes a *voluntary* payment to the original creditor, the peril consisting in this, that he may have to pay again. *Bigelow* v. *Andress, supra; Gregg* v. *Savage, supra; McElwee* v. *Wilce,*

supra.[1] The writ has no effect upon involuntary payments before the stage of judgment. Some other attaching creditor, suing the same defendant, may garnish the same debt in another jurisdiction. The Illinois plaintiff, though the first to have recourse to garnishment, will be postponed to the other plaintiff who is first with execution. *Lancashire Ins. Co.* v. *Corbetts,* 165 Ill. 592; 46 N.E. 631. Indeed, the primary creditor, i.e., the debtor of the attaching plaintiff, may bring suit against the garnishee in another jurisdiction, and collect the indebtedness if he wins the race to judgment. *Becker* v. *Illinois Central R. Co.,* 250 Ill. 40; 95 N.E. 42.[2] The garnishment suit is *in personam* against the debtor of a debtor (*Harris* v. *Balk,* 198 U.S. 215), and the *res* is not impounded till the compulsion of judgment and execution has caused it to be paid. Then, but not before, the garnishee will have protection against the hazard of conflicting claims. Cf. *Harris* v. *Balk, supra; Louisville & N. R. Co.* v. *Deer,* 200 U.S. 176; *B. & O. R. Co.* v. *Hostetter,* 240 U.S. 620.

What has been written does not go beyond the law as declared in Illinois. The fact is not ignored that there are other jurisdictions in which the process of garnish-

[1] "A garnishment is an attachment of the effects of the debtor in the hands of the garnishee; creating no lien upon anything, but holding the garnishee to a personal liability." *Gregg* v. *Savage, supra.*

[2] The Illinois Supreme Court in that case did, it is true, refer to a garnishment in Missouri as creating an "inchoate" lien, but coupled the description with a ruling that the inchoate lien was not a charge upon a cause of action elsewhere against the same defendant.

"By the service of the garnishee summons in Missouri, Miller [the plaintiff in that action] acquired a contingent or inchoate lien upon the debt, and appellant could not thereafter make a voluntary payment to the appellee; but the right which Miller acquired was dependent upon subsequently acquiring judgment, and that was not accomplished until a judgment had been recovered in this state, where the debt was free from any right or claim that he had." *Becker* v. *Illinois Central R. Co., supra.*

ment receives a different meaning. Sometimes the service of the writ is held to impose upon the debt a fixed and present lien which will have recognition and enforcement everywhere. See, e.g., *Embree* v. *Hanna,* 5 Johns. 100; *Wallace* v. *McConnell,* 13 Pet. 136; *In re Ransford,* 194 Fed. 658, 661; *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* 174 U.S. 710. Sometimes the lien is spoken of as a *quasi* lien or an inchoate one. See e.g., *Focke* v. *Blum,* 82 Tex. 436, 441; 17 S.W. 770; *North Star Boot Co.* v. *Ladd,* 32 Minn. 381, 383; 20 N.W. 334; *In re Ransford, supra.* Cf. *Becker* v. *Illinois Central R. Co., supra.* In the conflict of laws the difference may be important between realities and metaphors, between the organism and the germ. Sometimes the Illinois rule is accepted, and there is said to be no lien, or one that does no more than restrain the garnishee from making voluntary payments. See e.g., *Commercial State Bank* v. *Pierce,*[3] 176 Ia. 722; 158 N.W. 481; *McGarry* v. *Lewis Coal Co.,* 93 Mo. 237; 6 S.W. 81; *Parker* v. *Farr,* 2 Browne (Pa.) 331. Little is to be gained by dilating upon these and like decisions, for they are rooted in local laws or customs. Garnishment and attachment today are statutory remedies. They are what the state creating them declares that they shall be. It is of no moment that Illinois might have made their efficacy greater as long as her legislature and courts have preferred to make them less.

In that state of the law the garnishee would have been remiss if it had failed to shape its course with prudent recognition of conflicting possibilities. Its indebtedness

[3] "The garnishment proceedings created no lien upon any property belonging to the original defendant, if any, in the hands of the garnishee. By the garnishment proceedings a personal claim was acquired against the garnishees to the extent of any money or property that might be in their hands at the time the garnishment was served, belonging to the judgment defendant." *Commercial State Bank* v. *Pierce, supra,* at 732.

to Sanders had been subjected to garnishment by the Armour company in Illinois, but Sanders was threatening it with suit in Texas. If Sanders had a judgment there before Armour was in a position to issue execution in Illinois, the garnishment in all likelihood would count for nothing, yet there was a possibility even then of dispute and litigation. Plainly in the race for judgments and its aftermath, there was the risk of expense and embarrassment, if not of double payment.

The garnishee in this dilemma paid the amount of the indebtedness into the registry of the federal court in Texas and had the rival claimants interplead. 28 U.S.C., § 41 (26). The claimant Sanders was entitled to the money unless the Armour company had a lien, and the courts of Illinois had held there was no lien. True there had been a judgment against Sanders, though not against his codefendant, the insurer, but this judgment had been obtained by default after service by publication, not followed by an appearance. It was therefore ineffective as a judgment *in personam,* and in the absence of a lien did not operate *in rem.* *Pennoyer* v. *Neff,* 95 U.S. 714; *New York Life Ins. Co.* v. *Dunlevy,* 241 U.S. 518. The joinder of Sanders had no effect except to give him notice of the garnishment and an opportunity to come in, if he was so minded, and contest the plaintiff's claim. *Harris* v. *Balk, supra,* p. 27. He declined the invitation and preferred to litigate at home. Whatever lien has been adjudged as the result of his default was contingent upon the consummation of proceedings to charge the garnishee, and ended when they lapsed, just as if the suit were discontinued. It did not rise to the rank of a general interest in property, adhering to the debt everywhere and qualifying the title in another jurisdiction. Probably no one would contend that by force of the judgment against Sanders a suit could have been maintained by Armour as *quasi* owner of the policies outside of Illinois. If that was so before

the interpleader, it was even more plainly so thereafter. By the express terms of the decree the stakeholder was discharged when the fund was paid into the registry, 38 F. (2d) 212, with the result that there was no longer the possibility of pursuing the garnishee anywhere and thus perfecting the attachment. If some inchoate incumbrance had existed until then, it was then obliterated forever. The fund was free and clear.

The federal court in Texas was thus driven to a choice between a claimant with a foreign attachment which by the law of its creation was of no extraterritorial validity till it had ripened into payment under the compulsion of a judgment, and a claimant whose title to the fund was undisputed unless the lien of the attachment was presently effective. It is not easy to see how there could be any choice but one.

The decree of the Court of Appeals should be reversed and that of the District Court affirmed.

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, and MR. JUSTICE STONE join in this dissent.

AVERY *v.* COMMISSIONER OF INTERNAL REVENUE.

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

Nos. 791 and 792. Argued April 5, 1934.—Decided April 30, 1934.

Where dividends were declared payable on or before December 31st, but, pursuant to the invariable practice and the purpose of the corporation, were paid by checks so transmitted that they did not and could not reach the shareholders until the first business day in January of the following calendar year, *held:*

1. That, within the intendment of § 213 (a) of the Revenue Act of 1924, and like provisions of the Act of 1928, such dividends were " received " in the calendar years in which the checks were received. P. 214.

2. They were not on December 31st preceding "cash or other property unqualifiedly made subject" to the shareholder's demands, within the meaning of Treasury Regulations 65, Art. 1541. *Id.* 67 F. (2d) 310, reversed.

CERTIORARI, 291 U.S. 657, to review the affirmance of an order of the Board of Tax Appeals, decision unreported, which sustained deficiency assessments of income taxes.

Mr. Leland K. Neeves for petitioner.

Assistant Solicitor General MacLean, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Julius C. Martin, James W. Morris,* and *Morton K. Rothschild* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The petitioner was a large stockholder, and president, of the United States Gypsum Company. In November, 1924, the Company declared a dividend payable on or before the 31st day of December following. Its check, dated December 31st, for the amount attributable to his stock, payable to him, was received by petitioner January 2, 1925. In November, 1929, another dividend was declared, payable on or before the following December 31st, and the Company's check for petitioner's portion was received by him January 2, 1930.

Annually, dividend checks, signed by the proper corporate officers and dated December 31st, were on that day mailed out to all stockholders except those who were officers and employees, including the petitioner. Checks for the latter were held in the treasurer's office until the first business day of the next month and then distributed through the office mail.

The Company declared dividends quarterly; and in every instance they were made payable on or before the

last day of some month. The dividend checks never left the treasurer's office or went to the mailing department until the afternoon of the last day of the month. They were mailed on the last day of the month so as to be in the stockholders' hands on the first business day of the following month. The practice was without exception that no stockholder, whether employee or officer, should receive his check before the first business day of the month following the month in which the dividend was made payable.

Petitioner kept his accounts on the cash receipts and disbursements and calendar year basis.

The Commissioner assessed the dividends above described as part of the petitioner's income for the years 1924 and 1929. The Board of Tax Appeals approved; and the court below affirmed this action. The facts are not in dispute. The only question for our determination is when, within intendment of the statutes, the dividends were "received" by petitioner.

He maintains that under the plain language of the Revenue Acts of 1924 and 1928 the dividends—like other assessable items—should be treated as income for the taxable years during which they were actually received—1925 and 1930. The Commissioner claims that under Treasury Regulations promulgated in 1921 and in effect ever since, the dividends constituted income for the years in which they were declared and made payable.[1] The regulation specially important here (No. 65, Art. 1541) follows:—

"Dividends. . . . A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands."

[1] See Treasury Regulations, No. 62 (1921), Arts. 53 and 1541; No. 65 (1924), Arts. 52 and 1541; No. 69 (1926), Arts. 52 and 1541; Nos. 74 and 77 (1928–32), Arts. 333 and 621.

The Revenue Act of 1924, c. 234, 43 Stat. 253, provides—

"Sec. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

"Sec. 213. For the purposes of this title, . . .

"(a) The term 'gross income' includes gains, profits, and income. . . . The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be property accounted for as of a different period. . . .

"Sec. 1001. The Commissioner, with the approval of the Secretary, is authorized to prescribe all needful rules and regulations for the enforcement of this Act."

Sections 41, 42 and 62, Revenue Act of 1928, c. 852, 45 Stat. 791, are substantially like corresponding ones quoted from the 1924 Act. Similar provisions appear in the Revenue Act of 1918 and all subsequent ones.

The Revenue Act of 1921, c. 136, 42 Stat. 227, 229, is peculiar in that it makes distinction between dividends and other income items by the following provision which does not appear in subsequent Acts.

"Sec. 201. (e) For the purposes of this Act, a taxable distribution made by a corporation to its shareholders or

members shall be included in the gross income of the distributees as of the date when the cash or other property is unqualifiedly made subject to their demands."

If we give the words of the statutes their ordinary meaning, clearly the dividends under consideration were not actually received by the taxpayer during 1924 and 1929. Certainly, they were not received when declared. They did not come into the taxpayer's hands on December 31st simply because payable on that day. And unless Congress has definitely indicated an intention that the words should be construed otherwise, we must apply them according to their usual acceptation.

The petitioner insists that the word "receive" is free from ambiguity and admits of no interpretation; the statute furnishes the sole measure as to when dividends are to be reported.

In behalf of the Commissioner it is said—

The Revenue Act directs that the amount of all such (specified) items shall be included in the gross income for the taxable year in which received by the taxpayer. The word "received," as applied to dividends, is not entirely clear since there are different times at which it reasonably may be claimed the taxpayer receives them. To meet this situation the Commissioner promulgated the regulation that dividends are taxable when unqualifiedly made subject to the stockholder's demand. This provision has been included in all Treasury Regulations since 1918 and has been approved and accepted by Congress through subsequent re-enactments of the statute. When a dividend unqualifiedly becomes subject to a taxpayer's demand is essentially a question of fact. Here, the Board of Tax Appeals and the Circuit Court of Appeals agree that the dividends were subject to the taxpayer's demand on December 31st.

It is unnecessary for us to determine how far the quoted Treasury Regulation was incorporated into the Acts of

1924 and 1928. If we assume that the Regulation, in effect, became part of those enactments, nevertheless we think the Commissioner's action was erroneous. In the disclosed circumstances the dividends cannot properly be considered as cash or other property unqualifiedly subject to the petitioner's demand on December 31st. It was the practice of the Company to pay all dividends by checks not intended to reach stockholders until the first business day of January; there is nothing to show that petitioner could have obtained payment on December 31st, he did not expect this and the practice shows the company had no intention to make actual payment on that day. Nothing indicates that it recognized an unrestricted right of stockholders to demand payment except through checks sent out in the usual way. The checks did not constitute payments prior to their actual receipt. The mere promise or obligation of the corporation to pay on a given date was not enough to subject to petitioner's unqualified demand "cash or other property"; and none of the parties understood that it was.

This subject has been considered with varying results in *Commissioner* v. *Bingham,* 35 F. (2d) 503 (1929); *Hadley* v. *Commissioner,* 59 App.D.C. 139; 36 F. (2d) 543 (1929); *Commissioner* v. *Adams,* 54 F. (2d) 228, 230 (1931); *Shearman* v. *Commissioner,* 66 F. (2d) 256 (1933). The facts here disclose a situation substantially like that in the *Adams* case; and we agree with the conclusion of the court therein, stated as follows: "We are also of the opinion that, on the facts found, the dividends were 'not unqualifiedly made subject to the demand of the stockholder,' in the year 1924, if article 52 of the Departmental Regulations can be said to be valid and not in conflict with the express language of section 213 (a)."

Reversed.

LOUGHRAN *v.* LOUGHRAN ET AL., TRUSTEES.

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

No. 565. Argued March 7, 1934.—Decided April 30, 1934.

1. Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction. P. 223.
2. A statute of the domicile forbidding remarriage of a spouse divorced for adultery, has only territorial effect and does not invalidate a marriage solemnized in another State in conformity with the laws thereof. Code, D.C., § 966. P. 223.
3. Section 1287 of the Code of the District of Columbia, providing that if any marriage declared illegal "by the foregoing sections" shall be entered into in another jurisdiction by persons having and retaining their domicile in the District, such marriage shall be deemed illegal, etc., refers to preceding sections dealing with void or voidable marriages, and not to § 966, which deals with divorce *a vinculo* on the ground of adultery and provides that only the innocent party may remarry. P. 223.
4. A woman who, while domiciled in the District of Columbia, was divorced for her adultery with a resident of the District and was forbidden to remarry there by § 966 of the District Code, but who was afterwards lawfully married to him in a State, became upon his death his lawful widow and entitled to dower in his real property in the District. P. 225.
5. The full faith and credit clause *held* applicable to a decree of alimony rendered in a State and sought to be enforced in the District of Columbia. P. 227.
6. The mere fact that a woman was, while a resident of the District of Columbia, divorced there on the ground of adultery, with the result that, by D.C. Code, § 966, she was forbidden to remarry in that jurisdiction, affords no procedural obstacle to her assertion in the courts of the District of rights to dower arising from her subsequent marriage with the co-adulterer, solemnized in another jurisdiction, and of her rights under a judgment for alimony recovered against him in another jurisdiction. P. 228.

62 App.D.C. 262; 66 F. (2d) 567, reversed.

CERTIORARI, 290 U.S. 621, to review the reversal of a decree for dower.

Mr. Robert H. McNeill for petitioner.

Mr. Wm. E. Leahy, with whom *Messrs. Wm. J. Hughes, Jr., Eugene B. Sullivan,* and *James F. Reilly* were on the brief, for respondents.

As the answer denied that plaintiff became a *bona fide* resident of Florida, and that the marriage in Florida was in good faith, the only question submitted to the Court is whether a residence in Florida acquired in bad faith, and a marriage in bad faith, must be recognized by the District of Columbia courts.

Not only therefore does the record show that defendants denied that plaintiff acquired a *bona fide* domicile in Florida, but other facts in the record show that it is unlikely that she could have acquired a *bona fide* residence in Florida within the short time which elapsed between the date she was adjudged guilty of adultery with Loughran and the date she married him.

The good faith of the Florida residence and marriage being denied, the present case is exactly like *Olverson* v. *Olverson,* 54 App.D.C. 48, followed by the court below.

The full faith and credit clause does not require the District of Columbia courts to recognize a marriage in violation of the public policy of the District of Columbia itself. It does not apply in the District of Columbia; in so far as it is effective, it operates in the District only by reason of a federal statute. Act of March 27, 1804; 28 U.S.C., § 687.

The full faith and credit clause does not require the courts of a given jurisdiction to recognize a public act or record of another jurisdiction which is contrary to the public policy of the State of the forum. *Simmons* v. *Simmons,* 57 App.D.C. 216.

It is difficult to conceive how § 966 of the D.C. Code can be construed other than as a declaration of public policy. The legislative history of that section shows that it is so.

The divorce law of the District both as to length of time for residence and also in limiting the causes of divorce to adultery, is one of the most stringent in the country.

The Court of Appeals has not declared the public policy of this jurisdiction; it has merely taken cognizance of and applied an Act of Congress which does so.

It seems to be conceded by petitioner's counsel that if the marriage in the present case were a polygamous, incestuous or an abhorrent marriage, the full faith and credit clause would not require it to be recognized in the District even though it had been entered into in Florida. Am.L.Inst., Restatement of the Law of Marriage and Divorce, §§ 137, 138, 139, 142. The foregoing sections of the Restatement are of interest in the present case for the reason that Congress in enacting the District of Columbia Code has put the marriage of persons whose previous marriage has not been terminated by divorce in exactly the same classification as incestuous and polygamous marriages. D.C. Code, c. 43, § 1283. If the marriage has not been terminated by death or a decree of divorce, it is in exactly the same classification as an incestuous marriage.

The marriage of plaintiff to Daye was not terminated by a decree of divorce within the meaning of the word "terminate" as used in § 1283.

A further indication that the marriage has not been terminated in any absolute or complete sense is the fact that § 966 prohibiting the remarriage of a guilty party does not in so many words prescribe a penalty. It must be presumed that Congress enacted this with some intelligent purpose in mind and intended to make it as effective as it reasonably could. If it be conceded that it prescribes no penalty, and if it does not impinge upon the completeness of the decree of divorce, it follows that it is ineffec-

tive for any purpose whatsoever. The only rational interpretation of this section is that it is a statutory provision which is read into the decree of divorce in an applicable case, and that it deprives that decree of the absoluteness and completeness which it would otherwise have.

It should be noted also that the proviso of § 966 to the effect that only the innocent party may remarry is contained in the very section which conveys power upon the court to grant a divorce. Certainly it can not be contended that a court of the District could, in the teeth of § 966, pass a decree of divorce authorizing the guilty party to remarry. This being so, the reservation of the right of the guilty party to remarry is a limitation upon the power of the court to terminate a marriage by divorce.

The importance of whether plaintiff's marriage has been terminated within the meaning of § 1283 becomes clear when it is considered that § 1287 of the District of Columbia Code makes illegal in the District any marriage of persons domiciled in the District, if celebrated outside of the District, which marriage is illegal inside the District.

A court of equity has the right to deny equitable relief to one who has deliberately created a situation contrary to the public policy of the *lex fori.*

Petitioner herein, in equity, seeks the remedy of the District of Columbia court, whose decree *in personam* she has flouted and ignored. Her claim for dower is founded upon a marriage prohibited by a statute of the jurisdiction in which she seeks relief. *Armstrong* v. *Toler,* 11 Wheat. 258; *Hall* v. *Coppell,* 7 Wall. 542; *Oscanyan* v. *Arms Co.,* 103 U.S. 261; *Higgins* v. *McCrea,* 116 U.S. 671; *Hunter* v. *Wheate,* 53 App.D.C. 206; *Olverson* v. *Olverson,* 54 App.D.C. 48; *Morck* v. *Abel,* 3 B. & P. 35; *Collins* v. *Blanterm,* 1 Smith's Lead. Cas., Pt. 2, p. 716; *Vandyck*

v. *Hewitt,* 1 East. 96; *Clugas* v. *Penaluna,* 4 T.R. 466; *Weymel* v. *Read,* 5 T.R. 599; *Montefiori* v. *Montefiori,* 1 W. Black. 363; *Wilde* v. *Wilde,* 37 Neb. 891; *Lanktree* v. *Lanktree,* 42 Cal. App. 648; *Beard* v. *Beard,* 65 Cal. 354.

No principle seems to be better settled than that no court will lend its aid to one who founds his cause of action upon an illegal act. The good faith of the alleged Florida residence and the marriage therein being denied, the petitioner appeared in the court below as one whose position was created by reason of her violation of § 966, a positive law of the District of Columbia. Upon that ground, the court refused to lend to her its aid. The status she created was prohibited by law, on this present record.

Many cases are cited by petitioner to the effect that a marriage valid where performed is valid everywhere. To this rule there are exceptions as well known as the rule itself. Of these the most important is a marriage which the legislature, either by express terms or necessary implication, has declared to be invalid because of the public policy of the enacting State. *Maynard* v. *Hill,* 125 U.S. 190.

If the statute prohibiting the remarriage of the guilty party in divorce actions, contrary to the statute of the forum, is interpreted as an expression of the public policy of the enacting State, then a subsequent remarriage in another jurisdiction is invalid in the enacting State, notwithstanding the *lex loci* of the second jurisdiction. *Andrews* v. *Andrews,* 188 U.S. 14; *Haddock* v. *Haddock,* 201 U.S. 564; *Georgia* v. *Tutty,* 41 Fed. 753; *Jackson* v. *Jackson,* 82 Md. 17; *Simmons* v. *Simmons,* 57 App.D.C. 216; *Pennegar* v. *Tennessee,* 87 Tenn. 244; *Williams* v. *Oates,* 27 N.C. 535; *In re Stulls Estate,* 183 Pa. 625; *Heflinger* v. *Heflinger,* 136 Va. 289. See also, Restatement of the Law of Contracts, Am.L.Inst., § 142, p. 181.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case is here on certiorari to the Court of Appeals of the District of Columbia. It is a suit in equity brought in the Supreme Court of the District in 1932, by Ruth Loughran, then resident there. The defendants are John Loughran and others, trustees of real estate there located. The estate of Daniel Loughran, Jr., deceased, is a beneficiary. The plaintiff alleges that she is Daniel's widow; and she seeks to enforce, as such, rights in the nature of dower and to recover unpaid alimony. She alleges that in 1926 she married Daniel in Florida after living there more than two years; that in 1927 she and her said husband established their domicile in Virginia; that in 1929, while they were residing in Virginia, she obtained there a decree of divorce from him *a mensa et thoro,* with an award of alimony payable monthly; and that in 1931, while she remained Daniel's wife, he died, leaving a part of the alimony unpaid.

The trustees defend on the ground that before her marriage to Daniel, the plaintiff had been married to Henry Daye; that in 1924, while she and Daye were domiciled in the District, he had secured there an absolute divorce for her adultery with Daniel; that being the guilty party, she was by § 966 of the Code of the District prohibited from remarrying; and that, having remarried in violation of the statute, she is not in a position to enforce in a court of the District the alleged rights in the estate of the deceased. A copy of the record of the Daye divorce proceeding is annexed to the answer.

Section 966 provides:

"A divorce from the bond of marriage may be granted only where one of the parties has committed adultery during the marriage: *Provided,* That in such case the

innocent party only may remarry, but nothing herein contained shall prevent the remarriage of the divorced parties to each other: . . ."

On motion of the plaintiff, the case was heard on bill and answer. The trial court entered a decree for the plaintiff in respect to the claim in the nature of dower. That decree was reversed by the Court of Appeals of the District. It ordered that the cause be remanded to the lower court for further proceedings not inconsistent with the opinion, 62 App.D.C. 262, 263; 66 F. (2d) 567, 569, saying:

" It is unnecessary for us to concern ourselves with the legality of the Florida marriage in that State, or with the subsequent divorce proceedings in the State of Virginia since the disposition of the case is dependent entirely upon the law of the District of Columbia. In so far as the law of the District is concerned, the marriage between plaintiff and Daniel Loughran, Jr., in Florida, if performed in the District of Columbia, would be absolutely void, and the plaintiff, being the offending party against the law of the District, is in no position to enforce any claim against the estate of Daniel Loughran, Jr., growing out of the marriage in Florida."

Disclaiming consideration of the doctrine of clean hands, the court added:

" Plaintiff, by her own unlawful conduct has placed herself without the pale of the law, and cannot be heard in a court of equity to take advantage of her own wrong."

The trustees insist that the bill was properly dismissed because the plaintiff, retaining her domicile in the District, went to Florida and married there in order to evade the prohibition of § 966. The plaintiff contends that the admitted facts constitute no defence; that because the marriage was legal in Florida, its legality should, under the established doctrines governing conflict of laws, have been recognized by the courts of the District; and, more-

over, that this was required by the full faith and credit clause, since the validity of the Florida marriage had been adjudicated by the Virginia decree of divorce *a mensa et thoro*.

First. Marriages not polygamous or incestuous, or otherwise declared void by statute,[1] will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction. *Meister* v. *Moore,* 96 U.S. 76; *Travers* v. *Reinhardt,* 205 U.S. 423, 440. The mere statutory prohibition by the State of the domicile either generally of the remarriage of a divorced person, or of remarriage within a prescribed period after the entry of the decree, is given only territorial effect. Such a statute does not invalidate a marriage solemnized in another State in conformity with the laws thereof.[2]

Second. We have no occasion to decide what the rights of the parties would be if it appeared that the plaintiff and her paramour, retaining at all times their domicile in the District, had gone to Florida for the purpose of evading § 966 by a marriage there; and had then returned to the District to live as man and wife.[3] It is argued that marriage within the District would have been illegal because prohibited by § 966; and that a marriage which would be illegal if entered into within the District must be treated under § 1287 as void, even if valid under the law of the State in which it was solemnized. But § 1287

[1] For collection of statutes see: Vernier, American Family Laws, §§ 32, 45, 92. Compare The American Law Institute, Restatement of Conflict of Laws, Proposed Final Draft No. 4, March 22, 1934, pp. 88–95.

[2] See *Commonwealth* v. *Lane,* 113 Mass. 458; *Dudley* v. *Dudley,* 151 Iowa 142; 130 N.W. 785; *In re Miller's Estate,* 239 Mich. 455; 214 N.W. 428.

[3] By the widely prevailing view, the marriage would, even under such circumstances, be held valid by the courts of the domicile in the absence of express provision to the contrary. For cases see Joseph H. Beale, et al., Marriage and Domicile, 44 Harv.L.Rev. 501, 514–517.

has no application to marriages in violation of the prohibition of § 966. Section 1287 provides:

"If any marriage declared illegal by the aforegoing sections shall be entered into in another jurisdiction by persons having and retaining their domicile in the District of Columbia, such marriage shall be deemed illegal, and may be decreed to be void in said District in the same manner as if it had been celebrated therein."

The sections preceding § 1287 relate solely to marriages void, because incestuous or polygamous, and to those which are voidable, because entered into by a person who was a lunatic, under the age of consent, or impotent, and those which are voidable because procured by force or fraud. In the case at bar, there is no suggestion of any such obstacle to the validity of the marriage. The only objection urged is that by marrying in Florida the plaintiff violated § 966. But the preceding sections do not refer to § 966; and they contain no reference to remarriage of divorced persons. Their only reference to divorce is in Paragraph Third of § 1283 which declares void:

"The marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce."

Since the plaintiff had been legally divorced from Daye in the District while the parties were domiciled there, and the decree became effective under § 983a unconditionally and irrevocably, she was thereafter an unmarried woman; and if she had cohabited with Daniel in the District after the Florida marriage she would not have been guilty of polygamy. *Commonwealth* v. *Lane,* 113 Mass. 458, 460, 462.

Moreover, it does not appear that the plaintiff and Daniel did retain their domiciles in the District after her divorce, or that after the Florida marriage they ever lived in the District as man and wife. The trustees argue that it must be assumed on the pleadings that plaintiff's resi-

dence in Florida and the marriage there were not in good faith.[4] But the bill alleged the good faith of the residence and marriage in Florida; and the answer contains no specific denial of that allegation. Nor does it contain any averment that the residence in Florida and marriage there were with the intent of evading the prohibition against remarriage.[5] The Court of Appeals did not pass upon the issue sought to be raised. It expressly disclaimed deciding whether the Florida marriage was valid or what the effect of the Virginia decree was. And the question whether the marriage in Florida should be deemed void within the District because the parties went to Florida to evade the prohibition of § 966 was not presented by the petition for a writ of certiorari.

Third. The Court of Appeals stated that "the single question for determination here is, whether or not plaintiff is entitled to her dower interest"; and it held that the bill should be dismissed, regardless of whether the marriage was valid under the law of Florida. The requisites of dower are a valid marriage; seizin of the husband; and his death. It may be assumed that the law of the situs of real estate determines whether a widow is entitled to dower. Compare *De Vaughan* v. *Hutchinson,* 165 U.S. 566, 570. But, if the marriage was valid under the laws of Florida, the plaintiff was, under established doctrines of the conflict of laws, Daniel's widow. As such she was entitled, as an incident of the marriage, to dower in the property within the District. For, while a statute of the

[4] The argument rests upon the phraseology of the answer and the equity rules of the Supreme Court of the District.

[5] The allegation is "that having openly and in utter disregard of the prohibition contained in said statute violated the terms thereof, she cannot now return to this jurisdiction and this Honorable Court and herein make application for relief with respect to the very situation and relationship which she could and did create only in direct violation of the prohibitory mandate of the statute."

District provides for forfeiture of dower in case of the wife's adultery during marriage;[6] none denies dower to a widow because she had been guilty of adultery prior to the marriage with her late husband.

Section 966 is not extra-territorial in its operation. It does not purport to prohibit remarriage outside the District; and no other statute denies dower to a widow because by remarrying elsewhere she had disregarded the prohibition contained in § 966. It does not make remarriage a crime, or in terms impose any penalty, even if contracted within the District; and obviously it could not make criminal remarriage elsewhere. Nor does it in terms declare the remarriage void. Apparently, it is the law of the District that a remarriage elsewhere in disregard of the prohibition of § 966, even where both parties remained domiciled in the District, is not void *ab initio,* but, at most, voidable; and that a voidable marriage cannot be annulled after the death of either spouse.[7]

No case has been found in which, independently of statutory direction, a widow has been denied dower on the ground that a remarriage, legal by the law of the place where celebrated, had been entered into in violation of some prohibition imposed by the law of the State in

[6] The Code of the District 1929, Title 14, § 30, declares: "If a wife willingly leave her husband, and go away, and continue with her advouterer, she shall be barred forever of action to demand her dower, that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion reconcile her, and suffer her to dwell with him in which case she shall be restored to her action."

[7] *Sammons* v. *Sammons* (S.C.D.C.), 46 W.L.R. 39, 41. See *Tyler* v. *Andrews,* 40 App.D.C. 100, 104; *Simmons* v. *Simmons,* 57 App.D.C. 216, 218–219; 19 F. (2d) 690, 692–3; *Abramson* v. *Abramson,* 60 App.D.C. 119, 121, 122; 49 F. (2d) 501, 503, 504. Compare *Dimpfel* v. *Wilson,* 107 Md. 329; 68 Atl. 561; *Bonham* v. *Badgley,* 7 Ill. 622.

which the divorce was granted and the property was situated.[8] Ordinarily the operation of a statute of descent and distribution is held not affected even by the fact that the death of the decedent was caused by a crime of the heir;[9] and, by the common law, dower is not barred even by misconduct during marriage. Since, as matter of substantive law, the plaintiff is entitled to dower in property within the District, if the marriage in Florida was valid, and its validity was assumed by the Court of Appeals, we have no occasion to consider whether the decree in the Virginia divorce proceedings made that matter *res judicata.*

Fourth. The relief sought by the bill includes, besides dower rights, a claim under the Virginia decree for the alimony which had accrued and remained unpaid at the time of Daniel's death. The right to recover the alimony is independent of the right to dower. It rests upon a judgment to which, so far as appears, full faith and credit must be given by the courts of the District. It is true that, under rules of law generally applicable, these courts may refuse to enforce a mere right of contract if it provides for doing within the District things prohibited by its laws. *Bothwell* v. *Buckbee, Mears Co.,* 275 U.S. 274, 278. It may, in the exercise of the police power, prohibit the enjoyment by persons within its borders of many rights acquired elsewhere and refuse to lend the aid of its courts to enforce them. *Home Insurance Co.* v. *Dick,* 281 U.S. 397, 410. But when rights, however arising, have ripened into a judgment of a court in another State, the full faith

[8] Compare *Putnam* v. *Putnam,* 8 Pick. 433; *Dickson* v. *Dickson's Heirs,* 1 Yerg. 110. See 18 C.J., p. 859, § 102.

[9] *McAllister* v. *Fair,* 72 Kan. 533; 84 Pac. 112; *Eversole* v. *Eversole,* 169 Ky. 793; 185 S.W. 487; *Gollnick* v. *Mengel,* 112 Minn. 349; 128 N.W. 292; *Holloway* v. *McCormick,* 41 Okla. 1; 136 Pac. 1111; *Johnson's Estate,* 29 Pa. Sup. Ct. 255.

and credit clause applies. *Fauntleroy* v. *Lum,* 210 U.S. 230; *Converse* v. *Hamilton,* 224 U.S. 243, 260; *Kenney* v. *Supreme Lodge,* 252 U.S. 411, 415. And courts of the District are bound, equally with courts of the States, to observe the command of the full faith and credit clause, wherever applicable. *Bradford Electric Light Co.* v. *Clapper,* 286 U.S. 145, 155. Thus, the facts stated afford no basis in the substantive law for dismissal of the bill so far as it seeks to recover unpaid alimony. Whether the fact that this claim has been presented also in the probate court constitutes a reason for denying relief here, was not discussed below, and on this matter we express no opinion.

Fifth. It remains to consider whether the denial of relief can be justified on some principle of adjective law. The Court of Appeals holds that the "plaintiff by her own unlawful conduct has placed herself without the pale of the law"; but it does not state specifically the ground for that conclusion. The bar applied is not the plea of illegality commonly interposed in suits brought to enforce contracts tainted by illegality. In those suits the illegality relied on is inherent in the cause of action; is directly connected with the relief sought; and constitutes a substantive defence. Here, the relation of the illegality to the relief sought is indirect and remote. The wrong done is a thing of the past and is collateral. By the long line of cases following *Connolly* v. *Union Sewer Pipe Co.,* 184 U.S. 540, it is settled that illegality constitutes no defense when merely collateral to the cause of action sued on. A "person does not become an outlaw and lose all rights by doing an illegal act." *National Bank & Loan Co.* v. *Petrie,* 189 U.S. 423, 425. Courts grant relief against present wrongs and to enforce an existing right, although the property involved was acquired by some past illegal act. *Brooks* v. *Martin,* 2 Wall. 70, 79, 80; *Planters' Bank* v. *Union Bank,* 16 Wall. 483, 499, 500.

The Court of Appeals, while it disclaimed acting on the doctrine of clean hands,[10] declared that *Olverson* v. *Olverson,* 54 App.D.C. 48; 293 Fed. 1015 (decided by it in 1923) is decisive of the case at bar. But both the facts and the relief sought are different in the two cases. In the first place, the parties in the *Olverson* case were at the time of the marriage domiciled in the District; remained so when they went to Baltimore for the marriage ceremony with the purpose of evading the prohibition of § 966; returned immediately thereafter to the District; and then lived in the District as man and wife. On the other hand, in the case at bar it does not appear that the plaintiff and Daniel were domiciled in the District at the time of the marriage; or that they went to Florida in order to evade the prohibition of § 966; or that during their marriage they lived in the District; or that they ever cohabited there as man and wife. In the second place, the *Olverson* suit was brought by a wife for a decree of divorce *a mensa et thoro* with a motion for alimony; and was dismissed on the ground that the plaintiff could not "ask the courts of this jurisdiction to relieve her of the obligations of a relation which she willfully and wrongfully assumed."

The suit at bar was brought after termination of the marriage by death to enforce existing property rights growing out of the marriage in Florida and the decree entered in Virginia. It was not brought to enforce any transaction had within the District; nor was it brought to enforce an illegal contract; or to further an illegal relation.[11] Equity does not demand that its suitors shall have led blameless lives. Neither the doctrine of clean

[10] It had stated in *Simmons* v. *Simmons,* 57 App.D.C. 216, 218; 19 F. (2d) 690, 693, that the *Olverson* case rested on the doctrine of clean hands.

[11] Compare *Western Union Telegraph Co.* v. *Union Pacific Ry. Co.,* 3 Fed. 423, 427–8; *Bateman* v. *Fargason,* 4 Fed. 32.

hands, nor any kindred principle on which courts refuse relief, is applicable here. The decree of the Court of Appeals is vacated and the cause remanded to it for further proceedings not inconsistent with this opinion.

Reversed.

McKNETT *v.* ST. LOUIS & SAN FRANCISCO RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 597. Argued March 12, 1934.—Decided April 30, 1934.

The Federal Constitution forbids that a State should close its courts to transitory causes of action against foreign corporations arising in other States under federal law (Federal Employers' Liability Act) while opening them to the litigation of all like transitory causes arising in other States under state law. P. 232.

227 Ala. 349; 149 So. 822, reversed.

CERTIORARI, 290 U.S. 621, to review the affirmance of a judgment for the railway company in an action for damages.

Mr. J. Kirkman Jackson, with whom *Mr. Walter S. Brower* was on the brief, for petitioner.

Mr. L. D. Gardner, Jr., for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This action was brought under the Federal Employers' Liability Act, in the Circuit Court of Jefferson County, Alabama, to recover damages for an injury suffered in Tennessee. The plaintiff, McKnett, is a resident of Tennessee. The defendant, St. Louis & San Francisco Railway Company, is a foreign corporation doing business in Alabama. It pleaded in abatement that the court lacked jurisdiction, since the cause of action had arisen wholly

in Tennessee and did not arise by the common law or statute of that State. The plea rested upon the limiting words of the Act of 1907, now embodied in § 5681, Code of 1923, which declares:

"Whenever, either by common law or the statutes of another state, a cause of action, either upon contract or in tort, has arisen in such other state against any person or corporation, such cause of action shall be enforcible in the courts of this state, in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state."

A demurrer to the plea was overruled; and the judgment entered thereon for the defendant was affirmed by the highest court of the State. 227 Ala. 349; 149 So. 822. This Court granted certiorari.

The courts of Alabama have, at all times, taken jurisdiction of suits between natural persons on transitory causes of action arising in another state, even if both of the parties were non-residents of Alabama.[1] But prior to the Act of 1907, it had been consistently held, under the rule established by *Central Railroad & Banking Co.* v. *Carr*, 76 Ala. 388, that no Alabama court had jurisdiction of any suit against a foreign corporation unless the cause of action had arisen within the State.[2] In the case at bar, the court held that, despite the 1907 Act, lack of

[1] *Steen* v. *Swadley*, 126 Ala. 616, 621; 28 So. 620. *Lee* v. *Baird*, 139 Ala. 526; 36 So. 720. Compare *Smith* v. *Gibson*, 83 Ala. 284; 3 So. 321.

[2] The conclusion seems to have been reached largely as a matter of statutory construction. *Pullman Palace Car Co.* v. *Harrison*, 122 Ala. 149, 153–155; 25 So. 697; *Steen* v. *Swadley*, 126 Ala. 616, 622; 28 So. 620; compare *Lee* v. *Baird*, 139 Ala. 526, 529; 36 So. 720. Apparently the rule was applied whether the plaintiff was a resident or a non-resident. See *Louisville & Nashville R. Co.* v. *Dooley*, 78 Ala. 524; compare *Iron Age Publishing Co.* v. *Western Union Telegraph Co.*, 83 Ala. 498, 505–6; 3 So. 449.

jurisdiction still existed in respect to causes of action arising in another state under the federal law; because, since the statute was in plain terms limited to suits arising under the law of the other state, it could not be extended by construction to include causes of action arising in such other state under a federal law.

The plaintiff contends that by refusing to entertain jurisdiction, the state court has denied him a right expressly conferred by Congress and guaranteed by the Federal Constitution. The defendant insists that the statute as construed is consistent with the Federal Constitution; since a state may determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them; *Anglo-American Provision Co.* v. *Davis Provision Co., No. 1,* 191 U.S. 373; *Chambers* v. *Baltimore & Ohio R. Co.,* 207 U.S. 142, 148–9; and the extent to which its courts shall become a forum for the trial of transitory causes of action arising in other states. *Missouri Pacific R. Co.* v. *Clarendon Boat Oar Co.,* 257 U.S. 533; *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U.S. 377.

Alabama has granted to its circuit courts general jurisdiction of the class of actions to which that here brought belongs, in cases between litigants situated like those in the case at bar.[3] The court would have had jurisdiction of the cause between these parties if the accident had occurred in Alabama. It would have had jurisdiction although the accident occurred in Tennessee, if the defendant had been a domestic corporation. It would have had jurisdiction, although the defendant was a foreign corporation, the plaintiff a nonresident, and the accident

[3] Compare *Western Union Telegraph Co.* v. *Pleasants,* 46 Ala. 641; *Equitable Life Assurance Society* v. *Vogel's Executrix,* 76 Ala. 441; *Southern Ry. Co.* v. *Jordan,* 192 Ala. 528, 529; 68 So. 418; *National Council* v. *Hill,* 208 Ala. 63; 93 So. 812; *Jefferson Island Salt Co.* v. *E. J. Longyear Co.,* 210 Ala. 352, 355; 98 So. 119.

occurred in Tennessee, if the suit had been brought for an injury suffered while engaged in intrastate commerce. Thus, the ordinary jurisdiction of the Alabama circuit court is appropriate to enforce the right against this defendant conferred upon the plaintiff by the Federal Employers' Liability Act. And its jurisdiction was invoked according to the rules of procedure prevailing in that court.

The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. *Corfield* v. *Coryell,* 4 Wash.C.C. 371, 381. Compare *Canadian Northern Ry. Co.* v. *Eggen,* 252 U.S. 553. The full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy. *Fauntleroy* v. *Lum,* 210 U.S. 230; *Kenney* v. *Supreme Lodge,* 252 U.S. 411, 415; *Loughran* v. *Loughran,* decided this day, *ante,* p. 216. By *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U.S. 1, an action in a Connecticut court against a domestic corporation, it was settled that a state court whose ordinary jurisdiction as prescribed by local laws is appropriate for the occasion, may not refuse to entertain suits under the Federal Employers' Liability Act.

While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U.S. 377, 387, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal

law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.

Reversed.

LOCAL LOAN CO. *v.* HUNT.

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

No. 783. Argued April 4, 5, 1934.—Decided April 30, 1934.

1. A court of bankruptcy has jurisdiction by ancillary proceedings to enforce an order of discharge by enjoining the prosecution of suits brought against the debtor. P. 239.
2. Such a proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and nothwithstanding the provisions of § 265 of the Judicial Code; R.S., § 720; 28 U.S.C., § 379. P. 239.
3. Where the legal remedy of setting up a discharge as a defense in an action involving the rights of the bankrupt under it, would entail not only his intervention in a state court of first instance, but also, because of previous decisions of the State Supreme Court, a succession of appeals, causing disproportionate trouble, embarrassment, expense and possible loss to the bankrupt, *held* that the remedy was inadequate, and that the equitable jurisdiction of the court of bankruptcy by way of an ancillary suit for injunction was properly engaged. P. 241.
4. An assignment of future-earned wages to secure a loan, *held* not a lien within the meaning of § 67 (d) of the Bankruptcy Act. P. 242.
5. That such an assignment, even if a lien under the state law, should survive the discharge of the debt in bankruptcy, would be contrary to the policy of the Bankruptcy Act to free the debtor; and so it must be held, where the suit is ancillary in the bankruptcy court to enforce the discharge, though the decisions of the state court be to the contrary. P. 244.

67 F. (2d) 998, affirmed.

CERTIORARI, 291 U.S. 657, to review the affirmance of a decree by a court of bankruptcy enjoining prosecution of a suit in a state court.

Mr. Frederic Burnham, with whom *Messrs. David F. Rosenthal, Orville W. Lee,* and *Richard Mayer* were on the brief, for petitioner.

It is not within the jurisdiction of a bankruptcy court, after granting a discharge in bankruptcy, to adjudicate the effect of such discharge upon a claim or demand made against the bankrupt by a person not a party to the bankruptcy proceedings. *In re Marshall Paper Co.,* 102 Fed. 872; *Hellman* v. *Goldstone,* 161 Fed. 913; *In re Havens,* 272 Fed. 975; *In re DeLauro,* 1 F.Supp. 678; *In re Madden,* 257 Fed. 581; *In re Weisberg,* 253 Fed. 833; *In re Lockwood,* 240 Fed. 161; *In re Levitan,* 224 Fed. 241; *In re McCarty,* 111 Fed. 151; *In re Rosenthal,* 108 Fed. 368; *In re Mussey,* 99 Fed. 71; *In re Black,* 97 Fed. 493. Contra: *Sims* v. *Jamison,* 67 F. (2d) 409.

A bankruptcy court has no right to oust, by permanent injunction, the prior possession by a court of general jurisdiction of a suit brought against a bankrupt after discharge upon an obligation from which the bankrupt claims to have been freed by his discharge. Jud. Code, § 265; *Peck* v. *Jeness,* 7 How. 612; *Metcalf* v. *Barker,* 187 U.S. 165; *Hull* v. *Burr,* 234 U.S. 712; *Phelps* v. *Mutual Reserve Fund Life Assn.,* 112 Fed. 453, aff'd, 190 U.S. 147.

The injunction in this case does not come within the scope of the express exception to Jud. Code, § 265, by reason of being authorized by any provision of the Bankruptcy Act. §§ 2 (15), 11 (a); *Hull* v. *Burr,* 234 U.S. 712.

By the above section courts of bankruptcy are not invested with general equitable jurisdiction, but only such equitable powers as are necessary to carry out their stat-

utory jurisdiction in bankruptcy matters. *Bardes* v. *Hawarden Bank,* 178 U.S. 524; *In re Judith Gap Commercial Co.,* 5 F. (2d) 307.

Bankruptcy courts have no jurisdiction to adjudicate the rights of one who claims, adversely to the bankrupt, property not in the court's possession, even though it is part of the bankrupt's estate. Such an adverse claim must be litigated in a plenary proceeding in a court of general jurisdiction. *Bardes* v. *Hawarden Bank,* 178 U.S. 524; *Louisville Trust Co.* v. *Comingor,* 184 U.S. 18; *Harris* v. *First Nat. Bank,* 216 U.S. 382; *Galbraith* v. *Valley,* 256 U.S. 46; *Harrison* v. *Chamberlin,* 271 U.S. 191.

An assignee claiming wages earned subsequent to adjudication is an adverse claimant within the foregoing rule. *Progressive Bldg. & Loan Co.* v. *Hall,* 220 Fed. 45; *Copeland* v. *Martin,* 182 Fed. 805.

The wages in this case were earned after adjudication and therefore were not even part of Hunt's estate in bankruptcy. Bankruptcy courts have no power to entertain or enjoin litigation between a bankrupt and a third party with respect to property not a part of the bankrupt's estate. *Duffy* v. *Tegeler,* 19 F. (2d) 305; *Roden Grocery Co.* v. *Bacon,* 133 Fed. 515; *In re Amy,* 263 Fed. 8; *In re Rashbaum,* 4 F.Supp. 724.

A stay under § 11 (a) can not delay the prosecution of a suit longer than the determination of the application for a discharge. *In re Byrne,* 296 Fed. 98; *In re Federal Biscuit Co.,* 214 Fed. 221. The protection extended to bankrupts under that section expires with the granting or refusal of a discharge. *In re DeLauro,* 1 F.Supp. 678; *In re Lockwood,* 240 Fed. 161.

Since no power in the District Court to issue the injunction in this case is expressed in or can be implied from any provisions of the Bankruptcy Act, the injunction must be one which comes directly within the prohibitive language of § 265 of the Judicial Code. Such conclusion is

the only one compatible with the fundamental principles of comity upon which § 265 is based. *Phelps* v. *Mutual Reserve Fund Life Assn.*, 112 Fed. 453, aff'd, 190 U.S. 147.

A bankruptcy court may not disregard the decisions of the highest court of a State in determining whether in that State an assignment of future wages creates such a lien as is preserved from discharge in bankruptcy by § 67 (d) of the Bankruptcy Act. *Peck* v. *Jeness,* 7 How. 612; *Dooley* v. *Pease,* 180 U.S. 126; *Thompson* v. *Fairbanks,* 196 U.S. 516; *Humphrey* v. *Tatum,* 198 U.S. 91; *Hiscock* v. *Varick Bank,* 206 U.S. 28; *Benedict* v. *Ratner,* 268 U.S. 353; *In re Robert Jenkins Corp.,* 17 F. (2d) 555; *In re Simpson,* 35 F. (2d) 840; *Sims* v. *Jamison,* 67 F. (2d) 409.

In view of the cases cited above, it can not be supposed that this Court has ever considered that the doctrine of *Swift* v. *Tyson,* 16 Pet. 1, applies in a bankruptcy case where the nature and extent of a lien are in question.

The Supreme Court of Illinois holds that in Illinois an assignment of future wages creates such a lien as gives the assignee a vested property right from the date of the assignment, and that such a lien is within the terms of § 67 (d) of the Bankruptcy Act, and is therefore not invalidated by the assignor's discharge in bankruptcy. *Mallin* v. *Wenham,* 209 Ill. 252; *Monarch Discount Co.* v. *C. & O. Ry. Co.,* 285 Ill. 233.

The most representative statement of the supposed impossibility of a lien upon unearned wages is found in *Seaboard Small Loan Corp.* v. *Ottinger,* 50 F. (2d) 856.

The notion that there can be no lien upon something which does not exist is demonstrably fallacious. Even at common law a lien upon live stock attached to the increase thereof. In many States mortgages of after-acquired chattels are perfectly valid. In some States mortgages of unplanted crops are valid. *Butt* v. *Ellett,* 19 Wall. 544; *Sims* v. *Jamison,* 67 F. (2d) 409.

Unearned wages in an existing employment are not distinguishable in nature from other types of property having no actual existence, but having a potential existence sufficient to enable them to be ear-marked and subjected to rights of ownership which will attach to them as soon as they come into existence.

Mr. Lloyd A. Faxon for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On September 17, 1930, respondent borrowed from petitioner the sum of $300, and as security for its payment executed an assignment of a portion of his wages thereafter to be earned. On March 3, 1931, respondent filed a voluntary petition in bankruptcy in a federal district court in Illinois, including in his schedule of liabilities the foregoing loan, which constituted a provable claim against the estate. Respondent was adjudicated a bankrupt; and, on October 10, 1932, an order was entered discharging him from all provable debts and claims. On October 18, 1932, petitioner brought an action in the municipal court of Chicago against respondent's employer to enforce the assignment in respect of wages earned after the adjudication. Thereupon, respondent commenced this proceeding in the court which had adjudicated his bankruptcy and ordered his discharge, praying that petitioner be enjoined from further prosecuting said action or attempting to enforce its claim therein made against respondent under the wage assignment. The bankruptcy court, upon consideration, entered a decree in accordance with the prayer; and this decree on appeal was affirmed by the court below, 67 F. (2) 998, following its decision in *In re Skorcz*, 67 F. (2d) 187.

Challenging this decree, petitioner contends: That the bankruptcy court was without jurisdiction to entertain

a proceeding to enjoin the prosecution of the action in the municipal court; that, assuming such jurisdiction, the rule is that an assignment of future wages constitutes an enforceable lien; but that, in any event, the highest court of the State of Illinois has so decided, and by that decision this court is bound.

First. The pleading by which respondent invoked the jurisdiction of the bankruptcy court in the present case is in substance and effect a supplemental and ancillary bill in equity, in aid of and to effectuate the adjudication and order made by the same court. That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. *Root* v. *Woolworth,* 150 U.S. 401, 410–412; *Julian* v. *Central Trust Co.,* 193 U.S. 93, 112–114; *Riverdale Mills* v. *Manufacturing Co.,* 198 U.S. 188, 194 *et seq.; Freeman* v. *Howe,* 24 How. 450, 460. And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of § 265 of the Judicial Code (R.S., § 720), U.S.C., Title 28, § 379.[1] *Julian* v. *Central Trust Co., supra,* 112; *Dietzsch* v. *Huidekoper,* 103 U.S. 494, 497; *Root* v. *Woolworth, supra,* 413; *M'Donald* v. *Seligman,* 81 Fed. 753; *St. Louis, I. M. & S. Ry. Co.* v. *Bellamy,* 211 Fed. 172, 175–177; *Brun* v. *Mann,* 151 Fed. 145, 150.

[1] "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

These principles apply to proceedings in bankruptcy. *In re Swofford Bros. Dry Goods Co.,* 180 Fed. 549, 554; *Sims* v. *Jamison,* 67 F. (2d) 409, 410; *Pell* v. *M'Cabe,* 256 Fed. 512, 515–516; *Seaboard Small Loan Corp.* v. *Ottinger,* 50 F. (2d) 856, 859. Petitioner relies upon a number of decisions where other federal courts sitting in bankruptcy have declined to entertain suits similar in character to the present one, on the ground that the effect of a discharge in bankruptcy is a matter to be determined by any court in which the discharge may be pleaded. See, for example, *Hellman* v. *Goldstone,* 161 Fed. 913; *In re Marshall Paper Co.,* 102 Fed. 872, 874; *In re Weisberg,* 253 Fed. 833, 835; *In re Havens,* 272 Fed. 975. To the extent that these cases conflict with the view just expressed they are clearly not in harmony with the general rule in equity announced by this court. And we find nothing, either in the nature of the bankruptcy court or in the terms of the bankruptcy act, which necessitates the application of what would amount to a special rule on this subject in respect of bankruptcy proceedings. Courts of bankruptcy are constituted by §§ 1 and 2 of the bankruptcy act (U.S.C., Title 11, §§ 1 and 11), and are invested " with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings," etc. The words " at law " were probably inserted to meet clause (4) of § 2, which empowers such courts to arraign, try and punish certain designated persons for violations of the act. *Bardes* v. *Hawarden Bank,* 178 U.S. 524, 534–536. But otherwise courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity. *Bardes* v. *Hawarden Bank, supra,* 535; *In re Rochford,* 124 Fed. 182, 187; *In re Siegel-Hillman Dry Goods Co.,* 111 Fed. 980, 983; *Swarts* v. *Siegel,* 117 Fed. 13, 16; *Dodge* v. *Norlin,* 133 Fed. 363, 368–369; *In re Swofford Bros. Dry Goods Co., supra,* at p. 553; *In re Lahongrais,* 5 F. (2d) 899, 901; *French* v.

Long, 42 F. (2d) 45, 47. And, generally, proceedings in bankruptcy are in the nature of proceedings *in rem*, adjudications of bankruptcy and orders of discharge being, as this court clearly has treated them, in every essential particular decrees in equity determining a *status*. *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 192; *Commercial Bank of Manchester* v. *Buckner*, 20 How. 108, 118, 119.

What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order, and enjoin petitioner from its threatened interference therewith. It does not follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstances such as here exist. So far as appears, the municipal court was competent to deal with the case. It is true that respondent was not a party to that litigation; but undoubtedly it was open to him to intervene and submit to that court the question as to the effect upon the subject matter of the action of the bankruptcy decrees. And it may be conceded that the municipal court was authorized in the law action to afford relief the equivalent of that which respondent now seeks in equity. Nevertheless, other considerations aside, it is clear that the legal remedy thus afforded would be inadequate to meet the requirements of justice. As will be shown in a moment, the sole question at issue is one which the highest court of the State of Illinois had already resolved against respondent's contention. The alternative of invoking the equitable jurisdiction of the bankruptcy court was for respondent to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined. The

amount in suit is small, and, as pointed out by Judge Parker in *Seaboard Small Loan Corp.* v. *Ottinger, supra,* at p. 859, such a remedy is entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involves.

Second. Whether an assignment of future earned wages constitutes a lien within the meaning of § 67 (d) of the bankruptcy act,[2] is a matter upon which the decisions of the state and federal courts are not in complete accord; although by far the larger number of cases and the greater weight of authority are in the negative. We do not stop to review the state decisions. Among those which deny the existence of the lien are *Leitch* v. *Northern Pacific Ry. Co.,* 95 Minn. 35, 38; 103 N.W. 704; *Levi* v. *Loevenhart & Co.,* 138 Ky. 133, 136; 127 S.W. 748; *Public Finance Co.* v. *Rowe,* 123 Ohio St. 206; 174 N.E. 738; *Hupp* v. *Union Pac. R. Co.,* 99 Neb. 654; 157 N.W. 343. The only state cases definitely to the contrary which have been called to our attention are certain Illinois cases, mentioned later, and *Citizens Loan Assn.* v. *Boston & Maine R. Co.,* 196 Mass. 528; 82 N.E. 696. The lower federal courts which have had occasion to consider the question concur in the view that the lien has no existence or is ineffective as against an adjudication and discharge in bankruptcy. Judge Bellinger, in *In re West,* 128 Fed. 205, succinctly stated the ground of his ruling in accordance with that view as follows:

"The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended

[2] "Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act." U.S.C. Title 11, § 107 (d).

as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors."

This conclusion finds ample support in the following decisions among others. *In re Home Discount Co.,* 147 Fed. 538, 547 *et seq.; In re Lineberry,* 183 Fed. 338; *In re Voorhees,* 41 F. (2d) 81; *In re Fellows,* 43 F. (2d) 122; *In re Potts,* 54 F. (2d) 144; and especially *Seaboard Small Loan Corp.* v. *Ottinger, supra.*

The earning power of an individual is the power to create property; but it is not translated into property within the meaning of the bankruptcy act until it has brought earnings into existence. An adjudication of bankruptcy, followed by a discharge, releases a debtor from all previously incurred debts, with certain exceptions not pertinent here; and it logically cannot be supposed that the act nevertheless intended to keep such debts alive for the purpose of permitting the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective or even arising from, or connected with, pre-existing property, but brought into being solely as the fruit of the subsequent labor of the bankrupt.

Third. To the foregoing array of authority petitioner opposes the decisions of the Supreme Court of Illinois in *Mallin* v. *Wenham,* 209 Ill. 252; 70 N.E. 564, and *Monarch Discount Co.* v. *C. & O. Ry. Co.,* 285 Ill. 233; 120 N.E. 743. Undoubtedly, these cases hold, as petitioner asserts, that in Illinois an assignment of future wages creates a lien effective from the date of the assignment which is not invalidated by the assignor's discharge in bankruptcy. The contention is that even if the general rule be otherwise, this court is bound to follow the Illinois

decisions, since the question of the existence of a lien depends upon Illinois law.

We find it unnecessary to consider whether this contention would in a different case find support in § 34 of the Judiciary Act of 1789, now § 725, Title 28, U.S.C.,[3] since we are of opinion that it is precluded here by the clear and unmistakable policy of the bankruptcy act. It is important to bear in mind that the present case is one not within the jurisdiction of a state court, but is a dependent suit brought to vindicate decrees of a federal court of bankruptcy entered in the exercise of a jurisdiction essentially federal and exclusive in character. And it is that situation to which we address ourselves, and to which our decision is confined.

One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Williams* v. *U.S. Fidelity & G. Co.,* 236 U.S. 549, 554–555. This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy,* a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt. *Stellwagen* v. *Clum,* 245 U.S. 605, 617; *Hanover National Bank* v. *Moyses, supra; Swarts* v. *Fourth National Bank,* 117 Fed. 1, 3; *United States* v. *Hammond,* 104 Fed. 862, 863; *Barton Bros.* v. *Texas Produce Co.,* 136 Fed. 355, 357; *Hardie* v. *Swafford Bros. Dry Goods Co.,* 165 Fed. 588, 591; *Gilbert* v.

[3] "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Shouse, 61 F. (2d) 398. The various provisions of the bankruptcy act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act. Local rules subversive of that result cannot be accepted as controlling the action of a federal court.

When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern. From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either. The amount of the indebtedness, or the proportion of wages assigned, may here be small, but the principle, once established, will equally apply where both are very great. The new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy. Confining our determination to the case in hand, and leaving prospective liens upon other forms of acquisitions to be dealt with as they may arise, we reject the Illinois decisions as to the effect of an assignment of wages earned after bankruptcy as being destructive of the purpose and spirit of the bankruptcy act.

Decree affirmed.

OLSON *v.* UNITED STATES.*

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

No. 580. Argued March 9, 1934.—Decided April 30, 1934.

1. By the Fifth and Fourteenth Amendments of the Federal Constitution, as also under Art. I, § 13 of the Constitution of Minnesota, appropriation of private property for a public use is forbidden unless a full and exact equivalent be returned to the owner. P. 254.
2. That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. P. 255.
3. The sum required to be paid the owner of land does not depend upon the uses to which he has devoted it but is to be ascertained upon just consideration of all the uses for which it is suitable. P. 255.
4. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. P. 256.
5. But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. P. 256.
6. Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration. P. 257.
7. Dams constructed for power and other purposes at the outlet of the Lake of the Woods in Canada had raised the water-level on the shore lands, situate in Canada and Minnesota. Arrangement was made by treaty for maintaining the level, under control of both Governments, to a designated contour in the interests of navigation as well as power production and other uses. For the costs of acquiring the easement of flowage within its territory, the United

* Together with No. 581, *Karlson* v. *United States;* and No. 582, *Brewster* v. *United States.*

States assumed all liability to private landowners. In a suit to condemn such rights in Minnesota, brought under the Act of May 22, 1926, as amended, to carry out the treaty, *held:*

(1) That the use of Minnesota shore lands for reservoir purposes, as the result of the trespass committed by means of the dams, showed merely their physical adaptability to such purposes but did not affect their market value. P. 256.

(2) Having regard to the fact that the lands bordering the Lake and its islands, upon which flowage easements must be acquired to make lawful the raising of the level, are situate in two countries, and are held by very numerous private owners, by Indian Tribes and by sovereign proprietors, there is no legal and practical possibility that any person—other than the expropriating authority—could acquire those easements. Therefore there was no element of value belonging to the landowners that could legitimately be attributed to use and adaptability of their lands for reservoir purposes; and evidence of competition between power companies for purchase of flowage rights from private owners, and of prices paid, and of estimates or opinions based, upon the assumption that value to owners includes elements arising from the prospect of the Government's acquiring the flowage rights, was properly rejected. *Boom Co.* v. *Patterson,* 98 U.S. 403, distinguished. Pp. 557, 560.

8. A point not made in the specification of errors or in the reasons given in the petition for certiorari, is not properly before the Court. P. 262.

9. Under the Act of May 22, 1926, providing for acquisition of flowage easements on lands in Minnesota bordering upon the Lake of the Woods in Minnesota, claims for damages caused by unlawful floodings prior to the taking are not included in the condemnation proceedings but are to be dealt with by the Secretary of War under § 3 of the statute. P. 262.

67 F. (2d) 24, affirmed.

CERTIORARI, 290 U.S. 623, to review the affirmance of judgments in three condemnation cases which were tried together before a jury.

Mr. I. K. Lewis, with whom *Messrs. C. E. Berkman* and *John H. Hougen* were on the brief, for petitioners.

Mr. Harry H. Peterson, Attorney General of Minnesota, and *Mr. David J. Erickson,* Assistant Attorney General, joined in petitioners' brief on behalf of the State of Minnesota.

Mr. Charles Bunn, with whom *Solicitor General Biggs* and *Assistant Attorney General Blair* were on the brief, for the United States.

Mr. George Wharton Pepper, with whom *Mr. John E. Read* was on the brief, for the Government of Canada.

Mr. Justice Butler delivered the opinion of the Court.

These cases arise in a condemnation proceeding instituted by the United States in the federal district court for Minnesota to acquire easements of flowage upon lands bordering upon the Lake of the Woods in that State. The only substantial question is whether, on the facts disclosed by the record and others of which judicial notice may be taken, the actual use and special adaptability of petitioners' shorelands for the flowage and storage of water, that *inter alia* will be available for the generation of power, may be taken into consideration in ascertaining the just compensation to which petitioners are entitled.

The superficial area of the Lake of the Woods is between fourteen and fifteen hundred square miles; it lies in Minnesota, Ontario and Manitoba. Many streams flow into it. The Rainy River and Warroad River are the largest of those touching Minnesota. The former, coming from the east along the international boundary, drains a very large territory lying on both sides of the line. The latter, not so large, coming from the south, drains a considerable area within Minnesota and empties into the southwesterly part of the lake. The outlets of the lake are in Canada; they combine to make the Winnipeg, a great river, flowing northwesterly to Lake Winnipeg. In 1898 a Canadian corporation, by agreement with the

Crown, put in operation the Norman dam for the control of outflow down the Winnipeg. Since the construction of this dam and in consequence of it and other dams in the outlets, shorelands, in disregard of the rights of owners, have been intermittently flooded for the impounding of water used in Canada for the generation of power and other purposes.

In 1909 the United States and Great Britain made a treaty which (Art. VIII) created an international joint commission and conferred upon it jurisdiction in terms broad enough to include cases involving the elevation of the Lake of the Woods as the result of these dams. 36 Stat. 2451. In 1912 questions arising out of the raising of the lake were referred to the commission; and after hearings and extensive studies it made its final report in 1917. The United States and Great Britain then consummated the treaty of 1925, which provides (Article VIII): "A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement." [1]

[1] Article IX provides: "The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

"Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

Article X contains the following: "In consideration, however, of the undertakings of the United States as set forth in Article VIII, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost over the said sum shall, if the expenditure be in-

By an Act to carry into effect the provisions of the last mentioned treaty (Act of May 22, 1926, 44 Stat. 617, as amended April 18, 1928, 45 Stat. 431) Congress directed the Secretary of War to acquire by purchase or condemnation flowage easements up to the specified elevation upon all lands in Minnesota bordering upon the Lake of the Woods, the Warroad River and the Rainy River, and that compensation should be made in accordance with the Constitution of Minnesota, which declares (Article I, § 13): "Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured." Commissioners appointed to ascertain the damages sustained by the several owners by reason of such taking made their awards. The United States and these petitioners appealed. The cases were tried together, the jury returned verdicts for the amounts to which petitioners were found severally entitled, and judgments were entered accordingly.[2] Petitioners ap-

curred within five years of the coming into force of the present Convention, be paid by the Government of Canada."

Treaty of February 24, 1925, 44 Stat. 2108.

[2] Petitioner Olson, as stated in the condemnation petition, owns, as part of a homestead, 55.21 acres below contour 1064. He claimed $300 per acre, making in all $16,563. The commissioners awarded $1,296.50, including $40 for damage to dock and wharf. The jury's verdict was $490.

Petitioner Karlson, as stated in the condemnation petition, owns 163.65 acres below contour 1064. It lies in two parcels, one of which, 120 acres, he bought in 1921 for $175, or about $1.45 per acre. He claimed $275 per acre, or a total of about $44,000. The commissioners made but one award, $3,660. The jury's verdict was $880.

Petitioner Brewster, as stated in the condemnation petition, owns as part of his homestead 98.55 acres (exhibits indicate this should be about 156 acres) below contour 1064. Though contiguous, it is listed as three parcels. He claimed $300 per acre, making in all $46,965. The commissioners awarded $640.70 for one parcel of 32.15 acres and $3,195.80 for the remainder, about 124 acres, making in all $3,836.50. The jury's verdict for all three was $900.

pealed. The Circuit Court of Appeals affirmed. 67 F. (2d) 24.

At the trial petitioners sought to have just compensation ascertained on the theory that the flooding of their lands (for brevity called "use for reservoir purposes"), the circumstances which make them specially adaptable for that use, and the fact that prior to condemnation such adaptability had increased their market value, should be considered by the jury in determining just compensation. And, in order to establish a basis on which to rest that submission, petitioners offered to prove the following facts:

There are valuable power sites at the outlets and in the Winnipeg river which cannot be fully developed without flooding the shorelands. The industries using these waters to produce power are well established and financially responsible. Demand for electricity there produced will increase. The raising of the lake level creates a storage reservoir, of which petitioners' lands form a part, that serves to increase potential capacity by about 200,000 continuous horse power, which is worth more than one million dollars annually. Competition exists for the right to develop and control that capacity, the value of which is so great that one or another of the competitors would have acquired the flowage rights if the United States had not done so. It is entirely practicable for private enterprises to acquire flowage easements. Publicity, long given to the great value of the lake as a storage reservoir, created a demand and affected the market value of shorelands needed for that purpose. And, in connection with the facts above stated, petitioners offered to prove the fair market values of their lands before and after the imposition of the flowage easement, taking into consideration all the facts and circumstances affecting market prices.

Respondent, having obtained leave to establish foundation for objection to petitioners' offers to prove, introduced evidence of the following facts:

The main shore line of the Lake of the Woods, including the affected reaches of the Rainy river, exceeds 1035 miles, of which more than 110 are in Minnesota. There are in the lake a number of islands of a mile or over in length and approximately 10,000 smaller ones. The shorelines of the islands exceed 1180 miles, of which about 20 miles are in Minnesota. Below sea-level datum 1064, established by the treaty, there are about 850 parcels owned by more than 775 individuals. If mortgagees and other claimants are counted, the number to be dealt with is not less than 1225 persons. Of these, only 496 live on or near the land, 186 live elsewhere in Minnesota, and 123 in other parts of the United States and Canada. The addresses of 401 are unknown. The United States owns a considerable part—about one-fifth—of the shore line in Minnesota. Small areas are held under homestead entries. The State of Minnesota owns a small piece subject to contracts of sale.

And it was made to appear:

None of the 35 miles of shore lands in Manitoba, of which about 14,427 acres lie below contour 1064, are privately owned. In 1915 they were reserved by the Dominion in anticipation of action by the International Joint Commission to regulate lake levels, and in 1930 they were transferred to the Province. In Ontario more than 700 persons own shorelands. In 1920 that Province, in accordance with the recommendations of the Commission, withdrew its lands below the established level—about 13,043 acres—from private entry. On the Canadian side about 40 Indian reservations include 8,600 acres below the established level along about 250 miles of shore line. These lands may be disposed of only with the assent of a majority of the male members of the band of the full age

of 21 years, at a meeting summoned for that purpose according to the rules of the band, and subject to the approval of governmental authority.

The Lake of the Woods is one of the water communications which by the Webster-Ashburton Treaty is required to be free and open to the use of the citizens and subjects of both countries. Its usefulness for navigation is a matter of great concern. The United States is interested in navigation and in the protection of owners of shore lands on the American side rather than in the development of power in Canada. The levels controlled by dams in the outlets were regulated by Canadian authority until the creation of an international regime in pursuance of the Treaty of 1925. Regulation has not been exclusively for the production of power but, so far as practicable, for the protection of all interests, including navigation, logging, domestic use of water, irrigation and power.

The trial judge, being of opinion that under the circumstances neither the use nor the special adaptability of petitioners' lands for reservoir purposes could be considered in determining their market value, excluded the evidence offered by the petitioners. He instructed the jury first to determine as to each piece of land its fair market value on May 4, 1929—before the easement was imposed—taking into consideration the fact that prior to the taking the Government had the right to maintain the level of the lake up to 1059 sea-level datum (that may be taken as the natural level); next to find the fair market value after the taking, and that the difference is the amount for which the Government is liable. To guide the jury in the ascertainment of such values, the court charged: "You will take into consideration all of the uses for which the property was available on May 4, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not

make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands." The court suggested that petitioner Olson's lands might be used for fishing purposes and instructed the jury, if it so found, to "add to the value which it might have for agricultural purposes, any added value which might accrue to it, because of its usefulness as a fishing station." Under these instructions the Government was not entitled to, and it has not claimed, lesser awards because of diminution of value caused by the unauthorized flooding of petitioners' lands. The owners were severally entitled to the compensation then due as if no such trespass had been committed.

The rule prescribed by the Minnesota constitution is not, at least so far as concerns these cases, to be distinguished from that expressed by the just compensation clause of the Fifth Amendment and implied in the due process clause of the Fourteenth Amendment to the Federal Constitution. The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 324: "In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." The statement in that opinion (p. 326) that "no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned

to the owner" aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 399.

That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line Ry.* v. *United States,* 261 U.S. 299, 306. *Jacobs* v. *United States,* 290 U.S. 13, 17. 2 Lewis, Eminent Domain, 3d ed., § 682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. *Vogelstein & Co.* v. *United States,* 262 U.S. 337, 340. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions. *Minnesota Rate Cases,* 230 U.S. 352, 454.

Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson,* 98 U.S. 403, 408. *Clark's Ferry Bridge Co.* v.

Public Service Comm'n, 291 U.S. 227. 2 Lewis, Eminent Domain, 3d ed., § 707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., § 220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York* v. *Sage,* 239 U.S. 57, 61. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. *Boom Co.* v. *Patterson, ubi supra.* But the value to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled. *New York* v. *Sage, ubi supra. United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 76, 80. *Shoemaker* v. *United States,* 147 U.S. 282, 305. *Kerr* v. *South Park Commissioners,* 117 U.S. 379, 386. *Union Electric Light & Power Co.* v. *Snyder Estate Co.,* 65 F. (2d) 297, 304. The use of shore lands for reservoir purposes prior to the taking shows merely the physical possibility of so controlling the level of the lake. But physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could

use his tract together with the other shore lands for reservoir purposes or that another could acquire all lands or easements necessary for that use. The trespass committed by means of the dams added nothing to the value of the shore lands.

Flowage easements upon these lands were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation. As that measure (*United States* v. *New River Collieries,* 262 U.S. 341, 344) is lacking, the market value must be estimated. In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Brooks-Scanlon Corp.* v. *United States,* 265 U.S. 106, 124. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth. Cf. *Minnesota Rate Cases, supra,* p. 452. *Smith* v. *Illinois Bell Tel. Co.* 282 U.S. 133, 152. *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U.S. 287, 319.

Petitioners rely on *Boom Co.* v. *Patterson,* 98 U.S. 403. At the time of that condemnation, logs belonging to many

owners were floated down the Mississippi to sawmills at and below the Falls of St. Anthony. Patterson owned three islands, about 34 acres, in the river a few miles above the falls, lying near to each other and approximately parallel to the west bank. The company, merely by closing the spaces between the islands and connecting the downstream end to the bank so as to prevent the passage of floating logs, created a boom about a mile long and a quarter of a mile wide. The owner objected to that use of his property and the company condemned. There was evidence of value other than for boom purposes and also of value for all purposes. The jury specially found that aside from boom purposes the value of the land was $300 and that, in view of the adaptability for boom purposes, it had an additional value of $9,058.33. There was a general verdict for the sum of these amounts. The court ordered the verdict set aside unless the owner consent to reduce it to $5,500. He did consent and judgment was entered for that amount.

Upon appeal this court affirmed and, speaking through Mr. Justice Field, said (pp. 407–409): "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted. . . . The position of the three islands . . . fitting them to form, in connection with the west bank . . . a boom of immense dimensions . . . added largely to the value of the lands. . . . Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands. We do not understand that all persons, except the plaintiff in error,

were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. . . . The Mississippi is a navigable river above the Falls of St. Anthony, and the State could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners."

The principle governing that case has been frequently applied here [3] and in the lower federal courts.[4] The decision is authoritative in state courts in all condemnation cases in which the owner invokes protection of the due process clause of the Fourteenth Amendment.[5] But clearly it does not support petitioners' contention here.

[3] *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226, 250. *Boston Chamber of Commerce* v. *Boston,* 217 U.S. 189, 195. *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 77. *McGovern* v. *New York,* 229 U.S. 363, 372. *Minnesota Rate Cases,* 230 U.S. 352, 451. *Vogelstein & Co.* v. *United States,* 262 U.S. 337, 340. *United States* v. *New River Collieries,* 262 U.S. 341, 344. *Mitchell* v. *United States,* 267 U.S. 341, 345.

[4] *Murhard Estate Co.* v. *Portland & Seattle Ry. Co.,* 163 Fed. 194, 199. *Weiser Valley Land & Water Co.* v. *Ryan,* 190 Fed. 417, 421–422. *Denver & R. G. R. Co.* v. *Mills,* 222 Fed. 481, 489. *Northern Pac. Ry. Co.* v. *North American Tel. Co.,* 230 Fed. 347, 356. *North American Telegraph Co.* v. *Northern Pac. Ry. Co.,* 254 Fed. 417, 419. *United States* v. *Boston, C. C. & N. Y. Canal Co.,* 271 Fed. 877, 893. *Ford Hydro-Electric Co.* v. *Neely,* 13 F. (2d) 361, 362. *Guste* v. *United States,* 55 F. (2d) 115, 116.

[5] Illustrative cases are: *Fales* v. *Easthampton,* 162 Mass. 422, 425; 38 N.E. 1129. *Smith* v. *Commonwealth,* 210 Mass. 259, 261; 96 N.E. 666. *North Shore R. Co.* v. *Penna. Co.,* 251 Pa. 445, 450; 96 Atl. 990. *Rock Island & Peoria Ry. Co.* v. *Leisy Brewing Co.,* 174 Ill. 547, 555; 51 N.E. 572. *Currie* v. *Waverly & N. Y. B. R. Co.,* 52 N.J.L. 381, 396; 20 Atl. 56. *Russell* v. *St. Paul, Minneapolis & Manitoba Ry. Co.,* 33 Minn. 210, 214; 22 N.W. 379. *Conan* v. *Ely,* 91 Minn. 127, 131; 97 N.W. 737. *Santa Ana* v. *Harlin,* 99 Cal. 538, 542; 34 Pac. 224. *Alloway* v. *Nashville,* 88 Tenn. 510, 519; 13 S.W. 123.

The circumstances there disclosed required submission to the jury of the question whether the use and special adaptation of the islands for boom purposes affected market value at the time of the taking. They were amply sufficient to warrant a finding that the islands were well suited and presently needed for that purpose and that demand for them, actual or prospective, to form a part of a boom greatly enhanced their market value. The boom company could not exclude others from handling logs floated in the river. The owner and others had the right to use the island lands to construct a boom for their own purposes or for general use.

The situation in respect of lands bordering the Lake of the Woods is essentially different. The fact that the raising of the lake would take or damage shore lands could not affect their market value. There could be no rational basis for any demand that would affect value to the owner for reservoir purposes unless, as a legal and practical possibility, he or some other person or persons—other than the expropriating authority—could have acquired the right to flow the lands necessary for the lawful raising of the lake. The lands upon which the flowage easement is condemned are located in two countries. Neither could authorize expropriation in the other. Petitioners did not cite or offer evidence of any instance of acquisitions, without reliance upon the power of eminent domain, that are at all comparable with those under consideration. When regard is had to the number of parcels, private owners, Indian tribes and sovereign proprietors to be dealt with, it is clear that there is no foundation for opinion evidence to the effect that it was practicable for private parties to acquire the flowage easements in question.

The policy of joint governmental control of the lake levels was indicated years before the taking. The lands in Manitoba and Ontario that long prior to the condemna-

tion were reserved in anticipation of measures to be taken for the raising of the lake level were essential to the enterprise. Additional reservoir capacity could not lawfully be created without them, and they could not be purchased or condemned. There was no justifiable basis for competition for the purchase of flowage rights from private owners. Rivalry between power companies or others to secure opportunity to develop capacity resulting incidentally from lake levels established in the settlement of, or to prevent, controversy between the parties to the treaty or between either of them and nationals of the other is too remote to warrant a finding that market value of petitioners' lands was thereby enhanced. It had no direct, and could have no substantial or legitimate, influence upon such value.

As just compensation includes no increment resulting from the taking, petitioners were not entitled to elements of value arising from the prospect that the Government would acquire the flowage easements. Under the circumstances, intention to acquire was the equivalent of the formal designation of the property to be taken. Prices actually paid, and estimates or opinions based, upon the assumption that value to owners includes any such elements are not entitled to weight and should not be taken into account. On the facts shown, it conclusively appears that there was no element of value belonging to petitioners that legitimately could be attributed to use and adaptability of their lands for reservoir purposes. The evidence covered by petitioners' offers was inadmissible. The court rightly excluded reservoir uses from consideration.

In their brief, petitioners complain that the trial court instructed the jury "to consider only the value of the lands for agriculture, although it was admitted that the lands were not suitable for agriculture and had never been used for that purpose." The parts of the charge

above quoted show that the statement is without foundation as to Olson's land and inaccurate as to all. The record definitely shows that petitioners did not claim that, except for reservoir purposes, their lands are worth more than their value for agriculture. Moreover, the point is not made in the specification of errors or in the reasons given in the petition for this writ. The contention is not properly before us. *Gunning* v. *Cooley*, 281 U.S. 90, 98.

Petitioners maintain that the Circuit Court of Appeals erred in holding that the Treaty of 1909 did not give redress, and that they had no remedy, for the wrongful flooding of their lands. The statements in the opinion assailed by specifications of error in petitioners' brief were made *arguendo* and do not constitute decision of any point on which petitioners there sought reversal. The questions considered below concerned compensation for flowage easements. The condemnation was under § 1 of the Act of May 22, 1926, *supra*. The property taken was the right to use in the future. The commissioners were not authorized to make any award on account of damages caused by unlawful flooding of shore lands prior to the taking. That is clear from § 1, and especially so when its provisions are read in connection with the general condemnation Act of August 1, 1888, 25 Stat. 357, and the rule of just compensation prescribed by the Constitution of Minnesota, both of which are expressly adopted by that section. Moreover, § 3 directs the Secretary of War to deal with all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in the outlets. No question of liability for, or the amount of, such damages was before the lower courts.

Judgments affirmed.

HEALY, CHIEF OF POLICE, *v.* RATTA.

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

No. 731. Argued April 4, 1934.—Decided April 30, 1934.

1. A merchant whose business had been conducted through salesmen in a city and elsewhere in the State, alleging that a state law imposing a state-wide license tax on each salesman or graduated local tax in cities was in denial of equal protection of the laws, brought suit in a federal court to enjoin the enforcement of the law, naming as sole defendant a city officer whose authority to enforce it was confined to his particular city. *Held:*

   (1) That the matter in controversy did not embrace the right to restrain enforcement of the law by other officers in other places in the State, and that the collateral effect of the decree, by virtue of *stare decisis,* upon other and distinct controversies with other officers, could not be considered in ascertaining whether the jurisdictional amount was involved, even though their decision might turn on the same question of law. P. 266.

   (2) Evidence of injury to the plaintiff's business outside of the city, and of the cost of licenses for doing it, must therefore be disregarded in determining the amount in controversy. P. 267.
2. In an injunction suit in a federal court challenging the constitutionality of a state law which imposes license taxes on plaintiff's salesmen and subjects them to arrest and fine for non-payment, the issue being confined to the right of the State to collect the taxes and not extending to the method of enforcement, the amount in controversy is the amount of the taxes due from plaintiff or demanded of him and does not include the penalty or loss of business which payment of the tax would avoid. P. 267.
3. The inability of a taxpayer to litigate the validity of a tax without risk of irreparable injury to his business, which is ground for invoking the equitable jurisdiction of a federal court, affords no measure of the value of the matter in controversy. P. 269.
4. The policy of Congress to narrow the jurisdiction of federal courts in suits between citizens of different States or based on federal questions, calls for strict construction of the statute in determining the value of the matter in controversy. P. 270.
5. The power reserved to the States, under the Constitution, to provide for the determination of controversies in their courts may be

restricted only by the action of Congress in conformity with the judiciary sections of the Constitution. P. 270.

6. Due regard for the rightful independence of state government, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. P. 270.
7. In suits to enjoin the collection of a tax payable annually or the imposition of penalties in case it is not paid, the sum due or demanded is the matter in controversy, and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount. P. 270.

67 F. (2d) 554, reversed.

APPEAL from the affirmance of a decree against Healy, a police officer, perpetually enjoining him from making arrests, prosecuting or otherwise interfering with the plaintiff or his dealers in the City of Manchester, for failure to pay license taxes imposed by a New Hampshire "Hawkers & Peddlers" law.

Mr. H. Thornton Lorimer, Assistant Attorney General of New Hampshire, for appellant.

Mr. Fred C. Demond argued the cause, and *Mr. Jonathan Piper* filed a brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on appeal from a decree of the Court of Appeals for the First Circuit, affirming a decree of the District Court for New Hampshire, which enjoined appellant, the chief of police for the City of Manchester, from enforcing the "Hawkers and Peddlers Act," c. 102, New Hampshire Laws of 1931, as an infringement of the Fourteenth Amendment. An appeal taken directly to this Court from the district court, three judges sitting, was dismissed for want of jurisdiction here since, in the lower court, appellee had waived his prayer for temporary relief. 289 U.S. 701; see *Smith* v. *Wilson,* 273 U.S. 388, 391.

The Act, effective April 14, 1931, requires payment of an annual license tax or fee for every hawker or peddler, defined to be "any person, either principal or agent, who goes from town to town, or place to place in the same town, selling or bartering, or carrying for sale or barter, or exposing therefor any goods, wares or merchandise." The tax is $50.00 for a statewide license. Local licenses are obtainable at a rate graduated according to population. That for Manchester is stated to be $85.00 for each license. Violation of the Act is punishable by a fine of not more than $200.00. Appellee's chief ground of attack upon the statute, sustained by both the courts below, is that it denies the equal protection of the laws by excepting from its operation certain classes of hawkers and peddlers, in which appellee and his agents are not included.

The bill of complaint alleges that until the effective date of the Act, appellee, a resident of Massachusetts, was engaged in Manchester and elsewhere in New Hampshire in the distribution of vacuum cleaners through their sale and delivery to purchasers by traveling salesmen; that the business was conducted in such a manner as to subject the salesmen to the tax, which they were unwilling or unable to pay; and that their arrest and prosecution, which appellant threatens if they continue to sell without paying the tax, would destroy appellee's business. The value of his business and his loss on account of the enforcement of the Act are each alleged to be more than $3,000.00. Appellant's answer and motion to dismiss the cause, as not within the jurisdiction of the district court, admit the facts stated in the complaint, so far as now material, except that they deny the allegation that the matter in controversy exceeds $3,000, the jurisdictional amount.

On this issue a trial was had, in the course of which evidence was given to show the extent of appellee's busi-

ness in Manchester and elsewhere in New Hampshire and in adjoining states, and the profits derived from it in New Hampshire both before and after the enactment of the taxing statute. No interlocutory injunction was sought; and after the effective date of the statute appellee changed the method of doing his business in New Hampshire in a way to avoid the necessity of a license, sales being made by sample, with later delivery by shipping the merchandise directly to the purchaser from outside the state. The business was carried on in this manner in 1931 at a loss. It appeared that the total number of salesmen employed in conducting appellee's business in Manchester during 1931, when the statute was enacted, was six, and that in earlier years a larger number had been employed. During those years from twenty-two to twenty-seven salesmen were employed elsewhere in the state.

It is appellee's contention that the matter in controversy is either the tax which he would be required to pay annually in order to continue his business in New Hampshire, or his right to conduct the business there without payment of the tax, and that the value of each exceeds $3,000. He argues upon the evidence that the expenditure for payment of the tax which he would be obliged to bear in order to continue his business in Manchester is at least $350.00 per annum, and that the capitalized value of this expenditure would exceed $3,000.00.

The District Court concluded that as the tax which would be imposed for the conduct of appellee's business in Manchester would amount to at least $300.00 per annum, its capitalized value, which would exceed $3,000, satisfies the jurisdictional requirement. The Court of Appeals thought that the matter in controversy was appellee's right to do business throughout the state, which is valued at more than $3,000.00

It is conceded that the authority of appellant, as chief of police, to make arrests for violation of the statute is

restricted to the City of Manchester. The bill of complaint does not allege, nor does appellee assert, that appellant will cause the arrest of his salesmen or otherwise interfere with them or with his business outside the city. The controversy here is that defined by the pleadings, see *Smith* v. *Adams,* 130 U.S. 167, 175, and the matter in controversy does not embrace more than the right asserted to restrain appellant from compelling compliance with the statute in Manchester by criminal prosecutions. Appellee neither asks nor could he properly be awarded a decree in the present suit restraining enforcement of the law by police officers elsewhere, and the collateral effect of the decree, by virtue of *stare decisis,* upon other and distinct controversies may not be considered in ascertaining whether the jurisdictional amount is involved, even though their decision turns on the same question of law. *Lion Bonding Co.* v. *Karatz,* 262 U.S. 77, 85; *Colvin* v. *Jacksonville,* 158 U.S. 456; *New England Mortgage Co.* v. *Gay,* 145 U.S. 123; *Vicksburg, S. & P. R. Co.* v. *Smith,* 135 U.S. 195; *Gibson* v. *Shufeldt,* 122 U.S. 27; *Elgin v. Marshall,* 106 U.S. 578.

If the threatened action of appellant is not restrained, the consequence will be either the payment of the tax by appellee, or the suppression of his business in Manchester because of his failure to pay it. Hence we disregard evidence of injury to appellee's business outside the city and of the cost of licenses for doing it, and confine ourselves to the inquiry whether his right to do the business in Manchester or the tax which must be paid for doing the business there is the matter in controversy, and whether the record shows that its value does not exceed $3,000.00.

That the issue between the parties is the right of the state to collect the tax cannot be gainsaid. There is no question of the authority of a state to suppress the conduct of a business for the non-payment of an exaction lawfully imposed upon it, or of the appellant's authority

to suppress the business here, by threat of criminal prosecution of the salesmen, if this tax is valid. The dispute as to the lawfulness of the tax is the controversy which alone gives vitality to the litigation. Once that is resolved, no other issue survives for decision.

It has been said that it is the value of the "object of the suit" which determines the jurisdictional amount in the federal courts, *Mississippi & Missouri R. Co.* v. *Ward*, 2 Black 485; *Packard* v. *Banton*, 264 U.S. 140, 142. But this does not mean objects which are merely collateral or incidental to the determination of the issue raised by the pleadings. The statute itself does not speak of objects of the suit. It confers jurisdiction only if "the matter in controversy exceeds . . . the sum or value of $3,000.00." It has never been thought that the federal courts have jurisdiction of suits to restrain the collection of a property tax or other money exaction of less than the jurisdictional amount assailed as unconstitutional merely because the penalty for non-payment, which has not been incurred, exceeds that amount. *Atlantic Coast Line Ry. Co.* v. *Railroad Comm'n*, 281 Fed. 321. The tax, payment of which is demanded or resisted, is the matter in controversy, since payment of it would avoid the penalty and end the dispute. See *Ross* v. *Prentiss*, 3 How. 771, 772. Whether and in what manner the penalty for non-payment may be enforced in the event the tax is valid are but collateral and incidental to the determination whether payment may be exacted. Only when the suit is brought to restrain imposition of a penalty already accrued by reason of failure to comply with the statute or order assailed can the penalty be included as any part of the matter in controversy. See *McNeill* v. *Southern Ry. Co.*, 202 U.S. 543; *Kansas City Southern Ry. Co.* v. *Ogden Levee Dist.*, 15 F. (2d) 637; compare *Barry* v. *Edmunds*, 116 U.S. 550.

The case of a tax or fee exacted for the privilege of doing a particular business presents no different considerations. Where a challenged statute commands the suppression or restriction of a business without reference to the payment of any tax, the right to do the business, or the injury to it, is the matter in controversy. *Scott* v. *Donald,* 165 U.S. 107; see *Bitterman* v. *Louisville & Nashville R. Co.,* 207 U.S. 205; *Hunt* v. *New York Cotton Exchange,* 205 U.S. 322; *Gallardo* v. *Questell,* 29 F. (2d) 897.[1] But the possible suppression of the business here, through the prosecution of those who conduct it, is but the threatened consequence or penalty for non-payment of the challenged tax. It is true that where there is no method at law to test the legality of a tax without risk of incurring a penalty, the imminence of the penalty may involve such a threat of irreparable injury as to satisfy the requirements of equity jurisdiction. See *Matthews* v. *Rodgers,* 284 U.S. 521, 526. But the inability of a taxpayer to litigate the validity of a tax without risk of irreparable injury to his business, which is ground for invoking the equity powers of a federal court, affords no measure of the value of the matter in controversy. *Atlantic Coast Line Ry. Co.* v. *Railroad Comm'n, supra.* The disputed tax is the matter in controversy, and its value, not that of the penalty or loss which payment of the tax would avoid, determines the jurisdiction. See *Washington & Georgetown R. Co.* v. *District of Columbia,* 146 U.S. 227; compare *Elliott* v. *Empire Natural Gas Co.,* 4 F. (2d) 493.

Not only does the language of the statute point to this conclusion, but the policy clearly indicated by the successive acts of Congress regulating the jurisdiction of federal courts supports it. Compare *Davis* v. *Mills,* 99 Fed. 39, 40. From the beginning suits between citizens of different

[1] These and other authorities are discussed in 34 Col. L. Rev. 311.

states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount.[2] The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. See *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 233–234. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. See *Matthews* v. *Rodgers, supra,* at 525; compare *Elgin* v. *Marshall*, 106 U.S. 578.

The contested license fees must be paid annually as a condition precedent to doing the business. But it does not follow that capitalization of the tax is the method of determining the value of the matter in controversy. The bill of complaint does not allege, nor can it be assumed, that the appellant will act to compel compliance with the statute by appellee in future years for which no tax is yet payable, or that the appellee will seek to continue his business in Manchester indefinitely in the future, or that

[2] The amount originally fixed by § 11 of the Judiciary Act of 1789 at $500, exclusive of costs, 1 Stat. 78, was increased to $2,000, exclusive of interest and costs by Act of March 3, 1887, 24 Stat. 552, and to $3,000, exclusive of interest and costs, by the Act of March 3, 1911, 36 Stat. 1091; see U.S.C.A. § 41 (1).

the taxing act will be continued on the statute books, unmodified either as to the amount of the tax or the features to which the appellee objects. These, or like considerations, have led to the conclusion that, in suits to enjoin the collection of a tax payable annually or the imposition of penalties in case it is not paid, the sum due or demanded is the matter in controversy and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount. *Washington & Georgetown R. Co.* v. *District of Columbia, supra; Holt* v. *Indiana Manufacturing Co.,* 176 U.S. 68, 72; *Citizens Bank* v. *Cannon,* 164 U.S. 319; see *Atlantic Coast Line* v. *Railroad Comm'n, supra; Vicksburg, S. & P. Ry. Co.* v. *Nattin,* 58 F. (2d) 979; cf. *Wright* v. *Mutual Insurance Co. of New York,* 19 F. (2d) 117; *Elliott* v. *Empire Natural Gas Co., supra.*

A different question is presented where the matter in controversy is the validity of a permanent exemption by contract from an annual property tax, *Berryman* v. *Whitman College,* 222 U.S. 334, 348; see *Riverside & A. Ry. Co.* v. *Riverside,* 118 Fed. 736; or the validity of an order of a state commission directing a railroad to construct and maintain an unremunerative spur track. *Western & Atlantic R. Co.* v. *Railroad Comm'n,* 261 U.S. 264, 267. There the value of the matter drawn into controversy, the contract providing permanent immunity from taxation, or the order to maintain a permanent structure for an unlimited time, is more than a limited number of the annual payments demanded. Compare *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.,* 239 U.S. 121. In such a case the burden which rests on a defendant who challenges the plaintiff's allegation of the jurisdictional amount, see *Hunt* v. *New York Cotton Exchange,* 205 U.S. 322, 333, may well not be sustained by the mere showing that the annual payment is less than the jurisdictional amount.

Here the record shows affirmatively, see *Vance* v. *W. A. Vandercook Co.* (*No. 2*), 170 U.S. 468, that the total amount of the tax demanded, or which may be demanded, within any time reasonably required to conclude the litigation, is less than the jurisdictional amount; that any action by appellant to compel compliance by appellee or his salesmen with the taxing act in future years is at most conjectural; and that the effect of any decree rendered in the present suit upon the tax for other years, or with respect to appellee's business outside the City of Manchester, is collateral to the present controversy. The decree will be reversed, with instructions to the district court to dismiss the cause for want of jurisdiction.

Reversed.

SAUDER, ADMINISTRATRIX, ET AL. *v.* MID-CONTINENT PETROLEUM CORP.

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

No. 660. Argued April 3, 1934.—Decided April 30, 1934.

1. Under an oil and gas lease on a royalty basis for a stated number of years and so long thereafter as oil or gas can be produced in paying quantities, a lessee who has produced oil in paying quantities from a fraction of the land and continues such production after the expiration of the primary term, remains under an implied obligation to prosecute development of the other part. P. 279.
2. The lessee, in the circumstances stated, can not hold the undeveloped part of the land indefinitely, as against the lessor, merely because it may contain oil, and without drilling or any present intention to drill at any time in the future. P. 279.
3. Where the lessee in an oil and gas lease covering a forty-acre tract and an adjacent half section produced oil on the forty acres but for many years abstained from drilling on the half-section, *held* that the lessor was equitably entitled to have the lease canceled as to the half-section unless within a reasonable time an exploratory well were drilled upon it. P. 281.

67 F. (2d) 9, reversed.

CERTIORARI, 291 U.S. 655, to review the reversal of a decree canceling in part an oil and gas lease, in a suit begun by the lessor in a state court and prosecuted by his administratrix and heirs after removal.

Mr. Harry W. Colmery, with whom *Mr. Ray S. Pierson* was on the brief, for petitioners.

Mr. Richard H. Wills, with whom *Mr. James C. Denton* was on the brief, for respondent.

The primary question is whether there was any implied obligation to drill additional wells upon the leased premises.

It is the universal rule that an oil and gas lessee is not unconditionally required to drill an exploratory well at every location upon the leased premises, but is only required to drill such wells as an ordinarily prudent operator, under all the circumstances, would drill. In reliance on this rule, it has been unusual for lessees to drill an exploratory well at every location, even under a producing lease. The case is of much importance to the oil and gas industry.

Respondent contends that its lease does not impose upon it any implied obligation to drill an additional well upon the leased premises, in the absence of an affirmative showing that, under all the circumstances, there was a reasonable probability that oil or gas, in paying quantities, would have been discovered, or that a reasonably prudent operator would have drilled. *Brewster* v. *Lanyon Zinc Co.,* 140 Fed. 801; *Texas Co.* v. *Waggoner,* 239 S.W. 354; *Goodwin* v. *Standard Oil Co.,* 290 Fed. 92; *Orr* v. *Comar Oil Co.,* 46 F. (2d) 59; *Smith* v. *McGill,* 12 F. (2d) 32; *Denker* v. *Mid-Continent Petroleum Corp.,* 56 F. (2d) 725; *Cosden Oil Co.* v. *Scarborough,* 55 F. (2d) 634; *Franklin* v. *Wigton,* 132 Okla. 236; *Robinson* v. *Miracle,* 146 Okla. 31; *Empire Gas & Fuel Co.* v. *Haggard,* 152 Okla. 35; *Gypsy Oil Co.* v. *Cover,* 78 Okla. 158.

Inasmuch as it is admitted that the two wells were drilled during the primary term of the lease; that oil was discovered in paying quantities in each of them; that at all times subsequent to their completion they had produced oil in paying quantities and were still so producing, it necessarily follows that respondent's lease was in full force and effect as to each and every part of the leased premises, unless it had abandoned some portion, or unless it had failed to drill some "offset" well, which it was required to drill, or unless a reasonably prudent operator, under the circumstances, would have drilled an additional well. The burden was upon the petitioners to plead and prove that some one of these conditions existed.

None of the Kansas cases, before or after the execution of the lease, except certain dicta in *McCarney* v. *Freel,* 121 Kan. 189, conflicts with respondent's contention; but, if anything, they support it. The court below was not required to follow a Kansas decision later than the lease.

The construction of an oil and gas lease is a matter of general law concerning which the federal courts will reach their own conclusion. The fact that the contract happens to relate to property having a fixed situs should make no difference, particularly in view of the Kansas decisions with respect to the nature of such leases. *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 277 U.S. 518; *Swift* v. *Tyson,* 16 Pet. 1; *Kuhn* v. *Fairmont Coal Co.,* 215 U.S. 348; *Midland Valley R. Co.* v. *Jarvis,* 29 F. (2d) 539; *Midland Valley R. Co.* v. *Sutter,* 28 F. (2d) 163, cert. dismissed, 280 U.S. 521.

Since the relief sought is wholly in equity, the court below was not bound by any Kansas decisions. Rev. Stats., § 721; 28 U.S.C., § 725; *Bucher* v. *Cheshire R. Co.,* 125 U.S. 555; *Brill* v. *Foshay Co.,* 65 F. (2d) 420; *Lynn* v. *Union Gas & Oil Co.,* 274 Fed. 957; *Guffey* v. *Smith,* 237 U.S. 101; *Dallas* v. *Higginbotham-Bailey-Logan Co.,* 37 F. (2d) 513.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Philip Sauder, as owner of the E½ of Sec. 16, Twp. 23, Range 13, Greenwood County, Kansas, and the SE¼ of the SW¼ of the same section, amounting in all to 360 acres, brought suit in a Kansas state court for the cancellation of an oil and gas lease. The cause was removed to the federal district court, where, after Sauder's death, it was revived in the right of his administratrix and heirs. The lease was made June 6, 1916; by sundry assignments the Petroleum Corporation had become the tenant. The recited consideration was $1.00 and the covenants and agreements on the part of the lessee. The term was ten years, and as long thereafter as oil and gas could be procured in paying quantities. The lessee was to deliver to the lessor one-eighth of the oil realized, and if gas should be found, $100 per year was to be paid for each gas well so long as its product was sold or marketed. If no well were commenced within one year all rights and obligations of the parties were to cease upon notice from the lessor to that effect, provided that the lessee should have the right to continue the lease in force from year to year until a well should be drilled, by paying an annual rental of $1.00 per acre. The instrument provided that the lessee might enter upon the premises for the purposes of the lease, use water from any creek or pond, or drill for water, to run machinery for prospecting and for operating the wells, should have the exclusive right to erect, lay and maintain pipe, machinery and structures necessary for producing, storing or transporting oil or gas. The contract ran in favor of and against the heirs, assigns, successors and personal representatives of the parties.

To offset two wells drilled on adjoining property, the lessee completed one well in November, 1921, and a second in January, 1922; but no other wells have been sunk,

nor have any locations for wells been made. On the date of the expiration of the fixed term Sauder wrote the respondent stating that the lease had expired, and adding that he understood if it was a profitable contract respondent was supposed to operate, and if not, he understood the term had run out, and the respondent should release all the tract except the portion on which the wells were being operated. He asked what action the respondent proposed to take. The reply was that respondent considered it had a paying lease and would not surrender it.

The suit was instituted June 27, 1930. In addition to reciting the facts above outlined, the complaint asserted there had been development and production of oil on adjacent tracts, with consequent drainage of oil from the leased land; the respondent was bound to explore and develop the land and had neglected so to do; unless the lease were cancelled the respondent would continue to hold it for speculative purposes, and the plaintiffs be deprived of the objects and considerations for which the lease was made. The answer denied that the lease was being held for speculative purposes, denied the operations on surrounding tracts were causing drainage, alleged the drilling of the two wells was a fulfilment of the obligation to offset wells likely to drain from the demised premises, and denied any breach of the lease.

Upon the trial the petitioners offered in evidence a map showing the number of wells drilled on adjacent premises, the date when they came into production, and the amount of production from each, as well as the location of all which proved to be dry holes. The respondent offered expert testimony showing that in the vicinity there were two sands, the upper of which pinched out eastward of the demised premises, and that the wells on the latter and those on lands to the west and south thereof were in the lower sand, known as the Mississippi lime. These

witnesses testified that in their judgment the geological formation, and the experience with wells drilled on nearby lands, made it so unlikely that oil would be obtained as to justify a prudent operator in abstaining from drilling additional wells on the Sauder tract.

The district judge found that the two wells were drilled as offsets and had been producing oil in small but paying quantities. He summarized the evidence as to drilling on adjacent territory, and found that there was some probability that damage was being done to the leasehold through drainage by wells on adjoining properties. He was unable to decide the question of the likelihood that additional wells on the Sauder tract would produce oil or gas in paying quantities, and held that in the state of the proofs nothing but exploration and positive test by drilling could settle the controversy. After referring to the notice sent by Sauder to the respondent at the termination of the ten year period, he found that no effort had thereafter been made toward exploration or development by drilling wells or otherwise, and that the respondent and its officers had no present intention of further exploring and developing, unless and until developments in the immediate vicinity should convince them that it would pay to take such action. The conclusion was that petitioners had no adequate remedy at law; that respondent and its predecessors in title had not in good faith and with reasonable diligence explored and developed the lands as required by the express and implied covenants of the lease; that it would be inequitable to permit the respondent to hold the property without further exploration and development, as it proposed to do; and that the petitioners were entitled to a decree cancelling the lease, except as to a portion of the SE¼ of the SW¼ of Sec. 16 (upon which the two off-set wells were drilled), as to which the respondent may hold and enjoy its leasehold right so long as it produces gas or oil there-

from in paying quantities. A decree was entered in accordance with the findings, adding the qualification that as to tanks, pipes and equipment located somewhat north of the acreage which the respondent was permitted to retain, these need not be moved until they should become obstacles to the development of the petitioners' land.

Upon appeal, the Circuit Court of Appeals (one judge dissenting) reversed the decree, holding that the respondent had not violated the covenants of its lease, and until it should be guilty of a breach it was entitled to continue to hold the whole tract. The reversal was without prejudice to the bringing of a new suit in the event changed conditions should indicate a breach of respondent's implied covenant to develop. We brought the case here by writ of certiorari.

The question for decision is whether the respondent failed to comply with an implied covenant to develop the tract with reasonable diligence. The petitioners' position is that since the lease was of land in Kansas the case is to be decided according to the rule of law adopted by the Supreme Court of the State, which is said to be more stringent as respects the lessee's obligation than that generally applied by state and federal courts. The majority of the Court of Appeals were of opinion that at the date of the making of the lease the law of the State, as evidenced by the decisions of its Supreme Court, was the same as that followed by the federal courts; and if, by decisions announced subsequent to the effective date of the lease, a broader rule was laid down, the federal courts ought not to apply it with retroactive effect. The petitioners assert that the court was in error in both conclusions.

It is unnecessary to inquire as to the law of Kansas, or the effect to be given it in this case, since we think that the rule followed generally requires a reversal of the decree dismissing the bill.

It is conceded that a covenant on respondent's part to continue the work of exploration, development and production is to be implied from the relation of the parties and the object of the lease; and that this covenant was not abrogated by the expiration of the primary term of ten years.[1] The matter in dispute is the respondent's alleged failure to comply with its obligation. The petitioners say that if the lessee with good reason believes there is no mineral to be obtained by further drilling it should give up the lease; the respondent insists that as there is only a possibility of finding mineral, no prudent operator would presently develop, but the mere possibility entitles it to hold the lease, because it is producing oil from a portion of the area.

We think the respondent's contention cannot be sustained. With respect to a lease quite similar in its provisions it was said in *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801, 810, 814:

"The implication necessarily arising from these provisions—the intention which they obviously reflect—is that if, at the end of the five-year period prescribed for original exploration and development, oil and gas, one or both, had been found to exist in the demised premises in paying quantities, the work of exploration, development, and production should proceed with reasonable diligence for the common benefit of the parties, or the premises be surrendered to the lessor.

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[1] *Allegheny Oil Co.* v. *Snyder*, 106 Fed. 764; *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801; *Acme Oil & Mining Co.* v. *Williams*, 140 Cal. 681; 74 Pac. 296; *Daughetee* v. *Ohio Oil Co.*, 263 Ill. 518; 105 N.E. 308; *Gadbury* v. *Ohio & Indiana Consol. Nat. & Ill. Gas Co.*, 162 Ind. 9; 67 N.E. 259; *Dinsmoor* v. *Combs*, 177 Ky. 740; 198 S.W. 58; *Harris* v. *Ohio Oil Co.*, 57 Oh. St. 118; 48 N.E. 502; *Indiana Oil, Gas & Development Co.* v. *McCrory*, 42 Okla. 136; 140 Pac. 610; *Kleppner* v. *Lemon*, 176 Pa. 502; 35 Atl. 109; *J. M. Guffey Petrol. Co.* v. *Jeff Chaison Townsite Co.*, 48 Tex. Civ. App. 555; 107 S.W. 609; *Hall* v. *South Penn Oil Co.*, 71 W.Va. 82; 76 S.E. 124; *Phillips* v. *Hamilton*, 17 Wyo. 41; 95 Pac. 846.

"The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable."

After commenting on the fact that the lessee is not required to carry the operations on beyond the point where they will be profitable to him, even though some benefit to the lessor will result, the court adds:

"Whether or not in any particular instance such diligence is exercised depends upon a variety of circumstances, . . . Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."

This definition of the scope of the implied covenant has been generally adopted in decisions of federal and state courts.[2] The facts demonstrate that the respondent has not complied with its obligations. It has held a half section for seventeen years without the drilling of an exploratory well, and claims to be entitled to hold the lease for an indefinite period with no exploration unless some other operator brings in a producing well on adjoining land, or fresh geological data come to light. The two producing wells are on the forty acres comprising the smaller of the adjacent areas embraced in the lease. The justification for the respondent's position is that the geologic data and the experience upon surrounding lands

[2] *Goodwin* v. *Standard Oil Co.*, 290 Fed. 92; *Becker* v. *Submarine Oil Co.*, 55 Cal. App. 698; 204 Pac. 245; *Daughetee* v. *Ohio Oil Co.*, 263 Ill. 518; 105 N.E. 308; *Austin* v. *Ohio Fuel Oil Co.*, 218 Ky. 310; 291 S.W. 386; *Prince* v. *Standard Oil Co.*, 147 La. 283; 84 So. 657; *Indiana Oil, Gas & Development Co.* v. *McCrory*, 42 Okla. 136; 140 Pac. 610; *Texas Co.* v. *Ramsower*, (Tex.) 7 S.W. (2d) 872; *Jennings* v. *Southern Carbon Co.*, 73 W.Va. 215; 80 S.E. 368; *Phillips* v. *Hamilton*, 17 Wyo. 41; 95 Pac. 846.

are both unfavorable to the discovery of oil or gas upon the east half of section 16 (the 320 acre tract). The respondent's officers state that they desire to hold this tract because it may contain oil; but they assert that they have no present intention of drilling at any time in the near or remote future. This attitude does not comport with the obligation to prosecute development with due regard to the interests of the lessor. The production of oil on a small portion of the leased tract cannot justify the lessee's holding the balance indefinitely and depriving the lessor not only of the expected royalty from production pursuant to the lease, but of the privilege of making some other arrangement for availing himself of the mineral content of the land.

The decisions [3] on which the Circuit Court of Appeals relied recognize and apply the rule of *Brewster* v. *Lanyon Zinc Co., supra,* but are distinguishable because of a difference in the circumstances in which the rule was applied. Some of them involved the duty to drill wells to offset others brought into production on adjoining lands; others turned upon a waiver by the lessor of the lessee's obligation to explore, or the meaning of the phrase "so long as oil or gas is produced in paying quantities." In none of them was there a neglect to explore or develop for any such period as is here shown, or an expressed intention not to do so, in a comparable situation.

The petitioners are entitled to relief in equity as they have no adequate remedy at law. *Brewster* v. *Lanyon Zinc Co., supra,* pp. 818–819; *Guffey* v. *Smith,* 237 U.S. 101, 114. The District Court decreed a cancellation as to all except a strip four hundred feet wide along the southern boundary of the SE¼ of the SW¼ of Section 16, con-

[3] *Goodwin* v. *Standard Oil Co.,* 290 Fed. 92; *Humphreys Oil Co.* v. *Tatum,* 26 F. (2d) 882; *Orr* v. *Comar Oil Co.,* 46 F. (2d) 59; *Denker* v. *Mid-Continent Petroleum Corp.,* 56 F. (2d) 725; *Pelham Petroleum Co.* v. *North,* 78 Okla. 39; 188 Pac. 1069; *Broswood Oil & Gas Co.* v. *Mary Oil & Gas Co.,* 164 Okla. 200; 23 P. (2d) 387.

taining about eight acres. The dissenting judge in the court of appeals thought that a decree should be entered cancelling the lease as to the 320 acre tract (the E½ of the Section) unless within a reasonable time an exploratory well should be drilled therein to the Mississippi lime, and that the 40 acres embraced in the SE¼ of the SW¼ of Section 16 should remain under the lease. We are of opinion that such a decree would recognize and protect the equities of both parties.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

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

MISSISSIPPI VALLEY BARGE LINE CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION.

No. 807. Argued April 5, 1934.—Decided April 30, 1934.

1. Findings of the Interstate Commerce Commission may not be assailed in a suit to set its order aside in the absence of the evidence on which they were made. This settled rule can not be avoided by the submission of additional evidence in the form of affidavits. P. 286.
2. It is not for a court to substitute its judgment for that of the Interstate Commerce Commission in the adjustment of a rate schedule; the judicial function is exhausted when there is found a rational basis for the Commission's conclusion. P. 286.
3. Order of the Commission permitting lower rail rates on sugar, to meet water competition on the Mississippi and Ohio Rivers, *held* supported by the facts set forth in its report. *Id.*

4. The policy of Congress with respect to rail and water transportation, as evinced by the Transportation and the Inland Waterways Transportation Acts, does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through a change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably, in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the regulatory powers of the Commission, as e.g., in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all. P. 288.
5. The permissive minimum rail rate in this case, fixed high enough to more than pay the cost of service, involves no discrimination against the complaining water competitor. P. 288.

4 F.Supp. 745, affirmed.

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

Mr. James R. Van Slyke, with whom *Messrs. Guy A. Thompson* and *Truman P. Young* were on the brief, for appellant.

Mr. J. Stanley Payne, with whom *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Elmer B. Collins,* and *Daniel W. Knowlton* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. Elmer A. Smith for the Illinois Central R. Co., et al., interveners.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The appellant, Mississippi Valley Barge Line Company, is a common carrier by water, operating towboats and barges on the Mississippi and Ohio Rivers. It derives a large part of its earnings from the transportation

of sugar, which it carries from New Orleans to Cincinnati and St. Louis and intermediate ports. It is in active competition with rail carriers serving the same ports and inland points beyond.

In 1932, the Illinois Central Railroad Company and other carriers by rail filed with the Interstate Commerce Commission proposed schedules of reduced rates on sugar from New Orleans to northern points, the rates to become effective October 1 of that year. The aim of the reduction was to meet the competition of the appellant and other carriers by water who had been able by reason of low and unregulated rates to divert to themselves a large part of the traffic in sugar that till then had moved by rail. The railway companies perceived that they were threatened with still heavier losses in the future unless something was done by a reduction of their own charges to recover the business that was slipping from their grasp. Indeed the change had gone so far that already they were hauling practically no sugar within the field of competition. In 1932 the barge movement amounted to over 500,000 tons, about ten times as much as moved all-rail from Louisiana to the north. Of the water-borne traffic, by far the greater part was carried by the Federal Barge Line, which has acquiesced in the new schedules, preferring to let the rail carriers fix the rate level. The residue has been carried, part of it by this appellant, part by the American Barge Company, and part by tramp or contract operators. During the year 1932, one railway company, the Illinois Central, lost about half a million dollars by traffic thus diverted. The new schedules that were filed in the attempt to retrieve these losses proposed two different sets of rates, one based upon a minimum weight of 60,000 pounds per car, and the other upon a minimum weight of 80,000 pounds per car. To illustrate their effect, the old rate between New Orleans and Chicago had

been 56¢ per 100 lbs.; the new one was 30¢ per 100 lbs. for the 80,000 minimum and 39¢ per 100 lbs. for the 60,000 minimum. Between New Orleans and St. Louis the old rate of 52¢ became 28¢ and 34¢.

Protests against these changes having been filed by the appellant and others, the Interstate Commerce Commission proceeded to an investigation under § 15 (7) of the Interstate Commerce Act, and in the meantime ordered that the schedules be suspended. There were full hearings of the parties in interest, with testimony and argument. On July 3, 1933, the Commission found by its report that the respondents (the interveners in the court below) had justified the proposed rates with the 60,000 pound minimum. It found that they had not justified the proposed rates with the 80,000 pound minimum, but that they had justified rates four cents higher. "So far as the 80,000 pound minimum is concerned," the Commission said, "this means all-rail rates from New Orleans of 34 cents to Chicago and 32 cents to St. Louis." Sugar Cases of 1933, 195 I.C.C. 127. The rail carriers accepted this proposal, and an amended order of the Commission gave approval to the schedules so revised.

Under the Urgent Deficiencies Act (October 22, 1913, c. 32, 38 Stat. 208, 220; 28 U.S.C., §§ 47, 48), the Mississippi Valley Barge Line Company filed a bill to enjoin and set aside the order of the Commission, joining the United States and the Commission as defendants. A number of rail carriers who had been respondents in the proceeding were allowed to intervene. After the filing of answers, the suit was heard by a District Court of three judges in accordance with the statute. 28 U.S.C., § 47. None of the evidence received by the Commission was placed before the court. All that the court had, aside from the report and orders, was a group of affidavits by the complainant's officers, which were in substance to the

effect that the water carriers would be unable to compete with the carriers by rail if the schedules were to stand approved. These affidavits were received without objection as to their form, but subject to the objection that they were inadmissible in so far as they were inconsistent with what had been found in the report. The court dismissed the bill, holding that the findings of the report were conclusive as to the facts, and that they were sufficient on their face to uphold the lowered rates. 4 F.Supp. 745. An appeal to this court followed. Judicial Code, § 210; 28 U.S.C. § 47a.

The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. *Spiller* v. *A., T. & S. F. Ry. Co.*, 253 U.S. 117, 125; *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U.S. 114, 116; *Nashville, C. & St. L. Ry. Co.* v. *Tennessee*, 262 U.S. 318, 324; *Edward Hines Trustees* v. *United States*, 263 U.S. 143, 148; *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U.S. 287, 295. The appellant did not free itself of this restriction by submitting additional evidence in the form of affidavits by its officers. For all that we can know, the evidence received by the Commission overbore these affidavits or stripped them of significance. The findings in the report being thus accepted as true, there is left only the inquiry whether they give support to the conclusion. Quite manifestly they do. The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. *Florida* v. *United States*, *ante*, p. 1. It is not the province of a court to absorb this function to itself. *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 100; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 663. The judicial func-

tion is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the face of its report. The rates were not approved as the respondents had submitted them. For the 80,000 pound minimum, they were found to be too low. Not till there had been an increase of four cents per 100 pounds did the schedule win approval. There was a sedulous endeavor to guard against a rate war that would end in mere oppression.

We are told for the appellant that upon the face of the report the Commission has been heedless of the mandate of a statute. By § 500 of Transportation Act, 1920 (Feb. 28, 1920, c. 91, 41 Stat. 499; 49 U.S.C. § 142) "it is declared to be the policy of Congress to promote, encourage and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." Following this declaration, which is in the last title of the act, a duty is imposed upon the Secretary of War to do certain acts with the object of developing facilities for inland waterway transportation, and in particular to investigate the subject of water terminals both for inland waterway traffic and for through traffic by water and rail; to advise and coöperate with communities, cities and towns; and to ascertain whether the inland waterways "are being utilized to the extent of their capacity" and are meeting the demands of traffic. By earlier sections of the act, § 418; 49 U.S.C. § 15; 15 (1), 15 (4), the regulatory powers of the Commission had been broadened in respect of through or joint rates for carriers by rail and water, *Chicago, R. I. & P. Ry. Co.* v. *United States,* 274 U.S. 29, 36; and by the Inland Waterways Transportation Act as amended in 1928, these pow-

ers had a new extension. Act of May 29, 1928, c. 891, § 2, 45 Stat. 978; 49 U.S.C. § 153 (e); *United States* v. *Illinois Central R. Co.*, 291 U.S. 457.

For the determination of this case there is no need to go into the question whether the declaration of the policy of Congress to foster rail and water transportation creates a new standard of duty for the Commission in the ordering of rates, or is a source of private rights if the duty is ignored. That question does not become important until the policy of the lawmakers appears to have been flouted; and here it was obeyed. The admonition does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably, in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the regulatory powers of the Commission, as e.g., in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all.

No discrimination of that kind is proved or even charged. The rates affected by this schedule do not involve the division of joint earnings between land and water carriers. The appellant makes its own rates from port to port, and may increase or lower them at will. What has been done by the Commission affects the carriers by rail alone, at least in its immediate consequences. Transportation by water may feel the repercussions of regulation elsewhere. It has not been regulated directly. Even for transportation by land, the Commission has done no more than establish a permissive minimum, and this a minimum sufficient to give assurance that the carriage of the sugar will not involve a loss. "There is no reasonable doubt," we are told in the report, "that the proposed rates are high enough to pay more than the cost of service."

The appellant insists that it is fighting for its life, and that the effect of the new competition will be to drive it out of business. Nothing in the findings gives substance to the fear. There is significance in the fact that the Federal Barge Line, the leading carrier by water, submitted without protest. We do not overlook a sentence that the appellant has lifted from its setting and put before us as a finding. "If respondents succeed, the barge lines will be dealt a staggering blow." Taken by themselves the words suggest a finding that the new schedules will affect the barge lines to the point of destruction, or something very near it. Read in the light of the context, they are not a finding at all, but a summary of the grounds of protest, an outline of the pleadings, or of what amounts to the pleadings before an administrative body. This being so, we do not now consider whether the destruction of a rival through the mere force of competition is legally a wrong, unless "disinterested malevolence" (*American Bank & Trust Co.* v. *Federal Reserve Bank,* 256 U.S. 350, 358), or something akin thereto, has supplied the motive power. *M. Steinert & Sons Co.* v. *Tagen,* 207 Mass. 394, 397; 93 N.E. 584; *Nann* v. *Raimist,* 255 N.Y. 307, 319; 174 N.E. 690.

There is no substance to the contention that the effect of the report is to give the sanction of the Commission to an illegal combination in restraint of trade and commerce.

Nor is there substance to the contention that discretion was abused by denying a rehearing. *United States* v. *Northern Pacific Ry Co.,* 288 U.S. 490, 494.

For the purposes of this appeal we have assumed, as it was assumed in the court below, that the appellant has a standing sufficient to maintain the suit. See, however, *Sprunt & Son, Inc.* v. *United States,* 281 U.S. 249. We have made a like assumption in answer to the argument of counsel for the railways that the order of the Com-

mission is negative in form and substance, and hence not subject to review. *Alton R. Co.* v. *United States,* 287 U.S. 229. These objections to the suit coalesce to such an extent with the merits of the appellant's grievance under § 500 of the statute (Transportation Act, 1920) as to make it unnecessary to separate them.

The decree is

Affirmed.

DAYTON POWER & LIGHT CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 609. Argued March 13, 14, 1934.—Decided April 30, 1934.

1. In fixing the rates of a gas distributing company, the State is not bound to allow as operating expenses the full amounts paid for gas supplied the distributor under a contract between it and a closely affiliated seller, but may inquire into the reasonableness of the contract price. P. 295.
2. To prove that a lower allowance, found reasonable by the state authorities, resulted in a confiscatory rate, the distributor in this case was under the burden of showing that, in its transactions with the affiliated seller, which was itself subject to rate regulation, the contract price was no higher than would fairly be payable in a regulated business by a buyer unrelated to the seller and dealing at arms length. Pp. 295, 308.
3. Where a gas distributing company claimed that a rate fixed by a State was confiscatory, upon the ground that the allowance made for purchase of its gas supply from an affiliated producing company and chargeable to its operating expenses was inadequate, and this question turned upon the value of leases of gas land held by the affiliate, which were appraised by the state authorities at more than book value, *held* that the burden of proving such appraisal so inadequate as to result in confiscation through its effect upon the rate was not sustained by evidence consisting (a) of testimony of friendly experts who gave widely variant estimates based on forecasts of production capacity and on the assumption that the product would be sold in an unregulated market; and (b) actual sales of other gas leaseholds in sporadic transactions, separate in

time and place, and at prices too disparate to supply a helpful test of value. *United Fuel Gas Co.* v. *Railroad Comm'n*, 278 U.S. 200. P. 298.

4. Allowance for amortization and depletion of operated gas leaseholds and of the well-structures and equipment used in connection therewith, *held* not only adequate, but excessive, due to an overestimate of the value of such leaseholds and an underestimate of the life expectancy of the supply from the wells and from other sources not as yet tapped but available for the future. P. 303.
5. Estimate made by the state commission of accrued depreciation of wells and equipment of the affiliated gas producing company; and allowances for maintenance of its other plant and for depreciation of property of the distributing company,—considered and upheld. P. 305.
6. Any excess in estimated accrued depreciation of gas wells and equipment in this case is offset by excess in allowance for amortization and depletion. P. 306.
7. "Delay rentals" paid by a producing gas company to keep alive leases of gas land held in reserve, should not be charged to operating expenses when an annual amortization allowance makes provision whereby new leases can be acquired and paid for out of current earnings. P. 306.
8. In deciding upon the reasonableness of a price for gas charged by a producing company to an affiliated distributing company, the state commission was not concluded by evidence of prices between producers and distributors in other cities, when the prices were not uniform and the conditions affecting cost of transportation and delivery were not shown and, for all that appeared, the buyers and sellers were parts of the same system of affiliated companies. P. 306.
9. The burden is upon the public utility to sustain the fairness of payments for the managerial service of an affiliated company, which it makes to the affiliate and charges to its own operating expenses, and which have been found excessive by the public rate-making authority in fixing its rates. P. 307.
10. Failure to make an allowance for going value in addition to the valuation of the assets upon the basis of a plant in successful operation, was not unreasonable or arbitrary in this case, in view of the smallness of the company and the simplicity of its organization. P. 308.
11. Refusal of a state commission to make allowances for conjectural organization or preconstruction costs, and costs of financing

the business, as part of the hypothetical expense of reproduction, *held* no ground for declaring rates confiscatory in this case. P. 309.

12. Rate of return of 6½% for a distributing gas company *held* adequate, in view of business conditions judicially noticed. P. 311.

13. When a gas company, resisting a rate reduction, adduces valuations purporting to show that the rates which it has been receiving and those which it seeks to put into effect, as well as the prices at which it buys gas from an affiliate, are all greatly below the level of a fair return, the argument proves too much, and the valuations are discredited by the test of experience, since in the absence of extraordinary conditions, not proved to exist, business is not voluntarily transacted at confiscatory rates. P. 312.

127 Oh. St. 137; 187 N.E. 18, affirmed.

APPEAL from a judgment which affirmed an order of the Public Utilities Commission of Ohio by which a schedule of increased rates filed by the appellant Gas Company was stricken, and the Company was enjoined from putting it into effect.

Mr. John E. Mullin, with whom *Messrs. Edwin P. Matthews, Charles P. Pfarrer,* and *Chester J. Gerkin* were on the brief, for appellant.

Mr. Donald C. Power, Assistant Attorney General of Ohio, with whom *Mr. John W. Bricker,* Attorney General, was on the brief, for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The Dayton Power and Light Company, an Ohio corporation, is here as appellant challenging the validity of an order of the Public Utilities Commission of Ohio, affirmed by the Supreme Court of that state, which prescribes the rates chargeable to consumers of natural gas.

The appellant is a distributing company, producing no gas and owning no wells. The gas that it distributes it buys from the Ohio Fuel Gas Company, an affiliated corporation, delivery being made to it by the seller at the

gateways of the towns and cities where its mains and service pipes are laid. Both seller and buyer are subsidiaries of the Columbia Gas and Electric Corporation, which owns the entire capital stock of each of them as well as that of other companies producing in other fields or distributing in other cities.

On June 17, 1929, the appellant filed with the Commission a new schedule of "rates and prices" to take effect thirty days later unless suspended or annulled. The average rate of increase was 5.67 cents per thousand cubic feet. Under the authority of statute (Pence Law, 110 Ohio Laws 366, General Code, § 614–20), the Commission suspended the operation of the new schedule for 120 days, and at the same time initiated an inquiry of its own motion as to the fairness of the increase. The proceedings being undetermined at the end of the period of suspension, the statute permitted the appellant to put the schedule into effect at once upon filing a bond securing the repayment to the consumers of such portion of the increased rate as the Commission, upon final hearing, might determine to have been unreasonable or excessive. Such a bond was given on October 9, 1929. The proceeding was then continued, but a decision was not announced till November 3, 1932. There had been a pause in the hearings to await the final submission of the testimony in the case of the Columbus Gas and Fuel Company, an affiliated corporation serving other territory. Much of the testimony in that case was read into the record by stipulation as testimony in this. Upon the record thus supplemented the Commission announced its decision that the revenues under the earlier schedule were sufficient to yield a yearly net return of 6½ per cent. upon the fair value of the property, that this return was reasonable, and that more must not be charged. An order was therefore made striking the new schedule from the files of the Commission,

restraining the appellant from collecting the higher rates and directing as to the past that the difference between the old rates and the new ones, with six per cent. interest, be refunded to consumers in accordance with the bond. Upon appeal to the Supreme Court of Ohio, the order was affirmed, 127 Ohio St. 137; 187 N.E. 18, against the protest of the appellant that there had been an infringement of its privileges and immunities under the Constitution of the United States. Amendment XIV; Article I, § 10. Upon appeal to this court, Judicial Code, § 237 (a); 28 U.S.C. § 344, the protest is renewed.

At the threshold there is a controversy as to the scope of the problem before us for solution. The appellee argues that the only question for the Commission was one as to the reasonableness of the new schedule in the very form proposed: let the rates be excessive by ever so little, the schedule, it is said, was to be rejected altogether, and no other could be substituted. In opposition the appellant urges that this is too narrow a construction of the function and powers of the Commission under the applicable statute: if the proposed schedule was too high and the earlier one too low, there was a duty to fix a rate between, and thereby make the compensation adequate. We accept this broader view in the absence of a ruling to the contrary by the courts of the state. It is borne out by the terms of the bond and by the requirements of the statute under which the bond was given: such part of the new collections as shall be found to be unreasonable, that and no more is to be refunded to the customers. It is borne out again by the findings and the order: the rate is to be returned to what it had been before the change, and the difference repaid. Finally it is borne out by the opinion of the state court, which considers upon the merits the objections enumerated by the appellant in its petition to review the order of the Commission, and finds them all to be untenable.

With the field of inquiry thus charted, we turn to the objections in the effort to determine whether separately or collectively they support the claim of confiscation.

They fall into three classes: (1) objections to the computation of operating expenses; (2) objections to the valuation of the property making up the rate base; and (3) objections to the rate itself.

First. Objections to the computation of operating expenses.

The chief item of controversy under this head is the price payable to the affiliated seller for gas delivered at the gates.

The contract between the appellant and the Ohio Fuel Gas Company called for payment at the rate of 45 cents per thousand cubic feet; the Commission found this price to be excessive to the extent of 6 cents, thereby reducing to 39 cents the allowance to be made as a proper operating expense.[1] There is no doubt under the decisions of this court that the Commission was not concluded by the price fixed in the agreement. This results from the relation of intimate alliance between the buyer and the seller. They were not dealing with each other at arm's length, and the prices that they fixed in their intercompany transactions were of no concern to the consumer unless kept within the bounds of reason. *Western Distributing Co.* v. *Public Service Commission of Kansas,* 285 U.S. 119; *Smith* v. *Illinois Bell Telephone Co.,* 282 U.S. 133; *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U.S. 300, 320. Whether the bounds were overpassed or heeded is next to be considered.

1. First in order of importance is the value of the gas fields.

[1] The appraisal of the appellant's property at the amount fixed by the Commission will allow a return of 6½% if operating expenses are lowered by this reduction of the gateway price. At the contract price of 45 cents the return will be less.

The Ohio company, the seller, does not own its fields in fee. It does own leases covering nearly three million acres in Ohio and elsewhere. Some of these it uses as a source of supply to meet the present needs of customers. Others are held as a standby for the future. Are all to be included in determining the base on which a fair price is to be reckoned? Are some to be ruled out until the wells now in use are wholly depleted, or until depletion is near at hand? If some or all are to be included, what shall be the principle of appraisal: shall it be market value, or value as shown by the books, or some compromise between them?

These and like questions have been much debated in the opinions below and in the arguments of counsel. They suggest interesting and important problems in the process of rate making for companies with wasting assets. When regard is had, however, to what has been done by the Commission and the state court as distinguished from what has been said, the case assumes another aspect. Much of the debate is then perceived to be irrelevant to the issue of confiscation *vel non*—confiscation, that is to say, of the property interests of the appellant—which in ultimate analysis is the only issue to be determined. To bring this out more clearly there is need to amplify the statement of the subject matter to be valued and the mode of valuation.

The leaseholds, operated and unoperated, are grouped into four classes. Class No. 1 (291,396 acres) is made up of "tracts of land having producing gas wells drilled thereon from which gas is being furnished to the public." Class No. 2 (164,739 acres, unoperated) is made up of "tracts of land proved by actual developments and operations in the immediate vicinity thereof to be good gas-producing lands, but which do not have any producing wells drilled thereon." Class No. 3 (312,631 acres, unoperated) is made up of "tracts of land shown by sur-

rounding or neighboring developments of operations, geological considerations, etc., to be reasonably certain to be good gas land, at least as to large portions thereof, but not yet demonstrated to be such by actual drilling." Class No. 4 (2,065,421 acres, unoperated) is made up of "tracts of land situate within the areas of territory where gas sands are known or assumed to exist from general geological conditions, but which are so remote from actual gas-producing wells or territory that they are merely prospective gas lands."

The Commission has stated in its opinion that the leases in class No. 1 are the only ones that are presently "used and useful" in the public business of the owner, and hence the only ones to be valued in estimating a fair return.[2] The Commission has also stated in effect that there was no satisfactory evidence before it either of market or of intrinsic value for any portion of the acreage. This is what was said, but what was done was different. The value of the 291,396 acres in class No. 1 was $1,569,479 on the basis of their original cost with certain overheads and expenses added; the book value of the other classes, after deducting what is found to have been an arbitrary write up of about $3,700,000, was $3,160,765, a total for all classes of $4,730,244.[3] Instead of resorting to those tests the Commission made an allowance of $25 per acre for the 291,396 acres in class No. 1, selecting that figure because it had been approved by the Supreme Court

[2] Under the Ohio law a corporation selling its entire product to public utilities which in turn sell that product to consumers is itself a public utility if the shares are owned by the same persons. *Ohio Mining Co.* v. *P. U. Comm'n,* 106 Ohio St. 138, 146, 150; 140 N.E. 143.

[3] The Ohio Fuel Gas Company took over in June, 1929, the leases of an affiliated company, the Logan Gas Company and its predecessor, the Logan Natural Gas and Fuel Company. These leases, after being carried on the Logan books at about $2,500,000, were marked up in 1919 so as to show an increase in value of $3,748,036.48.

of Ohio in another litigation affecting part of the same lands. *Logan Gas Co.* v. *Public Utilities Comm'n,* 124 Ohio St. 248; 177 N.E. 587. The result was an appraisal of $7,284,900, which was about $2,500,000 more than the book value of all the leases in classes 1 to 4 inclusive. On appeal this method of valuation did not pass without impeachment. The Supreme Court of Ohio said in its opinion (*Columbus Gas & Fuel Corp.* v. *Public Utilities Commission of Ohio,* 127 Ohio St. 109; 187 N.E. 7; *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio,* 127 Ohio St. 137; 187 N.E. 18) that the appraisal at the rate of $25 per acre was too high, and that the limit of the allowance should have been the book value of the leases in class No. 1. Once more there must be a distinction between what was said and what was done. Criticizing the appraisal of the Commission as over-liberal to the company, the court affirmed the order which had been made on the assumption that there should be an allowance of $7,284,900 because of the ownership of leases. The appellant may not prevail unless there has been error in the result as well as error in the reasoning. Is the appraisal of the leases at over seven million dollars an arbitrary act, which in turn has brought about an arbitrary rejection of the contract for gas delivered at the gates, and hence an infringement of constitutional immunities?

As to that issue the burden of proof rests heavily on the appellant. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California,* 289 U.S. 287, 304, 305. In the endeavor to sustain it there has been an attempt to establish market and intrinsic values by the estimates of experts as well as by actual sales.

Webber, a witness for the appellant, placed the value of the leases in class No. 1 at $11,473,717; Meals at $17,483,760; Wittmer at $21,825,000, and Dally at $26,225,640. For class No. 2 the estimates were: (Webber), $10,-

440,300; (Meals), $9,884,340; (Wittmer), $12,300,000; (Dally), $16,473,900. For class No. 3, (Webber), $10,504,320; (Meals), $1,250,524; (Wittmer), $3,120,000; (Dally), $6,252,620. For class No. 4, (Webber), $6,196,263; (Meals), $8,261,684; (Wittmer), $6,195,000; (Dally), $4,130,842. Variations so wide are sufficient of themselves to disprove the existence of a market in the strict or proper sense. *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. 689, 697, 698, 699. If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury (*Head* v. *Hargrave,* 105 U.S. 45, 49) or to a judge (*The Conqueror,* 166 U.S. 110, 131, 133), or to a statutory board. *Uncasville Mfg. Co.* v. *Commissioner,* 55 F (2d) 893, 897; *Tracy* v. *Commissioner,* 53 F. (2d) 575, 577; *Anchor Co.* v. *Commissioner,* 42 F. (2d) 99, 100; *Gloyd* v. *Commissioner,* 63 F. (2d) 649, 650. There are reasons why the principle has special application here. In the first place, the intrinsic value of the leases is dependent upon the capacity of the lands to yield productive wells, a capacity seldom to be judged with even a fair approach to certainty until tested by experience. *Natural Gas Co. of W.Va.* v. *Public Service Comm'n,* 95 W.Va. 557, 569; 121 S.E. 716. In the second place, the profits to be earned in a regulated business must vary with the rates established by the supervising agencies of government, with the result that prophecies, however radiant, may be upset overnight by the publication of a lower schedule. The witnesses for the appellant were alive to these possibilities of surprise and disappointment, and there are admissions that their chief interest was in an unregulated market. To these perturbing tendencies, all operating to weaken

the persuasive force of their opinions, there must be added still another, that of interest or bias, conscious or unconscious. Webber, a broker, was a stockholder in the Columbia Gas and Electric Company, the parent corporation. For fifteen years he had been in the service of the Ohio Fuel Supply Co., the predecessor of the Ohio Fuel Gas Co. He had been a witness for the appellant in other litigations. Meals was the president of a gas company, had been engaged in the gas business for over forty years and had testified in other suits. Wittmer was the owner of gas fields and sold his gas to the Ohio Fuel Gas Company and affiliated corporations. Dally was in the same position. The testimony of all is subject to the infirmities that were pointed out by this court in another rate controversy involving fields in West Virginia. *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U.S. 300, 316. It is not based, at least to a controlling extent, "on prevailing prices for gas leases or on actual sales." It is based upon "an estimated or assumed exhaustible supply of gas available to appellants until exhausted, and upon a predictable price for natural gas in unregulated markets" through a future period of years. Cf. *Charleston* v. *Public Service Comm'n,* 110 W.Va. 245; 159 S.E. 38. How uncertain are the data can be gathered from the variant results.

The appellant has attempted to correct these uncertainties by supplementing the opinions of its experts with testimony of actual sales. But they were sporadic transactions, separate in time and space, and at prices too disparate to supply a helpful test of value. Thus in 1929 Wittmer sold 101,600 acres of Ohio leaseholds to the Penn-Ohio Gas Co. for $1,085,000, and in the same year bought 7,000 acres for $100,000. About the same time, Meals made a sale of 21,000 acres for $2,500,000. Dally had made purchases at prices ranging from $2 an acre for leaseholds of the quality of class No. 4 up to $50 or $75 an acre

for leaseholds of a higher grade. Over against the evidence of these prices must be set the evidence that class No. 1 leases, acquired by the appellant in 1927, 1928 and 1929, had been bought at an average price of $2.05 an acre, and if three leases be excluded, at an average of 62¼ cents an acre. Then too, there are quantitative considerations that are not to be ignored. For the most part the prices stated by the appellant's witnesses had been paid for small tracts, if comparison be made with the vast and often unproved acres in controversy here. Nor is there any such uniformity of price as to suggest the existence of a standard. Meals sold 21,000 acres for more than Wittmer sold a tract almost five times as large. Indeed, the truth becomes obvious when one reads the testimony as a whole that the prices upon sales were playing a subordinate rôle, and that the ultimate appraisal was a forecast of productive power. Granting even that the testimony had an evidential value, it had that and nothing more. It had no such commanding quality as to apply coercion to the judgment of the appointed triers of the facts, and exclude every choice but one.

We do not attempt to determine upon this record whether the Commission and the state court were in error in expressing the opinion that only class No. 1 leases should have a place in the appraisal. On the one side it is argued (cf. *Wichita Gas Co.* v. *Public Service Comm'n,* 2 F.Supp. 792, 799) that the discretion of the owner as to the extent of the reserve essential for prudent management ought not to be overridden by a court unless proved by convincing testimony to have been fraudulent or arbitrary. On the other side it is argued (cf. *Wichita Gas Co.* v. *Public Service Comm'n, supra,* p. 816; *United Fuel Gas Co.* v. *Public Service Comm'n,* 14 F. (2d) 209, 221) that the values of reserve leases acquired by the owner to supply the needs of a remote future are not a part of the rate base upon which profits are presently to be earned at

the cost of the consuming public, though they may be brought into the base afterwards when the time to use them is at hand. Moreover, the very reason for including in operating expenses a depletion allowance that will amortize wasting assets is to make provision for a fund out of which capital may be replenished by the purchase of other leases if that use is thought to be preferable to dividing the fund among the shareholders and winding up the business. These and other arguments we put aside without expression of a choice, and this for the reason that the case as it has shaped itself does not require us to weigh them. Again we emphasize the distinction between dictum and decision. If that distinction is observed, the upshot of the case is seen to be that the Supreme Court of Ohio, with authority to revise the findings of the Commission in respect of fact and law (*Hocking Valley Ry. Co.* v. *Public Utilities Comm'n,* 100 Ohio St. 321, 326, 327; 126 N.E. 397), has disapproved the appraisal of the No. 1 leaseholds at $25 an acre, has found the testimony insufficient to establish a value beyond that shown by the books, but has, none the less, upheld an order whereby rates have been fixed upon the basis of the book value of leases of every class (numbers 1 to 4 inclusive), and $2,500,000 besides. If the evidence would have been adequate to uphold a lower rate, *a fortiori* it was adequate to uphold the rate prescribed. Plainly in all this there has been no infringement of constitutional immunities unless a higher value has been made out by evidence too strong to be rejected. But for reasons already stated, the evidence is lacking in that high coercive power. Court and commission were free in their discretion to reject as unsatisfactory the conflicting opinions of a group of friendly experts. They were free in their discretion to refuse to draw an inference of value from the prices stated to have been paid upon a few purchases and sales. If those data were unacceptable, the only

others left were the entries in the books, and these perforce were followed for lack of anything better. The result is to reproduce the situation that was found and commented on in a suit by the United Fuel Gas Company, an affiliated corporation. *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U.S. 300, 318. "On the record as made, appellants have failed to present any convincing evidence of value of their gas field which would enable us to assign to it any greater value than that which they appear to have assigned to it on their books. This book value, therefore, may be accepted not as evidence of the real value of the gas field, but as an assumed value named by the appellants, which, on the evidence presented cannot reasonably be fixed at any higher figure." Cf. *United Fuel Gas Co.* v. *Public Service Commission of West Virginia,* 278 U.S. 322, 326.

2. Amortization and depletion.

In determining the price to be paid by the appellant for gas delivered at the gates, the Commission included among the operating expenses of the affiliated seller an annual allowance of $4,158,954 to amortize the value of leaseholds No. 1 (the only leaseholds then in use) and of the well-structures and equipment used in connection therewith, and thus provide a fund that would restore the depleted capital when the gas had been exhausted.

The Supreme Court of Ohio expressed the view in its opinion that this allowance was not permissible under the statutes of the state. None the less it affirmed the order of the Commission which fixed the rate of gas on the assumption that a charge for amortization was properly included in the operating expenses. In such circumstances the appellant is not aggrieved through the expression of a belief that the rate would have been lawful if the charge had been omitted.

The amount of the allowance is adequate and even liberal. It was made on the assumption (1) that the value

of the gas fields in class No. 1 was $25 an acre, and (2) that the life expectancy of the contents of the wells and of the appurtenant structures and equipment was only three years and two months. Both assumptions are erroneous, though the error results to the appellant's benefit. As to assumption (1), the state court has held that there is no satisfactory evidence of the value of the leases in class No. 1 in excess of the value assigned to them upon the books. A depletion allowance must therefore be excessive if it is made in the belief that a value of $25 per acre is the amount to be restored. As to assumption (2), there has been an underestimate of the life expectancy of the gas content of the wells, resulting once more in an exaggerated allowance for inroads upon capital. The prediction may have been correct in respect of the wells already driven and in use, though this is far from certain, but it was certainly too low if expectancy is to be measured by sources of supply in the 291,000 acres that had never been tapped and were available for the future.

The effect of these errors, and indeed of the first of them alone, without attempting to estimate the consequences of the second, is to make the amortization charge excessive to the extent of $761,098.50. In figuring the charge the present value of the leases was treated as 41.8874 per cent. of $7,284,900, or $3,051,455; that of the gas well construction as $5,944,692, and that of the gas well equipment as $4,069,434, a total of $13,065,581. The actual present value of the leases in class No. 1 was not more than 41.8874 per cent. of $1,569,479, or $657,414. The fund to be restored through amortization was thus overestimated to the extent of $2,394,041 or $18\frac{3}{10}$ per cent., which would reduce the annual charge, without change of the life expectancy, from $4,158,954 to $3,397,-865.50.

We have assumed in what has been written that for the purpose of amortization the leases in class No. 1 are

to be taken at the value shown on the books. The appellant will be little helped, however, if another standard is accepted. No method of valuation supported by the record will lay a basis for a holding that the allowance is inadequate to the point of confiscation. The truth seems to be, as was stated by a witness for the appellant, that the percentage of depletion appropriate for gas fields is "the wildest sort of guess." This results from many circumstances, not the least of which is the probability of improved methods of production. In an industry subject to these rapid changes the prophecies of one year are likely to be overturned by the experience of the next.

We think the allowance for depletion, instead of being too small, is so manifestly excessive as to supply a margin for the correction of other contested items that may approach the border line. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California, supra,* p. 317.

3. Reserve for depreciation.

The Commission allowed as a charge against the operating expenses of the affiliated seller an annual reserve of $667,612 to be placed in a sinking fund and devoted to the maintenance of the plant, with the exception of the wells and their equipment which had been separately cared for in the allowance for depletion.

The appellant has failed to show in any conclusive or convincing way that this reserve will be inadequate.

The Commission also allowed as a charge against the appellant's operating expenses an annual reserve in the amount of 2% of the "depreciable property" employed by the appellant in the business of distribution.

The percentage so fixed is stated to be in accord with the practice of the appellant as disclosed in its annual reports on file with the Commission.

The contention that the percentage of allowance should have been 4 per cent. instead of 2 has no basis in the evidence.

4. Accrued Depreciation.

In determining the price to be paid for gas delivered at the gateways, the Commission appraised the wells and equipment of the affiliated seller as having suffered a depreciation of 58.1126 per cent. The appellant insists that the depreciation is excessive.

There is evidence that the method of computation adopted by the Commission is in accordance with the accepted practice of mining engineers. The practice is to ascertain the rock pressure at the initial flow of the gas and again at the time of the appraisal, and to measure the depreciation by the reduction thus disclosed. The wells and their equipment have only a scrap value after the exhaustion of the gas, and contents and containers thus depreciate together.

The appellant, though complaining that the percentage of depreciation is excessive, has had a benefit, more than equivalent to any injury, in the enhancement of the allowance for amortization and depletion.

5. The disallowance of the " delay rentals " for unoperated leases.

To keep alive the leases acquired as a reserve the affiliated seller paid the annual carrying charges (known as " delay rentals "), and there is objection to the exclusion of the payments from operating expenses.

We think it a sufficient answer that the annual amortization allowance of $4,158,954 has made provision for a fund whereby new leases can be acquired and paid for out of current earnings. Operating expenses are magnified unduly if they cover both the fund and the payments that are made out of it.

6. The rate of 45 cents per thousand cubic feet viewed in the aspect of a customary charge.

An attempt is made to show that the price paid by the appellant to the affiliated seller was the current or market rate in contracts between producers and distributors in

other towns and cities. To bolster up that argument a schedule of contracts was marked as an exhibit. Twenty-five contracts are listed. There is a concession that in all but two the seller is the Ohio Fuel Gas Company or an affiliated corporation. There is no evidence as to the relation between the seller and the buyers. For all that appears the buyers in most instances are parts of the same system. The prices are not uniform: many are higher than 45 cents, but some are lower, one of them being as low as 39 cents. Distances and other geographical conditions affecting the cost of transportation and delivery are undescribed and unexplained.

The Commission did not err in its determination that this was inconclusive evidence.

7. The general administrative expenses incurred by the appellant in the conduct of its business.

These, as claimed by the appellant, were $38,395; the Commission reduced them to $32,432.

A contract had been made with the Columbia Engineering and Management Corporation, an affiliated company, for services as manager in return for a percentage of the gross earnings. This item ($13,741) was found by the Commission to be excessive to the extent of $5,963, and the compensation was reduced accordingly. In view of the close relation between the affiliated companies, the burden was upon the appellant to sustain the fairness of the contract. We cannot hold that it did so in opposition to the judgment of a Commission acquainted with prices and other conditions in the localities affected.

We have now considered the objections to the allowance and disallowance of operating expenses.

To determine whether 39 cents per thousand cubic feet is a fair price to be paid for gas delivered at the gates, there has been need to consider the assets and expenses of the affiliated seller, for only thus has it been possible to estimate a fair return.

We have kept in mind the principle that "rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate." *Banton* v. *Belt Line Ry. Corp.*, 268 U.S. 413, 423.

Even so, the burden of proof was on the buyer of the gas to show that in these transactions with the affiliated seller the price was no higher than would fairly be payable in a regulated business by a buyer unrelated to the seller and dealing at arm's length. *Western Distributing Co.* v. *Public Service Commission of Kansas*, 285 U.S. 119, 124.

State court and Commission did not act in an arbitrary fashion when they held upon the evidence before them that the burden had not been borne.

There are certain other objections that have relation to the value of the appellant's property, and not to its expenses of operation or to the value of the property of the affiliated seller.

To these we now turn.

Second. The value of appellant's property.

(a) Objection is made that the going value of the appellant's business should have been included in the base.

The decisions of this court show what going value means (*Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California, supra*, p. 313), distinguish it from good will, and hold that upon proof of its existence it may have a place in the base upon which rates are to be computed. The Commission was of opinion that there was here no constituent of property that called for separate appraisal apart from the recognition that had been given it as a contributory factor in other elements of value.

The appellant is a new company, engaged in business for a few years. The value of its physical assets is less than a million dollars. In the brief term of its existence it professes to have added to that value from $125,000 to

$140,000 by combining the parts into an organism and causing them to work together. The Commission took the view that whatever increment of value had emerged from these sources was sufficiently reflected in the allowance of the cost of developing "new business" and in the appraisal of the physical assets as parts of an assembled whole. A like conclusion has been reached by this court in very similar conditions. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California, supra,* p. 314. Going value is not something to be read into every balance sheet as a perfunctory addition. "It calls for consideration of the history and circumstances of the particular enterprise." *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California, supra,* p. 314. Here the company was a small one and its organization simple. There was no diversified and complex business with ramifying subdivisions. We cannot in fairness say that after valuing the assets upon the basis of a plant in successful operation, there was left an element of going value to be added to the total. Even if the addition might have been made without departure from accepted principles, the omission to make it does not appear to have been so unreasonable or arbitrary as to overleap discretion and reach the zone of confiscation. "It is necessary again, in this relation, to distinguish between the legislative and judicial functions." *Los Angeles* case, *supra,* p. 314. Much that the framers of a schedule are at liberty to do, this court in the exercise of its supervisory jurisdiction may not requre them to do. For the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled.

(b) A number of other objections may conveniently be grouped together.

The appellant complains of the refusal to make allowance for organization or pre-construction costs. There is no evidence that any were incurred, though this of itself

is indecisive. *Ohio Utilities Co. v. Public Utilities Comm'n*, 267 U.S. 359, 362. It is conjectural whether they would be incurred in the hypothetical event of a reproduction of the business, and, if incurred, in what amount. The appellant's position as a member of an affiliated system would have a tendency to reduce such expenses to a minimum. We think the ruling is supported by decisions of this court. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California, supra,* p. 310; *Wabash Valley Electric Co.* v. *Young,* 287 U.S. 488, 500. To this it is to be added that the item is of negligible importance. Its presence or absence would not make the difference between confiscation and a fair return. We do not figure to so fine a point in determining the application of the constitutional restraints of power.[4] An intelligent estimate of probable future values (*Southwestern Bell Telephone Co.* v. *Public Service Comm'n,* 262 U.S. 276, 288), and even indeed of present ones, is at best an approximation. The like is true of a forecast of the extent of future revenues. There is left in every case a reasonable margin of fluctuation and uncertainty.

The appellant complains also of the failure to include the hypothetical expense of financing the business as part of the cost of reproduction.

Considering the absence of evidence that any such expense had been incurred when the business was established and the uncertainty that it would be incurred if the plant were destroyed and reproduced, we think this item under recent decisions was properly rejected as remote and conjectural. *Wabash Valley Electric Co.* v. *Young, supra,* p. 500; *Los Angeles Gas & Electric Corp.*

[4] The appellant's yearly revenues during the period of inquiry were $666 in excess of the amount of money needed to yield a return of 6½ per cent. on the value fixed by the Commission. If pre-construction costs were to be added to the full extent claimed, the rate of return would be about .064.

v. *Railroad Commission of California, supra,* p. 310. We are to remember that the cost of reproduction is a guide, but not a measure. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California, supra,* p. 307.

What has been said of the foregoing items applies with little variation to the reduction of "general overheads," or undistributed expenses during the period of construction, from 17%, the amount claimed by the appellant, to 14%, the amount allowed by the Commission.

The cost in imaginary conditions of cutting and restoring pavements was not an increment of value. *Des Moines Gas Co.* v. *Des Moines,* 238 U.S. 153.

The amount necessary for working capital was carefully computed, and has not been proved to be too small for the requirements of the business.

Third. The rate of return on the investment.

The appellant contends that to avoid confiscation the rate of return should be 8 per cent., instead of 6½, which was allowed.

In view of business conditions, of which we take judicial notice (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U.S. 248, 260), the rate allowed was adequate. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission of California, supra,* p. 319.

Whether a lower rate could be upheld is a question not before us.

Dissection of the several items that have been criticized in the appellant's argument has thus brought us to the conclusion that the order of the Commission, whether generous or ungenerous, is at all events not confiscatory, and hence not subject to revision here. But the conclusion has reinforcements that come to it from other avenues of approach. In a statement put in evidence by the appellant, the rate of return under the new schedule is said to be $1\frac{28}{100}$ per cent. of the fair value of the property. Under the earlier schedule the revenue was even less. So modest

a rate suggests an inflation of the base on which the rate has been computed. It is a strain on credulity to argue that the appellant, when putting into effect a new schedule of charges, was satisfied with one productive of so meagre a return. The same surprise is excited when we consider what it claims as to the fair value of the gas delivered at the gates. All that the affiliated seller asks is 45 cents per thousand cubic feet, yet according to the appellant's figures nearly 7 cents more, or a price of about 52 cents, is necessary to protect the seller against the wrong of confiscation. The argument proves too much: the valuations are discredited by the teachings of experience. Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient. If such circumstances exist, the appellant has not proved them. Nothing in the record lays the basis for a belief that the natural gas business in Ohio is unable to pay its way. That being so, what the public utility has done belies what it has said. We shall hardly go astray if we prefer the test of conduct.

Upon the submission of the cause the appellant made a motion to amend its assignments of error, which motion is now granted. The decree of the Supreme Court of Ohio, affirming the order of the Public Utilities Commission, does not impair any privileges or immunities secured to the appellant by the Constitution of the United States, and must therefore be

Affirmed.

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

Mr. Justice McReynolds and Mr. Justice Butler concur in the result.

PRINCIPALITY OF MONACO *v.* MISSISSIPPI.

MOTION FOR LEAVE TO FILE DECLARATION.

No. —, original. Argued March 5, 1934.—Decided May 21, 1934.

1. This Court has no jurisdiction of a suit brought by a foreign State against a State of the Union without her consent. Pp. 320, 330.
2. The need for such consent, though not expressed in Art. III, § 2, cl. 1, of the Constitution, is clearly to be implied. P. 321.
3. Clause 2 of § 2, Art. III, of the Constitution, merely distributes the jurisdiction conferred by Clause 1, and deals with cases in which resort may be had to the original jurisdiction of this Court in the exercise of the judicial power as previously given. P. 321.
4. Neither the literal sweep of the words of Clause 1, § 2, Art. III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause 1, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent. P. 321.
5. Behind the words of these constitutional provisions are the essential postulates that the controversies shall be found to be of a justiciable character and that the States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the Constitution. P. 322.
6. There has been such a surrender of immunity as respects suits in this Court brought by one State of the Union against another, or by the United States against a State; but not as respects (1) suits against a State brought by citizens of another State or citizens of a foreign State (expressly barred by the Eleventh Amendment); or (2) suits against a State of the Union by its own citizens or by federal corporations; or (3) suits against a State of the Union by foreign States. P. 328.
7. In construing the constitutional provision with respect to suits by foreign States, consideration is given to the thought that such suits may involve questions of national concern. P. 331.

Leave to file denied.

HEARING upon the application of the Principality of Monaco for leave to bring in this Court an action against Mississippi to recover the principal and interest of cer-

tain bonds issued by that State. Mississippi made her return to a rule to show cause why the leave should not be granted.

Messrs. Frederic R. Coudert and *Dean Emery,* with whom *Messrs. Ethelbert Warfield, Frederic R. Kellogg,* and *Howard Thayer Kingsbury* were on the brief, for the Principality of Monaco.

Jurisdiction to entertain this action and render judgment is vested in this Court by the provisions of Art. III, § 2 of the Federal Constitution.

The Eleventh Amendment does not affect this jurisdiction.

In addition to the express provision of the Constitution vesting original jurisdiction in the Supreme Court in cases such as the one at bar, this Court has fully upheld the right of foreign States and foreign sovereigns to bring actions in the United States courts. *Colombia* v. *Cauca Co.,* 190 U.S. 524; *Ex parte Muir,* 254 U.S. 522; *The Sapphire,* 11 Wall. 164.

In *Cohens* v. *Virginia,* 6 Wheat. 264, Chief Justice Marshall, considering the Eleventh Amendment, said, at p. 406:

"It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued."

The Supreme Court, having jurisdiction, can not refuse to exercise it. *Fisher* v. *Cockerell,* 5 Pet. 248, 259; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 384; *The St. Lawrence,* 1 Black 522, 526.

The jurisdiction of this Court over the controversy is fully supported by *United States* v. *North Carolina,* 136 U.S. 211; *Virginia* v. *West Virginia,* 220 U.S. 1; 238 U.S. 202; 241 U.S. 531; *South Dakota* v. *North Carolina,* 192 U.S. 286.

The plaintiff is a foreign State within the meaning of § 2 of Art. III of the Constitution.

The consent of Mississippi is not necessary to give this Court jurisdiction.

Here we have a point that has been raised in this Court from the days of the argument in *Chisholm* v. *Georgia,* 2 Dall. 419, down through the decisions in *Virginia* v. *West Virginia,* 220 U.S. 1; 238 U.S. 202; 241 U.S. 531. That there has been a difference of opinion as to what the Constitution should have provided there is no doubt. The quotations from Madison, Marshall and others in the debates in the Virginia Convention held prior to the ratification of the Constitution have been urged time and time again. Despite this fact, however, the Constitution provides that the judicial power shall extend to controversies between a State and foreign States, and that the Supreme Court shall have original jurisdiction over such controversies. The decisions of the Supreme Court fully sustain the point that the word " controversies " includes all disputes of a civil nature. The cases further sustain the point that just as the States have given up the right to coin money, the right to make treaties, the right to enter into diplomatic relations, so they have given up the right to be free from suits in the specific cases provided for in the Constitution. See *Louisiana* v. *Texas,* 176 U.S. 1; *Kansas* v. *Colorado,* 206 U.S. 46.

That one of the States of the Union may be sued in the Supreme Court by a foreign State was expressly laid down as indisputable by both the prevailing and the dissenting opinions in *Cherokee Nation* v. *Georgia,* 1 Pet. 1.

While it is true under the normal circumstances of sovereignty that those who deal in the bonds and obligations of a sovereign State must rely altogether on the sense of justice and good faith of the State, it is also true that those who deal with States of the United States have the further assurance granted by the Constitution and en-

forceable by the Supreme Court of the United States that a State of the United States will not pass legislation impairing the obligation of contracts made by it. This is so, whether the attempted impairment is by an act of legislature or by constitutional amendment. *New Orleans Gas Light Co.* v. *Louisiana Light Co.,* 115 U.S. 650; *Fisk* v. *Police Jury,* 116 U.S. 131. See also, *Robertson* v. *Miller,* 276 U.S. 174; *Columbia Ry.* v. *South Carolina,* 261 U.S. 236; *Houston & Texas Central Ry.* v. *Texas,* 177 U.S. 66.

It is difficult to find a more definite form of "impairment of contract" than the Mississippi repudiation.

Mr. J. A. Lauderdale, Assistant Attorney General of Mississippi, and *Mr. Greek L. Rice,* Attorney General, with whom *Mr. W. W. Pierce,* Assistant Attorney General, was on the brief, for Mississippi.

Without consent the State can not be sued.

The compact of the States in the Constitution imposed no duties and conferred no rights upon any foreign nation.

A sovereign can not be sued without his consent. *United States* v. *Diekelman,* 92 U.S. 520, 524; *Briscoe* v. *Bank of Kentucky,* 11 Pet. 257; *Cohens* v. *Virginia,* 6 Wheat. 264; Hamilton, The Federalist, No. 80; 3 Elliott's Debates, pp. 533, 555, 556; *Beers* v. *Arkansas,* 20 How. 527; *Clark* v. *Barnard,* 108 U.S. 436; *Bank of Washington* v. *Arkansas,* 20 How. 530; Webster, opinion to Varning Bros. & Co., Oct. 16, 1839, Vol. 6, p. 537; *Crouch* v. *Credit Fancier,* 8 Q.B. 374; Hamilton, Report 1795, Annals of Congress, 1793–1795, 3d Cong., p. 1635; *Hans* v. *Louisiana,* 134 U.S. 1; *Osborn* v. *Bank of U.S.,* 9 Wheat. 783; *Davis* v. *Gray,* 16 Wall. 203; *Board of Liquidation* v. *McComb,* 92 U.S. 53; *United States* v. *Lee,* 106 U.S. 196; *Virginia Coupon Cases,* 114 U.S. 269; *Chisholm* v. *Georgia,* 2 Dall. 419, 741; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 720; *Worcester* v. *Georgia,* 6 Pet. 515, 569; *Mar-*

tin v. *Hunter*, 1 Wheat. 304, 524, 525; 1 Story's Com. on the Constitution, c. III.

Even though the Eleventh Amendment had not been adopted, the original clause in the Constitution extending judicial power of the Federal Government to controversies between the States of the Union and foreign powers did not contemplate that a foreign government could maintain an action such as this without the consent of the State.

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

The Principality of Monaco asks leave to bring suit in this Court against the State of Mississippi upon bonds issued by the State and alleged to be the absolute property of the Principality.

The proposed declaration sets forth four causes of action. Two counts are upon bonds known as Mississippi Planters' Bank Bonds, dated March 1, 1833, the first count being upon eight bonds of $1,000 each, due March 1, 1861, and the second count upon two bonds of $1000 each, due March 1, 1866, all with interest at six per cent. per annum. The remaining two counts are upon bonds known as Mississippi Union Bank Bonds, the third count being on twenty bonds of $2,000 each, dated June 7, 1838, due February 5, 1850, and the fourth count upon twenty-five bonds of $2,000 each, dated June 6, 1838, due February 5, 1858, all with interest at five per cent. per annum. In each count it was alleged that the bonds were transferred and delivered to the Principality at its legation in Paris, France, on or about September 27, 1933, as an absolute gift. Accompanying the declaration and made a part of it is a letter of the donors, dated September 26, 1933, stating that the bonds had "been handed down from their respective families who purchased them at

the time of their issue by the State of Mississippi"; that the State had "long since defaulted on the principal and interest of these bonds, the holders of which have waited for some 90 years in the hope that the State would meet its obligations and make payment"; that the donors had been advised that there was no basis upon which they could maintain a suit against Mississippi on the bonds, but that "such a suit could only be maintained by a foreign government or one of the United States"; and that in these circumstances the donors were making an unconditional gift of the bonds to the Principality to be applied "to the causes of any of its charities, to the furtherance of its internal development or to the benefit of its citizens in such manner as it may select."

The State of Mississippi, in its return to the rule to show cause why leave should not be granted, raises the following objections: (1) that the Principality of Monaco is not a "foreign State" within the meaning of § 2, Article III, of the Constitution of the United States, and is therefore not authorized to bring a suit against a State; (2) that the State of Mississippi has not consented and does not consent that she be sued by the Principality of Monaco and that without such consent the State cannot be sued; (3) that the Constitution by § 10, clause 3, Article I, "forbids the State of Mississippi without the consent of Congress to enter into any compact or agreement with the Principality of Monaco, and no compact, agreement or contract has been entered into by the State with the Principality"; (4) that the proposed litigation is an attempt by the Principality "to evade the prohibitions of the Eleventh Amendment of the Constitution of the United States"; (5) that the proposed declaration does not state a controversy which is "justiciable under the Constitution of the United States and cognizable under the jurisdiction of this Court"; (6) that the alleged right of action "has long since been defeated and

extinguished" by reason of the completion of the period of limitation of action prescribed by the statutes of Mississippi; that the plaintiff and its predecessors in title have been guilty of laches, and that the right of action, if any, is now and for a long time has been stale.

The State contends that the holders of her bonds had a statutory right to sue the State by virtue of the Act of February 15, 1833 (Hutchinson's Code, 1798–1848, Chap. 54, Art. 11, § 1; *State* v. *Johnson,* 25 Miss. 625); that by the operation of a constitutional amendment in 1856 abolishing the Superior Court of Chancery, and until the adoption of the Code of 1871, the State had no statutory provision authorizing suits against her (*Whitney* v. *State,* 52 Miss. 732); that the Code of 1871 (§ 1573) provided that the State might be sued, and that Code had no statute of limitations in respect to bonds or contracts under seal; that a limitation of seven years as to actions upon such obligations was imposed by the Act of April 19, 1873 (Laws of 1873, Chap. 26) and that the statute of limitations against the bonds in question began to run on that date; that the right to sue the State conferred by the Code of 1871 was taken away by the Code of 1880, which became effective on November 1st of that year (*Gulf Export Co.* v. *State,* 112 Miss. 452; 73 So. 281); that meanwhile, in 1876, the Constitution of the State was amended so as to provide that the State should not "assume, redeem, secure, or pay any indebtedness or pretended indebtedness claimed to be due by the State of Mississippi, to any person, association or corporation whatsoever, claiming the same as owners, holders or assignees of any bond or bonds, now generally known as Union Bank Bonds, or Planters' Bank Bonds," that this provision was incorporated in the Constitution of 1890 (§ 258), and that since its adoption no foreign State could accept the bonds in question as a charitable donation in good faith.

In reply to these objections, the Principality asserts that she is a foreign State recognized as such by the Government of the United States; that the consent of the State of Mississippi is not necessary to give the Court jurisdiction; that the obligation of the State of Mississippi to pay her bonds is not an agreement or a compact with a foreign power within § 10, Clause 3, Article I, of the Constitution; that the action is not a subterfuge to evade the Eleventh Amendment; that the cause of action is justiciable; that no statute of limitations has run against the plaintiff or its predecessors, and that neither has been guilty of laches. Upon the last-mentioned points the Principality urges that, under the provisions of the statutes of Mississippi, holders of her bonds never had an enforceable remedy which could be said to be barred by the running of any state statute of limitations, and that the Principality will be prepared in the course of the suit to meet the defense of laches by showing the history of the efforts of the holders of the bonds to procure payment.

These contentions have been presented in oral argument as well as upon briefs. We find it necessary to deal with but one, that is, the question whether this Court has jurisdiction to entertain a suit brought by a foreign State against a State without her consent. That question, not hithereto determined, is now definitely presented.

The Principality relies upon the provisions of § 2 of Article III of the Constitution of the United States that the judicial power shall extend to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" (Clause one), and that in cases "in which a State shall be Party" this Court shall have original jurisdiction (Clause two). The absence of qualification requiring the consent of the State in the case of a suit by a foreign State is asserted to be controlling. And the point is stressed that the Eleventh Amendment

of the Constitution, providing that the judicial power shall not be construed to extend to any suit against one of the United States " by Citizens of another State, or by Citizens or Subjects of any Foreign State," contains no reference to a suit brought by a foreign State.

The argument drawn from the lack of an express requirement of consent to be sued is inconclusive. Thus there is no express provision that the United States may not be sued in the absence of consent. Clause one of § 2 of Article III 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. *Williams* v. *United States,* 289 U.S. 553, 573. But by reason of the established doctrine of the immunity of the sovereign from suit except upon consent, the provision of Clause one of § 2 of Article III does not authorize the maintenance of suits against the United States. *Williams* v. *United States, supra;* compare *Cohens* v. *Virginia,* 6 Wheat. 264, 411, 412; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 384, 386; *Kansas* v. *United States,* 204 U.S. 331, 341, 342. And while Clause two of § 2 of Article III gives this Court original jurisdiction in those cases in which " a State shall be Party," this Court has no jurisdiction of a suit by a State against the United States in the absence of consent, *Kansas* v. *United States, supra.* Clause two merely distributes the jurisdiction conferred by Clause one, and deals with cases in which resort may be had to the original jurisdiction of this Court in the exercise of the judicial power as previously given. *Duhne* v. *New Jersey,* 251 U.S. 311, 314.

Similarly, neither the literal sweep of the words of Clause one of § 2 of Article III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent.

Thus Clause one specifically provides that the judicial Power shall extend " to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." But, although a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens. *Hans* v. *Louisiana,* 134 U.S. 1; *Duhne* v. *New Jersey, supra,* p. 311. The requirement of consent is necessarily implied. The State has the same immunity in case of a suit brought by a corporation created by Act of Congress. *Smith* v. *Reeves,* 178 U.S. 436. Yet in neither case is the suit within the express prohibition of the Eleventh Amendment. Again, the Eleventh Amendment mentions only suits " in law or equity"; it does not refer to suits in admiralty. But this Court has held that the Amendment does not " leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not." *Ex Parte State of New York, No. 1,* 256 U.S. 490, 498.

Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty,[1] shall be immune from suits, without their consent, save where there has been "a surrender of this

[1] See *Briscoe* v. *Bank of Kentucky,* 11 Pet. 257, 321; *Darrington* v. *Bank of Alabama,* 13 How. 12, 17; *Beers* v. *Arkansas,* 20 How. 527, 529; *In re Ayers,* 123 U.S. 443, 505.

immunity in the plan of the convention." The Federalist, No. 81. The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State.

The debates in the Constitutional Convention do not disclose a discussion of this question. But Madison, in the Virginia Convention, answering objections to the ratification of the Constitution, clearly stated his view as to the purpose and effect of the provision conferring jurisdiction over controversies between States of the Union and foreign States. That purpose was suitably to provide for adjudication in such cases if consent should be given but not otherwise.[2] Madison said: "The next case provides for disputes between a foreign state and one of our states, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between

[2] There is no question but that foreign States may sue private parties in the federal courts. *King of Spain* v. *Oliver,* 2 Wash.C.C. 429; *The Sapphire,* 11 Wall. 164. In the latter case the court said (pp. 167, 168): "Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit." (Cases cited.) In *Kingdom of Roumania* v. *Guaranty Trust Co.,* 250 Fed. 341, the court held that the bringing of an action by a foreign nation in a court of the United States to recover a deposit placed to its credit in a bank was not a waiver of its immunity as a sovereign from suit by other parties, and hence that the court was without jurisdiction to permit the defendant by interpleader to substitute as defendant another party claiming a lien on the deposit as a creditor of the plaintiff. See, also, *Colombia* v. *Cauca Co.,* 190 U.S. 524; *Ex parte Muir,* 254 U.S. 522.

an American state and a foreign state, without the consent of the parties. If they consent, provision is here made." 3 Elliot's Debates, 533.

Marshall, in the same Convention, expressed a similar view. Replying to an objection as to the admissibility of a suit by a foreign state, Marshall said: "He objects, in the next place, to its jurisdiction in controversies between a state and a foreign state. Suppose, says he, in such a suit, a foreign state is cast; will she be bound by the decision? If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce." 3 Elliot's Debates, 557.[3]

Hamilton, in The Federalist, No. 81, made the following emphatic statement of the general principle of immunity: "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 circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would by the adoption of that plan be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

[3] See Story on the Constitution, § 1699; Willoughby on the Constitution (2d ed.), § 885.

The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarrantable." [4]

It is true that, despite these cogent statements of the views which prevailed when the Constitution was ratified, the Court held, in *Chisholm* v. *Georgia*, 2 Dall. 419, over the vigorous dissent of Mr. Justice Iredell,[5] that a State was liable to suit by a citizen of another State or of a foreign country. But this decision created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted. As the Amendment did not in terms apply to a suit against a State by its own citizen, the Court had occasion, when that question was presented in *Hans* v. *Louisiana, supra* (a case alleged to arise under the Constitution of the United States), to give elaborate consideration to the application of the general principle of the immunity of States from suits brought against them without their consent. Mr. Justice Bradley delivered the opinion of the Court and, in view of the importance of the question, we quote at length from that opinion to show the reasoning which

[4] For statements by Madison and Marshall in the Virginia Convention in relation to the non-suability of States by individuals, see 3 Elliot's Debates, 533, 555.

[5] For comment upon the force of this dissent, see *Hans* v. *Louisiana*, 134 U.S. 1, 12, 14; *Williams* v. *United States*, 289 U.S. 553, 574, 576, 577.

led to the decision that the suit could not be maintained. The Court said (134 U.S. pp. 12 *et seq.*): "Looking back from our present standpoint at the decision in *Chisholm* v. *Georgia,* we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution, whilst it was on its trial before the American people." After quoting the statements of Hamilton, Madison and Marshall, the Court continued: "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

"The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution, when establishing the judicial power of the United States. . . .

"The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm* v. *Georgia;* and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States."

The Court then adverted to observations of Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheat. 264, which favored the argument of the plaintiff in error, but as those observations were unnecessary to the decision in the case of *Cohens,* the Court was of the opinion that they should not "outweigh the important considerations referred to which lead to a different conclusion." [6]

The same principle of immunity was reiterated and applied by the Court, upon the authority of *Hans* v. *Louisiana,* in *Smith* v. *Reeves, supra,* in deciding that a federal corporation could not sue a State without her consent, although, as we have seen, such a suit was not listed in the specific prohibitions of the Eleventh Amendment.

In the case of *South Dakota* v. *North Carolina,* 192 U.S. 286, 318, the Court observed that the expression in the opinion in *Hans* v. *Louisiana* of concurrence in the views announced by Mr. Justice Iredell in his dissenting opinion in *Chisholm* v. *Georgia,* could not be considered as a judgment of the Court, in view of the point which *Hans* v. *Louisiana* actually decided. But *South Dakota* v. *North Carolina* did not disturb the ruling in *Hans* v. *Louisiana* or the principle which that decision applied.

[6] See *Missouri* v. *Illinois,* 180 U.S. 208, 240; *New Hampshire* v. *Louisiana,* 108 U.S. 76.

South Dakota v. *North Carolina* was a suit by one State against another State and did not present the question of the maintenance either of a suit by individuals against a State or by a foreign State against a State. As a suit by one State against another State, it involved a distinct and essential principle of the constitutional plan which provided means for the judicial settlement of controversies between States of the Union, a principle which necessarily operates regardless of the consent of the defendant State. The reasoning of the Court in *Hans* v. *Louisiana* with respect to the general principle of sovereign immunity from suits was recently reviewed and approved in *Williams* v. *United States, supra.*

The question of that immunity, in the light of the provisions of Clause one of § 2 of Article III of the Constitution, is thus presented in several distinct classes of cases, that is, in those brought against a State (a) by another State of the Union; (b) by the United States; (c) by the citizens of another State or by the citizens or subjects of a foreign State; (d) by citizens of the same State or by federal corporations; and (e) by foreign States. Each of these classes has its characteristic aspect, from the standpoint of the effect, upon sovereign immunity from suits, which has been produced by the constitutional scheme.

1. The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union. The Federalist, No. 80; Story on the Constitution, § 1679. With respect to such controversies, the States by the adoption of the Constitution, acting "in their highest sovereign capacity, in the convention of the people," waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established

"by their own consent and delegated authority" as a necessary feature of the formation of a more perfect Union. *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 720; *Louisiana* v. *Texas,* 176 U.S. 1, 16, 17; *Missouri* v. *Illinois,* 180 U.S. 208, 240, 241; *Kansas* v. *Colorado,* 185 U.S. 125, 142, 144; 206 U.S. 46, 83, 85; *Virginia* v. *West Virginia,* 246 U.S. 565.

2. Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. *United States* v. *North Carolina,* 136 U.S. 211; *United States* v. *Texas,* 143 U.S. 621, 644, 645; 162 U.S. 1, 90; *United States* v. *Michigan,* 190 U.S. 379, 396; *Oklahoma* v. *Texas,* 258 U.S. 574, 581; *United States* v. *Minnesota,* 270 U.S. 181, 195. Without such a provision, as this Court said in *United States* v. *Texas, supra,* "the permanence of the Union might be endangered."

3. To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, the Eleventh Amendment erected an absolute bar. Superseding the decision in *Chisholm* v. *Georgia, supra,* the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification. The "entire judicial power granted by the Constitution" does not embrace authority to entertain such suits in the absence of the State's consent. *Ex parte State of New York, No. 1, supra,* p. 497; *Missouri* v. *Fiske,* 290 U.S. 18, 25, 26.

4. Protected by the same fundamental principle, the States, in the absence of consent, are immune from suits brought against them by their own citizens or by federal corporations, although such suits are not within the ex-

plicit prohibitions of the Eleventh Amendment. *Hans* v. *Louisiana, supra; Smith* v. *Reeves, supra; Duhne* v. *New Jersey, supra; Ex parte State of New York, No. 1, supra.*

5. We are of the opinion that the same principle applies to suits against a State by a foreign State. The decision in *Cherokee Nation* v. *Georgia,* 5 Pet. 1, is not opposed, as it rested upon the determination that the Cherokee nation was not a "foreign State" in the sense in which the term is used in the Constitution. The question now before us necessarily remained an open one. We think that Madison correctly interpreted Clause one of § 2 of Article III of the Constitution as making provision for jurisdiction of a suit against a State by a foreign State in the event of the State's consent but not otherwise. In such a case, the grounds of coercive jurisdiction which are present in suits to determine controversies between States of the Union, or in suits brought by the United States against a State, are not present. The foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates. We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State. As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State. The foreign State enjoys a similar sovereign immunity and without her consent may not be sued by a State of the Union.

The question of the right of suit by a foreign State against a State of the Union is not limited to cases of

alleged debts or of obligations issued by a State and claimed to have been acquired by transfer. Controversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative. One of the most frequent occasions for the exercise of the jurisdiction granted by the Constitution over controversies between States of the Union has been found in disputes over territorial boundaries. See *Rhode Island* v. *Massachusetts, supra,* p. 737. Questions have also arisen with respect to the obstruction of navigation, *South Carolina* v. *Georgia,* 93 U.S. 4; the pollution of streams, *Missouri* v. *Illinois,* 180 U.S. 208; 200 U.S. 496; and the diversion of navigable waters, *Wisconsin* v. *Illinois,* 278 U.S. 367; 289 U.S. 395, 400. But in the case of such a controversy with a foreign power, a State has no prerogative of adjustment. No State can enter "into any Treaty, Alliance, or Confederation" or, without the consent of Congress, "into any Agreement or Compact with a foreign Power." Const. Art. I, § 10. The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement of arbitration, or otherwise. It cannot be supposed that it was the intention that a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State, or a dispute arising from conflicting claims of a State of the Union and a foreign State as to territorial boundaries, should be taken out of the sphere of international negotiations and adjustment through a resort by the foreign State to a suit under the provisions of § 2 of Article III. In such a case, the State has immunity from suit without her consent and the National Government is protected by the

provision prohibiting agreements between States and foreign powers in the absence of the consent of the Congress. While, in this instance, the proposed suit does not raise a question of national concern, the constitutional provision which is said to confer jurisdiction should be construed in the light of all its applications.

We conclude that the Principality of Monaco, with respect to the right to maintain the proposed suit, is in no better case than the donors of the bonds, and that the application for leave to sue must be denied.

Rule discharged and leave denied.

EASTMAN KODAK CO. ET AL. *v.* GRAY.

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

No. 709. Argued May 1, 1934.—Decided May 21, 1934.

A judgment of the District Court holding a patent invalid for want of novelty and invention, in an action at law tried without a jury pursuant to §§ 773 and 875, U.S.C., Title 28, is not reviewable in the absence of any assignment of error based on the pleadings, and where the bill of exceptions discloses no special findings or request therefor nor any proposition of law presented and relied upon during the progress of the trial. P. 336.

67 F. (2d) 190, reversed.

CERTIORARI, 291 U.S. 655, to review a judgment reversing a judgment in an action at law based upon alleged infringement of a patent.

Mr. Dean S. Edmonds, with whom *Messrs. William H. Davis, George E. Middleton,* and *Allen Hunter White* were on the brief, for petitioners.

Mr. Thomas Raeburn White, with whom *Mr. Leon Edelson* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In an action at law, respondent Gray alleged that the petitioners had infringed his patent for a power transmitting mechanism and asked damages. The patent contains six claims; he relied upon all except the fourth. A plea of the general issue and notice of special matters raised questions of novelty, invention and infringement.

The cause was first tried to a jury, Judge Dickinson presiding. Certain facts were stipulated; witnesses were examined by both parties; there were many exhibits. The jury found for respondent; the Judge granted a new trial because he deemed the charge inadequate.

Thereupon, the parties stipulated in writing " that trial by jury is hereby waived and that the case shall be submitted to the Court for decision upon the record already made, as if the testimony and exhibits offered in evidence at the trial before Judge Dickinson and a jury had been duly offered in evidence before the Judge who may be assigned to hear this case, subject to any objections which appear on the record, and that all motions made by either party at the said trial shall be deemed to have been made before the Judge trying the case, both parties to have the right of appeal as in other cases."

Afterwards, at a session held before Judge Kirkpatrick, the issues between the parties " came to be tried by the Court without a jury upon the record of the same case which had been previously tried before a jury and the Court the tenth to fourteenth days inclusive of December, 1931, the issue between the said parties having been tried by the Court without a jury on said seventeenth day of March, 1932, in accordance with a stipulation entered into by and between the attorneys for the respective

parties, at which date, namely March 17, 1932, came as well the said plaintiff as the said defendants by their respective attorneys; and upon the trial the counsel for the respective parties offered their evidence as particularly set forth in the following stenographic notes of testimony and the stenographer's minutes attached hereto; and the evidence in the cause being closed the learned Trial Judge rendered his opinion and decision in writing, as hereinafter set forth . . ." Judgment went for the petitioners here, July 16, 1932. A supporting opinion dealt generally with the issues. Near the end of it he said: "The statements of fact contained in this opinion may be taken as findings of fact. If separate findings of fact are desired the parties may submit requests in accordance herewith." And he thus summarized his conclusions:

"1. The combination of closed coil inner thrust member and open coil outer sheath member is not patentable because its elements were known to the prior art and no new mode of operation or functional relationship arises from putting them together.

"2. Claims 1 and 2 cannot be interpreted as calling for a closed coil inner thrust member in view of the file wrapper history of this patent.

"3. Claims 1 and 2 are anticipated.

"4. Claim 3 is not infringed.

"5. Claims 5 and 6 are invalid because United States patent No. 1,297,327 to Dakin and Underwood antedating the plaintiff's application discloses the method of attaching the thrust member to the stem claimed, and conclusion '1' applies to these claims."

Finally, he directed, "judgment may be entered for the defendant."

Counsel for Gray tendered a bill of exceptions "to the rulings, opinion and action of the said Court, and re-

quested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided." This was duly signed and sealed July 28, 1932. The bill contains the evidence presented and the minutes of the proceedings. It shows no exception to any ruling upon a motion presented by respondent during the progress of the cause. The transcript shows the following docket entry opposite the date January 9, 1932: "Plaintiff's motion for judgment on the verdict and assessment of treble damages filed" without more. This is not enough to support the suggestion that a motion for judgment upon the whole record was duly presented and overruled accompanied by adequate exceptions.

August 15, 1932, respondent prayed and obtained allowance of an appeal to the Circuit Court of Appeals. The assignment of errors there stated in five separate paragraphs that the trial judge erred in finding as set out in conclusions 1, 2, 3, and 5, *supra,* and in granting the judgment.

Counsel for petitioner correctly affirm—"Examination of this bill of exceptions discloses that no request or motion was made, denied, and excepted to, or any like action taken during the progress of the trial, which presented to the trial court the question whether there was support in the evidence for the findings challenged by the assignment of errors or whether the undisputed evidence required contrary findings. The fact is that respondent made no request for any findings of fact or for any rulings of law at any time, either during the first trial before the jury, or during the progress of the second trial before the court, or even after the filing of the opinion directing judgment for defendants."

In the Circuit Court of Appeals petitioners unsuccessfully moved for dismissal of the appeal or affirmation of

the challenged judgment. They pointed out the situation disclosed by the record, and relied upon *Fleischmann Construction Co.* v. *United States,* 270 U.S. 349. The court examined the record, held the patent valid and infringed, and reversed the challenged judgment. It declared: "In substance the trial was a quasi demurrer. No witnesses were examined. On final hearing neither party asked for any special findings of fact, for there were no disputed facts." This, we think, was error. The motion to affirm should have been granted. The trial was not 'in substance a quasi demurrer.' All the essential facts were not stipulated, or agreed upon by counsel. To proceed upon the contrary view was improper.

In *Fleischmann Construction Co.* v. *United States,* 270 U.S. 349, 355, 356, 357, opinion by Mr. Justice Sanford, this Court considered and announced the proper interpretation of §§ 649 and 700, R.S. (28 U.S. Code, §§ 773, 875), copied in the margin.* Concerning civil causes tried without the intervention of a jury, we there said: "And it is settled by repeated decisions, that in the absence of special findings, the general finding of the court

* U.S. Code Ann. "Sec. 773. Trial of issues of fact; by court. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

"Sec. 875. Review in cases tried without jury. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute. . . . To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them." This ruling was followed in *Lewellyn* v. *Electric Reduction Co.*, 275 U.S. 243, 248, and in *Harvey Co.* v. *Malley*, 288 U.S. 415, 418. See also *General Motors Co.* v. *Swan Carburetor Co.*, 44 F. (2d) 24, and *Gerlach* v. *Chicago, R. I. & P. Ry. Co.*, 65 F. (2d) 862.

The assignments of error in the Circuit Court of Appeals presented no point based upon the pleadings. The bill of exceptions disclosed no special findings of fact nor any proposition of law duly presented and relied upon during the progress of the trial. The judgment of the Circuit Court of Appeals must be reversed; the one by the District Court is affirmed.

Reversed.

SMITH *v.* UNITED STATES.

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

No. 742. Argued May 9, 1934.—Decided May 21, 1934.

During the time of his first enlistment, a seaman in the Navy applied for and obtained a policy of war risk insurance, executing at the time of his application an authorization for deduction of premiums from his pay. He reënlisted twice and held a certificate of continuous service. Although the authorization for deduction of premiums was never formally revoked, and there was sufficient money due him at the end of each month to meet the premiums, deductions were in fact made only during the first enlistment; and

thereafter he accepted all pay that was due him and made no effort to pay the premiums. *Held:* by his conduct the insured abandoned the policy and it was not in force at the time of his death. P. 341.

67 F. (2d) 412, affirmed.

CERTIORARI, 291 U.S. 656, to review a judgment which reversed a judgment against the United States in a suit on a policy of war risk insurance.

Mr. James J. Crossley for petitioner.

Mr. Will G. Beardslee, with whom *Solicitor General Biggs, Assistant to the Attorney General Stanley,* and *Messrs. Wilbur C. Pickett* and *W. Marvin Smith* were on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By complaint filed in the District Court for Oregon, May 22, 1929, petitioner sought judgment against the United States for benefits said to have accrued to her under War Risk Insurance taken out by her son, Elias Melvin Zimmerman, in 1917. While enlisted in the Naval Service he died aboard the U.S.S. "Conestoga" June 30, 1921.

The United States denied liability upon the ground that the policy lapsed for nonpayment of premiums and was not in force after April 30, 1918.

By agreement the cause was tried without a jury. The District Court gave judgment for the complainant—petitioner here; the Circuit Court of Appeals reached a different conclusion and ordered reversal.

There is no dispute in respect of the essential facts.

Zimmerman enlisted in the Navy March 18, 1914, as an apprentice seaman and was honorably discharged at the expiration of his term March 17, 1918; he re-enlisted March 18, 1918, and received an honorable discharge September 15, 1919; he enlisted again September 16,

1919, and served until death. He held a continuous service certificate; but when this was actually received does not appear.* War Risk insurance amounting to $10,000 issued upon his application dated December 3, 1917, which contained the following clause, never formally revoked—"I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid."

The policy provided for monthly payments in the event of death or total disability occurring while it remained in force. It designated petitioner as the beneficiary. A Bulletin issued by the Director of War Risk Insurance, as authorized by the War Risk Insurance Act, 40 Stat. 398, 409, in force when the policy became effective, contained the following regulation:

"Premiums shall be paid monthly on or before the 1st day of each calendar month and will unless the insured otherwise elects in writing be deducted from any pay due him from the United States or deposit by him with the United States and if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium; provided that the premium may be paid within thirty-one (31) days after the expiration of the month during which period of grace the insurance

* Navy Regulations, 1913.

"Paragraph 3529 (1)—Any man who, having been honorably discharged, or discharged with a recommendation for reënlistment, shall within four months thereafter reënlist for four years shall receive in exchange for his discharge a continuous service certificate. . . .

"Paragraph 4427 (22)—If any enlisted man or apprentice, being honorably discharged, shall reënlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service. . . ."

shall remain in full force"; also "In case the applicant does not desire the premium to be deducted from his pay he should so state in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his pay or if such pay be insufficient any balance from his deposit."

Payments due upon the policy were met by deductions of $6.50 monthly from the assured's pay until the end of his first enlistment. Thereafter no deduction was made; he executed no new authorization for deductions; no premium was actually met. He was entitled to pay for every day from March 18, 1914, until his death.

When honorably discharged from his first enlistment Zimmerman received the full amount then due him; also, when discharged from his second enlistment. All pay due at his death was received by his mother, the petitioner. The records of the Navy Department "disclose that he never made any allotment for War Risk Insurance Premiums other than the authorization for deduction of premiums at the time of his application for insurance."

Petitioner insists that although no premium upon the policy was actually paid after March, 1918, it nevertheless remained in full force and effect during the assured's active service because of the unrestricted authorization for deductions in his application of December 3, 1917, never thereafter revoked in writing, since there was due him at the end of each month enough to meet the required premiums and the Navy Department was under a duty to make proper deductions.

In behalf of the United States the insistence is that the authorization for deductions was ineffective after the expiration of the first enlistment during which it was given. Moreover, that the action of the assured in accepting his pay without deduction for premiums during all of his second and third enlistments—more than three years—is enough to show acquiescence in the contempo-

raneous construction by the administrative officers; and, no circumstance indicating the contrary, this establishes his purpose to surrender the contract as he properly could have done.

We are of opinion there is enough to show abandonment of the contract by the assured and upon that ground the judgment of the Circuit Court of Appeals should be affirmed.

After expiration of the first enlistment, neither party to the contract appears to have treated as operative the authorization for deductions contained in the application. Zimmerman accepted every month during a considerable period the full amount due him; made no effort to provide for payment of premiums when he must have been aware that no deduction had been made. There is nothing to indicate that he did not have full possession of his faculties or lacked intelligence or probity, or that he was unaware of the important circumstances. If he had supposed the insurance remained in effect, common honesty would have moved him to provide for actual payment of the premiums. He must have known they had not been met. In the circumstances his conduct, we think, adequately indicates the exercise of his right to abandon the policy. See *Sawyer* v. *United States,* 10 F. (2d) 416; *United States* v. *Barry,* 67 F. (2d) 763; *contra, Unger* v. *United States,* 65 F. (2d) 946.

The challenged judgment must be

Affirmed.

ARIZONA *v.* CALIFORNIA ET AL.

MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY.

No. —, original. Return to Rule to Show Cause Presented April 2, 1934.—Decided May 21, 1934.

1. This Court may entertain a bill to perpetuate testimony in aid of future litigation within its original jurisdiction. P. 347.

2. The sole purpose of such a suit is to perpetuate the testimony; and in order to sustain the bill it must appear that the facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined will be material to the determination of the matter in controversy; that the testimony will be competent evidence; that depositions of the witnesses can not be taken and perpetuated in the ordinary methods prescribed by law, because the then condition of the suit (if one is pending) renders it impossible, or (if no suit is then pending) because the plaintiff is not in a position to start one in which the issue may be determined; and that taking of the testimony on bill in equity is made necessary by the danger that it may be lost by delay. P. 347.

3. Arizona asked leave to file a bill to perpetuate the testimony of persons who took part in the formulation of the "Colorado River Compact," apportioning the waters of the Colorado River, which was adopted by all the States embracing the water-shed of that river, except Arizona, and was approved, subject to certain limitations and conditions, by the Act of Congress of December 21, 1928, known as the Boulder Canyon Project Act (See 283 U.S. 423). By the bill she claimed that § 4 (a) of the Act, imposing limitations on the use of water by California, was intended for the benefit of Arizona; that § 4 (a) embodies by reference Article III (b) of the Compact for the purpose of defining those limitations, and that the proper interpretation of Art III (b) will be, therefore, essential in future litigation to the determination of Arizona's rights under the statute; that, read in the light of other parts of the Compact, Art. III (b) is ambiguous; and that the testimony sought to be perpetuated will be material and admissible in removing the ambiguity, and will show that the water apportioned by Art. III (b) to the lower basin of the water-shed—1,000,000 acre feet per annum—is for the sole and exclusive use and benefit of Arizona. *Held:*

(1) That the meaning of the Compact, considered merely as a contract, can never be material to the contemplated litigation, since Arizona refused to ratify the Compact. P. 356.

(2) The bill does not show that Art. III (b) of the Compact is relevant to the interpretation of § 4 (a) of the Act. The Act does not purport to apportion among the States of the lower basin (to which Arizona and California belong) the waters to which the lower basin is entitled under the Compact; it merely limits California's use of waters under Art. III (a) and of surplus waters; and there can be no claim that Art. III (b) is relevant in defining surplus waters under § 4 (a) of the Act. P. 357.

(3) Proof that Congress understood that Article III (b) had allotted all the waters therein to Arizona would not make Art. III (b) relevant to the interpretation of § 4 (a) of the Act. P. 358.

(4) Ambiguity in Art. III (b) is not shown. The Compact makes an apportionment only between the upper and lower basins. The fact that any of the waters apportioned to the lower basin are useful to Arizona only or have been appropriated by her does not contradict the clear intent of Paragraph (b) to apportion the 1,000,000 acre-feet therein to the States of the lower basin and not specifically to Arizona alone. P. 358.

(5) The proposed testimony, even if it were relevant, would not be competent, since the Act rests not upon what was thought or said by negotiators of the Compact, but upon its ratification by the six States other than Arizona. P. 359.

4. The rule permitting recourse to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish the meaning of a treaty when not clear, has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the Government of the negotiator or to its ratifying body. P. 360.

Leave to file denied.

ORIGINAL application upon the part of the State of Arizona for leave to file a bill to perpetuate testimony for use in future litigation against the State of California and other parties named.

Mr. Arthur T. LaPrade, Attorney General of Arizona, and *Messrs. Charles A. Carson, Jr.,* and *A. M. Crawford* were on the brief for plaintiff.

Mr. U. S. Webb, Attorney General of California, and *Messrs. I. W. Stewart, Arvin B. Shaw, Charles L. Childers, E. C. Finney, Ray L. Chesebro, James M. Stevens,* and *Fred M. Bottorf* were on the brief for California et al., defendants.

Messrs. James H. Howard, Northcutt Ely, Ray W. Bruce, C. L. Byers, Phil D. Swing, and *Thos. Whelan,* were on the brief for the Metropolitan Water District of Southern California et al., defendants.

Mr. Paul P. Prosser, Attorney General of Colorado, *Mr. Gray Mashburn,* Attorney General of Nevada, *Mr. E. K. Neumann,* Attorney General of New Mexico, *Mr. Joseph Chez,* Attorney General of Utah, and *Mr. Ray E. Lee,* Attorney General of Wyoming, were on the brief for Colorado et al., defendants.

Solicitor General Biggs, Assistant Attorney General Blair, and *Messrs. Charles Bunn, Aubrey Lawrence,* and *Nathan R. Margold* were on the brief for Ickes, Secretary of the Interior, defendant.

By leave of Court, *Messrs. James D. Parriott, R. C. Hecox, Malcolm Lindsey,* and *Stanley P. Smith* filed a brief on behalf of the City and County of Denver, as *amici curiae.*

Mr. Justice Brandeis delivered the opinion of the Court.

On October 13, 1930, Arizona sought, by an original bill, a declaration that the Colorado River Compact and the Boulder Canyon Project Act be decreed to be unconstitutional and void; that the Secretary of the Interior and California, Nevada, Utah, New Mexico, Colorado and Wyoming be permanently enjoined from carrying out said Compact or said Act; and that they be enjoined from performing contracts which had been executed by the Secretary on behalf of the United States for the use of stored water and developed power after the project shall have been completed, and from doing any other thing under color of the Act. The bill was " dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriation and to enjoy the same." *Arizona* v. *California,* 283 U.S. 423, 464.

On February 14, 1934, Arizona moved for leave to file in this Court its original bill of complaint to perpetuate testimony in an action or actions arising out of the Boulder Canyon Project Act which "at some time in the future" it will commence in this Court against California, and others therein named as defendants.[1] The bill sets forth:

(a) The Act of Congress, August 19, 1921, c. 72, 42 Stat. 171, which authorized Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to enter into a compact regarding the waters of the Colorado River; and the appointment of a representative to act for the United States.

(b) The Colorado River Compact dated November 24, 1922, signed by representatives of the seven States—to "become binding and obligatory when it shall have been approved by the legislature of each of the signatory States and by the Congress of the United States."

(c) The Act of Congress, December 21, 1928, known as the Boulder Canyon Project Act, c. 42, 45 Stat. 1057, which approved the Colorado River Compact subject to certain limitations and conditions, the approval to become effective upon the ratification of the compact, as so modified, by the legislature of California and at least five of the other six States.

(d) The Act of California, c. 16, March 4, 1929, limiting its use of the waters of the Colorado River in conformity with the Boulder Canyon Project Act.

(e) The Proclamation of the President declaring the Boulder Canyon Project Act to be in effect, June 25, 1929, 46 Stat. 3000.

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[1] Namely, Colorado, Nevada, New Mexico, Utah, Wyoming, Harold L. Ickes, Secretary of the Interior, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

(f) The General Regulation of the Secretary of the Interior, concerning the storage of water in Boulder Dam Reservoir and the delivery thereof, dated April 23, 1930, as amended September 28, 1931.

The bill alleges, among other things:

That no right of Arizona has yet been interfered with; that attempts will be made hereafter to interfere with its rights; that it is not possible to bring the issues which will arise to an immediate judicial investigation or determination and it may be years before this can be done because " the cause or causes of action have not accrued and may not accrue for years to come "; that facts known only to certain named persons will be evidence material in the determination of such controversy or controversies; that these persons will be necessary witnesses in the prosecution of the action or actions which Arizona will be compelled to institute in order to protect its rights and those of persons claiming under it; and that all the persons with present knowledge of the present facts may not be available as witnesses when the cause or causes of action shall have accrued to the plaintiff. The prayer is for process to take the oral depositions and to perpetuate the testimony of these witnesses.

On February 20, 1934, a rule issued to those named as defendants to show cause why leave to file the bill should not be granted. All filed returns. Colorado, Nevada, New Mexico, Utah and Wyoming stated that they have no objection to the filing of the bill or to the taking of any competent testimony; and prayed that to each state should be granted the right of cross-examination and the right to object to any such testimony on any ground either at the time of the taking or of its presentation to this Court. California and the public agencies of that state expressed a doubt as to the existence of jurisdiction in this Court. They opposed the granting of the motion on the ground that the testimony if taken

would not be admissible in evidence; opposed also on the ground that the United States is an indispensable party; and insisted that the bill should not be received in the absence of consent by the United States to be sued. The Secretary of the Interior conceded that this Court has jurisdiction, but objected on the same grounds as California to granting the motion. Thereupon, a brief was filed by Arizona, reply briefs by respondents and a brief *amicus curiae* by the City and County of Denver, Colorado.

First. No bill to perpetuate testimony has heretofore been filed in this Court; but no reason appears why such a bill may not be entertained in aid of litigation pending in this Court, or to be begun here. Bills to perpetuate testimony had been known as an independent branch of equity jurisdiction before the adoption of the Constitution.[2] Congress provided for its exercise by the lower federal courts.[3] There the jurisdiction has been repeatedly invoked;[4] and it has been recognized by this Court.[5]

The sole purpose of such a suit is to perpetuate the testimony. To sustain a bill of this character, it must appear that the facts which the plaintiff expects to prove

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[2] 1 Pomeroy's Equity Jurisprudence, (4th ed.) § 211; *West* v. *Lord Sackville,* L.R. [1903] 2 Ch. Div. 378.

[3] Revised Statutes, § 866: ". . . any circuit [district] court upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam,* if they relate to any matters that may be cognizable in any court of the United States. . . ."

[4] *New York & Baltimore Coffee Polishing Co.* v. *New York Polishing Co.,* 9 Fed. 578; 11 Fed. 813; *Richter* v. *Jerome,* 25 Fed. 679; *Westinghouse Machinery Co.* v. *Electric Storage Battery Co.,* 170 Fed. 430; reversing 165 Fed. 992; *The West Ira,* 24 F. (2d) 858; *Todd Engineering Co.* v. *United States,* 32 F. (2d) 734; *Union Solvents Corp.* v. *Butacet Corp.,* 2 F.Supp. 375.

[5] *Richter* v. *Union Trust Co.,* 115 U.S. 55; compare *Green* v. *Compagnia Generale,* 82 Fed. 490, 494–5.

by the testimony of the witnesses sought to be examined will be material in the determination of the matter in controversy; that the testimony will be competent evidence; that depositions of the witnesses cannot be taken and perpetuated in the ordinary methods prescribed by law, because the then condition of the suit (if one is pending) renders it impossible, or (if no suit is then pending) because the plaintiff is not in a position to start one in which the issue may be determined; and that taking of the testimony on bill in equity is made necessary by the danger that it may be lost by delay.

The allegations of the bill presented by Arizona are sufficient to show danger of losing the evidence by delay; and also to show Arizona's inability to perpetuate the testimony by the ordinary methods prescribed by law for the taking of depositions. The only question which requires consideration is whether the testimony which it is proposed to take would be material and competent evidence in the litigation contemplated.

Second. The action or actions which Arizona expects to bring may rest upon a claim that "the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." Specifically, Arizona claims rights under § 4 (a) of the Boulder Canyon Project Act; these rights, it is said, are governed in turn by the terms of the Colorado River Compact. Briefly, the Compact apportions the waters of the Colorado River between a group of States, termed the upper basin, north of Lee Ferry, and a group south thereof, the lower basin, among which are Arizona and California. The interference apprehended will, it is alleged, arise out of a refusal of the respondents to accept as correct that construction of Article III (b) of the

Compact which Arizona contends is the proper one. It claims that this paragraph, which declares:

"In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum"

means:

"that the waters apportioned by Article III (b) of said compact are for the sole and exclusive use and benefit of the State of Arizona."

The bill charges that the Secretary of the Interior and the other defendants refuse to accept such construction; and that, by certain contracts made between the Secretary and the California defendants, they are asserting a right to appropriate the said 1,000,000 acre-feet of water to California uses. The bill states that the decision in some future action construing Paragraph (b) will materially affect rights of Arizona arising under the Boulder Canyon Project Act, in particular § 4 (a) thereof.[6]

Arizona seeks, as stated in the bill, to perpetuate, and proposes to introduce in support of its construction of Paragraph (b) of Article III, of the Compact, in the actions to be brought in the future, testimony to the following effect by those who in 1922 were connected with the negotiation of the Compact:

"The representatives of all the States and the United States except the Arizona delegation were in agreement

[6] It is claimed that a future decision as to the meaning of Article III (b) will affect rights also under (a) the Colorado River Compact, (b) the conditions required by the Boulder Canyon Project Act to be attached to patents, grants, contracts, concessions, leases, permits, rights of way and other privileges from the United States, (c) the relative and respective rights of each of the parties (to the suit to perpetuate testimony) in the waters of the Colorado and its tributaries, and the use thereof and the burdens and restrictions upon such use.

as to the definition of the Colorado River System, including the Gila River and its tributaries, and as to the division proposed, which substantially apportioned the waters of the Colorado River at Lee Ferry, the point selected as dividing the Upper Basin from the Lower Basin. The Arizona delegation refused and declined to accept the proposed compact because of the inclusion of the Gila River and its tributaries without any compensating provision to the State of Arizona in lieu of the waters thereof, which had already been appropriated and in which no other State could have any interest on account of the further fact that the waters of the Gila River and its tributaries enter the Colorado River at Yuma, at a point so far down stream and of such low elevation that it was and is impossible to put the waters thereof to beneficial use in the United States after they reach the main stream of the Colorado River. Hence, the Arizona delegation pointed out that the conference was discussing something which had already been disposed of and in any event could not concern any State, other than Arizona. Several days elapsed in a discussion between the said representatives of this problem before a solution was found. The problem was finally thought solved by adding subdivision (b) of Article III to the compact as finally approved by said representatives which reads as follows:

"'(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.'

"It was agreed between all the representatives of the various States and the representative of the United States, negotiating said compact, that said one million acre-feet apportioned by subdivision (b) of Article III of said compact was intended for and should go to the State of Arizona to compensate for the waters of the Gila River and

its tributaries being included within the definition of the Colorado River System and the allocations of said compact, and that said one million acre-feet was to be used exclusively by and for the State of Arizona, that being the approximate amount of water then in use within the State of Arizona from the Gila River and its tributaries, and it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said compact directly to any State, the one million acre-feet for the State of Arizona should be included in said compact by an allocation for the Lower Basin. And it was further agreed that a supplemental compact between the States, California, Nevada and Arizona should be adopted and that such supplemental compact should so provide.

"The Arizona delegation stated that if it were agreed by all the representatives of the several States and of the United States that said million acre-feet should be for the exclusive benefit of the State of Arizona to provide compensation to Arizona on account of the inclusion of the waters of the Gila River and its tributaries in said compact, they would accept said compact, otherwise they would refuse to accept said compact. It was thereupon agreed by all representatives of all the States and of the United States, participating in said negotiations and conferences, that the waters apportioned by Article III (b) of said compact were for the sole and exclusive use and benefit of the State of Arizona, and it was further agreed that a supplemental compact between the States of California, Nevada and Arizona should be adopted and that such supplemental compact should so provide. Thereupon said compact was signed by the representatives of the several States and of the United States."

Third. In this suit Arizona asserts rights under the Boulder Canyon Project Act of 1928, not under the Colorado River Compact, which she has refused to ratify.

That Act approved the Colorado River Compact subject to certain limitations and conditions, the approval to become effective upon the ratification of the Compact, as so modified, by the legislatures of California and at least five of the six other states. It was so ratified. Arizona claims that § 4 (a) of that Act imposing limitations on the use of water by California was intended for her benefit; that § 4 (a) embodies by reference Article III (b), among others, of the Compact for the purpose of defining the limitation and that the proper interpretation of Article III (b) will be, therefore, essential to a determination of Arizona's rights under the statute; that, read in the light of other sections of the Compact, Article III (b) is ambiguous; and that the testimony sought to be perpetuated will be material and admissible in removing the ambiguity. The elaborate argument in support of these contentions appears to be, in substance, as follows:

1. Colorado River Compact, apportions the water of the Colorado River System between the upper and the lower basin. By Article II it defines the terms used:

"(a) The term 'Colorado River system' means that portion of the Colorado River and its tributaries within the United States of America."

"(b) The term 'Colorado River Basin' means all of the drainage area of the Colorado River system and all other territory within the United States of America to which the waters of the Colorado River system shall be beneficially applied."

"(g) The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry."

By Article III, the apportionment is made:

"(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

"(b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum."

"(d) The States of the upper division [Colorado, New Mexico, Utah and Wyoming] will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

Article III does not in terms apportion as between the upper and the lower basin the surplus waters in excess of the amounts specifically allocated. But it recognizes in Paragraph (c) that there may be "surplus" waters in the River, applicable to the lower basin.[7]

2. The Colorado River Compact does not purport to apportion between the States of the lower basin the share of each in the waters of the Colorado River Sys-

[7] Paragraph (c) provides: "If, as a matter of international comity, the United States of America, shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

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tem; but Boulder Canyon Project Act makes some provision for such apportionment. By § 4 (a) it provides that:

"California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

And that section authorizes Arizona, California and Nevada to enter into an agreement which, among other things, shall provide:

"(1) That of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus water unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial use of the Gila River and its tributaries within the boundaries of said State . . . (7) said agreement to take effect upon the ratification of

the Colorado River compact by Arizona, California and Nevada."

3. Arizona refused to ratify the Colorado River Compact, and the authority conferred upon Arizona, Nevada and California by the Boulder Canyon Project Act to enter into an agreement for apportioning the waters has not been acted on. But California bound itself, by the Act of its legislature, March 16, 1929, to the limitation of 4,400,000 acre-feet, plus one-half of the surplus; Arizona claims that the limitation on California's use must have been enacted for the benefit solely of Arizona, since geographically she alone could use waters in the lower basin which California may not use; and that, because it is embodied in a statute, the limitation imposed by Congress on California's use confers rights upon Arizona, although she failed to sign either the principal or the subsidiary compact.

4. In support of the contention that Article III (b) of the Compact has a bearing on the interpretation of the limitation of § 4 (a) of the Act, Arizona points to the fact that while the Boulder Canyon Project Act makes no mention of the 1,000,000 acre-feet assigned to the lower basin by Article III (b) of the Compact, § 4 (a) of the Act limits California, in terms, to 4,400,000 acre-feet of the waters apportioned to the lower basin under Article III (a) of the Compact plus one-half of the "surplus waters unapportioned by said compact"; that § 4 (a) declares that such uses by California are "always to be subject to the terms of said compact"; that California claims that, in addition to the waters already mentioned, she is entitled, as one of the parties to the Compact, to draw upon the Article III (b) waters; and that, acting upon this assumption, the Secretary of the Interior has already contracted with California users for delivery of 5,362,000 acre-feet of water per annum from the main

stream of the Colorado River, though this water is not yet being delivered; whereas Arizona contends that by a proper interpretation of Article III (b) California is excluded from all the waters thereunder in favor of Arizona.

5. In support of the contention that Article III (b) is ambiguous, Arizona points out that, whereas the Compact awards to the lower basin, in the aggregate, 8,500,000 acre-feet of water,[8] Article III (d) of the Compact shows that only 7,500,000 of this is to come from the main stream of the Colorado River, since that section provides:

"The States of the upper division will not cause the flow of the River at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

It argues that the 75,000,000 was doubtless arrived at through multiplying by ten the 7,500,000 acre-feet per annum apportioned to the lower basin under Article III (a); that though the lower basin is entitled to 8,500,000 acre-feet, it can only call on the upper basin to release 7,500,000 acre-feet from the main stream; that the only other waters below Lee Ferry which are available to the lower basin come from tributaries entirely in Arizona; that these waters enter the Colorado River at a point so far south that they could not be used in the United States after they enter the Colorado; and they have in fact been appropriated for use in Arizona; that, therefore, what has in terms been awarded to the lower basin is in practical effect available only to that part of the lower basin constituted by Arizona.

Fourth. It is clear that the meaning of the Compact, considered merely as a contract, can never be material in the contemplated litigation, since Arizona refused to ratify

[8] That is the 7,500,000 of the Article III (a) waters and the 1,000,000 of the Article III (b) waters.

the Compact. Arizona rests her rights wholly upon the Acts of Congress and of California. Arizona claims that California's construction of § 4 (a) of the statute would allow her water which under the Compact has been assigned to Arizona, and that a conflict is thus raised between the statute and the Compact which the suggested testimony is competent to resolve. But the resolution of this alleged conflict can never be material to any case based on the Compact considered as contract, since Arizona neither has nor claims any contractual right.

Fifth. Nor does Arizona show that Article III (b) of the Compact is relevant to an interpretation of § 4 (a) of the Boulder Canyon Project Act upon which she bases her claim of right. It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under Article III (b). But the Act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the Compact. The Act merely places limits on California's use of waters under Article III (a) and of surplus waters; and it is " such " uses which are " subject to the terms of said compact."

There can be no claim that Article III (b) is relevant in defining surplus waters under § 4 (a) of the Act; for both Arizona and California apparently consider the waters under Article III (b) as apportioned.[9] It is true that Arizona alleges (not in the bill however but in her brief) that she " hopes to be able to show in the case hereafter to be brought " by evidence of Congressional Committee hearings and other legislative history that the failure in the statute to apportion the 1,000,000 acre-feet of waters was due to an understanding by Congress that Article

[9] The Secretary of the Interior in his brief seems to be of the opinion that waters under Article III (b) might be surplus waters under § 4 (a) of the Act.

III (b) of the Compact had already assigned these waters to Arizona and that the limitation on California was passed in the light of this understanding. This hope if fulfilled would not make Article III (b) relevant. The allegation is, not that Congress incorporated Article III (b) into the Act; it is that Congress understood that Article III (b) had allotted all the waters therein to Arizona.

Sixth. The considerations to which Arizona calls attention do not show that there is any ambiguity in Article III (b) of the Compact. Doubtless, the anticipated physical sources of the waters which combine to make the total of 8,500,000 acre-feet are as Arizona contends, but neither Article III (a) nor (b) deal with the waters on the basis of their source. Paragraph (a) apportions waters "from the Colorado River system," i. e., the Colorado and its tributaries, and (b) permits an additional use "of such waters." The Compact makes an apportionment only between the upper and lower basin; the apportionment among the states in each basin being left to later agreement. Arizona is one of the states of the lower basin and any waters useful to her are by that fact useful to the lower basin. But the fact that they are solely useful to Arizona, or the fact that they have been appropriated by her, does not contradict the intent clearly expressed in Paragraph (b) (nor the rational character thereof) to apportion the 1,000,000 acre-feet to the states of the lower basin and not specifically to Arizona alone. It may be that, in apportioning among the states the 8,500,000 acre-feet allotted to the lower basin, Arizona's share of waters from the main stream will be affected by the fact that certain of the waters assigned to the lower basin can be used only by her; but that is a matter entirely outside the scope of the Compact.

The provision of Article III (b), like that of Article III (a) is entirely referable to the main intent of the

Compact which was to apportion the waters as between the upper and lower basins. The effect of Article III (b) (at least in the event that the lower basin puts the 8,500,000 acre-feet of water to beneficial uses) is to preclude any claim by the upper basin that any part of the 7,500,000 acre-feet released at Lee Ferry to the lower basin may be considered as "surplus" because of Arizona waters which are available to the lower basin alone. Congress apparently expected that a complete apportionment of the waters among the States of the lower basin would be made by the sub-compact which it authorized Arizona, California and Nevada to make. If Arizona's rights are in doubt it is, in large part, because she has not entered into the Colorado River Compact or into the suggested sub-compact.

Seventh. Even if the construction to be given Paragraph (b) of the Compact were relevant to the interpretation of any provision in the Boulder Canyon Project Act and such provision were ambiguous, the evidence sought to be perpetuated is not of a character which would be competent to prove that Congress intended by § 4(a) of the 1928 Act to exclude California entirely from the waters allotted by Article III (b) to the states of the lower basin and to reserve all of those waters to Arizona. The evidence sought to be perpetuated is not documentary. It is testimony as to what divers persons said six years earlier while negotiating a compact with a view to preparing the proposal for submission to the legislatures of the seven States and to Congress for approval—a proposal which Arizona has not ratified and which the six other States and Congress did ratify, as later modified, by statutes enacted in 1928 and 1929. The Boulder Canyon Project Act rests, not upon what was thought or said in 1922 by negotiators of the Compact, but upon its ratification by the six States.

It has often been said that when the meaning of a treaty is not clear, recourse may be had to the negotia-

tions, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning. *Nielsen* v. *Johnson*, 279 U.S. 47, 52; compare *United States* v. *Texas*, 162 U.S. 1; *Terrace* v. *Thompson*, 263 U.S. 197, 223; *Cook* v. *United States*, 288 U.S. 102. See Yü, The Interpretation of Treaties, pp. 138, 192; Chang, The Interpretation of Treaties, p. 59 *et seq.* But that rule has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body. There is no allegation that the alleged agreement between the negotiators made in 1922 was called to the attention of Congress in 1928 when enacting the Act; nor that it was called to the attention of the legislatures of the several States.

As Arizona has failed to show that the testimony which she seeks to have perpetuated could conceivably be material or competent evidence bearing upon the construction to be given Article III, Paragraph (b), in any action which may hereafter be brought, the motion for leave to file the bill should be denied. We have no occasion to determine whether leave to file the bill should be denied also because the United States was not made a party and has not consented to be sued.

Leave to file bill denied.

OHIO *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

No. —, original. Return to Rule to Show Cause Presented April 30, 1934.—Decided May 21, 1934.

1. The instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are exempt from taxation by the United States. P. 368.

2. The immunity of the States from federal taxation, under the above-stated rule, is limited to those agencies which are of a governmental character. P. 368.
3. Whenever a State engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the State, is not immune from the federal taxing power. P. 368.
4. Where a State engages in the business of distributing and selling intoxicating liquors, though pursuant to a legislative enactment providing a system of liquor control, it is not immune from the federal tax imposed on liquor dealers by R.S., § 3244. Following *South Carolina* v. *United States,* 199 U.S. 437. P. 368.
5. Though the Eighteenth Amendment outlawed the liquor traffic, it did not have the effect of converting what had always been a private activity into a governmental function. P. 369.
6. As applied to business activities, the police power is the power to regulate those activities, not to engage in carrying them on. P. 369.
7. Whether the word "person" or "corporation" as used in a statute includes a State or the United States depends upon the connection in which the word is found. P. 370.
8. As used in 26 U.S.C., § 205, which imposes a tax upon every person who deals in intoxicating liquors, the word "person" is *held* to include a State, either under the statutory extension of the word to include a corporation (26 U.S.C., § 11) or without regard to such extension. P. 371.

Motion denied.

THIS was a motion by the State of Ohio for leave to file a bill of complaint invoking the original jurisdiction of this Court. The State was seeking to enjoin the enforcement against it of federal statutes imposing taxes upon dealers in intoxicating liquors.

Mr. John W. Bricker, Attorney General of Ohio, *Mr. William S. Evatt,* and *Mr. Isadore Topper,* Assistant Attorney General, were on the brief for Ohio.

The right of a State to institute an original action in this Court against citizens of another State is granted in Art. III, § 2, of the Federal Constitution.

The right of a State to prosecute a suit in injunction has been recognized by this Court. *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230; *Florida* v. *Mellon*, 273 U.S. 12.

This is an action arising from extraordinary and exceptional circumstances.

If an individual may enjoin the collection of a federal tax in the District Court under certain circumstances, *Regal Drug Corp.* v. *Wardell*, 260 U.S. 386; *Hill* v. *Wallace*, 259 U.S. 44; *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498; a State may enjoin such collection under like circumstances in this Court.

In the operation of complainant's Department of Liquor Control, the State is performing a purely governmental function, an exercise of its police power.

It is difficult to conceive of a function at the present time more directly designed for the protection of the public health, safety, welfare and morals than the control of the liquor traffic, and hence more directly and exclusively a purely governmental function. *Plumb* v. *Christie*, 103 Ga. 686; *Dispensary Comm'rs* v. *Thornton*, 106 Ga. 106.

It is submitted that when a State, in the exercise of its police power, for the purpose of controlling the liquor traffic, prohibits the private business of wholesaling and retailing by the package of spirituous liquor, and itself takes over that function for the protection of its citizens from unscrupulous liquor dealers and bootleggers, it is performing a most vital governmental function. This, plaintiff contends, has always been true, but it is now doubly true in view of America's experience during the last fifteen years.

The adoption of the Eighteenth Amendment, followed by the adoption of the Twenty-first Amendment, has indisputably placed plaintiff's operation of its Department of Liquor Control in the category of a governmental function.

The federal statutes do not levy a tax against a State which sells and distributes intoxicating liquor.

In construing a statute, words are taken in their ordinary sense unless from the whole context a different meaning was intended. Giving to the term " person " its broad and commonly understood meaning, § 11 (R.S., § 3140) deals with individuals, associations, co-partnerships and corporations, since a State is not a person within the ordinary or legal definition of that word. *United States* v. *Fox,* 94 U.S. 315, 321; *In re Fox,* 52 N.Y. 530; *Lowenstein* v. *Evans,* 69 Fed. 908. See also, *McBride* v. *Board of Comm'rs,* 44 Fed. 17, 18; *Berton* v. *All Persons,* 176 Cal. 610.

It is also to be noted that Congress did not include within the definition of the word " person," as contained in 26 U.S.C., § 11 (R.S., § 3140), the phrase " body corporate or politic." Even if that phrase had been used, it would not include a State. *Des Moines* v. *Harker,* 34 Iowa 84; *Lowenstein* v. *Evans,* 69 Fed. 908, 911.

A State, accurately speaking, is not a corporation, since the State is self-existing, whereas a corporation is an entity created by a State. The failure of Congress to include the States in the definition of the term " person " could not have been inadvertent, since the States are not commonly thought of as persons. *Davis* v. *Pringle,* 1 F. (2d) 860, 863; *Mayrehofer* v. *Board of Education,* 89 Cal. 110.

This is not an action against the United States.

Defendants have no authority to assess and collect a tax against the State. This is an action to enjoin defendants from committing acts under color of office which are neither authorized by the statutes of the United States nor by its Constitution. *Philadelphia Co.* v. *Stimson,* 223 U.S. 605.

The inevitable result of taxing this state instrumentality is to interfere with and destroy it, thereby returning

to the Federal Government the power to prohibit the business, a power expressly taken away by the Twenty-first Amendment.

The Court is not here concerned with the destruction by a State of a "preëxisting right of taxation possessed by the Government of the United States," *Murray* v. *Wilson Distilling Co.*, 213 U.S. 173,—this for the reason that the United States has not for the past fifteen years had any right to tax the liquor business here under consideration, it having been during that interval prohibited; furthermore, since the adoption of the Twenty-first Amendment any right to tax this business is dependent, in the first instance, upon the State permitting the business to be conducted. To the extent that a State, since the Twenty-first Amendment, authorizes a return of this business by private individuals, to that extent is the right of the Federal Government to tax conferred.

There is no question here of interference with or danger to the sources of federal revenue. The liquor traffic has become primarily a problem of welfare, health and morals; it is no longer a problem of revenue. Revenue has become purely secondary. This traffic ceased to be a revenue traffic upon the adoption of the Eighteenth Amendment, and the Twenty-first Amendment did not return it to this category in States which adopt a state monopoly.

The case of *South Carolina* v. *United States*, 199 U.S. 437, is not inconsistent with plaintiff's position. The Court had before it a dispensary system established by the State of South Carolina in 1895, primarily for revenue, which was materially different from that presented in the present case. Under the South Carolina law, the dispensaries were operated by a dispenser licensed by a county board of control. Under the Ohio law, the state-owned stores are operated by civil service employees of the state government. In the present case, instead of being concerned with a matter of taxing natural persons

who were licensed by the State, we are concerned with the matter of the taxation of the State itself. The two cases are clearly distinguishable.

It is pertinent to note that although this *South Carolina* case has since been cited by this Court, it has been cited only as authority for the principle that a private business enterprise of the State, as distinguished from a governmental function, may be taxed by the Federal Government. In no single case has this Court cited the case as authority for the proposition that the exercise of a state monopoly of the liquor business is a private business and not the performance of a governmental function.

Solicitor General Biggs, Assistant Attorney General Wideman, and *Messrs. James W. Morris, M. H. Eustace,* and *Charles Bunn* were on the brief for defendants.

The cause is not within the original jurisdiction of this Court, because four of the defendants are citizens of the plaintiff State.

Injunction will not lie to restrain the collection of a federal tax. Section 3224, Revised Statutes, has been uniformly applied even where it appears that the tax is illegal or unconstitutional. To make this section inapplicable there must exist special and extraordinary circumstances, which do not exist in this case.

The Government has provided a complete system of corrective justice in the administration of its revenue laws, which is founded upon the idea of appeals within the executive departments, where, if the party aggrieved can not obtain satisfaction, there are provisions for recovering the tax after it is paid, by suit against the collecting officer, or against the United States. Complainant has an adequate remedy at law by paying the tax and suing for its recovery.

The tax which is challenged is one provided for the operation of the general Government. The defendants

have no personal interest in the collection of the tax. The acts complained of are the acts of the defendants in their official capacities, done under color of their offices in the performance of an official duty. Hence the United States is the real party in interest, and it can not be sued without its consent.

The merits have already been decided against plaintiff's contention. *South Carolina* v. *United States,* 199 U.S. 437; *Board of Trustees* v. *United States,* 289 U.S. 48.

Mr. Justice Sutherland delivered the opinion of the Court.

Upon the motion of complainant for leave to file a bill of complaint invoking the original jurisdiction of this court, a rule was issued directing the defendants to show cause why such leave should not be granted. Defendants, by their return to the rule, oppose the motion upon the ground, among others, that the merits have been conclusively settled against complainant by prior decision of this court.

The bill alleges that the defendant Helvering is Commissioner of Internal Revenue, and that the other defendants are collectors of internal revenue in the several internal revenue districts in the State of Ohio; that on December 22, 1933, the state legislature passed an act providing a system of control for the manufacture, sale and importation of, and traffic in, beer and intoxicating liquors within the state, and creating a state monopoly for the distribution and sale of all spirituous liquors under a department of liquor control; that the state has purchased intoxicating liquors at a cost of more than $4,500,000 for sale to permit-holders and to the public through its state stores, each of which will be entirely and exclusively state owned, managed and controlled; that the state is about to open in the various counties

one hundred and eighty-seven such state liquor stores; that defendants have threatened to, and unless enjoined by this court will, levy and collect excise taxes on the agencies and operations of the state in the conduct of its department of liquor control, and enforce against the state, its officers, agents and employees, penalties for nonpayment of taxes imposed by § 3244, R.S. (U.S.C., Title 26, § 205), and other designated statutes of the United States; that complainant is not subject to these statutes and is immune from any tax imposed thereby; and that the acts of Congress which impose such taxes do not by their terms include a state, or its officers or employees, and were not intended to do so. It is further alleged that the circumstances of the case are extraordinary and exceptional in several respects, among them being that the attempt is to tax a sovereign state; and it, therefore, is contended that the equity power of the court is properly invoked under the principles stated in *Hill* v. *Wallace,* 259 U.S. 44, 62.

The state act deals with the subject in great detail; but for present purposes the provisions set forth in the bill to which we have just referred are all that require consideration.

The provisions of the federal statutes, so far as necessary to be stated, follow:

U.S.C., Title 26, § 205 (R.S., § 3244, as amended):

"(a) *Retail liquor dealers.*—Retail dealers in liquor shall pay $25. Every person who sells or offers for sale foreign or domestic distilled spirits, wines or malt liquors otherwise than as hereinafter provided in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors.

"(b) *Wholesale liquor dealers.*—Wholesale liquor dealers shall each pay $100. Every person who sells, or offers for sale foreign or domestic distilled spirits, wines or malt liquors, otherwise than as hereinafter provided in quanti-

ties of not less than five wine gallons at the same time shall be regarded as a wholesale liquor dealer."

U.S.C., Title 26, § 11 (R.S., § 3140):

". . . where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Putting aside various preliminary questions raised by defendants (compare *Ex parte Bakelite Corp.*, 279 U.S. 438, 448; *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 553), we pass at once to the fundamental question involved in the state's challenge to the validity of the tax. That challenge seeks to invoke a principle, resulting from our dual system of government, which frequently has been announced by this court and is now firmly established,—that "the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are . . . exempt from taxation by the United States." *Indian Motocycle Co.* v. *United States,* 283 U.S. 570, 575; *McCulloch* v. *Maryland,* 4 Wheat. 316, 436; *Collector* v. *Day,* 11 Wall. 113; and other cases cited in *Trinityfarm Construction Co.* v. *Grosjean,* 291 U.S. 466. But, by the very terms of the rule, the immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. This court, in *South Carolina* v. *United States,* 199 U.S. 437, a case in no substantial respect distinguishable from the present one, definitely so held. Compare *Board of Trustees* v. *United States,* 289 U.S. 48, 59.

The *South Carolina* case arose under a state statute, which, like the one at bar, created a monopoly and prohibited the sale of intoxicating liquors except at dispen-

saries to be operated by the state. This court, while sustaining the validity of the statute and fully accepting the rule that the national government was without power to impose a tax in any form which had the effect of prohibiting the full discharge by the state of its governmental functions, held that " whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation." The decision sustained the identical tax provisions involved in the present case, and, therefore, we follow it as controlling.

A distinction is sought in the fact that after that case was decided the Eighteenth Amendment was passed, and thereby, it is contended, the traffic in intoxicating liquors ceased to be private business, and then with the repeal of the amendment assumed a status which enables a state to carry it on under the police power. The point seems to us altogether fanciful. The Eighteenth Amendment outlawed the traffic; but, certainly, it did not have the effect of converting what had always been a private activity into a governmental function. The argument seems to be that the police power is elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. *Rippe* v. *Becker,* 56 Minn. 100, 111–112; 57 N.W. 331. If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned. Compare *Georgia* v. *Chattanooga,* 264 U.S. 472, 480–483; *U.S. Bank* v. *Planters'*

Bank, 9 Wheat. 904, 907; *Bank of Kentucky* v. *Wister,* 2 Pet. 318, 323; *Briscoe* v. *Bank of Kentucky,* 11 Pet. 257, 323–325; *Curran* v. *Arkansas,* 15 How. 304, 309.

We find no merit in the further contention that a state is not embraced within the meaning of the word "person," as used in U.S.C., Title 26, § 205 and defined in § 11, *supra.* By § 205 the tax is levied upon every "person who sells, etc."; and by § 11 the word "person" is to be construed as meaning and including a partnership, association, company or corporation, as well as a natural person. Whether the word "person" or "corporation" includes a state or the United States depends upon the connection in which the word is found. Thus, in *Stanley* v. *Schwalby,* 147 U.S. 508, 517, it is said that the word "person" in the statute there under consideration would include the United States as a body politic and corporate. See also *Giddings* v. *Holter,* 19 Mont. 263, 266; 48 Pac. 8; *State* v. *Herold,* 9 Kan. 194, 199. A state is a person within the meaning of a statute punishing the false making or fraudulent alteration of a public record "with intent that any person may be defrauded." *Martin* v. *State,* 24 Tex. 61, 68. Under a statute defining a negotiable note as a note made by one person whereby he promises to pay money to another person, and providing that the word "person" should be construed to extend to every corporation capable by law of making contracts, it was held that the word included a state. *Indiana* v. *Woram,* 6 Hill (N.Y.) 33, 38. And a state is a person or a corporation within the purview of the priority provisions of the bankruptcy act.* *In re Western Implement Co.,* 166 Fed. 576, 582.

* U.S.C., Title 11, § 104 (b)(5)—"debts owing to any person who by the laws of the States or the United States is entitled to priority." This construction is explicitly adopted by the amendment of May 27, 1926, c. 406, § 15, 44 Stat. 666; U.S.C., Supp. VII, Title 11, § 104 (b)(7).

Compare *In re Jensen,* 59 N.Y.Supp. 653, 655; *Bray* v. *Wallingford,* 20 Conn. 416, 418; *County of Lancaster* v. *Trimble,* 34 Neb. 752, 756; 52 N.W. 711; *Rains* v. *City of Oshkosh,* 14 Wis. 372, 374; 1 Black. Comm. 123.

In the *South Carolina* case this court disposed of the question by holding that since the state was not exempt from the tax, the statute reached the individual sellers who acted as dispensers for the state. While not rejecting that view, we prefer, in the light of the foregoing examples, to place our ruling upon the broader ground that the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a "person" under the statutory extension of that word to include a corporation, or as a "person" without regard to such extension. The motion for leave to file the bill of complaint, accordingly, is

Denied.

MR. JUSTICE STONE concurs in the result.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* INDEPENDENT LIFE INSURANCE CO.

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

No. 689. Argued April 4, 1934.—Decided May 21, 1934.

1. A federal tax upon part of a building occupied by the owner, or upon the rental value of the space, is a direct tax and invalid unless apportioned. P. 378.
2. The rental value of a building used by the owner does not constitute income within the meaning of the Sixteenth Amendment. P. 379.
3. In computing the net income of life insurance companies under the Revenue Acts of 1921 and 1924, deductions for taxes, expenses, and depreciation, in respect of real estate owned and occupied in whole or in part by the taxpayer, are not permitted unless there be

included in gross income the rental value of the space so occupied, which amount must be not less than a sum which in addition to any rents received from other tenants shall provide a net income at the rate of 4 per centum of the book value of the real estate. *Held,* not inconsistent with the constitutional prohibition of unapportioned direct taxes. Art. I, § 9, cl. 4. Pp. 378, 381.

4. Congress has power to condition, limit, or deny deductions from gross income in order to arrive at the net that it chooses to tax. P. 381.
5. *National Life Ins. Co.* v. *United States,* 277 U.S. 508, distinguished. P. 381.

67 F. (2d) 470, reversed.

CERTIORARI, 291 U.S. 655, to review a judgment affirming a judgment of the District Court, which sustained a decision of the Board of Tax Appeals, 17 B.T.A. 757, adjudging an overpayment of income tax. A certificate in this case was dismissed, 288 U.S. 592.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. Sewall Key, J. Louis Monarch,* and *H. Brian Holland* were on the brief, for petitioner.

The statute involved, in effect, limits the allowance for expenses of operating a building which is occupied in part by an insurance company to those expenses which are attributable to the portion of the building devoted to the production of investment income. Since no other income is taxed, it was the purpose of Congress to prevent the investment income from being reduced by expenses of producing non-taxable income.

There can be no doubt of the power of Congress to deny or limit deductions, and the legislative history of the statute shows that Congress adopted the present method after careful consideration, as the most workable method of achieving the desired result. Apparently the way chosen was approved by the insurance companies. As a consequence the statute allows the deduction of the

expenses of operating the entire building and accomplishes the limitation by requiring the taxpayer who claims such deductions to report the rental value of the space occupied by it as gross income.

The attack upon the constitutionality of the statute amounts to no more than a criticism of the method by which Congress has exercised an admitted power. The result does not destroy guaranteed exemptions or put the burden upon one entitled to the exemption which he would not otherwise bear, as in *National Life Ins. Co.* v. *United States,* 277 U.S. 508. No direct tax is laid upon rental value of the property. Taxing the rental value is not the object at which the statute is aimed, and the fact that the rental value of space occupied is incidentally and casually affected is immaterial.

The tax upon life insurance companies is not the ordinary tax upon all income but a special tax upon a limited class of income. Despite its inclusion in an income tax statute it is in the nature of a special excise tax upon life insurance companies. Were it expressly called an excise it would not be invalid because measured in part by something not directly taxable, and no necessity for apportionment would exist. In determining the validity of a statute its form should not control.

The respondent did not except to the action of the Commissioner on the ground that the statute violates the Fifth Amendment, and no sufficient basis for consideration of that question appears in the record.

The taxpayer claimed and has received the benefit of deductions which are conditioned upon the inclusion of the rental value in gross income. It is well settled that one who has received a benefit under a statute will not be heard to assail it. Constitutional questions may be waived as well as others. The application of that rule to this case would result in limiting the deductions in the

way Congress intended. On the other hand, if the rule is not applied and the statute is held invalid, the investment income which Congress intended to tax will be reduced by some expenses which contributed to the production of nontaxable income.

If the provision under attack is held invalid, then the provision allowing deductions for real estate expenses must fall, insofar as it applies to home office property, for the provisions are inseparable. Then a life insurance company would be entitled to no deductions for expenses connected with its office building.

Mr. Wm. Marshall Bullitt, with whom *Mr. James A. Newman* was on the brief, for respondent.

Taxation of the "rental value" of such buildings to the extent that they were occupied by their owners, was a direct tax on the land itself, levied solely because of ownership; and such a tax is void unless apportioned.

If an insurance company rents a building to use as its Home Office, but does not occupy all the space, the Revenue Act does not tax the company on the "rental value" of (a) the space it occupies; or (b), the vacant space which it does not occupy; and this is solely because the company does not own the building.

But, on the other hand, if an insurance company owns its Home Office Building, and occupies any portion thereof (whether one room or several floors) the Revenue Act taxes it on the "rental value" of all the space it so occupies, and this tax is imposed solely because the company owns the building.

The Government may argue that the tax is not levied solely because of ownership, but because of (1) ownership, plus (2) occupancy of the thing owned. That is simply an argument that the owner of land or of personal property may be taxed (without apportionment) for the privilege of occupying or possessing that which he owns; and that such a tax is not a "direct" tax on the thing

owned, but is an " excise " tax for the privilege of occupying or possessing the thing owned.

The very essence of ownership is the right to the possession (i.e., the occupancy) of the thing owned. *Dawson* v. *Kentucky Distilleries,* 255 U.S. 288.

This Court has always held that a tax on land is a direct tax. If, then, this Court shall now decide that it is an excise tax, for Congress to tax a landowner a percentage of (a) the market value of the real estate or (b) an annual rental value, simply for the privilege of the landowner occupying his own land, then the constitutional guaranty against direct taxation disappears, and nothing whatever is left of that fundamental guaranty.

A tax on rents from real estate is still a direct tax on the land itself,—although the Sixteenth Amendment has removed the necessity of apportionment in levying a tax on such rents.

The rental value of land when occupied by its owner, does not constitute income to the owner within the meaning of the term income as used in the Sixteenth Amendment. *Commissioner* v. *Independent Life Ins. Co.,* 67 F. (2d) 470, 472.

The particular rental value which the Revenue Acts compelled the insurance companies to include as income (and to pay income taxes thereon) was an arbitrary sum having no reasonable relation to income in any constitutional sense.

After deducting taxes, expenses and depreciation from the actual rents collected from all other tenants in the building, the company must also include in its income (as the rental value of the space it occupies) such further sum, as when added to the net rent received from the other tenants, will produce a net taxable rental income for the entire building of 4% upon its book value.

One insurance company's book value of its building may bear no relation whatsoever to cost, rental return or

market value, or to the book value, of any other company's building.

The Revenue Acts, in thus defining what income the company shall return, do not use any definition of income which falls within the definitions prescribed by this Court in many cases, but prescribe as income a purely arbitrary and capricious sum, bearing no relation to reality or to any authoritative definition of income.

The tax imposed by §§ 242–245 is an income tax; and it is not in any sense a special excise tax for the privilege of engaging in the life insurance business. *National Life Ins. Co.* v. *United States,* 277 U.S. 508; *Massachusetts Mutual* v. *United States,* 288 U.S. 269.

Flint v. *Stone Tracy Co.,* 220 U.S. 107, and *Stratton's Independence* v. *Howbert,* 231 U.S. 399, arose under the 1909 Corporation Tax Act before any income tax had even been adopted. *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103, which arose under the 1913 Income Tax Act, was disposed of on the same grounds as *Brushaber* v. *Union Pacific,* 240 U.S. 1; and its reference to *Stratton's Independence* was dictum and illustrative only.

Congress can not impose an unconstitutional condition, to-wit, that a person shall surrender or waive a constitutional right as the price of receiving some benefit allowed to others. *National Life Ins. Co.* v. *United States,* 277 U.S. 508.

The power to impose conditions can not be used to accomplish a prohibited result. *Miller* v. *Milwaukee,* 272 U.S. 713, 715; *Nichols* v. *Coolidge,* 274 U.S. 531, 541–2; *Frost Trucking Co.* v. *Railroad Comm'n,* 271 U.S. 583, 593.

Mr. Justice Butler delivered the opinion of the Court.

This case involves the validity of deficiency assessments of income taxes made by the Commissioner against the life insurance company for 1923 and 1924. The 1921 Revenue Act (42 Stat. 261), § 244 (a) defines gross in-

come of such companies as that received from interest, dividends and rents. Premiums and capital gains are excluded. Section 245 (a) directs that net income be ascertained by making specified deductions from gross income. These include four per cent. of the company's reserve, "(6) Taxes and other expenses paid during the taxable year exclusively upon or with respect to the real estate owned by the company . . ." and "(7) A reasonable allowance for the exhaustion, wear and tear of property, including a reasonable allowance for obsolescence." But it is provided, § 245 (b), that no deduction shall be made under paragraphs (6) and (7) " on account of any real estate owned and occupied in whole or in part by a life insurance company unless there is included in the return of gross income the rental value of the space so occupied. Such rental value shall be not less than a sum which in addition to any rents received from other tenants shall provide a net income (after deducting taxes, depreciation, and all other expenses) at the rate of 4 per centum per annum of the book value at the end of the taxable year of the real estate so owned or occupied." Provisions similarly worded and having the same meaning are contained in the Revenue Act of 1924, §§ 244, 245, 43 Stat. 289.

During 1923 and 1924 respondent owned a building of which it occupied part and rented part. Its tax return for each year included in gross income the rents received for the space let and deducted the taxes, expenses and depreciation chargeable to the whole building. The result for 1923 was a net of $3,615.30 whereas four per cent. of book value amounted to $18,400. The result for 1924 was minus $14,629.76, four per cent. of the then book value being $19,770.32. The Commissioner, following § 245 (b) added to the rents received from lessees in each year a sum sufficient to make the net equal to the required four per cent. On that basis the amount of the deficiency for

1923 was $298.97, and for 1924, $1,115.65.[1] The board of Tax Appeals held them direct taxes and therefore invalid. 17 B.T.A. 757. The Circuit Court of Appeals affirmed, one of the judges dissenting. 67 F. (2d) 470. Its decision conflicts with *Commissioner* v. *Lafayette Life Ins. Co.* (C.C.A.–7), 67 F. (2d) 209, and *Commissioner* v. *Rockford Life Ins. Co.* (C.C.A.–7), 67 F. (2d) 213.

The question for decision is whether the statutory provisions relied on violate the rule that no direct tax shall be laid unless in proportion to the census. Constitution, Art. I, § 9, cl. 4. In support of the decision below, respondent maintains that the "rental value" of the space occupied by it was included in net income and taxed and that the exaction is a direct tax on the land itself and void for lack of apportionment.

If the statute lays taxes on the part of the building occupied by the owner or upon the rental value of that space, it cannot be sustained, for that would be to lay a direct tax requiring apportionment. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 580, 581; 158 U.S. 601, 635, 637, 659. *Brushaber* v. *Union Pac. R. Co.*, 240 U.S. 1, 16, 17. *Eisner* v. *Macomber*, 252 U.S. 189, 205. *Daw-*

[1] In 1923, rents were $73,620.48. Taxes, expenses and depreciation were $70,005.18. Book value was stipulated to be $460,000. The commissioner called the difference between $18,400 (4% of $460,000) and $3,615.30 ($73,620.48—$70,005.18) or $14,784.70 the "value of space owned and occupied by company." That, added to rents received, amounted to $88,405.18. He then subtracted from gross income so increased the sum of permissible deductions, including the $70,005.18.

In 1924, rents were $71,289.21. Taxes, expenses and depreciation were $85,918.97. Book value was $494,257.97. The commissioner added $19,770.32 (4% of $494,257.97) and $14,629.76 ($71,289.21—$85,918.97) and called the sum, $34,400.08, the "value of space owned and occupied by company." That, added to rents received, amounted to $105,689.29; and from gross income so increased were subtracted the deductions, including the $85,918.97.

son v. *Kentucky Distilleries Co.,* 255 U.S. 288, 294. *Bromley* v. *McCaughn,* 280 U.S. 124, 136. *Willcuts* v. *Bunn,* 282 U.S. 216, 227. The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment. *Eisner* v. *Macomber, supra,* 207. *Stratton's Independence* v. *Howbert,* 231 U.S. 399, 415, 417. *Doyle* v. *Mitchell Bros. Co.,* 247 U.S. 179, 185. *Bowers* v. *Kerbaugh-Empire Co.,* 271 U.S. 170, 174. *Taft* v. *Bowers,* 278 U.S. 470, 481, 482. *MacLaughlin* v. *Alliance Ins. Co.,* 286 U.S. 244, 249, 250. Cf. *Burk-Waggoner Assn.* v. *Hopkins,* 269 U.S. 110, 114.

Earlier Acts taxed life insurance companies' incomes substantially the same as those of other corporations. Because of the character of the business, that method proved unsatisfactory to the Government and to the companies. The provisions under consideration were enacted upon the recommendation of representatives of the latter. As rents received for buildings were required to be included in gross and expenses chargeable to them were allowed to be deducted, it is to be inferred that Congress found—as concededly the fact was—that the annual net yields from investments in such buildings ordinarily amounted to at least four per cent. of book value. Where an insurance company owns and occupies the whole of a building, it receives no rents therefor and is not allowed to deduct the expenses chargeable to the building. Where part is used by the company and part let, the rents are required to be included in the gross, but expenses may not be deducted unless, if it be necessary, there is added to the rents received an amount to make the total sufficient, after deduction of expenses, to leave four per cent. of book value. All calculations contemplated by § 245 (b) are made subject to that limitation. Congress intended that the rule should apply only where rents exceed such four per cent. Where they are less than that, addition of the

prescribed rental value and deduction of expenses operate to increase taxable income.[2] The classification is not without foundation.

The company is not required to include in gross any amount to cover rental value of space used by it, but in order that, subject to the specified limitation, it may have the advantage of deducting a part of the expenses chargeable to the building, it is permitted to make calculations by means of such an addition. The statute does not prescribe any basis for the apportionment of expenses between space used by the company and that for which it receives rents. The calculation indicated operates as such an apportionment where the rents received are more than four per cent. of book value, but less than that amount plus expenses.[3] In such cases the addition, called rental value of space occupied by the company, is employed to permit a deduction on account of expenses. That, as is clearly shown in the dissenting opinion, 67 F. (2d) 473, is the arithmetical equivalent

[2] Take for example: book value of building, $1,000,000; 4% of book value, $40,000; rents received, $30,000; expenses, $60,000. If the calculation prescribed by § 245 (b) is not made, taxable income is $30,000.

The calculation prescribed by § 245 (b) follows: rents, $30,000, plus "rental value," $70,000 (expenses, $60,000, minus rents, $30,000, plus the 4%—$40,000) amounts to $100,000, less expenses, $60,000, leaves taxable income, $40,000. Cf. Art. 686, Treasury Regulations 62 and 65.

[3] Take for example: book value of building, $1,000,000; 4% of book value, $40,000; rents received, $50,000; expenses, $60,000.

On that basis the calculation is: rents, $50,000 plus "rental value," $50,000 (expenses, $60,000 minus rents $50,000 plus 4%, $40,000) amounts to $100,000 less expenses $60,000 leaves taxable income $40,000. Deduction of expenses operates to reduce taxable income by $10,000.

Assume rents received were $100,000. No rental value need be added. Deducting expenses, $60,000, leaves taxable income $40,000.

of lessening the deduction by the amount of the so-called rental value.

Respondent cites *National Life Ins. Co.* v. *United States,* 277 U.S. 508, but the distinction between that case and this one is fundamental and obvious. There the effect of the statutory deduction was to impose a direct tax on the income of exempt securities, amounting to taxation of the securities themselves. We held that the tax imposed, so far as it affected state and municipal bonds, was unconstitutional and that, in so far as it affected United States bonds, it was contrary to the statute. In *Denman* v. *Slayton,* 282 U.S. 514, we held the taxpayer not entitled to deduct the interest on debts incurred to purchase securities the interest on which was exempt. The opinion points out the distinction between that exclusion from deductions and the taxation of exempt securities condemned in *National Life Ins. Co.* v. *United States.* As shown above, the prescribed calculation, § 245 (b), is in substance a diminution or apportionment of expenses to be deducted from gross income under the circumstances specified. See *Anderson* v. *Forty-Two Broadway Co.,* 239 U.S. 69.

Unquestionably Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax. *Burnet* v. *Thompson Oil & Gas Co.,* 283 U.S. 301, 304. *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103. *Brushaber* v. *Union Pac. R. Co., supra,* 23–24. It is clear that the provisions under consideration do not lay a tax upon respondent's building or the rental value of the space occupied by it or upon any part of either.

Reversed.

Mr. Justice McReynolds is of opinion the judgment should be affirmed.

ROCKFORD LIFE INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 722. Argued April 4, 1934.—Decided May 21, 1934.

1. Under the Revenue Act of 1928 a life insurance company is not allowed to deduct from gross income the expenses of a building owned and occupied in whole or in part by it unless there is included in the return of gross income the rental value of the space so occupied, not less than a sum which, in addition to any rents received from other tenants, shall provide a net income, after deducting taxes, depreciation and other expenses, at the rate of 4% per annum of the book value. *Helvering* v. *Independent Life Ins. Co., ante,* p. 371, followed. P. 383.
2. The deduction from gross income which a life insurance company may make under § 203 (a) (7) of the Revenue Act of 1928, as a "reasonable" allowance for depreciation of furniture and fixtures, is limited to such property as may fairly be allocated to its investment business, the income of which is taxed, as distinguished from its underwriting business, the income of which is not taxed. P. 384.

67 F. (2d) 213, affirmed.

CERTIORARI, 291 U.S. 655, to review the reversal, on appeal, of a decision of the Board of Tax Appeals overruling a deficiency assessment against the Insurance Company and finding an overassessment.

Mr. Wm. Marshall Bullitt for petitioner.

Solicitor General Biggs, with whom *Assistant Attorney General Wideman* and *Messrs. James W. Morris, J. Louis Monarch,* and *H. Brian Holland* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This case involves the validity of a deficiency assessment of 1929 income taxes made under the Revenue Act of 1928. Section 202 defines gross income to be that re-

ceived from interest, dividends and rents. Section 203 (a) defines net income to be the gross less specified deductions including (5) "investment expenses," (6) "Taxes and other expenses paid during the taxable year exclusively upon or with respect to the real estate owned by the company . . ." and (7) "A reasonable allowance for the exhaustion, wear and tear of property, including a reasonable allowance for obsolescence." Subsection (b) provides no deduction shall be made under (a) (6) and (7) "on account of any real estate owned and occupied in whole or in part by a life insurance company unless there is included in the return of gross income the rental value of the space so occupied. Such rental value shall be not less than a sum which in addition to any rents received from other tenants shall provide a net income (after deducting taxes, depreciation, and all other expenses) at the rate of 4 per centum per annum of the book value at the end of the taxable year of the real estate so owned or occupied." 45 Stat. 842–844.

During 1929 petitioner owned a building all of which it used. It received $15 rent for use of the premises and in its return included that amount as a part of gross income. It did not add any sum on account of rental value of the building. Nevertheless, it deducted expenses chargeable to the building, amounting to $4,033.05. The commissioner disallowed the deduction. Petitioner also deducted from gross $1,783.02 to cover depreciation on all furniture and fixtures. The commissioner held the deduction allowable only in respect of such as were used in connection with the company's "investment business." That phrase may be taken to include activities relating to interest, dividends and rents constituting the income taxed as distinguished from its "underwriting business" which embraces its other activities. There being no allocation, the commissioner apportioned depreciation on the ratio of investment income, $123,248.44, to total income, $751,147.77. This reduced the deduction to $292.56.

These adjustments resulted in a finding of deficiency of $607.53. Following its earlier decisions, the Board of Tax Appeals held petitioner entitled to deduct expenses chargeable to the building and depreciation of all its furniture and fixtures. On that basis it found an overpayment of $750.05. The Circuit Court of Appeals reversed. 67 F. (2d) 213.

The ruling of the lower court disallowing deduction of expenses chargeable to the building is sustained on the authority of *Helvering* v. *Independent Life Ins. Co.*, decided this day, *ante*, p. 371.

The other question presented for decision is whether petitioner is entitled to deduct depreciation on all furniture and fixtures or only such part as fairly may be attributed to the income taxed. Petitioner raises no question as to the method employed for making the apportionment, but insists that the "reasonable allowance" granted by § 203 (a) (7) extends to all property and includes depreciation of all furniture and fixtures. It refers to the language of the corresponding provision in the Revenue Act of 1916 which permits deduction of "a reasonable allowance for the exhaustion, wear and tear of property *arising out of its use or employment in the business or trade*" and to similar language in the Revenue Act of 1918.[1] It emphasizes absence from the Act of 1921 and later ones of the words above italicized. It argues that the change of language, made applicable to life insurance companies, shows that Congress intended to permit them to deduct depreciation of all property without regard to its use. The constructions put upon provisions in measures that did not limit income to be taxed, as did later Acts, are of no value as guides to the meaning of the clause under consideration. In reason the cost

[1] The Revenue Act of 1916, § 12 (a), 39 Stat. 768. 1917, § 4, 40 Stat. 302. Revenue Act of 1918, § 234 (a) (7), 40 Stat. 1078.

of depreciation, like other items of expense to be deducted, ought to be limited to that related to the income taxed. Allowance of deduction of expenses incurred for the collection of premiums or in respect of other income not taxed would be hard to justify. In absence of specific declaration of that purpose, Congress may not reasonably be held to have intended by that means further to reduce taxable income of life insurance companies.

There is adequate evidence that Congress intended to limit deductions of expenses to those related to the taxed income. *Helvering* v. *Independent Life Ins. Co., supra.* In the reports of committees having in charge the Act of 1921 in which first appeared the language under consideration, § 203 (a) (7), it is said: "The proposed plan would tax life insurance companies on the basis of their investment income from interest, dividends, and rents, with suitable deductions for expenses fairly chargeable against such investment income." [2] Section 203 (a) (5), by restricting deductions to investment expenses, indicates purpose to exclude those not related to investment income. Section 203 (b), by condition imposed, similarly restricts deductions of real estate expenses. The language under consideration opposes deduction of unrelated expenses and is in harmony with the construction for which the commissioner contends. The significance of the word "reasonable" qualifying allowance need not be limited to the amount to be ascertained. But having regard to the context and probable purpose of the provision it rightly may be construed to limit the ascertainment of depreciation to the property that is used in connection with the company's investment business. The construction put upon the statute by the Commissioner and Circuit Court of Appeals is sustained. *Affirmed.*

[2] 67th Congress, 1st Session, Senate Report No. 275, p. 20. See also House Report No. 350, p. 14.

OKLAHOMA GAS & ELECTRIC CO. ET AL. *v.* OKLAHOMA PACKING CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 832. Argued May 3, 4, 1934.—Decided May 21, 1934.

1. The three-judge procedure under Jud. Code, § 266 is an extraordinary one, designed for a specific class of cases, and must be kept within the limitations imposed by the statute. P. 391.
2. The procedure prescribed by § 266 may be invoked only if the suit is in fact and in law a suit to restrain the action of state officers. P. 390.
3. When it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed, and direct appeal to this Court must fail as well as where the plaintiff does not press his injunction or his constitutional attack. P. 391.
4. In a suit brought by a public utility company under Judicial Code, § 266, to enjoin the enforcement by state officers of an allegedly unconstitutional order affecting its service and rates, and also to enjoin a private party from prosecuting an action based upon the order, it became apparent at final hearing that there had been no basis for relief against the officers because the order had been superseded by another before the suit was begun and no penalties were threatened. *Held,* that there was no occasion for proceeding under § 266, and that a direct appeal would not lie to this Court for the purpose of determining the private controversy although it was one within the general jurisdiction of the District Court. P. 390.
5. Although without jurisdiction to hear the merits of an appeal erroneously based on Jud. Code, § 266, this Court has authority in the case to enforce the limitations of that section by appropriate directions, and it may frame its order in a way that will save to the appellants their proper remedies. P. 392.

6 F.Supp. 893, decree vacated.

APPEAL from a decree of the District Court, constituted of three judges, which dismissed a suit brought against the Corporation Commission of Oklahoma and its mem-

bers, to enjoin the enforcement of an order affecting service and rates of the plaintiff gas company; and also against a private corporation, beneficiary of the order, to restrain it from prosecuting an action to recover what it had paid in excess.

Messrs. Robert M. Rainey and *I. J. Underwood,* with whom *Messrs. Streeter B. Flynn* and *R. M. Campbell* were on the brief, for appellants.

Messrs. W. R. Brown and *Fred Hansen,* with whom *Messrs. J. Berry King* and *Crawford D. Bennett* were on the brief, for appellees.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 266 of the Judicial Code from a decree of the District Court for Western Oklahoma, three judges sitting, which dismissed the cause for want of equity jurisdiction. 6 F.Supp. 893. The suit was brought by Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company, two public service companies, against appellees, Wilson & Company, Inc., now Oklahoma Packing Company, a private business corporation, the State Corporation Commission, and the Attorney General of the State, to enjoin enforcement of an order of the Commission. The order, which directed the Oklahoma Natural Gas Company to supply Wilson & Company with natural gas at a prescribed rate, was assailed as an infringement of the due process and contract clauses of the Federal Constitution on the ground that it imposed on the Gas Company a duty to serve which it had never undertaken to perform, and impaired a contract between the two gas companies with respect to the distribution of gas by them to consumers in the vicinity of the plant of Wilson & Company. The order, which was made upon petition of Wilson & Company to the State

Commission, directed that the Oklahoma Natural Gas Company be required to supply it with gas at a lower rate than it had been paying for gas supplied by the Oklahoma Gas & Electric Company which that company purchased from the Natural Gas Company for distribution.

On appeal the state supreme court affirmed the order. 146 Okla. 272; 288 Pac. 316. Pending the appeal, supersedeas bonds were given which suspended the order and Wilson & Company continued to take its gas supply from the Oklahoma Gas & Electric Company at the higher rate. In the meantime, while the petition to review the order was pending before the state supreme court, and before the present suit was brought, the Oklahoma Natural Gas Company acquired the properties of the Oklahoma Gas & Electric Company and a new industrial rate for natural gas supplied by it was put into effect by order of the Commission.

Upon affirmance by the state supreme court of the Commission's earlier order, Wilson & Company brought suit in the state district court, joining as defendants the Oklahoma Gas & Electric Company and the sureties on the supersedeas bonds, to recover the amount paid for gas in excess of the rate prescribed by the earlier order of the Commission. That suit was defended upon the ground, among others, of the constitutional invalidity of the order. Judgment was given for Wilson & Company, from which an appeal was taken and is now pending in the state supreme court.

Following this judgment the present suit was brought upon a bill of complaint which set up the invalidity of the order, alleged that the action of the state supreme court in affirming it was legislative not judicial, see *Oklahoma Gas & Electric Co.* v. *Wilson & Co., Inc.*, 54 F. (2d) 596, and prayed an injunction restraining appellees from taking any steps to enforce it. The court below construed this as asking both that the state officers be enjoined from

enforcing the order and that Wilson & Company be restrained from prosecuting its pending suit in the state courts to recover the excess payments for gas. Upon the trial, the court below made its finding, not assailed here, that no penalties could be imposed for non-compliance with the challenged order, as it had been suspended by supersedeas in the proceedings to review it before the Supreme Court of Oklahoma, and while they were pending it had become inoperative by reason of the order of the Commission establishing the new rate. It found that "there is no suggestion in the record of any intention on the part of any of the officials of Oklahoma to undertake to impose any statutory penalties for failure to comply with the order." The court concluded that there was no basis for relief by injunction against state officials, and that the only issue left in the case was the right asserted by appellees to enjoin prosecution of the suit of Wilson & Company in the state courts, and that as the alleged invalidity of the Commission's order had been interposed as a defense in that suit and had been passed upon by the state court, there was no occasion for relief by a federal court of equity.

The appellants insist here, as they did below, that the district court of Oklahoma is without jurisdiction to pass upon the issue of the invalidity of the order, since by § 20, Art. 9 of the state constitution, exclusive jurisdiction to review or set aside an order of the Commission is conferred on the state supreme court. See *Pioneer Tel. & Tel. Co.* v. *State*, 40 Okla. 417; 138 Pac. 1033. We are asked on this appeal to sustain the equity jurisdiction of the three judge court to restrain the prosecution of the suit at law in the state courts, upon the ground that appellants are without adequate legal remedy to protect themselves from the exactions of the unconstitutional order.

By § 266 of the Judicial Code, suits, in which an interlocutory injunction is sought and pressed, to restrain any state officer from enforcing or executing a state statute or an order of a state commission, on the ground of its unconstitutionality, are required to be tried before a court of three judges. The section provides that "a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." Our jurisdiction to hear the present appeal is challenged and as this is the only provision authorizing the appeal to this Court, it is necessary at the outset to determine whether this is "such suit."

The procedure prescribed by § 266 may be invoked only if the suit is one to restrain the action of state officers. *Ex parte Public National Bank,* 278 U.S. 101; *Ex parte Collins,* 277 U.S. 565. That this condition is vital is sufficiently indicated by reference to the part played by *Ex parte Young,* 209 U.S. 123, in inducing enactment of the section.[1] Hence the cause of action alleged against Wilson & Company, although within the jurisdiction of the district court, is subject to this extraordinary procedure, and appealable directly to this Court, if at all only because it is incidental to the relief prayed against the state officers. See *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U.S. 479. Whether it is so incidental we need not inquire, for we conclude that the case against the state officers was not one within the appellate jurisdiction conferred upon this Court by § 266 so as to bring either that case or its incidents before us for decision. Compare *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103; *Clark* v. *Wooster,* 119 U.S. 322, 325.

[1] See 42 Cong. Rec. 4846, *et seq.;* 45 *id.* 7252, *et seq.;* Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 805.

The allegations against appellee officers, it is true, present on their face every prerequisite to three judge action. But when it became apparent, as it did upon the final hearing, that there was never any basis for relief of any sort against the state officers, and that the only matter in controversy was the right of Wilson & Company to recover the alleged excess payments for gas, there was no longer any occasion for proceeding under § 266. The issue is not one of the federal jurisdiction of the district court, see *Healy* v. *Ratta, ante,* p. 263; *Ex parte Poresky,* 290 U.S. 30, 31; compare *Rice & Adams Corp.* v. *Lathrop,* 278 U.S. 509, 514, with *Smith* v. *Wilson,* 273 U.S. 388, and *Ex parte Hobbs,* 280 U.S. 168; but whether a final hearing by three judges was prescribed by the section, and hence whether this Court has jurisdiction to hear the appeal. *Smith* v. *Wilson, supra.*

The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended. *Ex parte Collins, supra,* at 569. The limitations of the statute would be defeated were it enough to keep three judges assembled that a plaintiff could resort to a mere form of words in his complaint alleging that the suit is one to restrain action of state officers, with no support whatever in fact or law. Compare *Pacific Elec. Ry. Co.* v. *Los Angeles,* 194 U.S. 112, 118; see also *Wilderman* v. *Roth,* 17 F. (2d) 486. The restrictions placed upon appellate review in this Court by the jurisdictional act of February 13, 1925, would likewise be measurably impaired were groundless allegations thus to suffice. See *Smith* v. *Wilson, supra,* at 390; compare *United States* v. *Alaska S.S. Co.,* 253 U.S. 113. When it becomes apparent that the plaintiff has no case for three judges, though they may have been properly

convened, their action is no longer prescribed and direct appeal here must fail as well in this case as where the plaintiff does not press his injunction, *Smith* v. *Wilson, supra,* or his constitutional attack. Compare *Ex parte Hobbs, supra.*[2]

Although without jurisdiction to hear the merits of the appeal, this Court, in the exercise of its appellate jurisdiction, has authority to give such directions as may be appropriate to enforce the limitations of § 266, and to conform the procedure to its requirements. And we may frame our order in a way that will save to the appellants their proper remedies. *Gully* v. *Interstate Natural Gas Co., ante,* p. 16; see *Gulf, C. & S. F. Ry. Co.* v. *Dennis,* 224 U.S. 503; compare *United States* v. *Anchor Coal Co.,* 279 U.S. 812.

By mistakenly appealing directly to this Court appellants have lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals has expired. Compare *Healy* v. *Ratta,* 289 U.S. 701; *ante,* p. 263. We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under § 266 been more definitely settled at the time the appeal to this Court was attempted. But in the circumstances, it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings to be taken independently of § 266 of the Judicial Code. *Gully* v. *Interstate Natural Gas Co., supra.*

Costs will be awarded against the appellants. See *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan,* 111 U.S. 379, 387.

Decree vacated.

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[2] The authorities are collected and discussed in Bowen, When Are Three Federal Judges Required, 16 Minn. L.Rev. 1, 33–39.

Counsel for Parties.

NICKEY ET AL. *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 298. Argued February 5, 6, 1934.—Decided May 21, 1934.

1. Contentions based on the Federal Constitution, which were raised and adversely decided by a state supreme court, as shown by the discussion in its opinions with specific reference to that instrument, are reviewable by this Court, notwithstanding the failure of the appellant to mention them in his assignment of errors to the state court, as required by its rules. P. 394.
2. There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the State to pay it becomes final and irrevocable. P. 396.
3. A State may collect taxes, assessed against one parcel of property within its jurisdiction, from other parcels within the State, owned by the same person, though he be a nonresident. P. 396.
4. A nonresident who appears in a suit brought against him by a State to collect a tax on part of his property, and voluntarily gives a bond to secure the release of his other property from an attachment in the suit, has no ground to contend that the resulting substitution of his personal liability to the extent of the bond, for the liability *in rem* of the property attached, was in violation of due process. P. 397.

167 Miss. 650; 145 So. 630, affirmed.

See also, 146 So. 859; 147 *id.* 324.

APPEAL from the affirmance of a decree for *ad valorem* taxes in a suit in chancery brought by the State on the relation of the Attorney General, and accompanied by an attachment of other property of the defendants on which the taxes had been paid.

Mr. W. E. Gore, with whom *Mr. George Butler* was on the brief, for appellants.

Mr. J. A. Lauderdale, Assistant Attorney General of Mississippi, with whom *Mr. Greek L. Rice,* Attorney General, and *Messrs. E. C. Sharp* and *R. H. Knox* were on the briefs, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on appeal, § 237 of the Judicial Code, from a decree of the Supreme Court of Mississippi allowing recovery of delinquent taxes assessed upon appellants' lands within the state and overruling their contention that the assessment of the tax and the decree for its payment infringe the due process clause of the Fourteenth Amendment. 167 Miss. 650; 145 So. 630; 146 So. 859. So far as the state court discussed these contentions with specific reference to the Constitution of the United States, both in its original opinion, and in an opinion denying the appellants' application for rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignment of errors to the state supreme court, as required by its rules. *Wall* v. *Chesapeake & Ohio Ry. Co.,* 256 U.S. 125. *Saltonstall* v. *Saltonstall,* 276 U.S. 260, 267. *Cumberland Coal Co.* v. *Board of Revision,* 284 U.S. 23, 24. We confine our opinion to the questions thus discussed.

Appellants, non-residents of Mississippi, are owners of tracts of land in Tunica County, Mississippi, all of which were assessed for local and state taxation for the year 1928. They failed to pay the tax on one tract alone, and the state, on relation of the Attorney General, brought the present suit in the chancery court of Tunica County to recover the unpaid tax as a debt of the owners. This suit was begun by attachment of other lands of appellants' on which the tax had been paid. The bill of complaint alleges that the appellants are engaged in removing timber from the land on which the tax has not been paid; that the land without it is not of sufficient value to

pay the tax, and that unless they are restrained from cutting the timber the state and its municipal subdivisions will be deprived of the tax. The bill prays that appellants be enjoined from cutting the timber until the tax is paid, and that it be satisfied from the attached lands.

Appellants appeared generally in the suit, and secured the release of the attachment by giving bond, in the sum of $10,000, an amount in excess of all taxes claimed and recovered, by which they and their surety became bound to satisfy any decree which might be recovered in the suit. In their answer they set up numerous defenses on state grounds, all of which so far as now material have been resolved against them and may not be reviewed here. They also set up two distinct defenses, which are urged here: First, that they are and at all times have been nonresidents of the state and that the tax demanded was assessed without service of any process on them, or notice to them, or opportunity to be heard in any proceedings for its assessment, and without their appearance in any such proceedings; that in consequence the state taxing officers were without jurisdiction to assess the tax and that any collection is an infringement of the Fourteenth Amendment. Second, that the decree of the state court, so far as it purports to adjudicate any right of the state to satisfy the tax liability out of lands of appellants within the state other than those upon which the tax was assessed, or to impose upon appellants any personal liability for the tax, is likewise a violation of due process.

1. Section 3122 of the Mississippi Code of 1930 declares that every lawful tax is a debt for the recovery of which an action may be brought in the state courts " and in all actions for the recovery of ad valorem taxes the assessment rolls shall only be prima facie correct." In construing and applying this section in the present case, the state court held that the tax, recovery of which it

allowed, was a debt collectible by suit. But as the statute makes the assessment roll only prima facie correct, the court, following its decision in *George County Bridge Co.* v. *Catlett,* 161 Miss. 120; 135 So. 217, ruled that it is open to a defendant, in such a suit, to assail the correctness and legal sufficiency of the assessment; that it is the proceeding in court and not the assessment which finally fixes the liability to pay the tax, and since appellants had appeared in the suit and had had full opportunity to be heard before the decree was rendered upholding the assessment, there was no denial of due process.

Accepting, as we must, this construction of the laws of the state by its highest court, they infringe no constitutional limitation. There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. *Wells, Fargo & Co.* v. *Nevada,* 248 U.S. 165; *Bristol* v. *Washington County,* 177 U.S. 133, 146; *McMillen* v. *Anderson,* 95 U.S. 37; see *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 168.

2. The question remains whether the state, in conformity with due process, may declare the tax, lawfully assessed upon one tract of appellants' land, a debt collectible from other property of theirs within the state and from the appellants themselves by a judgment *in personam.* It can no longer be questioned that a state may collect taxes, assessed against one parcel of property within its jurisdiction, from other parcels within the state, owned by the same person, though he be a nonresident. *Scottish Union & National Ins. Co.* v. *Bowland,* 196 U.S. 611, 632; *Bristol* v. *Washington County, supra,* 145; compare *Marye* v. *Baltimore & Ohio R. Co.,* 127 U.S. 117, 123–124; see *Iowa* v. *Slimmer,* 248 U.S. 115, 120. To

that extent at least the power of the state over the property within its bounds may be exerted to affect the interest of the common owner. The power to collect the tax from property within the state is always exercised at the expense of the owner, even though a nonresident, and an obligation *in rem* is thus imposed on his ownership, which is within the control of the state because of the presence there of the physical objects which are the subject of ownership. As it is an incident of property that it may be made to respond to obligations to which its owner may be subject, no want of due process is involved in satisfying an obligation imposed upon the ownership of one item of property by resort to another which is subject to the same ownership.

Here the suit was brought to compel payment of the tax out of the attached property. The end sought was the same as that constitutionally achieved in *Scottish Union & National Ins. Co.* v. *Bowland, supra,* by distraint upon the nonresident's property to satisfy a tax assessed upon other property within the taxing state, and is equally free from constitutional objection. By giving their bond to release the attachment, the appellants have voluntarily substituted their personal liability on the bond for the liability which might otherwise have been satisfied from the attached property. As the tax, payment of which is decreed, is less than the amount of the bond, it is only this personal liability upon the bond which the state seeks to enforce here.

It is unnecessary to decide the different question with respect to appellants' personal liability to pay the tax which would be presented if the decree had exceeded the amount of the bond, or if appellants had appeared and defended the suit without giving bond or securing release of the attachment. See *Dewey* v. *Des Moines,* 173 U.S. 193; *Scottish Union & National Ins. Co., supra,* 632. Compare *York* v. *Texas,* 137 U.S. 15.

Affirmed.

COLUMBUS GAS & FUEL CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 937. Argued May 1, 2, 1934.—Decided May 21, 1934.

1. In fixing the rates of a distributing gas company, a State is not bound by the price at which that company purchases its gas supply under a contract with an affiliated gas producing company, if it is higher than a fair return to the seller. *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio, ante,* p. 290. P. 400.
2. A State can not constitutionally confine a public utility to a return of 6½% upon the value of its rapidly and inevitably wasting assets while withholding from it the privilege of including a depreciation allowance among its operating expenses. P. 404.
3. In finding the fair price for gas delivered by a producing company, "delay" rentals, paid for keeping alive leases of gas lands held in reserve, should not be charged to operating expenses, where sufficient depreciation allowance is made for replacement of operated lands when exhausted. *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio, ante,* p. 290. P. 406.
4. In computing the rate base, the market or book value of gas lands not presently in use need not be included unless the time for using them is so near that they may be said to have the quality of working capital. P. 406.
5. In allocating transmission property of a producing gas company, in the process of finding a fair return for gas delivered at one of many cities served by its unit system, it would be arbitrary to employ a formula based on the mileage to the particular city from an intermediate point where gas is compressed, remote from the source of supply, and which took no account of other parts of the unit system. P. 408.
6. Land and rights of way *held* rightly omitted in measuring depreciation, no evidence of their location or present or prospective uses having been presented. Pp. 410–411.
7. Going value of affiliated gas companies, not separately appraised, was, in this case, reflected in appraisal of the physical assets as parts of an assembled whole. P. 411.
8. In rejecting the estimates of expert witnesses of going value of affiliated gas supplying corporations, the state commission did not exceed its discretion in the circumstances of this case. P. 412.

9. The rule *de minimis* is applicable to trivial differences between opposing estimates of annual depreciation allowances, in deciding upon the adequacy of a rate. P. 413.
10. Under the laws of Ohio, gas companies which sell and deliver supplies of gas to affiliated distributors must serve them at reasonable rates. P. 414.
11. In so far as a reasonable rate of a public utility is something other or higher than one not strictly confiscatory, the difference, if any, is determined with finality by the appointed officers of the State. P. 414.

127 Ohio St. 109; 187 N.E. 7, reversed.

APPEAL from a judgment sustaining an order fixing the rates chargeable by the appellant gas company in Columbus, Ohio. The City of Columbus had intervened in the proceedings before the Utilities Commission. The City and company took cross-appeals from the order to the court below. Cf. *Dayton Power & Light Co.* v. *Public Utilities Commission of Ohio, ante,* p. 290. An earlier appeal to this Court was dismissed because the judgment was not final. 291 U.S. 651.

Mr. Edward C. Turner, with whom *Mr. Albert M. Calland* was on the brief, for appellant.

Messrs. John L. Davies and *James W. Huffman* for appellees.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

An ordinance of the City of Columbus, Ohio, approved by the electors at a referendum vote, provides that for five years from November 12, 1929, the price to be charged for natural gas shall be at the rate of 48 cents per thousand cubic feet with a minimum charge of 75 cents per month.

The appellant, the Columbus Gas & Fuel Company, supplies gas to consumers in the City of Columbus, purchasing the gas from the Ohio Fuel Gas Company, an

affiliated corporation. Part of the gas so supplied is produced by the Ohio Fuel Gas Company in its own gas fields, part is bought by it from another affiliated corporation, the United Fuel Gas Company, and part from independent producers. The three affiliated corporations, i.e., the appellant, the Ohio, and the United, are subsidiaries of one parent company, the Columbia Gas & Electric Corporation.

On December 31, 1929, the Columbus Gas & Fuel Company filed a complaint with the Public Utilities Commission of Ohio in which it prayed that the rate prescribed by the ordinance be declared to be inadequate and that such other rate be substituted as might be found to be just and reasonable. To dispose of that complaint there was need of an inquiry into the value of the complainant's property and into its operating expenses, which in turn necessitated an inquiry into the property and expenses of its affiliated corporations. Until some time in 1929, there had been a contract between the Columbus Company and the Ohio Fuel Gas Company whereby for gas delivered at the city gateway Columbus was to pay to Ohio 65% of the local retail rate, retaining 35% for itself as distributor. On the basis of a 48 cent retail rate, the gate rate would thus have amounted to 31.2 cents, and 16.8 cents would have been the return to the distributor. By consent, this agreement was canceled in 1929, and a gate rate of 45 cents was substituted. Most of this voluminous record grows out of a controversy as to the fairness of that charge. The Columbus Company and the Ohio being parts of a single affiliated system, their intercorporate agreement does not control the price to be paid by consumers if the rate thereby established is higher than a fair return. *Dayton Power & Light Co.* v. *Public Utilities Comm'n of Ohio, ante,* p. 290. The process of ascertaining that return did not end with an inquiry into the property and expenses of the affiliated seller.

It became necessary to examine the property and expenses of a second affiliated company, the United Fuel Gas Company, which produces gas in West Virginia and sells to the Ohio Company, delivery being made at the Ohio River. The price charged for this gas, which was afterwards mingled with the gas from other fields, is known as the "river rate," and is so described in the record. What was fairly due from Columbus for gas delivered at the gateway is not susceptible of ascertainment without tracing the supply to its sources far away.

The Commission followed these inquiries through all their elusive ramifications. Its members were in agreement as to the value of the appellant's property to be included in the base. They were also substantially in agreement as to all the items of operating expenses with the exception of the price to be paid to the affiliated seller. If that item was laid aside, a rate of 16 cents plus per thousand cubic feet would assure to the appellant the enjoyment of a fair return. Division of opinion came in estimating the price at the gateway and the river. As to that item of expense a majority held the view that a fair price to be paid to the affiliated seller was 39.02 cents per thousand cubic feet, which, added to a rate of 16.02 cents to be retained for distribution, would make the retail price in Columbus 55.04 cents, or 7.02 cents in excess of the rate established by the ordinance. A minority opinion fixed the price at the gateway at 31.70 cents per thousand cubic feet, and the total retail price at 47.95 cents. An order was made, in accordance with the report of the majority, whereby the ordinance rate of 48 cents was declared to be inadequate, and a rate of 55 cents, with an additional charge of 5 cents per thousand cubic feet if monthly bills were not paid within a fixed time, and a monthly minimum charge of 75 cents without discount, became a substituted schedule.

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Cross-appeals followed to the Supreme Court of Ohio. The City of Columbus, which had intervened in the proceeding, appealed upon the ground that the ordinance rate should have been upheld as adopted by the city and approved by the electors. The Columbus Gas & Fuel Company appealed upon the ground that the substituted schedule was too low, and that nothing less than 69.59 cents per thousand cubic feet would yield a fair return. United States Constitution, Amendment XIV. The Supreme Court of Ohio held in favor of the city, adopting for the most part the conclusions of the minority commissioner, though going in some respects beyond them. It held that an adequate price at the gateway would be 31.70 cents or less. In arriving at that conclusion it set aside the finding of the Commission that the operating expenses of the affiliated seller should include a yearly allowance of $4,158,954, to amortize the depletion of the gas fields and appurtenant equipment. It held also that the "river price" paid by the Ohio Company to the United, which had been fixed by the majority commissioners at 22 cents, was too high to the extent of 4.21 cents, thus reducing that item to 17.79 cents per thousand cubic feet. Going farther, it held that all the members of the Commission had erred in appraising the gas fields known as class No. 1 [1] at $25 an acre, and that the valuation of the leases should have been made on the basis of book cost, excluding all leases acquired as a reserve and not presently in use. Cf. *Dayton Power & Light Co.* v. *Public Utilities Comm'n of Ohio, supra.* It held also that in fixing the price of gas delivered at the gateway there should have been an additional reduction that would make appropriate allowance for the lower cost of transmission to Columbus as compared with points more distant, though the opinion does not furnish us with any workable formula whereby to put the precept into force.

[1] This classification is explained in *Dayton Power & Light Co.* v. *Public Utilities Comm'n of Ohio, supra.*

As the upshot of the whole matter, the court arrived at the conclusion that the ordinance rate was valid, and remanded the proceeding. 127 Ohio St. 109; 187 N.E. 7. There was an appeal to this court, which was dismissed upon the ground that the order was not final. 291 U.S. 651. Thereupon the Supreme Court of Ohio amended its decree by striking out the remand, and substituting a direction that the rate be established in accordance with the ordinance. Upon an appeal from the decree as thus amended the cause is here again.

Many of the questions urged on this appeal have been considered very recently by this court in disposing of an appeal by an affiliated company. *Dayton Power & Light Co.* v. *Public Utilities Comm'n of Ohio, ante,* p. 290. In so far as the cases overlap, we refer to that opinion without repetition of its reasoning. But along with many features of identity there are important points of difference. The issue in the *Dayton* case was one as to the right of the gas company to put into effect a new schedule higher than the rate level previously prevailing. The issue in this case is one as to the right of the municipality to establish a new schedule lower than any level accepted by the company. All that the state court had to do in order to uphold the determination in the *Dayton* case was to reach the conclusion that adherence to the old rates would not result in confiscation. What it said as to the possibility of excluding an amortization allowance and several other contested items did not determine the result. "If the evidence would have been adequate to uphold a lower rate, *a fortiori* it was adequate to uphold the rate prescribed." *Dayton Power & Light Co.* v. *Public Utilities Comm'n of Ohio, supra.* Here, on the other hand, the decision of the state court reverses the determination of the Commission, and in so doing excludes important items, such as an amortization charge and others, which had received allowance there. Not a little that was put aside in the *Dayton* case as unrelated to the re-

sult must have consideration and decision now. To those items we turn first, postponing for the moment what will have to be said later as to items less contentious.

1. Amortization, depletion and unoperated leases.

We have seen in the *Dayton* case that in determining the price to be paid for gas delivered at the gateway, the Commission included among the operating expenses of the affiliated seller an annual allowance of $4,158,954, to amortize the value of leaseholds No. 1 (the only leaseholds then in use) and of the well-structures and equipment used in connection therewith, and thus provide a fund that would restore the depleted capital when the gas had been exhausted. The same allowance was made here.

Upon the appeal by the City of Columbus to the Supreme Court of Ohio the item thus allowed was excluded altogether. The court did not deny that without the creation of a fund to replenish wasting assets the affiliated seller would be left with only a salvage value for leases, wells and fittings after the exhaustion of the gas. It put its judgment upon the ground that the statute of Ohio defining the powers of the Commission and the method of appraisal makes no provision for depletion (Ohio General Code, §§ 499–9 to 499–13), and that the statute, and nothing else, gives the applicable rule. We may assume in submission to the holding of that court that the amortization allowance must be rejected if the rate making process is to conform to the rule prescribed by statute, irrespective of any other. That assumption being made, the conclusion does not follow that the statutory procedure may set at naught restrictions imposed upon the states and upon all their governmental organs by the constitution of the nation.

To withhold from a public utility the privilege of including a depletion allowance among its operating expenses, while confining it to a return of 6½% upon the value of its wasting assets, is to take its property away

from it without due process of law, at least where the waste is inevitable and rapid. The Commission has found that the life expectancy of the operated gas fields is only three years and two months. If that holding is correct, the owner of the exhausted fields will find itself in a brief time with wells and leases that are worthless and with no opportunity in the interval to protect itself against the impending danger of exhaustion. Plainly the state must either surrender the power to limit the return or else concede to the business a compensating privilege to preserve its capital intact. *Knoxville* v. *Knoxville Water Co.*, 212 U.S. 1, 13; cf. *Helvering* v. *Falk*, 291 U.S. 183. There is nothing to the contrary of this in cases such as *Burnet* v. *Harmel*, 287 U.S. 103, 107, 108; *Stratton's Independence, Ltd.* v. *Howbert*, 231 U.S. 399; and *Goldfield Consolidated Mines Co.* v. *Scott*, 247 U.S. 126. The profits of a mine may be treated as income rather than as capital if the state chooses so to classify them and to tax them on that basis. This is far from saying that in the process of rate making depletion of the capital may be disregarded by the agencies of government in figuring the interest returned on the investment. "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life." *Knoxville* v. *Knoxville Water Co.*, *supra*; *Lindheimer* v. *Illinois Bell Telephone Co.*, *ante*, p. 151. It is idle to argue that a company using up its capital in the operations of the year will have received the same return as one that at the end of the year has its capital intact and interest besides.

We hold that a fair price for gas delivered at the gateway includes a reasonable allowance for the depletion of the operated gas fields and the concomitant depreciation of the wells and their equipment. What that allowance shall be has not yet been considered by the

Supreme Court of Ohio, invested with jurisdiction to review the law and facts. *Hocking Valley Ry. Co.* v. *Public Utilities Comm'n,* 100 Ohio St. 321, 326; 126 N.E. 397. The court will have to say in the light of all the circumstances whether the amount to be allowed shall be the same as that fixed by the Commission ($4,158,954), or something less or greater. It may disagree with the Commission either as to the value of the fields or as to the life expectancy of the supply of gas. There will be power, we assume, to direct another hearing if the basis for an intelligent judgment is lacking in the record. When the allowance has been fixed and has been charged to operating expenses, it will supply the answer to other questions in controversy now. There will be no need, when that is done, to include in operating expenses a separate provision for the payment of "delay rentals" upon leases in reserve. This is so for reasons that were explained in the *Dayton* case. "Operating expenses are magnified unduly if they cover both the fund and the payments that are made out of it." *Dayton Power & Light Co.* v. *Public Utilities Comm'n of Ohio, supra.* There will be no need in the computation of the rate base to include the market or the book value of fields not presently in use, unless the time for using them is so near that they may be said, at least by analogy, to have the quality of working capital. The arrival of that time cannot be known in advance through the application of a formula, but within the margin of a fair discretion must be determined for every producer by the triers of the facts in the light of all the circumstances.[2] The burden is on the gas company to supply whatever testimony

[2] The state court will be in a position to determine the unoperated acreage analogous to working capital when it has ascertained the life expectancy of present sources of supply.

If there is a change in the allowance for annual depreciation, there may be need for a corresponding change in accrued depreciation.

may be necessary to enable court or board to make the requisite division. Leases bought with income, the proceeds of the sale of gas, and thus paid for in last analysis through the contributions of consumers, ought not in fairness to be capitalized until present or imminent need for use as sources of supply shall have brought them into the base upon which profits must be earned. To capitalize them sooner is to build the rate structure of the business upon assets held in idleness to abide the uses of the future. At times the immediate purpose of buying up extensive tracts is to forestall or stifle competition that might bring the prices down. There is adequate compensation for investment so remotely beneficial when the cost of renewing fields in present operation, and thus replenishing the capital, is paid out of gross earnings as an expense of operation, with a proportionate increase of the prices to be charged for gas thereafter. Cf. *Natural Gas Co.* v. *Public Service Comm'n,* 95 W.Va. 557, 569, 570; 121 S.E. 716; *United Fuel Gas Co.* v. *Public Service Comm'n,* 14 F. (2d) 209, 221; *Erie City* v. *Public Service Comm'n,* 278 Pa. 512, 531; 123 Atl. 471. Postponement of other profit until the stage of imminent or present use is not an act of confiscation, but a legitimate exercise of legislative judgment. Certainly that is so when the amortization fund has been computed with reasonable liberality, and is large enough to make provision for adequate reserves. If the company is not satisfied to have the depletion allowance thus applied in renewal of its life, it may divide the fund among the stockholders and wind the business up. It cannot get its capital back at the expense of the consuming public and also at the same expense provide itself with a fresh supply to keep the business going.

2. The River Rate.

We have seen that the Ohio Company when buying gas from the United Company, an affiliated corporation,

paid an agreed rate (26½ cents per thousand cubic feet) for delivery at the river.

A majority of the Ohio Commission, following in substance a decision of the Commission for West Virginia, fixed the reasonable price for gas so delivered at 22 cents per thousand cubic feet, and computed operating expenses accordingly.

The West Virginia Commission with the approval of the Supreme Court of that state (*Charleston* v. *Public Service Comm'n*, 110 W.Va. 245; 159 S.E. 38) had permitted an annual depreciation allowance of 1.12% and a depletion or amortization allowance of 4.15%.

The Supreme Court of Ohio struck out these allowances, thereby reducing the rate payable at the river from 22 cents to 17.79 cents. In so doing it adhered to the ruling, announced elsewhere in the same opinion, that under the statutes of Ohio amortization is not permissible to replenish wasting assets. For reasons already stated these items should be restored with such modification in amount as may be found to be appropriate upon a survey of the evidence.

The claim is made by the appellant that the river price remains inadequate after adding the excluded items for depreciation and depletion, and that the price should be fixed in accordance with the contract. There is nothing to show that the Supreme Court of Ohio held itself bound by the determination of the West Virginia Commission, or failed to exercise an independent judgment upon the evidence before it. The testimony and exhibits in West Virginia had been read into the record. We must presume they were considered. Nothing now before us justifies a finding that they fail, with the exceptions already noted, to sustain what has been done.

3. Allocation.

Upon the hearings before the Commission, the city made the claim that in the appraisal of the property of

the Ohio Fuel Gas Company, the production property should be allocated between Columbus and other municipalities upon the basis of the sales, but the transmission property should be allocated upon the basis of mileage, multiplied by the peak demand at the place of distribution. In opposition the appellant contended that allocation on the basis of mileage was impracticable, and so the Commission unanimously held.

The opinion of the Supreme Court of Ohio, though giving its approval to the principle of mileage allocation favored by the city, does not furnish us with any formula that would make the principle a working one when applied to the Ohio system. If such a formula can be discovered, it may reduce the price at the Columbus gateway by an amount as yet unknown. Enough for present purposes that it is not discovered yet.

The formula proposed by the city, and, it seems, sanctioned by the court, would estimate the mileage by starting from a place described as the last point of major compression, and thence proceeding to the town or city where distribution is to be made. In its application to the Ohio system, such a measurement of mileage is unrelated to realities. In the first place, the compressor, wherever situated, is not the source of the supply. Gas may have traveled hundreds of miles before the process of compression starts. Conceivably these inequalities might be corrected by the aid of some law of averages. There has been no endeavor to correct them here. In the second place, no one municipality is served by any one compressor unaided by another. The system of transmission maintained by the Ohio Company with its 38 compressors scattered through the state is organized as a unit, and mileage from any single point would be an arbitrary measure of the value of the property devoted to transmission without including in the reckoning the mileage embraced in the system as a whole.

Nothing to the contrary was held in *Wabash Valley Electric Co.* v. *Young,* 287 U.S. 488, or in *United Fuel Gas Co.* v. *Railroad Comm'n of Kentucky,* 13 F. (2d) 510, 522. A municipality may be treated as the unit for determining the rates to be charged to its inhabitants. *Wabash Valley Electric Co.* v. *Young, supra.* This does not mean that allocation of values may be made by recourse to an arbitrary formula. The value of the property devoted to transmission may be measured upon the basis of mileage multiplied by demand. *United Fuel Gas Co.* v. *Railroad Comm'n of Kentucky, supra,* where the experts are stated to have agreed upon the method of division. This does not mean that a like basis will be approved when mileage contributing to the supply is omitted from the reckoning.

4. What has been said exhausts the points of difference between the decree and the report.

Other objections have been urged in respect of other points as to which the Commission and the court concurred. What has been said as to the points in respect of which they differed has brought us to the conclusion that the rate as fixed by the ordinance must be supplemented by an allowance for amortization or depletion. The appellant insists, however, that even this addition will not serve, and that confiscation will result unless there is an allowance of other items which the court and the Commission have united in rejecting. Whether that contention may be upheld is the question next before us.

Objection is made that the annual depreciation allowance ($667,612) for depreciable property other than well-structures and equipment is less than is necessary to maintain the property intact.

We considered this objection in the *Dayton* case and overruled it. In this case, however, the appellant submits a computation which is intended to prove that in

measuring depreciation certain items of property, such as land and rights of way, have been omitted altogether. The record tells us nothing as to the location of this property or its present or prospective uses. Whether it has relation to the operated fields or the fields to be opened in the future there is nothing to inform us. Certainly land and rights of way may not be characterized as wasting assets in the absence of explanation that would stamp that quality upon them. In saying this we do not forget that an abandonment of the business might bring about a sharp reduction in the value of the plant, aside from well-structures and equipment. There is nothing to show, however, that any such abandonment is planned or even reasonably probable. On the contrary, the course of business makes it clear that when the fields in use shall be exhausted, the business will extend to others, and this for an indefinite future, or certainly a future not susceptible of accurate estimation. We find no reason for a revision of our conclusion that the depreciation reserve has not been proved to be inadequate.

Objection is made also as to the disallowance of a going value for the affiliated companies. Going value was excluded both by court and by Commission as an item of property to be separately appraised and separately reported. The record justifies a holding that it was reflected in the other items and particularly in the appraisal of the physical assets as part of an assembled whole. Cf. *Hardin-Wyandot Lighting Co.* v. *Public Utilities Comm'n*, 118 Ohio St. 592, 603; 162 N.E. 262.[3] This, we think, was adequate.

[3] Going value, of course, is not to be confused with good will (*Los Angeles Gas & Electric Corp.* v. *Railroad Comm'n*, 289 U.S. 287, 314), and is not to be "read into every balance sheet as a perfunctory addition." *Dayton Power & Light Co.* v. *Public Utilities Comm'n*, *supra*.

The going value of the Columbus property must have been small, if not nominal, for the business, though broader in its beginning, had been narrowed in the course of years to one of distribution only. Cf. *Dayton Power & Light Co.* v. *Public Utilities Comm'n, supra.*

The going value of the Ohio Fuel Gas Company was placed by the appellant's witness at a figure so high ($12,000,000) as to be excessive almost on its face, and the impression of exaggeration is confirmed when the appraisal as a whole is resolved into its elements.

Thus, some of the appellant's experts have included interest or return unearned during the business development period as a factor contributing to going value, one witness placing this factor as high as $6,300,000. Their method of computation was condemned by this court in *Galveston Electric Co.* v. *Galveston,* 258 U.S. 388, 394, in very similar conditions. No evidence was offered by the appellant that expenses had been incurred " in overcoming initial difficulties incident to operation and in securing patronage." *Galveston Electric Co.* v. *Galveston, supra.* On the contrary there is evidence as to the business in Columbus that customers were clamoring for an extension of the service, to such an extent that a suit was begun for a mandatory injunction. The sales by the Ohio Company and the United to the extent of more than half in value were made to their own affiliates. In such circumstances, the base value is not greater because of losses at the beginning than it is where there is no development cost because the success of the business has been " instant and continuous." *Galveston Electric Co.* v. *Galveston, supra,* p. 396.

Other experts, who reject the factor of interest unearned during the period of development, build their estimates of going value upon the cost of attaching new customers to the business, a cost not taken from the

books, but merely presumed or estimated at widely variant amounts. So far as such expenses had been actually incurred by any affiliated company, they had already been included as part of the cost of operation. So far as value had been added above the moneys thus expended, there was not even approximate precision in measuring its amount. The burden of building up patronage may be negligible where there is little competition with any other producer or with other kinds of fuel. *Charleston* v. *Public Service Comm'n, supra.*

Other experts, testifying to an aggregate, without assigning a proportion to the contributory factors, give estimates so vague as to be little more than guesses, one of them, for illustration, holding to the opinion that ten would be a fair percentage, yet unable to give a reason why the amount should not be less or greater.

From the testimony as a whole one gains a definite impression that the opinions are derived for the most part from a professed experience and understanding of business conditions generally, and very little from any knowledge of the "history and circumstances of the particular enterprise." *Los Angeles Gas & Electric Corp.* v. *Railroad Comm'n, supra;* cf. *Houston* v. *Southwestern Bell Tel. Co.,* 259 U.S. 318, 325.

We cannot find that the Commission and the court went beyond the bounds of a legitimate discretion in putting aside these estimates as too uncertain to be followed.

Objection is made that there was an inadequate allowance ($68,196) for the annual depreciation of the physical assets in Columbus.

The value of those assets, together with general overheads, as fixed by the Commission was $3,927,647. The depreciation reserve at the end of 1929 was $1,166,762.30, and at the end of 1930 $1,251,886.77. On the other hand the accrued depreciation (which was taken at the com-

pany's own figures) was only $710,659 as compared with a reproduction cost new of $4,638,326.

The Commission determined that in view of the large reserve and the good condition of the plant, the allowance asked for by the company ($174,880.24) was too high, and that $68,196 was adequate.

This is slightly less, it is true, than the amount ($88,-695.03) suggested by a witness for the city, but the Commission was at liberty to form its own judgment. In any event the rule of *de minimis* is applicable where the difference is so trivial in its effect upon the rate. *Dayton Power & Light Co.* v. *Public Utilities Comm'n, supra.*

Other objections not covered by the opinion in the *Dayton* case are concerned almost wholly with inferences of fact as to which the concurrent conclusions of the court and the Commission must be accepted as conclusive.

We have not been unmindful in what has been written that the affiliated sellers (the Ohio and the United) are not parties to this proceeding nor bound by our decree. None the less, under the law of Ohio, they must serve their affiliated buyers at reasonable rates. *Ohio Mining Co.* v. *Public Utilities Comm'n,* 106 Ohio St. 138, 146, 150; 140 N.E. 143. In so far as a reasonable rate is something other or higher than one not strictly confiscatory (*Banton* v. *Belt Line Ry. Corp.,* 268 U.S. 413, 423), the difference, if any, is determined with finality by the appointed officers of the state. The only question for us in these intercorporate relations is whether the rejection of the contract as a measure of the appellant's operating expenses was a wholly arbitrary act, and thus equivalent in its effect to an act of confiscation. Neither our judgment nor that of the state court operates directly upon the contract by destroying its obligation. The measure

of judicial power in the absence of the affiliated sellers is the determination of the expenses to be borne by the consuming public.

There being error in the reduction of the appellant's operating expenses by the refusal to make provision for replenishing the wasting assets of its affiliated companies, the decree is reversed and the cause remanded to the Supreme Court of Ohio for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concur in the result.

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

LEE, COMPTROLLER, *v.* BICKELL, ET AL.

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

No. 944. Argued May 10, 1934.—Decided May 21, 1934.

1. Equity jurisdiction exists to enjoin numerous and repeated impositions of an unlawful tax for which redress at law would entail a multiplicity of actions. P. 421.
2. In a suit in the federal court to enjoin the imposition of stamp taxes on documents connected with the transactions in a broker's office, the jurisdictional amount consists of the taxes claimed by the taxing authority and resisted by the complainant. P. 421.
3. The tax imposed by Laws of Florida, 1931, c. 15,787, on memoranda of sales or deliveries of stock, relates to the memorandum in prescribed form which must be executed by the seller in case of an agreement to sell or where a transfer is executed by delivery of the certificate assigned in blank—a memorandum to be handed by the seller to the buyer as an evidence of the contract or as a muniment of title. P. 421.

4. As to purchases and sales of stock made on an exchange in another State for Florida customers through brokers having a branch office in Florida, this statute does not intend that tax stamps shall be affixed to telegrams announcing such transactions sent from the main office and received in and reduced to writing in the Florida office, or to copies of such telegrams delivered by the branch office to the customer; or to receipts signed in Florida by the customer when shares purchased for his account in the other State are sent to him directly from the main office; or to receipts delivered by the branch office to the customer for certificates to be sold; or to written orders to sell delivered by the customer to the branch. P. 422.
5. An order to sell securities delivered by a customer to a broker is not an agreement to sell. P. 424.
6. When this Court sustains an injunction against a state tax as unauthorized by a state statute, without passing upon objections to it raised under the Federal Constitution, the decree should be so framed that the case may be reopened if it should appear that the state supreme court has construed the statute as applicable. P. 425.

Affirmed with modification.

APPEAL from a final decree of the District Court, constituted of three judges, enjoining the Comptroller of the State of Florida from enforcing a statute for the levy and collection of stamp taxes. For the opinion of the court below accompanying the granting of an interlocutory injunction, see 5 F. Supp. 720.

Messrs. J. V. Keen and *H. E. Carter,* Assistant Attorneys General of Florida, with whom *Mr. Cary D. Landis,* Attorney General, and *Mr. Robert J. Pleus,* Assistant Attorney General, were on the brief, for appellant.

Mr. Charles A. Carroll, with whom *Messrs. Frank B. Shutts* and *Crate D. Bowen* were on the brief, for appellees.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The appellees, complainants in the court below, have brought this suit against the appellant, the Comptroller of the State of Florida, to restrain the enforcement of a Florida statute for the levy and collection of stamp taxes upon the documents described in the bill of complaint.

Their contention has been and is that the statute, properly construed, does not apply to the transactions stated in the bill, and that, if so applied, it is in conflict with the due process and commerce provisions of the Constitution of the United States. Amendment XIV; Art. I, § 8.

A District Court of three judges granted an interlocutory injunction, 5 F.Supp. 720, which thereafter was made permanent. The case is in this court upon an appeal by the state Comptroller. Judicial Code, § 266; 28 U.S.C., § 380.

The Florida statute (Chapter 15,787, Laws of Florida, 1931) imposes a stamp tax upon all bonds or certificates of indebtedness issued in Florida; upon each original issue of certificates of stock; and upon all sales of stock or certificates of stock, agreements to sell, memoranda of sales or deliveries, or transfers of title, the stamps to be placed upon the certificates if the assignment of the certificate is to a person named therein, and upon a written memorandum which the seller is required to execute and deliver to the buyer if there is either an agreement to sell or a transfer of title by delivery of a certificate assigned in blank. The provisions of the statute so far as material are printed in the margin.*

* "On all sales, agreements to sell, or memoranda of sales or deliveries of, transfers of legal title to shares, or certificates of stock or profits or interest in property or accumulations in any corpora-

The appellees are stockbrokers engaged in business in the City of New York with branch offices in Florida. Orders to buy or sell received from Florida customers are transmitted by the Florida branches, and are executed in New York in accordance with the customs of the Stock Exchange. The Comptroller does not contend that any document signed by the brokers in New York is subject to the tax. To the contrary there is a concession that the stamp taxes applicable to such transactions are those imposed by the New York statute (New York Tax Law, § 270) and by a statute of the United States (26 U.S.C. § 901 [3]), which are substantially the same as the stamp tax law of Florida. What the Comptroller contends is this, that after the transaction is executed in New York, where certificates and memoranda are stamped under the New York and federal statutes, there are certain supplementary papers, copies of the original memoranda, or receipts, or entries in the books, which are signed by the managers or employes of the Florida branches, or on occa-

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tion, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock interests, rights, or not, on each $100.00 of face value or fraction thereof 10¢; and where such shares are without par or face value, the tax shall be 10¢ on the transfer or sale or agreement to sell on each share: Provided, that in case of sale, where evidence of transfer is shown only by the books of the corporation, the stamps shall be placed upon such books of the corporation; and where the change of ownership is by transfer of the certificate, the stamps shall be placed upon the certificates; and in case of an agreement to sell or where the transfer is made by delivery of the certificate assigned in blank, there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned, shall show the date thereof, the name of the seller, the amount of the sale, and the matter or things to which it refers."

sion by the customers. These, it is said, are memoranda of sales or deliveries within the meaning of the Florida statute. A tax is also claimed where a written order for the sale of shares is signed by a Florida customer and delivered to the Florida agent for transmission to the central office.

The application of the statute to these and similar situations will be determined more easily when the course of business, first in respect of purchases, and next in respect of sales, has been traced in greater detail. What that course of business is appears very clearly from the stipulated facts.

Upon the transmission to New York of an order for the purchase of shares of stock and after the execution of the order upon the floor of the Exchange, the buying and selling brokers sign and exchange what is known as an "exchange contract." There is no contention by the Comptroller that this is taxable in Florida. When the shares are delivered, the rules call for the exchange of what is known as a "sales ticket," a memorandum of the transaction, which bears the stamps required by the Federal Stamp Tax Act and by the statute of New York. 26 U.S.C. § 901 (3); New York Tax Law, § 270. There is no contention that the sales ticket is taxable in Florida. After the execution of the order, the New York office reports the transaction by telegraph over its private wire to the Florida branch, where an employe receives the telegram and reduces it to writing. This copy according to the contention of the Comptroller is a memorandum of sale within the meaning of the Florida statute, and must be stamped accordingly. Another copy of the telegram is commonly, but not invariably, delivered by the branch office to the customer. This too is claimed by the Comptroller to be a taxable memorandum, though a stamp is not required if one has been affixed to the copy retained for the office files. In addition to the

telegraphic notice to its Florida representatives, the New York office follows the practice of sending notice of the purchase by mail directly to the customer. No stamp is required for this notice, which is signed and transmitted in New York. Finally when the purchase has been completed by delivery, there are times when the New York office, instead of holding the certificates for the account of its Florida customer, forwards them to him by registered mail. When this is done a form of receipt is enclosed, which the customer is asked to sign. The Comptroller contends that this receipt, if signed in Florida, is subject to a stamp tax as a memorandum of delivery.

The course of dealing upon an order for the sale of shares does not differ in essentials, so far as the present subject of inquiry is concerned, from that upon an order to buy. By concession the "exchange contracts," and the "sales tickets" are not taxable in Florida. Taxes are claimed, however, upon the telegraphic report of the sale when written out by employes in the Florida office or by them transmitted in writing to the Florida customer. Taxes are claimed also when the Florida branch delivers a receipt to the customer for certificates to be sold, or receives a written order to sell, the theory being that this last is an agreement to sell within the meaning of the statute.

If stamp taxes due in connection with any of these memoranda are not affixed when payable, they must be affixed, in the view of the Comptroller, to the corresponding entry upon the books of account, but the tax is payable only once in respect of the same transaction, duplicate documents or entries being held to be exempt.

The failure to pay the tax by affixing and cancelling stamps of the prescribed value is declared to be a crime and is punishable accordingly.

Upon these facts the District Court held that the complainants, who were nonresidents of Florida, were without an adequate remedy at law, and that the threatened acts of the Comptroller, if illegal, should be restrained by a court of equity. As to this we are not in doubt, the multiplicity of actions necessary for redress at law being sufficient, without reference to other considerations, to uphold the remedy by injunction. *Wilson* v. *Illinois Southern Ry. Co.*, 263 U.S. 574; *Hill* v. *Wallace*, 259 U.S. 44, 62. The taxes claimed by the Comptroller and resisted by the complainants exceed the amount necessary to sustain the federal jurisdiction. Several hundred transactions are affected every day.

The District Court held also (1) that the writings signed in Florida were not agreements or memoranda of sale or delivery within the meaning of the Florida statute; and (2) that the effect of a different construction would be to bring the statute into conflict with the Fourteenth Amendment. The two grounds are not sharply separated in the opinion of the District Court, the second being brought in to reinforce the first. We propose in what follows to keep them distinct.

First. The evidence drawn from the wording of the statute combines with the administrative interpretation of like statutes in other jurisdictions and with the practical interpretation of this one for nearly two years in Florida to exclude the transactions from the operation of the tax.

The scheme of the statute is to tax the transfer of shares of stock, whether executory or executed, by stamps to be affixed to those writings, and those only, which in a practical sense are the repository of the agreement or the instruments or vehicles for the ensuing change of title. Thus, if a transfer has been made and the only evidence of its making is on the books of the corporation, it is on such books and no where else that the stamps are to be placed.

The statute does not say or mean that they shall be placed also upon the memoranda of the transaction in the office of the brokers or that there shall be an election to affix them either at one place or the other. Again, "if the change of ownership is by transfer of the certificate" to a stated assignee, it is on the certificate and no where else that the stamps are to be placed. Only in two classes of cases is a different rule prescribed. "In case of an agreement to sell" (as distinguished from an executed transfer) "or where the transfer is made by delivery of the certificate assigned in blank," then a memorandum in a prescribed form must be executed by the seller, and this prescribed memorandum is the one to be stamped. In brief, the memorandum of sale or delivery to be taxed under the statute is not every note or entry made in Florida recording a transaction elsewhere. It is the kind of note or entry exacted by the statute where there is an executory agreement or a transfer by delivery, a note or entry to be handed by the seller to the buyer as an evidence of contract or as a muniment of title. If another view were to prevail, the tax could be multiplied repeatedly as the product of the same transaction. Not only the first memorandum would be taxable, but every copy of a copy, and every entry of the transaction in one book or in many. There is significance in the unwillingness of the Comptroller to press his claim so far. Refusing to concede that he is not at liberty under the statute to tax as many entries as he can find, he has none the less chosen in the administration of his office to tax the same transaction only once. The choice supplies a gloss upon the intention of the law makers. It is an illuminating token that the memoranda to be taxed are the mandatory memoranda only, the customary sales tickets of the brokers, tickets subject to a tax in Florida if ancillary to a transaction consummated there, but free from that burden if signed and delivered somewhere else. In this instance the sales

tickets were ancillary to a transaction consummated in New York, were signed and delivered in that state, and when signed and delivered carried stamps in the amount required by the laws of New York and the laws of the United States. We perceive nothing in the law of Florida indicative of a purpose that other memoranda, not the repository of the contract nor exchanged between the parties, should be subject to a tax anywhere.

One finds it hard, indeed, to see how the collection of the tax would be workable as an administrative problem if a broker were free to choose between stamping his own copy of a document and stamping the duplicate delivered as a memorandum to his customer. The taxing officials could never learn through an inspection of the files whether the mandate of the statute had been followed or ignored. One of the major merits of a stamp tax is to make the evidence of payment visible and almost automatic. That benefit is lost if the collector is uncertain whether the document to be stamped is on the files of the taxpayer or in the possession of another. A court will be slow to hold that the lawmakers had in view a method of collection so awkward and unwieldy. To tax every copy may be oppressive. To tax any one of them indifferently is ineffective. The intention of the lawmakers was to tax a particular set of documents identified with certainty.

Like statutes outside of Florida have had administrative interpretation pointing to a like conclusion. By § 270 of the Tax Law of New York, a stamp tax is imposed upon "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock . . . in any domestic or foreign association, company or corporation . . . whether made upon or shown by the books of the association, company, corporation or trustee, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or

other evidence of sale or transfer, whether intermediate or final. . . ." The Attorney General of New York has ruled that this statute does not apply to an assignment in blank in New York for delivery to a purchaser in Canada under a sale previously executed upon a Canadian exchange. Opinions of Attorney General 1928, p. 125. Cf. *People ex rel. Hatch* v. *Reardon,* 110 App. Div. (N.Y.) 821, 832, 97 N.Y.S. 535; aff'd 184 N.Y. 431, 77 N.E. 970; 204 U.S. 152. By a statute of the United States, Revenue Act of 1926, § 800, schedule A, subd. 3 as amended by the Revenue Acts of 1928 and 1932, 26 U.S.C. § 901 (3), a stamp tax is imposed upon sales or memoranda in almost the same words as those of the New York statute. Regulation No. 71, Article 36, of the Bureau of Internal Revenue, makes it clear that only the mandatory memorandum is required to bear a stamp. See also Article 35. Finally in Florida itself, the very statute now in controversy was ruled by the appellant's predecessor in the office of Comptroller to be inapplicable to these transactions or to others not to be distinguished. Counsel for the appellees, uncertain as to his clients' duty, put the case to the Comptroller, and received a favorable ruling. For nearly two years the statute was so administered till the present appellant, reaching out, it seems, for new sources of public revenue, found or thought he had found the evidence of an intention to tax a copy made in Florida of a memorandum in New York.

A word must be said in response to the suggestion that an order to sell, delivered by a customer in Florida to the manager of a Florida branch, is an agreement to sell, and therefore subject to the tax. Clearly, we think it is nothing of the kind. It is a grant of authority by customer to broker, by principal to agent, revocable till executed, like agencies in general. There was no agreement to sell till the selling broker and the buying one came to-

gether on the floor of the stock exchange in New York, and made a contract there.

The directive force of all these signposts of intention is little less than irresistible when the series is viewed together. The meaning ascribed to the statute by the judges of the court below gives it coherence and simplicity. The meaning read into it by the Comptroller splits it into jarring fragments, one a plan for the taxation of the operative documents, all executed in one place, and the other a plan for the taxation of casual reports and copies, executed in another. These plans, to be sure, might be held to coëxist if the purpose to combine them were unmistakably disclosed, yet disclosure short of that would be too weak to make the combination plausible. The Florida decisions tell us that doubts, if nicely balanced, will be resolved in favor of the taxpayer. *State ex rel. Packard* v. *Cook,* 108 Fla. 157; 146 So. 223; *State ex rel. Rogers* v. *Sweat,* 112 Fla. 797; 152 So. 432; cf. *Burnet* v. *Guggenheim,* 288 U.S. 280, 286. There is little need to summon to our aid that canon of construction invoked by the complainants. The meaning of the statute as we read it is too plain to be swayed by favor or disfavor for one class or another.

Second. The taxation of the documents being without warrant in the statute, there is no duty to determine whether the Constitution would be infringed if the meaning were something else. As to that we do not indicate an opinion, even by indirection. It will be soon enough to set a value upon the arguments of counsel when a statute is before us that requires us to choose between them. At the same time the parties to the controversy should have adequate protection in the possible contingency of a decision by the state Supreme Court at variance with ours in respect of the meaning of the statute, a meaning that will then be declared with ultimate authority.

Hartford Accident & Indemnity Co. v. *Nelson Mfg. Co.*, 291 U.S. 352. There should be an appropriate opportunity in such circumstances to terminate or modify the restraints of the decree. There should also be an opportunity to renew the litigation in respect of the issue of constitutional validity, now held to be irrelevant. The reservations proper to that end will follow the practice indicated in *Glenn* v. *Field Packing Co.*, 290 U.S. 177, and *Wald Transfer & Storage Co.* v. *Smith*, 290 U.S. 602.

In conformity with those decisions, the decree will be modified by striking therefrom any conclusion of law or other adjudication as to the validity of the Documentary Stamp Tax Act of Florida under the Constitution of the United States, and by adding a provision, that the parties to the suit or any of them may apply at any time to the court below, by bill or otherwise, as they may be advised, for a further order or decree, in case it shall appear that the statute has been then construed by the highest court of Florida as applicable to the transactions in controversy here. With this modification the decree will be affirmed.

Decree modified and affirmed.

W. B. WORTHEN CO. ET AL. *v.* THOMAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 856. Submitted May 2, 1934.—Decided May 28, 1934.

1. Plaintiff recovered a judgment for the payment of money upon a contract and garnished a life insurance company which owed the defendant upon a policy on the life of her deceased husband. The garnishment became a lien. After this, the legislature enacted a law exempting from judicial process the proceeds of life insurance policies payable to residents of the State; and the state courts construed the statute so as to vacate the lien of the garnishment and exempt the fund from judicial process. *Held* that as applied to plaintiff's contract the statute was void under the contract clause of the Constitution. P. 431.

2. The statute can not be justified by a legislative finding of emergency, since it is not limited to the emergency and sets up no conditions apposite to emergency relief. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, distinguished. P. 432.

188 Ark. 249; 65 S.W. (2d) 917, reversed.

APPEAL from the affirmance of a judgment dismissing a garnishment of a debt owing as life insurance, and holding the fund exempt from levy under a judgment recovered by the garnishor on a contract to pay rent.

Mr. Henry M. Armistead submitted for appellants.

Issuance and service of the writ of garnishment creates a lien upon the credit or the fund so attached. *Desha* v. *Baker,* 3 Ark. 509; *Martin* v. *Foreman,* 18 Ark. 249; *Smith* v. *Butler,* 72 Ark. 350; *St. Louis S. W. Ry. Co.* v. *Vanderberg,* 91 Ark. 252.

The exemption was so excessive as to exceed the right to alter mere remedial processes. *Gunn* v. *Barry,* 15 Wall. 610; *Terry* v. *Anderson,* 95 U.S. 628; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U.S. 398.

The effect of the decision of the Supreme Court of Arkansas is to make exempt retrospectively all proceeds of life insurance policies. Such an exemption is so lacking in uniformity and may be so grossly excessive in value as to be constitutionally void under the decisions of this Court.

This court, in deciding *Bank of Minden* v. *Clement,* 256 U.S. 126, quoted: *Sturges* v. *Crowninshield,* 4 Wheat. 122, 197, 198, and *Planters Bank* v. *Sharp,* 6 How. 301, 327, which hold that a test that a contract has been impaired is that its value has by legislation been substantially diminished. The footnotes to the majority opinion in *Home Bldg. & Loan Assn.* v. *Blaisdell, supra,* cite the *Bank of Minden* case as one of those in which the change of remedies destroyed substantial rights.

It is true that there is an emergency provision in the statute which is involved. That provision bears no rela-

tion to its validity in a constitutional sense. Hard times, financial distress, debt and panic have never been taken here as an excuse for the destruction of contracts and vested rights. *Edwards* v. *Kearzey,* 96 U.S. 595; *Memphis* v. *United States,* 97 U.S. 293; *Bronson* v. *Kinzie,* 1 How. 311, 317; *McGahey* v. *Virginia,* 135 U.S. 662; *Louisiana* v. *New Orleans,* 215 U.S. 180; *Kuhn* v. *Fairmont Coal Co.,* 215 U.S. 349, 369; *Northern Pac. Ry. Co. v. Wall,* 241 U.S. 87, 91.

The Supreme Court of Arkansas should have construed the statute as being prospective only in its operation. *Shwab* v. *Doyle,* 258 U.S. 534.

Mr. Kenneth W. Coulter, with whom *Mr. Harry Robinson* was on the brief, submitted for appellee.

The rental contract was merged in the judgment. A judgment is not a contract protected by the contract clause of the Constitution. *Evans-Snyder-Buell Co.* v. *McFadden,* 105 Fed. 293; *Morley* v. *Lake Shore & M. S. Ry. Co.,* 146 U.S. 162; *Read* v. *Mississippi County,* 69 Ark. 365.

The Act does not impair the obligation of any contract between the parties for the reason that it is a remedial statute, and only governs the issuance of garnishment in certain cases. In the case at bar the fund in question was not in existence when Mrs. Thomas entered into an implied rental contract with the appellant.

The remedy is to be distinguished from the obligation of the contract. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U.S. 398; *Sturges* v. *Crowninshield,* 4 Wheat. 200.

The Legislature of Arkansas created the writ of garnishment, there being none such at common law.

No person can claim a vested right in any particular mode of procedure. Sutherland, Statutory Construction, § 482; Cooley, Constitutional Limitations, p. 346; *Evans-Snyder-Buell Co.* v. *McFadden,* 105 Fed. 293.

The construction placed on the Act by the Supreme Court of Arkansas does not operate to take property without due process of law.

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

Appellee, Mrs. W. D. Thomas, and her husband, Ralph Thomas, were engaged in business as copartners in Little Rock, Arkansas, under the name of Enterprise Harness Company. They became indebted for the rent of premises leased to the partnership by appellant, W. B. Worthen Company, Agent. On August 31, 1932, judgment for the amount thus due ($1,200), with interest, was recovered against both partners. Ralph Thomas died on March 5, 1933. Thereupon, on March 10, 1933, a writ of garnishment was served upon the Missouri State Life Insurance Company alleging the indebtedness of that Company to Mrs. Thomas, in the sum of $5,000, as the beneficiary of a policy of insurance upon the life of Ralph Thomas. The service of the writ, under the laws of Arkansas, created a lien upon the indebtedness.[1]

A few days later, on March 16, 1933, the Legislature of Arkansas passed an Act—Act 102 of the Laws of 1933—providing as follows:

"All moneys paid or payable to any resident of this state as the insured or beneficiary designated under any insurance policy or policies providing for the payment of life, sick, accident and/or disability benefits shall be exempt from liability or seizure under judicial process of any court, and shall not be subjected to the payment

[1] See *Desha* v. *Baker*, 3 Ark. 509, 520, 521; *Martin* v. *Foreman*, 18 Ark. 249, 251; *Smith* v. *Butler*, 72 Ark. 350, 351; 80 S.W. 580; *St. Louis Southwestern Ry. Co.* v. *Vanderberg*, 91 Ark. 252, 255; 120 S.W. 993; *Foster* v. *Pollack Co.*, 173 Ark. 48, 51; 291 S.W. 989.

of any debt by contract or otherwise by any writ, order, judgment, or decree of any court, provided, that the validity of any sale, assignment, mortgage, pledge or hypothecation of any policy of insurance or of any avails, proceeds or benefits thereof, now made, or hereafter made, shall in no way be affected by the provisions of this act."

Appellee, on April 5, 1933, filed a motion to dismiss the writ of garnishment and for the purpose of scheduling the money owing to her by the Insurance Company as being exempt from seizure under judicial process. On April 6, 1933, the Insurance Company answered the garnishment, admitting its indebtedness. The court then ordered the payment of $2,000 into its registry as sufficient to cover appellant's claim and released the garnishee from further liability. Appellant responded to the motion to dismiss the garnishment, and to the claim of exemption, by insisting that Act 102 of the Laws of 1933, if so applied, contravened Article I, section 10, of the Constitution of the United States by impairing the obligation of appellant's contract. The court of first instance, overruling that contention, and holding the insurance moneys to be free from all judicial process, dismissed the garnishment and granted the schedule of exemption. The judgment was affirmed by the Supreme Court of the State, 188 Ark. 249; 65 S.W. (2d) 917. The constitutional question was again urged by petition for rehearing, which was denied. The case comes here on appeal.

1. There is no question that the state court gave effect to the Act of 1933, and we are not concerned with any earlier state statute in relation to policies of insurance.[2] The debt of the wife herself, as a member of a business partnership, is involved. We have not been referred to any

[2] Compare § 5579, Crawford & Moses' Digest of the Statutes of Arkansas, 1921; Acts 76 and 141 of the Laws of Arkansas, 1931; *Mente* v. *Townsend,* 68 Ark. 391, 397; 59 S.W. 41; *Townes* v. *Krumpen,* 184 Ark. 910, 913; 43 S.W. 1083.

statute of Arkansas, existing prior to the firm's contract and to the incurring by appellee of the debt in question, which in such a case, either by the terms of the statute or by the construction of it by the state court, precluded resort to insurance moneys such as those in question.[3] The state court has mentioned none. On the contrary, the state court recognized the greater breadth of the Act of 1933, as compared with earlier statutes, and its controlling operation, and with this recognition sustained and applied it.[4] "The only question," said the court, "for determination here is the constitutionality of Act 102 of 1933, approved March 16, 1933."

2. The exemption created by the Act of 1933, as to the avails of life insurance policies, is unlimited. There is no limitation of amount, however large. Nor is there any limitation as to beneficiaries, if they are residents of the State. There is no restriction with respect to particular circumstances or relations. "All moneys paid or payable" to any resident of the State "as the insured or beneficiary designated" under any life insurance policy, are exempted "from liability or seizure under judicial process" and "shall not be subjected to the payment of any debt." The profits of a business, if invested in life insurance, may thus be withdrawn from the pursuit of creditors to whatever extent desired. No conditions are imposed, save that assignees, mortgagees, or pledgees of policies are protected.

Such an exemption, applied in the case of debts owing before the exemption was created by the legislature, constitutes an unwarrantable interference with the obliga-

[3] As to moneys payable by fraternal benefit societies, see Act 462 of Laws of Arkansas, 1917; *Acree* v. *Whitley*, 136 Ark. 149; 206 S.W. 137.

[4] See *Wilmington & Weldon R. Co.* v. *Alsbrook*, 146 U.S. 279, 293; *McCullough* v. *Virginia*, 172 U.S. 102, 116, 117; *Houston & Texas Central R. Co.* v. *Texas*, 177 U.S. 66, 77; *Appleby* v. *City of New York*, 271 U. S. 364.

tion of contracts in violation of the constitutional provision. *Gunn* v. *Barry,* 15 Wall. 610, 622, 623; *Edwards* v. *Kearzey,* 96 U.S. 595, 604; *Bank of Minden* v. *Clement,* 256 U.S. 126, 129. Chief Justice Marshall, in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 198, observed that "it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation." This principle was applied to an exemption of insurance moneys, in relation to antecedent debts, in *Bank of Minden* v. *Clement, supra.* The argument of appellee that a judgment is not in itself a contract within the constitutional protection,[5] and that it is competent for the State to alter or modify forms of remedies, is unavailing. The judgment and garnishment in the instant case afforded the appropriate means of enforcing the contractual obligations of the firm of which appellee was a member and the statute altered substantial rights. *Gunn* v. *Barry, supra; Edwards* v. *Kearzey, supra; Fisk* v. *Jefferson Police Jury,* 116 U.S. 131, 134; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 430.

3. The Legislature sought to justify the exemption by reference to the emergency which was found to exist. But the legislation was not limited to the emergency and set up no conditions apposite to emergency relief.

We held in *Home Building & Loan Assn.* v. *Blaisdell, supra,* pp. 434, *et seq.,* that the constitutional prohibition against the impairment of the obligation of contracts did not make it impossible for the State, in the exercise of its essential reserved power, to protect the vital interests

[5] See *Morley* v. *Lake Shore & M. S. Ry. Co.,* 146 U.S. 162, 169,

of its people. The exercise of that reserved power has repeatedly been sustained by this Court as against a literalism in the construction of the contract clause which would make it destructive of the public interest by depriving the State of its prerogative of self-protection. We held that this reserved protective power extended not only to legislation to safeguard the public health, public safety, and public morals, and to prevent injurious practices in business subject to legislative regulation, despite interference with existing contracts,—an exercise of the State's necessary authority which has had frequent illustration—but also to those extraordinary conditions in which a public disaster calls for temporary relief. We said that the constitutional prohibition should not be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood or earthquake, and that the State's protective power could not be said to be non-existent when the urgent public need demanding relief was produced by other and economic causes. But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. We held that when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. This is but the application of the familiar principle that the relief afforded must have reasonable relation to the legitimate end to which the State is entitled to direct its legislation. Accordingly, in the case of *Blaisdell,* we sustained the Minnesota mortgage moratorium

law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed.

In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation, as here applied, to be a clear violation of the constitutional restriction.

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

Reversed.

MR. JUSTICE SUTHERLAND, concurring.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and I concur unreservedly in the judgment of the court holding the Arkansas statute void as in contravention of the contract impairment clause of the Federal Constitution. We concur thus specially because we are unable to agree with the view set forth in the opinion that the differences between the Arkansas statute and the Minnesota mortgage moratorium law, which was upheld as constitutional in the *Blaisdell* case, are substantial. On the contrary, we are of opinion that the two statutes are governed by the same principles and the differences found to exist are without significance, so far as the question of constitutionality is concerned. The reasons set forth in the dissenting opinion in the *Blaisdell* case, and the long line of cases previously decided by this court there cited, fully support this conclusion. We were unable then, as we are now, to concur in the view that an emergency can ever justify, or, what is really the same thing, can ever furnish an occasion for justifying, a nullification of the constitutional restriction

upon state power in respect of the impairment of contractual obligations. Acceptance of such a view takes us beyond the fixed and secure boundaries of the fundamental law into a precarious fringe of extraconstitutional territory in which no real boundaries exist. We reject as unsound and dangerous doctrine, threatening the stability of the deliberately framed and wise provisions of the Constitution, the notion that violations of those provisions may be measured by the length of time they are to continue or the extent of the infraction, and that only those of long duration or of large importance are to be held bad. Such was not the intention of those who framed and adopted that instrument. The power of this court is not to amend but only to expound the Constitution as an agency of the sovereign people who made it and who alone have authority to alter or unmake it. We do not possess the benevolent power to compare and contrast infringements of the Constitution and condemn them when they are long-lived or great or unqualified, and condone them when they are temporary or small or conditioned.

NEW COLONIAL ICE CO., INC. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 547. Argued March 5, 6, 1934.—Decided May 28, 1934.

1. Whether and to what extent deductions of losses shall be allowed in computing income taxes depends upon legislative grace; and only as there is clear statutory provision therefor can any particular deduction be allowed. P. 440.
2. The statutes pertaining to the determination of taxable income have proceeded generally on the principle that there shall be a computation of gains and losses on the basis of a distinct accounting for each taxable year; and only in exceptional situations, clearly

defined, has there been provision for an allowance for losses suffered in an earlier year. P. 440.

3. The statutes also have disclosed a general purpose to confine allowable losses to the taxpayer sustaining them, *i.e.*, to treat them as personal to him and not transferable to or usable by another. P. 440.
4. In order to overcome financial difficulties, all the assets, liabilities and business of a corporation were taken over by a new corporation specially organized for the purpose and having substantially the same capital structure, in exchange for a portion of its stock, which was distributed by the older corporation among its stockholders, share for share, thereby retiring the old shares. Creditors were given a supervising management of the new corporation through a stock-voting trust until their claims should be paid. The corporate existence of the older corporation continued. *Held* that the two corporations were distinct entities, and that the new corporation, in the computation of the tax on its net income for succeeding years, was not entitled to deduct earlier losses of the old corporation, under § 204 (b) of the Revenue Act of 1921, which provides that where any "taxpayer" has sustained a net loss the amount may be deducted from the net income of "the taxpayer" for succeeding tax years. P. 440.
5. As a general rule a corporation and its stockholders are deemed separate entities, and this is true in respect of tax problems. P. 442.

66 F. (2d) 480, affirmed.

CERTIORARI, 290 U.S. 621, to review the affirmance of a decision of the Board of Tax Appeals, 24 B.T.A. 886, upholding deficiency assessments of income taxes.

Mr. Joseph Sterling, with whom *Mr. Edward G. Griffin* was on the brief, for petitioner.

Mr. H. Brian Holland, with whom *Solicitor General Biggs* and *Messrs. Sewall Key* and *John MacC. Hudson* were on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a controversy respecting deficiencies in the petitioner's income taxes for 1922 and 1923.

The question presented is—where all the assets and business of an older corporation are taken over by a new corporation, specially organized for the purpose and having substantially the same capital structure, in exchange for a portion of its stock, which is distributed by the older corporation among the latter's stockholders share for share, thereby retiring the old shares, is the new corporation entitled, notwithstanding the change in corporate identity and ownership, to have its taxable income for the succeeding period computed and determined by deducting from its net income for that period the net losses sustained by the older corporation in the preceding period? The answer involves a construction of § 204 (b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 231, which declares:

"If for any taxable year beginning after December 31, 1920, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year; and if such net loss is in excess of the net income for such succeeding taxable year, the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year; the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

The material facts out of which the controversy arises are as follows:

Both corporations were organized under the laws of New York for the purpose of producing and selling ice—the older in 1920, with an authorized capital of $750,000, and the new on April 13, 1922, with an authorized capital of $700,000. The older one had proceeded to issue and sell stock, acquire a site for its plant and supply necessary equipment. When the equipment was only partly in-

stalled, and the plant was being operated at forty per cent of its intended capacity, the company became financially embarrassed and unable to meet its indebtedness or supply additional equipment needed to render the business profitable.

A creditors' committee was organized, and likewise a stockholders' committee. Investigation disclosed that much stock had been issued of which there was no record and for which no consideration was received. Negotiations resulted in the restoration and cancellation of the spurious stock and in an agreement to organize a new company to take over the assets and liabilities, proceed with the completion of the equipment and continue the operation of the business. The agreement included provisions for the issue of stock by the new company to the old equal in class, par value and number of shares, to the outstanding stock so that the old company could make an exchange share for share with its stockholders and thereby retire its outstanding stock; for obtaining new funds with which to complete the equipment; for an extension of time by existing creditors; and for investing creditors with a supervising management through a stock-voting trust until their claims were paid.

Accordingly the new corporation—petitioner here—was organized and took over the assets, liabilities and business of the old corporation on April 13, 1922. Other provisions of the agreement were carried out in the manner contemplated, save in minor particulars not material here. The corporate existence of the old corporation continued (so it is stipulated) during the remainder of 1922 and all of 1923, but after the transfer it transacted no business and had no assets or income.

The old corporation sustained statutory net losses in the sum of $36,093.19 during 1921 and in the further sum of $10,338.90 during the part of 1922 preceding the transfer. The new corporation realized a net income of $48,-763.43 during the part of 1922 succeeding the transfer

and of $56,242.55 during the year 1923. In this proceeding the new corporation asserts a right under § 204 (b) to a deduction from its income so realized of the losses so sustained by the old corporation.

The petitioner insists that the continuity of the business was not broken by the transfer from the old company to the new; and this may be conceded. But it should be observed that this continuity was accomplished by deliberate elimination of the old company and substitution of the new one. Besides, the matter of importance here, as will be shown presently, is not continuity of business alone but of ownership and tax liability as well. Had the transfer from one company to the other been effected by an unconditional sale for cash there would have been continuity of business, but not of ownership or tax liability.

Petitioner also insists that the ultimate parties in interest—stockholders and creditors—were substantially the same after the transfer as before; and this may be conceded. But there is here no effort to tax either creditors or stockholders. Other statutes, as also constitutional provisions, have an important bearing on the taxation of gains by stockholders through corporate reorganizations, and the cited decisions relating to that subject [1] are not presently apposite. What is being taxed in this instance is the income realized by the new company in conducting the business after the transfer; and the sole matter for decision is whether, under § 204 (b), there shall be deducted from that income the losses suffered by the old company in its conduct of the same business before the transfer.

The Board of Tax Appeals, 24 B.T.A. 886, and the Circuit Court of Appeals, 66 F. (2d) 480, both ruled that the deduction is not admissible under the statute.

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[1] *United States* v. *Phellis,* 257 U.S. 156; *Rockefeller* v. *United States,* 257 U.S. 176; *Cullinan* v. *Walker,* 262 U.S. 134; *Weiss* v. *Stearn,* 265 U.S. 242; *Marr* v. *United States,* 268 U.S. 536.

The power to tax income like that of the new corporation is plain and extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.

The statutes pertaining to the determination of taxable income have proceeded generally on the principle that there shall be a computation of gains and losses on the basis of a distinct accounting for each taxable year; and only in exceptional situations, clearly defined, has there been provision for an allowance for losses suffered in an earlier year. Not only so, but the statutes have disclosed a general purpose to confine allowable losses to the taxpayer sustaining them, *i.e.,* to treat them as personal to him and not transferable to or usable by another.

Obviously, therefore, a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.

These views, often reflected in decisions of this Court, have been recently reaffirmed and applied in *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 326 *et seq.; Planters Cotton Oil Co.* v. *Hopkins,* 286 U.S. 332; and *Helvering* v. *Independent Life Ins. Co., ante,* p. 371.

When § 204 (b) is read with the general policy of the statutes in mind, as it should be, we think it cannot be regarded as giving any support to the deduction here claimed. It brings into the statutes an exceptional provision declaring that where for one year "any taxpayer has sustained a net loss" the same shall be deducted from the net income of "the taxpayer" for the succeeding taxable year; and, if such loss be in excess of the income for that year, the excess shall be deducted from the net income for the next succeeding taxable year. Its words are plain and free from ambiguity. Taken according to their natural import they mean that the taxpayer who sustained the loss is the one to whom the deduction shall

be allowed. Had there been a purpose to depart from the general policy in that regard, and to make the right to the deduction transferable or available to others than the taxpayer who sustained the loss, it is but reasonable to believe that purpose would have been clearly expressed. And as the section contains nothing which even approaches such an expression, it must be taken as not intended to make such a departure.

We come then to an alternative contention that, even though the section be not as broad as claimed, the deduction should be allowed, because " for all practical purposes the new corporation was the same entity as the old one and therefore the same taxpayer." This is not in accord with the view on which the stockholders and creditors proceeded when the new company was brought into being. They deserted the old company and turned to the new one because they regarded it as a distinct corporate entity and therefore free from difficulties attending the old one. Having sought and reaped the advantages incident to the change, it well may be that they would encounter some embarrassment in now objecting to an incidental and remote disadvantage such as is here in question. But, be this as it may, we are of opinion that in law and in fact the two corporations were not identical but distinct. This was plainly implied in the transfer of the assets and business from one to the other. That transaction was voluntary and contractual, not by operation of law. Thereafter neither corporation had any control over the other;[2] the old corporation had no interest in the assets or business, and the chance of gain and the risk of loss were wholly with the new one. Thus the contention that the two corporations were practically the same entity and therefore the same taxpayer has no basis, unless, as the petitioner insists, the fact that the stock-

[2] See *Southern Pacific Co.* v. *Lowe,* 247 U.S. 330, 337; *Peabody* v. *Eisner,* 247 U.S. 347, 349; *Gulf Oil Corp.* v. *Lewellyn,* 248 U.S. 71.

holders of the two corporations were substantially the same constitutes such a basis.

As a general rule a corporation and its stockholders are deemed separate entities [3] and this is true in respect of tax problems.[4] Of course, the rule is subject to the qualification that the separate identity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights.[5] But in this case we find no such exceptional situation—nothing taking it out of the general rule. On the contrary, we think it a typical case for the application of that rule.

The petitioner relies on *Pioneer Pole & Shaft Co.* v. *Commissioner,* 55 F. (2d) 861; *Industrial Cotton Mills* v. *Commissioner,* 61 F. (2d) 291; and *H. H. Miller Industries Co.* v. *Commissioner,* 61 F. (2d) 412. The decisions in these cases are not wholly in point but contain language giving color to the petitioner's claim, and are to that extent in conflict with other federal decisions, notably *Athol Mfg. Co.* v. *Commissioner,* 54 F. (2d) 230; *Turner-Farber-Love Co.* v. *Helvering,* 68 F. (2d) 416; and the decision now under review. In so far as they are not in harmony with the views expressed in this opinion they are disapproved.

Judgment affirmed.

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[3] *Pullman Car Co.* v. *Missouri Pacific Ry. Co.,* 115 U.S. 587, 596–597; *Donnell* v. *Herring-Hall-Marvin Safe Co.,* 208 U.S. 267, 273; *United States* v. *Delaware, L. & W. R. Co.,* 238 U.S. 516, 527–529; *Cannon Mfg. Co.* v. *Cudahy Co.,* 267 U.S. 333; *Klein* v. *Board of Supervisors,* 282 U.S. 19, 24.

[4] *Klein* v. *Board of Supervisors,* 282 U.S. 19, 24; *Dalton* v. *Bowers,* 287 U.S. 404, 410; *Burnet* v. *Clark,* 287 U.S. 410, 415; *Burnet* v. *Commonwealth Improvement Co.,* 287 U.S. 415, 418–420.

[5] *United States* v. *Lehigh Valley R. Co.,* 220 U.S. 257, 272–274; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic Assn.,* 247 U.S. 490, 500–501; *Southern Pacific Co.* v. *Lowe,* 247 U.S. 330, 337–338; *Gulf Oil Corp.* v. *Lewellyn,* 248 U.S. 71.

REYNOLDS *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 734. Argued May 3, 1934.—Decided May 28, 1934.

1. Although the function of determining whether a veteran is entitled to hospital facilities under the World War Veterans Act, and of ordering his hospitalization or certifying to his right thereto, is a function of the Director of the Veterans Bureau, the right of the veteran, where it exists on indisputable facts as a matter of law, may be enforced by the courts. P. 446.
2. An honorably discharged veteran of the Spanish-American War, suffering from a neuropsychiatric ailment, was in 1911 committed to St. Elizabeths Hospital by the Secretary of the Interior, pursuant to statutory authority, and remained there confined as an insane person until, in 1930, he was discharged. *Held:*

   (1) That the Veterans Bureau having had and exercised the right to make use of this hospital for insane veterans, the facilities of the hospital were under the control and jurisdiction of that Bureau within the meaning of § 202 (10) of the World War Veterans Act of 1924, as amended July 2, 1926. P. 445.

   (2) Under the proviso of § 202 (10) of this amended Act, the pension money credited to the veteran while in the hospital could not, upon his discharge, be withheld to pay for his board at the hospital during that period. P. 447.

   (3) This applies to the charges for board incurred before July 2, 1926, the date of the proviso, as well as to those incurred afterwards, the entire deduction having been made after the proviso became effective. P. 447.
3. A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment. *Cox* v. *Hart*, 260 U.S. 427, 435. P. 449.

78 Ct. Cls. 401, reversed.

CERTIORARI * to review a judgment rejecting a claim for recovery of pension money which had been applied to pay for the board of a Spanish War Veteran at a government hospital for the insane.

* See Table of Cases Reported in this volume.

Mr. Francis W. Hill, Jr., for petitioner.

Mr. H. Brian Holland, with whom *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* were on the brief, for the United States.

Mr. Justice Sutherland delivered the opinion of the Court.

This suit was brought in the Court of Claims by petitioner, an honorably discharged veteran of the Spanish-American War, to recover judgment against the United States for money deducted from his pension on account of board furnished him while he was an inmate of St. Elizabeths Hospital. He was committed to the hospital as an insane person on June 19, 1911, and remained there until April 25, 1930, when he was discharged in the custody of his brother. Thereafter, petitioner regained his sanity and was of sound mind when this suit was prosecuted. During the entire period of his confinement he suffered from a neuropsychiatric ailment. Preceding the time of his discharge from the hospital there had been placed to his credit on the books of the institution, under the certificate of the Bureau of Pensions, $4,036, representing funds paid to the institution by the Bureau of Pensions on his behalf. Upon his discharge the hospital deducted from these pension funds a sum which had been advanced to him for clothing and cash, and applied the remaining $3,259.17 on account of board furnished during the period of his confinement. Petitioner, at the time, protested against the application thus made and against the refusal of the hospital to pay over to him the amount so withheld.

Shortly after his discharge from the hospital, application was made on his behalf to the Director of the Veterans' Bureau for an order authorizing and directing his hospitalization at St. Elizabeths Hospital from the effec-

tive date of the World War Veterans' Act of June 7, 1924, to the date of his discharge, April 25, 1930. The director held that since no application had been made by petitioner or by anyone acting in his behalf until after his discharge, the question was moot, and the director was without authority of law to issue a retroactive order authorizing hospitalization in such a case. Following this ruling, however, the bureau issued a certificate recognizing petitioner as a veteran entitled to hospitalization under § 202 (10) of the World War Veterans' Act of 1924, as amended.

Petitioner, by three successive enlistments, served in the army of the United States from November 30, 1897, until January 25, 1907, at which time he was honorably discharged by reason of the expiration of his term of service.

The Court of Claims denied petitioner's right to recover and dismissed his petition. 78 Ct. Cls. 401.

Section 202 (10) of the World War Veterans' Act, as amended (U.S.C., App., Title 38, § 484), directs that all hospital facilities under the control and jurisdiction of the Veterans' Bureau shall be available " for every honorably discharged veteran of the Spanish-American War, . . . suffering from neuropsychiatric . . . ailments," with the following proviso:

" That the pension of a veteran entitled to hospitalization under this subdivision shall not be subject to deduction, while such veteran is hospitalized in any Government hospital, for board, maintenance, or any other purpose incident to hospitalization."

This proviso appeared for the first time in the Act of July 2, 1926, c. 723, § 9, 44 Stat. 794.

The Veterans' Bureau had and exercised the right to make use of St. Elizabeths Hospital for insane veterans; and this, we think, satisfied the requirement contemplated by the statute that the hospital facilities (not the hospi-

tal) shall be under the control and jurisdiction of that bureau.

The court below, in ruling against petitioner, proceeded upon the theory that a court is without jurisdiction to entertain a proceeding for the determination of the question whether a veteran is entitled to hospital facilities, to order his hospitalization, or to certify his right thereto—those being matters, the court said, within the sole authority of the director of the bureau. Granting the correctness of this view, we are of opinion that it does not apply in this case. The undisputed and indisputable facts bring the veteran within the requirements of the statute. Undoubtedly, therefore, as matter of law, he was entitled to the hospital facilities of St. Elizabeths, and if timely application had been made to the director of the bureau, a refusal upon his part to order the hospitalization would have been wholly without evidentiary support, clearly arbitrary and capricious, and would not, upon well settled principles, have concluded the courts. *Silberschein* v. *United States,* 266 U.S. 221, 225, and authorities cited; *United States* v. *Williams,* 278 U.S. 255, 257. So much, indeed, seems to be within the concession made in the brief and argument for the government:

"It may be conceded at the outset that if a court may determine whether a person is entitled to hospitalization under the statute when the Director of the Veterans' Bureau has not passed upon the facts of the case, the petitioner has stated and proved a good cause of action, and the court below erred in rendering judgment in favor of the United States."

Here no application was made to the director for the sufficient reason that petitioner was mentally, and therefore legally, incapable of making it; and apparently he had no guardian to act for him. However, his condition being certified to the Secretary of the Interior, in virtue of a statutory provision, that official, acting under the

statute, ordered petitioner confined at St. Elizabeths Hospital; and to that hospital he was accordingly committed and there held until his discharge in 1930. It would, perhaps, not be going too far to say that the hospital authorities were charged with the duty of making application to the director if under these circumstances any further steps were required. We, therefore, do not have the case of an insane person seeking at the hands of a court an order awarding him the facilities of the hospital, but that of one who having been accorded such facilities was in and entitled to be in the possession and use of them as of right.

In this state of affairs, about which there is and can be no dispute, the only question presented to the court below was whether, under the proviso already quoted, the pension of petitioner was subject to deduction for board. The purpose of that proviso was to exempt pensions of the class named from hospital charges like the one here involved, and thereby cure what Congress deemed a defect in the prior law. The language is clear and explicit, namely, "that the pension of a veteran entitled to hospitalization under this subdivision shall not be subject to deduction, while such veteran is hospitalized . . ., for board . . ." Given their natural meaning, these words plainly are applicable to the situation with which the court below was called upon to deal. The result is that the hospital was without authority to retain the funds here in question, and the court below should have given judgment for petitioner.

The final contention of the government is that, in any event, petitioner is not entitled to recover so much of the funds withheld by the hospital as equal the charges for board furnished prior to July 2, 1926, when the proviso first came into effect, since to allow him to do so, it is said, would be to give the proviso a retroactive operation contrary to the intention of Congress. The evidence of

such intention is said to lie in the fact that the bill as it passed the House contained an additional provision to the effect that when any such deductions "have heretofore been made" the Veterans' Bureau shall reimburse the veterans concerned in amounts equal thereto; and that this provision was rejected by the Senate and finally eliminated from the bill; thus evincing the intention of Congress that the proviso should operate prospectively only.

But the rejected provision spoke only of deductions made before the enactment of the proviso, and the deduction in the present case was not so made. The court below found that at the time of petitioner's discharge from the hospital the sum of the pension payments which had been credited to him on the books of that institution was $4,036; and that *upon his discharge* the hospital deducted the amount here in dispute on account of board from May 7, 1922, to February 6, 1930. The deduction, therefore, was not one which had "heretofore been made," but was one made long after the passage of the proviso and did not come within the terms of the rejected provision. Certainly Congress has power to relieve a pension paid by the federal government from liability to answer for a preëxisting unpaid debt owing to a governmental institution, as well as one thereafter incurred; and it seems entirely clear that the proviso in question was so intended. The liability for board arose from continuous charges, beginning before the proviso was passed and ending at the time of petitioner's discharge, when the pension funds credited to petitioner and then in the hands of the hospital were taken over, or "deducted," in settlement of the then existing account for board—a proceeding plainly forbidden by the proviso.

But in no aspect of the matter would the allowance of that portion of the amount sued for which was applicable to board furnished prior to July 2, 1926, cause the proviso

to operate retroactively. A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment. *Cox* v. *Hart*, 260 U.S. 427, 435, and cases cited.

Judgment reversed with directions to enter judgment for petitioner.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO dissent.

WOODSON, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* DEUTSCHE GOLD UND SILBER SCHEIDEANSTALT VORMALS ROESSLER.

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

No. 795. Argued May 3, 1934.—Decided May 28, 1934.

1. The proceeds of enemy property, seized under the Trading with the Enemy Act, are subject to the disposition of Congress. P. 453.
2. The original Trading with the Enemy Act, coupled with the Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration. P. 454.
3. The Act of March 28, 1934, provides, *inter alia*, that no suit shall be instituted or maintained "against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, . . . nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, . . ." *Held*, that the Act is applicable to a suit already

pending in this Court when it passed, and operated to ratify deductions from amounts paid to an enemy owner; and that it infringes no constitutional right of such owner. P. 454.

62 App. D.C. 344; 68 F. (2d) 391, reversed.

CERTIORARI, 291 U.S. 657, to review the affirmance of a decree overruling a motion to dismiss in a suit against the Alien Property Custodian and the Treasurer of the United States.

Solicitor General Biggs, with whom *Assistant Attorney General Sweeney* and *Mr. H. Brian Holland* were on the brief, for petitioners.

Mr. Richard H. Wilmer, with whom *Mr. Douglas L. Hatch* was on the brief, for respondent.

The Alien Property Custodian was not authorized under the Trading with the Enemy Act, as from time to time amended, to deduct and retain from property seized from a former enemy under the guise of administration expenses, an amount computed at a fixed percentage applicable alike to the property of all other similar claimants and bearing no relation to the actual and necessary cost of the work done or services performed in securing the possession, collection or control of the particular claimant's property or in protecting or administering the same. This Court has already held in *Escher* v. *Woods,* 281 U.S. 379 (1930), that the directions of § 24 of the Trading with the Enemy Act as amended are explicit that the expenses chargeable against a given property are those incurred in getting or protecting it, or other property due to the same owner. In other words, each property should bear its own necessary costs. Hence it follows that any flat-rate charges deducted from the property of the claimant without reference to the necessary expenses incurred are illegal. The statute being clear on this, no practice contrary to the explicit directions of the statute is relevant.

The Independent Offices Appropriation Act for 1935 does not deprive the courts of jurisdiction to enter judgment in favor of the respondent in this case. Congress can not validly and constitutionally deprive former alien enemies of property rights hitherto vested in them. This is not a suit against the United States; but, even if it were so regarded, the statute would be unconstitutional as applied to the facts of this case. By statutory ratification of prior illegal deductions, Congress can not validly and constitutionally deprive respondent of its property or take it without just compensation.

MR. JUSTICE BUTLER delivered the opinion of the Court.

April 15, 1931, respondent brought this suit in the Supreme Court of the District of Columbia against the Alien Property Custodian and the Treasurer of the United States. Petitioners are their successors in office and as such have been substituted in their official capacities for the original defendants. Respondent is a corporation organized under the laws of Germany and at the time of the war between the United States and that country was there engaged in the manufacture and sale of chemicals, etc. It owned property in the United States including shares of stock in American corporations doing like business. Another German corporation, Holzverkohlungs-Industrie Aktiengesellschaft, was then similarly engaged and it also owned property in the United States including shares in one of the American corporations. Pursuant to the Trading with the Enemy Act, 40 Stat. 411, the Custodian seized the shares and other property in this country respectively belonging to these alien enemies. In July, 1930, respondent acquired all the assets of the other German corporation.

Section 24 of the Trading with the Enemy Act[1] authorized the Custodian to pay expenses incurred in

[1] Added by § 2, Act of March 4, 1923, 42 Stat. 1516.

obtaining and administering property taken and held by him and required payments to be made out of the property in respect of which the expenses were incurred. The Act of May 16, 1928, 45 Stat. 574, directed that all expenses of the Custodian's office, including his compensation, should be paid from interest and collections of trust funds and other property under his control. Under the Act of March 4, 1923,[2] there was released to each of the German corporations $10,000 of principal and income in the same amount annually thereafter, less one per cent. of the amounts paid between March 4, 1923, and November 1, 1927, and two per cent. of those paid after the date last mentioned. The amount so withheld was $1,400. By the Act of March 10, 1928,[3] the President was authorized to order return of all except 20 per cent. of the principal of money and property to which he should find the claimant entitled. Respondent and the other German corporation filed their claims, which in due course were allowed. The Custodian released to them various sums, retaining the required 20 per cent. and other amounts not here material. Of the amounts released he deducted two per cent., $60,346.52. He also retained out of Treasury interest paid upon the proceeds of the seized property $8,142.31. The total of these deductions is $69,888.83; all was taken by the Custodian to cover the general or administrative expenses of his office.

The amended bill alleges, *inter alia,* the facts above stated and prays an accounting and judgment for the amount so withheld by the Custodian. Defendant in-

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[2] §§ 9 (b) (10), (h) and 23, added by §§ 1 and 2, Act of March 4, 1923, 42 Stat. 1512, 1513, 1515, 1516.

[3] § 9 (b) (16), (m), added by §§ 11 and 14, Act of March 10, 1928, 45 Stat. 270, 272, and § 23, as amended by § 17, Act of March 10, 1928, 45 Stat. 275.

terposed a motion to dismiss and an answer. The trial court overruled the motion, and on special appeal its decree was affirmed. 62 App.D.C. 344; 68 F. (2d) 391.

March 28, 1934, shortly after this writ was granted, Congress passed an Act [4] containing an amendment to § 24 of the Trading with the Enemy Act, which declares: "No claim shall be filed . . . nor shall any suit be instituted or maintained against the Alien Property Custodian or the Treasurer of the United States, or the United States, under any provisions of law, by any person who was an enemy or ally of enemy as defined in the Trading with the Enemy Act, as amended, . . . nor judgment entered in any such suit heretofore or hereafter instituted, for the recovery of any deduction or deductions, heretofore or hereafter made by the Alien Property Custodian from money or properties, or income therefrom, held by him or by the Treasurer of the United States hereunder, for the general or administrative expenses of the office of the Alien Property Custodian, . . ."

This amendment was intended to forbid, and it is broad enough to cover, the commencement or maintenance of suits such as this. If valid, it requires the decree below to be reversed and the bill to be dismissed. The moneys sued for are a part of proceeds of property that was taken by the Custodian from respondent and the other German corporation. The Trading with the Enemy Act was passed by Congress in the exertion of the war power; its purpose was to weaken enemies by diminishing the sources from which they could obtain aid, and to strengthen this country by adding to resources for the successful prosecution of the war. Section 12 declares that after the end of the war any claim of any enemy to recover money or property received and held by the

[4] 48 Stat. 510.

Custodian or deposited in the United States Treasury "shall be settled as Congress shall direct." 40 Stat. 424. While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during and after the war. It is clear the enemy owners were divested of every right in respect of property taken and held under the Act. *United States* v. *Chemical Foundation,* 272 U.S. 1, 9–11.

The original Act, coupled with the later Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration. The funds here in question are proceeds which were deducted for that purpose when payments were made from time to time to the enemy owner. As respects property or proceeds so retained by the Custodian there is no room to doubt that Congress had full power to cause it to be applied to the payment of such expenses. And, of course, Congress had ample power to ratify deductions made by the Custodian to cover such expenses. This is in effect what was done by the Act of March 28, 1934. True, it forbade the commencement or maintenance of a suit to recover funds so deducted, but this merely reflects and emphasizes the purpose to sanction and ratify the deductions by the Custodian, and in such circumstances does not deprive the respondent of any vested interest.

It follows that the Act of March 28, 1934, infringes no constitutional right of respondent. The decree of the Court of Appeals is reversed and the cause remanded to

the Supreme Court of the District of Columbia with directions to that court to dismiss the bill.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEW YORK TRUST CO., TRUSTEE.*

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

No. 873. Argued May 8, 9, 1934.—Decided May 28, 1934.

1. A father transferred securities irrevocably to a trustee, in trust, to pay income and eventually the principal to his son. Within less than two years the trustee sold the securities for a price which exceeded their value at the time of the creation of the trust and exceeded still more the price for which the trustor had acquired them. *Held:*

(1) That the shares were "acquired by gift," by the trustee, within the meaning of § 202 (a)(2) of the Revenue Act of 1921; and, under that Act, the basis for ascertaining the gain derived from the sale was "the same as that which it would have been in the hands of the donor," *i.e.*, the cost of the shares to the trustor. P. 462.

(2) The shares were "capital assets," defined by § 206 (a)(6) of the Act as "property acquired and held by the taxpayer for profit or investment for more than two years," and the gain was therefore taxable under that section at 12½%, and not at the normal and surtax rates. In applying the definition, the tenures of donor and trustee must be treated as continuous. P. 463.

(3) The purpose of this provision of § 206 was to lessen the discouragement of sales of capital assets caused by high normal and surtaxes, in which respect there is no distinction between gains derived from a sale made by an owner who has held the property for more than two years and those resulting from one by a donee whose tenure plus that of the donor exceeds that period. P. 466.

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*Together with No. 899, *New York Trust Co., Trustee,* v. *Helvering, Commissioner,* certiorari to the Circuit Court of Appeals for the Second Circuit.

(4) No valid ground has been suggested for requiring tenures of capital assets to be added to get the base under § 202 (a)(2) and forbidding their combination for finding the rate under § 206 (a)(6). P. 467.

2. The rule requiring that an unambiguous statute shall be given effect according to its language is not to be put aside to avoid hardships that may result from carrying out the legislative purpose. P. 464.
3. But adherence to the letter of a statutory provision without regard to other parts of the Act and to the legislative history will often defeat its object. P. 464.
4. Generally, questions as to the meaning intended do not arise until the language used is compared with the facts or transactions in respect of which the intent and purpose are to be ascertained. P. 465.
5. Mere change of language in a reënactment does not necessarily indicate an intention to change the law. The purpose may be to prevent misapprehension of the existing law by clarifying what was doubtful. P. 468.

68 F. (2d) 19, affirmed.

CERTIORARI * to review a judgment modifying a decision of the Board of Tax Appeals, 27 B.T.A. 1127.

Mr. Erwin N. Griswold, with whom *Solicitor General Biggs, Assistant Attorney General Wideman, Mr. James W. Morris,* and *Miss Helen R. Carloss* were on the brief, for the Commissioner of Internal Revenue.

Under § 202 (a) (2) of the Revenue Act of 1921, which is applicable to "property, acquired by gift," the basis for determining the gain from the sale of the stock by the trustee was its cost to the grantor. In the present case the trustee who sold the stock received it by an irrevocable transfer in trust, which completely divested the grantor of all ownership of or interest in the property. The transfer of title from the donor to the trustee was made by delivery of the securities and was without consideration. This was a gift in trust, as distinguished from

* See Tables of Cases Reported in this volume.

a gift direct, but it was none the less a gift. If there could have been any doubt on this question, it is removed, we submit, by this Court's decision in *Burnet* v. *Guggenheim*, 288 U.S. 280.

A gift is a transaction affecting the legal title to property. The essential requirements of a gift have been developed at law as distinguished from in equity. Gifts may be beneficial or otherwise; but if a gratuitous transfer does not result to the benefit of the transferee, the reasons lie in equity—the transaction is none the less a gift at law.

The Bureau of Internal Revenue has consistently construed the phrase "acquired by gift" to include irrevocable transfers in trust. These rulings have not been revoked and are still in effect. This long continued administrative interpretation of the statute is entitled to great weight.

In the Revenue Act of 1924, Congress included a specific provision relating to transfers in trust. We submit that in doing so Congress was enacting into law the accepted administrative interpretation in order to remove any possible doubt as to the correctness of that interpretation.

The gain from the sale by the trustee is not taxable as a capital gain under § 206 of the Revenue Act of 1921. In that section the term "capital assets" is defined as property "held by the taxpayer" for more than two years. In this case, the trust is the taxpayer, and it is undisputed that the trust had not held the property for two years. There is no ambiguity in the statute. It allows no room for construction.

The conclusion that the property sold by the trustee did not constitute "capital assets" is not only required by the plain text of the statute itself, but this was the contemporaneous construction of the Treasury Department which has been uniformly followed by the Board of Tax

Appeals and by the courts, until the decision of the court below in the present case.

The rule for which the taxpayer contends was expressly adopted in § 208 of the Revenue Act of 1926. But such a change in the law can not authorize construction of an earlier Act not consonant with the language there employed. The change shows a recognition of the administrative construction and a desire on the part of Congress to establish a different rule for the future. Congress could have made the change retroactive if it had desired; but it did not do so.

Mr. Chauncey Newlin, with whom *Messrs. J. DuPratt White* and *Russell D. Morrill* were on the brief, for the New York Trust Co., Trustee.

As to basis, the statute does not apply because the trustee did not acquire the trust *corpus* by "gift." The trust was merely an instrumentality for effecting the gifts to the life tenant and remaindermen. The statute would be applicable if they had sold the property given to them. Against the receipt of trust *corpus* the trustee gives an undertaking which deprives him of all benefit therefrom. The property is not a "gift" to him. For present purposes, his position is analogous to that of a bailee, an attorney-in-fact, a custodian, or a nominee, in none of which cases is the transferee a donee. The view that a trustee does not acquire "by gift" within the meaning of § 202 (a) (2) has been incorporated in the Revenue Act of 1924 and all subsequent Revenue Acts, and this construction by legislation should be given effect. To apply the statute would conflict with the rule that the trust is a taxpayer separate and distinct from the beneficiaries. The Board of Tax Appeals has not been consistent on this question and earlier decisions to a different effect should be followed. Section 202 (a) (2) not being applicable, the

proper basis is value at the time the stock was transferred in trust.

As to Capital Gain: The basis section and the capital gain section should be read together and the policy of the law and the object of Congress should be given effect. The purpose of the basis provision was to put the donee in the position of his donor. This theory should be applied with consistency; otherwise, the donee will be in a less favorable position than the donor and the object of the law will be defeated *pro tanto*. The purpose of the capital gain section was to induce taxable transactions otherwise prevented by the excessive tax burden resulting from applying graduated rates to a profit representing an appreciation over a period of years. Hence, it must have been the intention of Congress to measure the period by reference to the time the gain accrued. That view best promotes the end desired. The change in the 1926 Act obviating the question was interpretative. The purpose and policy of the law lead to that conclusion. The change is stated in the interpretative form. It appears from the Committee Reports on the 1926 Act that the change was considered interpretative as to nontaxable exchanges and distributions. It approved Treasury Department Regulations in those cases. The Reports indicate, and it is only reasonable to assume, that the concurrent change as to gifts was made for the same purpose. The terms of the statute in fact are not clear and the word "held" must be interpreted in any case. In that event, it should be interpreted in a way consistent with the policy of the law, and not in a way which would defeat its purpose and impose an unintended burden. The adoption of the 1924 Act without change, and after a short-lived interpretation of this provision by the Treasury Department, did not constitute legislative recognition of that interpretation. There is no indication that Con-

gress considered the matter before the passage of the 1924 Act. The decisions cited by the Commissioner do not support his position; whereas there are many decisions of this Court which do support the taxpayer's position.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This controversy arises out of the calculation of an income tax on the gain realized on the sale of property by a trustee in 1922. April 27, 1906, one Matthiessen acquired 6,000 shares of stock at a cost of $141,375. Its value on March 1, 1913, was less than cost. December 4, 1921, desiring to make provision for his son, Erard, he transferred the stock to the New York Trust Company in trust for him with remainder over in case of his death. When the trust was created the market value of the stock was $577,500. The trustee sold it in 1922 for $603,385. In the tax return for that year the trustee included $87,385 as the gain resulting from the sale. That figure was reached by subtracting the cost of the shares to the trustor, then claimed to be $516,000, from the amount the trustee received for them. But the trustee then, as it always has, insisted that the gain should be calculated on the basis of the value at the time of the creation of the trust. And it applied the rate of 12½ per cent., applicable to capital gains. The Commissioner ascertained gain on the principle adopted in the return but found the cost to trustor to be $141,375. He applied the normal and surtax rates that ordinarily are laid upon the incomes of individuals and by the use of these factors arrived at an additional assessment of $238,275.95.[1] The Board of Tax Appeals sustained the determination. 27 B.T.A.

[1] On the basis of the return made the tax was $14,391.71. On the construction of § 202 (a) (2) for which trustee contends the tax would be $7,714.00.

1127. The lower court held that the gain had been correctly ascertained, but that it was taxable at 12½ per cent. 68 F. (2d) 19. These writs were granted on petition of the Commissioner and cross-petition of the trustee.

The questions are: (1) Whether the gain resulting from the trustee's sale is the difference between price paid by trustor and that received by trustee, and (2) if so, whether the 12½ per cent. rate is applicable.

The Revenue Act of 1921, 42 Stat. 227, governs. Section 2 (9) defines taxpayer to include any person, trust or estate subject to a tax imposed by the Act. Section 202 (a) provides: "That the basis for ascertaining the gain derived . . . from a sale . . . of property . . . shall be the cost of such property; except that . . . (2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor." Section 206 (a) (6) defines capital assets to be "property acquired and held by the taxpayer for profit or investment for more than two years" and (b) provides that the net gain from the sale of capital assets may be taxed at the rate of 12½ per cent. instead of at the ordinary rates. Section 219 (a) declares that the normal and surtax on net incomes of individuals shall apply to the income of property held in trust, including (3) income held for future distribution; (b) the fiduciary is required to make the return of income for the trust. And subsection (c) provides that in cases under (a) (3) the tax shall be imposed upon the net income of the trust and shall be paid by the fiduciary.

By the trust indenture, which recites mutual covenants and agreements and the payment of $10 by each to the other as the consideration, the trustor did "sell, assign, transfer, and convey" the 6,000 shares "in trust, nevertheless, for the benefit of" his son, Erard, "to be administered by the trustee" under specified terms and condi-

tions among which are these: The trustee was required to hold the shares and any property purchased out of the avails, to collect and retain income until the twenty-first birthday of Erard, then to pay him the accumulated income, thereafter to pay him current income until he attained the age of twenty-five years, and at that time to deliver to him the principal and undistributed income. During the life of the trustor, the trustee was not to sell or reinvest without the written consent and approval of the trustor. In case of Erard's death before the age of twenty-five, the entire estate was to go to other sons of the trustor.

The trustor irrevocably disposed of the shares. He did not sell but made a gift. *Burnet* v. *Guggenheim,* 288 U.S. 280. He gave the trustee legal title temporarily to be held to enable it to conserve, administer and transfer the property for the use and benefit of his son to whom he gave the beneficial interest. It may rightly be said that the trustee and beneficiary " acquired by gift " as meant by § 202 (a).[2] If the broad definition in § 2 (9) stood alone, either might be regarded as the taxpayer but it is qualified by the rule that the trustee must pay the tax. It follows that the trustee properly may be regarded as the taxpayer and, for the purpose of calculating the gain, as having assumed the place of the trustor. Section 202 (a) (2) was enacted to prevent evasion of taxes on capital gains. *Taft* v. *Bowers,* 278 U.S. 470, 479, 482. And see *Cooper* v. *United States,* 280 U.S. 409. Transfers to trustees for the benefit of others are clearly within the reason for the enactment.

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[2] *McDonogh's Executors* v. *Murdoch,* 15 How. 367, 400, 404. *Maguire* v. *Trefry,* 253 U.S. 12, 16. *Neilson* v. *Lagow,* 12 How. 98, 106–107, 110. *Croxall* v. *Shererd,* 5 Wall. 268, 281. *Doe* v. *Considine,* 6 Wall. 458, 471. *Bowen* v. *Chase,* 94 U.S. 812, 817, 818–819. *Young* v. *Bradley,* 101 U.S. 782, 787. *Anderson* v. *Wilson,* 289 U.S. 20, 24–25.

They may be used to avoid burdens intended to be imposed, quite as effectively as may gifts that are directly made. The difference between the cost to the trustor in 1906 and the amount for which the trustee sold in 1922 was rightly taken as taxable income of the trust.

We come to the question whether the gain derived from the trustee's sale is taxable at 12½ per cent. That rate is not applicable unless the shares were "capital assets" defined by § 206 (a) (6) to be "property acquired and held by the taxpayer for profit or investment for more than two years." The time between the creation of the trust and the sale was less than the specified period and, if the words alone are to be looked to, the shares were not by the taxpayer "held . . . for more than two years." Soon after the passage of the Act the Income Tax Unit of the Bureau of Internal Revenue ruled that property transferred to a trustee, for purposes and upon terms and conditions analogous to those expressed in the indenture before us, which remained in his hands less than two years was not "capital assets" and that the resulting gain was not taxable at the 12½ per cent. rate. That construction was followed by the Board of Tax Appeals, the Circuit Court of Appeals for the Third Circuit and the Court of Appeals of the District of Columbia.[3] The Commissioner says that the words of the definition are free from ambiguity and that the statute contains no exception. From an opinion of this court he

[3] I.T. 1379, I-2 C.B. (July–December, 1922) 41. I.T. 1660, II-1 C.B. (January–June, 1923) 36. I.T. 1889, III-1 C.B. (January–June, 1924) 70. *McKinney* v. *Commissioner* (1929) 16 B.T.A. 804, 808. *Johnson* v. *Commissioner* (1929) 17 B.T.A. 611, 614; affirmed (C.C.A.-3, 1931) 52 F. (2d) 727. *Schoenberg* v. *Commissioner* (1930) 19 B.T.A. 399, 400; affirmed, 60 App.D.C. 381; 55 F. (2d) 543. *Steagall* v. *Commissioner* (1931) 24 B.T.A. 1231, 1235. *McCrory* v. *Commissioner* (1932) 25 B.T.A. 994, 1011.

invokes these statements: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe." *United States* v. *Hartwell,* 6 Wall. 385, 396. He suggests that his construction was approved by the Revenue Act of 1924, § 208 (a) (8), 43 Stat. 263, which retained the definition, and that the provision in the Revenue Act of 1926, § 208 (a) (8), 44 Stat. 19, which conforms to the construction for which the trustee here contends operated to make a change in the law.

The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commissioner of Immigration* v. *Gottlieb,* 265 U.S. 310, 313. *Bate Refrigerating Co.* v. *Sulzberger,* 157 U.S. 1, 37. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown* v. *Duchesne,* 19 How. 183, this court said (p. 194): "It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning." Quite recently in *Ozawa* v. *United States,* 260 U.S. 178, we said (p. 194): "It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must

examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail." And in *Barrett* v. *Van Pelt,* 268 U.S. 85, 90, we applied the rule laid down in *People* v. *Utica Ins. Co.,* 15 Johns. 358, 381, that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers."

The part of the definition under consideration is this: "held . . . for more than two years." Although on superficial inspection the words appear to be entirely clear, the Treasury Department deemed construction necessary to disclose the meaning that, upon consideration of the actual transactions of the taxpayers, it found Congress to have intended. Regulations 62, Art. 1651, declares: "The specific property sold or exchanged must have been held for more than two years, but in the case of a stock dividend the prescribed period applies to the original stock and the stock received as a dividend considered as a unit and where property is exchanged for other property . . . the prescribed period applies to the property exchanged and the property received in exchange considered as a unit." Construed strictly according to the letter, the provision would not include shares received as a dividend less than two years before the sale, or property taken in exchange within that period. The need of this regulation illustrates how ambiguities requiring construction often exist where upon first reading the words seem clear. Generally, questions as to the meaning intended do not arise until the language used is compared with the facts or transactions in respect of which the intent and purpose are to be ascertained. *Bradley* v. *Washington,*

A. & G. Steam-Packet Co., 13 Pet. 89, 97. *Deery* v. *Cray*, 10 Wall. 263, 270. *Patch* v. *White*, 117 U.S. 210, 217. *Gilmer* v. *Stone*, 120 U.S. 586, 590. *American Net & Twine Co.* v. *Worthington*, 141 U.S. 468, 474.

Legislative reasons for applying the lower rate to capital gains give support to the construction for which the trustee contends. The report of the Committee on Ways and Means states: "The sale of . . . capital assets is now seriously retarded by the fact that gains and profits earned over a series of years are under the present law taxed as a lump sum (and the amount of surtax greatly enhanced thereby) in the year in which the profit is realized. Many such sales, with their possible profit taking and consequent increase of the tax revenue, have been blocked by this feature of the present law. In order to permit such transactions to go forward without fear of a prohibitive tax, the proposed bill, in section 206, adds a new section . . . to the income tax, providing that where the net gain derived from the sale or other disposition of capital assets would, under the ordinary procedure, be subjected to an income tax in excess of 15 per cent. [afterwards changed to 12½ per cent.] the tax upon capital net gain shall be limited to that rate. It is believed that the passage of this provision would materially increase the revenue, not only because it would stimulate profit-taking transactions but because the limitation of 15 per cent. is also applied to capital losses. Under present conditions there are likely to be more losses than gains." 67th Congress, 1st Session, House Report No. 350, p. 10. See also Senate Report No. 275, p. 12. In respect of the legislative purpose to lessen hindrance caused by high normal and surtaxes, there is no distinction between gains derived from a sale made by an owner who has held the property for more than two years and those resulting from one by a donee whose tenure plus that of the donor exceeds that period.

Here the taxable gain was ascertained by putting together the periods in which the shares were held by trustor and trustee respectively. The taxable gain was the same as if the former held continuously from the time of purchase in 1906 until the sale in 1922. But to ascertain the applicable rate the Commissioner broke the continuity. If the trustor had held until the sale, the 12½ per cent. rate would have been applicable and the tax would have been substantially less than one-fourth of the amount assessed against the trustee who, for the purpose of calculating the gain, was substituted for the trustor.[4]

Sections 202 (a) (2) and 206 (a) (6) are included in the same Act and are applicable respectively to different elements of the same or like transactions and are not to be regarded as wholly unrelated. While undoubtedly legally possible and within the power of Congress, the methods adopted and results attained by the Commissioner are so lacking in harmony as to suggest that the continuity required to be used to get the base was also intended for use in finding the rate. No valid ground has been suggested for requiring tenures to be added for the one purpose and forbidding combination for the other. The legislative purpose to be served by the application of the lower rate upon capital gains is directly opposed to the Commissioner's construction. There is no ground for discrimination such as that to which the trustee was subjected. It is to be inferred that Congress did not intend penalization of that sort.

The Commissioner's suggestion that, by retaining the same definition in the 1924 Act, Congress approved the construction for which he contends is without merit. The

[4] The deficiency assessed, $238,275.91, plus original assessment, $14,391.71, makes the total $252.667.66. The taxpayer's calculation indicates that if the 12½ per cent. rate were applied the total tax would be $58,921.51.

definition had not been construed in any Treasury Decision, by the Board of Tax Appeals or by any court prior to that enactment. The dates of all constructions of the definition to which our attention has been called are shown in the margin.[5] The Regulation above referred to was approved February 15, 1922. In respect of the question here involved, it puts no construction upon the definition. The rulings, I.T. 1379, 1660 and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they "have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law." See cautionary notice published in the bulletins containing these rulings. It does not appear that the attention of Congress had been called to any such construction. There is no ground on which to infer that by the 1924 Act Congress intended to approve it.

The Revenue Act of 1926, § 208 (a) (8)[6] contains substantially the same language as that used in the 1921 Act to define capital assets. That part of the subdivision is followed by rules for determining the period for which the taxpayer has held the property. Among them is one applicable to facts such as those presented in the case before us. It is substantially the same as the construction for which the trustee contends. Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as

[5] See Note 3.

[6] "The term 'capital assets' means property held by the taxpayer for more than two years. . . . In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 204 [corresponding to § 202 (a) (2) of the 1921 Act] such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person." 44 Stat. 19.

to existing law. In view of the inclusion of the same definition in the Acts of 1921, 1924 and 1926 and the legislative purpose underlying it, the contention that the new words were added to change the meaning of "capital assets" as defined in the earlier Acts is without force. The definition so clarified was not new law but "a more explicit expression of the purpose of the prior law." *Jordan* v. *Roche,* 228 U.S. 436, 445. *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837, 842. *McCauley* v. *Commissioner,* 44 F. (2d) 919, 920.

Affirmed.

MR. JUSTICE ROBERTS, dissenting.

Within the meaning of § 202 (a) of the Revenue Act of 1921 the trustee acquired the trust *res* by gift. But reference must be had to §§ 206 and 219 to ascertain the rate of tax to be applied to the gain on the sale. These are distinct sections, found not in juxtaposition with 202, but in portions of the Act dealing with unrelated topics; the one with "Capital Gains" and the other with "Estates and Trusts." Confessedly the first grants an exemption from the normal rate of tax and allows payment at a lower rate only to a "taxpayer" who realizes gain from the sale of a capital asset which he (the "taxpayer") has held for profit or investment for over two years. The second, in words too plain to be misunderstood, designates the trustee of a trust such as the one here in question as the taxpayer. The unambiguous mandate of the Act should be enforced.

1. Under the recognized rules of construction we should give the words of the statute their ordinary and common meaning. *Old Colony R. Co.* v. *Commissioner,* 284 U.S. 552, 560. If the language be plain there is nothing to construe. *Hamilton* v. *Rathbone,* 175 U.S. 414, 419; *Thompson* v. *United States,* 246 U.S. 547, 551. We cannot enact a law under the pretense of construing one. *Heiner* v. *Donnan,* 285 U.S. 312, 331.

Nor can we avoid the plain meaning of a statute by construction, so-called, because we think as written it begets "hard and objectionable or absurd consequences, which probably were not within the contemplation" of its framers. *Crooks* v. *Harrelson,* 282 U.S. 55. Where, as in the present case, the provision is one granting an exemption from the full rate of taxation, doubts must be resolved against the taxpayer. *Heiner* v. *Colonial Trust Co.,* 275 U.S. 232, 235.

2. For twelve years after the passage of the Act the administrative rulings uniformly denied the benefit of the capital gains sections of the Act of 1921 to a donee who had not himself held the property over two years. These are entitled to respectful consideration and will not be disregarded except for weighty reasons. *Fawcus Machine Co.* v. *United States,* 282 U.S. 375, 378. Two Courts of Appeals have decided against the trustee's contention. In the face of this unbroken agreement of the executive and judicial departments, we should be slow to announce a contrary view.

3. The reason assigned for ignoring the plain import of the terms used in §§ 206 and 219 is that the provisions, read in their ordinary sense, bring about a result thought to be contradictory of the paramount purpose to permit the payment of tax on capital gains at a reduced rate. The suggestion is that Congress inadvertently omitted a provision whereby the tacking of the tenures of donor and donee would be allowed for finding the rate, since it has required such tacking for ascertaining the base. It is said that it would be absurd to attribute any other intent to the framers of the law. But there is no necessary inconsistency in the two provisions, literally applied. Plainly the requirement that a donee should calculate his gain on the value paid by his donor was to prevent evasions, through transfer and immediate sale by the donee, who would claim the value at the date of the gift

as the base and assert that he had made no gain. There is no incongruity in declaring that in the case of a gift the donee shall pay tax at the full rate unless he shall have held the property a full two years. Congress might well think it proper thus to condition the privilege of a reduced rate to one who paid nothing for the property.

Assuming, however, for the sake of argument, that there is a logical inconsistency between the prescribed method for arriving at the base and that for ascertaining the rate, it is the province of Congress alone to remove it. There is no abstract justice in any system of taxation. Nothing could involve more dangerous consequences, than that the courts should rewrite plain provisions of a tax act in order to bring them into harmony with a supposed general policy. Such a principle of decision would embark us on a sea of construction whose bounds it is difficult to envisage. Every revenue act embodies policies which conflict to some extent with those elsewhere in the Act evinced. Income tax legislation is a continuous series of corrections and amendments in an effort to make the policy of taxation more congruous.

The very sections extending the relief of a reduced rate on capital gains, teach us how inconsistently the principle has been followed and how impossible and improper it would be for a court to rewrite the sections in an effort to make them logically consistent.

The Act omitted to impose any limitation of 12½ per cent. on capital net losses. If, therefore, a taxpayer had no capital gains during the year, he could deduct his entire capital losses from his ordinary income.[1] This omission was cured by the Revenue Act of 1926, which reduced the permissible deduction from the tax on net income to 12½ per cent. of capital net loss.[2] The amend-

[1] § 202 (a) (2); § 206 (a) (2); § 206 (b); 42 Stat. 229, 232–3.
[2] § 208 (c), 44 Stat. 20.

ment of 1926, in turn, leaves a glaring inconsistency, for though the taxpayer may have no actual income, yet as a result of the application of the mandatory 12½ per cent. rate to capital net losses, he may have to pay a tax.[3]

Under the Act of 1921 capital assets were so defined as to exclude property held for personal use or consumption of the taxpayer or his family.[4] By the Revenue Act of 1924 and later Acts the exception was omitted.[5] It results that whereas the taxpayer may now include such property as the residence occupied by him, his automobiles, his jewels, and similar items, in respect to gains, he may not include them with respect to losses, for no deduction whatever for losses is permitted in the case of property held for personal use or consumption.[6]

Instances might be multiplied of logical inconsistency in the incidence of the capital gain or loss provisions; but this court is not at liberty, because it thinks the provisions inconsistent or illogical, to rewrite them in order to bring them into harmony with its views as to the underlying purpose of Congress.

4. The sections in question were reënacted without change in the Revenue Act of 1924. If, as is suggested, omission of a provision permitting one circumstanced as this trustee to have the benefit of the reduced rate in virtue of his donor's as well as his own tenure was an inad-

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[3] See § 208 (c), 44 Stat. 20. As stated in Regulations 69, Art. 1654, by 208 (b), if the taxpayer has a capital net gain he has an election whether to return it under the capital gains and losses provisions; but the limitation with respect to a capital net loss provided in 208 (c) will be applied irrespective of the taxpayer's election.

[4] § 206 (a) (6), 42 Stat. 233.

[5] § 208 (a) (8), 43 Stat. 263; Act of 1926, § 208 (a) (8), 44 Stat. 19; Act of 1928, § 101 (a) (8), 45 Stat. 811.

[6] Revenue Act of 1926, § 208 (a) (2), 44 Stat. 19; Regulations 69, Art. 1651; Art. 141; Cumulative Bulletin V–I, 61.

vertence as respects the Act of 1921, it is curious that the same inadvertence occurred in the enactment of the 1924 Act, despite the fact that the rulings of the department had been against the trustee's present contention. The section was amended by the Act of 1926 so as to allow the donee to tack his donor's tenure to make up the required two years.[7] In reporting it the committees of the Senate and House both referred to this as an amendment of the law. The change was recommended in connection with two other alterations of language, both intended to confirm rulings of the department. In referring to this particular alteration the committees said:

"The same question arises in the case of property received by gift after December 31, 1920. The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section." [8]

Certainly this language is far from compelling the conclusion pressed upon us, that the amendment was merely a confirmation of the understanding of Congress as to the effect of the earlier Acts.

The judgment should be reversed and the cause remanded for the calculation of the tax to the trustee at ordinary rates for the reason that it did not hold the capital assets for two years, so as to entitle it to the 12½ per cent. rate.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concur in this opinion.

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[7] § 208 (a) (8), 44 Stat. 19.

[8] House Rep. No. 1 and Senate Rep. No. 52, 69th Cong., 1st Session.

Syllabus.

ILLINOIS COMMERCE COMMISSION ET AL. *v.* UNITED STATES ET AL.

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

No. 787. Argued April 30, May 1, 1934.—Decided May 28, 1934.

1. Under § 13 (4) of the Interstate Commerce Act, the Interstate Commerce Commission is given plenary power to remove the discrimination created by intrastate rates against interstate commerce, by raising intrastate rates so that the intrastate traffic may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service. P. 479.
2. In a hearing before the Interstate Commerce Commission to determine whether intrastate switching rates in the Chicago Switching District should be increased to the level of interstate rates, in order to do away with discrimination against interstate commerce, the question whether a cost study used at an earlier hearing was adequate and representative of conditions existing at the time of the later hearing or should be refined and supplemented, was a question of fact for the determination of the Commission, which will not be disturbed when supported by evidence. P. 480.
3. Findings of the Interstate Commerce Commission supporting its order for the raising of intrastate rates to the level of interstate rates for switching in the Chicago Switching District, are to be read in the light of traffic conditions in the District as disclosed in the evidence before the Commission and described in its report. P. 481.
4. Findings of the Interstate Commerce Commission showing that the Chicago Switching District (situate part in Illinois and part in Indiana) is essentially a unit, so far as switching movements are concerned; that the interstate and intrastate traffic are commingled and handled indiscriminately in the same manner, often in the same trains and by the same crews; that the movements have no relation to main line hauls, but are chiefly between local industries, and involve a complete service originating and terminating within the District; that transportation conditions throughout the District are substantially similar; that the established interstate scale is reasonable and not shown to cause any undue preference or advantage to persons or localities in intrastate or interstate com-

merce; that the lower intrastate rates have resulted, and will result, in unjust discrimination against interstate commerce; that they caused loss of carrier revenue and that their increase to the level of the interstate rates will probably result in increase of such revenues—*held* ample to support the Commission's order raising the intrastate rates accordingly. P. 482.

5. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. P. 483.
6. The effect of maintaining an intrastate rate lower than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the Chicago Switching District, under substantially the same conditions. P. 485.
7. There was evidence in support of the Commission's conclusion that the area should be treated as a unit and a uniform blanket or group rate applied within it rather than distance or zone rates. P. 485.
8. An order, made applicable to all carriers in the Chicago Switching District, directing that intrastate switching rates shall be maintained on a parity with the interstate rates "contemporaneously applied by said carriers," interpreted in the light of the report, applies to interstate carriers whose rails in the district are confined to one State and which for that reason have filed no interstate switching rate, and requires them to adopt the prescribed intrastate rate. P. 486.
9. The rule that a carrier may not be required to remove discrimination against a locality unless it participates in both the prejudicial and preferential rates, is irrelevant to proceedings under § 13 (4) of the Interstate Commerce Act for removal of discrimination against interstate commerce caused by intrastate rates maintained by state authority. P. 487.

Affirmed.

Appeal from a decree of the District Court, constituted of three judges, which dismissed a bill brought against the United States and 37 railroad corporations by two

rate-making commissions, of the States of Illinois and Indiana respectively, and by other parties, to set aside an order of the Interstate Commerce Commission. That Commission intervened.

Messrs. Luther M. Walter and *Herbert J. Campbell,* with whom *Mr. Philip Lutz, Jr.,* Attorney General of Indiana, and *Messrs. Herbert J. Patrick,* Deputy Attorney General, *John S. Burchmore,* and *Nuel D. Belnap* were on the brief, for appellants.

Mr. Daniel W. Knowlton, with whom *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Elmer B. Collins* and *Edward M. Reidy* were on the brief, for the United States and Interstate Commerce Commission.

Mr. J. N. Davis, with whom *Messrs. Harry I. Allen, J. R. Barse, P. F. Gault, Walter McFarland, Elmer A. Smith,* and *James Stillwell* were on the brief, for the Alton R. Co. et al., appellees.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220, from a decree of a District Court for Northern Illinois, three judges sitting, which dismissed the complaint upon which appellants sought to set aside an order of the Interstate Commerce Commission.

The order, made under § 13 (3) (4) of the Interstate Commerce Act, directed the removal of unjust discrimination against interstate commerce, resulting from disparity of the intrastate and interstate switching rates of interstate rail carriers in the Chicago Switching District, lying partly in Illinois and partly in Indiana. It provided that the intrastate rate should be not less than the interstate switching rates prescribed in an earlier order

of the Commission in Switching Rates in the Chicago Switching District, 177 I.C.C. 669, of 3¢ per 100 lbs. for one-line hauls, 3.5¢ for two-line hauls, and 4¢ for three-or-more-line hauls, of carloads of minimum weight of 60,000 lbs. The rates, both interstate and intrastate, which were thus displaced were commodity rates of 2.5¢ per 100 lbs. for one and two-line hauls, and 3¢ for three-or-more-line hauls. The rates are for district intrastate switching movements, having no relation to main line movements. They are chiefly between local industries, involve a complete service originating and terminating within the district, and embrace a loaded and empty car movement and two complete terminal services.

The Commission, of its own motion, began the first proceeding in Switching Rates in the Chicago Switching District, *supra,* in which the carriers, interested shippers, and the state commissions of Illinois and Indiana were parties, and in the course of which extensive hearings were conducted jointly by the Interstate Commerce Commission and the two state commissions. Pending this proceeding, the carriers were directed by the Interstate Commerce Commission to make a cost study of switching movements in the District. This study, which involved the preparation of statistics showing the longest, shortest and average hauls within the District and detailed cost data for selected periods in 1926–1927, was completed and submitted to the Commission and was an important part of the evidence on which it based its decision.

In its report and order, made July 31, 1931, the Commission found the rates which it prescribed for interstate switching service to be reasonable for future application on all commodities shipped within the District, except railway equipment on its own wheels. It also stated that a large percentage of the traffic was intrastate in character, but that the record did not disclose any difference

in the conditions surrounding the handling of the interstate and intrastate movements. It made no order with respect to the intrastate traffic, but expressed the hope that the two state commissions would bring the intrastate rates into harmony with the interstate rates which it had prescribed.

The state commissions failed to prescribe a higher level of intrastate rates, and the carriers of the District, shortly after the new rates became effective, filed with the Interstate Commerce Commission a petition to establish an increased rate for intrastate traffic, whereupon the Commission, on November 2, 1931, reopened the proceeding for further hearing with respect to the relationship of intrastate and interstate rates. A complaint filed with the Commission by numerous shippers attacking the lawfulness of the interstate switching rates was assigned for hearing with the proceeding already pending.

At the hearings, the state commissions in one proceeding and the shippers in the other offered evidence which, by stipulation, was treated as received in both, to show that the interstate switching rates were unreasonably high, and in support of allegations that the cost study made in the first proceeding was defective because of changed conditions. The Commission consolidated the two dockets in one report, and by its report and order of July 3, 1933, 195 I.C.C. 89, assailed here, it dismissed the complaint of the shippers with respect to the interstate rates and placed the intrastate rates on the same basis as the interstate rates already in effect. Before the hearings were closed motions of the state commissions and shippers, appellants here, that a further and more detailed cost study be made, which it was contended would be more representative of the traffic, and which would reflect conditions in 1932, five years after the period selected for study, were denied. The same questions were raised by motions to reopen the proceedings in the two dockets, or

for reargument, to reconsider the cost study, which were also denied.

In the District Court below the case was submitted upon the pleadings, the two reports and orders of the Commission, and certified copies of the evidence and exhibits before the Commission in the second proceeding. The court dismissed the complaint upon findings of fact and law, rejecting the several contentions which appellants make before us.

The scope and application of § 13 (4) have so recently been fully considered in opinions of this Court in *United States* v. *Louisiana,* 290 U.S. 70; *Florida* v. *United States, ante,* p. 1; see also *Georgia Public Service Commn.* v. *United States,* 283 U.S. 765; *Florida* v. *United States,* 282 U.S. 194; that it is unnecessary to repeat that discussion here. Under § 13 (4) of the Interstate Commerce Act, the Interstate Commerce Commission is given plenary power to remove the discrimination created by intrastate rates against interstate commerce, by raising intrastate rates so that the intrastate traffic may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service. The question for decision is whether the order of the Commission directing the removal of the discrimination is supported by the findings, based upon substantial evidence.

The numerous objections to the order are grounded for the most part on an elaborate analysis and discussion of the evidence. All have received our attention, but so far as they require our discussion they may be summarized as follows: (1) The order of the Commission is void because of its abuse of discretion in denying the motions for an order requiring that the original cost study be supplemented by a further and more detailed study which would reflect conditions in 1932 and in denying

the petition for reopening the proceedings or reargument for reconsideration of the effect to be given the cost study. (2) The order is not supported by the findings. (3) Certain essential findings are not supported by evidence. (4) The order is too indefinite to be applied.

1. The alleged abuse of discretion by the Commission is not that it refused to consider the contention of appellants as to the sufficiency of the cost study in the light of the facts relied upon, see *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U.S. 248, but that it decided these contentions wrongly. There can be no serious doubt that the cost study faithfully represented conditions obtaining during the periods in 1926–1927 selected for study. It was characterized by the Commission as "perhaps more exhaustive" than any previously undertaken in proceedings involving switching charges. To the seven carriers of the thirty-five serving the District, originally chosen for study during selected periods, eight others were added on the initiative of the Commission. A request of certain of the appellants that the Chicago Junction Railway be included in the study was denied, the Commission pointing out in both reports that because of the short hauls on this line it did not regard the traffic as representative. Appellants urge specifically that if all the lines in the District were not to be included, this line should have been, in order to make the study fairly representative; but the Commission considered the issue of fact so raised and decided to the contrary.

The principal contention is that conditions since 1927 had so changed that a new study should have been made. The changes emphasized are (1) falling off in volume of traffic; (2) improvement of highways in the District resulting in diversion of traffic from the rail lines for movement by truck; (3) the decline in value of many of the articles transported; (4) reduction in wages and cost of supplies; and (5) curtailment of the amount of service rendered by

carriers to industries within the District. In considering these changes on the basis of the data already in the record, the Commission pointed out that they had resulted in increased unit costs because unaccompanied by a corresponding or proportionate decrease in operating expense. It also concluded, upon the basis of data before it, that in view of the improvement of highways and trucking facilities and other changes in conditions affecting traffic the Commission could not, even though it were its duty to do so, provide a rate which would enable the railroads to compete successfully with trucking movements, by which the traffic had been diverted. The Commission decided that, on the record before it, it was able to consider the effect of the factors suggested by appellants and that a new cost study was unnecessary.

Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts. See *Manufacturers Ry. Co.* v. *United States,* 246 U.S. 457, 481; *Assigned Car Cases,* 274 U.S. 564, 580.

2. The Commission's findings are to be read in the light of traffic conditions, fully disclosed in the evidence and described in the Commission's report. The Chicago Switching District comprises an area of more than 600 square miles, served by thirty-five railroads, which maintain there more than 5,000 miles of track, serving 4,000 private industries. The District is essentially a unit, so far as switching movements are concerned. Interstate and intrastate traffic are commingled in switching movements and handled in the same manner indiscriminately,

often in the same trains and by the same crews. As already noted, the movements have no relation to main line hauls, are chiefly between local industries, involve a complete service originating and terminating within the District, a loaded and empty car movement, and two complete terminal services.

In the original proceeding, no party took the position that a rate should apply on intrastate traffic within the District different from that applied to interstate traffic, the only substantial issue being whether the rates finally adopted and applied to interstate traffic were too high. In the second proceeding, after considering and stating at length the evidence showing the effect upon interstate commerce of the lower rates prevailing upon intrastate traffic of the same general character, and the probable effect in an increased return to the carriers if the intrastate rate were raised to the interstate level, the Commission found that the transportation conditions throughout the Chicago Switching District are substantially similar; that they are no more favorable to interstate movements than to intrastate movements within the District; that the established interstate scale of rates was reasonable and not shown, when applied intrastate, to have or cause any undue preference and advantage to the persons or localities in intrastate commerce, or any undue preference and advantage to persons and localities in interstate commerce; that the lower intrastate rates had resulted and would for the future result in unjust discrimination against interstate commerce. The report dealt at length with the evidence showing probable increase in revenue which would result if the intrastate rates were raised to the interstate level; comparisons based on the recorded traffic in 1926 and in November, 1931, and January, 1932, indicated a loss of revenue by the maintenance of the lower intrastate rate in excess of $1,000,000. These findings, which are supported by detailed subsidiary findings

in the report, are ample to support the order. *Florida* v. *United States, ante,* p. 1. They disclose no such defects as were found in *Florida* v. *United States,* 282 U.S. 194, or urged in *United States* v. *Louisiana, supra.*

Specific objections to the sufficiency of the findings, so far as they are not already disposed of by what has been said, are that there is no finding that the intrastate rates, before the increase, were less than maximum reasonable rates, and there was no finding which separated interstate and intrastate property, revenues and expenses of the carriers so as to make it possible to compare revenues with cost for the two classes of traffic considered separately. But these objections, and others which we need not stop to consider in detail, leave out of account the nature of the traffic and the significance of the principal and subsidiary findings showing that the conditions throughout the District were substantially the same for both classes of traffic, which were handled in the same manner. The inquiry in both proceedings was directed to the commerce of the District as a unit. The decision in the first proceeding, that the increase in interstate rates was reasonable, was made in the hope that the state commissions would bring intrastate rates into harmony. When they failed to do so, the Commission reaffirmed its finding that the new interstate rates were reasonable and found that the intrastate rates must be raised in order that the intrastate traffic may bear its fair share of the revenue burden. It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate

rates more specifically, or to separate intrastate and interstate costs and revenues. Compare *American Express Co.* v. *Caldwell*, 244 U.S. 617; *United States* v. *Louisiana, supra; Florida* v. *United States, ante*, p. 1.

3. Appellants contend there is no evidence in the record to support the Commission's findings that the prescribed interstate rate was reasonable or that after the increase in that rate the old intrastate rate unjustly discriminated against interstate commerce. Appellants reach their conclusion as to the reasonableness of the interstate rate by disregarding the cost study as evidence because, as is contended, it was erroneously considered by the Commission. But as we have already said it was for the Commission to determine whether the cost study was adequate or whether it was necessary to refine or supplement it in order to make it dependable evidence for the purpose of rate making. The study itself afforded evidence of the reasonableness of the rate fixed, and upon the whole record there was abundant support for the Commission's finding, which was carefully and thoroughly considered in its report. There is no basis upon which the courts, not authorized to weigh evidence, could reëxamine or disregard its conclusion.

The increased intrastate rate applied to grain, to which specific objection is made, does not stand on a different footing. This objection is also predicated upon the mistaken assumption that the Commission should have disregarded the cost study and traffic analysis as evidence. It is true that the rates on grain were not included in the all-commodity rate prevailing in the District before the first proceeding was initiated, and were not uniform throughout the District, but the proceeding was reopened by the Commission to investigate the lawfulness of "all rates and charges . . . of all carload traffic" interstate, and their relationship to like rates and charges intrastate.

It acted upon a record showing that the grain moved intra-District, under the same conditions as other commodities, and the Commission had before it evidence showing that the cost of the traffic largely exceeded the revenue derived from the old rates and that a rate on a distance or zoning basis was impracticable.

Similarly, the finding of unjust discrimination against interstate commerce made in the second report rests upon evidence. The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions. Compare *United States* v. *Louisiana, supra.* Moreover, it appeared that many of the railroads cannot move traffic between points of origin and destination in Indiana and between points of origin and destination in Illinois without crossing the state line, and thus subjecting the shippers to the interstate rate; that some of the industries are located on both sides of the state line and that some of the assembling yards and interchange tracks overlap state lines. On the other hand, many industries, in preference to a more direct interstate route, resort to intrastate routes to obtain lower rates, although they are so-called "unnatural" routes, against the flow of traffic, and therefore entail additional expense in handling. Evidence to show the extent of the burden upon the carriers' revenues, and the diversion of traffic from interstate to "unnatural" intrastate movements, is found both in the testimony of the carrier witnesses and in exhibits of record.

Appellants recur to their criticism of the cost study and insist that in view of differences between average lengths of haul in intrastate and in interstate movements, costs and revenues intrastate and interstate should have been segregated. But this objection is directed not only to the conclusion of the Commission, already con-

sidered, that the cost study was representative and dependable evidence, but is based upon the assumption that the Commission should disregard the long history of rates in the Switching District, in the course of which a commodity rate, generally applicable without regard to distance, had been built up through the District, and that upon a review of the evidence we are free to reject the Commission's conclusion that a distance or zone rate should not apply. Upon this subject there was substantial evidence supporting the reasonableness of uniform commodity rates in preference to a distance or zone rate. So far as this objection is of any force it goes only to the weight of the evidence and not to the want of it. Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switching rates, is within the competence of the Commission. See *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U.S. 136, 138, Note 1, 141; *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 518, Note 1; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 660, 664.

4. Appellants contend that the order cannot be applied to certain carriers whose rails extend only into the Illinois section of the District. As in terms it directs that intrastate rates be established on the level of the interstate switching rates maintained by the carriers who are parties to the proceeding, it is said to be inapplicable to those carriers which because they do not cross state lines in their switching operations have filed no interstate switching rates. But we think the order is not to be read so narrowly. It is made applicable to all the carriers in the District and directs that the intrastate switching rates shall be maintained on a parity with the interstate rates "contemporaneously applied by the said carriers." On its face it would seem that the quoted phrase was intended only to describe the intrastate rates

maintained by such of the carriers as had occasion to establish interstate switching rates. But if this were doubtful the order is to be read with the report. *Georgia Public Service Comm'n* v. *United States, supra,* 771; *American Express Co.* v. *Caldwell, supra,* 627. So read there can be no doubt that it was intended to prescribe for all intrastate traffic within the District the same rate as that prescribed for all interstate traffic there, and that interstate carriers whose rails are confined to either state and which for that reason have filed no interstate switching rates are nevertheless required to adopt the prescribed intrastate rate.

Appellants also urge that interstate carriers whose rails reach only the Illinois part of the District cannot be required to remove a discrimination against interstate commerce unless they participate in both the prejudicial and preferential rates, as was said in *Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627, with respect to discriminations between localities forbidden by § 3 of the Act. But this restriction has no relevance to proceedings under § 13 (4) directed to the removal of discriminatory intrastate rates maintained by state authority. By that section the Interstate Commerce Commission is expressly authorized to prescribe the intrastate rates which will remove the discrimination. *Affirmed.*

BURNS MORTGAGE CO. *v.* FRIED.

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

No. 786. Argued May 3, 1934.—Decided May 28, 1934.

1. The Conformity Act, 28 U.S.C. 724, requires that the form of a law action in a federal court and the right in which it may be brought shall be determined by the local law, but it does not apply to substantive questions upon which the local procedure may depend. P. 492.

2. Under the Rules of Decision Act, 28 U.S.C. 725, the applicable state statute furnishes the rule of decision for a federal court sitting within or outside of the State, and must be given the meaning and effect attributed to it by the highest court of the State, as if the state court's decision was literally incorporated into the enactment. P. 493.
3. There is no valid distinction in this respect between an Act which alters the common law and one which codifies or declares it, such as the Uniform Negotiable Instruments Law; nor between a statute prescribing rules of commercial law and one concerned with some other subject of narrower scope. *Swift* v. *Tyson,* 16 Pet. 1, considered; *Watson* v. *Tarpley,* 18 How. 517, 521, limited. P. 495.
4. The negotiability of a promissory note made and payable in Florida, *held* to depend upon the Florida Negotiable Instruments Law. P. 495.
5. In the absence of construction by the Florida court, it was the duty of the federal courts in this case (tried in Pennsylvania) to decide the question of negotiability according to the accepted canons and in the light of the decisions of the courts of other States with respect to the same sections of the Negotiable Instruments Law. P. 496.
6. Promissory notes provided for interest on the principal sum at the rate of 7% per annum from date until paid and for payment of interest semi-annually, and added that deferred interest payments should bear interest from maturity at 10% per annum, payable semi-annually. *Held* that the word "maturity" refers to the due dates of interest and not to date for payment of principal; that there is, therefore, no ambiguity with respect to the rate of interest; and that the notes are negotiable. Pp. 496, 497.

67 F. (2d) 352, reversed.

CERTIORARI, 291 U.S. 657, to review the affirmance of a judgment entered against the Burns Mortgage Company in its action on promissory notes made by Fried. The decision below went upon the ground that the notes were non-negotiable and that the company, as assignee, could not sue in Pennsylvania in its own name but only as use-plaintiff in the name of the payee.

Mr. Sigmund H. Steinberg, with whom *Mr. John P. Stokes* was on the brief, for petitioner.

Mr. John C. Noonan, with whom *Messrs. H. P. McFadden, Albert S. Lisenby,* and *Albert L. Moïse* were on the brief, for respondent.

Under the rule enunciated in *Swift* v. *Tyson,* 16 Pet. 1, the Circuit Court of Appeals was compelled to determine the question of negotiability according to the general commercial law; and, under that law, the notes are non-negotiable. *Carpenter* v. *Providence Washington Ins. Co.,* 16 Pet. 495; *Lane* v. *Vick,* 3 How. 464; *Chicago* v. *Robbins,* 2 Black 418; *Yates* v. *Milwaukee,* 10 Wall. 497; *Olcott* v. *Fond du Lac Co.,* 16 Wall. 678; *Liverpool & G. W. Steamboat Co.* v. *Phenix Ins. Co.,* 129 U.S. 397; *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U.S. 368; *Salem Trust Co.* v. *Manufacturers Finance Co.,* 264 U.S. 182; *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U.S. 518; *Watson* v. *Tarpley,* 18 How. 517; *Goodman* v. *Simonds,* 20 How. 343; *Boyce* v. *Tabb,* 18 Wall. 546; *Oates* v. *First Nat. Bank,* 100 U.S. 239; *Brooklyn City & N. R. Co.* v. *National Bank,* 102 U.S. 14.

In numerous cases heretofore, even though state statutes were involved, this Court has declined to consider itself bound by the interpretation of the statutes where they have had to do with mercantile or general commercial law, this Court reasserting the doctrine of *Swift* v. *Tyson, supra. Board of Supervisors* v. *Schenck,* 5 Wall. 772; *Pana* v. *Bowler,* 107 U.S. 529; *Burgess* v. *Seligman,* 107 U.S. 20; *Enfield* v. *Jordan,* 119 U.S. 680; *Presidio Co.* v. *Noel-Young B. & S. Co.,* 212 U.S. 58.

The lower federal courts have frequently taken the position that they are not bound by state decisions construing statutes which are merely declaratory of the common law. *Cudahy Packing Co.* v. *State Nat. Bank,* 134 Fed. 538; *Guernsey* v. *Imperial Bank,* 188 Fed. 300; *Smith* v. *Nelson Land & Cattle Co.,* 212 Fed. 56; *Peterson* v. *Metropolitan Life Ins. Co.,* 19 F. (2d) 74; *Mutual Life Ins. Co.* v. *Lane,* 151 Fed. 276, aff'd, 157 Fed. 1002, cert. den., 208

U.S. 617; *Capital City State Bank* v. *Swift,* 290 Fed. 505; *Jockmus* v. *Claussen & Knight,* 47 F. (2d) 766.

The passage of the Uniform Negotiable Instruments Act by a State should not have the effect of abrogating the rule of *Swift* v. *Tyson;* on the contrary, it furnishes an additional reason for adherence to that rule.

The Uniform Negotiable Instruments Law was urged upon and adopted by the States with the same idea of uniformity in mind. It was not intended to supplant or to change principles of commercial law as they were recognized throughout the commercial world, but to reënact or codify the settled and established principles familiar to those engaged in commercial enterprises. *Taylor* v. *American Nat. Bank,* 63 Fla. 631, 649.

As interpreted in *Swift* v. *Tyson,* the Constitution gives to litigants privileged to use the federal courts the right to have questions of general commercial law determined by those courts after an independent investigation of the principles of commercial law applicable to the situation.

One particular weakness of petitioner's position lies in the fact that it presupposes a definite fixity of interpretation by the state courts.

Assuming that the Circuit Court of Appeals erred in applying general commercial law, such error was harmless, as it would be compelled to apply Pennsylvania law, the law of the forum, to the procedural question involved, and the Pennsylvania law accords with that found by the court to be general commercial law.

The law of Florida has not definitely determined that a note like those in suit is negotiable under the Florida Negotiable Instruments Law.

The court below, in refusing to be bound by the Florida statute and its interpretation, did not violate the full faith and credit clause of the Constitution.

Under general commercial law, the notes in question are rendered non-negotiable because of uncertainty as to the

amount due. *First Nat. Bank* v. *Bosler,* 297 Pa. 353; *New Miami Shores Corp.* v. *Duggan,* 9 N.J. Misc. Rep. 620; aff'd, 109 N.J.L. 220.

The negotiability of a written instrument is to be determined by what appears upon the face of the paper, unaided by outside proof. *Gazlay* v. *Riegel,* 16 Pa. Super. Ct. 501; *Overton* v. *Tyler,* 3 Pa. 347; *Davis* v. *Brady,* 17 S.D. 511; *Story* v. *Lamb,* 52 Mich. 525; *Waterhouse* v. *Chouinard,* 128 Me. 505; Williston, Negotiable Instruments (1931), p. 37.

Mr. Justice Roberts delivered the opinion of the Court.

This writ brings here for review a judgment entered by the District Court for eastern Pennsylvania in an action on six instruments, each promising the payment of $1000, all of even date and like tenor. They were executed and delivered by the respondent at Miami, Florida, and were there payable to Golden Isles Corporation at intervals of six months, the first falling due six months from August 28, 1925, and the last, three years from that date. Prior to maturity the payee endorsed and delivered them to one Williamson, who, after refusal of payment at maturity, transferred them by delivery to the petitioner. In response to the petitioner's statement of claim the respondent filed an affidavit of defense in the nature of a statutory demurrer, asserting that as the writings did not embody a promise to pay a sum certain they were not negotiable notes.

The District Judge followed the decisions of the Pennsylvania courts to the effect that the holder of negotiable paper, whether he obtained title before or after dishonor, may sue in his own name,[1] but a holder must sue as use-plaintiff in the name of the obligee if the instrument is not

[1] *Rankin* v. *Woodworth,* 2 Watts (Pa.) 134; *Hanratty* v. *Dougherty,* 71 Pa. Super. Ct. 248.

negotiable.[2] Concluding that the notes were not negotiable and consequently the petitioner could sue only in the name of Golden Isles Corporation, he sustained the affidavit of defense, and, as the petitioner refused to amend, entered judgment for the respondent. The Court of Appeals affirmed.[3]

The provisions held to create the uncertainty which deprived the notes of negotiability, were: "with interest thereon [the principal sum] at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. . . . Deferred interest payments to bear interest from maturity at ten per cent per annum, payable semi-annually."

The petitioner urged that as Florida had adopted the Uniform Negotiable Instruments Law the federal courts were bound to decide the issue according to that statute as interpreted by the Florida court of last resort; the respondent insisted as the action was in the District Court sitting in Pennsylvania, which had also adopted the Uniform Act, the statute as interpreted by the courts of that state must be applied. The Circuit Court of Appeals held that it need not adopt the construction of the Act by the courts of either state, but should decide the case upon the general principles of the law merchant. From these it concluded the quoted provisions rendered the instruments uncertain as to the amount payable and therefore non-negotiable.

1. The conformity act[4] required the trial court to apply the local law in matters of procedure. The form of action and the right in which it must be brought were therefore governed by the Pennsylvania practice. But the procedural question turned on another of substance, namely, whether the instruments were negotiable.

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[2] *Fahnestock* v. *Schoyer,* 9 Watts (Pa.) 102; *Reynolds* v. *Richards,* 14 Pa. 205.

[3] 67 F. (2d) 352.

[4] U.S.C. Tit. 28, § 724.

2. The negotiable quality of the notes is to be ascertained by reference to the law of Florida.[5] The Uniform Negotiable Instruments Law adopted in that State provides[6] (§ 1) that,

"An instrument to be negotiable must conform to the following requirements:

. . . . . .

"2. Must contain an unconditional promise or order to pay a sum certain in money."

And by § 2 it is declared:

"The sum payable is a sum certain within the meaning of this Act, although it is to be paid: (1) With interest; or (2) By stated installments; or (3) By stated installments, with a provision that upon the default in payment of any installment or of interest, the whole shall become due; . . ."

Section 34 of the Judiciary Act of 1789 directs that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.[7] The applicable state statute furnishes the rule of decision for a federal court sitting in the state[8] or outside its borders.[9] And in that court the law

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[5] Ogden, Negotiable Instruments, (3d ed.) 374; *Tilden* v. *Blair,* 21 Wall. 241; *Kobey* v. *Hoffman,* 229 Fed. 486.

[6] Florida Compiled General Laws, §§ 6761, 6762.

[7] Act of September 24, 1789, c. 20, § 34; R.S. § 721; U.S.C. Tit. 28, § 725.

[8] *Bank of the United States* v. *Tyler,* 4 Pet. 366; *Bank of the United States* v. *Daniels,* 12 Pet. 32; *Paine* v. *Central Vermont R. Co.,* 118 U.S. 152, 160; *Moses* v. *Lawrence County Bank,* 149 U.S. 298; *Sowell* v. *Federal Reserve Bank,* 268 U.S. 449, 456; *Crittenden* v. *Widrevitz,* 272 Fed. 871; *Mack* v. *Dailey,* 3 F. (2d) 534, 538; *Queensboro Nat. Bank* v. *Kelly,* 48 F. (2d) 574.

[9] *Junction R. Co.* v. *Bank of Ashland,* 12 Wall. 226; *Flash* v. *Conn,* 109 U.S. 371, 378; *Prentice* v. *Zane,* 19 Fed. Cas. 1270; *Phipps* v.

must be given the meaning and effect attributed to it by the highest court of the state, as if the state court's decision were literally incorporated into the enactment, whatever the federal tribunal's opinion as to the correctness of the state court's views.[10] The petitioner says the Supreme Court of Florida has construed the pertinent sections of the Negotiable Instruments Law as declaring writings of the tenor of those in suit to be negotiable, and the courts below were, therefore, bound so to rule. The Circuit Court of Appeals, however, held that the construction by a state court of last resort of a state statute which is merely declaratory of the common law or law merchant does not bind federal courts. It ascribed that character to the Uniform Act and refused to consider as conclusive the Florida decision upon which the petitioner relied. The court referred to several opinions which sustain this position.[11] It recognized that the opposing view also finds support in other decisions of the federal courts.[12] Because of this contrariety of opinion we granted the writ of certiorari.

Harding, 70 Fed. 468; *United Divers Supply Co.* v. *Commercial Credit Co.,* 289 Fed. 316; *Gutelius* v. *Stanbon,* 39 F. (2d) 621.

[10] *Knights of Pythias* v. *Meyer,* 265 U.S. 30, 32; *Jones* v. *Prairie Oil & Gas Co.,* 273 U.S. 195, 199–200; *Gregg Dyeing Co.* v. *Query,* 286 U.S. 472, 480.

[11] *Mutual Life Ins. Co.* v. *Lane,* 151 Fed. 276; *Capital City State Bank* v. *Swift,* 290 Fed. 505, 509; *Peterson* v. *Metropolitan Life Ins. Co.,* 19 F. (2d) 74; *Jockmus* v. *Claussen & Knight,* 47 F. (2d) 766. In addition to the cases cited by the Circuit Court the following express like views: *Byrne* v. *Kansas City, Ft. S. & M. R. Co.,* 61 Fed. 605, 614; *Babbitt* v. *Read,* 236 Fed. 42, 49; *Manufacturers' Finance Corp.* v. *Vye-Neill Co.,* 62 F. (2d) 625, 628. Compare *American Mfg. Co.* v. *U. S. Shipping Board,* 7 F. (2d) 565, 566.

[12] The court cited *Savings Bank of Richmond* v. *National Bank of Goldsboro,* 3 F. (2d) 970 and *Niagara Fire Ins. Co.* v. *Raleigh Hardware Co.,* 62 F. (2d) 705. There are other cases in which the federal courts have held they must follow the state court's construction of

We think the better view is that there is no valid distinction in this respect between an act which alters the common law and one which codifies or declares it. Both are within the letter of § 34 of the Judiciary Act (*supra*). And a declaratory act is no less an expression of the legislative will because the rule it prescribes is the same as that announced in prior decisions of the courts of the state. Nor is there a difference in this respect between a statute prescribing rules of commercial law and one concerned with some other subject of narrower scope. The contention of the respondent that this court announced a contrary view in *Swift* v. *Tyson,* 16 Pet. 1, is not sustained by a careful reading of the opinion in that case.[13] We are referred to certain expressions found in *Watson* v. *Tarpley,* 18 How. 517, at page 521. What was there said on the subject was unnecessary to the decision, and has not been followed in later cases. The Florida Negotiable Instruments Law, as construed by the Supreme Court of the State, furnishes the rule of decision by which the negotiable character of the notes is to be determined.

3. The petitioner asserts that in *Taylor* v. *American National Bank of Pensacola,* 63 Fla. 631; 57 So. 678, the supreme court of that State construed the statute so as to make negotiable an instrument of the tenor of those in suit. The note involved in that case was payable two years after date with interest from date at the rate of eight per cent. per annum, interest payable quarter-annually, and was held to be negotiable, § 2 of the Uniform Act being quoted. The decision is a clear authority that under the Act the provision for periodical payment of

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the Uniform Negotiable Instruments Law. See: *Kobey* v. *Hoffman,* 229 Fed. 486, 488; *Crittenden* v. *Widrevitz,* 272 Fed. 871; *Mack* v. *Dailey,* 3 F. (2d) 534, 538; *Gutelius* v. *Stanbon,* 39 F. (2d) 621; *Queensboro National Bank* v. *Kelly,* 48 F. (2d) 574. Compare *Bank of United States* v. *Cuthbertson,* 67 F. (2d) 182, 186.

[13] The language relied on is found at p. 18.

interest before the due date of the principal does not destroy negotiability. As the note did not provide for interest on deferred interest payments, either at the same or a different rate from that named as payable upon principal, the effect of such a stipulation was not decided. Upon this matter, therefore, the case cannot be said to be an authority by which the Circuit Court of Appeals was bound.

4. The absence of a decision by the Supreme Court of the State did not relieve the courts below from applying the Florida statute. Lacking such authoritative construction, their duty was to determine the question according to the accepted canons and in the light of the decisions of the courts of other states with respect to the same sections of the Negotiable Instruments Law.[14]

If, as is admitted, the court of last resort of the state holds that provision for payment of interest in instalments prior to maturity of principal does not render the sum payable so uncertain as to destroy negotiability, we think an added stipulation that overdue interest shall bear interest at a named rate until paid would not call for a different decision. Courts which have had occasion to consider the effect of the Act upon instruments of like tenor, have uniformly pronounced them negotiable.[15] And cases decided prior to the adoption of the Act are to the same effect.[16] No contrary decision has been brought

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[14] *Wabash Valley Electric Co.* v. *Young*, 287 U.S. 488, 496; *Farmers' National Bank* v. *Sutton Mfg. Co.*, 52 Fed. 191, 196; *Kobey* v. *Hoffman*, 229 Fed. 486, 488; *United Divers Supply Co.* v. *Commercial Credit Co.*, 289 Fed. 316, 319; *Gutelius* v. *Stanbon*, 39 F. (2d) 621.

[15] *Lister* v. *Donlan*, 85 Mont. 571; 281 Pac. 348; *National Bank* v. *Jefferson*, 51 S.Dak. 477; 215 Pac. 533; *Barker* v. *Sartori*, 66 Wash. 260; 119 Pac. 611.

[16] *Gilmore* v. *Hirst*, 56 Kan. 626; 44 Pac. 603; *Brown* v. *Vossen*, 112 Mo. App. 676; 87 S.W. 577.

to our notice. Until the Supreme Court of Florida holds otherwise, we are justified in construing the Act in accordance with what we think its intent, especially as this construction accords with the views of the courts of other states.

5. The respondent urges that the notes are so ambiguous with respect to the rate of interest that they do not call for the payment of a sum certain, and must therefore be held not to be negotiable. *First National Bank of Miami* v. *Bosler,* 297 Pa. 353, is cited as sustaining this position. The note there under consideration stipulated for eight per cent. per annum upon the principal, " from date until fully paid. Interest payable semi-annually. . . . *Deferred payments* are to bear interest from maturity at ten per cent per annum semi-annually." The decision against negotiability rested upon the proposition that the two interest provisions were so inconsistent that one reading the note could not ascertain at which rate interest was payable on overdue principal. The decision has been criticized, *Lessen* v. *Lindsey,* 238 App. Div. (N.Y.) 262; 264 N.Y.S. 391, on the ground that ambiguity alone does not destroy negotiability, but requires merely a construction of the instrument and a determination of which of two inconsistent clauses shall control. But, be this as it may, the notes in the present case are, we think, free from ambiguity. They provide for interest on the principal sum at the rate of seven per cent. per annum from date until fully paid, for interest payable semi-annually, and add that deferred *interest* payments shall bear interest from maturity at ten per cent. per annum, payable semi-annually. While, therefore, the principal is to bear interest at seven per cent, overdue interest is to be paid with interest at ten per cent. The word " maturity " seems obviously to refer to the due dates of interest and not to the date for payment of principal.

The judgment must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

OHIO ET AL. *v.* UNITED STATES ET AL.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 868. Argued May 8, 1934.—Decided May 28, 1934.

The Interstate Commerce Commission found that intrastate rates on bituminous coal from certain mining districts in southeastern Ohio to destinations in the northeastern portion of the State, as reduced by order or permission of the Public Utilities Commission of the State, were substantially lower, distance considered, than interstate rates on such coal moving to the same destinations from districts in Pennsylvania and West Virginia; that the interstate rates from the latter districts were reasonable; that the system of differentials between the Ohio origins and the more remote other-State origins was proper, distance and other conditions considered; that the reduced Ohio rates were unduly preferential of persons and localities in Ohio and unduly prejudicial to persons and localities in the Pennsylvania and West Virginia districts; and that to remove such discrimination, the intrastate rates should be increased to their former level and the preëxisting interrelationship reëstablished. In a suit to annul the resulting order, *held:*

1. Objection that the Commission did not afford a fair hearing is based on excerpts from its report, taken out of their connection, and is disproved by an examination of the record, report and findings. P. 505.

2. There was ample evidence before the Commission to sustain the finding of undue prejudice against interstate shippers and localities. P. 506.

3. It is not required of the Commission that, before it can remove undue prejudice caused by intrastate rates to districts of origin in other nearby States whose rates are under consideration and found reasonable, it must find or make reasonable other interstate rates to the destination in question, which are adjusted on a

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* Together with No. 886, *United States et al.* v. *Ohio et al.*

different rate base and apply to districts lying in comparatively remote areas. P. 506.

4. It is a theory of rate-making that the longer haul may be expected to yield a lower ton-mile return. P. 508.

6 F. Supp. 386, affirmed.

Appeal in No. 886, dismissed.

APPEALS from decrees of the District Court, constituted of three judges, which dismissed the bills in two suits to set aside an order of the Interstate Commerce Commission. The two suits had been consolidated for trial. The cross-appeal, No. 886, was from an order of the court below staying the operation and enforcement of the order of the Commission for 60 days. This order of the court below was vacated by this Court, February 12, 1934, see 291 U.S. 644. The cross-appeal is therefore now dismissed as moot.

Mr. John W. Bricker, Attorney General of Ohio, and *Messrs. Ernest S. Ballard, Clan Crawford,* and *H. Austin Hauxhurst,* with whom *Messrs. Donald C. Power, Atlee Pomerene,* and *Andrew P. Martin* were on the brief, for the State of Ohio et al., appellants in No. 868 and appellees in No. 886.

Mr. J. Stanley Payne, with whom *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Elmer B. Collins* and *Daniel W. Knowlton* were on the brief, for the United States and Interstate Commerce Commission, appellees in No. 868 and appellants in No. 886.

Mr. August G. Gutheim for the Western Pennsylvania Coal Traffic Bureau et al., appellees in No. 868 and appellants in No. 886.

Mr. Alexander M. Bull, with whom *Mr. Henry C. Hall* was on the brief, for Robert C. Hill et al., Receivers, appellees in No. 868 and appellants in No. 886.

Mr. Guernsey Orcutt, with whom *Messrs. M. Carter Hall, Leo P. Day, Charles R. Webber,* and *Frederic D. McKenney* were on the brief, for the Pennsylvania Railroad Co. et al., interveners.

Mr. Justice Roberts delivered the opinion of the Court.

These are appeals from orders of a statutory court of three judges, convened in the Southern District of Ohio, in two suits, one brought by the State of Ohio and the Public Utilities Commission of Ohio, and the other by the Wheeling and Lake Erie Railway Company, against the United States and the Interstate Commerce Commission, to enjoin and set aside two orders of the Commission. The suits were consolidated for trial. The first of the Commission's orders, that of May 2, 1933, required the increase of Ohio intrastate rates on bituminous coal from certain mining districts in eastern and southern Ohio to destinations in the northeastern portion of the State. The second order, that of May 9, 1933, required the rates prescribed by the first to be increased by the amount of the surcharge authorized upon interstate rates on bituminous coal in the Fifteen Per Cent Case, 1931, 178 I.C.C. 539, 179 I.C.C. 215, and 191 I.C.C. 361. While the causes were under submission the period during which the surcharge was authorized expired, and it was discontinued. The court, therefore, refrained from any adjudication as to the order of May 9, 1933, and no issue is here raised concerning it.

The court granted preliminary injunctions, but after a hearing on the merits, dissolved them and dismissed the bills. It, however, stayed the operation of the order of May 2, 1933, for a period of sixty days, so that the plaintiffs might perfect an appeal to this court. Upon the allowance of an appeal (No. 868) the defendants took a

cross-appeal (No. 886) assigning as error the entry of the stay order. By decree of February 12, 1934 (291 U.S. 644), the stay was vacated. The appeal in No. 886 will, therefore, be dismissed as moot.

The Commission's order of May 2, 1933, requiring the rates intrastate from points in southern and eastern Ohio to destinations in northeastern Ohio, on bituminous coal in carload lots, to conform to those in effect prior to June 30, 1932, was entered under § 13 (3) and (4) of the Interstate Commerce Act.[1] The Commission found that the reduced rates put into effect on the intrastate traffic in question as a result of orders or permission of the Public Utilities Commission of Ohio were unduly preferential of persons and localities in Ohio, unduly prejudicial to persons and localities without the State, and that they cast an undue revenue burden upon interstate commerce.

The appellants, conceding the Commission's power under § 13 (3) and (4) of the Act (*Florida* v. *United States,* 282 U.S. 194, 208; *United States* v. *Louisiana,* 290 U. S. 70; *Florida* v. *United States, ante,* p. 1), claim the dismissal of the bills was erroneous for these reasons: (1) The Commission did not afford them the full and fair hearing to which they are entitled by § 13 of the Act. (2) There is no evidence to support the finding that restoration of the state rates to their former level was required to avoid undue preference and prejudice between persons and localities. (3) The Commission exceeded its authority in requiring the state rates to be raised, without first having found reasonable, or made reasonable, all substantially competitive interstate rates to the same destinations.

The District Court held the order justified by reason of undue preference and prejudice, but did not pass upon the lawfulness of the Commission's action in respect of

[1] U.S.C. 49, c. 1, § 13 (3), (4).

revenue discrimination. We hold the decision of the court was right and we need not discuss the arguments presented as to revenue burden.

The litigation does not involve state-wide rates, but only those on bituminous coal in carloads from producing fields in Ohio to destinations in that portion of the State lying northwardly of a line drawn east and west through Columbus, and eastwardly of a line drawn north and south through Galion and Sandusky and Columbus. The latter territory is highly industrialized, and great quantities of coal are there consumed for manufacturing and domestic purposes. This comes from the producing districts in eastern Ohio and from those to the east and south in Pennsylvania, West Virginia, Kentucky and adjoining states. The rates are group rates from each mining district; all mines within a single district enjoying the same rate to a given destination. As found by the court below, prior to August 1, 1932, there was maintained what it described as " a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from western Pennsylvania, northern West Virginia, and Ohio coal mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable in view of all the elements which must be considered in rate making." These differentials had been maintained long prior to the year 1932; the rates being based upon that from the Pittsburgh district to Youngstown. With that rate fixed those from more remote producing districts, such as Connellsville, immediately south of the Pittsburgh district, and Fairmont, south of Connellsville, in northern West Virginia, were made by adding a differential; and rates to Cleveland and other more distant destinations also by adding a differential.

In 1932 the Ohio Commission ordered a reduction in the rates from two Ohio producing districts (Middle-Massillon and Ohio No. 8) to Canton and to Massillon.

Thereafter the Wheeling & Lake Erie Railway sought and obtained permission to extend the reductions to other destinations. The result was lowered scales to important coal consuming points such as Cleveland and Lorain. The New York Central, the Pennsylvania, the Baltimore & Ohio, and the Pittsburgh & West Virginia, as well as the Wheeling & Lake Erie, serve the Ohio producing territory. They resisted the proposed reductions of the Wheeling & Lake Erie, but without success. In order to meet competition, they reduced the rates between No. 8 District in Ohio and northeastern Ohio destinations. Thereafter, in order to preserve rate relationships, the Ohio Commission compelled reductions from mines in the Cambridge, Hocking and Pomeroy districts. Thus, by November 1, 1932, all of the intrastate rates between origins in Ohio and destinations in the territory above mentioned had been substantially lowered. This threw out of relation the interstate rates from the Freeport, Pittsburgh, Connellsville and Fairmont districts.

Several proceedings before the Interstate Commerce Commission resulted. In September and October, 1932, twelve carriers serving the Ohio districts and other origin territory in Pennsylvania, Maryland and nearby states, complained that the reductions gave an undue advantage and preference to persons and localities in Ohio to the prejudice of persons and localities outside the State, and charged also unreasonable and unjust discrimination against, and undue burden upon, interstate commerce. The Commission ordered an investigation, and named as respondents all railroads operating in Ohio subject to its jurisdiction. Subsequently four complaints were filed on behalf of operators of mines in Pennsylvania, Maryland and West Virginia. These alleged that the reduced Ohio rates in their relation to interstate rates were unduly preferential of Ohio shippers and localities, and unduly prejudicial to interstate shippers and localities, and un-

justly discriminated against interstate commerce. Three of the complaints asserted that the interstate rates to northeastern Ohio from mines in the Pittsburgh, Freeport, Connellsville, and Fairmont districts were unreasonable and in violation of § 1 of the Interstate Commerce Act. After the Ohio rates were reduced the P. & W. Va. Railroad lowered its rates from the Pittsburgh district. The Commission suspended these rates, but by a subsequent order permitted their continuance subject to further investigation. The Complaint cases and the Investigation and Suspension case against the P. & W. Va. Railroad were consolidated with the 13th section investigation and heard upon a single record.

The Commission found that northeastern Ohio is served principally by the Pennsylvania, New York Central, Baltimore & Ohio, Wheeling, and Nickle Plate-Erie system; that all of these carriers participate in the rates and transportation of bituminous coal from the Ohio mines and mines in Pennsylvania, West Virginia, and other states, to the same destination, and that there is a large movement of coal from the Ohio, Pennsylvania and West Virginia mines to northeastern Ohio. From the record it concluded that coal is transported from the Ohio mines to the destinations in question "at intrastate rates which are generally substantially lower, distance considered, than are the reasonable interstate rates herein provided, under which such coal is moved to such destinations from Pennsylvania and West Virginia"; and that "this disparity in rates is greater than is warranted by differences in transportation conditions from the Ohio mines on the one hand and the Pennsylvania and West Virginia mines on the other."

There was evidence in substantial volume bearing upon the issue of the reasonableness of the existing interstate rates from the Freeport, Pittsburgh, Connellsville and Fairmont districts to the destination territory involved.

Much evidence was adduced as to rates approved by the Commission in other proceedings for approximately similar hauls, under similar transportation conditions. The Wheeling & Lake Erie introduced a cost study, and the State and other parties produced evidence as to coal rates in Illinois, fixed by the Commission, and a comparison of the conditions in that territory and those found in Ohio, all for the purpose of demonstrating that the reduced Ohio rates were maximum reasonable rates. There was evidence in opposition to this contention. The testimony showed that coal had moved freely from all producing areas, intrastate and interstate, under the old rates, and tended to prove that the unbalancement of the relation between the state and interstate rates had retarded and prohibited the shipment of a large quantity of coal from the other states to northeastern Ohio. The Commission in its report discusses this evidence in detail, and based upon it, makes findings to the effect that the interstate rates from the Freeport, Pittsburgh, Connellsville and Fairmont districts are reasonable; the system of differentials between the nearer state origins and the more remote interstate origins is proper, distance and other conditions considered; the reduced state rates are unduly preferential of persons and localities in Ohio and unduly prejudicial to persons and localities in the Freeport, Pittsburgh, Connellsville and Fairmont districts; and in order to remove the undue discrimination between persons and localities the intrastate rates should be increased to the former level, and the preëxisting interrelationships reëstablished.

1. The assertion that appellants were denied a fair hearing rests not upon any refusal to receive evidence tendered, but upon the Commission's alleged misconception of the rules as to burden of proof. It is said that from the outset the Commission acted upon a presumption that the reduced Ohio rates were unlawful and cast

on the appellants the burden of overcoming it by a preponderance of proof impossible of production. This complaint is founded upon a portion of the opening sentence of the report and two sentences near its close and by an analysis of the remainder of the report intended to show that the Commission gave too little weight to appellants' evidence and too much to that in opposition. On examination of the record, the report and the findings, we are satisfied there is no adequate foundation for the contention. The excerpts from the report which are cited, when read in their context, indicate only that the Commission intended fairly to inquire with respect to the lawfulness of the attacked rates and, after evaluating all the proofs on both sides, concluded that the preponderance was heavily against the appellants. The hearing was fair.

2. Untenable, also, is the position that there was no sufficient evidence to support the finding of preference and prejudice. We agree with the District Court that the proof of discrimination against interstate shippers and localities was convincing. Upon the issue whether the preference and prejudice was undue,—that is, whether the interstate rates were reasonable, whether the attacked intrastate rates were reasonable maxima, and what the proper relationship between the two scales should be,—a large amount of evidence was taken and considered in detail. There was ample support for each of the findings. In effect, we are asked to reëxamine the evidence, appraise it, and hold the Commission erred in its judgment as to the facts. We have often said that we have no such power.

3. The claim is that the Commission exceeded its authority in requiring state rates to be raised without having found or made reasonable all substantially competitive interstate rates. This contention requires the statement of certain matters in addition to those above recited. As we have seen, the coal which reaches north-

eastern Ohio comes from mines within and without the State. Those within Ohio are grouped in eight origin districts lying in the eastern and southern portions of the State. Those without Ohio lie in two rough arcs known as the inner and outer crescents. The inner includes the Pittsburgh district in western Pennsylvania contiguous to the Ohio River, the Connellsville immediately to the south, the Fairmont to the south of that, and eleven others to the southwestward through northern West Virginia, eastern Kentucky and Tennessee. The outer crescent is composed of districts extending in a wider arc eastward and southward of the inner crescent from the Altoona in Pennsylvania at the northeastern extremity to the Rathburn in southern Tennessee at the southwestern extremity.[2]

The mines in each district enjoy the same rate to a single destination, but the rates from the more remote districts are higher than those from the Ohio districts and from the more northerly districts in the inner crescent. In the proceedings before the Commission the only attack upon the reasonableness of interstate rates was leveled at those from the Pittsburgh, Connellsville and Fairmont regions. The complainants did not plead or offer proof that the rates from the more southerly districts in the inner crescent, or from those in the outer crescent, were unreasonably high. Nor did the appellants, who were respondents before the Commission, assert or attempt to prove that they were too low. These rates were put in evidence by the appellants, but only for the purpose of showing, by comparison of the ton-mile earnings under them, that the reduced Ohio rates were reasonable maxima.

[2] A map showing the area and location of the Ohio districts and most of those in the inner and outer crescents will be found in 46 I.C.C. opposite page 158.

The argument is that by confining its investigation of the reasonableness of the interstate rates to those from the Freeport, Pittsburgh, Connellsville and Fairmont origins and neglecting to investigate the reasonableness of those from the inner and outer crescents generally, the Commission exposed intrastate commerce to unjust discrimination in relation to competitive interstate commerce originating in the inner and outer crescents. Support for the argument is drawn from the assertion first, that the existing interstate rates from the crescents are lower than those from the Ohio mines, and secondly, that the entire crescent adjustment has always been made and regulated so as to represent a reasonable average level, and therefore any consideration of the Ohio rates should rest upon a comparison of the average reasonableness of the entire interstate adjustment.

The appellants fail to call attention to anything in the record which supports either of these statements, and we have been unable to find anything of the sort. The fact is that the rates from the southern inner and from the outer crescent territory are much higher than those from Ohio mines, and considerably in excess of those from the Freeport, Pittsburgh, Connellsville and Fairmont districts. It is undoubtedly true that the former show lower earnings per ton-mile than the latter. This, however, is in entire accord with the theory of rate making, namely, that the longer haul may be expected to yield a lower ton-mile return. But entirely apart from this, the record not only does not disclose that the entire adjustment of interstate rates from the Appalachian district is upon an average basis, but shows the contrary. Coal moves from Ohio origins and from both the crescents to destinations in territory other than the destination area here involved. Rates upon these movements have been the subject of repeated investigations by the Commission. Examination of the record and of the various proceedings with

respect to these interstate rate adjustments discloses that there are four major adjustments on northwestward-bound coal from Ohio and the crescents. One is the lake cargo adjustment, applicable on coal moving to lower Lake Erie ports for transshipment by water. The rate from any origin district is the same to all ports to which rates are published, but there are differentials in favor of Ohio origins and against inner and outer crescent districts.[3] A second embraces rates to northwestern Ohio, northeastern Indiana, and the southern peninsula of Michigan. The third is to territory west of that just mentioned, in which Chicago is a typical destination point. To the destination territory covered by the last mentioned areas the adjustments are similar, though the differentials from various points of origin are not the same. Five of the Ohio districts—No. 8, Cambridge, Hocking, Pomeroy, and Jackson—have the same rate to any given destination; the other Ohio districts take differentials under the rates from the former. All inner crescent districts have the same rate to a given destination. It is 50¢ over the Hocking rate to a destination in the first mentioned territory, and 35¢ over the Hocking rate to Chicago. The outer crescent has differentially higher rates than those applicable to the inner. The base rate for these two adjustments is the rate from Hocking to Toledo.[4]

The fourth adjustment is that to northeastern Ohio. It differs from the three previously mentioned. On shipments from Crooksville, Pomeroy and Hocking in Ohio, and from Kanawha and other southern inner crescent districts, northeastern Ohio prior to August 1, 1932, was included in the Toledo group, Cleveland taking the same rate as Toledo from those Ohio districts, and a rate 50¢

[3] See Lake Cargo Coal Cases, 1930, 181 I.C.C. 37.

[4] Compare Bituminous Coal to C. F. A. Territory, 46 I.C.C. 66; Ohio-Michigan Coal Cases, 80 I.C.C. 663.

higher from the named inner crescent districts. On the other hand, from Middle, Massillon, No. 8 and Cambridge in Ohio, and from Freeport, Pittsburgh, Connellsville and Fairmont in the northern part of the inner crescent, the adjustment was quite distinct. The base for these rates was not the Hocking-Toledo rate, but the Pittsburgh-Youngstown, or Pittsburgh-Cleveland rate. The rate from Ohio district No. 8 to Cleveland was 10¢ under the Pittsburgh-Cleveland rate. The rate from Connellsville is 9¢, and from Fairmont 15¢, over the Pittsburgh-Cleveland rate. The more southerly Ohio districts have always had a rate differentially higher than No. 8. Thus it appears that the adjustment from the crescent districts has not been, as appellant asserts, based on an average principle or average rates of all origin territory shipping coal to northeastern Ohio.

The appellant's argument, then, comes to this: That if a commodity is shipped in large quantities in interstate commerce from certain districts without Ohio to a destination in that state, and if it happens that the commodity also reaches the same destination from wholly different regions whose rates have been built upon a different key rate, the Commission cannot abate a discrimination between the first named group of rates, found to be reasonable, and the intrastate rates, without first finding that the rate from every other region to the same destination in Ohio is reasonable. To state the proposition is to answer it. The Commission has found the interstate rates from Freeport, Pittsburgh, Connellsville and Fairmont districts to northeastern Ohio destinations are reasonable. It cannot remove a preference and prejudice due to the reduction of the Ohio intrastate rate, so the argument runs, unless it finds also that the rate from a district in eastern Tennessee, close to the Alabama border, to the same destination, is also reasonable. Where rates are uniform from a group of origins to a given destination it

is necessary for the Commission to find that the rates from the group as a whole are reasonable, before it can raise the intrastate rates. Compare *Georgia Public Service Comm'n* v. *United States,* 283 U.S. 765; State Corporation Comm'n *v.* Aberdeen & Rockfish R. Co., 136 I.C.C. 173. But it by no means follows that that body, before it can remove discrimination against the district of origin whose rates are under consideration, must find or make reasonable rates adjusted to a different base rate and applying from districts lying in comparatively distant areas.

The Commission has found that the interstate rates from four districts of origin are reasonable. It has found that Ohio intrastate rates, the transportation conditions being similar, are, distance considered, out of relation to these interstate rates, so as to create undue preference and prejudice. These findings, supported by evidence, fully justified the order with respect to the intrastate rates under § 13 of the Act. Compare *Louisiana Commission* v. *Texas & N. O. R. Co.,* 284 U.S. 125.

No. 868, Judgment affirmed.
No. 886, Appeal dismissed.

INTERNATIONAL MILLING CO. *v.* COLUMBIA TRANSPORTATION CO.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 561. Argued February 16, 1934.—Decided May 28, 1934.

1. In determining whether a suit brought in a state court by one foreign corporation against another on a foreign cause of action is an unreasonable burden on the interstate commerce conducted by the defendant and is therefore beyond the jurisdiction of the court, the fact that the plaintiff is a resident of the State, in the sense that its business is there, is of high significance. P. 519.
2. The business of a Delaware corporation, with its principal office in Ohio, was carriage of merchandise by steamer in interstate and

foreign commerce, between ports on the Great Lakes and tributary waters including ports of Minnesota. Its vessels navigated waters of Lake Superior over which Minnesota and Wisconsin have concurrent jurisdiction, and it maintained at Duluth, Minnesota, an agent who did whatever was necessary to facilitate loading and unloading of cargoes. When one of its vessels, bearing cargo partly destined for Duluth, arrived in adjacent waters within the concurrent jurisdiction, it was attached in an action brought by another Delaware corporation, whose business was in Minnesota, on a cause of action for negligence in the transportation of cargo between Chicago, Illinois, and Buffalo, New York. *Held:*

(1) That maintenance of the action would not be an unreasonable burden upon interstate commerce. P. 520.

(2) The forum being in other respects appropriate, jurisdiction was not lost because the property subjected to the attachment was an instrumentality of commerce, nor because the chief witnesses on the trial resided in other States. P. 521.

189 Minn. 516; 250 N.W. 190, reversed.

CERTIORARI, 290 U.S. 622, to review a judgment affirming a judgment which vacated for want of jurisdiction a summons and attachment served on the master of a vessel in an action against the owner for negligence in the transportation of cargo. See 189 Minn. 507; 250 N.W. 186.

Mr. James G. Nye, with whom *Messrs. Oscar Mitchell* and *Albert C. Gillette* were on the brief, for petitioner.

Mr. Edgar W. MacPherran, with whom *Messrs. Thomas H. Garry, Carl V. Essery,* and *Thomas H. Adams* were on the brief, for respondent.

Maintenance of a suit against a foreign corporation engaged in interstate commerce on a cause of action arising outside the State is, in the absence of consent, an unreasonable burden on interstate commerce. *Davis* v. *Farmers Co-operative Equity Co.,* 262 U.S. 312; *Atchison, T. & S. F. R. Co.* v. *Wells,* 265 U.S. 101; *Michigan Central R. Co.* v. *Mix,* 278 U.S. 492; *Denver & R. G. W. R. Co. v. Terte,* 284 U.S. 284. Distinguishing: *Missouri ex rel. St.*

Louis, B. & M. R. Co. v. *Taylor,* 266 U.S. 200; *Hoffman* v. *Missouri ex rel. Foraker,* 274 U.S. 21; *Denver & R. G. W. R. Co.* v. *Terte,* 284 U.S. 284 (as to Santa Fe).

The burden is objectionable regardless of the nature of the process employed to subject the defendant to jurisdiction. *Atchison, T. & S. F. R. Co.* v. *Wells,* 265 U. S. 101; *Denver & R. G. W. R. Co.* v. *Terte,* 284 U.S. 284.

While this Court has perhaps laid down no specific rules as to when such an action will or will not be objectionable, it is clear from the adjudicated cases that it is the burden imposed upon the defendant which renders the maintenance of the action objectionable and that in the absence of facts which render it clearly reasonable to impose the burden, the maintenance of the suit will not be allowed.

Petitioner is not a resident or a citizen of Minnesota. For purposes of jurisdiction, the residence of a corporation is considered to be in the State where incorporated, regardless of its doing business elsewhere. *Germania Fire Ins. Co.* v. *Francis,* 11 Wall. 210, 216; *Ex parte Schollenberger,* 96 U.S. 369, 377; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.,* 118 U.S. 290, 295; *Shaw* v. *Quincy Mining Co.,* 145 U.S. 444, 450; *Seaboard Milling Co.* v. *Chicago Ry. Co.,* 270 U.S. 363.

The decisions under the statute relating to removal of actions from state to federal courts on the ground of diversity of citizenship, are applicable to the present question. *Southern Ry.* v. *Allison,* 190 U.S. 326; *Missouri Pacific Ry. Co.* v. *Castle,* 224 U.S. 541.

While it is true that in the *Davis* case this Court left open the question of what, if any, effect the fact that the suit was instituted in the jurisdiction of which the plaintiff was a resident at the time of the accrual of the cause of action might have, it is submitted that this question has since been determined by the *Terte* case adversely to

the position taken by petitioner that residence of the plaintiff is of importance. *Cressey* v. *Erie R. Co.*, 278 Mass. 284, distinguished.

The true doctrine enunciated by this Court in the *Davis* case and succeeding cases is that regardless of the residence of the plaintiff, a suit against a foreign corporation in a jurisdiction unconnected with the cause of action constitutes a burden upon interstate commerce and can not be maintained unless defendant has either expressly consented to be sued there, or its operations in the State are of such a character that consent must necessarily be implied.

Respondent had neither consented to be sued in Minnesota nor was it carrying on such business there as to warrant the maintenance of this action. See *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U.S. 79, 86; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U.S. 264.

Minnesota's jurisdiction and territorial limits are covered by two separate sections of the Minnesota Constitution. The first, § 1, Art. II, defines the boundaries of the State; the second, § 2 of the same Article, gives to Minnesota certain concurrent jurisdiction beyond its boundaries. The attached vessel, up to the time of its attachment, had not come within the boundaries of Minnesota. The respondent, whether on waters within the boundaries of Minnesota, on waters without those boundaries but within the so-called concurrent jurisdiction of Minnesota, or whether on waters entirely outside any Minnesota jurisdiction, is operating upon the navigable waters of the United States which are free to commerce under the repeated decisions of this Court. The respondent, on the other hand, only goes to the State as it secures cargoes from other States destined to Minnesota. When, if ever, it may again go to Minnesota is a matter of conjecture.

While it is true that the mere fact that the business carried on by a corporation is entirely interstate in char-

acter does not render that corporation immune from the ordinary process of the courts of the State, *International Harvester Co.* v. *Kentucky,* 234 U.S. 579, it does not follow that the mere carrying on of some business in the State renders the foreign corporation amenable to suit upon all causes of action. *Louisville & N. R. Co.* v. *Chatters,* 279 U.S. 320.

Mr. Justice Cardozo delivered the opinion of the Court.

Petitioner, plaintiff in the court below, is a Delaware corporation, a dealer in grain, with its principal office and place of business in Minneapolis, Minnesota. Respondent, defendant below, is also a Delaware corporation, a carrier by water, with its principal office in Cleveland, Ohio. We are to determine whether in the circumstances exhibited in the record a suit between the parties in the courts of Minnesota is an unreasonable burden upon interstate commerce.

On January 1, 1930, petitioner loaded a cargo of grain on one of the vessels of respondent's predecessor for transportation and storage. This vessel was the W. C. Richardson, and the termini of the voyage were Chicago and Buffalo. At one of those points or somewhere between them the grain was negligently handled while in the carrier's possession with ensuing damage discovered about the end of 1930. The defendant in this suit is a successor corporation, which took over the business in December, 1931, and assumed its liabilities.

The new corporation, like its predecessor, is a carrier of merchandise in interstate and foreign commerce, picking up cargoes where it can get them, but principally along the Great Lakes and in tributary waters. It has a fleet of ten steamers which it uses for that purpose as occasion requires. Owing to slack business, the only vessel in commission during the first half of 1932 was

the C. Russell Hubbard, which operated principally between ports on Lakes Superior and Michigan. On July 1, 1932, this vessel arrived at Duluth, Minnesota, carrying a cargo of coal from Sandusky, Ohio. While unloading in neighboring waters she was seized by the sheriff under a writ of attachment sued out by the petitioner in a District Court of the state. The summons and the attachment writ were served on the master of the vessel, who made report of the proceeding to the respondent's agents at Duluth. These agents, a firm of vessel brokers, were employed by the respondent as its Duluth representatives to act for it as might be necessary when its boats were at the dock. They saw to it that the cargoes were loaded and unloaded, reported to their principal the coming and going of the vessels, and issued bills of lading. Notice of an expected cargo came to them by telegraph, for there was no regular schedule to put them on the watch. Payment was by the job, $10 for each cargo. Like services had been rendered by the same agents since 1928, and, it may be, even earlier. Just how often they had acted, the record does not tell us, though presumably the facts were within the knowledge of the principal. If there may be inferences from silence, we draw them against the party who bears the burden of persuasion.

Promptly upon the seizure of the vessel, the respondent filed an undertaking in the sum of $40,000, whereupon the levy was released. Then, appearing specially, it moved to vacate the attachment and the summons upon the ground that the prosecution of the action in the state of Minnesota would impose a serious and unreasonable burden upon interstate commerce, in contravention of Article I, Section 8, of the Constitution of the United States. The District Court granted the motion. The Supreme Court of Minnesota affirmed, three judges dissenting. 189 Minn. 507; 250 N.W. 186. Later there was a final judgment in the District Court, and again an affirmance

on appeal. 189 Minn. 516; 250 N.W. 190. A writ of certiorari has brought the case here. 290 U.S. 622.

Our point of departure is the decision of this court in *Davis* v. *Farmers Co-operative Equity Co.*, [1923] 262 U.S. 312. There a Kansas corporation brought suit in Minnesota against the Director General of Railroads, representing the Atchison, Topeka & Santa Fe Railway Company, also a Kansas corporation. The plaintiff was not a resident of Minnesota, nor engaged in business there. The railway company was not a resident of Minnesota, and did no business there, except to solicit traffic. The cause of action had no relation to any local activity. Service of process was made in reliance upon a Minnesota statute (Laws of 1913, c. 218, p. 274) whereby every foreign interstate carrier was compelled "to submit to suit there as a condition of maintaining a soliciting agent within the State." 262 U.S. at pp. 313, 315. Upon those facts the ruling of this court was that the effect of the statute, when applied to a carrier so situated, was an unreasonable obstruction of interstate commerce. The decision was confined narrowly within the bounds of its own facts. "It may be," the court said (262 U.S. at p. 316), "that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the State, or if the plaintiff was, when it arose, a resident of the State." The facts in the *Davis* case were substantially identical with those in *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U.S. 101, decided a year later. Then, in 1929, *Michigan Central R. Co.* v. *Mix*, 278 U.S. 492, enforced the same conclusion where the plaintiff, a resident of Michigan at the time of an accident, sued a Michigan railway company in Missouri upon a Michigan cause of action, though the defendant's only activity in Missouri was the maintenance of an agency for the solicitation of business. The suit

was not saved because the plaintiff had moved into Missouri "after the injury complained of, but before instituting the action." "For aught that appears her removal to St. Louis shortly after the accident was solely for the purpose of bringing the suit; and because she was advised that her chances of recovery would be better there than they would be in Michigan." (278 U.S. at p. 495.) There was no proof of such a relation between the residence or activities of the suitor and the forum chosen for the suit as to make the choice a natural or suitable one, and rid the burden on the carrier of at least a measure of its hardship.

To be contrasted with these cases where jurisdiction was denied because of the necessities of commerce is another series of cases where differentiating circumstances led to a different result. Thus, in *Missouri ex rel. St. Louis, B. & M. R. Co.* v. *Taylor,* [1924] 266 U.S. 200, a Delaware corporation with a usual place of business in Missouri brought suit in a Missouri court against the St. Louis, Brownsville & Mexico Railway Company, a Texas corporation, operating a railroad in Texas and nowhere else, jurisdiction being asserted solely by reason of the garnishment of traffic balances due from a connecting carrier. The cause of action was for damages to freight originating in Texas on lines of the Brownsville Company and shipped on through bills of lading to points in Missouri as well as other states. This court rejected the carrier's contention that *Davis* v. *Farmers Co-operative Equity Co., supra,* and *Atchison, T. & S. F. Ry. Co.* v. *Wells, supra,* supplied the applicable rule. The opinion pointed out (1) that for anything made to appear the negligence of the connecting carrier may have occurred in Missouri where the goods were to be delivered, and (2) that "the plaintiff consignee is a resident of Missouri—that is, has a usual place of business within the State."

"To require that, under such circumstances, the foreign carrier shall submit to suit within a State to whose jurisdiction it would otherwise be amenable by process of attachment does not unreasonably burden interstate commerce." 266 U.S. at p. 207. In line with that decision is *Denver & Rio Grande Western R. Co.* v. *Terte,* [1931] 284 U.S. 284, where the plaintiff, a resident of Missouri, had brought suit in a Missouri court upon a cause of action for personal injuries suffered in Colorado. There were two defendants, the Rio Grande railway company and the Santa Fe. The first, a Delaware corporation, did not operate a railroad in Missouri, but had a traffic agency only. As to it the suit was dismissed upon the authority of the *Davis* case. The other defendant had part of its line in Missouri, though the accident occurred elsewhere. Cf. *Hoffman* v. *Foraker,* 274 U.S. 21. As to the defendant so situated, jurisdiction was upheld. The groups are clearly marked, and also the reasons for the grouping.

The question now is whether the defendant with its steamship business shall be placed in the one group or the other. At the outset, we mark the fact that the petitioner, though a Delaware corporation, is suing in the state of its business activities. For many purposes, its domicile in law is in the state of its creation (*Shaw* v. *Quincy Mining Co.,* 145 U.S. 444; *Seaboard Rice Milling Co.* v. *Chicago, R. I. & P. Ry. Co.,* 270 U.S. 363), but it is living its life elsewhere. In a very real and practical sense, it is a resident of the forum, like the plaintiff in the *Taylor* case (266 U.S. 200, 207), who was domiciled in one state and resided in another. Certainly its relation to the locality was so permanent and intimate as to relieve it of the opprobrium of an impertinent intruder when it went into the local courts. In saying this we do not hold that the residence of the suitor will fix the proper forum without reference to other considerations, such as the nature

of the business of the corporation to be sued. *Denver & Rio Grande Western R. Co.* v. *Terte, supra,* is opposed to such a holding. Residence, however, even though not controlling, is a fact of high significance. Our next inquiry must be whether there is anything in the nature of the activities of the defendant to overcome its force.

The defendant, though an interstate carrier, does not do business like a railroad company along a changeless route. It is engaged in transportation in Minnesota as much as it is engaged in transportation anywhere, if we exclude the activities of management that have their centre in Ohio. Its vessels navigate the waters of Lake Superior, not merely occasionally, but by long continued practice, and Minnesota and Wisconsin maintain over the boundary waters of that lake a concurrent jurisdiction. Constitution of Minnesota, Art. II, § 2; Constitution of Wisconsin, Art. IX, § 1. At Duluth a designated agent does whatever is necessary to facilitate the work of loading and unloading cargoes, and in the waters near at hand there was a levy of an attachment upon property brought into the state in the usual course of business. When subjected to this levy, the carrier was not engaged in some incidental or collateral activity, such as the solicitation of freight to be carried at other times and places. It was engaged, when thus subjected, in the very act of transportation, the dominant end and aim of its corporate existence.

Viewing all these circumstances together, we find ourselves unable to conclude that by the prosecution of this suit there has been laid upon the carrier a burden so heavy and so unnecessary as to be oppressive and unreasonable. Rather we find a situation where the defendant, chargeable with knowledge of the attachment laws of Minnesota, brought its property into that state, not fortuitously or by a rare accident, but in furtherance of a

systematic course of business, and thereby subjected itself to suit *quasi in rem,* at the instance of a local creditor, who could not with equal convenience or facility have sued it anywhere else. Such a suit may be a burden, but oppressive and unreasonable it is not. There is no occasion to determine whether the conclusion would be the same if an attachment had been levied upon property brought within the state through the voluntary act of the defendant, but in an isolated instance, dissevered from a course of dealing. In the circumstances of this case, *Missouri ex rel. St. Louis, B. & M. R. Co.* v. *Taylor, supra,* and *Denver & Rio Grande Western R. Co.* v. *Terte, supra,* to the extent that the latter case involved a suit against the Santa Fe, supply, when read together, the applicable rule, and sustain the jurisdiction of the Minnesota courts.

The forum being in other respects appropriate, jurisdiction is not lost because the property subjected to the attachment is an instrumentality of commerce (*Atchison, T. & S. F. Ry. Co.* v. *Wells, supra,* p. 103; *Davis* v. *Cleveland, C., C. & St. L. Ry. Co.,* 217 U.S. 157), nor because the chief witnesses on the trial reside in other states, most of them, it seems, in Chicago, Illinois. "As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the State and retain or refuse jurisdiction according to the relative inconvenience of the parties." *Denver & Rio Grande Western R. Co.* v. *Terte, supra,* p. 287; *Hoffman* v. *Foraker, supra,* p. 22.

The judgment should be reversed and the cause remanded to the Supreme Court of Minnesota for further proceeding not inconsistent with this opinion.

Reversed.

TEXAS ET AL. *v.* UNITED STATES ET AL.

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

No. 920. Argued May 9, 1934.—Decided June 4, 1934.

1. It is a primary aim in the new railroad policy inaugurated by the Transportation Act, 1920, to secure avoidance of waste; and the authority given to the Interstate Commerce Commission to permit consolidations, purchases, leases, etc., was given in aid of that policy. P. 530.
2. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. P. 531.
3. The term "public interest," as used in the statute, is not a mere general reference to public welfare, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. P. 531.
4. Under § 5 of the Interstate Commerce Act, as amended by §§ 201 and 202 of Title II of the Emergency Railroad Transportation Act of 1933, the Interstate Commerce Commission has power to authorize a lease of one interstate railway to another permitting the lessee to abandon or remove general offices and shops of the lessor, the maintenance of which as found by the Commission would entail unnecessary and wasteful expenditures, even though such abandonment or removal be forbidden by the law of the State of the lessor's incorporation in which such offices and shops are located. P. 532.
5. By concession in this case, the lease and order do not affect the "public" or principal office which the lessor is required to keep in Texas by the laws of that State, as distinguished from "general offices" required by the Texas "Office-Shops" Act; so that there can be no interference by the lease in question with the supervision of the State over the lessor company in matters essentially of state concern. P. 532.
6. Section 11 of Title I of the Emergency Railroad Transportation Act of 1933, providing that nothing in that Title (which deals with

the authority of the Federal Coördinator of Transportation and kindred matters) shall be construed to relieve any carrier from any contractual obligation which it may have assumed, prior to the enactment, with regard to the location or maintenance of its offices, shops, or roundhouses at any point, is not inconsistent with power in the Commission, when acting under § 5 of the Interstate Commerce Act, as amended by Title II of the Emergency Act, to relieve from like obligations imposed by state statute. P. 533.

7. Title II of the Emergency Railroad Transportation Act, *supra,* in amending § 5 (15) of the Interstate Commerce Act, relieves carriers from the operation of the antitrust laws and "of all other restraints or prohibitions by or imposed under authority of law, state or federal, insofar as may be necessary to enable them to do anything authorized or required by" any order under the foregoing provisions of that section. *Held,* that the scope of the immunity is not limited to laws of the same genus as antitrust legislation. P. 534.

6 F. Supp. 63, affirmed.

APPEAL from a decree of the District Court, consisting of three judges, which dismissed a bill brought by the State of Texas, and some of its officers and municipalities, to annul an order of the Interstate Commerce Commission.

Mr. A. R. Stout, Assistant Attorney General of Texas, with whom *Mr. James V. Allred,* Attorney General, *Mr. Elbert Hooper,* Assistant Attorney General, and *Mr. Elmer L. Lincoln* were on the brief, for appellants.

Assistant Attorney General Stephens, with whom *Solicitor General Biggs* and *Messrs. Carl McFarland, Ashley Sellers, Daniel W. Knowlton,* and *E. M. Reidy* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. Samuel W. Moore, with whom *Messrs. Frank H. Moore* and *Cyrus Crane* were on the brief, for the Kansas City Southern Ry. Co. et al., appellees.

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

The Interstate Commerce Commission, by its report and order of October 4, 1933, authorized the Kansas City Southern Railway Company, a corporation organized under the laws of Missouri, to acquire control by lease of the railroad and properties of the Texarkana & Fort Smith Railway Company, incorporated under the laws of Texas. 193 I.C.C. 521. In this suit, the State of Texas, and officers and municipalities of that State, assailed the order as transcending the authority granted to the Commission by the Congress. The order was sustained by the District Court, 6 F.Supp. 63, three judges sitting as required by statute, and from its decree this appeal is taken.

The single point in controversy is with respect to the authority of the Commission to approve the acquisition of control by a lease which permits the lessee to abandon, or to remove from the State, the general offices, shops, etc., of the lessor. The provision of § 5 of the lease, which has that effect, is set forth in the margin.[1] The provi-

[1] "But the Southern Company (applicant) does not assume the performance of any corporate obligations on the part of the Texarkana Company independent of its obligations as a common carrier. The Southern Company does not assume any obligation to maintain, during the term of this lease, any general offices, machine shops or roundhouses for or belonging to the Texarkana Company at any particular place or places, regardless of present or previous locations thereof; but shall have the right to change any existing location of general offices, machine shops, roundhouses and terminal facilities, belonging to the Texarkana Company, and to relocate the same, and, from time to time, to change the same, during the full term of this lease, and shall have the right to make all such locations, changes and alterations as in the judgment of the Southern Company will enable it to operate the demised premises in the public interest and with the greatest economy and efficiency; and the Southern Company shall not be obligated or bound to perform any contractual,

sion is attacked as being in violation of the laws of Texas, which confine to Texas corporations the right to "own or maintain any railways" within the State, which require every railroad company chartered by the State to "keep and maintain permanently its general offices within this State at the place named in its charter," and at that place also to maintain the offices of its principal officers, and which prohibit any railroad company from changing "the location of its general offices, machine shops, or roundhouses, save with the consent and approval of the Railroad Commission" of the State.[2]

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statutory, or other obligations with reference to such matters which may now or hereafter rest upon the Texarkana Company; and any and all such changes may be made, from time to time, by the Southern Company as may be approved by the judgment of its officers or Board of Directors."

[2] These provisions of the Revised Civil Statutes of Texas, 1925, are as follows:

Art. 6260. "No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any railways within State."

Art. 6275. "Every railroad company chartered by this State, or owning or operating any line of railway within this State, shall keep and maintain permanently its general offices within this State at the place named in its charter for the location of its general offices. If no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this State where it contracts or agrees to locate its general office for a valuable consideration."

Art. 6278. "Railroad companies shall keep and maintain at the place within this State where its general offices are located the office of its president, or vice-president, secretary, treasurer, local treasurer, auditor, general freight agent, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, fuel agent, general claim agent; and each one of its general offices shall be so kept and

The Interstate Commerce Commission was divided in opinion. Upon a prior hearing, the Commission approved the lease upon the condition that the paragraph in controversy should be eliminated. Report and order of December 27, 1932; 189 I.C.C. 253. Following the enactment of the Emergency Railroad Transportation Act, 1933 (Act of June 16, 1933, c. 91), the proceeding was reopened and, after hearing, the Commission modified its order by striking out the above-mentioned condition, thus approving and authorizing the lease with its provision, in § 5, as to offices and shops.

The findings of fact set forth in the Commission's report are not contested. The lines which constitute what is called the Kansas City Southern Railway system (embracing the portions covered by the proposed lease) extend from Kansas City, Missouri, to Port Arthur, Texas (over 800 miles). The line of the Kansas City Southern Railway Company, the applicant, extends from Kansas City, Missouri, to Mena, Arkansas. The line of the Texarkana & Fort Smith Railway Company is in two segments. The northern segment extends from Mena in a southerly direction, crosses the Arkansas-Texas State line, and runs through Texarkana and thence southeasterly into Arkansas and to the Arkansas-Louisiana State line.

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maintained by whatever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where said general offices are required to be located and maintained; and the persons holding said general offices shall reside at the place and keep and maintain their offices at the place where said general offices are required by law to be kept and maintained. . . ."

Art. 6286. "No railroad company shall change the location of its general offices, machine shops or roundhouses, save with the consent and approval of the Railroad Commission of Texas, and this shall apply also to receivers and to purchasers of the franchises and properties of railroad companies and to new corporations formed by such purchasers or their assigns. . . ."

The portions of this segment in Arkansas are operated by the applicant under a lease previously authorized by the Interstate Commerce Commission. 105 I.C.C. 523. The portion of the northern segment which lies in the State of Texas, is approximately 31 miles in length. The southern segment of the Texarkana & Fort Smith Railway extends from the Louisiana-Texas State line at the Sabine River to Port Arthur, Texas, and is approximately 50 miles in length. Thus, the total main line mileage of the Texarkana & Fort Smith Railway in Texas is 81 miles; there are about 18 miles of branch lines. The portion of the railroad system lying between the Arkansas-Louisiana State line and the Louisiana-Texas State line, approximately 228 miles, is owned by the Kansas City, Shreveport & Gulf Railroad Company, a subsidiary of the applicant.

The Commission, on the first hearing, found that the consummation of the plan presented by the applicant would result in an annual saving, under normal conditions, of about $81,000. This finding was repeated in the final report. The estimated saving would result from the unification of operations, the discontinuance of general offices of the Texarkana & Fort Smith Railway Company at Texarkana, and the removal to Shreveport and Kansas City of many of the activities at Texarkana which caused duplication of work. Thus, under the proposed plan, the auditor's and treasurer's departments of the Texarkana & Fort Smith Railway Company would be transferred to the applicant's headquarters at Kansas City, with an estimated annual saving of over $57,000. The offices of the general freight agent, general passenger agent, superintendent, and division engineer, and of the master mechanic at Port Arthur, would be removed to Shreveport and consolidated with similar offices of the applicant, at an estimated annual saving of over $21,000. There would also be a decrease in expenses for various services in connection with the building at Texarkana.

Shreveport, said the Commission, is considered to be more centrally located from an operating standpoint than Texarkana, and there are at that point the applicant's main terminal for the southern territory, shops for heavy repairs, more industry, greater population, and more railroad connections.

The Commission found that for the four years, 1928–1931, the Texarkana & Fort Smith Railway Company handled an average of 993,622 tons of intrastate traffic and 3,405,944 tons of interstate traffic. Of the average total of 4,399,566 tons, the applicant participated in the handling of 3,192,554 tons. The net income of the Texarkana & Fort Smith Railway Company amounted to $441,922 in 1926, $204,052 in 1927, $437,270 in 1928, $598,172 in 1929, and $95,655 in 1930. In 1931 there appears to have been no net income. The Commission concluded that "in view of the volume of interstate traffic handled by the T. & F. S. and the net income earned by that carrier, it is clear that the expenditure of approximately $81,000 a year, which will be unnecessary under the plan that the applicant proposes to put into effect under the lease, constitutes an undue burden upon interstate commerce."

The Commission further found "that the lease by the Kansas City Southern Railway Company of the railroad and properties of the Texarkana & Fort Smith Railway Company, located in Texas and elsewhere not now under lease, in accordance with the proposed lease, will be in harmony with and in furtherance of the plan for the consolidation of railroad properties heretofore established by us and will promote the public interest."

The State of Texas raises no question as to the constitutional power of the Congress to confer authority upon the Commission to approve the proposed lease with the stipulations under consideration. The question is simply as to the scope of the authority which has been con-

ferred,—the construction of the applicable statutory provisions. These are found in § 5 of the Interstate Commerce Act as amended by the Emergency Railroad Transportation Act, 1933 (Title II, §§ 201, 202). Paragraphs (4) (a) and (4) (b) of that section make it lawful, with the approval and authorization of the Commission, for two or more carriers to consolidate or merge their properties; "or for any carrier . . . to purchase, lease, or contract to operate the properties, or any part thereof, of another," or to acquire control of another through purchase of its stock. On application to the Commission for such approval, appropriate notice of public hearing must be given to the Governor of each State in which any part of the properties of the carriers involved is situated, as well as to the carriers themselves. If after hearing "the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest," the Commission may give its approval and authorization accordingly.[3]

[3] The full text of paragraphs (4) (a) and (4) (b) is as follows:

"(4) (a). It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier

These broadening provisions of the Emergency Railroad Transportation Act, 1933, confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920, (Title IV, 41 Stat. 474, *et seq.*). We found that Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563, 585; *New England Divisions Case*, 261 U.S. 184, 189, 190; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, 478. It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. *Davis* v. *Farmers Co-operative Co.*, 262 U.S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 277. The authority given to the Commission to authorize consolidations, purchases,

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and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

"(b). Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, " has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." *New York Central Securities Corp.* v. *United States, supra.*

It is in the light of this criterion that we must consider the scope of the Commission's authority in relation to provisions which are intended to relieve interstate carriers from burdensome outlays. The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interstate commerce. As we said in *Colorado* v. *United States,* 271 U.S. 153, 163: " Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce." Even explicit charter provisions must yield to the paramount regulatory power of the Congress. *New York* v. *United States,* 257 U.S. 591, 601. Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, " efficiently to render transportation services in interstate commerce." *Colorado* v. *United States, supra,* p. 165. See *Transit Commission* v. *United States,* 284 U.S. 360, 367, 368; *Transit Commission* v. *United States,* 289 U.S. 121, 127; *Florida* v. *United States,*

ante, p. 1. In the present case, the findings of the Commission, setting forth undisputed facts, leave no doubt that the provision of the lease permitting the abandonment, or removal from the State, of general offices and shops of the lessor has direct relation to economy and efficiency in interstate operations and to the achievement of the purpose which the Congress had in view in its grant of authority.

Counsel for the United States and for the Interstate Commerce Commission emphasize the limitations of the challenged provision. They point out that, in addition to the customary "general offices" of railroads, § 3, of Article X, of the Constitution of Texas provides that railroad corporations must "maintain a public office or place in this State for the transaction of its business, where transfers of stock shall be made, and where shall be kept for inspection by the stockholders of such corporations, books," in which shall be recorded the amount of capital stock subscribed, the names of stockholders, etc., and transfers, the amount of its assets and liabilities, and the names and places of residence of its officers. See, also, Art. 4115, Texas Revised Statutes, 1879; Laws of Texas, 1885, c. 68; Arts. 1358, 6281, Revised Civil Statutes of Texas, 1925. Counsel for the United States and for the Interstate Commerce Commission urge that the "Office-Shops Act," here involved, was enacted independently of the above statutes. Laws of Texas, 1889, c. 106; Art. 6275, Revised Civil Statutes of Texas, 1925. Accordingly, they insist that the order of the Commission and the lease in question apply to the "general offices," shops, etc., and not to the "public office" of the domestic corporation. Counsel for the applicant, the Kansas City Southern Railway Company, submits that the lease by necessary implication requires the Texarkana & Fort Smith Railway Company to maintain its principal office

in Texas as the Texas statute requires. See as to service of process, Art. 2029, Revised Civil Statutes of Texas, 1925. In view of the disclaimer on behalf of the United States and the Interstate Commerce Commission, and the interpretation placed upon the provision in the lease, we assume that the question before us merely relates to the abandonment or removal of "general offices," shops, etc., as distinguished from the "public office" required by the Texas statutes, that is, to those transportation facilities the continued maintenance of which, in the circumstances described by the findings of the Commission, would entail unnecessary and burdensome expenditures in operation. As thus construed, we find no ground for concluding that the approval of the provision in the lease was beyond the Commission's authority. There is no interference with the supervision of the State over the lessor in matters essentially of state concern, as distinguished from the operations which in their effect upon interstate commerce are of national concern.

The State invokes § 11 of Title I of the Emergency Railroad Transportation Act, 1933, which provides that "Nothing in this title shall be construed to relieve any carrier from any contractual obligation which it may have assumed, prior to the enactment of this Act, with regard to the location or maintenance of offices, shops, or roundhouses at any point." But that section refers explicitly to what is contained in Title I of the Act, with respect to "emergency powers," dealing with the authority of the Federal Coördinator of Transportation and kindred matters, and does not by its terms apply to the provisions of Title II of the Act, in which are found the amendments of § 5 of the Interstate Commerce Act with respect to the approval and authorization by the Interstate Commerce Commission of consolidations, purchases and leases. And § 11 of Title I relates to "contractual obligations" assumed by the carrier and does not aptly refer to obli-

gations imposed by statute.[4] The insertion of the provision in Title I, with its restricted application, and the omission of a similar provision from Title II, indicate an intentional distinction.

Title II of the Emergency Railroad Transportation Act, 1933, in amending § 5 of the Interstate Commerce Act, carries its own provision as to immunity from state requirements which would stand in the way of the execution of the policy of the Congress through the Commission's orders. Subdivision (15) of § 5 as amended, reads: [5]

"The carriers and any corporation affected by any order under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order."

The view that, by reference to the context, this immunity should be regarded as limited to those "restraints or prohibitions by or imposed under authority of law" which fall within the general description of "anti-trust" legislation, is too narrow. The rule of "*ejusdem generis*" is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained. *Mid-Northern Oil Co.* v. *Montana,* 268 U.S. 45, 49. The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of economy and efficiency in interstate transportation by the

[4] See Cong. Rec., 73d Cong., 1st sess., Vol. 77, Pt. 5, p. 4439.

[5] Compare subdivision (8) of § 5 of the Interstate Commerce Act as amended by Transportation Act, 1920.

removal of the burdens of excessive expenditure, the removal of such burdens when imposed by state requirements was an essential part of the plan. The State urges that in the course of the passage of Transportation Act, 1920, a provision for federal incorporation of railroads was struck out. But while railroad corporations were left under state charters, they were still instrumentalities of interstate commerce, and, as such, were subjected to the paramount federal obligation to render the efficient and economical service required in the maintenance of an adequate system of interstate transportation. *Colorado* v. *United States, supra.*

The decision in *International & Great Northern Ry. Co.* v. *Anderson County*, 246 U.S. 424, is not opposed. Apart from the fact that in that case the state court had found, upon the verdict of a jury, that the maintenance of the offices and shops at the place at which the predecessor of the plaintiff in error had contracted to maintain them, did not impose a burden upon interstate commerce—a finding which this Court found no reason to disturb (*Id.*, pp. 433, 434)—the case arose prior to the enactment of Transportation Act, 1920, and the question here presented was not involved.

The decree dismissing the bill of complaint is affirmed.

Decree affirmed.

CONCORDIA FIRE INSURANCE CO. *v.* ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 12. Argued October 11, 12, 1933.—Decided June 4, 1934.

1. A state statute may be valid when given a particular application and invalid when given another. P. 545.
2. Under an Illinois statute taxing net receipts of foreign fire, marine and inland navigation insurance companies at the same rate as all other personal property, the net receipts were assessed at full value,

whereas personal property in general was systematically assessed at 60% of its value, with the result that the tax on the insurance companies was disproportionately high. *Held* that the discrimination was a denial of equal protection of the laws. P. 545.

3. Upon a review of a judgment recovered by a State in a suit to collect a tax on net receipts of a foreign fire insurance company, *held* that the company was in no position to attack the assessment upon the ground that failure to deduct insurance losses in making it resulted in unconstitutional discrimination, it appearing that it did not claim the right to such deduction in the proceeding before the assessors and was precluded by the state law from claiming it for the first time in defense of the suit. P. 546.
4. Substantial equality and fair equivalence are important factors in determining the presence or absence of arbitrary discrimination in state taxation. Mathematical equivalence is neither required nor attainable; nor is identity in mere modes of taxation of importance where there is substantial equality in the resulting burdens. P. 547.
5. A foreign corporation complaining of a tax on its net receipts upon the ground that no such tax is imposed upon competing domestic corporations is under the burden of showing that the latter are not subjected to other forms of taxation, not applied to foreign corporations, and which are the substantial equivalent of the tax in question. P. 546.
6. Two classes of foreign corporations, those engaged in fire, marine, inland navigation and casualty insurance and those engaged in casualty insurance alone, do business in Illinois by license of the State. The second class conduct the same character of casualty insurance business as the first class, and these businesses are competitive. Both classes are taxed on their local tangible property; but the former class are subjected in addition to a property tax on net receipts, including the receipts from their casualty business—a tax which the latter class are not required to pay. *Held* that the discrimination is arbitrary and unconstitutional. P. 548.

350 Ill. 365; 183 N.E. 241, reversed in part.

APPEAL from a judgment recovered by the State in an action of debt, to collect taxes.

Mr. George Wharton Pepper, with whom *Messrs. William B. Bodine, Frederick D. Silber,* and *Herbert W. Hirsh* were on the brief, for appellant.

Mr. Hiram T. Gilbert, with whom *Messrs. Leon Hornstein* and *Harris F. Williams* were on the brief, for appellee.

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action of debt brought by the State of Illinois, in a court of that State, against the Concordia Fire Insurance Company, to recover taxes levied on the net receipts of the latter from its insurance agencies in Cook County, Illinois, during annual periods ending April 30 in each of the years 1923–1927. The defendant interposed a plea of *nil debet.* The cause was heard by the court without a jury under a stipulation entitling the defendant to introduce any evidence which would be admissible in equity under appropriate pleadings, and enabling the court to give effect to equitable principles and render judgment in conformity to the evidence. The court found the issues for the defendant and gave judgment accordingly. The Supreme Court of the State disapproved that judgment and in its stead entered one awarding the plaintiff a recovery of smaller taxes than were claimed for the years ending April 30 in 1923–1926 and of the full tax claimed for the year ending April 30 in 1927. 350 Ill. 365; 183 N.E. 241. The defendant then sought and was allowed an appeal to this Court—the ground for the appeal being that the state court overruled the defendant's claim that the state statute, under which the taxes were levied, when construed and applied as sustaining them (it was so construed and applied by that court), conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The defendant is a Wisconsin insurance corporation and, conformably to its charter and to licenses from Illi-

nois, has been engaged for several years in conducting in Cook County in the latter State the business of insuring against fire, marine and inland navigation risks and various so-called casualty risks. Its receipts from that business consisted only of premiums received on policies issued.

The taxes in question were levied under § 30 of a statute of March 11, 1869,[1] entitled "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois." Several sections of the act relate to the creation and regulation of domestic corporations, and others relate to the licensing, taxing, etc., of foreign corporations. Section 30 provides in respect to foreign corporations doing business in the State that in the month of May, annually, " the amount of the net receipts " of their local agencies shall be entered on the local tax lists and be " subject to the same rate of taxation for all purposes, state, county, town and municipal, that other personal property is subject to at the place where located."

Throughout the years 1923–1927, and before, it was the uniform practice of officers and boards engaged in listing and assessing personal property for taxation to treat and list 60% of the fair cash value as the " full value "; and in the years 1923–1926 these officers and boards, pursuant to the direction of a statute of 1919,[2] treated and listed one-half of such " full value " as the " assessed value." By these processes 30% of the fair cash value uniformly was made the basis of personal property taxes in 1923–1926.[3] The same processes were applied in respect of real property. In 1927, before the

[1] Ill. Laws 1869, 209, 228; Ill. Laws 1874, 179; Cahill's Ill. Rev. Stat., c. 73, § 159.

[2] Act June 30, 1919; Ill. Laws 1919, p. 727.

[3] *Hanover Fire Ins. Co.* v. *Harding*, 327 Ill. 590, 594–595.

assessments of that year were completed, the statute directing that 50% of the listed " full value " be taken as the assessed value was repealed,[4] and therefore was not applied in making assessments in that year. But the practice of taking 60% of the fair cash value as the true value was continued and applied in the assessments of that year as it had been in those of earlier years.

In the years 1923–1926 the defendant made returns of its net receipts from fire, marine and inland navigation insurance. The amounts so returned were accepted by the assessing officers as correct, but were not scaled down to 60% or further reduced to one-half of 60%, as was done in the assessment of other property. On the contrary, taxes were levied on the full amounts reported in the returns.

In 1927 the defendant made a return of its net receipts from fire, marine and inland navigation insurance, the amount reported being $76,291.00. It arrived at this amount by deducting operating expenses from gross receipts, the former being treated in the computation as 54% of the latter. On this basis its gross receipts were $165,850.00.[5] The amount returned as net receipts was accepted as correct by the board of assessors of the county and 50% thereof was listed by that body as the assessed value. But that assessment, as will appear presently, was not approved by the next superior body, the board of review of the county.

In November, 1927, the defendant was cited by the board of review to appear before it on December 15 at a hearing on a proposed reassessment of the net receipts in the years covered by the returns of 1923–1926, and also on a review of the assessment by the board of assessors

[4] Act July 7, 1927; Ill. Laws of 1927, p. 745; Cahill's Ill. Rev. Stat. 1933, c. 120, §§ 328, 329.

[5] In one of the briefs this amount is given as $165,670.00.

of the net receipts in the year covered by the return of 1927. The defendant appeared in response to the citation, and in view of the importance which has been given to the hearing it will be described at some length.

At the hearing the defendant had full opportunity to support and supplement its returns by a further showing respecting its gross receipts and the deductions rightly to be made in determining the net receipts. But it chose to stand on its returns and made no additional showing. It freely conceded that the returns included receipts from fire, marine and inland navigation insurance but not from casualty insurance. And it also conceded that the deductions made by it in computing the net receipts included some items, such as overhead expenses and reinsurance costs, the deduction of which had been and still was the subject of diverging opinions.

A full report of the hearing before the board was produced in evidence at the trial of this cause and is set forth in the record. The report shows that—apart from a controversy over the construction and constitutional validity of the taxing statute—the matters brought to the board's attention were (1) defendant's failure to include and state separately in its returns the receipts from casualty insurance; (2) defendant's failure to specify with greater particularity the expenses deducted by it in computing the net receipts; (3) a contention that the receipts from casualty insurance should be included in the computation of the taxable net receipts; and (4) a contention that the deductions made for operating expenses were excessive.

One participant in the hearing, who had investigated and studied the matter, made evidential statements to the board tending to show that the defendant's receipts from fire, marine and inland navigation insurance were about 75% of its total receipts, the remainder coming from casualty insurance, and that the operating expenses of an

insurance business like that of the defendant in Cook County averaged about 30% of the gross receipts. These statements, although informal, were of such a nature that, under repeated rulings of the Supreme Court of the State, the board could consider them and give some weight to them—particularly as the defendant presented no showing to the contrary beyond referring to its returns which were meager and practically silent on the points to which the statements were directed.

Because of a contention which will be noticed later on it should be stated in this connection that in the hearing before the board the defendant neither claimed that losses paid to policy holders should be deducted in determining net receipts nor presented any showing or statement of the amount of such losses.

After the hearing the board made corrected assessments of the net receipts for the years covered by the returns of 1923–1926; but as the Supreme Court of the State held this action of the board was of no effect, save as it brought the original assessments forward and attached them to the 1927 roll without affecting their original validity or force, the corrected assessments do not require further notice.

Coming to the net receipts for the year ending April 30, 1927, the board fixed their amount at $121,550.00, instead of $76,291.00 as stated in the return; and without scaling or debasing the amount so fixed the board listed it as their assessed value.

The record makes it plain that the board in fixing the net receipts for that year at an amount much larger than was stated in the return proceeded on the theory and conviction that the receipts from casualty insurance, which were omitted from the return, should be included in computing the taxable net receipts, and that the deductible operating expenses, which the defendant had regarded as 54% of the gross receipts, were only about 30% of such receipts.

In *Hanover Fire Ins. Co.* v. *Harding,* 327 Ill. 590; 158 N.E. 849,[6] which preceded the decision in the present case about five years, the Supreme Court of the State in considering and applying § 30 now in question ruled that the reductions, by scaling and debasement, applied in the assessment of other personal property should be applied to net receipts of foreign insurance corporations; and on that ground the court condemned a tax of $7,184.18, where such reductions were not made, and awarded a recovery of $2,155.24, which would have been the tax had the net receipts been reduced like the value of other personal property. In stating the reason for its ruling the court said (pp. 601–602):

"Section 30 provides that 'net receipts shall be subject to the same rate of taxation . . . that other personal property is subject to at the place where located.' The use of the word 'other' indicates that the net receipts were to be considered as personal property and treated the same as other personal property. Clearly, this provision means that not only the percentage of the rate but the basis of the valuation shall be the same. Taxing by a uniform rule requires uniformity not only in the rate of taxation but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment as well as in the rate per cent of taxation. (*Green* v. *L. & I. R.R. Co.,* 244 U.S. 499; *Boyer* v. *Boyer,* 113 *id.* 889; *Cummings* v. *National Bank,* 101 *id.* 153; *Exchange Bank* v. *Hines,* 3 Ohio St. 1.) Section 30 and the law of 1898[7] should be construed together, and

[6] This was the second decision of that court in the case. An earlier decision reported in 317 Ill. 366; 148 N.E. 23 had been reversed in 272 U.S. 494 and the case had been remanded for further proceedings.

[7] Sections 17 and 18 of the Act of February 25, 1898, Ill. Laws 1898, p. 32, directed assessing officers to take one-third of the listed

when the net receipts are placed upon the tax list they are to be treated as personal property valuation, and are to be scaled, debased and treated the same as other personal property by the taxing officials."

In that connection the court approvingly quoted from its decision in *People* v. *Cosmopolitan Fire Ins. Co.*, 246 Ill. 442, 448; 92 N.E. 922, as follows:

"The net receipts are personal property and are to be listed by the board of assessors and board of review and taxed the same as other property."

In the present case that court in dealing with the original assessments made in 1923–1926, after the returns in those years were received, said (350 Ill. 372; 183 N.E. 241):

"Such returns were received and accepted as correct by the assessor, acted upon by the taxing bodies and the taxes extended thereon. The taxes extended were not legal, for the reason that the amounts returned as net receipts were not scaled and debased as the returns of other personal property were in the extension of the taxes."

But while the court ruled that the taxes so extended were not legal, it referred to the stipulation whereby judgment was to be rendered in conformity with the evidence and equitable principles, and held that the plaintiff, while not entitled to recover all that was extended, was entitled to a judgment for what would have been due had the net receipts been "scaled and debased in conformity with the assessments on other personal property" and had the taxes been computed and extended on the resulting assessments.

Respecting the tax on net receipts for the year ending April 30, 1927, that court considered several objections,

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"full value" as the "assessed value." These sections were amended June 30, 1919, Ill. Laws 1919, p. 727, by changing "one-third" to "one-half."

not material here, which were urged against the action of the board of review and pronounced them not well grounded. It then sustained the assessment as a valid one, held that equity and good conscience required that the tax be paid, and included the full amount in the recovery awarded the plaintiff. Nothing was said in the opinion about the failure of the board of review to scale the net receipts down to 60% of their value, as was done in assessing other property, nor was there mention of anything which could cure that departure from the general practice or render it of no significance. The matter was plainly presented on the record, and the full tax could not have been sustained without resolving it against the defendant. So the conclusion is unavoidable that it was so resolved, although not given distinct mention.

From the outset the defendant has insisted as part of its defense that the taxing act, if construed and applied as sustaining the taxes in question, denies to it the equal protection of the laws contrary to the prohibition of the Fourteenth Amendment. This appears in the stipulation under which the case was tried, in the opening statement of counsel at the trial, and elsewhere in the record. The Supreme Court, in the opinion, recites that this contention was made, and disposes of it by saying that a like contention was considered and overruled in *Hanover Fire Ins. Co.* v. *Harding,* 327 Ill. 590; 158 N.E. 849; and *People* v. *Franklin National Ins. Co.,* 343 Ill. 336; 175 N.E. 431.

Of course the question in this Court is whether the act as applied by the state court in this case arbitrarily and prejudicially discriminates against the defendant and in favor of others in circumstances fairly admitting of equal treatment. The particulars in which it is claimed that the act works such a discrimination will be taken up separately.

1. It is said that the act as it was applied to the net receipts of 1927 subjects the personal property of a foreign fire insurance corporation to a tax based on its full actual value whereas other personal property is taxed on a basis of 60% of its value. The complaint is not that the net receipts were valued excessively, but that the value when determined was not debased like that of other personal property. The tax, as extended on the full actual value fixed by the board of review, was $5,895.19. Had that value been debased to 60%, as was the value of other personal property, the tax would have been $3,537.11, making a difference of $2,358.08. The act deals specially and only with the taxation of net receipts of foreign fire, marine and inland navigation insurance corporations. The assessing officers acted in virtue of it and the state court held their action was valid under it. Thus both applied it, and they applied it as subjecting the net receipts of a foreign fire insurance company, by reason of being such, to a tax burden 66⅔% greater than that laid on other personal property. No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover Fire Ins. Co.* v. *Harding,* 272 U.S. 494.

Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another. Here the application which was made of § 30 in respect of the taxation of the net receipts of 1927, *i.e.,* the application made by the assessing officers and sustained by the Supreme Court, brought the section into conflict with the prohibition of that clause. This means that as so applied it is invalid, notwithstanding its validity in some different applications.

By way of excusing the failure to debase it is said that something else was done which was a practical equivalent. But careful consideration of the asserted excusing action shows that it neither did nor could operate as a practical equivalent or rectify the material omission sought to be excused. Effect must be given to the board's recorded action in fixing the net receipts at $121,550. This is the amount which should have been debased to 60% to put the net receipts on a plane with other property.

2. It is said that § 30 works an unreasonable discrimination against the foreign corporations named therein in that it taxes their net receipts without permitting in the computation of such receipts a deduction of paid insurance losses, whereas competing domestic corporations are taxed only on what remains of their receipts on April 1 of each year after insurance losses, as well as operating expenses, are paid. But the defendant is not in a position to press this claim. Neither in its return nor in the hearing before the board of review did it make any showing respecting paid insurance losses or ask that such losses be deducted in arriving at its net receipts. The amount of these receipts—whether one sum or another—was primarily, at least, to be determined by the assessing officers. And as the matter was not presented to them it was not admissible, according to the decision of the Supreme Court, for the defendant to make it a ground for asking the court to reject or revise their finding respecting the amount of the receipts.

3. It is said that § 30 arbitrarily discriminates against foreign fire, marine and inland navigation insurance corporations and in favor of competing domestic corporations, in that it taxes the net receipts of the former, while the latter are not subjected to such a tax or to any equivalent tax. It appears to be conceded that no tax is laid directly on the net receipts of the domestic corporations; but it is denied that those corporations are not subjected to an equivalent tax.

For a long period the Supreme Court of the State ruled that the tax imposed by § 30 was a property tax; later on it ruled that the tax was an occupation or privilege tax; and still later it returned to its first ruling. In *Hanover Fire Ins. Co.* v. *Harding,* 272 U.S. 494, this court in sustaining a claim that the section, when applied according to the second ruling, was in conflict with the equal protection clause of the Fourteenth Amendment said (p. 516) :

"Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in."

Counsel differ as to whether that statement was necessary to the decision of the case in hand. Be this as it may, the statement recognizes that substantial equality and fair equivalence are important factors in determining the presence or absence of arbitrary discrimination in such situations; and in this respect the statement is in accord with repeated decisions of this Court. Mathematical equivalence is neither required nor attainable; nor is identity in mere modes of taxation of importance where there is substantial equality in the resulting burdens.

By reason of the presumption of validity which attends legislative and official action one who alleges unreasonable discrimination must carry the burden of showing it. This has not been done as respects the claim now being considered. The defendant recognizes that the domestic

corporations are subjected to some taxes not laid on the foreign corporations, a capital stock tax apparently being one. But the full situation is not shown; nor is it reflected in the opinion of the Supreme Court or the cases there cited. For aught that appears it may be that taxes not applied to the foreign corporations are laid on the domestic corporations which are the substantial equivalent of the net receipts tax. For these reasons this claim of discrimination must fail.

4. It is said that § 30 requires foreign fire insurance corporations to pay the tax not alone on their net receipts from fire, marine and inland navigation insurance but also on their net receipts from casualty insurance, whereas foreign casualty insurance corporations severally conducting a casualty insurance business in direct competition with the foreign fire insurance corporations are not required to pay a tax on their net receipts or any equivalent tax. The factual premises of this claim are stipulated. The Supreme Court of the State has construed § 30 as taxing the foreign fire insurance companies on their net receipts from casualty insurance,[8] and has held that foreign casualty insurance companies conducting a casualty insurance business are not taxable on their net receits under § 30 or any other statute.[9] The stipulation shows that all of these foreign corporations are lawfully entitled by reason of licenses, etc., to conduct their respective businesses within the State; that the casualty corporations are conducting the "same character" of casualty insurance business as the fire insurance corporations; that these businesses are competitive; and that the casualty corporations are taxed on such real and tangible personal property as they hold within the State,

[8] *People* v. *Concordia Fire Ins. Co.*, 350 Ill. 365; 183 N.E. 241.

[9] *Fidelity & Casualty Co.* v. *Board of Review*, 264 Ill. 11; 105 N.E. 704.

while the fire insurance companies are taxed not only on their real and tangible personal property but also on their net receipts from casualty insurance.

This statement shows that § 30, as the state court construes and applies it, works a very real and prejudicial discrimination against the fire insurance companies and in favor of the casualty companies in respect of competitive casualty businesses of the same character, conducted in the same way and in the same territory. The companies are all foreign corporations, and all are for present purposes equally within the jurisdiction of the State and subject to her power to tax. There is no basis or reason for making a distinction between them that has any pertinence to the imposition of a property tax such as is in question. The net receipts which are taxed are not different from those which are not taxed; and both come from the same source. Such a discrimination in respect of the taxation of real or tangible personal property obviously would be essentially arbitrary. In principle it is not different with the net receipts. They are property and the tax which § 30 imposes is, as the state court holds, a property tax. It follows that the section, when construed and applied in the way just described, is in conflict with the equal protection clause of the Constitution. Full support for this conclusion is found in prior decisions.[10]

When the views expressed in this opinion are applied to the judgment under review the result, shortly stated, is as follows: The taxes of 1923–1926, as reduced by the Supreme Court, were only on net receipts from fire,

[10] *Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U.S. 32; *Cumberland Coal Co.* v. *Board of Revision,* 284 U.S. 23; *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239; *Royster Guano Co.* v. *Virginia,* 253 U.S. 412; *Kentucky Finance Corp.* v. *Paramount Auto Exchange,* 262 U.S. 544; *Power Manufacturing Co.* v. *Saunders,* 274 U.S. 490.

marine and inland navigation insurance, and were computed on amounts obtained by proper scaling and debasement. None of the constitutional objections urged against the taxes of those years is well taken. Therefore as to those taxes the judgment must be affirmed. The tax of 1927 was partly on net receipts from casualty insurance and was also laid on the full amount of the net receipts of that year without first debasing them to 60% as was done with other property. In both of these particulars there was a denial of the equal protection of the laws. Therefore as to that tax the judgment must be reversed. And incidentally the cause must be remanded to the Supreme Court of the State for further proceedings not inconsistent with this opinion.

Affirmed in part.
Reversed in part.

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

MR. JUSTICE CARDOZO, dissenting in part.

I am unable to concur in the opinion of the court to the extent of its holding that the tax upon the net receipts of premiums for casualty insurance is a denial to the appellant of the equal protection of the laws.

The validity of a tax depends upon its nature, and not upon its name. *St. Louis Compress Co.* v. *Arkansas,* 260 U.S. 346, 348; *Federal Land Bank* v. *Crosland,* 261 U.S. 374, 378; *Louisville Gas Co.* v. *Coleman,* 277 U.S. 32, 38; *Educational Films Corp.* v. *Ward,* 282 U.S. 379, 387.

In the State of Illinois there has long been a usage, reinforced by statute until 1927, whereby property subject to an *ad valorem* tax is to be assessed at 30% or later 60% of its value, and no more. The highest court of that state held for many years that within the meaning of this rule of debasement, the tax upon the net receipts

of foreign fire and inland navigation companies was a tax upon property, or at least was to be assessed in the same way. *Chicago* v. *Phoenix Insurance Co.*, 126 Ill. 276; 18 N.E. 668; *National Fire Ins. Co.* v. *Hanberg*, 215 Ill. 378, 380; 74 N.E. 77; *People* v. *Cosmopolitan Fire Ins. Co.*, 246 Ill. 442, 448; 92 N.E. 922. This continued to be the practice till 1921. In that year and for a time afterwards, the Court determined that the tax did not come within the rule of debasement, but was a tax upon a privilege. *People* v. *Kent*, 300 Ill. 324; 133 N.E. 276; *People* v. *Barrett*, 309 Ill. 53; 139 N.E. 903; *Hanover Fire Ins. Co.* v. *Carr*, 317 Ill. 366; 148 N.E. 23. The companies affected by the new ruling attacked the discrimination as unconstitutional, and brought the controversy here. In 1926, this court held that the denial of the 30% debasement to foreign corporations brought about an inequality so gross in comparison with the burdens of domestic corporations as to vitiate the tax and the statute that imposed it. *Hanover Ins. Co.* v. *Harding*, 272 U.S. 494. Following that decision, the Supreme Court of Illinois receded from the position that it had taken in 1921, and held that there must be a debasement of value as in the case of taxes upon property. *Hanover Fire Ins. Co.* v. *Harding*, 327 Ill. 590, 601; 158 N.E. 849; *People* v. *Franklin National Ins. Co.*, 343 Ill. 336; 175 N.E. 431.

No descriptive epithet applied to the tax by the Illinois court or any other can transform the essential nature of the tax into something other than it is. *St. Louis Compress Co.* v. *Arkansas, supra; Federal Land Bank* v. *Crosland, supra; Educational Films Corp.* v. *Ward, supra.* No descriptive epithet can make a tax upon the net receipts of the business of the whole year the same as one upon the property located on a particular day of the year within the area of the taxing district, or the same as one upon the capital or income of investments. If the foreign corpo-

rations subjected to this tax on net receipts had taken the gross receipts out of the state at once after collection, or had placed them in an insolvent bank with the result that nothing remained when the assessment day arrived, the tax would still have been due without the abatement of a dollar. *Fidelity & Casualty Co.* v. *Board of Review,* 264 Ill. 11, 14; 105 N.E. 704. On the other hand, nothing would have been due if no premiums had been collected during the year, though the profits of earlier years were still within the county. The tax, whatever its label, is upon the operations of a business. Generally in the United States, though perhaps not abroad, a tax so imposed is spoken of as an excise. *Flint* v. *Stone Tracy Co.,* 220 U.S. 107, 145; cf. Encyclopaedia of the Social Sciences, vol. V, article "Excise"; Seligman, Essays in Taxation, 9th ed., pp. 161, 165, 169. It is what it is, no matter what one calls it. It is a tax on net receipts.

This court did not hold in *Hanover Ins. Co.* v. *Harding, supra,* that if the tax was an excise, it would be void for that reason, though the assessment were to be debased. All that was held was that calling it an excise would not save it if the benefit of debasement was withheld in a discriminatory way. By the same token, calling it a property tax does not condemn it if debasement is allowed. The Illinois court did not hold, in retracting the description of a tax upon a privilege, that a tax upon investments is identical with a tax upon the net receipts of the business of the year. Things so essentially different would not become the same even if a court were to confuse them and speak of them as one. The Illinois court held no more than this, that whatever the differences between the taxes, the two would be viewed as if they were taxes upon property for the purpose of applying the prescribed percentage of debasement. If the tax upon net receipts, including casualty insurance premiums, would not effect a denial of the equal protection of the laws in the event that the

Supreme Court of Illinois, while debasing the assessment, had described the tax as an excise, it does not effect such a denial because the court, rightly or wrongly, has described it as something else. *New York Cent. R. Co.* v. *Miller,* 202 U.S. 584, 596. The question still is, what kind of classification is permissible when the yearly net receipts are the subject matter of the tax and the measure of the burden?

Now, plainly, a tax on the net receipts of a business of a particular kind is not condemned as void for the reason that a like tax or an equal one is not laid on the net receipts of every other kind of business. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U.S. 232, 237; *Pacific Express Co.* v. *Seibert,* 142 U.S. 339, 351, 353; *Adams Express Co.* v. *Ohio,* 165 U.S. 194, 223, 228; *Southwestern Oil Co.* v. *Texas,* 217 U.S. 114; *Oliver Iron Co.* v. *Lord,* 262 U.S. 172; *Stebbins* v. *Riley,* 268 U.S. 137, 142; *Ohio Oil Co.* v. *Conway,* 281 U.S. 146, 159; *Union Bank* v. *Phelps,* 288 U.S. 181. Not even the appellant makes any contention to the contrary. If it did, it would be driven to maintain that the whole statute must fall, and not merely so much as affects the casualty premiums. To say that a tax on the net receipts of one kind of business is void because a like tax is not laid on different forms of business would mean that the net receipts of insurance companies may not be taxed without laying a like tax on manufacturers and merchants. The cases above cited make it clear to the point of demonstration that this is not the law. "The state may tax real and personal property in a different manner." *Bell's Gap R. Co.* v. *Pennsylvania, supra; Ohio Oil Co.* v. *Conway, supra.* "It may impose different specific duties upon different trades and professions, and may vary the rate of excise upon different products." *Ibid.* Nowhere is it intimated that what was approved would have been condemned if there had been in the statute a glossary that gave the tax another name.

With the aid of this analysis the path is cleared to a conclusion. A tax upon the receipts of a business is not invalid as of course because some forms of business are hit and others are exempt. To bring about that result the assailant of the tax must be able to satisfy the court that the classification had its origin in nothing better than whim and fantasy a tyrannical exercise of arbitrary power. *Ohio Oil Co.* v. *Conway, supra,* p. 160; *Stebbins* v. *Riley, supra; Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78. This is the heavy burden that the appellant must sustain. Is it a whimsical and fantastic act to tax foreign fire insurance companies upon all their net receipts, including those derived from casualty premiums, when no such tax is imposed upon the receipts of insurance companies that do a casualty business only? If so, the arbitrary quality of the division must have its origin in the fact that the activities of the one class overlap to some extent the activities of the other. But plainly there is no rule that overlapping classes can never be established in the realm of taxation except at the price of an infringement of the federal constitution. The recognition of such a rule means that a department store may not be taxed on the net receipts of its business unless all the many activities thus brought under a single roof are taxed in the same way when separately conducted. Cf. *State Board of Tax Commissioners* v. *Jackson,* 283 U.S. 527; *Liggett Co.* v. *Lee,* 288 U.S. 517, 532. There must be a tax on the business of the draper, the jeweler, the shoemaker, the hatter, the carpet dealer, and what not. For the same reason, the proprietor of a retail market dealing in meats and groceries and vegetables and fruits will then escape, at least proportionately, a tax upon receipts if the statute does not cover the business of the shopkeeper who derives a modest income from the sale of peanuts and bananas. There are few taxes upon earnings that would pass so fine a sieve. The rule, if

there is any, against the creation of overlapping classes for purposes of taxation is manifestly not one of general validity. The range of its application must depend upon the facts.

Fire insurance companies in Illinois, though organized in other states, have never been allowed to do a general casualty business. It is misleading to argue about them on the assumption that they are appropriately described as casualty insurers. For a long time they were restricted to the risks of fire, lightning and tornadoes, and those of inland navigation and transportation. Act of March 11, 1869; Act of May 31, 1879; Act of June 30, 1885. Then in 1905 (Act of May 16, 1905), they were permitted to insure against the leakage of sprinklers, pumps, and other apparatus of that order. In 1912 (Act of June 11, 1912), the list was increased by adding the risk of damage to property through the use of motor vehicles, but not the risk of liability for damage to the person. In 1925 (Act of June 30, 1925), there was a revision of the form of the then existing statutes, but with little change of substance. After the revision just as formerly the casualty policies written by the fire companies were confined with negligible exceptions to liability for loss through the use of pumps and sprinklers, and liability for damage to property through the use of motor vehicles. They occupied only a small part of the total casualty business.

The accuracy of this statement is perceived upon a survey of the activities of the casualty companies. These companies insure against bodily injury, disability or death as a consequence of accident. They indemnify merchants and other business men against loss by reason of giving credit to customers. They guarantee against loss by burglary or theft or the breakage of glass. They insure against any hazard resulting from the maintenance or use of automobiles or other vehicles, whether there is

personal injury or death or only damage to property. Act of April 21, 1899 as amended by Act of January 30, 1919 and June 28, 1921.

A study of the reports to the Insurance Department of Illinois exposes the overlapping segments in their comparative dimensions. Thus, in 1927, the foreign fire stock-companies of Illinois received premiums from all sources of $68,741,901.34, of which $48,266,624.47 came from fire policies, $680,645.43 from ocean marine insurance, $4,018,503.22 from inland navigation and transportation, $7,866.42 from insurance against earthquakes, $5,743,891.81 from tornado policies, $171,833.15 from insurance against damage by hail, $327,933.61 from riot insurance, $48,414.68 from miscellaneous policies; and $9,476,188.55 from the two fields where the business of fire companies and casualty companies overlap, *i.e.*, motor vehicle property damage and sprinkler leakage ($9,207,-980.43 for the one and $268,208.12 for the other). 60th Annual Insurance Report, part I, pp. 96–105. During the same year the foreign casualty companies received premiums of $7,384,454.72 from accident and health policies, $12,728,070 from workmen's compensation insurance, $3,274,293.63 from fidelity insurance premiums, $7,879,541.48 from automobile liability insurance, exclusive of property damage, $3,047,350.53 from liability insurance not connected with automobiles, $3,957,757.69 from insurance against burglary and theft, $4,371,869.46 from surety bonds, $1,961,445.08 from plate glass insurance, $442,020.20 from steam boiler insurance, $161,-862.91 from engine and machinery insurance, $370,040.02 from credit insurance, $111,164.20 from property damage not connected with motor vehicles, $22,676.10 from insurance of live stock, $794,119.43 from miscellaneous policies, and finally $3,199,397.92 from motor vehicle policies covering damage to property and $44,267.48 from sprink-

ler damage insurance. The total premiums from all sources were $50,679,141.98. 60th Annual Insurance Report, part III, pp. 79–92.

This comparison makes it clear that the business of fire insurance companies as carried on in Illinois is essentially a different one from the business generally known as that of casualty insurance, though the spheres coincide for the space of a small segment. A phase or department of one business may be akin to a phase or department of another, and still the kindred branches may bear unequal taxes. Coincidence of some of the parts is not enough unless the parts are so many as to determine the identity of the whole. The vice of any different principle may be known from its consequences. The drug store of today supplies many things besides medicines and surgical appliances. It has a counter where sandwiches and salads and ice cream and many other edibles are furnished to its customers. If a tax were to be laid upon the earnings of a drug store, the acceptance of the appellant's argument would drive us to a holding that the receipts from the sale of edibles must be excluded from the reckoning in the absence of a like tax upon the proprietors of restaurants. Dealers of ready made clothing have a department of their business in which clothes are made to order. The appellant would have us say that the earnings from that department are exempt under the constitution from a tax upon receipts unless a like tax is laid upon the earnings of the merchant tailor. The legislature in that view may no longer classify the forms of business with an eye to a composite group of uniformities and differences. There must be a segregation of forms of business into their constituent activities, which, to the extent that there is identity, must be taxed for any one group as they are taxed for any other. Immunity from tax laws of unequal operation has never

until now been pressed to that extreme. *Armour & Co.* v. *Virginia,* 246 U.S. 1, 6; *Armour Packing Co.* v. *Lacy,* 200 U.S. 226; *Quong Wing* v. *Kirkendall,* 223 U.S. 59; *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89; *Pacific Express Co.* v. *Seibert, supra; State Board of Tax Commissioners* v. *Jackson, supra; N.Y. ex rel. N.Y. & Albany Lighterage Co.* v. *Lynch,* 288 U.S. 590; *Puget Sound Power & Light Co.* v. *Seattle,* 291 U.S. 619; *A. Magnano Co.* v. *Hamilton, ante,* p. 40.

By the very law of their being, companies whose principal business is to provide insurance against fire, but who provide casualty insurance in a very narrow field, are in a class of their own, with capacities and opportunities essentially diverse from those of companies who are incompetent to provide insurance against fire, but who do insure against almost every other imaginable risk. The state is not called upon to explain the reasons for taxing the members of the one class more heavily than it does the members of the other. The burden is on the appellant who would strike the statute down, and not on the state which invokes the presumption of validity. *Weaver* v. *Palmer Bros. Co.,* 270 U.S. 402, 410; *Detroit Bridge Co.* v. *Tax Board,* 287 U.S. 295, 297. "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, Inc.* v. *Hartford Fire Insurance Co.,* 282 U.S. 251, 257; *Lawrence* v. *State Tax Commission,* 286 U.S. 276, 283; *Williams* v. *Mayor,* 289 U.S. 36, 42. Here the foundation fails, and with it the assault.

Nothing that was determined in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U.S. 389, is at war with this conclusion. There the business done by the taxpayer was the same as that done by others to whom an exemption was allowed. Here they are not the same, though at places they overlap.

535 Syllabus.

For many years the fire insurance companies in Illinois were without power to write a policy unless the hazards were those of fire or of inland navigation. When the power was conferred upon them to cover risks of other kinds, a statute gave them notice that they must pay taxes to the county upon the net earnings of their business from whatever source derived. They were free to use the new privilege or to reject it as they pleased. They accepted it *cum onere* if they accepted it at all.

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

LEWIS, RECEIVER, *v.* FIDELITY & DEPOSIT CO. OF MARYLAND.

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

No. 802. Argued May 4, 1934.—Decided June 4, 1934.

1. Under the Act of June 25, 1930, which authorizes any national bank, upon the deposit with it of public money of a State or any political subdivision thereof, to "give security for the safekeeping and prompt payment of the money so deposited of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State," the authority is not limited to the pledging of specific assets to secure the public deposits, but is broad enough to authorize a general lien on present and future assets of the national bank wherever banks organized under the laws of the State have that power. P. 564.
2. The main purpose of the Act of June 25, 1930, was to equalize the positions of national and state banks; and, without the power granted, national banks would be at a disadvantage in competing for deposits with state banks possessing it. P. 564.
3. A national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law. P. 566.

4. Under statutes of Georgia, a bank, state or national, may be appointed depository of state funds upon giving a bond for the faithful performance of all such duties as shall be required of it by the General Assembly or the laws of the State; and the bond, with sureties, creates a lien on all the bank's assets, existing and subsequently acquired, for the security of the bond. *Held:*

(1) That the execution of such a bond by a national bank was not objectionable upon the ground that the state legislature might in the future impose duties which the bank would be without authority to undertake. P. 566.

(2) That acceptance of the appointment as state depository is not objectionable because of a power in the Georgia governor to issue a *fieri facias* which, if exercised against a national bank, might conflict with R.S. § 5242. P. 566.

(3) Accepting conclusions of the court below as to the application of the lien under the state law and its results in long practice, it is not to be anticipated that it will interfere with performance by national banks of their duties to the public or produce conflict between their duties to the State and to the United States. P. 567.

(4) Though limited in its operation upon commercial assets to such moneys, stocks, bonds, notes, etc., as shall be captured by a receivership, the lien, in the event of insolvency, is not legally a preference, and to give it effect would not conflict with the policy expressed by § 50 of the National Bank Act. P. 568.

(5) A provision of the state law requiring that the bond of a national bank shall be double the deposit secured and that of a state bank only equal to it, does not appear to conflict with or cloud the clear provision attaching the lien to depository bonds as such and without qualifications. P. 569.

5. A national bank became a depository of state funds and gave a bond which under the state law created a general lien on its assets in favor of the State to secure the bond. The contract was for a term of years extending before and after the passage of the Act of June 25, 1930, which first empowered such banks to give such security under state laws; but during the entire period both parties believed the lien valid and deposits were made, withdrawn and renewed on the faith of that assumption until some time after the date of that Act, when the bank became insolvent. *Held* that the lien became operative as to deposits made after the date of the Act, and that execution of a new bond was not necessary. P. 570.

6. A statute is not retroactive merely because it draws on antecedent facts for its operation. P. 571.

67 F. (2d) 961, affirmed.

CERTIORARI, 291 U.S. 658, to review the reversal of a decree in equity denying a prior lien on assets of an insolvent national bank to the surety on a bond which it had furnished for the security of deposits of state funds.

Messrs. Wallace Miller and *George P. Barse,* with whom *Messrs. Samuel H. Wiley, John F. Anderson,* and *F. G. Awalt* were on the brief, for petitioner.

Mr. Max F. Goldstein, with whom *Mr. Arthur G. Powell* was on the brief, for respondent.

By leave of Court, *Messrs. F. G. Awalt* and *George P. Barse* filed a brief on behalf of the Comptroller of the Currency, as *amicus curiae.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Under statutes of Georgia, in force since 1879, a bank, state or national, may be appointed depository of state funds. To qualify it must give a bond for the faithful performance of its duty. A bond with surety creates a lien on all the bank's assets, both those held at the time of the execution of the bond and those subsequently acquired.[1]

[1] "The bond to be made by the State depositories may be a personal bond or may be made by a deposit with the State treasurer of United States bonds or Georgia State bonds, or either one or both of said methods." § 1256, Code of Georgia (1910). Section 1252 provides that the depository bond shall have "the same binding force and effect as the bond required by law to be given by State treasurers, and, in case of default shall be enforced in like manner." Section 218 of the Code relating to the treasurer's bond provides that "a lien is hereby created in favor of the State upon the property of the treasurer to the amount of said bond, and upon the property of the securities upon his said bond to the amount for which they may be severally liable, from the date of the execution thereof." The

In July, 1928, the Governor of Georgia appointed The Hancock National Bank of Sparta, Georgia, a state depository for the term of four years. It gave a bond with the Fidelity and Deposit Company of Maryland as surety in the sum of $10,000 for the faithful discharge of its duties. From time to time thereafter, until May 23, 1932, the tax collector of Hancock County deposited in the bank moneys collected on account of state taxes. On that day the Comptroller of the Currency declared the bank insolvent and appointed a receiver for whom the petitioner, John C. Lewis, was later substituted. The amount of state funds then on deposit was $6,157.41. This sum, and the accrued interest, the company paid to the State and received an assignment of its rights arising out of the deposit. Then, the company brought in the federal court for the Middle District of Georgia this suit in equity against the receiver to enforce a lien for the amount upon all the assets in his hands, claiming priority according to the date of the bond.

The District Court, after denying a motion to dismiss, heard the cause substantially upon agreed facts. It ruled that the company was entitled to the rights of the State by subrogation and by transfer; held that neither the State nor the company was entitled to a lien or to preferential treatment; and allowed the claim as one entitled merely to a *pro rata* dividend. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment and remanded the cause for further proceedings, holding that

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Supreme Court of Georgia held, in cases involving state banks, that under these statutes the State acquires a lien on all the assets of a depository bank, both those at the time of the execution of the bond and those subsequently acquired. See *Seay* v. *Bank of Rome,* 66 Ga. 609; *Colquitt* v. *Simpson,* 72 Ga. 501; *Simpson* v. *Mathis,* 79 Ga. 159; 3 S.E. 646. Compare *State* v. *Brobston,* 94 Ga. 95; 21 S.E. 146. *Standard Accident Ins. Co.* v. *Luther Williams Bank & Trust Co.,* 45 Ga. App. 831; 166 S.E. 260.

the asserted lien was valid, subsisting in favor of the company, and entitled to the priority claimed. 67 F. (2d) 961. This Court granted certiorari.

That court, following *Pottorff* v. *El Paso-Hudspeth Road District,* 62 F. (2d) 498, ruled, as matter of federal law, that national banks had under National Bank Act as enacted in 1864 power to pledge assets to secure public deposits. It ruled as matter of state law that the lien is a contractual one arising, not *proprio vigore* by reason of the statutes, but by contract of the bank as an incident of giving a personal bond; that these statutes apply to both state and national banks, and the scope of the lien is the same in respect to both; declared, in describing its character, that from the date of the bond the lien attaches to all property real and personal then owned or thereafter acquired; that a grantee of real estate having constructive notice would take subject to the lien; that as to money, bonds, stocks, notes, drafts and other choses in action, the lien of the State is inferior to the rights of third persons who receive the property *bona fide* in the ordinary course of business prior to insolvency or sequestration; and that the lien is inferior even to the right of depositors to set-off against their own indebtedness that of the bank to them.

The court took judicial notice of the fact that throughout the fifty-three years since the enactment of the law both national and state banks had acted as state depositories; that the lien had been enforced against money and choses in action when captured by a receivership, but had never been asserted as to commercial assets transferred in due course of business; that the existence of the lien had presented no obstacle to the ordinary operations of the banking business or interfered in any way with the performance by national banks of their federal functions; and that a bank's appointment as state depository is customarily advertised and accepted as evi-

dence of soundness and credit. Compare *In re Blalock*, 31 F. (2d) 612.

In *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U.S. 245, and *Marion* v. *Sneeden*, 291 U.S. 262, decided after the entry of the judgment below, we held that a national bank had, prior to the Act of June 25, 1930, no power to make any pledge to secure deposits except the federal deposits specifically provided for by Acts of Congress. It follows that, in 1928, no lien arose when the bank was appointed depository; and that the judgment of the Circuit Court of Appeals must be reversed unless the Act of June 25, 1930, c. 604, 46 Stat. 809, authorizes a national bank to give as security a general lien of the character prescribed by the Georgia statutes.

That Act provides:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

First. The receiver contends that the Act of 1930 should be construed as authorizing merely a pledge of specific assets to secure public deposits; and that the giving of a general lien upon the bank's assets is still *ultra vires.* The language of the Act is broad enough to authorize giving a general lien on present and future assets, wherever banks organized under the laws of the State have such power; and it should be given that construction. For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The policy of equalization was adopted in the National Bank Act

of 1864, and has ever since been applied, in the provision concerning taxation.[2] In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches;[3] in those conferring power to act as fiduciary;[4] in those concerning interest on deposits;[5] and in those concerning capitalization.[6] It appears also to have been of some influence in securing the grant in 1913 of the power to loan on mortgage.[7] Compare *Fidelity & Deposit Co.* v. *Kokrda,* 66 F. (2d) 641, 642.

Second. The receiver insists that, even if the Act of 1930 authorizes the giving of a general lien, the lien here asserted must fail because there are provisions in the Georgia law inconsistent with the National Bank Act

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[2]Acts of June 3, 1864, c. 106, § 41, 13 Stat. 99, 111; Feb. 10, 1868, c. 7, 15 Stat. 34; R.S. § 5219; Mar. 25, 1926, c. 88, 44 Stat. 223. See *Van Allen* v. *Assessors,* 3 Wall. 573; *Mercantile Bank* v. *New York,* 121 U.S. 138; *First National Bank* v. *Hartford,* 273 U.S. 548.

[3]Acts of Feb. 25, 1927, c. 191, § 7, 44 Stat. 1224, 1228; June 16, 1933, c. 89, § 23, 48 Stat. 162, 189. See 36 Op. Atty. Gen. 116, 344.

[4]Acts of Dec. 23, 1913, c. 6, § 11(k), 38 Stat. 251, 262; Sept. 26, 1918, c. 177, § 2, 40 Stat. 967, 968; compare June 16, 1933, c. 89, § 24(a, b), 48 Stat. 162, 190. See *First National Bank* v. *Fellows,* 244 U.S. 416; *Burnes National Bank* v. *Duncan,* 265 U.S. 17.

[5]Acts Feb. 25, 1927, c. 191, § 16, 44 Stat. 1224, 1232 (to pay no greater interest on time and savings deposits than state banks); and note in particular June 16, 1933, c. 89, § 11(b), 48 Stat. 162, 181 in which national banks are forbidden to pay interest on demand deposits except on deposits of state, county, etc., where state law demands it.

[6]Act of Feb. 25, 1927, c. 191, § 4, 44 Stat. 1224, 1227.

[7]Acts of Dec. 23, 1913, c. 6, § 24, 38 Stat. 251, 273 (see 50 Cong. Rec. 4819; 51 Cong. Rec. 1189); Sept. 7, 1916, c. 461, 39 Stat. 752, 754 (64th Cong., 1st Sess., see Report No. 481, p. 14); Feb. 25, 1927, c. 191, § 16, 44 Stat. 1224, 1232. See *First National Bank* v. *Anderson,* 269 U.S. 341, 354; *First National Bank* v. *Hartford,* 273 U.S. 548, 558.

and because obligations are imposed upon state depositories with which no national bank may comply.

1. Attention is called specifically to the terms of the statutory bond which is conditioned "for the faithful performance of all such duties as shall be required" of the depository "by the General Assembly or the laws of this State." The argument is that a national bank is an instrumentality of the United States and cannot subject itself by contract to the laws of a State. But a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law. *National Bank* v. *Commonwealth,* 9 Wall. 353, 362; *McClellan* v. *Chipman,* 164 U.S. 347, 356; *First National Bank* v. *Missouri,* 263 U.S. 640, 656. What obligations to the State the bank assumes may be defined by the law of that State. It is quite possible that the legislature might attempt to impose, under the conditions of the bond, a duty which the bank would be without authority to undertake; and to that extent the contract would be unenforceable. But it is not shown that the obligations as now defined by the courts of Georgia are contrary to anything in the National Bank Act. Moreover, the state court, which would be the controlling authority on the question, might decide that the failure of part of the consideration to be given would not invalidate the appointment.

2. It is urged that acceptance of the appointment as state depository is incompatible with the functions of a national bank, because under § 224 of the Georgia Code it has been held that the Governor may issue a *fieri facias* against the depository bank for the amount due to the State, whereas, Revised Statutes, § 5242, provides that "no attachment, injunction or execution, shall be issued against such association or its property before final judg-

ment in any suit, action or proceeding, in any state, county or municipal court." [8] Assuming, without deciding, that there is such conflict, it is not material here. Section 224 of the Code provides merely a method of enforcing the bond which has not been used here, and hence against which there is at present no occasion for complaint.

3. It is contended that the lower court erred in its rulings on the Georgia law; that under the state statutes, properly construed, the lien attaches to all kinds of property from the date of the bond; that it applies to real estate and other tangible property, to money, bonds, stocks, notes, drafts and other choses in action then owned or thereafter acquired by the bank, and that it is not defeated even by a *bona fide* sale or other disposition of such property in the ordinary course of business; that, consequently, the general lien would present an insuperable obstacle to the bank's serving the public in its ordinary business operations; that the bank could not sell the property it was authorized to acquire, for no one would take it subject to the lien; that the general lien would prevent the pledge of specific bonds or other securities required in order to secure the deposits of the United States and federal agencies pursuant to provisions of the National Bank Act as amended;[9] and that it would prevent the pledge of specific security required to authorize the issue of circulating notes.[10] The lower court took judicial notice of the fact that for more than half a century the general lien described has been in force, and has not interfered with the performance by banks of their duties to the public; and that national banks while serving as depositories have not, so far as appears, ever been

[8] Act of March 3, 1873, c. 269, § 2, 17 Stat. 603; R.S. § 5242.

[9] Act of June 3, 1864, c. 106, § 45, 13 Stat. 99, 113.

[10] Act of March 14, 1900, c. 41, § 12, 31 Stat. 45, 49.

confronted with a conflict between their duties to the State and to the United States. The reasons given by that court for its conclusions as to the operation and effect of the lien under the law of Georgia are set forth fully and persuasively in the opinion of the Circuit Court of Appeals. We cannot say that it erred in the conclusions reached either as to the state law, or as to the facts. Compare *Marion* v. *Sneeden,* 291 U.S. 262, 270–271.

4. The receiver contends that the lien, if limited in its operation upon commercial assets to such moneys, stocks, bonds, notes, drafts and other choses in action as are captured by a receivership, is not a true security at all; that if so limited the alleged lien would, in the event of insolvency, be legally a preference; that to give it effect would conflict with the policy expressed in § 50 of the National Bank Act [11] which forbids preferences made in view of insolvency; and that Congress cannot be assumed to have sanctioned a transaction which though in form a security is in essence a preference.

Sections 50 and 52 do not prohibit liens given prior to insolvency and not in contemplation thereof, whether they arise from express agreements, or are implied from the nature of the dealings between parties, or arise by operation of law. *Scott* v. *Armstrong,* 146 U.S. 499, 510; *Earle* v. *Pennsylvania,* 178 U.S. 449, 454. The lien here asserted arises out of an agreement executed at a time when there was no question of insolvency; nor is it restricted in its operation to the event of insolvency. It may be exercised by execution or otherwise whenever the bank refuses to pay. It resembles the lien which is enforced when seizure is made by the creditor within four months of bankruptcy, of property claimed under an after-acquired property clause of a mortgage; *Thompson* v. *Fairbanks,* 196 U.S. 516; *Humphrey* v. *Tatman,* 198

[11] Act of June 3, 1864, c. 106, § 50, 13 Stat. 99, 114; R.S. § 5236.

U.S. 91.[12] It resembles also those cases where, under the common law of distress or under a statutory lien, described by the courts as "inchoate" or "dormant," a landlord, within four months of bankruptcy, seizing or levying upon whatever property was on the tenant's premises, was held to have a valid lien. *Henderson* v. *Mayer,* 225 U.S. 631; *Richmond* v. *Bird,* 249 U.S. 174. Compare *Minnich* v. *Gardner, ante,* p. 48. The case at bar is unlike *Davis* v. *Elmira Savings Bank,* 161 U.S. 275, relied upon by the receiver, where a New York statute dealing with the administration of insolvent banks provided that in the event of insolvency the deposits of a savings bank would be entitled to a preference.

5. The receiver contends that, under a proper interpretation of the state depository statute, no lien whatever is intended or arises when a national bank gives a bond to secure state deposits, because the bond required of a national bank is more onerous than that required of a state bank.

The bond of the national bank must be double the amount of the deposit; of the state bank only equal to it. The lien is security for the bond, not the deposit; thus in the case of a national bank, if the provision were applicable, the lien would be twice the amount of the deposit. As the court below noted, the double bond may have been thought necessary because the State has not the power to examine national banks. But whatever the occasion for the difference, it does not appear to conflict with or cloud the clear statement of the statute attaching the lien to depository bonds as such and without qualifications. The ultimate decision of this question is for the Supreme Court of Georgia but until it decides otherwise

[12] Compare *In re Ball,* 123 Fed. 164; *In re Rogers,* 132 Fed. 560; *Wood* v. *U.S. Fidelity & Guaranty Co.,* 143 Fed. 424; *In re Glover Specialties Co.,* 18 F. (2d) 314; *In re Riggi Bros. Co.,* 42 F. (2d) 174.

we see no reason for not accepting the holding of the court below as correct.

Third. The receiver contends that even if national banks are authorized under the 1930 Act to give a general lien upon their assets of the character described by the Circuit Court of Appeals, the judgment should be reversed because the bond antedated the Act. It appears that the balance on hand June 25, 1930, was withdrawn soon thereafter; that between June 25, 1930 and the appointment of the receiver, May 23, 1932, deposits were regularly made aggregating a large sum; that from time to time checks were drawn against these deposits; and that all of the balance in bank when the receiver was appointed represented deposits made after the passage of the Act.[13] The appointment of the bank as depository in 1928 and the bond were to cover a period of four years. Though the lien was in form security for the bond, the extent of liability was to be measured by the unpaid balance. Thus, the transaction was not completed in 1928; it was contemplated that there would be continuous dealings between the parties for four years. In fact, the relation continued until the appointment of the receiver. Throughout the whole period the parties intended that the lien should be operative and supposed that it was. The appointment was within the power of the State to confer and of the bank to accept, but by reason of the paramount federal law one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the lien became operative as to deposits thereafter made and is entitled to priority from

[13] The facts concerning the dates of the deposits and the amounts were supplied by counsel for the Comptroller of the Currency who joined with counsel for petitioner in briefs and argument.

the date of the Act. A statute is not retroactive merely because it draws upon antecedent facts for its operation. Compare *Cox* v. *Hart,* 260 U.S. 427, 435; *Ewell* v. *Daggs,* 108 U.S. 143; *Petterson* v. *Berry,* 125 Fed. 902; *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. Ry. Co.,* 62 Fed. 904, 910; *Rosenplanter* v. *Provident Savings Society,* 96 Fed. 721. It was not necessary to go through the form of executing a new bond. Compare *Jones* v. *Guaranty & Indemnity Co.,* 101 U.S. 622, 627. We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date. Compare *Gross* v. *United States Mortgage Co.,* 108 U.S. 477, 488; *West Side Belt R. Co.* v. *Pittsburgh Construction Co.,* 219 U.S. 92; *Charlotte Harbor & Northern Ry. Co.* v. *Welles,* 260 U.S. 8.

Affirmed.

LYNCH *v.* UNITED STATES.*

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

No. 855. Argued May 7, 1934.—Decided June 4, 1934.

1. Policies of yearly renewable term insurance issued under the War Risk Insurance Act, are not gratuities but are contracts of the United States. P. 576.
2. Such valid contracts of the United States are property, and the rights of private individuals arising out of them are protected by the Fifth Amendment. P. 579.
3. Congress is without power to reduce expenditures by repudiating and abrogating the contractual obligations of the United States. P. 580.
4. Consent to sue the United States on a contract is not a part of the obligation of the contract which may not be impaired; it is a privilege accorded, not the grant of a property right protected by the Fifth Amendment, and may be withdrawn at any time. P. 580.

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* Together with No. 861, *Wilner* v. *United States,* certiorari to the Circuit Court of Appeals for the Seventh Circuit.

5. Withdrawal of all remedy, administrative as well as judicial, for enforcement of a contract against the United States would not imply a repudiation of the contract. P. 582.
6. By the provision of § 17 of the Economy Act of March 20, 1933, purporting to repeal "all laws granting or pertaining to yearly renewable term insurance," Congress intended to take away the rights of beneficiaries under outstanding yearly renewable term policies, and not merely to withdraw their privilege to sue the United States in respect of such policies. P. 583.
7. This statutory provision being void in so far as it purports to take away the contractual right, can not by the rules of construction be given effect as a withdrawal of consent to suit; *non constat* that Congress would have wished to deny the remedy if it had realized that the contractual right remained valid. P. 586.
8. Section 5 of the Economy Act providing: "All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision," does not relate to war risk insurance but concerns only pensions, compensation allowances and special privileges, all of which are gratuities. P. 587.

67 F. (2d) 490; 68 *id.* 442, reversed.

CERTIORARI * to review two judgments, in different circuits, which sustained the dismissal by District Courts of actions to recover amounts alleged to be due the beneficiaries of war risk term insurance policies.

Mr. Rowland W. Fixel, with whom *Messrs. Arthur E. Fixel, John J. McCreary,* and *M. Frome Barbour* were on the brief, for petitioner in No. 855.

Mr. Edward H. S. Martin for petitioner in No. 861.

Solicitor General Biggs, with whom *Assistant to the Attorney General Stanley* and *Messrs. Will G. Beardslee* and *Charles Bunn* were on the brief, for the United States.

* See Table of Cases Reported in this volume.

Jurisdiction was refused below because of §§ 5 and 17 of the Economy Act of March 20, 1933.

Section 5 does not concern war risk insurance, and § 17 is the controlling section. By that section " all laws granting or pertaining to yearly renewable term insurance are hereby repealed," with certain saving provisos which do not include this case. The repeal includes the section under which suits on such policies have hitherto been brought in District Courts (World War Veterans' Act, 1924, § 19, as amended by Act of July 3, 1930, c. 839, 46 Stat. 991, 992) and under which this suit was brought. The repeal preceded the filing of the present suit. The situation, therefore, is that at the time the present suit was filed the only law under which jurisdiction of it was conferred upon the court had already been repealed. The court, therefore, held correctly that it had no jurisdiction.

It is clear, and not seriously disputed, that this is the meaning of the Act of 1933. That it was also the purpose of Congress is made clear by the legislative history. The question, therefore, is the power of Congress to withdraw the jurisdiction previously given, and to terminate, before the suit was brought, the consent of the United States to be sued in such a case.

Petitioner complains that the Act of 1933 has wholly confiscated his rights under an insurance contract by repealing all the laws that grant them; but by the same Act of which he complains, the courts were deprived of all jurisdiction to entertain his complaint. If such withdrawal of jurisdiction is valid, the alleged effect of the Economy Act upon petitioner's asserted contract rights can not be considered. *United States* v. *Babcock,* 250 U.S. 328; *Hans* v. *Louisiana,* 134 U.S. 1, 13; *Hill* v. *United States,* 149 U.S. 593; *Beers* v. *Arkansas,* 20 How. 527, 529; *De Groot* v. *United States,* 5 Wall. 419, 432.

There is no difference, we submit, between an asserted violation of the Fifth Amendment involving a con-

tractual obligation and one which does not; nor does a different situation arise where the right to sue is withdrawn from that which arises when it has never been conferred.

Of course, where a right has vested in an individual to sue one other than the United States, Congress may be without power to remove that right. Its absolute power to take away a right to sue applies only where the suit is against the Government. This power is inherent in the status of the Government as a sovereign. *United States* v. *Lee,* 106 U.S. 196, 206; *Bryson* v. *Hines,* 268 Fed. 290.

In short, whatever power Congress may have had over the petitioner's contract, directly, it clearly had the power to close the courts. Having done that before the suit was brought, it follows that the District Court had no jurisdiction of the case, and both courts below have properly so held.

The present suit is not shown to have been filed in time.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases, which are here on certiorari, present for decision the same question. In each, the plaintiff is the beneficiary under a policy for yearly renewable term insurance [1] issued during the World War pursuant to the War Risk Insurance Act of October 6, 1917, c. 105,

[1] Section 404 provides: "That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two, and into other usual forms of insurance. . . ."

Article IV, §§ 400–405. The actions were brought in April, 1933, in federal district courts to recover amounts alleged to be due. In each case it is alleged that the insured had, before September 1, 1919 and while the policy was in force, been totally and permanently disabled; that he was entitled to compensation sufficient to pay the premiums on the policy until it matured by death; that no compensation had ever been paid; that the claim for payment was presented by the beneficiary after the death of the insured; that payment was refused; and that thereby the disagreement arose which the law makes a condition precedent to the right to bring suit. In No. 855, which comes here from the Fifth Circuit, the insured died November 27, 1924. In No. 861, which comes here from the Seventh Circuit, the insured died May 15, 1929.

In each case, the United States demurred to the petition on the ground that the court was without jurisdiction to entertain the suit, because the consent of the United States to be sued had been withdrawn by the Act of March 20, 1933, c. 3, 48 Stat. 9, commonly called the Economy Act.

The plaintiffs duly claimed that the Act deprived them of property without due process of law in violation of the Fifth Amendment. The district courts overruled the objection; sustained the demurrers and dismissed the complaints. Their judgments were affirmed by the circuit courts of appeals. 67 F. (2d) 490; 68 *id.* 442. The only question requiring serious consideration relates to the construction and effect to be given to the clause of § 17 of the Economy Act upon which the Government relies; for the character and incidents of War Risk Insurance and the applicable rules of constitutional law have been settled by decisions of this Court. The clause in question is:

". . . all laws granting or pertaining to yearly renewable term insurance are hereby repealed. . . ."

First. War Risk Insurance policies are contracts of the United States. As consideration for the Government's obligation, the insured paid prescribed monthly premiums. *White* v. *United States,* 270 U.S. 175, 180. True, these contracts, unlike others, were not entered into by the United States for a business purpose. The policies granted insurance against death or total disability without medical examination, at net premium rates based on the American Experience Table of Mortality and three and one-half per cent interest, the United States bearing both the whole expense of administration and the excess mortality and disability cost resulting from the hazards of war. In order to effect a benevolent purpose heavy burdens were assumed by the Government.[2] But the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents.

War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them funda-

[2] The disbursements to June 30, 1933, for term and automatic insurance (the latter provided for those who were permanently and totally disabled or who died within 120 days after entrance into the service and before making application for term insurance) exceeded the premium receipts by $1,166,939,057. Administrator of Veterans' Affairs, Report for Year 1933, p. 28. The annual cost of administration was estimated at $1,744,038.56. Report of United States Veterans' Bureau for 1922, p. 465. War Risk Insurance was devised in the hope that it would, in large measure, avoid the necessity of granting pensions. Term insurance was issued at a very low premium rate. Over 4,684,000 persons applied before the armistice to the amount of about $40,000,000,000 for War Risk term insurance; but over 75 per cent. of the men who carried term insurance while in the service never paid a premium after the war. See Report of Bureau of War Risk Insurance for 1920, pp. 5, 7, 41; Report of United States Veterans' Bureau for 1922, p. 456; for 1925, p. 268.

mentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *United States* v. *Teller,* 107 U.S. 64, 68; *Frisbie* v. *United States,* 157 U.S. 160, 166; *United States* v. *Cook,* 257 U.S. 523, 527. On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

In order to promote efficiency in administration and justice in the distribution of War Risk Insurance benefits, the Administration was given power to prescribe the form of policies and to make regulations. The form prescribed provided that the policy should be subject to all amendments to the original Act, to all regulations then in force or thereafter adopted. Within certain limits of application this form was deemed authorized by the Act, *White* v. *United States,* 270 U.S. 175, 180, and, as held in that case, one whose vested rights were not thereby disturbed could not complain of subsequent legislation affecting the terms of the policy. Such legislation has been frequent.[3] Moreover, from time to time, privileges granted

[3] Extension of class of beneficiaries: Acts of June 25, 1918, c. 104, § 2, 40 Stat. 609; Dec. 24, 1919, c. 16, §§ 2, 3, 4, 13, 41 Stat. 371, 375; Aug. 9, 1921, c. 57, § 23, 42 Stat. 147, 155; May 29, 1928, c. 875, § 13, 45 Stat. 964, 967. Upheld: *White* v. *United States,* 270 U.S. 175.

Payment where beneficiary dies before exhaustion of policy: e.g., Dec. 24, 1919, c. 16, §§ 15, 16, 41 Stat. 371, 376; Aug. 9, 1921, c. 57, § 26, 42 Stat. 147, 156; June 7, 1924, c. 320, § 26, 43 Stat. 607, 614.

Payment where beneficiary incompetent: e.g., Dec. 24, 1919, c. 16, § 5, 41 Stat. 371; Mar. 2, 1923, c. 173, § 1, 42 Stat. 1374; July 2, 1926, c. 723, § 2, 44 Stat. 790, 791.

were voluntarily enlarged and new ones were given by the Government.[4] But no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress; and none could be given by any regulation promulgated by the Administrator. Prior to the Economy Act, no attempt was made to lessen the obligation of the Government.[5] Then, Congress, by a clause of thirteen words included in a very long section dealing with gratuities, repealed " all laws granting or pertaining

[4] Reinstatement of lapsed policies: Aug. 9, 1921, c. 57, § 27, 42 Stat. 147, 156; Mar. 4, 1923, c. 291, § 7, 42 Stat. 1521, 1525; July 2, 1926, c. 723, §§ 15, 17, 44 Stat. 790, 799, 800.

Liability undertaken on certain policies which have lapsed through failure of payment of premiums, been cancelled by surrender or estoppel of later contract: e.g., Dec. 24, 1919, c. 16, § 12, 41 Stat. 371, 374; Aug. 9, 1921, c. 57, § 27, 42 Stat. 147, 156; July 3, 1930, c. 849, § 24, 46 Stat. 991, 1001.

Incontestability in favor of insured: Aug. 9, 1921, c. 57, § 30, 42 Stat. 147, 157; July 3, 1930, c. 849, § 24, 46 Stat. 499, 1001.

Administration may waive time for premium payment, grant various tolerances: Aug. 9, 1921, c. 57, §§ 24, 28, 42 Stat. 147, 155, 157; Mar. 4, 1923, c. 291, § 8, 42 Stat. 1521, 1526.

Proceeds exempted from taxation: June 25, 1918, c. 104, § 2, 40 Stat. 609.

The War Risk Insurance Act provided for the conversion of yearly renewable term insurance into level premium insurance at any time within five years from the date of the termination of the war; and The World's War Veterans' Act of June 7, 1924, c. 320, § 304, 43 Stat. 607, 625, provided that all yearly renewable term insurance should cease on July 2, 1926. But provision for extending the period for conversion and for reinstatement were made by later statutes and by regulations issued thereunder; June 2, 1926, c. 449, 44 Stat. 686; May 29, 1928, c. 875, § 14, 45 Stat. 964, 968; July 3, 1930, c. 849, § 22, 46 Stat. 991, 1001; June 24, 1932, c. 276, 47 Stat. 334. See Reports of United States Veterans' Bureau for 1926, pp. 54–56; for 1927, pp. 23–25; Reports of Administrator of Veterans' Affairs for 1931, p. 32; for 1932, p. 42; for 1933, p. 28.

[5] But compare Acts of June 25, 1918, c. 104, § 2, 40 Stat. 609; Aug. 9, 1921, c. 57, § 15, 42 Stat. 147, 152; March 4, 1923, c. 291, § 1, 42 Stat. 1521; March 4, 1925, c. 553, § 3, 43 Stat. 1302, 1303.

to yearly renewable term insurance." The repeal, if valid, abrogated outstanding contracts; and relieved the United States from all liability on the contracts without making compensation to the beneficiaries.

Second. The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.,* 118 U.S. 235, 238; *United States* v. *Northern Pacific Ry. Co.,* 256 U.S. 51, 64, 67. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.[6] That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power.[7]

The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions

[6] Compare *United States* v. *Bank of the Metropolis,* 15 Pet. 377, 392; *The Floyd Acceptances,* 7 Wall. 666, 675; *Garrison* v. *United States,* 7 Wall. 688, 690; *Smoot's Case,* 15 Wall. 36, 47; *Vermilye & Co.* v. *Adams Express Co.,* 21 Wall. 138, 144; *Cooke* v. *United States,* 91 U.S. 389, 396; *United States* v. *Smith,* 94 U.S. 214, 217; *Hollerbach* v. *United States,* 233 U.S. 165, 171; *Reading Steel Casting Co.* v. *United States,* 268 U.S. 186, 188; *United States* v. *National Exchange Bank,* 270 U.S. 527, 534.

[7] Compare *Lottery Case,* 188 U.S. 321; *Hipolite Egg Co.* v. *United States,* 220 U.S. 45, 58; *Hoke* v. *United States,* 227 U.S. 308, 323; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U.S. 146; *Calhoun* v. *Massie,* 253 U.S. 170, 175. Compare *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 430.

which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an "Act to maintain the credit of the United States." Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Sinking-Fund Cases,* 99 U.S. 700, 719.

Third. Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened.[8] A different rule prevails in respect to contracts of sovereigns. Compare *Principality of Monaco* v. *Mississippi, ante,* p. 313. "The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no

[8] See *Worthen Co.* v. *Thomas, ante,* p. 426; and cases cited by Mr. Justice Sutherland in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 448.

pretensions to compulsive force. They confer no right of action independent of the sovereign will." [9] The rule that the United States may not be sued without its consent is all embracing.

In establishing the system of War Risk Insurance, Congress vested in its administrative agency broad power in making determinations of essential facts—power similar to that exercised in respect to pensions, compensation, allowances and other gratuitous privileges provided for veterans and their dependents. But while the statutes granting gratuities contain no specific provision for suits against the United States,[10] Congress, as if to emphasize the contractual obligation assumed by the United States when issuing War Risk policies, conferred upon beneficiaries substantially the same legal remedy which beneficiaries enjoy under policies issued by private corporations. The original Act provided in § 405:

"That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides." [11]

Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. *DeGroot* v. *United States,*

[9] Hamilton, The Federalist, No. 81.

[10] See Sixth, *infra,* p. 587.

[11] The provision for suit was later modified. See World War Veterans' Act 1924, § 19, as amended by Act of July 3, 1930, c. 849, 46 Stat. 991, 992, under which these suits were brought.

5 Wall. 419, 432. Compare *Darrington* v. *State Bank,* 13 How. 12, 17; *Beers* v. *Arkansas,* 20 How. 527–529; *Gordon* v. *United States,* 7 Wall. 188, 195; *Railroad Co.* v. *Tennessee,* 101 U.S. 337; *Railroad Co.* v. *Alabama,* 101 U.S. 832; *In re Ayers,* 123 U.S. 443, 505; *Hans* v. *Louisiana,* 134 U.S. 1, 17; *Baltzer* v. *North Carolina,* 161 U.S. 240; *Baltzer & Taaks* v. *North Carolina,* 161 U.S. 246.[12] The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, *DeGroot* v. *United States,* 5 Wall. 419, 431; *United States* v. *Babcock,* 250 U.S. 328, 331; and to those arising from some violation of rights conferred upon the citizen by the Constitution, *Schillinger* v. *United States,* 155 U.S. 163, 166, 168. The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away.

Mere withdrawal of consent to sue on policies for yearly renewable term insurance would not imply repudiation. When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States* v. *Babcock,* 250 U.S. 328, 331. It may limit the individual to administrative remedies. *Tutun* v. *United States,* 270 U.S. 568, 576. And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfilment without the interposition of either a court or an administrative tribunal.

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[12] Compare also *Imhoff-Berg Silk Dyeing Co.* v. *United States,* 43 F. (2d) 836, 841; *Synthetic Patents Co.* v. *Sutherland,* 22 F. (2d) 491, 494; *Kogler* v. *Miller,* 288 Fed. 806.

Fourth. The question requiring decision is, therefore, whether in repealing "all laws granting or pertaining to yearly renewable term insurance" Congress aimed at the right or merely at the remedy. It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States.[13] As Congress took away the contractual right it had no occasion to provide for withdrawal of the remedy. Moreover, it appears both from the language of the repealing clause and from the context of § 17 that Congress did not aim at the remedy. The clause makes no mention of consent to sue. The consent to sue had been given originally by § 405 of the Act of 1917, which, like the later substituted sections, applied to all kinds of insurance, making no specific reference to yearly renewable term policies. Obviously, Congress did not intend to repeal generally the section providing for suits.[14] For in March 1933, most of the policies then outstanding were "converted" policies, in no way affected by the Economy Act.[15]

That Congress sought to take away the right of beneficiaries of yearly renewable term policies and not to withdraw their privilege to sue the United States, appears, also, from an examination of the other provisions of § 17. The section reads:

"All public laws granting medical or hospital treatment, domiciliary care, compensation and other allowances, pen-

[13] Veteran Regulation No. 8, promulgated March 31, 1933, pursuant to this Act provides: "V. Except as stated above [matter not here relevant] no payment may hereafter be made under contracts of yearly renewable term insurance (including automatic insurance) and all pending claims or claims hereafter filed for such benefits shall be disallowed."

[14] See Note 11.

[15] The number of "converted policies" in force June 30, 1933, was 616,069. Administrator of Veterans' Affairs, Report for 1933, pp. 25, 27.

sions, disability allowance, or retirement pay to veterans and the dependents of veterans of the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection, and the World War, or to former members of the military and naval service for injury or disease incurred or aggravated in the line of duty in the military or naval service (except so far as they relate to persons who served prior to the Spanish-American War and to the dependents of such persons, and the retirement of officers and enlisted men of the Regular Army, Navy, Marine Corps, or Coast Guard) are hereby repealed, and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted." [16]

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[16] The rest of the section is as follows:

" The Administrator of Veterans' Affairs under the general direction of the President shall immediately cause to be reviewed all allowed claims under the above referred to laws and where a person is found entitled under this Act, authorize payment or allowance of benefits in accordance with the provisions of this Act commencing with the first day of the fourth calendar month following the month during which this Act is enacted and notwithstanding the provisions of section 9 of this Act, no further claim in such cases shall be required. *Provided,* That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: *Provided further,* That, subject to such regulations as the President may prescribe, allowances may be granted for burial and funeral expenses and transportation of the bodies (including preparation of the bodies) of deceased veterans of any war to the places of burial thereof in a sum not to exceed $107 in any one case.

" The provisions of this title shall not apply to compensation or pension (except as to rates, time of entry into active service and

That section deals principally with the many grants of gratuities to veterans and dependents of veterans. Congress apparently assumed that there was no difference between the legal status of these gratuities and the outstanding contracts for yearly renewable term insurance. It used in respect to both classes of benevolences the substantially same phrase. It repealed "all public laws" relating to the several categories of gratuities; and it repealed "all laws granting or pertaining to" such insurance. No right to sue the United States on any of these gratuities had been granted in the several statutes conferring them; and the right to the gratuity might be withdrawn at any time. The dominant intention was obviously to abolish rights, not remedies.

That Congress intended to take away the right under outstanding yearly renewable term policies, and was not concerned with the consent to sue the United States thereon, appears also from the saving clauses in § 17. These provide that "all allowed claims under the above referred to laws" are to be reviewed and the benefits are to be paid "where a person is found entitled under this Act"; and that "nothing contained in this section shall interfere with payments to be made under contracts of yearly renewable term insurance under which payments have commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending."

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special statutory allowances) being paid to veterans disabled, or dependents of veterans who died, as the result of disease or injury directly connected with active military or naval service (without benefit of statutory or regulatory presumption of service connection) pursuant to the provisions of the laws in effect on the date of enactment of this Act. The term 'compensation or pension' as used in this paragraph shall not be construed to include emergency officer's retired pay referred to in section 10 of this title."

That is, the rights under certain yearly renewable term policies are excepted from the general repealing clause.[17]

Fifth. There is a suggestion that although, in repealing all laws "granting or pertaining to yearly renewable term insurance," Congress intended to take away the contractual right, it also intended to take away the remedy; that since it had power to take away the remedy, the statute should be given effect to that extent, even if void insofar as it purported to take away the contractual right. The suggestion is at war with settled rules of construction. It is true that a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall. *Dorchy* v. *Kansas,* 264 U.S. 286, 288, 290. Here, both those essentials are absent. There is no separate provision in § 17 dealing with the remedy; and it does not appear that Congress wished to deny the remedy if the repeal of the contractual right was held void under the Fifth Amendment.

War Risk Insurance and the war gratuities were enjoyed, in the main, by the same classes of persons; and were administered by the same governmental agency. In respect of both, Congress had theretofore expressed its benevolent purpose perhaps more generously than would have been warranted in 1933 by the financial condition of the Nation. When it became advisable to reduce the Nation's existing expenditures, the two classes of benevolences were associated in the minds of the legislators; and it was natural that they should have wished to sub-

[17] Compare Veteran Regulation No. 8, March 31, 1933.

ject both to the same treatment. But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly renewable term policies if it had realized that these had contractual rights. It is, at least, as probable that Congress overlooked the fundamental difference in legal incidents between the two classes of benevolences dealt with in § 17 as that it wished to evade payment of the Nation's legal obligations.

Sixth. The judgments below appear to have been based, in the main, not on § 17 of the Economy Act, but on § 5 which provides:

"All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

This section, as the Solicitor General concedes, does not relate to War Risk Insurance. It concerns only grants to veterans and their dependents—pensions, compensation allowances and special privileges, all of which are gratuities. The purpose of the section appears to have been to remove the possibility of judicial relief in that class of cases even under the special circumstances suggested in *Crouch* v. *United States,* 266 U.S. 180; *Silberschein* v. *United States,* 266 U.S. 221; *United States* v. *Williams,* 278 U.S. 255; *Smith* v. *United States,* 57 F. (2d) 998. Compare *United States* v. *Meadows,* 281 U.S. 271.

Seventh. The Solicitor General concedes that in No. 861 no question is presented except that of jurisdiction dependent upon the construction of the clause in § 17 of the Economy Act discussed above. He contends in No. 855, that if jurisdiction is entertained, the demurrer

should be sustained on the ground that the complaint fails to set forth a good cause of action, since it fails to show that the suit was brought within the period allowed by law. This alleged defect was not pleaded or brought to the attention of either of the courts below. Nor was it brought by the Solicitor General to the attention of this Court when opposing the petition for a writ of certiorari. We do not pass upon that question, which like others relating to the merits, will be open for consideration by the lower courts upon the remand.

Eighth. Mention should be made of legislation by Congress enacted since the commencement of these suits.

1. Act of June 16, 1933, c. 101, § 20, 48 Stat. 309 provides:

"Notwithstanding the provisions of section 17, title I, Public Numbered 2, Seventy-third Congress, any claim for yearly renewable term insurance on which premiums were paid to the date of death of the insured . . . under the provisions of laws repealed by said section 17 wherein claim was duly filed prior to March 20, 1933, may be adjudicated by the Veterans' Administration on the proofs and evidence received by Veterans' Administration prior to March 20, 1933, and any person found entitled to the benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws. . . ."

2. Section 35 of the Independent Offices Appropriation Act of 1935, passed on March 27–28, 1934, over the President's veto, provides:

"That notwithstanding the provisions of section 17 of title I, of an Act entitled 'An Act to maintain the Credit of the United States Government' approved March 20, 1933, and section 20 of an Act entitled 'An Act making appropriations for the Executive offices, etc. . . .' approved June 16, 1933, any claim for yearly renewable term insurance under the provisions of laws repealed by said section 17, wherein claim was duly filed prior to

March 20, 1933, and on which maturity of the insurance contract had been determined by the Veterans' Administration prior to March 20, 1933, and where payments could not be made because of the provisions of the Act of March 20, 1933, or under the provisions of the Act of June 16, 1933, may be adjudicated by the Veterans' Administration and any person found entitled to yearly renewable term insurance benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws." [18]

The provision in the Act of June 16, 1933, which was enacted before the entry of judgments by the district courts, does not appear to have been considered by the lower courts. The provision in the Act of March 27–28, 1934, was enacted after the filing in this Court of the petitions for certiorari but before the writs were granted. As neither of these Acts was referred to by the Solicitor General or by counsel for the petitioners, we assume that there is nothing in them, or in any action taken thereunder, which should affect the disposition of the cases now before us. Any such matter also will be open for consideration by the lower courts upon the remand.

Reversed.

FAIRPORT, PAINESVILLE & EASTERN RAILROAD CO. *v.* MEREDITH.

CERTIORARI TO THE COURT OF APPEALS, SEVENTH JUDICIAL DISTRICT, OF OHIO.

No. 820. Argued May 4, 7, 1934.—Decided June 4, 1934.

1. The requirement of the Safety Appliance Act that trains shall be equipped with power brakes implies that such brakes shall be maintained for use. P. 593.

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[18] See instructions issued April 11, 1934, by the Administrator of Veterans' Affairs, pursuant to the Act of March 27–28.

2. The title of an Act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the Act in case of ambiguity. P. 594.
3. Power brakes are required by the Safety Appliance Act for the safety not only of railway employees and passengers on trains but also of travelers on the highways at railway crossings. P. 594.
4. It fairly may be said that the nature of the duty imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to invoke its protection. P. 596.
5. The Safety Appliance Act imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law. P. 598.
6. The doctrine of last clear chance amounts in effect to a qualification of the rule of contributory negligence, having the result of relieving the injured person from the consequences of his violation of that rule; and its application in a grade-crossing case in a state court on the assumption that the accident might have been avoided, notwithstanding the contributory negligence, if power brakes had been maintained as prescribed by the Federal Safety Appliance Act, is a matter of local law. P. 598.

46 Oh. App. 457; 189 N.E. 10, affirmed.

CERTIORARI, 291 U.S. 657, to review the affirmance of a recovery from the Railroad in an action for personal injuries suffered in a highway crossing accident. The Supreme Court of Ohio refused to take up the case.

Messrs. Atlee Pomerene and *Elbert F. Blakely,* with whom *Messrs. Harry T. Nolan* and *Thomas M. Kirby* were on the brief, for petitioner.

No cases in the courts of the United States have been found where the provisions of the Safety Appliance Act have been applied for the benefit of any person except employees and travelers upon the railroad itself.

The purpose of the Act, as shown by the recommendations of President Harrison, which brought it about, and by the title of the Act itself, was confined to employees and travelers. Thornton's Federal Employers' Liability

Act, § 227; Roberts, Federal Liability of Carriers, Vol. 2, § 718; *Clay* v. *Atchison, T. & S. F. Ry. Co.,* 210 S.W. 1072; *Grand Rapids Ry. Co.* v. *United States,* 249 Fed. 650; *St. Louis & S. F. R. Co.* v. *Conarty,* 238 U.S. 243, 250; *Louisville & N. R. Co.* v. *Layton,* 243 U.S. 617; *Lang* v. *New York Central R. Co.,* 255 U.S. 455; *Davis* v. *Wolfe,* 263 U.S. 239, 241.

The violation of a statutory duty is the foundation of an action in favor of such persons only as belong to the class intended by the legislature to be protected by the statute. *Schell* v. *DuBois,* 94 Oh. St. 93, 107; *Hannan* v. *Ehrlich,* 102 Oh. St. 176; *Pittsburgh Ry. Co.* v. *Bingham,* 29 Oh. St. 364; *Baltimore & O. S. W. Ry. Co.* v. *Cox,* 66 Oh. St. 276; *St. Louis & S. F. R. Co.* v. *Conarty,* 238 U.S. 243, 249; *Lake Shore & M. S. Ry. Co.* v. *Harris,* 13 Ohio Cir. Dec. 400; *C. A. & C. Ry. Co.* v. *Workman,* 66 Oh. St. 509.

The holding upon the last clear chance doctrine based upon the Federal Safety Appliance Act deprived the railroad company of its defense of contributory negligence which was clearly established in this case.

The trial court ignored the fact that there was nothing that the crew could do by way of connecting this air hose after the dangerous position of plaintiff was discovered.

The doctrine of last clear chance does not apply unless danger is actually discovered. *Pennsylvania R. Co.* v. *Swartzel,* 17 F. (2d) 869; *Cleveland Ry. Co.* v. *Masterson,* 126 Oh. St. 42.

The error complained of is not cured by any claim that the case might properly have been decided for the plaintiff upon an issue other than the application of the Safety Appliance Act. *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter,* 229 U.S. 265, 276; *Cleveland Ry. Co.* v. *Masterson,* 126 Oh. St. 42.

Mr. David F. Anderson for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Respondent recovered judgment against petitioner upon the verdict of a jury in an Ohio state court of first instance for a personal injury resulting from a collision at a railroad-highway crossing between an automobile which she was driving and a train of cars operated by petitioner over its line of railroad. There is evidence that the train approached the crossing without sounding the whistle of the engine or ringing the bell so as to give warning of the train's approach. There is also evidence which fairly establishes that as respondent drew near the crossing the train was in plain view for a sufficient length of time to have enabled respondent, by the use of ordinary care, to see the train, stop and avoid the collision, and, therefore, that she was guilty of contributory negligence. *Miller* v. *Union Pacific R. Co.*, 290 U.S. 227, 231. The train was equipped with air brakes, in conformity with the federal Safety Appliance Act, as amended, U.S.C., Title 45, c. 1, §§ 1 and 9,[1] and the orders of the Interstate

[1] Section 1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Section 9. Whenever, as provided in this chapter, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said chapter, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be

Commerce Commission made thereunder; but the air was disconnected between the cars and the engine, leaving the brakes of the engine and tender as the only means of stopping the train or checking its speed, thus constituting a clear violation of the act, since the requirement that a train shall be equipped with power brakes necessarily contemplates that they shall be maintained for use. See *United States* v. *Great Northern Ry. Co.*, 229 Fed. 927, 930.

The complaint alleges, as one ground of negligence, failure on the part of petitioner to make an air connection between the engine and cars, and to maintain and use the power brakes. In respect of that ground of negligence the trial court instructed the jury, in effect, that if the violation of the federal act resulted proximately or immediately in the injury complained of, the railroad company was liable. But the jury was also told that if respondent was guilty of contributory negligence she could not recover notwithstanding the negligence of petitioner. The trial court also instructed the jury in respect of the doctrine of the last clear chance—its view apparently being that, notwithstanding the contributory negligence of respondent, petitioner would be liable if, after the danger to respondent became apparent, it could have avoided the injury but for its antecedent failure to maintain and use an equipment of air brakes such as required by the federal act.

The appellate court, in sustaining the judgment of the trial court, held: (1) that the federal law violated by petitioner was enacted not only for the protection of railroad employes and passengers on railroad trains, but

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operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

the public generally—that is to say, as applied to the present case, that the requirement of the federal Safety Appliance Act as to power-controlled brakes and their use imposed a duty upon the railroad company in respect of travelers at railroad-highway crossings; and (2) that the instructions of the trial court in respect of the doctrine of the last clear chance correctly stated the law. 46 Ohio App. 457; 189 N.E. 10.

These two rulings present the questions which the writ brings here for consideration.

First. The contention of petitioner is that the federal Safety Appliance Act was intended only for the protection of employes and travelers upon the railroads, and has no relation to the safety of travelers upon highways or of the public generally. Very likely, the primary purpose in the mind of Congress was to protect employes and passengers. So much is indicated by the title—"An act to promote the safety of employes and travelers upon railroads" etc. And this is borne out by the history of the legislation. President Harrison in his first annual message to Congress called attention to the need of legislation for the better protection of the lives and limbs of those engaged in operating the interstate freight lines of the country, and especially the yard men and brakemen, and expressed the view that Congress had power to require uniformity in the construction of cars used in interstate commerce and the use of approved safety appliances upon them.

But we are asked to hold that the title expresses the sole intent of the act, and this involves a question of statutory construction. The title of an act and the history leading up to its adoption, as aids to statutory construction, are to be resorted to only for the purpose of resolving doubts as to the meaning of the words used in the act in case of ambiguity. *Patterson* v. *Bark Eudora,* 190 U.S. 169, 172; *Cornell* v. *Coyne,* 192 U.S. 418,

430; *Lapina* v. *Williams,* 232 U.S. 78, 92. Compare *Russell Motor Car Co.* v. *United States,* 261 U.S. 514, 519, 522. But here the words of §§ 1 and 9 of the act speak plainly and nothing in the nature or operation of the legislation requires, or suggests the necessity of, an appeal to extrinsic aids to determine their meaning. It may be that the protective operation of § 2 of the act requiring automatic couplers [2] was not meant to extend to persons other than employes. Compare *St. Louis & S. F. R. Co.* v. *Conarty,* 238 U.S. 243; *Louisville & Nashville R. Co.* v. *Layton,* 243 U.S. 617, 620; *Lang* v. *New York Cent. R. Co.,* 255 U.S. 455; *Davis* v. *Wolfe,* 263 U.S. 239, 243; *Philadelphia & R. Ry. Co.* v. *Eisenhart,* 280 Fed. 271. But the installation and use of power brakes required by §§ 1 and 9 so obviously contribute to the safety of the traveler at crossings that it is hardly probable that Congress could have contemplated their inapplicability to that situation.

Section 9, *supra,* provides that when a train is operated with power or train brakes, not less than 50 per cent. (under regulation of the Interstate Commerce Commission now 85 per cent.) of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing the train. That a train so equipped and operated can be brought to a stop much more quickly than by the use of hand brakes is, of course, perfectly clear; and it is reasonable to conclude that a result so readily perceivable lies within the purview of the requirement. The most important purpose of a brake upon any vehicle is to enable its operator to check its speed or stop

[2] Section 2. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

it more quickly than would otherwise be possible. The old railway hand brake was principally for that purpose, but it was undesirable for two reasons—first, because in setting it the brakeman was exposed to danger, and second, and especially in the case of long heavy trains, it did not meet the necessity of stopping the train quickly in emergencies. In this second aspect, the common law duty of the railway company to use ordinary care to provide and keep in reasonably safe condition adequate brakes for the control of its trains was one owing, among others, to travelers in the situation which the respondent here occupied. Sections 1 and 9 of the Safety Appliance Act converts this qualified duty imposed by the common law into an absolute duty, from the violation of which there arises a liability for an injury resulting therefrom to any person falling within the terms and intent of the act. Compare *Louisville & Nashville R. Co.* v. *Layton, supra,* 620; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U.S. 281, 295. To confine the beneficial effect of these provisions to employes and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statute imposing the duty as including all of them.

It fairly may be said that the nature of the duty imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to invoke its protection. In *Atchison, T. & S. F. R. Co.* v. *Reesman,* 60 Fed. 370, where the railroad company failed to erect and maintain sufficient fences, as required by a state statute, in consequence of which an animal got upon the track and derailed the train, it was held than an employe upon the train who was injured was entitled to recover under the statute. In the opinion,

delivered by Mr. Justice Brewer (pp. 373–374), it is said:

"At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. It may well be said that, though primarily intended for the benefit of one class, it was also intended for the protection of all who need such protection. . . . The purpose of fence laws, of this character, is not solely the protection of proprietors of adjoining fields. It is also to secure safety to trains. That there should be no obstruction on the track is a matter of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains, and those who are traveling thereon is the same. To prevent such obstruction being one of the purposes of the statute, any one whose business calls him to be on a train has a right to complain of the company, if it fails to comply with this statutory duty."

See also *Hayes* v. *Michigan Central R. Co.,* 111 U.S. 228, 239–240, and other authorities cited in the *Reesman* case.

In the light of what has now been said, it follows that the duty imposed upon petitioner by the provisions of the act in respect of power-controlled brakes extends to and includes travelers at railway-highway crossings.

Second. The holding of the court below as to the doctrine of the last clear chance is challenged as being contrary to the weight of American authority;[3] but we are

[3] See, for example, *Illinois Cent. R. Co.* v. *Nelson,* 173 Fed. 915; *St. Louis & S. F. R. Co.* v. *Summers,* 173 Fed. 358; *Smith* v. *Norfolk*

precluded from considering the contention because it does not present a federal question. The federal Safety Appliance Act, as we already have said and this court repeatedly has ruled, imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law. The act does not affect the defense of contributory negligence, and, since the case comes here from a state court, the validity of that defense must be determined in accordance with applicable state law. *Moore* v. *C. & O. Ry. Co.*, 291 U.S. 205, 214 *et seq.*, and cases cited; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, *ante*, p. 57. And see *Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U.S. 1, upon second appeal, 220 U.S. 590, 598. The same is true of the doctrine of the last clear chance, which likewise is not affected by the act. If doubt might otherwise exist in respect of the specific application of the cases cited to that doctrine, regarded independently, the doubt would vanish when consideration is given to the relation which it bears to the rule of contributory negligence, namely, that it amounts in effect to a qualification of that rule, *Atchison, T. & S. F. Ry. Co.* v. *Taylor*, 196 Fed. 878, 880, having the result of relieving the injured person from the consequences of his violation of it.

Nothing we have said is to be understood as indicating our acceptance, as a substantive principle, of the ruling of the court below in respect of the point. That question is left open for consideration and determination when, if ever, it shall be so presented as to admit of its being dealt with upon its merits.

Judgment affirmed.

& Southern R. Co., 114 N.C. 728, 734–735; 19 S.E. 863; *Hays* v. *Gainesville Street Ry. Co.*, 70 Texas 602, 607; 8 S.W. 491. *Contra: Thompson* v. *Salt Lake Rapid Transit Co.*, 16 Utah 281, 292; 52 Pac. 92.

DECISIONS PER CURIAM, FROM MARCH 20 TO AND INCLUDING JUNE 4, 1934.*

No. 885. SILSBY *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. Motion submitted March 24, 1934. Decided April 2, 1934. *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). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. H. P. Viering* for appellant. No appearance for appellee. Reported below: 178 La. 663; 152 So. 323.

No. 857. RALPH SOLLITT & SONS CONSTRUCTION CO. *v.* VIRGINIA. Appeal from the Supreme Court of Appeals of Virginia. Jurisdictional statement submitted March 24, 1934. Decided April 2, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Ohio River Contract Co.* v. *Gordon,* 244 U.S. 68, 71, 72; *Gromer* v. *Standard Dredging Co.,* 224 U.S. 362, 371, 372; *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311; *Wabash R. Co.* v. *Flannigan,* 192 U.S. 29; *Roe* v. *Kansas,* 278 U.S. 191; *American Baseball Club* v. *Philadelphia,* 290 U.S. 595. *Mr. John L. Abbot* for appellant. *Messrs. W. W. Martin* and *Henry R. Miller, Jr.,* for appellee. Reported below: 161 Va. 854; 172 S.E. 290.

No. 863. KNASS ET AL. *v.* MADISON & KEDZIE STATE BANK ET AL. Appeal from the Supreme Court of Illinois. Motions submitted March 26, 1934. Decided April 2, 1934. *Per Curiam:* The motions of the appellees to dis-

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* For decisions on applications for certiorari, see *post,* pp. 615, 622.

miss the appeal herein are granted, and the appeal is dismissed for the want of a substantial federal question. *Quong Ham Wah Co.* v. *Industrial Commission,* 255 U.S. 445, 448, 449; *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444, 451; *Knights of Pythias* v. *Meyer,* 265 U.S. 30, 32, 33; *Hicklin* v. *Coney,* 290 U.S. 169, 172. *Mr. Meyer Abrams* for appellants. *Messrs. Silas H. Strawn, Ralph M. Shaw, Harold A. Smith, James C. Condon, Thos. D. Nash,* and *Michael J. Ahern* for appellees. Reported below: 354 Ill. 554; 188 N.E. 836.

No. 862. Braverman *v.* Terrill Bond & Mortgage Co. et al. Appeal from the Supreme Court of Illinois. Motion submitted March 28, 1934. Decided April 2, 1934. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Meyer Abrams* for appellant. *Mr. Emmet F. Byrne* for appellees.

No. 89. Life & Casualty Insurance Co. of Tennessee *v.* McCray. April 2, 1934. Petition for rehearing denied. See 291 U.S. 566.

No. 509. Life & Casualty Insurance Co. of Tennessee *v.* Barefield. April 2, 1934. Petition for rehearing denied. See 291 U.S. 575.

No. 128. Texas & Pacific Ry. Co. *v.* Pottorff, Receiver. April 2, 1934. Petition for rehearing denied. See 291 U.S. 245.

No. 428. CHASSANIOL ET AL. *v* GREENWOOD. April 2, 1934. Petition for rehearing denied. See 291 U.S. 584.

No. 725. MUTUAL LIFE INSURANCE CO. OF NEW YORK *v.* WELLS FARGO BANK & UNION TRUST CO. April 2, 1934. Petition for rehearing denied. See 291 U.S. 676.

No. —, original. OHIO *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL. April 2, 1934. Motion for leave to file bill of complaint submitted by *Mr. John W. Bricker* for the complainant.

No. —, original. ARIZONA *v.* CALIFORNIA ET AL. April 2, 1934. Returns to rules to show cause presented.

No. 655. BOYNTON, ATTORNEY GENERAL, *v.* HUTCHINSON GAS CO. On writ of certiorari to the Supreme Court of Kansas. Argued April 2, 3, 1934. Decided April 9, 1934. *Per Curiam:* The writ of certiorari herein is dismissed for the lack of showing of service of summons and severance upon those appellees in the state court who are not parties to the proceedings in this Court. *Garcia* v. *Vela,* 216 U.S. 598; *Journeymen Stone Cutters Assn. v. United States,* 278 U.S. 566; *Newton* v. *Consolidated Gas Co.,* 264 U.S. 571, 572; 265 U.S. 78, 81, 82. *Mr. John G. Egan,* with whom *Mr. Roland Boynton,* Attorney General of Kansas, and *Mr. Arthur V. Roberts* were on the brief, for petitioner. *Mr. Robert Stone,* with whom *Messrs. Robert D. Garver, James A. McClure, Robert L. Webb, Beryl R. Johnson,* and *Ralph W. Oman* were on the brief, for respondent. Reported below: 137 Kan. 717; 22 P. (2d) 958.

No. 905. NEW YORK EX REL. BLAGDEN *v.* LYNCH ET AL. Appeal from the Supreme Court of New York, Albany County. Jurisdictional statement submitted April 5, 1934. Decided April 9, 1934. *Per Curiam:* 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). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Sidney W. Davidson* for appellant. No appearance for appellees. Reported below: 263 N.Y. 568; 189 N.E. 701.

No. 906. SOUTH PASADENA *v.* SAN GABRIEL ET AL. Appeal from the District Court of Appeal, 2nd Appellate District, of California. Jurisdictional statement submitted April 5, 1934. Decided April 9, 1934. *Per Curiam:* 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). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237(c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Horace E. Vedder* for appellant. *Mr. Benjamin F. Bledsoe* for appellees. Reported below: 134 Cal. App. 403; 25 P. (2d) 516.

No. —, original. EX PARTE DUKE. April 9, 1934. Motion for leave to file petition for writ of mandamus is denied. The motion for leave to proceed *in forma pauperis* is also denied. *Mr. Jesse C. Duke, pro se.*

No. —, original. OHIO *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL. April 9, 1934. A rule is

ordered to issue, returnable April 30 next, requiring defendants to show cause why leave to file the bill of complaint should not be granted.

No. 608. COLUMBUS GAS & FUEL CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. April 9, 1934. Petition for rehearing denied. See 291 U.S. 651.

No. 919. LUTZ *v.* HOUCK ET AL. Appeal from the Supreme Court of New York. Motion submitted April 14, 1934. Decided April 30, 1934. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *Hayes* v. *Missouri,* 120 U.S. 68, 71, 72; *Budd* v. *New York,* 143 U.S. 517, 548; *Toyota* v. *Hawaii,* 226 U.S. 184, 191, 192; *Packard* v. *Banton,* 264 U.S. 140, 143, 144; *Radice* v. *New York,* 264 U.S. 292, 296; *Miller* v. *Wilson,* 236 U.S. 373, 384; *Price* v. *Illinois,* 238 U.S. 446, 453; *Silver* v. *Silver,* 280 U.S. 117, 123, 124; *Sproles* v. *Binford,* 286 U.S. 374, 396. *Mr. George Clinton, Jr.,* for appellant. *Mr. Henry Epstein* for appellees. Reported below: 263 N.Y. 116; 188 N.E. 274.

No. —, original. EX PARTE MARTIN. April 30, 1934. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Milford B. Martin, pro se.*

No. 824. MISSOURI *v.* MISSOURI PACIFIC RY. CO. ET AL. April 30, 1934. Petition for rehearing denied. Act of February 13, 1925, § 13 (43 Stat. 936, 942). See *ante,* p. 13.

No. 344. PUGET SOUND POWER & LIGHT CO. *v.* SEATTLE. April 30, 1934. Petition for rehearing denied. See 291 U.S. 619.

No. 355. TRINITYFARM CONSTRUCTION CO. *v.* GROSJEAN. April 30, 1934. Petition for rehearing denied. See 291 U.S. 466.

No. 796. ILLINOIS BANKERS LIFE ASSN. ET AL. *v.* TALLEY, ADMINISTRATOR. April 30, 1934. Petition for rehearing denied. See 291 U.S. 685.

No. 797. BENSON *v.* SULLIVAN, RECEIVER. April 30, 1934. Petition for rehearing denied. See 291 U.S. 684.

No. 804. BETTS *v.* RAILROAD COMMISSION OF CALIFORNIA. April 30, 1934. Petition for rehearing denied. See 291 U.S. 652.

No. 814. NEW YORK EX REL. SACKETT *v.* LYNCH ET AL. April 30, 1934. Petition for rehearing denied. See 291 U.S. 652.

No. 857. RALPH SOLLITT & SONS CONSTRUCTION CO. *v.* VIRGINIA. April 30, 1934. Petition for rehearing denied. See *ante*, p. 599.

No. 863. KNASS ET AL. *v.* MADISON & KEDZIE STATE BANK ET AL. April 30, 1934. Petition for rehearing denied. See *ante*, p. 599.

No. 627. UTLEY ET AL. *v.* ST. PETERSBURG. April 30, 1934. Petition for rehearing denied. See *ante*, p. 106.

No. 772. CREGIER *v.* COE, COMMISSIONER OF PATENTS. April 30, 1934. Petition for rehearing denied. See 291 U.S. 683.

No. 845. WILLIS *v.* FIRST REAL ESTATE & INVESTMENT CO. ET AL. April 30, 1934. Petition for rehearing denied. See *post*, p. 626.

No. 848. STANDARD OIL CO. *v.* MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. April 30, 1934. Petition for rehearing denied. See *post,* p. 631.

No. —, original. OHIO *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL. April 30, 1934. Return to rule to show cause presented.

No. 847. LANGER, GOVERNOR, ET AL. *v.* GRANDIN FARMERS CO-OPERATIVE ELEVATOR CO. ET AL. Appeal from the District Court of the United States for the District of North Dakota. Argued May 1, 1934. Decided May 7, 1934. *Per Curiam:* The order granting an interlocutory injunction is affirmed. *Meccano, Ltd.,* v. *Wanamaker,* 253 U.S. 136, 141; *Alabama* v. *United States,* 279 U.S. 229, 231; *National Fire Ins. Co.* v. *Thompson,* 281 U.S. 331, 338; *United Drug Co.* v. *Washburn,* 284 U.S. 593; *South Carolina Power Co.* v. *South Carolina Tax Comm'n,* 286 U.S. 525; *Ogden & Moffett Co.* v. *Michigan Public Utilities Comm'n,* 286 U.S. 525. *Mr. P. O. Sathre,* with whom *Mr. William Langer,* Governor of North Dakota, and *Mr. J. A. Heder* were on the brief, for appellants. *Messrs. Herbert F. Horner, Alan E. Gray,* and *John F. Sullivan* were on the brief for appellees. Reported below: 5 F.Supp. 425.

No. 843. GYPSY OIL CO. *v.* OKLAHOMA TAX COMM'N ET AL. Appeal from the District Court of the United States for the Northern District of Oklahoma. Argued May 4, 1934. Decided May 7, 1934. *Per Curiam:* The decree dismissing the bill of complaint is affirmed upon the ground that the District Court was without jurisdiction because the requisite jurisdictional amount was not involved. *Healy* v. *Ratta, ante,* p. 263. *Mr. James B.*

Diggs, with whom *Messrs. Russell G. Lowe, Wm. C. Liedtke, Redmond S. Cole,* and *C. L. Billings* were on the brief, for appellant. *Messrs. C. W. King, George W. Selinger,* and *W. D. Humphrey* were on the brief for appellees. Reported below: 6 F.Supp. 6. See *post,* p. 611.

No. 874. ASSINIBOINE INDIAN TRIBE *v.* UNITED STATES. Appeal from and on writ of certiorari to the Court of Claims. Jurisdictional statement submitted April 28, 1934. Decided May 7, 1934. *Per Curiam:* The appeal herein is dismissed. *Colgate* v. *United States,* 280 U.S. 43. The petition for writ of certiorari is denied. *Messrs. Everett Sanders* and *Joseph E. Davies* for appellant. *Solicitor General Biggs, Assistant Attorney General Blair,* and *Messrs. Charles Bunn* and *George T. Stormont* for the United States. Reported below: 77 Ct.Cls. 347.

No. 968. SMITH *v.* NEW YORK. Appeal from the Court of Special Sessions of the City of New York. Jurisdictional statement submitted April 28, 1934. Decided May 7, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Patsone* v. *Pennsylvania,* 232 U.S. 138, 144; *Silver* v. *Silver,* 280 U.S. 117, 123; *Sproles* v. *Binford,* 286 U.S. 374, 396. *Mr. Albert E. Kane* for appellant. No appearance for appellee. Reported below: 263 N.Y. 255; 188 N.E. 745.

No. 990. NORTHWEST BANCORPORATION *v.* BENSON, COMMISSIONER OF BANKS OF MINNESOTA, ET AL. Appeal from the District Court of the United States for the District of Minnesota. Motion submitted May 3, 1934. Decided May 7, 1934. *Per curiam:* The motion for im-

mediate consideration of the jurisdictional statement is granted. The order denying interlocutory injunction is affirmed. *United Fuel Gas Co.* v. *Railroad Commission,* 278 U.S. 300, 326; *Alabama* v. *United States,* 279 U.S. 229, 231; *National Fire Ins. Co.* v. *Thompson,* 281 U.S. 331, 338; *United Drug Co.* v. *Washburn,* 284 U.S. 593; *South Carolina Power Co.* v. *South Carolina Tax Comm'n,* 286 U.S. 525; *Ogden & Moffett Co.* v. *Michigan Public Utilities Comm'n,* 286 U.S. 525. MR. JUSTICE BUTLER took no part in the consideration and decision of this appeal. *Messrs. G. A. Youngquist, F. H. Stinchfield,* and *Claude G. Krause* for appellant. *Mr. Harry H. Peterson* for appellees. Reported below: 6 F.Supp. 704.

No. 731. HEALY *v.* RATTA. May 7, 1934. Ordered that the words "hawkers or peddlers" be substituted for the words "itinerant vendors of merchandise" in the sixth line from the bottom of the first page of the opinion as delivered. Opinion reported as amended, *ante,* p. 263.

No. 505. MANHATTAN PROPERTIES, INC. *v.* IRVING TRUST CO., TRUSTEE; and

No. 506. BROWN ET AL. *v.* SAME. May 7, 1934. Petition for rehearing denied. See 291 U.S. 320.

No. 635. MCGARRITY, ADMINISTRATOR, *v.* DELAWARE RIVER BRIDGE COMM'N ET AL. May 7, 1934. Petition for rehearing denied. See *ante,* p. 19.

No. 650. HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* DELTA & PINE LAND CO. May 7, 1934. Petition for rehearing denied. See *ante,* p. 143.

No. 905. NEW YORK EX REL. BLAGDEN *v.* LYNCH ET AL. May 7, 1934. Petition for rehearing denied. See *ante*, p. 602.

No. 867. INDIAN VALLEY R. Co. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of California. Submitted May 7, 1934. Decided May 14, 1934. *Per Curiam:* The decree herein is affirmed. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 273, 277; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U.S. 35, 42; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U.S. 382, 392; *Interstate Commerce Comm'n* v. *Oregon-Washington R. & N. Co.*, 288 U.S. 14, 36, 37; *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 663; *Georgia Commission* v. *United States*, 283 U.S. 765, 775; *New York Central Securities Co.* v. *United States*, 287 U.S. 12, 29. *Messrs. John L. McNab, John E. Truman,* and *S. C. Wright* were on the brief, for appellant. *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. Carl McFarland, M. S. Huberman, Mac Asbill, Daniel W. Knowlton,* and *Edward M. Reidy* were on the brief for the United States et al. Reported below: 52 F. (2d) 485.

No. 975. ROBERTS ET AL. *v.* WASHINGTON TRUST Co. Appeal from the Supreme Court of Pennsylvania. Motion submitted May 5, 1934. Decided May 14, 1934. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Robert H. Locke* for appellants.

Mr. John C. Judson for appellee. Reported below: 313 Pa. 584; 170 Atl. 291.

No. 815. O'RYAN ET AL. *v.* MILLS NOVELTY CO. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Argued May 1, 1934. Decided May 21, 1934. *Per Curiam:* In view of the effect of Chapter 317, Laws of New York of 1934, upon the decree of injunction herein, the decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint without prejudice and without costs to either party. *Board of Public Utility Comm'rs* v. *Compania General,* 249 U.S. 425; *United States* v. *Hamburg-American Co.,* 239 U.S. 466, 477, 478; *United States* v. *Alaska S.S. Co.,* 253 U.S. 113, 116, 117; *Railroad Commission* v. *MacMillan,* 287 U.S. 576; *Coyne* v. *Prouty,* 289 U.S. 704. *Mr. Paxton Blair,* with whom *Messrs. Paul Windels* and *Alvin McKinley Sylvester* were on the brief, for petitioner. Mr. *Howard Ellis,* with whom *Messrs. Weymouth Kirkland, Emil Weitzner,* and *Marion B. Stahl* were on the brief, for appellee. By leave of Court, *Messrs. Nat W. Bond* and *Henry B. Curtis* filed a brief on behalf of the City of New Orleans as *amicus curiae.* Reported below: 68 F. (2d) 1009. See also 3 F.Supp. 968.

No. 991. DILL *v.* COLORADO. Appeal from the Supreme Court of Colorado. Jurisdictional statement submitted May 12, 1934. Decided May 21, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Rosenberg* v. *Wisconsin,* 290 U.S. 600, 601; *Mueller* v. *Illinois,* 289 U.S. 711; *Leach* v. *California,* 287 U.S. 579, 590; *Lavine* v. *California,* 286 U.S. 528; *Sproles* v. *Binford,* 286 U.S. 374, 393; *Bandini* v.

Superior Court, 284 U.S. 8, 18; *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 501–503. Insofar as the papers whereon the appeal was allowed seek review in respect of asserted denial of rights under the Federal Constitution by rulings of the Supreme Court of Colorado not involving the validity of any statute of the state, such papers are treated as a petition for writ of certiorari (§ 237 (c), Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938), and certiorari is denied. *Mr. Charles Ginsberg* for appellant. *Mr. Paul P. Prosser* for appellee. Reported below: 94 Colo. 230; 29 P. (2d) 1035.

No. 1004. Ex parte Steckler et al. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted May 12, 1934. Decided May 21, 1934. *Per Curiam:* The appeal herein is dismissed for the reason that the decision of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *New Orleans Water Works Co.* v. *Louisiana Sugar Co.,* 125 U.S. 18, 38, 39; *Cross Lake Club* v. *Louisiana,* 224 U.S. 632, 639, 640; *Long Sault Development Co.* v. *Call,* 242 U.S. 272, 277, 278; *Hardin-Wyandot Lighting Co.* v. *Upper Sandusky,* 251 U.S. 173, 178, 179; *Girard Trust Co.* v. *Ocean & Lake Realty Co.,* 286 U.S. 523; *Real Estate-Land Title & Trust Co.* v. *Springfield,* 287 U.S. 577. *Mr. Thomas Gilmore* for appellants. Reported below: 179 La. 410; 154 So. 41.

No. 1025. Comer *v.* Washington. Appeal from the Supreme Court of Washington. Jurisdictional statement submitted May 12, 1934. Decided May 21, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Fisher* v. *New Orleans,* 218 U.S. 438, 440; *Seattle & Renton Ry.* v. *Linhoff,* 231

U.S. 568, 570; *Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 165, 166; *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 317; *American Ry. Express Co.* v. *Kentucky*, 273 U.S. 269, 272, 273. *Mr. Ewing D. Colvin* for appellant. *Mr. John J. Sullivan* for appellee. Reported below: 176 Wash. 257; 28 P. (2d) 1027.

No. 843. GYPSY OIL CO. *v.* OKLAHOMA TAX COMM'N ET AL. May 21, 1934. *Order:* It is ordered that the *per curiam* opinion of this Court, delivered May 7, 1934, in this cause, be and it is hereby amended to read as follows:

"*Per curiam:* The decree dismissing the bill of complaint is modified so as to provide that the complaint is dismissed upon the ground that the District Court was without jurisdiction because the requisite jurisdictional amount was not involved. *Healy* v. *Ratta, ante*, p. 263. As so modified, the decree is affirmed." See *ante*, p. 605.

No. 978. U.S. FIDELITY & GUARANTY CO. *v.* TOLEDO ET AL.;

No. 979. STANDARD SURETY & CASUALTY CO. *v.* SAME;

No. 980. NATIONAL SURETY CO. *v.* SAME;

No. 981. GUARDIAN CASUALTY CO. *v.* SAME; and

No. 982. VAN SCHAICK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL. *v.* SAME. Appeals from the Supreme Court of Ohio. Jurisdictional statement submitted May 5, 1934. Decided May 28, 1934. *Per Curiam:* The appeals herein are dismissed for the want of a substantial federal question. *Fisher* v. *New Orleans*, 218 U.S. 438, 440; *Seattle & Renton Ry.* v. *Linhoff*, 231 U.S. 568, 570; *Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 165, 166; *Tidal Oil Co.* v. *Flannagan*, 263 U.S. 444, 451; *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 317; *American Ry. Express Co.* v. *Ken-*

tucky, 273 U.S. 269, 272, 273; *Comer* v. *Washington*, *ante*, p. 610. *Mr. Ray Martin* for appellants in Nos. 978, 979, and 980. *Mr. Harold W. Fraser* for appellant in No. 981. *Mr. U. G. Denman* for appellants in No. 982. *Messrs. Ralph W. Doty* and *Earl F. Boxell* for appellees. Reported below: 127 Ohio St. 403; 188 N.E. 755.

No. 18. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTHERN COAL CO.;

No. 19. SAME *v.* C. H. SPRAGUE & SON CO.;

No. 20. SAME *v.* U.S. REFRACTORIES CORP.; and

No. 21. SAME *v.* OSWEGO & SYRACUSE RAILROAD CO. May 28, 1934. The petition for rehearing in these cases is entertained, and the cases are set for hearing on the questions raised in the petition for rehearing and the answers thereto, including the question of the construction and effect of the provisions of § 1005 of the Revenue Act of 1926, on October 8, 1934, after the cases heretofore assigned for that day, and will then be heard with the same effect as though the hearing on said petition had taken place at this term of Court. See 290 U.S. 591.

No. —, original. PORESKY *v.* BREWSTER, JUDGE. May 28, 1934. Motion for leave to file bill of complaint denied. *Mr. Joseph Poresky, pro se.*

No. —. ILLINOIS EX REL. COBINE *v.* ANGSTEN ET AL. May 28, 1934. The application for allowance of appeal, having been considered by the whole Court, is denied.

No. 106. SANDERS *v.* ARMOUR FERTILIZER WORKS ET AL. May 28, 1934. Petition for rehearing denied. See *ante*, p. 190.

No. 597. McKnett *v.* St. Louis & San Francisco Ry. Co. May 28, 1934. Petition for rehearing denied. See *ante,* p. 230.

No. 660. Sauder, Administratrix, et al. *v.* Mid-Continent Petroleum Corp. May 28, 1934. Petition for rehearing denied. See *ante,* p. 272.

Nos. 727 and 728. Spring City Foundry Co. *v.* Commissioner of Internal Revenue. May 28, 1934. Petition for rehearing denied. See *ante,* p. 182.

No. 975. Roberts et al. *v.* Washington Trust Co. May 28, 1934. Petition for rehearing denied. See *ante,* p. 608.

No. 657 (October Term, 1932). Federal Radio Comm'n *v.* Nelson Brothers Bond & Mortgage Co. (Station WIBO);

No. 658 (October Term, 1932). Federal Radio Comm'n *v.* North Shore Church (Station WPCC);

No. 659 (October Term, 1932). Federal Radio Comm'n et al. *v.* Nelson Brothers Bond & Mortgage Co. (Station WIBO); and

No. 660 (October Term, 1932). Federal Radio Comm'n et al. *v.* North Shore Church (Station WPCC). May 28, 1934. Motions for leave to file petition for rehearing out of time; for leave to file cross petition for writs of certiorari; for leave to appoint and refer causes to special master; for rule on Federal Radio Commission to show cause why it took appeals; to vacate mandates prematurely issued; for temporary injunction restraining Johnson-Kennedy Corporation (Station WJKS) from using 560 KC; and for rule on Clerk of this Court

to show cause why he refuses to enter appearance of August Swarz in these cases, submitted by *Mr. August Swarz,* and motions denied. See 289 U.S. 266.

No. 1064. CATTERLIN *v.* OHIO. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted May 26, 1934. Decided June 4, 1934. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Morrison* v. *California,* 291 U.S. 82, 88–91; *Casey* v. *United States,* 276 U.S. 413, 418; *Mugler* v. *Kansas,* 123 U.S. 623, 674. *Messrs. Frank L. Johnson* and *Daniel W. Iddings* for appellant. No appearance for appellee. Reported below: 128 Ohio St. 110; 190 N.E. 578.

No. 1075. HALL *v.* CALIFORNIA. Appeal from the Supreme Court of California. Jurisdictional statement submitted May 26, 1934. Decided June 4, 1934. *Per Curiam:* The appeal herein is dismissed (1) for the want of a properly presented federal question, *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U.S. 341, 343, 344; *Appleby* v. *Buffalo,* 221 U.S. 524, 529; *White River Co.* v. *Arkansas,* 279 U.S. 692, 700; and (2) for the reason that the decision of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *Atlantic Coast Line R. Co.* v. *Mims,* 242 U.S. 532, 535; *Mutual Life Ins. Co.* v. *McGrew,* 188 U.S. 291, 308; *Hartford Life Ins. Co.* v. *Johnson,* 249 U.S. 490, 493. *Mr. Marshall B. Woodworth* for appellant. No appearance for appellee. Reported below: 220 Cal. 166; 30 P. (2d) 23, 996.

No. 964. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WIESE. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

June 4, 1934. *Per Curiam:* Petition for writ of certiorari granted. Judgment reversed on authority of *Helvering* v. *Newport Company,* 291 U.S. 485. *Solicitor General Biggs* for petitioner. No appearance for respondent. Reported below: 68 F. (2d) 878.

No. 578. ASCHENBRENNER *v.* UNITED STATES FIDELITY & GUARANTY CO. June 4, 1934. Leave granted to file petition for rehearing. Petition for rehearing denied. See *ante,* p. 80.

No. 565. LOUGHRAN *v.* LOUGHRAN ET AL. June 4, 1934. Petition for rehearing denied. See *ante,* p. 216.

No. 941. CONTINENTAL CASUALTY CO. *v.* UNITED STATES EX REL. AINSWORTH, TRUSTEE. June 4, 1934. Petition for rehearing denied. See *post,* p. 641.

No. 942. WAHLGREN *v.* BAUSCH & LOMB OPTICAL CO. ET AL. June 4, 1934. Petition for rehearing denied. See *post,* p. 639.

DECISIONS GRANTING CERTIORARI, FROM MARCH 20 TO AND INCLUDING JUNE 4, 1934.

No. 815. O'RYAN, COMMISSIONER OF POLICE, ET AL. *v.* MILLS NOVELTY CO. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Paxton Blair, F. H. LaGuardia,* and *Paul Windels* for petitioners. *Messrs. Weymouth Kirkland, Howard Ellis, Emil Weitzner,* and *Marion B. Stahl* for respondent. Reported below: 68 F. (2d) 1009.

No. 734. REYNOLDS *v.* UNITED STATES. April 2, 1934. Petition for writ of certiorari to the Court of Claims granted. *Mr. Francis W. Hill, Jr.,* for petitioner. *Solicitor General Biggs* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 78 Ct.Cls. —.

No. 831. LYNCH ET AL. *v.* NEW YORK EX REL. PIERSON. April 2, 1934. Petition for writ of certiorari to the Supreme Court of New York granted. *Mr. Henry Epstein* for petitioners. *Mr. Charles W. Pierson* for respondent. Reported below: 237 App. Div. 763; 189 N.E. 684.

No. 834. UNITED STATES *v.* CREEK NATION. April 9, 1934. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Biggs* for the United States. *Messrs. E. J. Van Court* and *Paul M. Niebell* for respondent. Reported below: 77 Ct.Cls. 159.

No. 873. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEW YORK TRUST CO., TRUSTEE; and

No. 899. NEW YORK TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 9, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biggs* for the Commissioner of Internal Revenue. *Messrs. J. Du Pratt White* and *Chauncey Newlin* for New York Trust Co., Trustee. Reported below: 68 F. (2d) 19.

No. 855. LYNCH *v.* UNITED STATES. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Arthur E. Fixel, Rowland W. Fixel, M. F. Barbour,* and *John J. McCreary* for petitioner. *Solicitor General Biggs* for the United States. Reported below: 67 F. (2d) 490.

No. 861. WILNER *v.* UNITED STATES. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Edward H. S. Martin* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee, Randolph C. Shaw,* and *Charles Bunn* for the United States. Reported below: 68 F. (2d) 442.

No. 870. WARNER, ADMINISTRATRIX, *v.* GOLTRA. April 9, 1934. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Messrs. Samuel W. Fordyce, C. Powell Fordyce,* and *Henry J. Richardson* for petitioner. *Mr. Joseph T. Davis* for respondent. Reported below: 334 Mo. 396; 67 S.W. (2d) 47.

No. 901. MCCANDLESS, RECEIVER, *v.* FURLAUD ET AL. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the questions pertaining to the validity of the appointment of the petitioner as ancillary receiver, and his right as such to maintain this suit. *Mr. Ralph Royall* for petitioner. *Mr. Louis B. Eppstein* for respondents. Reported below: 68 F. (2d) 925.

No. 887. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BLISS. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biggs* for petitioner. *Mr. James McKinley Rose* for respondent. Reported below: 68 F. (2d) 890.

No. 888. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HARBISON; and

No. 889. SAME *v.* COLGATE. April 30, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for

the Second Circuit granted. *Solicitor General Biggs* for petitioner. *Messrs. Hugh Satterlee* and *J. E. MacCloskey, Jr.*, for respondents. Reported below: 68 F. (2d) 1004.

No. 895. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* STOCKHOLMS ENSKILDA BANK. April 30, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Biggs* for petitioner. *Mr. Truman Henson* for respondent. Reported below: 62 App.D.C. 360; 68 F. (2d) 407.

No. 904. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MORGAN'S, INC., ET AL. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Biggs* for petitioner. *Mr. Haskell Cohn* for respondents. Reported below: 68 F. (2d) 325.

No. 892. ROWLEY ET AL. *v.* CHICAGO & NORTHWESTERN RY. CO. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Ray E. Lee* and *James A. Greenwood* for petitioners. *Messrs. Samuel H. Cady* and *William T. Faricy* for respondent. Reported below: 68 F. (2d) 527.

No. 883. WACO *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. J. Walter Cocke* for petitioner. No appearance for respondents. Reported below: 67 F. (2d) 785.

No. 909. DETROIT TRUST CO., TRUSTEE, *v.* THE THOMAS BARLUM ET AL.; and

No. 910. SAME *v.* THE JOHN J. BARLUM ET AL. April 30, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Ferris D. Stone, Ray M. Stanley,* and *Ellis H. Gidley* for petitioner. *Messrs. George E. Brand* and *Thomas C. Burke* for respondents. Reported below: 68 F. (2d) 946.

No. 914. MCNALLY *v.* HILL, WARDEN. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. John S. Wise, Jr.,* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 69 F. (2d) 38.

No. 924. VIRGINIA *v.* IMPERIAL COAL SALES CO., INC. May 7, 1934. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia granted. *Messrs. Henry R. Miller, Jr.,* and *W. W. Martin* for petitioner. *Mr. James R. Caskie* for respondent. Reported below: 161 Va. 718; 167 S.E. 268.

No. 954. LONG *v.* ANSELL. May 7, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Seth W. Richardson, Joseph E. Davies, Adrien F. Busick,* and *Raymond N. Beebe* for petitioner. No appearance for respondent. Reported below: 63 App.D.C. 68; 69 F. (2d) 386.

No. 977. BRITISH-AMERICAN TOBACCO CO., LTD. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr.*

H. H. Shelton for petitioner. *Solicitor General Biggs* for respondent. Reported below: 69 F. (2d) 528.

No. 946. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* POWERS, EXECUTOR, ET AL. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Biggs* for petitioner. *Mr. J. Colby Bassett* for respondents. Reported below: 68 F. (2d) 634.

No. 969. IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, *v.* A. W. PERRY, INC. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Charles K. Beekman* and *Edward K. Hanlon* for petitioner. *Messrs. John M. Perry* and *Thos. F. Dougherty* for respondent. Reported below: 69 F. (2d) 90.

No. 962. METROPOLITAN CASUALTY INSURANCE CO. *v.* BROWNELL, RECEIVER. May 21, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. James W. Noel* for petitioner. *Messrs. Sidney S. Miller* and *Samuel D. Miller* for respondent. Reported below: 68 F. (2d) 481.

No. 973. ICKES, SECRETARY OF THE INTERIOR, *v.* VIRGINIA-COLORADO DEVELOPMENT CORP. May 21, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Biggs* for petitioner. No appearance for respondent. Reported below: 63 App.D.C. 47; 69 F. (2d) 123.

No. 994. GILLIS, RECEIVER, *v.* CALIFORNIA. May 28, 1934. Petition for writ of certiorari to the Circuit Court

of Appeals for the Ninth Circuit granted. *Mr. Ernest C. Carman* for petitioner. *Messrs. U. S. Webb* and *H. H. Linney* for respondent. Reported below: 69 F. (2d) 746.

No. 964. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WIESE. See *ante*, p. 614.

No. 1037. NATIONAL PAPER PRODUCTS CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE; and

No. 1038. ZELLERBACH PAPER CO. *v.* SAME. June 4, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. John Francis Neylan* and *J. Paul Miller* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Erwin N. Griswold* and *James W. Morris* for respondent. Reported below: 69 F. (2d) 857.

No. 1039. ZELLERBACH PAPER CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 1040. ZELLERBACH PAPER CO., TRANSFEREE, *v.* SAME; and

No. 1041. NATIONAL PAPER PRODUCTS CO. *v.* SAME. June 4, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. John Francis Neylan* and *J. Paul Miller* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Erwin N. Griswold* and *James W. Morris* for respondent. Reported below: 69 F. (2d) 852.

No. 1033. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* PINKSTON. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Thomas Stevenson* for

petitioners. *Mr. James R. Garfield* for respondent. Reported below: 69 F. (2d) 600.

DECISIONS DENYING CERTIORARI, FROM MARCH 20 TO AND INCLUDING JUNE 4, 1934.

No. 885. SILSBY *v.* LOUISIANA. See *ante*, p. 599.

No. 862. BRAVERMAN *v.* TERRILL BOND & MORTGAGE CO. ET AL. See *ante*, p. 600.

No. 860. FINE *v.* UNITED STATES. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Lawrence M. Fine, pro se.* No appearance for the United States. Reported below: 67 F. (2d) 591.

No. 872. MARSHALL *v.* NEW YORK. April 2, 1934. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. John Marshall, pro se.* No appearance for respondent.

No. 679. RUBIO *v.* SOTTO. April 2, 1934. Petition for writ of certiorari to the Supreme Court of the Philippine Islands, and motion for leave to proceed further *in forma pauperis*, denied. *Elizabeth Rubio, pro se.* No appearance for respondent.

No. 884. PREVETTE, ADMINISTRATOR, ET AL. *v.* UNITED STATES. April 2, 1934. 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. Robert H. McNeill* for petitioners. No appearance for the United States. Reported below: 68 F. (2d) 112.

No. 790. W. J. SAVAGE Co. *v.* KNOXVILLE ET AL. April 2, 1934. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. Norman B. Morrell* for petitioner. *Messrs. Charles H. Smith* and *W. H. Peters, Jr.*, for respondents.

No. 821. FINDLAY ET AL. *v.* FLORIDA EAST COAST RY. Co. ET AL. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Sam R. Marks* and *Francis M. Holt* for petitioners. *Messrs Jesse E. Wald, John C. Cooper, Jr., N. P. Adair, Martin H. Long, Robert H. Anderson, E. J. L'Engle, J. W. Shands,* and *Cloyd LaPorte* for respondents. Reported below: 68 F. (2d) 540.

No. 789. GENERAL PAINT CORP. *v.* KRAMER. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. W. H. Orrick, A. A. Davidson, Preston C. West,* and *Charles E. Townsend* for petitioner. *Messrs. A. J. Biddison, Harry Campbell,* and *John H. Cantrell* for respondent. Reported below: 68 F. (2d) 40.

No. 803. DINUBA ASSOCIATES, LTD. *v.* KILLEFER MANUFACTURING Co. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wm. S. Hodges* for petitioner. *Messrs. Frederick S. Lyon* and *Leonard S. Lyon* for respondent. Reported below: 67 F. (2d) 362.

No. 806. PACIFIC MUTUAL LIFE INSURANCE CO. ET AL. *v.* MCCOMBS ET AL. April 2, 1934. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. S. Lasker Ehrman* for petitioners. *Mr. Robert E. Wiley* for respondents. Reported below: 188 Ark. 52; 64 S.W. (2d) 333.

No. 811. HARPERS FERRY & POTOMAC BRIDGE CO. *v.* PUBLIC SERVICE COMMISSION. April 2, 1934. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Carlyle Barton* for petitioner. No appearance for respondent. Reported below: 114 W.Va. —; 171 S.E. 760.

No. 813. ULMEN *v.* NATIONAL SURETY CO. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. Lowndes Maury* for petitioner. *Mr. John G. Brown* for respondent. Reported below: 68 F. (2d) 330.

No. 817. WEST SHORE R. CO. ET AL. *v.* BOARD OF PUBLIC UTILITY COMMISSIONERS. April 2, 1934. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. John A. Hartpence* for petitioners. *Mr. Frank H. Sommer* for respondent. Reported below: 112 N.J.L. 83; 169 Atl. 829.

Nos. 818 and 819. TERRE HAUTE ELECTRIC CO., INC., *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 2, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. A. E. James* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, John MacC. Hudson,* and *H. Brian Holland* for respondent. Reported below: 67 F. (2d) 697.

No. 822. INDEMNITY INSURANCE CO. *v.* SLOAN. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Roscoe R. Koch, Walter C. Capper,* and *Edward M. Biddle* for petitioner. No appearance for respondent. Reported below: 68 F. (2d) 222.

No. 825. NEW YORK TRUST CO., TRUSTEE, *v.* CARGILE ET AL. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Joseph W. House, James G. Martin, George B. Rose,* and *A. W. Dobyns* for petitioner. *Messrs. Hal L. Norwood* and *Walter L. Pope* for respondents. Reported below: 67 F. (2d) 585.

No. 828. NEW ENGLAND NEWSPAPER PUBLISHING CO. *v.* BONNER; and

No. 846. BONNER *v.* NEW ENGLAND NEWSPAPER PUBLISHING CO. April 2, 1934. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis P. Garland* for New England Newspaper Publishing Co. *Messrs. Richard W. Hale* and *John W. Guider* for Bonner. Reported below: 68 F. (2d) 880.

No. 829. NEW ENGLAND NEWSPAPER PUBLISHING CO. *v.* GRIFFITH. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis P. Garland* for petitioner. No appearance for respondent. Reported below: 67 F. (2d) 1005.

No. 835. ATLANTIC COAST LINE R. CO. *v.* STRINGFELLOW. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Messrs. McKinney Barton, James R. Bussey, and *W. E. Kay* for petitioner. *Messrs. Doyle Campbell* and *Wm. C. McLean* for respondent. Reported below: 67 F. (2d) 1012.

No. 836. Missouri Pacific R. Co. et al. *v.* Treece. April 2, 1934. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Thomas B. Pryor, William L. Curtis, Joseph M. Hill,* and *Henry L. Fitzhugh* for petitioners. *Mr. David S. Partain* for respondent. Reported below: 188 Ark. 68; 64 S.W. (2d) 561.

No. 837. Hill *v.* Brewer et al. April 2, 1934. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. Elias Goldstein, Leon O'Quin,* and *H. C. Walker, Jr.,* for petitioner. *Mr. John B. Files* for respondents. Reported below: 178 La. 533; 152 So. 75.

No. 845. Willis *v.* First Real Estate & Investment Co. et al. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Sydney Smith, Fred C. Knollenberg, H. R. Gamble,* and *J. U. Sweeney* for petitioner. *Messrs. Wm. H. Burges* and *A. H. Culwell* for respondents. Reported below: 68 F. (2d) 671.

No. 853. Helvering, Commissioner of Internal Revenue, *v.* St. Louis Southwestern Ry. Co. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Solicitor General Biggs* for petitioner. *Messrs. B. F. Batts,* and *Claude W. Dudley* for respondent. Reported below: 66 F. (2d) 633.

No. 816. CONTINENTAL OIL CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 2, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Arthur B. Hyman* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John H. McEvers* for respondent. Reported below: 63 App.D.C. 5; 68 F. (2d) 750.

No. 841. POSSELIUS ET AL., EXECUTORS, *v.* FIRST NATIONAL BANK-DETROIT ET AL. April 2, 1934. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Arthur E. Fixel, Clarence J. McLeod,* and *Rowland W. Fixel* for petitioners. *Messrs. Robert X. Marx* and *Rockwell T. Gust* for respondents. Reported below: 264 Mich. 687; 251 N.W. 429.

No. 842. HUTESON *v.* UNITED STATES. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wm. F. Waugh* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 67 F. (2d) 731.

No. 850. NORTHWESTERN MUTUAL LIFE INSURANCE CO. *v.* WEST. April 2, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Paul F. Myers* for petitioner. *Messrs. Leon Tobriner* and *Selig C. Brez* for respondent. Reported below: 62 App.D.C. 381; 68 F. (2d) 428.

No. 812. COMMERCIAL STANDARD INSURANCE CO. *v.* DAVIS ET AL. April 2, 1934. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hobert Price* for petitioner. *Mr. W. J. Rutledge, Jr.,* for respondents. Reported below: 68 F. (2d) 108.

No. 826. IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, *v.* BANK OF AMERICA NATIONAL ASSN. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Robert C. Morris, Martin Saxe,* and *Robert C. Beatty* for petitioner. *Mr. Moses Cohen* for respondent. Reported below: 68 F. (2d) 887.

No. 844. BONDHOLDERS' COMMITTEE ET AL. *v.* REALTY ASSOCIATES SECURITIES CORP. ET AL. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioners. *Mr. Alfred T. Davison* for respondents. Reported below: 69 F. (2d) 41.

No. 849. TITLE GUARANTEE & TRUST CO. *v.* BOWERS, EXECUTOR. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Graham Sumner* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Erwin N. Griswold, Sewall Key,* and *Lucius A. Buck* for respondent. Reported below: 67 F. (2d) 892.

No. 852. NOAKES *v.* STANDARD OIL CO. ET AL. April 2, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Cleon K. Calvert* and *George R. Hunt* for petitioner. *Messrs. Wm. Marshall Bullitt* and *John E. Tarrant* for respondents. Reported below: 68 F. (2d) 1011.

No. 876. NASHVILLE, CHATTANOOGA & ST. LOUIS RY. *v.* BYARS. April 2, 1934. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Messrs. Fitzgerald Hall* and *Wm. A. Miller* for petitioner. *Mr. Virgil Y. Moore* for respondent. Reported below: 252 Ky. 507; 67 S.W. (2d) 497.

No. 775. MYERS, ADMINISTRATOR, *v.* UNITED STATES. April 2, 1934. Petition for writ of certiorari to the Court of Claims denied. The motion to remand is also denied. *Messrs. Newton D. Baker, T. G. Thompson, Thaddeus G. Benson,* and *John L. McMaster* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. Charles Bunn* for the United States. Reported below: 77 Ct.Cls. 429; 2 F.Supp. 1000.

No. 905. NEW YORK EX REL. BLAGDEN *v.* LYNCH ET AL. See *ante,* p. 602.

No. 906. SOUTH PASADENA *v.* SAN GABRIEL ET AL. See *ante,* p. 602.

No. 897. KEYS *v.* KEETS ET AL.; and

No. 898. SAME *v.* HANSBOROUGH ET AL. April 9, 1934. Petition for writs of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. John O. Keys, pro se.* No appearance for respondents. Reported below: 62 App.D.C. 362; 68 F. (2d) 409.

No. 911. BODENHEIMER *v.* CONFEDERATE MEMORIAL ASSN. April 9, 1934. 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. Robert H. McNeill* for petitioner. No appearance for respondent. Reported below: 68 F. (2d) 507.

No. 823. BURNHAM *v.* ARCOLA SUGAR MILLS CO. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert H. Kelley* for petitioner. No appearance for respondent. Reported below: 67 F. (2d) 981.

No. 830. ROSSMOORE *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel E. Darby, Jr.,* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Charles Bunn* and *James W. Morris* for respondent. Reported below: 67 F. (2d) 1009.

No. 839. KANSAS CITY STRUCTURAL STEEL CO. ET AL. *v.* DAGGETT ET AL. April 9, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Stanley H. Fischer, Norman Fischer,* and *Cyrus Crane* for petitioners. *Messrs. I. N. Watson, Henry N. Ess,* and *C. V. Garnett* for respondents. Reported below: 334 Mo. 207; 65 S.W. (2d) 1036.

No. 851. MAY *v.* DISTRICT OF COLUMBIA. April 9, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Dewey S. Edwards* for petitioner. *Messrs. E. Barrett Prettyman* and *Elwood H. Seal* for respondent. Reported below: 63 App.D.C. 10; 68 F. (2d) 755.

No. 877. ST. PAUL BRIDGE & TERMINAL RY. CO. *v.* GENOVA, ADMINISTRATRIX. April 9, 1934. Petition for writ of certiorari to the Supreme Court of Minnesota

denied. *Mr. Morton Barrows* for petitioner. *Mr. Samuel A. Anderson* for respondent. Reported below: 189 Minn. 555; 250 N.W. 190.

No. 878. ST. PAUL BRIDGE & TERMINAL RY. CO. *v.* NATALINO. April 9, 1934. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Morton Barrows* for petitioner. *Mr. Samuel A. Anderson* for respondent. Reported below: 190 Minn. 124; 251 N.W. 669.

No. 690. APARTMENT CORPORATION *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Theodore B. Benson* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *J. P. Jackson* for respondent. Reported below: 67 F. (2d) 3.

No. 696. STANDARD OIL CO. ET AL. *v.* THOMPSON. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. George L. Buist* for petitioners. *Mr. Sam M. Wolfe* for respondent. Reported below: 67 F. (2d) 644.

No. 848. STANDARD OIL CO. *v.* MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. F. D. Madison, Alfred Sutro, Felix T. Smith,* and *Claude R. Branch* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius*

A. Buck for respondent. Reported below: 67 F. (2d) 111.

No. 875. BAUMAN ET AL. *v.* CHICAGO & NORTH WESTERN RY. CO. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul F. Good* for petitioners. *Messrs. Wymer Dressler, Robert D. Neely, Wm. T. Faricy,* and *Samuel H. Cady* for respondent. Reported below: 69 F. (2d) 171.

No. 858. PERRY ET AL., TRUSTEES, *v.* PAGE, COLLECTOR OF INTERNAL REVENUE. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. James F. Armstrong* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, S. E. Blackham,* and *H. Brian Holland* for respondent. Reported below: 67 F. (2d) 635.

No. 799. PRICE *v.* UNITED STATES. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. P. McLean* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John H. McEvers* for the United States. Reported below: 68 F. (2d) 133.

No. 833. UNITED STATES EX REL. WILKINSON ET AL. *v.* HINES, ADMINISTRATOR OF VETERANS' AFFAIRS. April 9, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wm. Wolff Smith* for petitioners. *Solicitor General Biggs* and *Messrs. Will G. Beardslee* and *W. Marvin Smith* for respondent.

No. 866. BLUMENTHAL *v.* GREENFIELD. April 9, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Robert T. McCracken* and *Ralph S. Harris* for petitioner. *Messrs. Stanley Folz* and *George Wharton Pepper* for respondent. Reported below: 69 F. (2d) 294.

No. 918. BEALE *v.* NEW YORK. April 30, 1934. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Grant O. Beale, pro se.* No appearance for respondent. Reported below: 239 App. Div. 261.

No. 927. LEE *v.* ADERHOLD, WARDEN. April 30, 1934. 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. Parker H. Lee, pro se.* No appearance for respondent. Reported below: 68 F. (2d) 824.

No. 931. UPTON *v.* HARRISON, EXECUTOR, ET AL. April 30, 1934. 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. *Messrs. Robert H. McNeill* and *Leland Stanford* for petitioner. No appearance for respondents. Reported below: 68 F. (2d) 232.

No. 943. BRIDGES *v.* ALABAMA. April 30, 1934. Petition for writ of certiorari to the Court of Appeals of Alabama, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. G. Ernest Jones* and *Benjamin F. Ray* for petitioner. No appearance for respondent. Reported below: 152 So. 51.

No. 935. PERKINS ET AL. *v.* HARRISON, JUDGE. April 30, 1934. Petition for writ of certiorari to the Supreme Court of Arizona, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Cephas F. Perkins, pro se.* No appearance for respondent.

No. 971. LEWIS, EXECUTOR, *v.* SIMON, JUDGE. April 30, 1934. Petition for writ of certiorari to the Supreme Court of Louisiana, and motion for leave to proceed further *in forma pauperis,* denied. *Agnes E. Lewis, pro se.* No appearance for respondent. Reported below: 178 La. 227; 151 So. 189.

No. 984. SMALL *v.* NEW YORK. April 30, 1934. Petition for writ of certiorari to the Supreme Court of New York, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. George Small* and *Samuel Rubinton* for petitioner. No appearance for respondent.

No. 989. UNITED STATES EX REL. NERBONNE *v.* HILL, WARDEN. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Alfred R. Nerbonne, pro se.* No appearance for respondent. Reported below: 70 F. (2d) 1006.

No. 854. GEORGE *v.* UNITED STATES. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will E. Orgain* for petitioner. *Solicitor General Biggs* and *Mr. Harry S. Ridgely* for the United States. Reported below: 68 F. (2d) 513.

No. 864. AMES *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Burton E. Eames* and *R. Gaynor Wellings* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, John MacC. Hudson,* and *H. Brian Holland* for respondent. Reported below: 68 F. (2d) 301.

No. 871. OWSLEY *v.* UNITED STATES. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edgar Wright* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 68 F. (2d) 162.

No. 893. THE GILDERSLEEVE No. 325 *v.* HOWARD; and

No. 894. NORTHWESTERN FIRE & MARINE INSURANCE CO. *v.* SEABOARD SAND & GRAVEL CO. April 30, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William F. Purdy* for petitioners. *Messrs. Anthony V. Lynch* and *Horace L. Cheyney* for respondents. Reported below: 67 F. (2d) 997.

No. 865. POMEROY ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 30, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Samuel F. Beach, Robert M. Heth,* and *Morgan H. Beach* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John H. McEvers* for respondent. Reported below: 62 App.D.C. 364; 68 F. (2d) 411.

No. 879. MESECK TOWING & TRANSPORTATION CO. ET AL. *v.* BAKER ET AL;

No. 880. SAME *v.* SMITH-MURPHY CO., INC.; and

No. 881. SAME *v.* RYAN ET AL. April 30, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Erskine* for petitioners. *Messrs. Anthony V. Lynch, John W. Crandall,* and *Horace L. Cheyney* for respondents. Reported below: 69 F. (2d) 54.

No. 882. AMCHANITZKY *v.* SINNOTT. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan Amchanitzky, pro se. Solicitor General Biggs, Assistant Attorney General Blair,* and *Mr. H. Brian Holland* for respondent. Reported below: 69 F. (2d) 97.

No. 890. EATON, COLLECTOR OF INTERNAL REVENUE, *v.* HARWOOD. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. Henry F. Parmelee* for respondent. Reported below: 68 F. (2d) 12.

No. 891. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WESTERN UNION TELEGRAPH CO. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. Francis R. Stark* for respondent. Reported below: 68 F. (2d) 16.

No. 900. FISKE ET AL. *v.* MISSOURI ET AL. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. G. A.*

Buder, Jr., and *Oscar E. Buder* for petitioners. No appearance for respondents. Reported below: 69 F. (2d) 683.

No. 925. STOODY CO. *v.* MILLS ALLOYS, INC. ET AL. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles C. Montgomery* for petitioner. *Mr. Frank W. Dahn* for respondents. Reported below: 67 F. (2d) 807.

No. 896. OLSON *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. W. W. Spalding* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Erwin N. Griswold* and *James W. Morris* for respondent. Reported below: 67 F. (2d) 726.

No. 902. CHEVROLET MOTOR CO. *v.* WATSON. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Arthur Miller* and *Alton Gumbiner* for petitioner. *Mr. William T. Thompson* for respondent. Reported below: 68 F. (2d) 686.

No. 912. LEHIGH VALLEY R. CO. *v.* MCGRATH, ADMINISTRATRIX. April 30, 1934. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Howard Cobb* and *Harold E. Simpson* for petitioner. *Mr. Clayton R. Lusk* for respondent. Reported below: 263 N.Y. 657; 189 N.E. 742.

No. 913. STREET ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. April 30, 1934. Petition for

writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George E. H. Goodner* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, Lucius A. Buck,* and *H. Brian Holland* for respondent. Reported below: 67 F. (2d) 1012.

No. 923. LEHIGH & NEW ENGLAND R. Co. *v.* HEISTER, ADMINISTRATRIX. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Morton L. Fearey* and *Wm. Jay Turner* for petitioner. *Mr. Thomas J. O'Neill* for respondent. Reported below: 68 F. (2d) 1005.

No. 956. PARKER BROTHERS *v.* FAGAN, RECEIVER. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Kenneth I. McKay* and *Maynard Ramsey* for petitioner. *Mr. Donald C. McMullen* for respondent. Reported below: 68 F. (2d) 616.

No. 958. DELAWARE & HUDSON R. CORP. *v.* COTTRELL. April 30, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wade H. Ellis* and *H. T. Newcomb* for petitioner. *Mr. Joseph F. Gunster* for respondent. Reported below: 69 F. (2d) 195.

No. 916. TENNESSEE EX REL. LEA ET AL. *v.* BROWN ET AL. April 30, 1934. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Messrs. L. E. Gwinn, Clarence Darrow, Arthur Garfield Hays,* and *Henry E. Colton* for petitioners. *Mr. Dennis G. Brummitt* for respondents. Reported below: 166 Tenn. 669; 64 S.W. (2d) 841.

No. 874. ASSINIBOINE INDIAN TRIBE *v.* UNITED STATES. See *ante,* p. 606.

No. 942. WAHLGREN *v.* BAUSCH & LOMB OPTICAL CO. ET AL. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Roy M. Wahlgren, pro se. Messrs. Silas H. Strawn* and *John D. Black* for respondents. Reported below: 68 F. (2d) 660.

No. 1022. MILLEN *v.* CAPEN, SHERIFF. May 7, 1934. 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. George Stanley Harvey* for petitioner. *Mr. Charles B. Rugg* for respondent.

No. 908. WALDEN, JUDGE, *v.* OKLAHOMA EX REL. SCHOOL DISTRICT NO. 40, BRYAN COUNTY. May 7, 1934. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Guy H. Sigler* for petitioner. *Mr. C. C. Hatchett* for respondent. Reported below: 167 Okla. 144; 28 P. (2d) 546.

No. 915. CEDAR PARK CEMETERY ASSN., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Leonard L. Cowan* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, Lucius A. Buck,* and *H. Brian Holland* for respondent. Reported below: 67 F. (2d) 699.

No. 921. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* LYNCHBURG TRUST & SAVINGS BANK ET AL. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Biggs* for petitioner. *Mr. Samuel H. Williams* for respondents. Reported below: 68 F. (2d) 356.

No. 922. SHAWKEE MANUFACTURING CO. ET AL. *v.* HARTFORD-EMPIRE CO. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Allan C. Bakewell, Otto R. Barnett, Jo Bailey Brown, Drury W. Cooper,* and *William B. Jaspert* for petitioners. *Messrs. Clarence P. Byrnes, Thomas G. Haight, Vernon M. Dorsey, William J. Belknap,* and *Robson D. Brown* for respondent. Reported below: 68 F. (2d) 726.

No. 926. WILLOUGHBY CAMERA STORES, INC. *v.* UNITED STATES. May 7, 1934. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Jules Chopak* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Lawrence* for the United States. Reported below: 21 C.C.P.A. (Cust.) 322; T.D. 46,851.

No. 928. BROCK, STATE BANK COMMISSIONER, ET AL. *v.* WAINER. May 7, 1934. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Messrs. William C. Dufour, John St. Paul, Jr., Henry P. Dart, Jr.,* and *Leonard B. Levy* for petitioners. *Messrs. James Wilkinson* and *John D. Miller* for respondent. Reported below: 178 La. 961, 152 So. 578; 178 La. 687, 152 So. 331.

Nos. 929 and 930. UTILITIES POWER & LIGHT CORP. ET AL. *v.* IRVING TRUST CO., TRUSTEE, ET AL. May 7, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles A. Boston* and *Henry Wollman* for petitioners. *Mr. Thurlow M. Gordon* for respondents. Reported below: 68 F. (2d) 859.

No. 933. BOSTON & MAINE RAILROAD *v.* FERNALD, ADMINISTRATRIX. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clive C. Handy* for petitioner. *Mr. Sol Gelb* for respondent. Reported below: 68 F. (2d) 1001.

No. 934. BRUSSELBACK *v.* CHICAGO JOINT STOCK LAND BANK ET AL. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Morris Townley* for petitioner. *Solicitor General Biggs* and *Messrs. Erwin N. Griswold* and *Peyton R. Evans* for respondents. Reported below: 69 F. (2d) 598.

No. 939. MISSOURI PACIFIC R. CO. *v.* BENSON. May 7, 1934. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Edward J. White, Thomas Hackney,* and *Leslie A. Welch* for petitioner. *Mr. Frank P. Walsh* for respondent. Reported below: 334 Mo. 851; 69 S.W. (2d) 656.

No. 941. CONTINENTAL CASUALTY CO. *v.* UNITED STATES EX REL. AINSWORTH, TRUSTEE. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William P. Smith* for petitioner. *Mr. C. J. Doyle* for respondent. Reported below: 68 F. (2d) 577.

No. 961. HERSHON, TRUSTEE IN BANKRUPTCY, *v.* ABELSON. May 7, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Marcy Finkelstein* for petitioner. *Mr. Harry Tabershaw* for respondent. Reported below: 69 F. (2d) 102.

No. 975. ROBERTS ET AL. *v.* WASHINGTON TRUST CO. See *ante,* p. 608.

No. 1003. UNITED STATES EX REL. GALLIVAN *v.* HILL, WARDEN. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Burton Gallivan, pro se.* No appearance for respondent. Reported below: 70 F. (2d) 840.

No. 1008. BENTON *v.* UNITED STATES. May 14, 1934. 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. Warren E. Miller* for petitioner. No appearance for the United States. Reported below: 70 F. (2d) 24.

No. 903. UNITED STATES EX REL. NEW YORK WAREHOUSE, WHARF & TERMINAL ASSN., INC., ET AL. *v.* DERN, SECRETARY OF WAR. May 14, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Harper A. Holt, John Philip Hill, Francis W. Hill, Jr.,* and *Robert F. Cogswell* for petitioners. *Solicitor General Biggs, Assistant Attorney General Blair,* and *Messrs. Aubrey Lawrence* and *Charles Bunn* for respondent. Reported below: 63 App.D.C. 28; 68 F. (2d) 773.

No. 907. GOLDING *v.* UNITED STATES. May 14, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. George E. Golding, pro se. Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 78 Ct. Cls. 682.

No. 936. VANS AGNEW, EXECUTRIX, *v.* FORT MYERS DRAINAGE DISTRICT. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Palmer Garrett* for petitioner. No appearance for respondent. Reported below: 69 F. (2d) 244.

No. 938. GLANZ *v.* UNITED AMERICAN TRUST & SAVINGS BANK ET AL. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jacob Levy* for petitioner. *Messrs. Carl Meyer, David F. Rosenthal,* and *Frank D. Mayer* for respondents. Reported below: 67 F. (2d) 994.

No. 940. GRAY, TRUSTEE, *v.* HOPKINS, COLLECTOR OF INTERNAL REVENUE. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. Milliken* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 68 F. (2d) 561.

No. 945. AMERICAN NATIONAL INSURANCE CO. *v.* BASS, COLLECTOR OF INTERNAL REVENUE. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James W. Wayman* for petitioner. *Solicitor General Biggs, Assistant Attorney*

General Wideman, and *Messrs. James W. Morris* and *Frank J. Ready, Jr.,* for respondent. Reported below: 68 F. (2d) 511.

No. 947. MARICOPA COUNTY, ARIZONA, ET AL. *v.* PHOENIX SAVINGS BANK & TRUST CO.;

No. 948. SAME *v.* PHOENIX NATIONAL BANK;

No. 949. SAME *v.* VALLEY BANK & TRUST CO.;

No. 950. SAME *v.* FIRST NATIONAL BANK OF ARIZONA;

No. 951. SAME *v.* TEMPE NATIONAL BANK; and

No. 952. PIMA COUNTY, ARIZONA, ET AL. *v.* SOUTHERN ARIZONA BANK & TRUST CO. May 14, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Dean Acheson, Arthur T. LaPrade,* and *Charles L. Strouse* for petitioners. *Messrs. Harry M. Fennemore* and *Thomas G. Nairn* for respondents in Nos. 947 and 948. *Mr. J. L. Gust* for respondent in No. 949. *Messrs Thomas Armstrong, Jr.,* and *Joseph E. Morrison* for respondent in No. 950. *Mr. Charles Woolf* for respondent in No. 951. *Mr. Samuel L. Kingan* for respondent in No. 952.

No. 960. CITY BANK FARMERS TRUST CO., EXECUTOR, *v.* BOWERS, EXECUTOR. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Allen T. Klots* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Erwin N. Griswold, James W. Morris,* and *J. Louis Monarch* for respondent. Reported below: 68 F. (2d) 909.

No. 967. FERRAND *v.* NEW YORK LIFE INSURANCE CO. May 14, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied.

Messrs. J. L. London and *Walter H. Saunders* for petitioner. *Messrs. James C. Jones, William O. Reeder, James C. Jones, Jr.,* and *Louis H. Cooke* for respondent. Reported below: 69 F. (2d) 159.

No. 991. DILL *v.* COLORADO. See *ante,* p. 609.

No. 1044. PATTEN *v.* UNITED STATES. May 21, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Walter J. Patten, pro se.* No appearance for the United States. Reported below: 68 F. (2d) 1012.

No. 859. STRIPLIN *v.* LAWRENCEBURG WAREHOUSE CO. ET AL. May 21, 1934. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Messrs. George S. Wright, C. M. Smithdeal,* and *Alex. W. Spence* for petitioner. *Mr. Wm. M. Hall* for respondents. Reported below: 167 Tenn. 14.

No. 917. BAUSCH & LOMB OPTICAL CO. *v.* UNITED STATES. May 21, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. E. Willoughby Middleton* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Sweeney* for the United States. Reported below: 78 Ct. Cls. 584.

No. 932. DUNN *v.* INTERSTATE BOND CO. ET AL. May 21, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. W. Larsen* for petitioner. *Solicitor General Biggs, As-*

sistant Attorney General Wideman, and *Messrs. Charles Bunn, James W. Morris,* and *Samuel Nesbit Evins* for respondents. Reported below: 68 F. (2d) 364.

No. 953. UNITY SCHOOL OF CHRISTIANITY (WOQ) *v.* FEDERAL RADIO COMM'N ET AL. May 21, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George E. Strong* and *Rush L. Holland* for petitioner. *Solicitor General Biggs, Assistant Attorney General Stephens,* and *Messrs. M. S. Huberman, Andrew W. Bennett,* and *George B. Porter* for respondents. Reported below: 63 App.D.C. 84; 69 F. (2d) 570.

No. 957. DUNCAN *v.* UNITED STATES. May 21, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Mark L. Herron* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 68 F. (2d) 136.

No. 966. MCNAIR, RECEIVER, *v.* CARCABA ET AL. May 21, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Kenneth I. McKay* and *Maynard Ramsey* for petitioner. *Mr. George C. Bedell* for respondents. Reported below: 68 F. (2d) 795.

No. 970. NEW YORK CENTRAL R. CO. *v.* JERRELL. May 21, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Noel S. Symons* for petitioner. *Mr. Frank Gibbons* for respondent. Reported below: 68 F. (2d) 856.

No. 972. MANUFACTURERS TRUST CO., TRUSTEE, *v.* BACHRACH. May 21, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Basil Robillard* for petitioner. *Mr. Milton Hertz* for respondent. Reported below: 69 F. (2d) 816.

No. 976. MCNAIR, RECEIVER, *v.* DAVIS. May 21, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Kenneth I. McKay* and *Maynard Ramsey* for petitioner. *Mr. George C. Bedell* for respondent. Reported below: 68 F. (2d) 935.

No. 1006. NAVIGAZIONE LIBERA TRIESTINA SOCIETA ANONYME ET AL. *v.* MONAHOS ET AL.; and

No. 1007. SAME *v.* F. ROMEO & CO., INC. May 21, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Homer L. Loomis* for petitioners. *Mr. Harry D. Thirkield* for respondents in No. 1006. *Messrs. Oscar R. Houston* and *F. Herbert Prem* for respondent in No. 1007. Reported below: 69 F. (2d) 824.

No. 1056. DAVIS *v.* ADERHOLD, WARDEN. May 28, 1934. 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. Henry Davis, pro se.* No appearance for respondent. Reported below: 68 F. (2d) 824.

No. 1078. LONG *v.* MICHIGAN. May 28, 1934. Petition for writ of certiorari to the Supreme Court of Michigan, and motion for leave to proceed further *in forma*

pauperis, denied. *Mr. Henry Long, pro se.* No appearance for respondent. Reported below: 266 Mich. 369; 254 N.W. 133.

No. 1046. HUMBLE OIL & REFINING CO. *v.* CAMPBELL, RECEIVER, ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. May 28, 1934. The petition for writ of certiorari herein is denied for failure to comply with Rule 38, paragraph 2, of the rules of this Court. The brief for the petitioner is 211 pages and that of the respondent is 239 pages, in length. Both briefs are stricken from the files of this Court. *Messrs. Edgar E. Townes* and *Robert M. Rowland* for petitioner. *Mr. H. C. Ray* for respondents. Reported below: 69 F. (2d) 667.

No. 1083. ILLINOIS EX REL. COBINE *v.* ANGSTEN, CHAIRMAN, ET AL. May 28, 1934. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Ferdinand Tunnell* for petitioner. No appearance for respondents.

No. 808. BARRY ET AL. *v.* UNITED STATES. May 28, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles M. Bryan* and *W. F. Barry, Jr.,* for petitioners. *Solicitor General Biggs* for the United States. Reported below: 67 F. (2d) 763.

No. 955. HURST *v.* D. P. DAVIS PROPERTIES ET AL. May 28, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Floyd Hurst, pro se. Messrs. Peter O. Knight, C. Fred Thompson,* and *A. G. Turner* for respondents. Reported below: 69 F. (2d) 333.

No. 974. STANDARD PIPE LINE CO., INC. *v.* BURNETT. May 28, 1934. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. T. M. Milling* for petitioner. *Messrs. Pat McNalley* and *Jordon Sellers* for respondent. Reported below: 188 Ark. 491; 66 S.W. (2d) 637.

No. 983. WASHINGTON LOAN & TRUST CO., TRUSTEE, *v.* ALLMAN, RECEIVER. May 28, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Arthur Peter, Charles V. Imlay,* and *Vinson L. Smathers* for petitioner. *Messrs. Edward F. Colladay, Joseph C. McGarraghy, F. G. Awalt,* and *George P. Barse* for respondent. Reported below: 63 App.D.C. 116; 70 F. (2d) 282.

No. 992. WASHINGTON GAS LIGHT CO. *v.* DANN, ADMINISTRATRIX. May 28, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wilton J. Lambert, R. H. Yeatman,* and *George D. Horning, Jr.,* for petitioner. *Mr. Joseph D. Sullivan* for respondent. Reported below: 63 App.D.C. 142; 70 F. (2d) 746.

No. 993. TEXAS COMPANY *v.* ROOS. May 28, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. H. Tallichet* for petitioner. *Messrs. J. B. Lewright* and *R. L. Batts* for respondent. Reported below: 68 F. (2d) 321.

No. 995. SIMPSON ET AL. *v.* STERN ET AL. May 28, 1934. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Stanton C. Peelle, Paul E. Lesh, Dale D. Drain,* and *H. Winship Wheatley* for petitioners. *Messrs. Spencer Gordon*

and *Wm. Marshall Bullitt* for respondents. Reported below: 63 App.D.C. 161; 70 F. (2d) 765.

No. 996. ALEXANDER *v.* MISSOURI STATE LIFE INSURANCE CO. May 28, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Ralph F. Potter* for petitioner. *Mr. William E. Lamb* for respondent. Reported below: 68 F. (2d) 1.

No. 1005. JOHNSON, DRAKE & PIPER, INC. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 28, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Clark R. Fletcher* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John MacC. Hudson* for respondent. Reported below: 69 F. (2d) 151.

No. 1009. TELMAN *v.* UNITED STATES. May 28, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. George R. Craig* for petitioner. *Solicitor General Biggs* for the United States. Reported below: 67 F. (2d) 716.

No. 1010. GOLDSMITH *v.* NEW YORK LIFE INSURANCE CO. May 28, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Perry Post Taylor* and *Ben L. Shifrin* for petitioner. *Messrs. James C. Jones, Lon O. Hocker, Frank Y. Gladney, James C. Jones, Jr.,* and *Louis H. Cooke* for respondent. Reported below: 69 F. (2d) 273.

No. 1021. UNITED STATES RADIATOR CORP. *v.* HENDERSON ET AL. May 28, 1934. Petition for writ of certiorari

to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. George L. Nye* and *Robert G. Bosworth* for petitioner. No appearance for respondents. Reported below: 68 F. (2d) 87, 733.

No. 1031. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. Co. *v.* O'CONNOR, ADMINISTRATRIX. May 28, 1934. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Messrs. A. C. Erdall, F. W. Root,* and *C. S. Jefferson* for petitioner. *Messrs. Tom Davis, Ernest A. Michel, John I. Davis,* and *A. L. Janes* for respondent. Reported below: 190 Minn. 290; 253 N.W. 670.

No. 1043. UNITED BRITISH STEAMSHIP COMPANY, LTD. *v.* NEWFOUNDLAND EXPORT & SHIPPING CO., LTD., ET AL. May 28, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles R. Hickox* for petitioner. *Messrs. F. Herbert Prem, D. Roger Englar,* and *Henry N. Longley* for respondents. Reported below: 69 F. (2d) 300.

No. 1074. JINDRA *v.* UNITED STATES. June 4, 1934. 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. *Messrs. Bart A. Riley* and *J. Aron Abbott* for petitioner. No appearance for the United States. Reported below: 69 F. (2d) 429.

No. 1097. MARCUM *v.* MARCUM ET AL. June 4, 1934. 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. *Messrs. Louis Titus* and *James T. Crouch* for petitioner. No appearance for

respondents. Reported below: 63 App.D.C. 156; 70 F. (2d) 760.

No. 965. NELSON *v.* JADRIJEVICS. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. P. M. Milner* for petitioner. No appearance for respondent. Reported below: 68 F. (2d) 631.

No. 987. MORSE ET AL. *v.* UNITED STATES. June 4, 1934. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Marvin Farrington* and *Robert Cushman* for petitioners. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *H. Brian Holland* for the United States. Reported below: 78 Ct. Cls. 608.

No. 997. GUARDIAN TRUST CO. ET AL. *v.* KEITH ET AL. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Archer Wheatley, Justin D. Bowersock,* and *John F. Rhodes* for petitioners. No appearance for respondents. Reported below: 69 F. (2d) 477.

No. 998. MCINTOSH *v.* SEYMOUR, TRUSTEE IN BANKRUPTCY, ET AL. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis E. Hart* for petitioner. *Mr. Thomas S. Tobin* for respondents.

No. 999. BENSINGER, TRUSTEE, ET AL. *v.* HILLES ET AL. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Mr. Samuel Zirn for petitioners. *Mr. Grenville Clark* for respondents. Reported below: 68 F. (2d) 703.

No. 1000. BANKS *v.* CORNING BANK & TRUST CO. June 4, 1934. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. Thos. S. Buzbee* for petitioner. *Mr. G. B. Oliver, Jr.,* for respondent. Reported below: 188 Ark. 841; 68 S.W. (2d) 452.

No. 1001. CLOUDY REALTY CORP. *v.* IRVING TRUST COMPANY, TRUSTEE IN BANKRUPTCY. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel C. Duberstein* for petitioner. *Mr. William D. Whitney* for respondent. Reported below: 70 F. (2d) 263.

No. 1002. RUWITCH *v.* FRANKEL ET AL. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles P. Schwartz* for petitioner. *Messrs. Irving Herriott, Walter H. Eckert,* and *A. N. Pritzker* for respondents. Reported below: 68 F. (2d) 52.

No. 1012. DUNLAP *v.* UNITED STATES. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wm. St. John Wines* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 70 F. (2d) 35.

No. 1015. GHADIALI *v.* DELAWARE. June 4, 1934. Petition for writ of certiorari to the Supreme Court of Delaware denied. *Mr. Dinshah P. Ghadiali, pro se.* No appearance for respondent.

No. 1016. GLASER ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Abraham Lowenhaupt, Abraham B. Frey,* and *R. S. Doyle* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Erwin N. Griswold, James W. Morris,* and *John MacC. Hudson* for respondent. Reported below: 69 F. (2d) 254.

No. 1018. HOWELL *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Daniel V. Howell* and *Chas. M. Howell, Jr.,* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Charles Bunn* and *James W. Morris* for respondent. Reported below: 69 F. (2d) 447.

No. 1019. GILDERSLEEVE SHIPBUILDING CO. *v.* THE KATHERINE R. HICKEY ET AL. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William F. Purdy* for petitioner. *Mr. John Tilney Carpenter* for respondents. Reported below: 68 F. (2d) 845.

No. 1023. UNITED STATES EX REL. SEEMAN *v.* MULLIGAN, U.S. MARSHAL. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ellsworth C. Alvord* for petitioner. *Solicitor General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 69 F. (2d) 1022.

No. 1024. FROTHINGHAM *v.* ANTHONY. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Barton Corneau* for petitioner. *Mr. George Hurley* for respondent. Reported below: 69 F. (2d) 506.

No. 1029. TRICOU *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Joseph D. Brady* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Charles Bunn, James W. Morris,* and *J. P. Jackson* for respondent. Reported below: 68 F. (2d) 280.

No. 1030. PETROLEUM NAVIGATION CO. *v.* UTILITY OIL CORP. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Roscoe H. Hupper* for petitioner. *Messrs. Cletus Keating, Edwin S. Murphy,* and *L. DeGrove Potter* for respondent. Reported below: 69 F. (2d) 524.

No. 1071. CARPENTER, RECEIVER, *v.* LUDLUM ET AL., RECEIVERS. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Albert L. Moise* and *J. A. Fowler* for petitioner. *Messrs. Percival H. Grander, John Arthur Brown,* and *William A. Carr* for respondents. Reported below: 69 F. (2d) 191.

No. 1036. VON WEISE ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. June 4, 1934. Petition

for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Abraham Lowenhaupt, C. Powell Fordyce,* and *R. S. Doyle* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 69 F. (2d) 439.

No. 1013. CONSOLIDATED RENDERING CO. *v.* UNITED STATES. June 4, 1934. Petition for writ of certiorari to the Court of Claims denied. *Mr. Robert A. Littleton* for petitioner. *Solicitor General Biggs* and *Assistant Attorney General Wideman* for the United States. Reported below: 78 Ct. Cls. 766; 5 F.Supp. 774.

No. 1014. BIGELOW *v.* BOWERS, EXECUTOR. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ernest A. Bigelow, pro se. Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *J. P. Jackson* for respondent. Reported below: 68 F. (2d) 839.

No. 1017. THIMGAN *v.* NEBRASKA. June 4, 1934. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Mr. Sterling F. Mutz* for petitioner. *Messrs. Paul F. Good* and *Thos. S. Allen* for respondent. Reported below: 125 Neb. 696; 251 N.W. 837.

No. 1045. ALEOGRAPH COMPANY *v.* WESTERN ELECTRIC CO., INC. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. G. Willard Rich* for petitioner. *Mr. Charles Neave* for respondent. Reported below: 68 F. (2d) 853.

No. 1047. GOTTLIEB, EXECUTOR AND TRUSTEE, *v.* WHITE, COLLECTOR OF INTERNAL REVENUE. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Samuel Gottlieb* and *J. Weston Allen* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman, Miss Helen Carloss,* and *Mr. James W. Morris* for respondent. Reported below: 69 F. (2d) 792.

No. 1048. ROBINSON, TRUSTEE IN BANKRUPTCY, *v.* WALTHAM NATIONAL BANK; and

No. 1049. SAME *v.* WALTHAM TRUST CO. June 4, 1934. Petition for writs of certiorari to the Supreme Judicial Court of Massachusetts denied. *Mr. Edmond A. Whitman* for petitioner. *Messrs. William J. Bannan* and *John J. Flynn* for respondents. Reported below: 285 Mass. 404; 189 N.E. 204.

No. 1062. WEEK ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. A. Henry Walter* and *Fred B. Morrill* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 68 F. (2d) 693.

No. 1095. INTERSTATE FOLDING BOX CO. *v.* EMPIRE BOX CORP. June 4, 1934. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Weld Peck* for petitioner. *Messrs. A. C. Paul* and *Maurice M. Moore* for respondent. Reported below: 68 F. (2d) 500.

Nos. 1026, 1027, and 1028. TYSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. June 4, 1934. Petition

for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Arnold R. Baar* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 68 F. (2d) 584.

Nos. 1050 and 1053. JAMISON ET AL. *v.* EDWARDS, FORMERLY COLLECTOR OF INTERNAL REVENUE;

Nos. 1051 and 1054. SAME *v.* BOWERS, EXECUTOR; and

Nos. 1052 and 1055. SAME *v.* LOWE, FORMERLY COLLECTOR OF INTERNAL REVENUE. June 4, 1934. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. W. A. Seifert, John G. Frazer, Frank C. Miller,* and *Arthur Gunther* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Edward H. Horton* for respondents. Reported below: 68 F. (2d) 1006.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM MARCH 20 TO AND INCLUDING JUNE 4, 1934.

No. 801. NEWCOMB ET AL. *v.* YORK ICE MACHINERY CORP. April 30, 1934. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Dismissed on motion of *Mr. W. M. Pardue* for petitioners. Reported below: 68 F. (2d) 314.

Rules of Practice and Procedure, After Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases Brought in the District Courts of the United States and in the Supreme Court of the District of Columbia

PROMULGATED MAY 7, 1934

ACT OF MARCH 8, 1934, AMENDING ACT OF FEBRUARY 24, 1933.

AN ACT

To amend an Act entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of February 24, 1933 (ch. 119), entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict" (U.S.C., title 28, sec. 723a), be, and the same is hereby, amended to read as follows:

"That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States: *Provided*, That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"SEC. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

"SEC. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force."

Approved, March 8, 1934.

Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia.

ORDER.

Pursuant to the provisions of the Act of Congress, approved March 8, 1934, amending an Act entitled "An Act to give the Supreme Court of the United States authority to prescribe Rules of Practice and Procedure with respect to proceedings in criminal cases after verdict" (Act of February 24, 1933, c. 119, U.S.C., Title 28, Sec. 723(a))—

It is ordered on this seventh day of May, 1934, that the following rules be adopted as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States.

It is further ordered that these rules shall be applicable to proceedings in all cases in which a plea of guilty shall be entered or a verdict or finding of guilt shall be rendered, on or after the first day of September, 1934.

I. *Sentence.* After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in the

Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed.

Pending sentence, the court may commit the defendant or continue or increase the amount of bail.

II. *Motions.* (1) Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly.

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

(3) A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment.

(4) A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

III. *Appeals.* An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion.

Petitions for allowance of appeal, and citations, in cases governed by these rules are abolished.

Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and appellant's attorney, a general statement of the nature of the offense, the date of the judgment, the sentence imposed, and, if the appellant is in custody, the prison where appellant is confined. The notice shall also contain a succinct statement of the grounds of appeal and shall follow substantially the form hereto annexed.

IV. *Control by Appellate Court.* The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

V. *Supersedeas.* An appeal from a judgment of conviction stays the execution of the judgment, unless the defendant pending his appeal shall elect to enter upon the service of his sentence.

VI. *Bail.* The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the

appellate court, or, where the appellate court is not in session, by any judge thereof or by the circuit justice.

Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court.

VII. *Directions for preparation of record on appeal.* The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. The action and directions contemplated by this Rule may be had and given by the trial judge at any place he may designate within the judicial district where the conviction was had.

VIII. *Record on appeal without bill of exceptions.* When it appears that the appeal is to be prosecuted upon the clerk's record of proceedings, that is, upon the indictment and other pleadings and the orders, opinions, and judgment of the trial court, without a bill of exceptions, the trial judge shall direct the appellant to file with the clerk of the trial court, within a time stated, an assignment of the errors of which he complains (which may amplify or add to the grounds stated in the notice of appeal), and shall direct the clerk to forward promptly, with his certificate, to the appellate court the above-mentioned record and assignment of errors, and upon receipt thereof the appellate court shall at once set the appeal for argument as provided in these rules.

IX. *Bill of Exceptions.* In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by

the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

X. *Setting the appeal for argument.* Save where good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than thirty (30) days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar of the appellate court will permit. Preference shall be given to criminal appeals over appeals in civil cases.

XI. *Writs of certiorari.* Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the appellate court shall be made within

thirty (30) days after the entry of the judgment of that court. Such petition shall be made as prescribed in Rules 38 and 39 of the Rules of the Supreme Court of the United States.

XII. *Local rules.* Each appellate court may prescribe rules, not inconsistent with the foregoing rules, with respect to cost bonds, the procedure on the hearing of appeals, the issue of mandates, and the time and manner in which petitions for rehearing may be presented.

XIII. In the foregoing rules, the phrase "trial court" shall be deemed to refer to the District Courts of the United States and the Supreme Court of the District of Columbia; the phrase "trial judge" includes the judge before whom the case was tried or brought to judgment and, in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried or brought to judgment; the phrase "appellate court" shall be deemed to refer to the United States Circuit Court of Appeals and the Court of Appeals of the District of Columbia.

For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded.

Form of Notice of Appeal Under Rule III.

Form No. 1

(To be used on appeals to the United States Circuit Court of Appeals.)

District Court of the United States
For the.....

United States of America
vs.
.....

Name and address of appellant.....
.....
Name and address of appellant's attorney.....
.....
Offense.....
.....
Date of judgment.....
Brief description of judgment or sentence.....
.....
Name of prison where now confined, if not on bail.....
.....

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the ..... Circuit from the judgment above-mentioned on the grounds set forth below.

(Signed) .....
Appellant.

Dated.....

Grounds of appeal:

Form of Notice of Appeal Under Rule III.

Form No. 2.

(To be used on appeals to the Court of Appeals of the District of Columbia.)

Supreme Court of the District of Columbia

United States of America
vs.
.....

Name and address of appellant.....
.....
Name and address of appellant's attorney.....
.....
Offense.....
.....
Date of judgment.....
Brief description of judgment or sentence.....
.....
Name of prison where now confined, if not on bail.....
.....

I, the above-named Appellant, hereby appeal to the Court of Appeals of the District of Columbia from the judgment above-mentioned on the grounds set forth below.

(Signed) .....
Appellant.

Dated.....

Grounds of appeal:

Form of Clerk's Statement of Docket Entries to be Forwarded Under Rule IV.

Form No. 3.

(To accompany duplicate notice of appeal to the United States Circuit Court of Appeals.)

District Court of the United States

For the.....

United States of America

vs.

.....

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1. Indictment or Information for.....
.....filed.....193..
2. Arraignment.....193..
3. Plea to Indictment or Information.....
.....193..
4. Motion to withdraw plea of guilty denied.....193..
5. Trial by jury, or by court if jury waived.....193..
6. Verdict or finding of guilt.....
.....193..
7. Judgment—(with terms of sentence).....
.....entered.....193..
8. Notice of Appeal filed.....193..

Date.....193..

Attest..... Clerk.

N.B.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in Rules VII, VIII, and IX.

Form of Clerk's Statement of Docket Entries to be Forwarded Under Rule IV.

Form No. 4.

(To accompany duplicate notice of appeal to the Court of Appeals of the District of Columbia.)

Supreme Court of the District of Columbia

United States of America
vs.
.....

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1. Indictment or Information for.....
.....filed.....193..
2. Arraignment.....193..
3. Plea to Indictment or Information.....
.....193..
4. Motion to withdraw plea of guilty denied.....193..
5. Trial by jury, or by court if jury waived.....193..
6. Verdict or finding of guilt.....
.....193..
7. Judgment—(with terms of sentence).....
.....entered.....193..
8. Notice of Appeal filed.....193..

Date.....193..

Attest..... Clerk.

N.B.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in Rules VII, VIII, and IX.

AMENDMENT OF RULES.

ORDER.

IT IS ORDERED that Rule 38 of the Rules of this Court be, and it is hereby, amended as follows, effective September 1, 1934, viz:

(1) That the heading of the said Rule be amended to read as follows:

"Review on writ of certiorari of decisions of State Courts, Circuit Courts of Appeals and the Court of Appeals of the District of Columbia.

"(See Secs. 237 (b) and 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; also Act of March 8, 1934, and Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia, promulgated May 7, 1934.)"

(2) That paragraph 2 of the said Rule be amended to read as follows:

"2. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ. A supporting brief may be included in the petition, but, whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be a sufficient reason for denying the petition. See *United States* v. *Rimer,* 220 U.S. 547; *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.,* 242 U.S. 430; *Houston Oil Co.* v. *Goodrich,* 245 U.S. 440; *Layne & Bowler Corporation* v. *Western Well Works,* 261 U.S. 387, 392; *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163; *Southern Power Co.* v. *North*

Carolina Public Service Co., 263 U.S. 508. Forty printed copies of the petition and supporting brief shall be filed. The petition will be deemed in time when it, the record, and the supporting brief, are filed with the clerk within the period prescribed by section 8 of the Act of February 13, 1925, except that in cases of petition to this Court for writ of certiorari to review a judgment of a Circuit Court of Appeals or of the Court of Appeals of the District of Columbia in criminal cases within the provisions of the Act of March 8, 1934, the petition shall be made within the period prescribed pursuant to said Act in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934."

JUNE 4, 1934.

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1931, 1932, AND 1933

	ORIGINAL			APPELLATE			TOTALS		
Terms	1931	1932	1933	1931	1932	1933	1931	1932	1933
Total cases on dockets	20	21	19	1, 003	1, 016	1, 113	1, 023	1, 037	1, 132
Cases disposed of during terms	1	4	4	883	906	1, 025	884	910	1, 029
Cases remaining on dockets	19	17	15	120	110	88	139	127	103

	TERMS		
	1931	1932	1933
Distribution of cases disposed of during terms:			
Original cases	1	4	4
Appellate cases on merits	282	257	293
Petitions for certiorari	601	649	732
Cases remaining on dockets:			
Original cases	19	17	15
Appellate cases on merits	61	56	43
Petitions for certiorari	59	54	45

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