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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1934

FROM APRIL 1 (CONCLUDED) TO AND INCLUDING
JUNE 3, 1935 (END OF THE TERM)

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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.
STANLEY REED, 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, 1934.

UNITED STATES *v.* OREGON.

No. 13, original. Argued March 12, 1935.—Decided April 1, 1935.

1. An Executive Order setting aside a non-navigable lake on the public domain as a bird reservation was within the authority of the President, though made before the effective date of the Migratory Bird Treaty Act of July 3, 1918. P. 10.
2. Title to land within the meander line of a non-navigable lake on the public domain did not pass to the State as an incident to ownership of abutting uplands granted by the United States as school land, where, prior to approval of the survey of the uplands, the lake had been set aside by Executive Order as a federal reservation. P. 9.
3. Acceptance by a State of other lands in lieu of lands within the meander line of a non-navigable lake adjacent to uplands granted it as school lands, *held* a practical construction of the boundary and a relinquishment of a claim to title within the meander. P. 10.
4. In a suit by the United States against a State to quiet title to the bed of a lake on which the State owns part of the uplands bordering the meander line, the owners of other parts of the uplands in like situation are not necessary parties and their rights will not be affected by the decree. P. 12.
5. Upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. P. 14.
6. But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State. P. 14.

7. In determining whether title to lands underlying waters passed to the State in virtue of its admission to statehood, the question whether the waters were navigable or non-navigable is a federal question, which is to be determined according to the laws and usages applied by the federal courts, even though the waters are not capable of use for navigation in interstate or foreign commerce. P. 14.

8. The test of navigability is whether the body of water in question, in its natural and ordinary condition, is susceptible of use for navigation in the customary modes of trade and travel over water, and has capacity for general and common usefulness for trade and commerce. P. 15.

Upon the evidence in this case, Malheur, Mud and Harney Lakes, and connecting waters in Oregon, are adjudged to have been non-navigable at the time of admission of the State, and since. Pp. 8, 16 *et seq.*

9. Previous recognition of the non-navigable character of a lake on the public domain, by the Secretary of the Interior and by the state courts, is significant in determining the question. P. 23.

10. A bill to quiet title may not be defeated by showing that the plaintiff's interest, otherwise sufficient to support the bill, may be subject to possibly superior rights in third persons not parties to the suit. It is enough that the interest asserted by the plaintiff in possession of land is superior to that of those who are parties defendant. P. 24.

11. A possession under color and claim of title which is sufficient to preclude the claimant from trying the title in ejectment is an adequate basis for a suit in equity to remove clouds created by assertions of an inferior title by another. P. 25.

12. The United States has complete control, free from restriction or limitation by the States, over the disposition of title to its lands; the construction of its grants is a federal question and involves the consideration of state questions only in so far as it may be determined as a matter of federal law that the United States had impliedly adopted and assented to a state rule of construction as applicable to its conveyances. P. 27.

13. A state statute declaring that lakes within the State which have been meandered by the United States surveys are navigable public waters of the State, and that the title to their beds is in the State, can have no effect upon title retained by the United States to the

bed of a non-navigable lake, nor upon the interests in the bed that may have passed to others as incidents of grants of the United States conveying abutting uplands. Pp. 26, 28.

Decree for the plaintiff.

ORIGINAL SUIT brought by the United States against the State of Oregon to quiet title to unsurveyed land within a meander line purporting to mark the boundaries of lands underlying three lakes, and waters connecting them, in that State. For decree, see *post,* p. 701.

Solicitor General Biggs, with whom *Messrs. David E. Hudson, Aubrey Lawrence, H. Brian Holland, Lee A. Jackson,* and *Benjamin Catchings* were on the brief, for the United States.

Mr. L. A. Liljeqvist, Assistant Attorney General of Oregon, with whom *Mr. I. H. Van Winkle,* Attorney General, was on the brief, for defendant.

The area involved constituted navigable waters (in fact) on February 14, 1859, when Oregon was admitted into the Union.

There were no stable lands constituting islands or promontories within the area involved on February 14, 1859.

The meander line laid down by J. H. Neal was a correct line. Furthermore it is not challenged in the pleadings of the United States herein.

There were no relicted lands within the meander line boundary at the commencement of this suit.

All the grants made by the United States to lands bordering upon the meander line are comparable in form to those involved in *Hardin* v. *Jordan,* 140 U. S. 371, except that in the case of school sections and lieu lands no patent was issued, the grant being in effect the provisions of the statutes under which title passed to the State.

The rule of the common law under *Hardin* v. *Jordan, supra,* that the effect of conveyances of lands bordering on a meandered lake is that the grantee takes to the center, is not in force in Oregon; the local law provides that the grantee takes only to the water's edge.

The rule is not applicable to lakes of the size and character of Malheur and Harney Lakes.

In Oregon the title, from the water's edge to the center of a non-navigable lake, passes to the State—at least as to so much of the bed fronting uplands which have been granted without restrictions or reservations.

The same rule of riparian rights (no more, no less) applying to upland owners on meandered lakes in Oregon applies to owners of the school sections and indemnity lands taken in lieu of deficiencies in school sections abutting on the meander line.

If the State uses the deficiency within the meander, or fractional sections of school lands bordering upon the lake, as a base for lieu lands, it does not, in any event, lose title to any lands other than those so used.

Oregon claims that it was within its jurisdiction by judicial decisions and statute to assert title to the lands within the meander line.

Where the United States grants the uplands on a correctly meandered non-navigable lake without reservations or restrictions in terms, it is within the power of the State to declare the waters in front of such granted lands navigable and public, and to assert ownership and sovereignty over the bed and to preserve its control.

The Executive Order of August 18, 1908, was ultra vires and invalid. Furthermore, it was only the surveyed lands touching the shore line of the lakes, under the designation "the smallest legal subdivisions," which were reserved; and therefore unsurveyed lands bordering the lakes were not reserved by the Order.

This Court should make an order bringing in riparian owners and the claimants to the bed, so that the legal

questions involved may be completely determined, and the entire controversy settled in this suit. Such owners and claimants are necessary and indispensable parties herein.

The rule that a plaintiff in a suit to quiet title must recover upon the strength of his own title is applicable. If this Court holds the waters to be non-navigable, then the plaintiff can recover title to only so much of the beds of the lakes as front unpatented, vacant public lands upon the meander line.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an original suit brought by the United States against the State of Oregon to quiet title to 81,786 acres of unsurveyed lands in Harney County, Oregon. The lands lie within a meander line 105.36 miles in length. The line was surveyed principally by John H. Neal in 1895–1896, and approved by the Commissioner of the Land Office in 1897; the remainder has since been surveyed, and has been approved by the Commissioner. The meander line purports to mark the boundaries of lands underlying five bodies of water at the ordinary or mean high water mark. They are Lake Malheur (47,670 acres), Mud Lake (1,466 acres), Harney Lake (29,562 acres), the Narrows (296 acres, connecting Lake Malheur with Mud Lake), and the Sand Reef (2,792 acres, connecting Mud Lake with Harney Lake). The five bodies of water extend from the extreme end of Lake Malheur on the east to the westerly side of Harney Lake, a distance of approximately thirty miles. Lake Malheur is shown by maps in evidence to be 16.66 miles in length and more than 6 miles in width. Mud Lake is a small body of water, a little over a mile in diameter. Harney Lake is similarly shown to be 8.57 miles long and approximately 5 miles wide.

The principal source of inflow to Lake Malheur, at all the times material to the present controversy, has been from the Silvies River on the north and the Donner und Blitzen River on the south. The source of inflow to Harney Lake is from Lake Malheur through the Narrows, thence through Mud Lake and the Sand Reef. Some water also flows into Harney Lake on the north from Silver Creek, a mountain stream which is dry for part of the year. Harney Lake has no outlet.

By Executive Order of August 18, 1908, all of the land claimed by the United States in this suit was set apart as a bird reserve, known as the Lake Malheur Reservation, and has since been administered as such by the United States Bureau of Biological Survey, under the direction of the Department of Agriculture.

The State of Oregon was admitted to the Union on February 14, 1859. At that date the area within the meander line was a part of the public domain of the United States. No part of it has ever been disposed of, in terms, by any grant of the United States. Decision of the principal issues raised by the pleadings and proof turns on the question whether the area involved underlay navigable waters at the time of the admission of Oregon to statehood. If the waters were navigable in fact, title passed to the State upon her admission to the Union. *Shively* v. *Bowlby,* 152 U. S. 1, 26–31; *Scott* v. *Lattig,* 227 U. S. 229, 242, 243; *Oklahoma* v. *Texas,* 258 U. S. 574, 583, 591; *United States* v. *Utah,* 283 U. S. 64, 75. If the waters were non-navigable, our decision must then turn on the question whether the title of the United States to the lands in question, or part of them, has passed to the State. This is asserted to be a consequence of the United States having parted with title to the uplands bordering on the meander line, by patents to private grantees, and by statutory grant to the State of school and indemnity lands in the act admitting Oregon to statehood, see *United States* v. *Morrison,* 240 U. S. 192. The State contends

that the common-law rule, applied by this Court in *Hardin* v. *Jordan,* 140 U. S. 371, that a conveyance of land bounded upon the waters of a non-navigable lake carries by implication to the center of the lake, does not obtain in Oregon, especially in the case of lakes of the size of Malheur and Harney. It insists that grants by the United States of lands within the State, like those of a private individual, are to be construed in accordance with state law, and that by the common and statute law of Oregon a conveyance of the uplands bordering on a non-navigable lake, by the owner of the lake bed to any grantee, vests title to the bed in the State. Other questions of minor importance will be considered as it is found necessary to deal with them in the course of the opinion.

The issues raised by the pleadings were referred to a special master, with the powers of a master in chancery, to take the evidence and report his findings of fact and conclusions of law, and to make recommendations to this Court for a decree. After hearing and considering voluminous testimony he has rendered his report, with findings of fact and conclusions of law and a proposed form of decree. He found that none of the waters within the meander line was navigable in fact and concluded that the State of Oregon had acquired no right, title or interest in any part of the land lying within the meander line, save such as is incidental to the ownership of land acquired by it from patentees of the United States, fronting a distance of 159.67 chains on the meander line on either side of the westerly portion of the Narrows, designated on maps in evidence as Subdivision B (between the bridge and Mud Lake), and such as is incidental to its ownership of uplands acquired from grantees of the United States by patents bounding the granted lands upon the meander line fronting on the easterly side of Mud Lake, a distance of 72.31 chains. See *Hardin* v. *Jordan, supra.*

With reference to the land within the meander boundaries of Subdivision B of the Narrows, he found that the

United States, prior to the commencement of suit, had disposed of all its interest in the uplands bordering on the meander line on both sides, to patentees and as indemnity lands under the school land grant to Oregon. He also found that the Narrows had the character of a non-navigable stream, and concluded that the United States had retained no interest in the land within the meander line boundary, since R. S. § 2476, applicable to grants of the United States, provides: ". . . in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

The Master accordingly recommended a decree adjudging that the State is owner in fee simple of the land lying within the meander line of Subdivision B of the Narrows, incidental to its ownership of patented uplands bordering on the meander line, and to a portion of the bed of Mud Lake fronting the riparian or littoral patented land of the State on Mud Lake, aggregating 8.99% of the total lake bed. The percentage was derived by determining the proportion which the length of the State's boundary on the meander line bears to the total meander line of the lake. It was further recommended that the State be adjudged to have no other right, title or interest in any of the lands in suit.

He also made the following findings which have a bearing on the title of the United States to land within the meander line boundary of each of the five bodies of water.

Lake Malheur: He found that the United States, before suit, had disposed of 79.80% of the total frontage of the upland bordering on the meander line of Lake Malheur and had retained upland fronting on the meander line to the extent of the remaining 20.20%. Of the 79.80% disposed of, 1.34% was school lands, granted to Oregon and sold by it to private grantees, and 4.80% was indemnity land, listed to and similarly sold by the State

before action was brought. The remaining 73.66% had been patented directly to private grantees. As none of the owners of these lands is a party to the present suit, the Master made no recommendation for a decree as to their interests in the land within the meander line.

The Narrows: As to Subdivision A, the Master found that the lands bordering on both sides comprised patented and indemnity lands which had been conveyed to individual owners, and that, as the Narrows is a non-navigable stream, the United States, by virtue of R. S. 2476, retained no interest in the land within the meander line, except insofar as it may have an easement through the entire Division for the flow of water from Lake Malheur.

Mud Lake: The Master found that the United States had retained no upland fronting on the meander line boundary. All except that now vested in Oregon, already referred to as having a frontage of 72.31 chains on the meander line boundary, is vested in private owners. Neither party has taken any exception to the findings, and as the private owners are not parties to the present suit, the Master made no recommendation for a decree with respect to their title or interest in the land within the meander boundary.

The Sand Reef: The Master found that the United States, at the commencement of the suit, had retained uplands having 84.92% of the total frontage on the meander line boundary of the Sand Reef. Of the frontage disposed of, 4.90% is that acquired by individuals and the remaining 10.18% is school land acquired by Oregon. The claim of the State that it has title to the adjacent lands within the meander line, as incident to its ownership of the upland, was rejected by the Special Master because the survey of the uplands was approved subsequent to the Executive Order of August 18, 1908, setting aside the area in question as the Lake Malheur Reservation. Although the State has excepted to this finding, because the Proclamation antedated the effective date of the Migra-

tory Bird Treaty Act, approved July 3, 1918, c. 128, 40 Stat. 755, we conclude that the Master's determination was correct. See *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469–475; *United States* v. *Morrison,* 240 U. S. 192, 210; see also the Act for the Protection of Game Birds of June 28, 1906, c. 3565, 34 Stat. 536.

Harney Lake: The Master found that at the time of commencement of the suit the United States had retained uplands bordering on 87.91% of the meander line boundary of Harney Lake and that it had disposed of lands having a frontage of 12.09%. Of this, 1.10% represents the frontage of land patented to a private individual. The remaining 10.99% represents frontage of school lands, of which those having a frontage of 5.87% were acquired by Oregon upon surveys approved after the Executive Order of August 18, 1908. For reasons already stated we conclude that the Master correctly determined that the State acquired no interest in the lands within the meander line upon this frontage, as incident to its ownership of the upland.

The Master found that the remaining school lands, having a frontage of 5.12%, passed to Oregon under a survey approved before the Executive Order, but he rejected the claim of Oregon to any interest in the adjacent land within the meander line. This was done because he thought the rule of *Hardin* v. *Jordan, supra,* was not applicable to school and indemnity lands surveyed to the border of non-navigable waters, and because the State had claimed and received lieu lands elsewhere for a deficiency in granted school lands, which deficiency lay within the meander line. We do not pass upon the first ground, but agree that the acceptance by the State of lands elsewhere, in lieu of lands lying within the meander line adjacent to the granted uplands, was such a practical construction of the boundary, and necessarily involved such a relinquishment of any interest in the

adjacent lands as an incident to the grant of uplands, as to preclude the assertion of that claim here.

The Master accordingly concluded that the United States retained the entire interest in the area within the meander line of Harney Lake, except such interest as was acquired by the individual patentee of upland. As he was not a party to the suit, the Master made no recommendation with respect to a decree as to his interest.

Stable Lands within the Meander Line: The Special Master found that there were stable lands, consisting of islands and promontories within the meander line, aggregating 9,327.8 acres at the mean water surface elevation of 4,093 feet above sea level, the title to which he found to be in the United States.[1]

The exceptions filed to the Master's report raise further issues with respect to the following findings, among others:

1. That the waters under which the lands in question lay were not navigable in fact on February 14, 1859, the date of admission of Oregon to statehood.

2. That there were on that date stable lands constituting islands and promontories within the meander line.

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[1] Malheur Lake.

	Acres	
(a) Pelican Island	840.0	
(b) Cole Island	350.0	
(c) All other Islands	4,921.6	
(d) Promontories	1,880.0	
Total		7,991.6
The Narrows Islands		21.2
Mud Lake Islands		88.0
Sand Reef Islands		1,227.0
		9,327.8

3. That the meander line as surveyed by J. H. Neal, 1895–1896, and approved in 1897, was and is a correct line.

4. That it is unnecessary to make any finding with respect to relicted lands within the meander line boundary, since such findings would affect only the title to upland owners not parties to the suit.

5. That the grants made by the United States to patentees of lands bordering upon the meander line boundary were comparable to those involved in *Hardin* v. *Jordan, supra.*

The State of Oregon has excepted to findings 1 and 2, and to the Master's failure to find that there were no relicted lands within the meander line boundary, and the United States has excepted to findings 3 and 5, its exceptions being intended to confine the decision to the issues between the United States and the State of Oregon and to eliminate consideration of questions affecting the rights of the upland patentee proprietors and settlers who are not parties to the suit.

In the view we take of the issues which are decisive of the present controversy between the United States and Oregon, it is unnecessary to determine the rights in the disputed area of the owners, other than Oregon, of uplands bordering on the meander line boundary, whether their claims are based upon reliction or the acquisition of an interest as an incident to the grants by the United States of uplands bordering the meander line. Nor is it necessary to determine whether any part of the meander line is correct upon which the lands of such upland owners border. As they are not parties, their rights cannot be affected by any decree to be entered in the present suit. *Priest* v. *Las Vegas,* 232 U. S. 604. Adjudication of their rights, as will be later pointed out, is not prerequisite to maintenance of the present suit or to entry of an appropriate decree.

It is also unnecessary to consider in detail the State's exceptions to the findings that there are stable lands within the disputed area. Even if such lands are not fast lands, because, as the State maintains, the mean surface water elevation is higher than 4,093 feet, as found by the Master, the claim of the United States that it has title to them will be controlled by our conclusions as to its title to lands within the meander line in which the Master has found the State to have no title or interest.

Neither the Government nor the State challenges the findings of the Master that Oregon has title to a part of the land lying within the meander line of Mud Lake, and to the land within the meander line boundary of Subdivision B of the Narrows. We accordingly accept those findings as correct. We have already resolved against the State the contentions that it has acquired and retains any right or interest, in the land lying within the meander line of any of the other divisions, as an incident to ownership of the uplands bordering on the meander line.

Such being the state of the case, the contentions of the State are reduced to three, which are those mainly relied upon in brief and argument. They are: (1) that the waters lying within the meander line boundary were and are navigable in fact. If not, it is then urged that the Government is impaled on one of the two horns of a dilemma: either (2) under the doctrine of *Hardin* v. *Jordan, supra,* title to the land underlying the water passed to the upland proprietors by virtue of the grants by the United States of uplands bordering on the meander line, in which case the United States, which must maintain its suit to quiet title by the strength of its own title rather than by the weakness of the defendant's, is not entitled to the relief which it seeks; or (3) the United States, by its conveyance of the uplands, has transferred to Oregon its title to adjacent lands within the meander line, by operation of the common and statute

law of the State, to which all conveyances of land within the State are subject.

We therefore pass directly to a consideration of these principal issues of the case.

I. Navigability.

Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts* v. *New York,* 271 U. S. 65, 89. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State. See *United States* v. *Utah, supra,* 75; *Oklahoma* v. *Texas, supra,* 583, 591. Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts, even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce. *United States* v. *Holt State Bank,* 270 U. S. 49, 55, 56; *United States* v. *Utah, supra,* 75; *Brewer-Elliott Oil Co.* v. *United States,* 260 U. S. 77, 87.

The Special Master based his conclusion that the waters within the meander line boundary were not navigable in fact on the date of the admission of Oregon to the Union, or afterward, on his finding of fact that:

"neither trade nor travel did then or at any time since has or could or can move over said Divisions, or any of them, in their natural or ordinary conditions according to the customary modes of trade or travel over water; nor was any of them on February 14, 1859, nor has any of them since been used or susceptible of being used in the natural or ordinary condition of any of them as permanent or other highways or channels for useful or other commerce."

It is not denied that this finding embodies the appropriate tests of navigability as laid down by the decisions of this Court. See *United States* v. *Holt State Bank, supra,* 56; *United States* v. *Utah, supra,* 76; *Brewer-Elliott Oil Co.* v. *United States, supra,* 86; *Oklahoma* v. *Texas, supra,* 586; *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 123; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 698; *The Daniel Ball,* 10 Wall. 557, 563. The only attack upon it is that it is not adequately supported by the evidence.

The finding, as the Master's report shows in detail, is rested upon his observations, made in the course of a personal inspection of the disputed area, and a careful consideration of the voluminous testimony of one hundred and forty-three witnesses. He made subsidiary findings with respect to (1) the physical condition, present and past, of the several bodies of water with respect to their depth, their channels or waterways capable of use in navigation, and the presence within them of vegetation, all of which affect their use and the access to them for purposes of navigation, and (2) their actual use, past and present, with special reference to (a) trapping of fur-bearing animals and (b) boating.

Physical Condition: The Special Master inspected Lake Malheur Reservation on or about November 1, 1931, accompanied by counsel and engineers representing the parties. He found that the entire area was then dry, and showed no signs in the soil of ever having been under water, except that water one to two inches in depth was found in Harney Lake, and about 400 acres in Lake Malheur was covered by water of negligible depth, and was surrounded by about 1,000 acres of mud. This 1,400 acre area lay in the more southerly part of the lake. The surface elevation above sea level of the 1,400 acres varied from 4,090 to 4,092 feet, which was below the average elevation of the meander line, fixed in the findings at 4,093 feet.

These data as to the condition of the area then, which are not directly challenged and are abundantly supported by the testimony, indicate clearly enough that all five divisions are shallow bodies of water which, with the exception of Lake Malheur, disappear completely or become negligible during a dry season. The five divisions are shown to lie in a flat plateau and their basins or beds to be so shallow and unprotected by banks that variations in the amount of water flowing into them produce large variations in the area covered by water, but relatively slight variations in depth. The entire area is shown to be an "evaporation pan" for the Harney County water basin, with an average annual evaporation of forty inches. The Master found that, except in years of abundant rainfall and favorable run-off, the water is not available to maintain an average water surface elevation of much above 4,093 feet.

Contour maps of Lake Malheur, where conditions admittedly are the most favorable for navigation, show that nearly half its area, with water surface standing at 4,093 feet, would be covered with water two feet or less in depth, and less than one-fourth of its area with water

between three and four feet in depth.[2] The areas which would be covered by water of depth sufficient to float boats are shown not to be continuous enough to afford channels or waterways capable of use in navigation. At a surface elevation of 4,093 feet the water is so shallow for long distances from the meander line as to preclude passage over it by boats, and with the water reduced to lower levels by seasonal evaporation the same area becomes mud or dry land. With a reduction of only one foot in water surface elevation, approximately 11,716 acres, otherwise covered by water, becomes mud or dry land, and other marked changes in the distribution of depths are produced. With the reduction in water surface attending the usual dry season of the summer, much of the area is made up of small lakes or ponds, separated by mud or dry land.

There has been no survey of Harney Lake, but contour maps of the other divisions show similar conditions, though less favorable to navigability. The evidence establishes that Harney Lake is even more shallow and is without banks on its westerly end. Its waters are alkaline, and almost without vegetation. Its water area at the time of trial was approximately 2,000 acres, having a depth of from one to two inches. The depths have been

[2] The evidence establishes the following data with respect to Lake Malheur with water surface at an elevation of 4,093 feet:

	Acres
Lands under water of 1 foot, or less	11,715.8
Lands under between 1 and 2 feet	10,126.6
Lands under between 2 and 3 feet	6,988.4
Lands under between 3 and 4 feet	10,821.2
Lands under between 4 and 5 feet	26.8
Lands under water	39,678.8
Lands above water surface	7,991.6
Total	47,670.4

variable, but the lake has not been shown at any time to have had a depth exceeding three feet. The evidence establishes that it has no stable or constant stand of water, and that large variations in the water area occur with seasonal and climatic changes.

All the other divisions are shown to be covered in substantial measure by tules, which ordinarily grow only in depths of five feet or less, and to be filled in the shallower portions with growths of vegetation of a character and extent such as to make navigation difficult, even though there were channels or waterways otherwise capable of use for that purpose. The presence of dead sagebrush and greasewood in all three lakes, in considerable areas generally covered by water, indicates that the land has been dry for substantial periods.

Scientific and historical evidence in great volume supports the conclusion that the physical condition of the bodies of water within the area has not varied substantially, so as to affect the possibility of their use in navigation, since the admission of Oregon to the Union. This is established by early maps and reports; a study of tree rings, indicating past climatic conditions, particularly the amount of annual rainfall; and the presence in all divisions, except Harney Lake, of underlying beds of peat varying from twelve to thirty inches in depth and tending to establish shallow water conditions, and the presence of vegetation, over a long period. The conclusion must be that at the time of admission to statehood the bodies of water within the meander line were shallow, with average surface water not much above 4,093 feet, with the water of all except Harney Lake substantially filled with tules and other types of water vegetation, so as to give them largely the character of swamps, with irregularly located but connected areas of shallow open water of variable depths.

The conclusion of the Special Master, that only under exceptional conditions does the water surface rise above 4,093 feet, is challenged by the State. The finding is based in part upon an elaborate study and report of water conditions in the Harney County water basin, prepared by Jessup, a Government engineer, showing that " in order to maintain a mean average elevation of this lake surface [Lake Malheur] much above 4,093 feet would require more water than has ever been available." In support of Oregon's exception to the Master's finding, it relies upon two independent private surveys, the results of which did not differ materially from those tendered by the Government, and the evidence of numerous witnesses who testified that at one time or another during the past 45 years they had seen the water at points which, if their estimates and recollections are correct, would establish a water surface elevation above 4,093 feet. Their testimony, aside from its often vague and untrustworthy character because based on estimates and unaided recollections over long periods of time, as well as that of the surveys referred to, tended at most to show that in exceptional conditions of flood the water surface rose somewhat above the elevation of the meander line. There is abundant scientific evidence, and the testimony of contemporary observers, that for considerable parts of each year, and except in unusual conditions of flood, the water falls substantially below that elevation. There is no convincing evidence that the Special Master erred in his conclusion that the mean water surface elevation is not much above that point.

The Master also found against the contention of Oregon, set up by its amended answer, that the water surface elevation had been materially lessened by diversion of water from the Silvies and Donner und Blitzen rivers, for purposes of irrigation. The record affords no sub-

stantial support for this contention. The voluminous scientific evidence must be accepted as establishing that any diversion, which could reasonably be assumed to take place by reason of irrigation, is too small in comparison with the area affected to produce any variation in depth of water sufficient to affect navigability. At a surface elevation of 4,092 feet the three lakes are connected and the flow of water required to raise water surface an additional foot, when allowance is made for increased evaporation, would considerably exceed any estimated amount of water artificially diverted.

Nor does the evidence support the contention of Oregon that the navigability of Lake Malheur and Mud Lake is affected by the breaking of a channel through the Sand Reef, and the resulting connection with Harney Lake, which is said materially to have lowered the surface of the waters in the two upper lakes. The Special Master found that the gap, about 45 feet wide, which was broken through the top of Sand Reef by flood water in 1881, has had no such effect. In this he is supported by the scientific evidence based upon the contour maps of the region, and the annual inflow of water into Lake Malheur, and the outflow through the Sand Reef to Harney Lake. There is no outflow in some years. The evidence shows that with the Sand Reef closed the depth of water in Malheur and Mud Lakes would be increased by only a few tenths of a foot.

Trapping. The State places much reliance on the large amount of testimony relating to the trapping of fur-bearing animals, principally muskrats, in the contested area. The evidence shows that, at times subsequent to 1890, a large number of animals were trapped in the tule areas, some in fall and spring, but principally in the winter months. Most of this evidence has no bearing on navigability, for with a few exceptions, the trappers appear

to have waded or walked. See *Toledo Liberal Shooting Co.* v. *Erie Shooting Club*, 90 Fed. 680, 682 (C. C. A. 6th). Before 1908 only three trappers are shown to have used boats. Later one trapper is shown to have used a rowboat and another to have used both a rowboat and a motor boat. Of the four witnesses who had used boats in connection with trapping, three referred to use of homemade boats of three or four to six inches draft, one in the fall of 1833 and following years, another in 1894–1895, and another subsequent to 1909. All wore gummed boots and found it necessary, in the use of the boats, to get out and pull them over shallow points in the lake where the depths were from one to four inches. Another, who used a boat in which he had installed a small motor, stated that the propeller sometimes struck bottom, when it would be necessary to pole the boat off, and that it was often stalled by the tangling of the " weedless " propeller in the vegetation of the lake.

Boating. The Special Master found that the boating which took place in the area involved had no commercial aspects and was of such a character as to be no indication of navigability; that it was only such as might reasonably be expected to occur in a swampy area of the character and magnitude described. The issue of navigability was chiefly concerned with Lake Malheur, but the findings were made with respect to the entire area.

Numerous witnesses who had lived in the vicinity for many years had never used a boat and had never, or rarely, seen one on the lake. Most of the evidence of boating related to the use of boats by trappers, to which reference has already been made, and by duck hunters in the spring and fall of the year. The boats were all of light draft, those most in use being canvas canoes or homemade rowboats, drawing between one and six inches of water. The record is replete with evidence showing

that many difficulties were customarily encountered in the use of boats. It was usual to drag them many yards, sometimes several hundred, from the fast land before they would float. Once embarked they encountered tules, often six feet or more in height, and much other water vegetation, impenetrable at many points, but through which there was a labyrinth of channels leading to no definite or certain destination. Hunters, in many instances, found it necessary to flag or otherwise mark the course in order to insure a convenient and safe route for return. The boats were often propelled by poling them through the tules and over the shallow places, or by getting out and pulling them.

Only four motor boats appear ever to have been used, and then only to a very limited extent, when conditions were favorable, in the more open water in the southeasterly part of Lake Malheur. This could ordinarily be reached by motor boat only by passing through a considerable distance of relatively shallow water in the region of the Blitzen River. One operator of a motor boat was often marooned by shallow water and took with him a small canoe as a means of proceeding when the motor boat was grounded. He had never found the boat useful because of the weeds and the shallowness of the water. The others had the same difficulties. Two stated that they could only use the boats during high water in spring and early summer. One of them, the Reserve Protector, a resident since 1909, had patrolled Lake Malheur in his boat in high water, but the greater portion of his patrolling was not by boat. The fourth person who had used a motor boat had often found it necessary to get out and pull the boat over shoals in one to four inches of water.

The evidence of any use of boats in the other divisions was much more meagre and still less indicative of the possibility of navigation. There is a single instance of bringing a small quantity of hay by rowboat from one

of the small islands in Lake Malheur, but there is no other evidence of transportation of any commodity, beyond that already indicated.

The evidence, taken as a whole, clearly establishes the flat topography of the disputed area, the shallow water without defined banks, ice-bound from three to four months of the year, the separation of areas covered by water of sufficient depth to float boats, the presence of tules and other forms of water vegetation, a dry season every year, and frequent dry years during which Mud and Harney Lakes are almost entirely without water, and Lake Malheur is reduced to a relatively few acres of disconnected ponds surrounded by mud. These conditions preclude the use for navigation of the area in question, in its natural and ordinary condition, according to the customary modes of trade or travel over water, and establish an absence of that capacity for general and common usefulness for purposes of trade and commerce which is essential to navigability. See *United States* v. *Rio Grande Irrigation Co., supra,* 698. At most the evidence shows such an occasional use of boats, sporadic and ineffective, as has been observed on lakes, streams or ponds large enough to float a boat, but which nevertheless were held to lack navigable capacity. See *United States* v. *Rio Grande Irrigation Co., supra,* 699; *The Montello,* 20 Wall. 430, 442; *Leovy* v. *United States,* 177 U. S. 621, 627, 633; *North American Dredging Co.* v. *Mintzer,* 245 Fed. 297 (C. C. A. 9th); *Toledo Liberal Shooting Co.* v. *Erie Shooting Club, supra,* 682; *Harrison* v. *Fite,* 148 Fed. 781, 786 (C. C. A. 8th).

It is not without significance that the disputed area has been treated as non-navigable both by the Secretary of the Interior and the Oregon courts. The Secretary, in 19 L. D. 439, December 3, 1894, described Lake Malheur as " non-navigable," and in 16 L. D. 256, March 3, 1893, and in 30 L. D. 521, March 11, 1901, as " little more than

a swamp or marsh," and again as a "vast marsh or tule swamp with comparatively little open water." The Oregon Supreme Court, in cases involving the correctness of the present or previous meander lines, has repeatedly recognized that Lake Malheur is non-navigable. See *French-Glenn Live Stock Co.* v. *Springer,* 35 Ore. 312, 323; 58 Pac. 102 (1899), 185 U. S. 47, 53; *Cawlfield* v. *Smyth,* 69 Ore. 41, 42; 138 Pac. 227 (1914); *Bailey* v. *Malheur Irrigation Co.,* 36 Ore. 54, 55; 57 Pac. 910 (1899); *In re Rights to Use of Waters of Silvies River,* 115 Ore. 27, 34; 237 Pac. 322 (1925).

II. Right of the United States to Maintain the Suit.

Oregon contends that the State has never adopted the rule of *Hardin* v. *Jordan, supra,* and that in any case the rule has never been applied by this Court and, further, is not applicable to lakes the size of Malheur and Harney. See *Stewart* v. *Turney,* 237 N. Y. 117, 123; 142 N. E. 437; *Granger* v. *Canandaigua,* 257 N. Y. 126, 130; 177 N. E. 394; *Richardson* v. *Sims,* 118 Miss. 728; 80 So. 4; *Boardman* v. *Scott,* 102 Ga. 404, 406–419; 30 S. E. 982. But if applied, and the upland proprietors whose grants are bounded by the meander line are held to take to the center of the lakes, then it is insisted that the United States, which must prevail upon the strength of its own title rather than the weakness of that of the State, cannot maintain the present suit to quiet title with respect to any part of the beds of the lakes thus shown to belong to the upland proprietors.

A bill to quiet title may not be defeated by showing that the plaintiff's interest, otherwise sufficient to support the bill, is subject to possibly superior rights in third persons not parties to the suit. *Van Wyck* v. *Knevals,* 106 U. S. 360, 368, 369; *Lane* v. *Watts,* 234 U. S. 525, 541; 235 U. S. 17, 23; see also *Gridley* v. *Wynant,* 23 How. 500, 503; *Clipper Mining Co.* v. *Eli Mining & Land Co.,* 194

U. S. 220, 223, 234. It is enough that the interest asserted by the plaintiff in possession of land is superior to that of those who are parties defendant. Before Oregon was admitted to statehood, the United States is shown to have acquired title which it has never in terms conveyed away. Its possession and claim of title have ever since continued. The Executive Order setting aside the area in question as a bird reservation was an assertion of title and possession. Following the Order, as the Master found, the United States, through representatives of the Department of Agriculture, particularly a resident protector or warden, has taken active control of all the lands within the meander line. In the exercise of that control it has excluded hunters, erected posts marking the limits of the reservation, posted notices advising all persons of the existence of the reservation and warning them to refrain from hunting on it. This possession of the United States, under color and claim of title, is not shown to have been disputed or interfered with. As it is sufficient to preclude any action at law in the nature of ejectment, it is an adequate basis for relief in equity to remove the cloud created by the assertion of any inferior title of the State. *Wehrman* v. *Conklin,* 155 U. S. 314, 325; *Allen* v. *Hanks,* 136 U. S. 300, 311; see *Sharon* v. *Tucker,* 144 U. S. 533, 543–548; *Lancaster* v. *Kathleen Oil Co.,* 241 U. S. 551, 555. There is no course of legal procedure by which a title to land can be adjudicated as good against all the world. It is therefore unnecessary to determine whether the rule of *Hardin* v. *Jordan, supra,* applies to grants of upland fronting on Lake Malheur and Harney Lake, or what interests, if any, have been acquired in the disputed area by any of the upland owners, other than Oregon. The United States is entitled to relief so far as it is able to show that Oregon is without any right or title on the basis of which it would be entitled to disturb the possession of the United States.

III. Oregon's Claim of Title to the Lake Beds in Consequence of Grants of Uplands by the United States.

This claim is based upon the assumption, which for present purposes we also make, that the rule of *Hardin* v. *Jordan, supra,* does not obtain in Oregon, and that accordingly the ownership of upland proprietors does not extend within the meander line boundary, and also upon the statute of Oregon effective February 25, 1921, c. 280, Laws of 1921. This legislation declares that lakes within the State which have been meandered by United States surveys are navigable public waters of the State, and that "the title to the bed and land thereunder, including the shore or space between ordinary high and low water marks" not previously granted by the State "is hereby declared to be in the State of Oregon, and the State of Oregon hereby asserts and declares its sovereignty over the same and its ownership thereof." The contention is that, upon grant of the uplands by the United States, whether to the State or others, title to the adjacent lake beds vested in the State by operation of the statute.

It is insisted that after statehood local law controls the disposition of the title to lands retained by the United States underlying non-navigable waters within the State, and that the effect, upon the title to such lands, of the conveyances of the adjacent upland by the United States is to be determined by reference to state laws. In support of this proposition, reliance is placed upon language in the opinion in *Hardin* v. *Jordan, supra,* 381–384, which, however, refers in part to conveyances of uplands bounded on navigable waters (tide water), and upon the decisions of certain state courts applying the rule contended for to lands underlying non-navigable waters. See *Fuller* v. *Shed,* 161 Ill. 462, 494; 44 N. E. 286; *Hammond* v. *Shepard,* 186 Ill. 235, 241; 57 N. E. 867; *Wilton* v. *Van-Hessen,* 249 Ill. 182; 94 N. E. 134; *Iowa* v. *Jones,* 143

Iowa 398, 402; 122 N. W. 241; *Lamprey* v. *State,* 52 Minn. 181, 192; 53 N. W. 1139; *McBride* v. *Whitaker,* 65 Neb. 137, 154; 90 N. W. 966; *Ne-pee-Nauk Club* v. *Wilson,* 96 Wis. 290, 295; 71 N. W. 661; compare *Whitney* v. *Detroit Lumber Co.,* 78 Wis. 240, 246; 47 N. W. 425.

It is true, as was specifically pointed out in *Oklahoma* v. *Texas, supra,* 594, 595, that the disposition of such lands is a matter of the intention of the grantor, the United States, and "if its intention be not otherwise shown it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies." This was the effect of the decisions in *Hardin* v. *Jordan, supra; Mitchell* v. *Smale,* 140 U. S. 406; and *Kean* v. *Calumet Canal Co.,* 190 U. S. 452, in which conveyances bounded upon the waters of a non-navigable lake were, when construed in accordance with local law, held impliedly to convey to the middle of the lake.

The rule that title to lands underlying navigable waters presumptively passes to the State upon admission to the Union has already been noted. *Massachusetts* v. *New York, supra,* 89; see *Scott* v. *Lattig, supra,* 242, 243. But in no case has this Court held that a state could deprive the United States of its title to land under non-navigable waters without its consent, or that a grant of uplands to private individuals, which does not in terms or by implication include the adjacent land under water, nevertheless operates to pass it to the State. Whether, on any theory, such a result could be upheld was a question expressly reserved in *Hardin* v. *Shedd,* 190 U. S. 508, 519; *Whitaker* v. *McBride,* 197 U. S. 510, 515; *Marshall Dental Co.* v. *Iowa,* 226 U. S. 460, 462. In none of these cases were the parties necessary for the determination of that question before the Court.

The laws of the United States alone control the disposition of title to its lands. The States are powerless to place

any limitation or restriction on that control. *Wilcox* v. *Jackson,* 13 Pet. 498, 516, 517; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; see *Brewer-Elliott Oil Co.* v. *United States, supra,* 88; *United States* v. *Utah, supra,* 75. The construction of grants by the United States is a federal not a state question, *Packer* v. *Bird,* 137 U. S. 661, 669, 670; *French-Glenn Live Stock Co.* v. *Springer,* 185 U. S. 47, 54; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District,* 232 U. S. 186, 196, and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances. See *Oklahoma* v. *Texas, supra,* 594, 595; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 404. In construing a conveyance by the United States of land within a State, the settled and reasonable rule of construction of the State affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted. But no such question is presented here, for there is no basis for implying any intention to convey title to the State.

The State, in making its present contention, does not claim as a grantee designated or named in any grant of the United States. It points to no rule ever recognized or declared by the courts of the State that a grant to individual upland proprietors impliedly grants to the State the adjacent land under water.[3] The only support for its claim is the statute of 1921, adopted subsequent to

[3] By § 63–102, Oregon Code Annotated, 1930, enacted in 1862, and by judicial decision, *Micelli* v. *Andrus,* 61 Ore. 78, 85, conveyances of upland bounded upon non-navigable streams carry to the middle or thread of the stream.

every grant of the United States involved in the present case. The case is not one of the reasonable construction of grants of the United States, but the attempted forfeiture to the State by legislative fiat of lands which, so far as they have not passed to the individual upland proprietors, remain the property of the United States. Such action by the State can no more affect the title of the United States than can the similar legislative pronouncements that streams within a State are navigable which this Court has found to be non-navigable. See *Oklahoma* v. *Texas, supra; United States* v. *Utah, supra,* 75; *United States* v. *Holt State Bank, supra,* 55, 56.

The Master correctly found that there were no facts or circumstances to establish, as matter of fact, any intent on the part of the United States to abandon or surrender its claim to any part of the area within the meander line.

We accordingly accept the findings and determination of the Special Master, to which the Government does not except, as to the title and interest of the State of Oregon in Mud Lake and in Division B of the Narrows, and conclude that the State has no right, title or interest in any part of the remainder of the area, which is superior to that of the United States. The United States is entitled to a decree in conformity with this opinion, and also with the decree recommended by the Special Master so far as it is not inconsistent with this opinion, quieting its title and possession, as against the State of Oregon, to such remaining area within the meander line boundary of the five divisions.

The parties, or either of them, if so advised, may, within thirty days, submit the form of decree to carry this opinion into effect, failing which the Court will prepare and enter the decree.

It is so ordered.

GORDON, SECRETARY OF BANKING, ET AL. *v.* WASHINGTON ET AL.*

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

No. 549. Argued March 7, 1935.—Decided April 1, 1935.

1. Under the banking laws of Pennsylvania the Secretary of Banking is authorized to take over any banking business which is in an unsafe and unsound condition. After filing in his office a certificate of possession, and in the office of the prothonotary a certified copy thereof, the Secretary has the status of an equity receiver responsible to the court in which such certificate of possession is filed. In respect of mortgage pools operated by banks taken over, provision is made for their administration by the Secretary until such time as a substitute fiduciary is appointed by the court. Pursuant to these laws, the Secretary came into possession of the property of a state bank, including mortgage pools. Subsequently, owners of participation certificates in the mortgage pools brought suits in the federal district court, praying the appointment of a receiver and the usual injunction. No other remedy was sought. No charge of misconduct, neglect, or mismanagement was made against the Secretary. The District Court nevertheless appointed receivers, whereupon the Secretary petitioned to vacate the orders, alleging that his management of the pools was in accordance with the laws of the State and had been in the interest of the participants. *Held:*

(1) The suits for the appointment of receivers, the requisite diversity of citizenship and jurisdictional amount being shown and unchallenged, were within the jurisdiction of the District Court. *Pennsylvania* v. *Williams,* 294 U. S. 176. P. 35.

(2) The appointment of receivers, under the circumstances, was an abuse of discretion and should have been promptly set aside on the application of the Secretary. *Pennsylvania* v. *Williams,* 294 U. S. 176; *Gordon* v. *Ominsky,* 294 U. S. 186. P. 36.

(3) A finding of the District Court that nothing had been done by the Banking Department to provide the means for an active,

* Together with No. 550, *Gordon, Secretary of Banking, et al.* v. *O'Brien et al.* Certiorari to the Circuit Court of Appeals for the Third Circuit.

intelligent and responsible administration of the mortgage pools, was without support in the record. P. 39.

2. The phrase "suits in equity" in § 11 of the Judiciary Act of 1789 refers to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts. P. 36.
3. A federal court of equity should not appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give. P. 37.
4. A federal court, even in the exercise of an equity jurisdiction not otherwise inappropriate, should not appoint a receiver to displace the possession of a state officer lawfully administering property for the benefit of interested parties, except where it appears that the procedure afforded by state law is inadequate or that it will not be diligently and honestly followed. *Pennsylvania* v. *Williams*, 294 U. S. 176; *Gordon* v. *Ominsky*, 294 U. S. 186. P. 39.

73 F. (2d) 577, reversed.

CERTIORARI, 293 U. S. 553, to review a decree affirming a decree of the District Court denying motions of the Secretary of Banking of Pennsylvania to dismiss bills of complaint and to vacate the appointment of receivers for property which was in his possession under the banking laws of the State.

Mr. Joseph K. Willing, with whom *Mr. Charles J. Margiotti,* Attorney General of Pennsylvania, and *Mr. Shippen Lewis,* Special Deputy Attorney General, were on the brief, for petitioners.

Mr. David Bortin for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

In these cases certiorari was granted to review a decree of the Court of Appeals for the Third Circuit, 73 F. (2d) 577, which affirmed a decree of the district court overruling motions to dismiss the bills of complaint and to vacate the appointments of receivers. The questions involved are of public importance. See

Pennsylvania v. *Williams,* 294 U. S. 176; *Gordon* v. *Ominsky,* 294 U. S. 186; *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189.

On February 14, 1933, petitioner, the Secretary of Banking of the Commonwealth of Pennsylvania, took possession of the business and property of the Chester County Trust Company, a Pennsylvania banking corporation. By § 21 of the Banking Act of 1923, P. L. 809, he is authorized to take possession of and to liquidate the business and property of banking corporations of the commonwealth which are in "an unsafe or unsound condition." Pursuant to § 22, he filed a "certificate of possession" in his office and on the following day filed a certified copy of the certificate with the prothonotary of the Court of Common Pleas of Chester County. When this is done, he has, by § 29, the status of a receiver appointed by any court of equity of the commonwealth.

Included in the business and property taken over by the Secretary were two trust funds, or "mortgage pools," consisting of mortgages held by the trust company as fiduciary, against which it had issued participation certificates entitling the holder to an undivided share in the principal and interest of mortgages aggregating in excess of $2,900,000 in one pool and of $1,700,000 in the other. The Department of Banking Code of May 15, 1933, P. L. 565, which became effective July 3, 1933, provides in § 701 that the Secretary, when in possession of the business and property of a banking corporation, shall have the status of a general receiver and be responsible to the court in which his certificate of possession is filed, in this case the Court of Common Pleas of Chester County, and that he shall exercise all the rights, powers and duties of the corporation and succeed to its title and right to possession of all property and securities. Article IX of the Code, §§ 901–905, provides for the disposition of the trust funds and mortgage pools of a trust company taken over by the Secretary. After he has filed a notice of his intention to

proceed with its liquidation, any certificate holder of a mortgage pool is authorized to apply to the court for the appointment of a substituted fiduciary of the pool. The Secretary is required, " as soon as it may be convenient," to file in court an account of the securities in any mortgage pool conducted by the trust company, and he is directed to apply for the appointment of a substituted fiduciary of the mortgage pool if, within thirty days after the filing of the account, no certificate holder has made such an application. The Code thus provides for the Secretary's possession and administration of the mortgage pools of a closed bank until such time as a substituted fiduciary is appointed.

The bills of complaint in the present suits, naming the Secretary as defendant, were respectively filed in the district court on August 25th and August 28th, 1933, approximately a month and three weeks after the mortgage pool provisions of the Banking Code had become effective. There is no material difference between the two bills of complaint. The plaintiff in No. 549, respondent here, a citizen of Connecticut, is alleged to be the owner of a participation certificate in the larger of the two pools, and the plaintiff in No. 550, respondent here, a citizen of New Jersey, is alleged to be the owner of a participation certificate in the smaller. Each bill, after stating the facts already detailed with respect to the Secretary's possession of the property of the trust company, including the mortgage pools, alleged that the plaintiff had received no interest or income on his participation certificate after the Secretary had taken possession; that the Secretary had filed no account of the mortgage pools; and avers, on information and belief, " that interest on many of the mortgages comprising said pool has not been paid . . . and that little effort is made to secure the collection of the interest. . . ." It is also alleged that " there is danger of sales by the respective authorities by reason of the nonpayment of taxes on said properties and that little effort

is being made to compel the payment of taxes. . . ." The bills contain no charge of improper conduct, neglect or mismanagement, or any allegation that the failure of the mortgagors to pay interest and taxes was due to want of diligence on the part of the Secretary. They pray the appointment of a receiver to take charge of, conserve and administer all the assets comprising the mortgage pools, but they do not ask the appointment of a new trustee or the removal of the Secretary, or pray any directions or instructions to him, or any other relief except the usual injunction in aid of the receivership.

On the day the bill of complaint in the second suit was filed, attorneys for the plaintiffs filed motions for the appointment of receivers. Two days later, on August 30, 1933, upon telephone notice to the petitioners of an hour and a half, the district judge heard the motions and appointed receivers. The Secretary failed to surrender the mortgage pools to the receivers and the district court issued, on September 2, 1933, a rule to show cause why the Secretary should not be adjudged in contempt. On September 4th, the Court of Common Pleas of Chester County, upon application by a mortgage pool certificate holder, issued an injunction restraining the Secretary from relinquishing possession of the mortgage pool assets until further order of the court. On September 5th, the petitioner filed answers to the petitions to punish for contempt, and made motions, on affidavits and petitions, to dismiss the bills and to vacate the appointment of the receivers. Both motions assailed the bills as not stating facts to show that damage would be suffered by any party in interest if receivers were not appointed. The motions to dismiss also challenged the " authority " of the district court to appoint receivers. In the petitions to vacate the orders appointing receivers, it was alleged that since the closing of the trust company the Secretary had continued to operate the mortgage pools and was ready to file with the Court of Common Pleas his account of assets compris-

ing the pools, that his management of them was in accordance with the Pennsylvania statutes, and that he had conducted the mortgage pools "with the utmost regard for the interests of the participants." No action appears to have been taken upon the motion to adjudge the petitioners in contempt, but in denying, upon the pleadings and motion papers, the motions to dismiss and to vacate the orders appointing receivers, the district court ruled that it had jurisdiction of the cause as a federal court, and found that nothing had been done by the Banking Department "to provide the means for an active, intelligent, responsible administration of its pools."

The Court of Appeals ruled that the district court had jurisdiction, since the Secretary, in taking possession of the mortgage pools, had acted by authority of the statute and not under any order or decree of the state court. The assets, it was said, were not in the actual or constructive possession of the state court, and consequently there was no occasion to apply the rule of comity under which a federal court will relinquish its jurisdiction in favor of a state court which has first acquired possession of the property which is the subject of suit. See *Penn Casualty Co.* v. *Pennsylvania, supra.* Upon the basis of the finding of the district court that the Banking Department had failed to provide suitable means for the administration of the pools, it concluded that no abuse of discretion in the appointment of receivers had been shown.

From what this Court has recently said in *Pennsylvania* v. *Williams, supra,* it is evident that the district court correctly determined that it had jurisdiction of the cause. The requisite diversity of citizenship and the jurisdictional amount in controversy are shown by the record and are unchallenged. The relief prayed was that which a court of equity is competent to give. The bills of complaint were therefore sufficient to invoke the power and authority conferred on the district court, by the Consti-

tution and statutes of the United States, to entertain the suit and render an appropriate decree.

Since the court had power to act, it is necessary to consider the various objections urged to the decree only insofar as they are addressed to the propriety of its action as a court of equity. These objections were not foreclosed by the determination that the court had jurisdiction. By the Judiciary Act of 1789, c. 20, § 11, 1 Stat. 73, 78; U. S. C., Tit. 28, § 41 (1), the lower federal courts were given original jurisdiction "of suits . . . in equity," where the other jurisdictional requisites are satisfied. From the beginning, the phrase "suits in equity" has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts.[1] *Robinson* v. *Campbell,* 3 Wheat. 212, 221–223; *United States* v. *Howland,* 4 Wheat. 108, 115; *Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U. S. 33, 43. When the petitioners challenged the sufficiency of the bills of complaint and the appropriateness of the appointment of receivers, it was not enough for the district court to decide that as a federal court it had power to act. It should also have determined whether, in accordance with the accepted principles of equity, any state of facts was presented to it which called for the exercise of its extraordinary powers as a court of equity. See *Pennsylvania* v. *Williams, supra.*

The sole relief prayed by the bills was the appointment of receivers and the command of the court that property, shown to be in the lawful possession of the pe-

[1] The Act of May 8, 1792, c. 36, § 2, 1 Stat. 275, 276; U. S. C., Tit. 28, § 723, further provided "That . . . the forms and modes of proceeding in suits . . . shall be . . . in those of equity . . . according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law. . . ." See *Robinson* v. *Campbell,* 3 Wheat. 212, 221, 222.

titioner acting as a temporary trustee or fiduciary, be surrendered to them. A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition. For that purpose, the court may appoint a receiver of mortgaged property to protect and conserve it pending foreclosure, *Wallace* v. *Loomis,* 97 U. S. 146, 162; *Union Trust Co.* v. *Illinois Midland Ry. Co.,* 117 U. S. 434, 455; *Hitz* v. *Jenks,* 123 U. S. 297, 306; *Freedman's Saving & Trust Co.* v. *Shepherd,* 127 U. S. 494, 500–504; *Shepherd* v. *Pepper,* 133 U. S. 626, 652, of trust property pending the appointment of a new trustee, *Underground Electric Rys. Co.* v. *Owsley,* 176 Fed. 26 (C. C. A. 2d); *Ball* v. *Tompkins,* 41 Fed. 486, 489 (C. C.); cf. *Haines* v. *Carpenter,* 1 Woods 262, aff'd 91 U. S. 254, or of property which a judgment creditor seeks to have applied to the satisfaction of his judgment, *Covington Drawbridge Co.* v. *Shepherd,* 21 How. 112, 125; *Ogilvie* v. *Knox Insurance Co.,* 22 How. 380, 392; *Ingle* v. *Jones,* 9 Wall. 486, 498.

But there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose. *Anonymous,* 1 Atkyns 489, 578; *Ex parte Whitfield,* 2 Atkyns 315; *Goodman* v. *Whitcomb,* 1 Jacob & Walker 589, 592; *Robinson* v. *Hadley,* 11 Beavan 614; *Roberts* v. *Eberhardt,* Kay 148, 160, 161.[2] It is true that

[2] The jurisdiction of the English court of chancery to appoint a receiver for the estates of infants, even though no other relief be asked, is a statutory development since 1789. 4 and 5 Wm. IV, c. 78, § 7. The appointment of a receiver for the estate of a lunatic is a non-judicial duty performed for the Crown pursuant to statute. 17

the receivership of an insolvent corporation, upon the application of a simple contract creditor with the consent of the corporation, has been recognized by the federal courts as an appropriate form of relief when the end sought is the liquidation of the assets and their equitable distribution among the creditors. *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530; *Re Metropolitan Railway Receivership,* 208 U. S. 90, 109, 110; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 500, 501; *United States* v. *Butterworth-Judson Corp.,* 269 U. S. 504, 513, 514; compare *Harkin* v. *Brundage,* 276 U. S. 36, 52; *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, 345; *Shapiro* v. *Wilgus,* 287 U. S. 348, 356; *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436; *First National Bank* v. *Flershem,* 290 U. S. 504, 525. Whether this exercise of jurisdiction, to liquidate or conserve the assets of a corporation through the agency of a receivership, is to be supported as an extension of that exercised over decedents' estates, see Glenn on Liquidation, §§ 154–161, or of remedies afforded to judgment creditors where legal remedies are inadequate, see *Manhattan Rubber Mfg. Co.* v. *Lucey Mfg. Co.,* 5 F. (2d) 39, 42 (C. C. A. 2nd),[3] it has never been extended to other classes of cases. Whenever the attempt thus to extend it, by using the receivership as an end instead of a means, has been brought to the attention of this Court, it has pointed out that a federal court of equity will not appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give. *Pusey & Jones Co.* v. *Hanssen, supra,* 497; *Booth* v. *Clark,*

Edw. II, c. 9, 10; see *Sheldon* v. *Fortesque,* 3 Peere Williams 104, n. 108. Further provisions for appointment of receivers by interlocutory decree, whenever "just or convenient," were included in the Judicature Act, 1873, 36 & 37 Victoria, c. 66, § 25 (8).

[3] See also the authorities collected and discussed in Kroeger, The Jurisdiction of Courts of Equity to Administer Insolvents' Estates, 9 St. Louis Law Rev., 87, 179.

17 How. 322, 331; see *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371.

Respondents' bills of complaint not only failed to seek any remedy other than the appointment of receivers, but they failed to disclose any basis for equitable relief by the appointment of receivers or otherwise. Respondents are not shown to be creditors, much less judgment creditors. As beneficiaries of the fiduciary relationship of the trust company, and later of the Secretary, to the mortgage pools, they failed to allege misconduct or neglect on which any equitable relief could be predicated. They did not show that there was any danger to the assets of the mortgage pools, or to their management, which would be avoided or removed by the appointment of receivers. Petitioner did not waive these defects of the bills, or consent to the appointment of receivers.

We have recently had occasion to point out that a federal court, even in the exercise of an equity jurisdiction not otherwise inappropriate, should not appoint a receiver to displace the possession of a state officer lawfully administering property for the benefit of interested parties, except where it appears that the procedure afforded by state law is inadequate or that it will not be diligently and honestly followed. *Gordon* v. *Ominsky, supra; Pennsylvania* v. *Williams, supra.* Even when the bill of complaint states a cause of action in equity, the summary remedy by receivership, with the attendant burdensome expense, should be resorted to only on a plain showing of some threatened loss or injury to the property, which the receivership would avoid. Here no such showing was made. It is true the district court found that nothing had been done by the Banking Department to provide the means for an active, intelligent and responsible administration of the mortgage pools. The Court of Appeals, on the basis of this finding, thought there had been no

abuse of discretion. But that finding is without support in the record.

The court below erred in not directing dismissal of the bills of complaint as failing to state a cause of action in equity. The appointment of receivers, in the circumstances, was an abuse of discretion which should have been promptly set aside on the applications of the petitioner. The decrees below will be reversed and the cause remanded with directions to the district court to dismiss the bills and discharge the receivers.

Reversed.

NEBRASKA *v.* WYOMING.

No. 16, original. Motion to dismiss submitted January 21, 1935.—Argued March 13, 1935.—Decided April 1, 1935.

1. Upon motion to dismiss a bill of complaint in an original proceeding brought in this Court by Nebraska against Wyoming for the equitable apportionment, as between the two States, of the waters of the North Platte River, and for an injunction, *held:*

   (1) The State of Colorado, against whom the complainant alleges no wrongful act and asks no relief, is not an indispensable party to the proceeding, even though the river rises and drains a large area in that State. P. 43.

   (2) The Secretary of the Interior, whose rights as an appropriator in Wyoming, in connection with projects authorized by the Reclamation Act, are subject to the law of that State, will be bound by an adjudication of the State's rights, and is not an indispensable party. P. 43.

   (3) The allegations of the bill are not vague and indefinite, but state a cause of action in equity entitling the complainant to the relief prayed. P. 44.

2. A contention that the complainant is chargeable with such a failure to do equity as requires a dismissal of the bill, examined and rejected. P. 44.

Motion denied.

BILL OF COMPLAINT in an original proceeding brought by Nebraska against Wyoming to have determined the

rights of the two States in the waters of the North Platte River. The defendant State filed a motion to dismiss.

Mr. Ray E. Lee, Attorney General of Wyoming, with whom *Mr. William C. Snow,* Assistant Attorney General, and *Mr. Thomas F. Shea,* Deputy Attorney General, were on the brief, for defendant in support of the motion to dismiss.

Mr. Paul F. Good, with whom *Mr. Wm. H. Wright,* Attorney General of Nebraska, and *Mr. C. G. Perry* were on the brief, for plaintiff in opposition to the motion to dismiss.

Mr. Justice Roberts delivered the opinion of the Court.

Nebraska, by leave of court, has filed a bill of complaint against Wyoming praying ascertainment of the equitable apportionment, as between the two States, of the waters of the North Platte River, and a decree to enforce compliance with the findings in that behalf. Wyoming has presented a motion to dismiss.

The allegations of the bill, in summary, are: The river, a non-navigable stream, has its source in Colorado, enters and traverses Wyoming, crosses the state line into Nebraska and in that State unites with the South Platte to form the Platte River, which flows from the junction through Nebraska to the Missouri River, the eastern boundary of the State. Nebraska's citizens need irrigation water from the Platte above Grand Island and the North Platte; appropriation of water from these streams by her citizens began in 1882, continues to the present time, and is of large extent. Plaintiff and defendant alike recognize by their laws the doctrine that the waters of streams may be appropriated for beneficial use and that he whose appropriation is prior in time has the superior

right. Appropriations of the waters of the North Platte have been made in both states. The Reclamation Act of the United States[1] authorized the construction of reservoirs in Wyoming for storage of water to be used for irrigation, and the Secretary of the Interior, pursuant to the Act, applied to the state engineer of Wyoming and obtained from him permission to construct in that state reservoirs for impounding the waters of the North Platte, and to appropriate waters, and was awarded a priority date. Reservoirs of large capacity have accordingly been constructed and operated by the United States, but solely under and subject to the irrigation and appropriation laws of Wyoming. Projects completed under the Reclamation Act are also supplied with water withdrawn from the direct flow of the North Platte, and the Bureau of Reclamation of the Department of the Interior of the United States has, pursuant to the Warren Act,[2] contracted with irrigation projects having earlier priorities to supplement the direct flow rights of such projects by the addition of waters stored in its reservoirs. All of the acts of the Reclamation Bureau in operating the reservoirs so as to impound and release waters of the river are subject to the authority of Wyoming; and she and her officers are under the duty to administer these waters fairly and impartially, and to control appropriators whose rights arise under the law of Wyoming from encroaching upon the rights of Nebraska appropriators by diminishing the flow so that the latter are unable to obtain the waters embraced within their appropriations. This duty Wyoming officials have neglected and disregarded, in spite of Nebraska's protests; and have permitted the diversion of waters belonging to Nebraska's appropriators to the great loss and damage of

[1] June 17, 1902, c. 1093, 32 Stat. 388. U. S. C. Tit. 43, §§ 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 476, 491, 498.

[2] Feb. 21, 1911, c. 141, 36 Stat. 925; U. S. C. Tit. 43, §§ 523–525.

her citizens. The priorities of the appropriators in each state, including the Bureau of Reclamation, can be ascertained, and investigation discloses that the defendant has allotted the Bureau too early a date with respect to a proposed project and unless restrained Wyoming will permit appropriation in aid thereof.

The motion to dismiss advances three propositions of law.

1. Colorado is said to be an indispensable party, because the bill discloses that the North Platte rises in that state and drains a considerable area therein. The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proofs may disclose a necessity to bring her into the suit. It suffices to say that upon the face of the bill she is not a necessary party to the dispute between Nebraska and Wyoming concerning the respective priorities and rights of their citizens in the waters of the North Platte River.

2. The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges, and we know as matter of law,[3] that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.

[3] Act of June 17, 1902, c. 1093, § 8, 32 Stat. 390; U. S. C. Tit. 43, § 383.

3. Wyoming says that the bill fails to state a cause of action in equity and states no matter of equity entitling Nebraska to the relief for which she asks. The printed argument submitted on behalf of defendant asserts that the complaint is vague and indefinite in its assertions of fact and may be read as claiming the entire flow of the river for use in Nebraska. We do not so read the bill. The plaintiff asserts that appropriations have been made in both states; that some in Wyoming are prior to others in Nebraska and vice versa, and prays an ascertainment of the proper dates of all and relief in conformity with the facts found.

In oral argument the defendant called attention to statements in the bill to the effect that certain of the Nebraska water users whose rights the plaintiff desires adjudicated, must take water from the Platte River which is formed by the confluence of the North and the South Platte rivers; that the latter rises in Colorado and flows for a substantial distance through Nebraska before it joins the North Platte, and the bill fails to state anything respecting the augmentation of the flow of the Platte from the South Platte, which increment should be considered in ascertaining the amount of the waters contributed by the North Platte to which these users are entitled as against users in Wyoming. It is said the plaintiff's failure to mention the contribution of the South Platte or to signify a willingness that the water this stream supplies to the Platte shall be taken into account, is a failure to tender equity, and requires a dismissal of the suit. We think the position is not well taken. The bill states " that in the drainage basin of the said Platte and North Platte Rivers, between the said state line dividing the State of Nebraska from the State of Wyoming, and the City of Grand Island, Nebraska, there are no tributaries of the said North Platte and Platte Rivers supplying any substantial amount of water. . . ." If the

fact be otherwise Wyoming may traverse this allegation and thus make it an issue to be determined with proper regard to such proofs as may be produced respecting the supply from the South Platte.

We think no sufficient ground appears for dismissing the bill.

The motion is denied, and the defendant will be given sixty days within which to answer the bill.

GROVEY *v.* TOWNSEND.

CERTIORARI TO THE JUSTICE COURT, PRECINCT NO. 1, HARRIS COUNTY, TEXAS.

No. 563. Argued March 11, 1935.—Decided April 1, 1935.

1. In the light of principles announced by the highest court of Texas, relative to the rights and privileges of political parties under the laws of that State, the denial of a ballot to a negro for voting in a primary election, pursuant to a resolution adopted by the state convention restricting membership in the party to white persons, can not be deemed state action inhibited by the Fourteenth or Fifteenth Amendment. P. 49.
2. Analysis of the decisions of the Supreme Court of Texas in the cases of *Bell* v. *Hill* and *Love* v. *Wilcox* lends no support to the claim that §§ 2 and 27 of the Bill of Rights of Texas violate the Federal Constitution. P. 53.
3. The provisions of Art. 3167 of the Revised Civil Statutes of Texas, 1925, prescribing the times when state conventions of political parties are to be held and regulating the method of choosing delegates, do not warrant the conclusion that the state convention is a mere creature of the State. P. 53.
4. That in Texas nomination by the Democratic party is equivalent to election, and exclusion from the primary virtually disfranchises the voter, does not, without more, make out a forbidden discrimination in this case. P. 54.
5. That the Democratic national organization has not declared a policy to exclude negroes from membership, gives no support to

the claim of one who was thus excluded pursuant to a resolution of a state convention of the party in Texas, that he was discriminated against by the State in violation of the Federal Constitution. P. 55.

Affirmed.

CERTIORARI, 294 U. S. 699, to review a judgment dismissing an action for ten dollars damages, brought by Grovey, in a justice's court, against Townsend, a county clerk, based on the latter's refusal to issue to the former an absentee ballot for voting in a primary election. Under the state law, the judgment, because of the small amount involved, was not reviewable in any higher court of the State.

Mr. J. Alston Atkins, with whom *Mr. Carter W. Wesley* was on the brief, for petitioner.

No appearance for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner, by complaint filed in the Justice Court of Harris County, Texas, alleged that although he is a citizen of the United States and of the State and County, and a member of and believer in the tenets of the Democratic party, the respondent, the county clerk, a state officer, having as such only public functions to perform, refused him a ballot for a Democratic party primary election, because he is of the negro race. He demanded ten dollars damages. The pleading quotes articles of the Revised Civil Statutes of Texas which require the nomination of candidates at primary elections by any organized political party whose nominees received one hundred thousand votes or more at the preceding general election, and recites that agreeably to these enactments a Democratic primary election was held on July 28, 1934, at which petitioner had the right to vote. Referring to statutes

which regulate absentee voting at primary elections, the complaint states the petitioner expected to be absent from the county on the date of the primary election, and demanded of the respondent an absentee ballot, which was refused him in virtue of a resolution of the state Democratic convention of Texas, adopted May 24, 1932, which is:

"Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations."

The complaint charges that the respondent acted without legal excuse and his wrongful and unlawful acts constituted a violation of the Fourteenth and Fifteenth Amendments of the Federal Constitution.

A demurrer, assigning as reasons that the complaint was insufficient in law and stated no cause of action, was sustained; and a motion for a new trial, reasserting violation of the federal rights mentioned in the complaint, was overruled. We granted certiorari,[1] because of the importance of the federal question presented, which has not been determined by this court.[2] Our jurisdiction is clear, as the Justice Court is the highest state court in which a decision may be had,[3] and the validity of the constitution and statutes of the state was drawn in question on the ground of their being repugnant to the Constitution of the United States.[4]

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[1] 294 U. S. 699.

[2] Rule 38, 5 (a).

[3] *Downham* v. *Alexandria,* 9 Wall. 659; *Tinsley* v. *Anderson,* 171 U. S. 101. Constitution of Texas, Article V, §§ 3, 6, 8, 16 and 19. Revised Civil Statutes of Texas of 1925, Articles 1906–1911, 2385–2387, 2454, 2460. *Gulf, C. & S. F. Ry. Co.* v. *Rawlins,* 80 Tex. 579; *Hudson* v. *Smith,* 63 Tex. Civ. App. 412; 133 S. W. 486; *Arrington* v. *People's Supply Co.,* 52 S. W. (2d) 678.

[4] U. S. C. Tit. 28, § 344 (b).

The charge is that respondent, a state officer, in refusing to furnish petitioner a ballot, obeyed the law of Texas, and the consequent denial of petitioner's right to vote in the primary election because of his race and color was state action forbidden by the Federal Constitution; and it is claimed that former decisions require us so to hold. The cited cases are, however, not in point. In *Nixon* v. *Herndon,* 273 U. S. 536, a statute which enacted that " in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas," was pronounced offensive to the Fourteenth Amendment. In *Nixon* v. *Condon,* 286 U. S. 73, a statute was drawn in question which provided that " every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party." We held this was a delegation of state power to the state executive committee and made its determination conclusive irrespective of any expression of the party's will by its convention, and therefore the committee's action barring negroes from the party primaries was state action prohibited by the Fourteenth Amendment. Here the qualifications of citizens to participate in party counsels and to vote at party primaries have been declared by the representatives of the party in convention assembled, and this action upon its face is not state action. The question whether under the constitution and laws of Texas such a declaration as to party membership amounts to state action was expressly reserved in *Nixon* v. *Condon, supra,* pp. 84–85. Petitioner insists that for various reasons the resolution of the state convention limiting membership in the Democratic party in Texas to white voters does not relieve the exclusion of negroes from participation in Democratic primary elections of its true nature as the act of the state.

First. An argument pressed upon us in *Nixon* v. *Condon, supra,* which we found it unnecessary to consider, is again presented. It is that the primary election was held under statutory compulsion; is wholly statutory in origin and incidents; those charged with its management have been deprived by statute and judicial decision of all power to establish qualifications for participation therein inconsistent with those laid down by the laws of the state, save only that the managers of such elections have been given the power to deny negroes the vote. It is further urged that while the election is designated that of the Democratic party, the statutes not only require this method of selecting party nominees, but define the powers and duties of the party's representatives, and of those who are to conduct the election, so completely, and make them so thoroughly officers of the state, that any action taken by them in connection with the qualifications of members of the party is in fact state action and not party action.

In support of this view petitioner refers to Title 50 of the Revised Civil Statutes of Texas of 1925,[5] which by Article 3101 requires that any party whose members cast more than one hundred thousand ballots at the previous election, shall nominate candidates through primaries, and fixes the date at which they are to be held; by Article 2939 requires primary election officials to be qualified voters; by Article 2955 declares the same qualifications for voting in such an election as in the general elections; by Article 2956 permits absentee voting as in a general election; by Article 2978 requires that only an official ballot shall be used, as in a general election; by Articles 2980–2981 specifies the form of ballot and how it shall be marked, as other sections do for general elections; by Article 2984 fixes the number of ballots to be provided, as another article does

[5] Vernon's Annotated Revised Civil and Criminal Stautes, Vol. 9, p. 3ff; *id.*, January 1935 Cumulative Supplement, pp. 117, 118.

for general elections; by Articles 2986, 2987 and 2990 permits the use of voting booths, guard rails, and ballot boxes which by other statutes are provided for general elections; by Articles 2998 and 3104 requires the officials of primary elections to take the same oath as officials at the general elections; by Article 3002 defines the powers of judges at primary elections; by Articles 3003–3025 provides elaborately for the purity of the ballot box; by Article 3028 commands that the sealed ballot boxes be delivered to the county clerk after the election, as is provided by another article for the general election; and by Article 3041 confers jurisdiction of election contests upon district courts, as is done by another article with respect to general elections. A perusal of these provisions, so it is said, will convince that the state has prescribed and regulated party primaries as fully as general elections, and has made those who manage the primaries state officers subject to state direction and control.

While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the state, but by members of the party seeking nomination (Arts. 3108; 3116); the ballots are furnished not by the state, but by the agencies of the party (Arts. 3109; 3119); the votes are counted and the returns made by instrumentalities created by the party (Arts. 3123; 3124–5; 3127); and the state recognizes the state convention as the organ of the party for the declaration of principles and the formulation of policies (Arts. 3136; 3139).

We are told that in *Love* v. *Wilcox,* 119 Tex. 256; 28 S. W. (2d) 515, the Supreme Court of Texas held the state was within its province in prohibiting a party from

establishing past party affiliations or membership in non-political organizations as qualifications or tests for participation in primary elections, and in consequence issued its writ of mandamus against the members of the state executive committee of the Democratic party on the ground that they were public functionaries fulfilling duties imposed on them by law. But in that case it was said (p. 272):

"We are not called upon to determine whether a political party has power, beyond statutory control, to prescribe what persons shall participate as voters or candidates in its conventions or primaries. We have no such state of facts before us."

After referring to Article 3107, which limits the power of the state executive committee of a party to determine who shall be qualified to vote at primary elections, the court said:

"The Committee's discretionary power is further restricted by the statute directing that a single, uniform pledge be required of the primary participants. The effect of the statutes is to decline to give recognition to the lodgment of power in a State Executive Committee, to be exercised at its discretion."

Although it did not pass upon the constitutionality of § 3107, as we did in *Nixon* v. *Condon, supra,* the Court thus recognized the fact upon which our decision turned, that the effort was to vest in the state executive committee the power to bind the party by its decision as to who might be admitted to membership.

In *Bell* v. *Hill,* 74 S. W. (2d) 113, the same court, in a mandamus proceeding instituted after the adoption by the state convention of the resolution of May 24, 1932, restricting eligibility for membership in the Democratic party to white persons, held the resolution valid and effective. After a full consideration of the nature of political parties in the United States, the court concluded that

such parties in the state of Texas arise from the exercise of the free will and liberty of the citizens composing them; that they are voluntary associations for political action, and are not the creatures of the state; and further decided that §§ 2 and 27 of Article 1 of the State Constitution guaranteed to citizens the liberty of forming political associations, and the only limitation upon this right to be found in that instrument is the clause which requires the maintenance of a republican form of government. The statutes regulating the nomination of candidates by primaries were related by the court to the police power, but were held not to extend to the denial of the right of citizens to form a political party and to determine who might associate with them as members thereof. The court declared that a proper view of the election laws of Texas, and their history, required the conclusion that the Democratic party in that state is a voluntary political association and, by its representatives assembled in convention, has the power to determine who shall be eligible for membership and, as such, eligible to participate in the party's primaries.

We cannot, as petitioner urges, give weight to earlier expressions of the state courts said to be inconsistent with this declaration of the law. The Supreme Court of the state has decided, in a case definitely involving the point, that the legislature of Texas has not essayed to interfere, and indeed may not interfere, with the constitutional liberty of citizens to organize a party and to determine the qualifications of its members. If in the past the legislature has attempted to infringe that right and such infringement has not been gainsaid by the courts, the fact constitutes no reason for our disregarding the considered decision of the state's highest court. The legislative assembly of the state, so far as we are advised, has never attempted to prescribe or to limit the membership of a

political party, and it is now settled that it has no power so to do. The state, as its highest tribunal holds, though it has guaranteed the liberty to organize political parties, may legislate for their governance when formed and for the method whereby they may nominate candidates, but must do so with full recognition of the right of the party to exist, to define its membership, and to adopt such policies as to it shall seem wise. In the light of the principles so announced, we are unable to characterize the managers of the primary election as state officers in such sense that any action taken by them in obedience to the mandate of the state convention respecting eligibility to participate in the organization's deliberations, is state action.

Second. We are told that §§ 2 and 27 of the Bill of Rights of the Constitution of Texas as construed in *Bell* v. *Hill, supra,* violate the Federal Constitution, for the reason that so construed they fail to forbid a classification based upon race and color, whereas in *Love* v. *Wilcox, supra,* they were not held to forbid classifications based upon party affiliations and membership or non-membership in organizations other than political parties, which classifications were by Article 3107 of Revised Civil Statutes, 1925, prohibited. But, as above said, in *Love* v. *Wilcox* the court did not construe or apply any constitutional provision and expressly reserved the question as to the power of a party in convention assembled to specify the qualifications for membership therein.

Third. An alternative contention of petitioner is that the state Democratic convention which adopted the resolution here involved was a mere creature of the state and could not lawfully do what the Federal Constitution prohibits to its creator. The argument is based upon the fact that Article 3167 of the Revised Civil Statutes of Texas, 1925, requires a political party desiring to elect

delegates to a national convention, to hold a state convention on the fourth Tuesday of May, 1928, and every four years thereafter; and provides for the election of delegates to that convention at primary conventions, the procedure of which is regulated by law. In *Bell* v. *Hill, supra,* the Supreme Court of Texas held that Article 3167 does not prohibit declarations of policy by a state Democratic convention called for the purpose of electing delegates to a national convention. While it may be, as petitioner contends, that we are not bound by the state court's decision on the point, it is entitled to the highest respect, and petitioner points to nothing which in any wise impugns its accuracy. If, as seems to be conceded, the Democratic party in Texas held conventions many years before the adoption of Article 3167, nothing is shown to indicate that the regulation of the method of choosing delegates or fixing the times of their meetings, was intended to take away the plenary power of conventions in respect of matters as to which they would normally announce the party's will. Compare *Nixon* v. *Condon, supra,* 84. We are not prepared to hold that in Texas the state convention of a party has become a mere instrumentality or agency for expressing the voice or will of the state.

Fourth. The complaint states that candidates for the offices of Senator and Representative in Congress were to be nominated at the primary election of July 9, 1934, and that in Texas nomination by the Democratic party is equivalent to election. These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. A similar situation may exist in other states where one or another party includes a great majority of the qualified electors. The argument is that as a negro may not be denied a

ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government and discrimination by the state as respects participation by negroes on account of their race or color is prohibited by the Federal Constitution.

Fifth. The complaint charges that the Democratic party has never declared a purpose to exclude negroes. The premise upon which this conclusion rests is that the party is not a state body but a national organization, whose representative is the national Democratic convention. No such convention, so it is said, has resolved to exclude negroes from membership. We have no occasion to determine the correctness of the position, since even if true it does not tend to prove that the petitioner was discriminated against or denied any right to vote by the State of Texas. Indeed, the contention contradicts any such conclusion, for it assumes merely that a state convention, the representative and agent of a state association, has usurped the rightful authority of a national convention which represents a larger and superior country-wide association.

We find no ground for holding that the respondent has in obedience to the mandate of the law of Texas discriminated against the petitioner or denied him any right guaranteed by the Fourteenth and Fifteenth Amendments.

Judgment affirmed.

W. B. WORTHEN CO., TRUSTEE, ET AL. *v.* KAVANAUGH, TRUSTEE.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 556. Argued March 7, 1935.—Decided April 1, 1935.

Several years after negotiable bonds secured by a mortgage of benefit assessments had been issued by a municipal improvement district, statutes were passed which greatly diminished the remedies for their security provided by law at the time of their issuance, viz: The time within which an assessment might be foreclosed and the assessed land sold for default in payment of the assessment was enlarged from approximately 65 days to at least 2½ years, and it might be much longer; provisions for adding a penalty of 20%, as well as costs and attorneys' fees, were altered by omitting the costs and attorneys' fees and reducing the penalty to 3%; a provision allowing the purchaser at foreclosure sale to go into possession upon confirmation of the sale and keep the rents and profits during the years allowed for redemption was repealed, so that the possession of the delinquent owner might remain for another four years unaffected by the sale. The mortgagee was thus left for at least 6½ years without an effective remedy and there would be no enforcible obligation in the meantime to pay instalments of principal or even accruing coupons. *Held* in violation of the contract clause of the Constitution. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, distinguished; *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, followed. P. 60.

189 Ark. 723; 75 S. W. (2d) 62, reversed.

APPEAL from the affirmance of a decree in a suit to foreclose benefit assessments on the lots in a public improvement district. The assessments were mortgaged as security for negotiable bonds issued by the Improvement District to pay for the improvements; and the suit was brought by the mortgage trustee and some of the bondholders. The decree appealed from was limited by recent statutes which were attacked as unconstitutional.

Mr. A. W. Dobyns, with whom *Messrs. George B. Rose, J. F. Loughborough,* and *A. F. House* were on the brief, for appellants.

No appearance for appellee.

Mr. Justice Cardozo delivered the opinion of the Court.

Municipal Improvement Districts organized under the laws of Arkansas are empowered to issue bonds and to mortgage benefit assessments as security therefor. Street Improvement District, No. 513, of Little Rock, Arkansas, acted under the power thus conferred. On July 1, 1930, it issued bonds, payable to bearer, in the amount of $31,000, and made a mortgage to a firm of bankers as trustee for the bondholders. Accompanying the mortgage was a copy of the assessment of benefits stating in detail the amount of benefits assessed against each piece of property within the improvement district. Some of the bonds were in default on January 1, 1934, for nonpayment of principal and interest. This suit was brought by the trustee and also by representative bondholders to foreclose the assessments upon the lots of delinquent owners and for other relief. The right to maintain the suit is undisputed. The controversy hinges upon the terms of the decree.

At the execution of the bonds and mortgages the statutes of Arkansas contained provisions well planned to make these benefit assessments an acceptable security. Under the statutes then in force, lot owners had thirty days for payment of assessments, the time to run from the date of a notice required to be published by the collector. Crawford & Moses' Digest, § 5671. If payment was not made within that time, the collector was

to add a penalty of twenty per cent, and make immediate return of delinquents to the Board of Commissioners. § 5673. The duty was then imposed upon the Commissioners to bring foreclosure suits at once. § 5674. In case of personal service, the defendant was to be required to appear and respond within five days after service. § 5678. The decree when granted was to add to the assessment the twenty per cent penalty, costs, and attorneys' fees. § 5678. In case of constructive service, publication was to be completed within fifteen days, the cause was to be made ready for hearing within fifteen days thereafter, and a decree was to be rendered as in case of actual service. § 5679. If the sum adjudged was not paid within ten days, the property was to be sold upon twenty days notice. § 5684. The property owner was given time to redeem upon payment of the purchase price, with interest at ten per cent if the land had a rental value, and if it had none, then with interest at twenty per cent. § 5644. The time for redemption was either two years or five, there being uncertainty in that respect as to the meaning of the statute. In any event, the purchaser was to be let into possession at once upon the approval of the sale, and was not to be accountable for rents upon redemption. § 5642. If there was an appeal from the decree, the Supreme Court was to advance the cause upon its docket, and give a hearing and decision at as early a date as practicable. § 5686. The transcript was to be filed in the office of the clerk within twenty days after the rendering of the decree appealed from (§ 5687), and no appeal was to be prosecuted if that condition was not fulfilled. § 5689.

In March, 1933, the legislature of Arkansas passed three acts (Nos. 278, 252, and 129), which made over the whole plan to enforce the payment of assessments. Under Act 278, the time for payment after notice was enlarged from thirty days to ninety; the penalty was

reduced from twenty per cent to three per cent; the return of the delinquent list, which till then had to be made forthwith, was to be withheld for another ninety days; the time to appear and answer after personal service, which had formerly been five days, was changed to six months; if service was constructive, there was to be publication for six months (instead of fifteen days), and another six months was to elapse before the cause was to be heard. The decree when rendered was to give still another twelve months for payment (instead of ten days as theretofore) and an additional six months after the new default before the property could be sold. There were to be no costs or attorneys' fees, and only a three per cent penalty. There was also a repeal of the provisions for the expediting of appeals. Under Act 252, the time for redemption was fixed at four years from the sale, and the rate of interest (formerly 10% or 20%) was reduced to 6%, the statute reciting that the law previously in force did not provide an adequate period of redemption from land sales for delinquent taxes in municipal improvement districts. Finally, under Act 129, there was a repeal of § 5642, under which a purchaser had been given the right to go into possession during the term allowed for redemption and to hold such possession without accountability for rents. Coupled with the repeal was the declaration of an emergency, which was stated to endanger the peace, health and safety of a multitude of citizens.

Upon the hearing of the foreclosure suit the trustee and the bondholders contested the validity of these statutory changes, and demanded a decree in accordance with the law theretofore in force. The changes were attacked as an unconstitutional impairment of the obligation of contract (United States Constitution, Art. 1, § 10), as well as upon other grounds. The validity of the new acts was upheld by the Chancery Court, and thereafter on appeal by the Supreme Court of the state. 189 Ark. 723; 75

S. W. (2d) 62. Cf. *Sewer Improvement District, No. 1,* v. *Delinquent Lands,* 188 Ark. 738; 68 S. W. (2d) 80. Three judges dissented. The case is here upon appeal. Judicial Code, § 237; 28 U. S. C. § 344.

To know the obligation of a contract we look to the laws in force at its making. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 197; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 429. In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. *Von Hoffman* v. *Quincy,* 4 Wall. 535; *Louisiana* v. *New Orleans,* 102 U. S. 203; *Barnitz* v. *Beverly,* 163 U. S. 118; cf. *Home Building & Loan Assn.* v. *Blaisdell, supra,* at pp. 429, 434, where the cases are assembled. The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 433, distinguishing *Home Building & Loan Assn.* v. *Blaisdell, supra.* We state the outermost limits only. In stating them we do not exclude the possibility that the bounds are even narrower. The case does not call for definition more precise. A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor.

Under the statutes in force at the making of the contract, the property owner was spurred by every motive of self-interest to pay his assessments if he could, and to pay them without delay. Under the present statutes he

has every incentive to refuse to pay a dollar, either for interest or for principal. The interval between default in payment and a sale in the foreclosure suit was approximately sixty-five days under the practice formerly prevailing, unless there was service by publication or unless a defense was interposed, in which events the time would be a little longer. The interval between default and sale under the amendatory acts is at least two and a half years, and may be a good deal more. The earlier statutes imposed a penalty of twenty per cent as well as costs and attorneys' fees. The later ones drop the provision for costs and attorneys' fees, and reduce the penalty to three per cent. The changes do not end, however, with the rendition of the judgment and the sale thereunder. Under the earlier law the purchaser, who was likely to be the plaintiff mortgagee, could go into possession upon the confirmation of the sale, and keep the rents and profits during the years allowable for redemption. Today this privilege is withdrawn, and for another four years the possession of the delinquent owner is unaffected by the sale. A minimum of six and a half years is thus the total period during which the holder of the mortgage is without an effective remedy. There is no enforcible obligation in the interval to pay instalments of the principal or even the accruing coupons. The case is not one in which the Chancellor has intervened, either with or without the permission of a statute, to halt the oppressive enforcement of a mortgage by putting off the day of sale or entry for a reasonable time upon compliance by the debtor with reasonable conditions. Relief is not conditioned upon payment of interest and taxes or the rental value of the premises. The case is one of postponement for a term of many years with undisturbed possession for the debtor and without a dollar for the creditor. There is not even a requirement that the debtor shall satisfy the court of his inability to pay.

Whether one or more of the changes effected by these statutes would be reasonable and valid if separated from the others, there is no occasion to consider. A state is free to regulate the procedure in its courts even with reference to contracts already made (*Bronson* v. *Kinzie,* 1 How. 311), and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. *Penniman's Case,* 103 U. S. 714, 720; *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437; *Henley* v. *Myers,* 215 U. S. 373, 385; *National Surety Co.* v. *Architectural Decorating Co.,* 226 U. S. 276. What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security.

The point is made in the opinion of the court below that the amendment denying to a purchaser the privilege of possession during the period for redemption does not modify the power of the Chancellor to appoint a receiver of the rents during the pendency of a suit if the value of the property is so low as to make the security precarious. This is small comfort for an investor who has put his money into a mortgage in the expectation of receiving a return on his investment. If the value of the property is less than the assessment, a receiver will hold the rents to apply upon the judgment in the event of a deficiency, and will not presently disburse them except for necessary expenses. *Booth* v. *Clark,* 17 How. 322, 331; *Davis* v. *Gray,* 16 Wall. 203, 218; *Grant* v. *Phoenix Insurance Co.,* 106 U. S. 429, 431; *Freedman's Saving &*

Trust Co. v. *Shepherd,* 127 U. S. 494; *Union Bank of Chicago* v. *Kansas City Bank,* 136 U. S. 223, 236; *Porter* v. *Sabin,* 149 U. S. 473, 479. If the value of the property is greater than the assessment, the delinquent owner will keep the rents, for there will then be no receiver; and the mortgagee must wait until the period for redemption has expired. Active bidding at the sale is made virtually impossible. The buyer, almost of necessity, will be the mortgagee himself, who may offset the price against the debt. Strangers will not bid when four years must go by before they can be let into possession and have a return on what they pay.

Upholders of the challenged acts appeal to the authority of *Home Building & Loan Assn.* v. *Blaisdell, supra,* the case of the Minnesota moratorium. There for a maximum term of two years, but in no event beyond the then existing emergency, a court was empowered, if there was a proper showing of necessity, to stay the foreclosure of a mortgage, but only upon prescribed conditions. "The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness." 290 U. S. at p. 445. None of these restrictions, nor anything approaching them, is present in this case. There has been not even an attempt to assimilate what was done by this decree to the discretionary action of a Chancellor in subjecting an equitable remedy to an equitable condition. Not Blaisdell's case, but Worthen's (*W. B. Worthen Co.* v. *Thomas, supra*), supplies the applicable rule.

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

Reversed.

DOTY ET AL. *v.* LOVE, SUPERINTENDENT OF BANKS.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 585. Argued March 11, 12, 1935.—Decided April 1, 1935.

1. The constitutional rights of a depositor of an insolvent state bank, which is in the hands of a liquidating official under direction of a state court, are *held* not violated by the adoption, under a later statute, of a plan consented to by three-fourths of the depositors and approved by the liquidating official and the court, whereby, instead of bringing about liquidation and distribution of the assets through the officer as provided by the general law, the bank was reopened in a reorganized form with new shareholders and took the place of the officer for the purpose of gathering and guarding the assets and discharging the liabilities. P. 70.
2. The statute is not given an unconstitutional application because, by the plan approved and decreed under it, some of the assets of the old bank are risked in the business of the new one, this being done to improve the chances of collection for the benefit of existing creditors, and provision being made to insure that the equivalent of such assets shall be repaid the creditors or be deposited in a fund held by the new bank for their benefit, before any profits of its business shall inure to its shareholders. P. 71.
3. To make such a reorganization possible, some of the shareholders of the old bank contributed capital to the new one in return for its shares, upon which they became personally liable, and were released from personal liability on their old shares. *Held* that the release did not infringe constitutional rights of non-assenting creditors, since it was a necessary incident to the plan for the protection of all and was but an exercise of the power of the liquidating officer, with approval of the court, to compromise claims of uncertain collectibility and value upon terms beneficial to his trust. P. 72.
4. Mere error in judgment in the compromising of claims of an insolvent bank by state officials in charge of its liquidation, is not an unconstitutional taking of the property rights or impairment of the contract rights of non-assenting creditors. P. 73.
5. It is not an unconstitutional discrimination against depositors of an insolvent bank to pay in full the claims of other banks which

are fully secured by collateral, or to discharge in full other deposit accounts which are so small that it will be more economical to pay them than to incur bookkeeping expenses incidental to calculation of dividends. P. 74.

6. One who has appeared generally and been fully heard upon the merits can not complain of insufficiency of notice to others. P. 74.

172 Miss. 342; 155 So. 331, affirmed.

APPEAL from the affirmance of a decree of the Court of Chancery in Mississippi, which ordered the reopening of a closed bank under a plan approved and presented to it by the Superintendent of Banks. The appellants were two of the depositors who did not assent but whose objections were overruled.

Messrs. Charles S. Mitchell and *Elmer C. Sharp* for appellants.

Messrs. Hiram H. Creekmore and *C. Richard Bolton,* with whom *Mr. Clyde L. Hester* was on the brief, for appellee.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A statute of Mississippi, adopted in 1932, permits the reopening of closed banks upon terms proposed by three-fourths of the creditors in number or in value if the plan is approved by the Superintendent of Banks and confirmed by the Court of Chancery. A bank has been reopened in accordance with this statute. The question is whether contractual rights have been impaired or rights of property annulled in contravention of the provisions of the Constitution of the United States.

The People's Bank & Trust Company of Tupelo, Mississippi, closed its doors on December 24, 1930. In accordance with the statutes then in force (Code of 1930, § 3817), the Superintendent of Banks took charge of the business and proceeded to liquidate it, his action being

subject at all times to the supervision of the Court of Chancery. The bank owed about $200,000 for public moneys on deposit. These were preferred claims under the laws of Mississippi, and were paid in full. It owed for bills payable and rediscounts $457,500, amply secured by collateral. These also were paid in full, the security being unaffected by liquidation or insolvency. Out of the remaining assets, so far as they would serve, the liquidator would have to pay the general deposits (about $1,450,000) as well as any other debts. There was also available for the protection of depositors the personal liability of the shareholders to the extent of the par value of their shares, a liability which under the statute was to be "enforced in a suit at law or in equity by any such bank in process of liquidation, or by the superintendent of banks, or other officer succeeding to the legal rights of said bank." Mississippi Code, § 3815. The share capital of the bank was $200,000, and the personal liability of the shareholders would have added a like amount to the assets if all the shareholders had paid in full.

In the fall of 1932, after about two years of liquidation by the Superintendent of Banks, a movement was started by a large number of depositors to set the bank upon its feet. For help in that endeavor, they had recourse to methods made available by a statute adopted in May, 1932, which is quoted in the margin.* Laws of Missis-

* "Section 1. Be it enacted by the Legislature of the State of Mississippi, That the Superintendent of Banks of the State of Mississippi be authorized to reopen any closed bank, with the approval of the chancery court of the county in which the bank is situated, or of the chancellor in vacation, when at least three-fourths of the general depositors and creditors therein, or any number of the general depositors and creditors therein provided they own at least three-fourths of the deposits in or claims against such bank, agree to the reopening thereof and sign what is commonly termed a 'freezing-of-deposits agreement,' under which they agree to accept repayment of their deposits and claims over a period of years, for the full amount

sippi, 1932, c. 251; supplement to Mississippi Code of 1930, § 3817–1. The substance of the statute is that the Court of Chancery shall have power to reopen a closed

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thereof or in reduced amounts, with or without interest, the period over which the deposits and claims are to be repaid and the rate of payment, together with the interest rate, if any, to be determined by the superintendent of banks, provided the superintendent of banks is convinced that such bank is in solvent condition and can repay the depositors the amounts of their deposits in accordance with the terms of the agreement for the repayment of same. But, before any such bank shall be reopened, the entire plan for the reopening of same, and all facts in connection therewith, shall be submitted by the superintendent of banks to the chancery court of the county in which the bank is situated, or to the chancellor in vacation, by proper petition, duly verified, such petition to contain a statement of the assets and liabilities of the bank and such other information as may be necessary to convey to the court or chancellor the true facts with reference to the condition of such bank, and a decree of the court or of the chancellor in vacation obtained approving the plan agreed upon for the reopening of such bank and authorizing the same to be reopened.

"Section 2. When any closed bank has been reopened as herein provided, the general depositors and creditors thereof who have not expressly agreed to accept the repayment of their deposits and claims in accordance with the freezing-of-deposits plan shall be bound to accept repayment of their deposits and claims on the same basis and at the same rate as those general depositors and creditors who have signed the freezing-of-deposits agreement, but this shall not apply to public depositors or to those depositors and creditors holding preferred claims, or secured claims, nor to correspondent banks holding bills payable of the closed bank. Proper provision must be made in the plan for the reopening of such bank to pay public depositors, depositors and creditors holding preferred claims and secured claims, and correspondent banks, on terms acceptable to them, but any arrangement so made shall not operate prejudicially to the rights of the general depositors and creditors of the bank.

"Section 3. That this Act shall not be construed to give the superintendent of banks the right to diminish the assets of a closed bank to the prejudice of the depositors and creditors thereof, and any assets that may be charged out as doubtful or as losses shall be held by the bank and collected for the benefit of its depositors and

bank in accordance with a plan proposed by at least three-fourths of the creditors and recommended by the Superintendent, if the court is satisfied that the plan is feasible and just. Upon the approval of such a plan, assenting and non-assenting creditors shall be required to accept payment in accordance with its terms. The Superintendent shall have no power to diminish to the prejudice of creditors any assets that otherwise would be available for payment. Liquidation by the bank itself, though in a reorganized form, is to be substituted for liquidation at the hands of a statutory receiver.

Resorting to that statute, about eighty per cent of the creditors signed a "freezing-of-deposits agreement" prescribing a time and method for the payment of the debts. The bank, when reorganized, was to have a capital of $55,000 and a surplus of $45,000, a total capital and surplus of $100,000. Shareholders of the old bank, having shares of the par value of $110,000, were to contribute the new capital ($55,000, or 50% of their old holdings) in cash or its equivalent. In consideration of this payment, they were to be released from any other liability on the old shares, though the statutory liability would attach automatically to the new ones if the reorganized bank were to go under. Shareholders not contributing to capital (representing $90,000 of the old shares) were to remain personally liable as if no plan had been adopted. Of the claims against the old bank as distinguished from those against the shareholders, twenty-five per cent were to be assumed by the reopened bank; seventy-five per cent were to be a charge upon certain assets which were

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creditors, and all amounts so collected shall be held by the bank to be paid to them in accordance with the agreement for the repayment of their deposits and claims.

"Section 4. That this act shall be in force from and after its passage.

"Approved May 18, 1932."

to be placed in a pool and made to realize what they could. Assets having an estimated value in excess of the liabilities assumed were to be turned over to the reopened bank to enable it to make good its promise. This was the primary source of payment, though the covenant of assumption was to be back of it. Out of the assets so delivered deposits of $5 or less, amounting in all to $3,649.87, were to be paid in full. All other claims then outstanding for deposits or other debts were to be ratably satisfied up to the limit of twenty-five per cent, five per cent at once, and the remaining twenty per cent in five per cent instalments as the assets turned over to the reopened bank were converted into cash, the process of conversion being subject to the supervision of the court. Proceeds of collection in excess of the twenty-five per cent were not to be retained, but were to be paid into the pool. Certain other assets having an estimated value of $45,000 were turned over to the reopened bank for surplus or reserve. This amount was to be repaid out of the net earnings at the rate of $7,500 a year by additions to the pool. No dividends were to be declared upon the shares of the reopened bank till all the liabilities assumed by it had been satisfied completely. The assets deposited in the pool were to be administered by the bank as a trust for the benefit of creditors. Many other details would have to be stated to exhibit the plan fully. For an understanding of the objections the outline given will suffice.

The Superintendent of Banks filed a petition in the Court of Chancery approving the plan and recommending its adoption. Notice of hearing was served by publication upon the 5,000 creditors affected, as well as personally upon some of them selected by the court as representing the interests of all. Only a few creditors opposed the granting of the petition. Some of these withdrew their objections at the close of the hearing with the result that the number of opponents was reduced to six. After

full consideration, the court on May 15, 1933, entered a decree overruling the objections and reopening the bank in accordance with the plan. Two of the objecting creditors appealed to the Supreme Court of the state, invoking the protection of Article I, § 10, and the Fourteenth Amendment of the Federal Constitution. The decree was affirmed, one judge dissenting. 155 So. 331. The case is here upon appeal. Judicial Code, § 237; 28 U. S. C. § 344.

If we look to the surface of the statute and no farther, there is not even colorable basis for the argument that the Constitution is infringed. All that the statute does upon its face is to change the method of liquidation. The assets of the business are to be devoted without impairment or diversion to the payment of the debts. As to this the statute is explicit. Act of 1932, Chapter 251, § 3. In the discretion of the Court of Chancery a reopened bank is to take the place of the state Superintendent for the purpose of gathering in the assets and discharging liabilities. The substitution may not be made unless the court is satisfied that the reopened bank is solvent and able to satisfy the debts to be assumed. Payment of the creditors is still the end to be attained, and resumption of business a means and nothing more. If debts are thereby swollen or assets made to shrink, the outcome is an unlooked for incident of a method of administration conceived to be more efficient than present sale and distribution. The Constitution of the United States does not confer upon the depositors a vested right to liquidation at the hands of a state official. *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332.

The argument will not hold that the necessary operation of the statute is to subject dissenting creditors, who may be as many as one-fourth, to the will or the whim of the assenting three-fourths. The creditors favoring reorganization, though they be ninety-nine per cent, have no power under the statute to impose their will on a minority.

They may advise and recommend, but they are powerless to coerce. Their recommendation will be ineffective unless approved by the Superintendent. Even if approved by him, it will be ineffective unless the court after a hearing shall find it to be wise and just. Upon such a hearing every objection to the plan in point of law or policy may be submitted and considered. The decree when made by the Chancellor will represent his own unfettered judgment. The judicial power has not been delegated to non-judicial agencies or to persons or factions interested in the event. Like statutes have been upheld by the courts of other states. *Dorman* v. *Dell,* 245 Ky. 34; 52 S. W. (2d) 892; *Milner* v. *Gibson,* 249 Ky. 594; 61 S. W. (2d) 273; *Nagel* v. *Ghingher,* 166 Md. 231; 171 Atl. 65; *McConville* v. *Fort Pierce Bank & Trust Co.,* 101 Fla. 727; 135 So. 392; *Smith* v. *Texley,* 55 S. D. 190; 225 N. W. 307; *Hoff* v. *First State Bank of Watson,* 174 Minn. 36; 218 N. W. 238; *Paul* v. *Farmers & Merchants State Bank,* 187 Minn. 411; 245 N. W. 832.

The Act of 1932 being valid on the surface, the question remains whether it has been so applied or interpreted in the adoption of this plan as to bring out defects that were lurking underneath. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Merchants' National Bank* v. *Richmond,* 256 U. S. 635, 637; *Kansas City So. Ry. Co.* v. *Road Improvement District, No. 6,* 256 U. S. 658, 659.

The argument is made that some of the assets of the old bank are placed at the risk of the business of the new one. All this was done for the protection of existing creditors. The finding is that collections are made more promptly and readily by a going concern than by one in liquidation. Cf. *Christensen* v. *Merchants & Marine Bank of Pascagoula,* 168 Miss. 43, 57; 150 So. 375. For illustration, a live bank is much more efficient than a closed one in selling parcels of real estate or in carrying them while unsold at profitable rentals. Adequate pre-

cautions are embodied in the plan to assure the enjoyment of these benefits by the creditors and not by others. It is one of the terms of the decree that none of the profits of the business may be used for the new shareholders until every dollar's worth of assets turned over by the Superintendent has been paid to the creditors or delivered to the pool. The court may intervene upon a showing of unreasonable delay. There is no need to consider whether any of these safeguards might have been omitted without invalidating the plan. We take the record as we find it.

The argument is made that a cause of action upon contract has been destroyed or given away to the prejudice of depositors in that shareholders have been released from their personal liability in return for a contribution of capital to the regenerated business. This is said to constitute a denial of due process or an impairment of contract within the doctrine of *Ettor* v. *Tacoma,* 228 U. S. 148, and *Coombes* v. *Getz,* 285 U. S. 434. The answer is much the same as to the argument last considered. The effect of the release has been to make it possible for the bank to be reopened with the result to the creditors of economies and other benefits that would otherwise be lost. During about two years and a half of liquidation there had been collected from the whole body of the shareholders, representing 2,000 shares, a small percentage only of the total liability. The Superintendent expressed the belief that it might be possible in the course of many years and with great expense and labor to bring collections from these sources to a total of $75,000. Through the method called for by the plan, capital in the sum of $55,000 became available at once as additional security for the obligations assumed by the reorganized business. This capital was supplied by the holders of 1,100 shares, whose maximum liability was $110,000. The liability of

the other shareholders ($90,000 at the maximum) continued unimpaired for whatever it was worth. The Chancellor found from the evidence that in all probability the moneys thus obtained as contributions to capital could not have been collected by judgment and execution, and that the depositors would be the gainers by the substituted form of payment. He reached that conclusion after a trial in the county of the vicinage with his finger on the pulse of neighborhood conditions. On appeal to the Supreme Court his findings were confirmed. Cf. *Smith* v. *Texley, supra,* at p. 195.

In such circumstances it is idle to speak of the release of liability as a gift or a sacrifice of valuable assets. The release was none of that, but a compromise of a liability of uncertain value upon terms beneficial to the creditors. So the trier of the facts has found. The title to the extinguished cause of action was not in the depositors, but in the Superintendent or the bank. If there had been no plan to reorganize, the Superintendent like a receiver might have compromised the cause of action and released it with the approval of the court. His authority was no less because the release was incidental to a project to rehabilitate a business for the good of all concerned. The jurisdiction of the Court of Chancery to give approval to a settlement by a receiver or other officer did not have its genesis in the Act of 1932 or in the procedure there prescribed. It existed in like measure when the liquidation of this bank was begun in 1930 and for many years before. Depositors were chargeable with notice of that power and became subject to its exercise in making their deposits.

In last analysis, then, the appellants' grievance, if they have any, is this and nothing more, that there was error of judgment to their prejudice in the approval of the plan with the compromise of liability as one of its important

features. They refer us to nothing in the record to give support to that contention. The testimony as to the probable results of liquidation without the aid of a reopened bank was not contradicted or discredited. But the result would not be changed if the record in that respect were different. Error of judgment in the compromise of liabilities is not a taking of property or an impairment of contract in derogation of the restraints of the Constitution of the United States.

The appellants make the point that by the Act of 1932 a preference was accorded to the claims of correspondent banks, though such a preference did not exist under the statutes in force when the Superintendent went into possession. A sufficient answer is that in this case the correspondent banks were protected by collateral security which apart from the new preference would have required them to be paid in full.

The appellants also say that their constitutional rights were infringed by those provisions of the plan whereby a preference was granted to the holders of small claims. None of these claims ($3,649.87 in the aggregate) was for more than $5, and many, we were informed upon the argument, were for only a few cents. The Chancellor found by his decree that it would be more economical to pay these accounts in full than to incur the bookkeeping expenses incidental to a calculation of percentages whenever dividends were paid to others. Cf. *Nagel* v. *Ghingher, supra,* at p. 69. The objecting creditors have not been damaged by that feature of the plan.

Finally the appellants say that the proceedings in the Court of Chancery are void for insufficient notice to the depositors and others. A sufficient answer is that the appellants appeared generally and were fully heard upon the merits.

The decree should be affirmed, and it is so ordered.

Affirmed.

Per Curiam.

FOX, TAX COMMISSIONER OF WEST VIRGINIA, *v.* GULF REFINING CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 70. Argued April 2, 1935.—Decided April 8, 1935.

Where all questions relied on to sustain a judgment appealed from the District Court were disposed of adversely to appellee while the appeal was pending by a decision of this Court in another case, except a question of state law which the District Court had not decided, the judgment was reversed and the cause remanded to the District Court for decision of that question.

Reversed.

APPEAL from a decree of the District Court, of three judges, permanently enjoining enforcement of the West Virginia Chain Store Taxing Act.

Mr. Homer A. Holt, Attorney General of West Virginia, with whom *Messrs. R. Dennis Steed* and *Wm. Holt Wooddell,* Assistant Attorneys General, were on the brief, for appellant.

Mr. Arthur Dayton, with whom *Mr. Fred O. Blue* was on the brief, for appellee.

PER CURIAM.

The appellee brought this suit to restrain the enforcement of the West Virginia Chain Store Act (c. 36, West Virginia Acts, 1933), upon the grounds (1) that gasoline filling stations were not "stores" within the meaning of the Act; (2) that, if the Act were interpreted to include such filling stations, it violated the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States; and (3) that if the foregoing questions were resolved against appellee,

there were certain filling stations, particularly described, which were not stores "belonging to, operated or controlled" by appellee.

The District Court of three judges (28 U. S. C. 380) entered a final decree permanently enjoining the enforcement of the Act, and the case comes here on appeal. In so deciding, the District Court sustained the first of the above-mentioned contentions of appellee, and also the second contention with respect to the denial of the equal protection of the laws, following its decision to the same effect in *Standard Oil Co.* v. *Fox,* 6 F. Supp. 494. That decision was reversed by this Court. *Fox* v. *Standard Oil Co.,* 294 U. S. 87. The District Court did not determine the third contention of appellee, as to its relation to certain gasoline stations, and that is the only question now sought to be presented to this Court. The judgment is reversed and the cause is remanded to the District Court, composed as above stated, in order that it may consider and decide that issue.

Reversed.

STANLEY *v.* PUBLIC UTILITIES COMMISSION.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE.

No. 551. Argued April 3, 1935.—Decided April 15, 1935.

In limiting the use of state highways for intrastate transportation for hire, the legislature reasonably may provide that carriers who have furnished adequate, responsible and continuous service over a given route from a specified date in the past shall be entitled to licenses as a matter of right, but that the licensing of those whose service over the route began later than the date specified shall depend upon the public convenience and necessity. P. 78.

133 Me. 91; 174 Atl. 93, affirmed.

APPEAL from a judgment overruling exceptions taken in the court below for the review of an order of the Public

Utilities Commission of Maine. The order denied in part the appellant's application for a certificate of public convenience and necessity authorizing him to operate motor vehicles as a common carrier, on certain designated highways.

Mr. Charles F. King for appellant.

Mr. Clyde R. Chapman for appellee.

PER CURIAM.

Chapter 259 of the Public Laws of the State of Maine of 1933 placed common carriers operating motor vehicles for the transportation of goods for hire, under the control of the Public Utilities Commission, and required them to obtain certificates of public convenience and necessity which, however, were to be granted as a matter of right in the case of carriers who had provided adequate, responsible and continuous service since March 1, 1932.

Appellant, John M. Stanley, applied to the Commission for a certificate to enable him to operate as a common carrier from Portland to Haines Landing in that State. Upon hearing, the Commission determined that he was entitled, as a matter of right, to a certificate for operation between Portland and Lewiston, but not north of the latter point, as it did not appear that he had supplied the described service north of Lewiston since March 1, 1932. The Commission found that there were several common carriers operating over all, or portions, of the route between Lewiston and Haines Landing, including those which were entitled to certificates as a matter of right, and denied appellant's application for that part of the route. Complaining that this determination deprived him of his property without due process of law and denied to him the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States, appellant obtained review by the Supreme Court

of the State, which overruled his exceptions and sustained the Commission's action. 133 Me. 91; 174 Atl. 93. The case comes here on appeal.

Appellant's contentions are without merit. No question as to interstate transportation is involved. In safeguarding the use of its highways for intrastate transportation, carriers for hire may be required to obtain certificates of convenience and necessity. *Packard* v. *Banton,* 264 U. S. 140, 144; *Stephenson* v. *Binford,* 287 U. S. 251, 264. In the exercise of this power, the legislature could determine, within reason, as of what period the service of carriers for hire over its highways did not impair their use or cause congestion, and require certificates for those seeking to supply additional transportation for a later period. The selection of any date would necessarily establish a distinction between service immediately before and after; but that, like similar selections of distances, weights and sizes, would not of itself prove that the choice was beyond the range of legislative authority. *Columbus & Greenville Ry. Co.* v. *Miller,* 283 U. S. 96, 101, 102; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370, 371; *Sproles* v. *Binford,* 286 U. S. 374, 388, 389. There is no ground for concluding that the legislature transgressed the bounds of permissible discretion in this case. The judgment is

Affirmed.

BERGER *v.* UNITED STATES.

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

No. 544. Argued March 7, 1935.—Decided April 15, 1935.

1. Where an indictment charges a conspiracy of several persons and the conspiracy proved involves only some of them, the variance is not fatal. P. 81.
2. Where the proof shows two conspiracies, each fitting the single charge in the indictment, and each participated in by some but

not all of the convicted defendants, one of them who was connected by the evidence with one only of the conspiracies revealed by it has no ground to complain of the variance if it did not affect his substantial rights. Jud. Code, § 269. P. 82.

3. The objects of the rule that allegations and proof must correspond are (1) to inform the accused, so that he may not be taken by surprise, and (2) to protect him against another prosecution for the same offense. P. 82.
4. The purpose of Jud. Code, § 269, as amended, was to end the too rigid application of the rule that, error being shown, prejudice must be presumed, and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. P. 82.
5. Misconduct of a United States Attorney in his cross-examination of witnesses and address to the jury, in a criminal case, may be so gross and persistent as to call for stern rebuke and repression—even for the granting of a mistrial—by the trial judge; and, when not so counteracted, it may require the reversal of a conviction, particularly when weakness of the case accentuates the probability of prejudice to the accused. P. 84.
6. It is as much the duty of the United States Attorney to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. P. 88.

73 F. (2d) 278, reversed.

CERTIORARI, 293 U. S. 552, to review the affirmance of a conviction and sentence for conspiracy.

Mr. Nathan D. Perlman, with whom *Mr. Sydney Rosenthal* was on the brief, submitted for petitioner.

Mr. Justin Miller, with whom *Solicitor General Biggs* and *Messrs. H. Brian Holland, W. Marvin Smith,* and *Harry S. Ridgely* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner was indicted in a federal district court charged with having conspired with seven other persons named in the indictment to utter counterfeit notes pur-

porting to be issued by designated federal reserve banks, with knowledge that they had been counterfeited. The indictment contained eight additional counts alleging substantive offenses. Among the persons named in the indictment were Katz, Rice and Jones. Rice and Jones were convicted by the jury upon two of the substantive counts and the conspiracy count. Petitioner was convicted upon the conspiracy count only. Katz pleaded guilty to the conspiracy count, and testified for the government upon an arrangement that a *nolle prosequi* as to the substantive counts would be entered. It is not necessary now to refer to the evidence further than to say that it tended to establish not a single conspiracy as charged but two conspiracies—one between Rice and Katz and another between Berger, Jones and Katz. The only connecting link between the two was that Katz was in both conspiracies and the same counterfeit money had to do with both. There was no evidence that Berger was a party to the conspiracy between Rice and Katz. During the trial, the United States attorney who prosecuted the case for the government was guilty of misconduct, both in connection with his cross-examination of witnesses and in his argument to the jury, the particulars of which we consider at a later point in this opinion. At the conclusion of the evidence, Berger moved to dismiss the indictment as to the conspiracy count, on the ground that the evidence was insufficient to support the charge. That motion was denied. Petitioner, Rice, Katz and Jones were sentenced to terms of imprisonment.

The court of appeals, affirming the judgment, 73 F. (2d) 278, held that there was a variance between the allegations of the conspiracy count and the proof, but that it was not prejudicial; and that the conduct of the prosecuting attorney, although to be condemned, was not sufficiently grave to affect the fairness of the trial. We brought the case here on certiorari because of a conflict

with other circuit courts of appeals in respect of the effect of the alleged variance.

1. It is settled by the great weight of authority that although an indictment charges a conspiracy involving several persons and the proof establishes the conspiracy against some of them only, the variance is not material. But several circuit courts of appeals have held that if the indictment charges a single conspiracy, and the effect of the proof is to split the conspiracy into two, the variance is fatal. Thus it is said in *Telman* v. *United States,* 67 F. (2d) 716, 718: "Where one large conspiracy is charged, proof of different and disconnected smaller ones will not sustain a conviction." In support of that statement the various decisions upon which petitioner here relies are cited. This view, however, ignores the question of materiality, and should be so qualified as to make the result of the variance depend upon whether it has substantially injured the defendant.

In the present case, the objection is not that the allegations of the indictment do not describe the conspiracy of which petitioner was convicted, but, in effect, it is that the proof includes more. If the proof had been confined to that conspiracy, the variance, as we have seen, would not have been fatal. Does it become so because, in addition to proof of the conspiracy with which petitioner was connected, proof of a conspiracy with which he was not connected was also furnished and made the basis of a verdict against others?

Section 269 of the Judicial Code, as amended (28 U. S. C. § 391) provides:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. *Bennett* v. *United States,* 227 U. S. 333, 338; *Harrison* v. *United States,* 200 Fed. 662, 673; *United States* v. *Wills,* 36 F. (2d) 855, 856–857. Cf. *Hagner* v. *United States,* 285 U. S. 427, 431–433.

Evidently Congress intended by the amendment to § 269 to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. See *Haywood* v. *United States,* 268 Fed. 795, 798; *Rich* v. *United States,* 271 Fed. 566, 569–570.

The count in question here charges a conspiracy to utter false notes of one federal reserve bank each calling for $20, and those of another each calling for $100. The object of the utterance thus concerted is not stated; but the proof as to the conspiracies is that the one between Katz and Rice was with the purpose of uttering the false notes to buy rings from persons advertising them for sale, and the object of the other between Katz, Jones and Berger was to pass the notes to tradesmen. Suppose the indictment had charged these two conspiracies in separate counts in identical terms, except that, in addition, it had specifically set forth the contemplated object

of passing the notes, naming Berger, Katz, Rice and Jones as the conspirators in each count. Suppose further that the proof had established both counts, connecting Berger with one but failing to connect him with the other, and thereupon he had been convicted of the former and acquitted of the latter. Plainly enough, his substantial rights would not have been affected. The situation supposed and that under consideration differ greatly in form; but do they differ in real substance? The proof here in respect of the conspiracy with which Berger was not connected may, as to him, be regarded as incompetent; but we are unable to find anything in the facts—which are fairly stated by the court below—or in the record from which it reasonably can be said that the proof operated to prejudice his case, or that it came as a surprise; and certainly the fact that the proof disclosed two conspiracies instead of one, each within the words of the indictment, cannot prejudice his defense of former acquittal of the one or former conviction of the other, if he should again be prosecuted.

In *Washington & Georgetown R. Co.* v. *Hickey,* 166 U. S. 521, 531, this court said that "no variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial." This was said in a civil case, it is true, but it applies equally to a criminal case if there be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense. See *Meyers* v. *United States,* 3 F. (2d) 379, 380; *Mansolilli* v. *United States,* 2 F. (2d) 42, 43.

We do not mean to say that a variance such as that here dealt with might not be material in a different case. We simply hold, following the view of the court below,

that applying § 269 of the Judicial Code, as amended, to the circumstances of this case the variance was not prejudicial and hence not fatal.

2. That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner. We reproduce in the margin* a few excerpts

*[The defendant (petitioner) was on the stand; cross-examination by the United States attorney]:

"Q. The man who didn't have his pants on and was running around the apartment, he wasn't there?

"A. No, Mr. Singer. Mr. Godby told me about this, he told me, as long as you ask me about it, if you want it, I will tell you, he told me 'If you give this man's name out, I will give you the works.'

"Q. Give me the works?

"A. No, Mr. Godby told me that.

"Q. You are going to give me the works?

"A. Mr. Singer, you are a gentleman, I have got nothing against you. You are doing your duty.

"Mr. Wegman: You are not going to give Mr. Singer the works. Apparently Mr. Singer misunderstood you. Who made that statement?

"The Witness: Mr. Godby says that.

"Q. Wait a minute. Are you going to give me the works?

"A. Mr. Singer, you are absolutely a gentleman, in my opinion, you are doing your duty here.

from the record illustrating some of the various points of the foregoing summary. It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct. The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.

The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. A reading of the entire argument is necessary to an appreciation of these objectionable features. The following is an illustration: A witness by the name of Goldie Goldstein

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"Q. Thank you very much. But I am only asking you are you going to give me the works?

"A. I do not give anybody such things, I never said it.

"Q. All right. Then do not make the statement.

"Mr. Wegman: The witness said that Mr. Godby said that.

"The Court: The jury heard what was said. It is not for you or me to interpret the testimony.

"Q. I asked you whether the man who was running around this apartment . . . , was he there in the Secret Service office on the morning that you were arrested?

"A. I didn't see him.

"Q. I wasn't in that apartment, was I?

"A. No, Mr. Singer.

"Q. I didn't pull the gun on you and stick you up against the wall?

"A. No.

"Q. I wasn't up in this apartment at any time, as far as you know, was I?

"A. As far as I know, you weren't.

had been called by the prosecution to identify the petitioner. She apparently had difficulty in doing so. The prosecuting attorney, in the course of his argument, said (italics added):

"Mrs. Goldie Goldstein takes the stand. She says she knows Jones, *and you can bet your bottom dollar she knew Berger*. She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm everybody started to holler, 'Don't point at him.'

"Q. You might have an idea that I may have been there?
"A. No, I should say not.
"Q. I just want to get that part of it straight.

. . . . .

"Q. Was I in that apartment that night?
"A. No, but Mr. Godby——
"Q. Was Mr. Godby in that apartment?
"A. No, but he has been there.

. . . . .

"Q. Do you include as those who may have been there the Court and all the jurymen and your own counsel?
"A. Mr. Singer, you ask me a question. May I answer it?
"Mr. Wegman: I object to the question.
"The Witness: Are you serious about that?
"The Court: I am not going to stop him because the question includes the Court. I will let him answer it.
"Mr. Singer: I would like to have an answer to it.
"The Witness: Mr. Singer, you asked me the question before——
"The Court: You answer this question.
(Question repeated by the reporter.)
"A. I should say not; that is ridiculous.

. . . . .

"Q. Now Mr. Berger, do you remember yesterday when the court recessed for a few minutes and you saw me out in the hall; do you remember that?
"A. I do, Mr. Singer.
"Q. You talked to me out in the hall?
"A. I talked to you?
"Q. Yes.
"A. No.

You know the rules of law. Well, it is the most complicated game in the world. I was examining *a woman that I knew knew Berger and could identify him,* she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now, imagine that! But that is the rules of the game, and I have to play within those rules."

"Q. You say you didn't say to me out in the hall yesterday, 'You wait until I take the stand and I will take care of you'? You didn't say that yesterday?

"A. No; I didn't, Mr. Singer; you are lying.

"Q. I am lying, you are right. You didn't say that at all?

"A. No.

"Q. You didn't speak to me out in the hall?

"A. I never did speak to you outside since this case started, except the day I was in your office, when you questioned me.

"Q. I said yesterday.

"A. No, Mr. Singer.

"Q. Do you mean that seriously?

"A. I said no.

"Q. That never happened?

"A. No, Mr. Singer, it did not.

"Q. You did not say that to me?

"A. I did not.

"Q. Of course, I have just made that up?

"A. What do you want me to answer you?

"Q. I want you to tell me I am lying, is that so? . . .

[No effort was later made to prove that any such statement had ever been made.]

. . . . . .

"Q. Did she say she was going to meet me for anything except business purposes?

"A. No.

"Q. If she was to meet me?

"A. Just told me that you gave her your home telephone number and told her to call you up after nine o'clock in the evening if she found out anything about the case that you could help me with, that is what she told me.

"Q. Even if that is so, what is wrong about that, that you have been squawking about all morning."

The jury was thus invited to conclude that the witness Goldstein knew Berger well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney.

Again, at another point in his argument, after suggesting that defendants' counsel had the advantage of being able to charge the district attorney with being unfair "of trying to twist a witness," he said:

"But, oh, they can twist the questions, . . . *they can sit up in their offices and devise ways to pass counterfeit money;* 'but don't let the Government touch me, that is unfair; please leave my client alone.'"

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were

the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt " overwhelming," a different conclusion might be reached. Compare *Fitter* v. *United States,* 258 Fed. 567, 573; *Johnson* v. *United States,* 215 Fed. 679, 685; *People* v. *Malkin,* 250 N. Y. 185, 201–202; 164 N. E. 900; *Iowa* v. *Roscum,* 119 Iowa 330, 333; 93 N. W. 295. Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare *N. Y. Central R. Co.* v. *Johnson,* 279 U. S. 310, 316–318.

The views we have expressed find support in many decisions, among which the following are good examples: *People* v. *Malkin, supra; People* v. *Esposito,* 224 N. Y. 370, 375–377; 121 N. E. 344; *Johnson* v. *United States, supra; Cook* v. *Commonwealth,* 86 Ky. 663, 665–667; 7 S. W. 155; *Gale* v. *People,* 26 Mich. 157; *People* v. *Wells,* 100 Cal. 459; 34 Pac. 1078. The case last cited is especially apposite.

Judgment reversed.

SPIELMAN MOTOR SALES CO., INC. *v.* DODGE, DISTRICT ATTORNEY.

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

No. 567. Argued March 11, 1935.—Decided April 29, 1935.

1. District attorneys in New York, though classed by statute as local officers, are part of the judicial system of the State, and, in enforc-

ing state laws of general application by criminal prosecution, perform a state function within their respective counties and are officers of the State within the meaning of § 266, Jud. Code. P. 92.

2. In the absence of a clear showing of necessity, a federal court of equity will not restrain the institution of a criminal prosecution in a state court upon the ground that the statute defining the offense violates the Federal Constitution, but will leave the party to set up the federal question in the state court and to his right of review in this Court. P. 95.
3. Allegations that enforcement of a state regulation of one's business will cause irreparable damage and deprivation of "rights, liberties, properties, and immunities" are in themselves conclusions of law, which will not sustain the jurisdiction of equity to enjoin a criminal prosecution for violation of the regulation. P. 96.

   The bill, to restrain prosecution under a state statute making it a misdemeanor to violate a "Code of Fair Competition in the Motor Vehicle Retailing Trade," alleged that the plaintiff had a large business in buying and selling such vehicles, but did not show that the single prosecution in contemplation would work serious interference with the business. *Held* insufficient.
4. Decree dismissing a bill on the merits, *affirmed* on the ground that the allegations failed to state a case within the equity jurisdiction of the District Court. P. 97.

8 F. Supp. 437, affirmed.

APPEAL from a decree of the District Court of three judges dismissing the bill in a suit to enjoin a criminal prosecution under a state law.

Mr. Isadore Paul argued the cause and *Mr. S. Frederick Placer* filed a brief for appellant.

Mr. Karl D. Loos, with whom *Messrs. David Blitzer, Harold H. Straus, Stanley Osserman, Eugene Roth,* and *Burton A. Zorn* were on the brief, for appellee.

Mr. Henry Epstein, Solicitor General of New York, with whom *Mr. John J. Bennett, Jr.,* Attorney General, and *Messrs. Eugene F. Roth* and *Burton A. Zorn* were on the brief, for the State of New York.

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

Appellant, a retail dealer in automobiles in the City of New York, brought this suit to restrain the District Attorney of New York County from instituting a criminal prosecution for alleged violation of the "Code of Fair Competition for the Motor Vehicle Retailing Trade." Appellant alleged that he was threatened with prosecution under Chapter 781 of the Laws of 1933 of the State of New York, which made it a misdemeanor to violate any provision of a code of fair competition as approved by the President of the United States under Title I of the National Industrial Recovery Act. 48 Stat. 195. It appears that the charge of violation of the code related to the provisions which limited the amount to be allowed for an old car "traded in" as part payment for a new car and required the maintenance of factory list prices, plus certain charges, with a prohibition against discounts, gratuities, etc. for the purpose of inducing purchases. The state statute was challenged as repugnant to the Constitution of the State, by reason of an improper delegation of legislative power, and also as effecting a deprivation of liberty and property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

Appellant's application for an interlocutory injunction was heard in the District Court by three judges. Jud. Code, § 266, 28 U. S. C. 380. There was also a motion by the defendant to dismiss the bill of complaint upon the grounds, among others, that it failed to allege facts constituting an equitable cause of action, and that the District Court was without jurisdiction. Pursuant to notice, the Attorney General of the State appeared in support of the state act. Affidavits were submitted on both sides and, on hearing, the District Court sustained the

validity of the statute and, on that ground, denied the motion for injunction and granted the motion to dismiss the bill. An order to that effect was entered and the case comes here on appeal.

Upon the argument at this bar, the questions were raised (1) whether the District Attorney was an officer of the State within the meaning of § 266 of the Judicial Code, and (2) whether the complaint stated a cause of action within the equitable jurisdiction of the District Court. The case was continued to permit the parties to file briefs upon these questions, and the briefs are now in.

First. If the District Attorney of the County of New York, is to be deemed a local officer, performing a local function in a matter of interest only to the particular county, § 266 of the Judicial Code has no application and we are without jurisdiction of this direct appeal from the District Court. *Ex parte Collins,* 277 U. S. 565, 568; *Ex parte Public National Bank,* 278 U. S. 101, 104; *School District No. 7* v. *Hunnicut,* 283 U. S. 810. See, also, *Oklahoma Gas Co.* v. *Packing Co.,* 292 U. S. 386, 390.

The office of district attorney in the State of New York was created in 1801. In each of the districts as then established, which included several counties, he was charged with duties which previously had devolved upon an assistant attorney general. In 1815 the County of New York was made a separate district, and in 1818 provision was made for the appointment of a district attorney in each county. The power of appointment was vested in the Governor and the Council of Appointment until the constitution of 1821, when that power was given to the county courts. The constitution of 1846 provided that district attorneys should be chosen by the electors of the respective counties.

Despite this provision for local elections, the district attorney in each county has been regarded as a state officer performing a state function and taking the place, in

respect to his duties within the district or county, of the attorney general, upon whom at the outset these duties had been laid. Lincoln's Constitutional History of New York, vol. 2, pp. 529, 530; vol. 4, pp. 722, 723. Under the state statutes prior to 1892, it appears that district attorneys were classified as judicial officers. N. Y., Rev. Stat., Chap. V, Title I. In *Fellows* v. *Mayor* (1876), 8 Hun 484, 485, dealing with the status of an assistant district attorney, the court said: "It is conceded that the district attorney is a state officer. It could not well be questioned." And in *People ex rel. Lyon* v. *Nicoll* (1891), 32 N. Y. S. 279, 280, the court referred to the office of the district attorney as "a state office, classified by the Revised Statutes as a judicial office."

In the Public Officers Law of 1892 (now Chapter 47 of the Consolidated Laws of New York, Article I, § 2) a different classification was made and public officials were defined as either "state officers" or "local officers," the latter embracing officers chosen "by the electors of a portion only of the State." District attorneys fall within this description of local officers. Notwithstanding the change in classification, they are still to be deemed a part of the judicial system of the State, each performing within his county a distinctively state function. Lincoln's Constitutional History of New York, *loc. cit.* See Opinions, Attorney General of New York, 1924, p. 120.

In this view we cannot regard the local description, or the method of selecting the officer, as decisive with respect to the application of § 266 of the Judicial Code. That section relates to suits in which an interlocutory injunction is sought to restrain, on constitutional grounds, the enforcement "of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes

of such State." To determine the application of this provision, we must have regard both to the nature of the legislative action which is assailed and to the function of the officer who is sought to be restrained. We have said that the reference is not to every legislative action, regardless of its nature and scope, but to a statute "of general application" or an order of a state board or commission. Thus, the section does not apply to suits to restrain the enforcement of municipal ordinances or the orders of a city board. *Ex parte Collins, supra.* And, although the constitutionality of a statute is challenged, the provision is inapplicable where the defendants are local officers and the suit " involves matters of interest only to the particular municipality or district." *Id.* Accordingly, a suit against local officials to enjoin the collection of taxes assessed against shares in a national banking association, in pursuance of a state law but " by, and for the sole use of, the city," was found not to be within the section. *Ex parte Public National Bank, supra.* We pointed out that the suit must not only seek to have a state statute declared unconstitutional, or that in effect, but to restrain the action " of an officer of the state." But the Court was careful to reserve the question whether so-called local officers might not in fact represent the State or exercise " state functions in the matters involved," so as to bring the suit to restrain their action within the provision for three judges and direct appeal. *Id.*, p. 105.

Where a statute embodies a policy of statewide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality where he serves. This is especially true in the case of a prosecuting officer who acts for the entire State, as a part of its machinery of enforcement, in proceedings against violators of the state statute. The function of

such an officer, in enforcing a statute of general application, is of controlling importance in giving effect to the intent of the Congress.

In the instant case it is manifest that the statute under attack attempted to establish a statewide policy, and not one merely in the interest of the particular county. The defendant is charged with the duty of enforcing the statute by prosecuting those who disobey it, and in performing that duty he acts not merely in the local interest but in the name of the people of the State in compelling observance of its laws. In that enforcement, he is acting in a true sense as an officer of the State. Appellant sought to restrain his action in that aspect and hence we think that the case fell within § 266 of the Judicial Code and was properly heard by three judges.

Second. We pass to the question whether the bill of complaint stated a cause of action within the equitable jurisdiction of the District Court.

The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 500. See, also, *In re Sawyer,* 124 U. S. 200, 209–211; *Davis & Farnum Manufacturing Co.* v. *Los Angeles,* 189 U. S. 207, 217. To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. See *Terrace* v. *Thompson,* 263 U. S. 197, 214; *Packard* v. *Banton,* 264 U. S. 140, 143; *Tyson* v. *Banton,* 273 U. S. 418, 428; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 452; *Ex parte Young,* 209 U. S. 123, 161–162. We have said that it must appear that "the danger of irreparable loss is both great and immediate"; otherwise, the accused should first set up his defense in the state court, even though the validity of a statute is challenged. There is ample oppor-

tunity for ultimate review by this Court of federal questions. *Fenner* v. *Boykin,* 271 U. S. 240, 243, 244.

Appellant's bill of complaint failed to meet this test. Appellant alleged that the District Attorney had applied to a magistrate of the city of New York for the issue of a summons directing the appearance of the appellant, to the end that an investigation should be made of a complaint against him for violation of the provisions of the "Motor Vehicle Retailing Code" and that an information charging violation should be drawn. He alleged that the District Attorney intended, unless restrained, to institute criminal proceedings. The state statute made any violation of the provisions of the code a misdemeanor punishable by a fine not exceeding $500 for each offense. The bill contained general allegations of irreparable damage and deprivation of "rights, liberties, properties, and immunities" without due process of law, if the statute were enforced. But the bill failed to state facts sufficient to warrant such conclusions, which alone were not enough. The bill alleged that appellant had a large business in buying and selling motor vehicles, but the statute did not prohibit the continuance of that business and the bill gave no facts to show that the particular requirements of the code, which were in question, would create such a serious interference as to require equitable relief. Aside from the statement of general and unsupported conclusions, the case presented by the bill was the ordinary one of a criminal prosecution which would afford appropriate opportunity for the assertion of appellant's rights. So far as the bill disclosed, nothing more than a single prosecution was in contemplation, a point which the District Attorney emphasized by his disclaimer, on the hearing below, of any intention to institute any further prosecution against appellant until his rights, constitutional or otherwise, had been adjudicated in the pending criminal proceeding.

The bill should have been dismissed upon the ground that it failed to state a case within the equitable jurisdiction of the District Court. The decree is modified accordingly, and, as modified, the decree is affirmed.

Decree modified, and, as modified, affirmed.

MOTLOW *v.* STATE EX REL. KOELN.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

Nos. 659 and 660. Argued April 10, 1935.—Decided April 29, 1935.

1. The rule that a forfeiture of real property at the suit of the United States for an offense against the internal revenue laws relates back to the date of the offense, applies only where there is an effective judgment of condemnation. *Henderson's Distilled Spirits,* 14 Wall. 44; *United States* v. *Stowell,* 133 U. S. 1. P. 99.
2. Where the judgment provided forfeiture but contained alternative provisions allowing the landowner to retain the property "free of all claims" (meaning all claims of the United States) upon giving an appeal bond in a specified amount, which was in fact done, title to the property did not become vested in the United States and the property thereafter remained subject to state taxes imposed upon it between the date of the offense and the date of the judgment. P. 99.
3. A state court is not without jurisdiction to enforce the lien of a state tax on real property in a suit begun while a proceeding on the part of the United States to forfeit title to the same property was pending in a federal court, where no step was taken in the state court beyond the filing of the petition until the property had been released by the federal court. P. 100.

336 Mo. 40, 50; 76 S. W. (2d) 417, 421, affirmed.

CERTIORARI, 294 U. S. 703, to review the affirmance of judgments for taxes on real property recovered on behalf of the State.

Mr. Clem F. Storckman argued the cause and *Mr. Patrick H. Cullen* filed a brief for petitioner.

Mr. Frank H. Haskins, with whom *Messrs. James T. Blair, Oscar Habenicht,* and *Harry S. Rooks* were on the brief, for respondent.

PER CURIAM.

These actions were brought in the Circuit Court of the City of St. Louis to enforce the lien of the State of Missouri upon certain real property. The first action (No. 659), begun in December, 1925, was for the taxes of 1920 to 1923, and the second (No. 660), brought in December, 1928, was for the taxes of 1924 to 1926. Judgments for the plaintiff were affirmed by the Supreme Court of the State. 76 S. W. (2d) 417, 421. In view of the contention that the state court had denied effect to a judgment of the United States District Court decreeing forfeiture of title to the United States, writs of certiorari were granted.

It appeared that in 1921, in connection with a lease of the premises to a distilling company, petitioner and his wife, as owners, had filed the required consent with respect to the priority of the lien of the United States for taxes and penalties (26 U. S. C. 286); that in September, 1923, the land had been seized by the United States Collector of Internal Revenue for forfeiture on account of violations of law in removing distilled spirits without payment of the federal tax (26 U. S. C. 306); that, in January, 1924, the United States brought a libel for forfeiture in the United States District Court, and in September, 1928, obtained a judgment which was affirmed on appeal. *Motlow* v. *United States,* 35 F. (2d) 90. Petitioner contends that the land was *in custodia legis,* in the federal court, when the first action in the state court was begun, and, by virtue of the judgment in the federal court, title vested in the United States as of the date of the offense upon which the judgment was based. *Henderson's Distilled Spirits,* 14 Wall. 44; *United States* v. *Stowell,* 133 U. S. 1.

But, although the judgment provided for forfeiture to the Government, it contained an alternative provision,

inserted pursuant to a stipulation of the parties, that if the owners paid to the Government the sum of $20,000 within thirty days, the property should be delivered to them free of all claims. The provision was explicit that, in that event, "the judgment of forfeiture above entered shall not be enforcible nor shall it be enforced, but the payment of Twenty Thousand ($20,000.00) Dollars shall be in full satisfaction of the aforesaid judgment and shall operate as a release of the lien of said judgment and any cause of action in favor of the Government as to said property described in said libel." The judgment also provided that, if the owners desired to perfect an appeal, they might give bond to the Government in the sum of $20,000, conditioned as specified in the stipulation, and, on approval of the bond, possession of the property should be immediately delivered to the owners "forever released of any lien or claim of any kind whatsoever in favor of the United States Government and the aforesaid bond shall stand in lieu of and in place of said property." The bond was given, and the District Court, in September, 1928, ordered the release of the property accordingly.

While, under the statute in question, a judgment of forfeiture relates back to the date of the offense as proved, that result follows only from an effective judgment of condemnation. *Henderson's Distilled Spirits, supra,* p. 57. In this instance, there was no such judgment and hence title did not vest in the United States. As the title of the owners was not divested, the land remained subject to the claim for local taxes. The release "from all claims," for which the judgment provided, manifestly referred to claims of the United States and not to claims of the State. Nor is there merit in the contention that the state court was without jurisdiction to enforce the liens for taxes because the property was *in custodia legis.*

The second suit (No. 660), for the taxes of 1924 to 1926, was not brought until after the property had been released by the federal court in 1928; and, while the first

suit (No. 659) was begun in 1925, it does not appear that any proceedings beyond the filing of the petition were taken until 1929. There was no interference with the custody of the federal court. *Heidritter* v. *Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 304, 305. Compare *Shields* v. *Coleman*, 157 U. S. 168, 178, 179; *Zimmerman* v. *So Relle*, 80 Fed. 417, 420; *Mathis* v. *Ligon*, 39 F. (2d) 455, 456.

The judgments are

Affirmed.

WILSHIRE OIL CO., INC. ET AL. *v.* UNITED STATES ET AL.

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

No. 858. Briefs filed pursuant to order of April 9, 1935.—Decided April 29, 1935.

1. Questions certified to this Court should be aptly and definitely stated. P. 102.
2. Upon an interlocutory appeal presenting the question whether the District Court abused its discretion in granting an interlocutory injunction, the Circuit Court of Appeals is not bound to decide important constitutional questions raised by the bill, as to which it is in doubt, in advance of determination by the District Court of the facts of the case to which the challenged statute is sought to be applied. *Id.*
3. This Court should not undertake to determine the constitutionality of a federal statute upon certified questions as presented in this case, on an interlocutory appeal, which would require ordering up the entire record and involve unnecessary delay in the final determination of the case. *Id.*

Certificate dismissed.

On a certification of questions from the Circuit Court of Appeals. For opinion of the District Court granting an interlocutory injunction, see 9 F. Supp. 396.

Messrs. Robert B. Murphey and *Wm. L. Murphey* were on the brief for Wilshire Oil Co. et al.

Solicitor General Reed, Assistant Attorney General Stephens, and *Messrs. Carl McFarland* and *M. S. Huberman* were on the brief for the United States et al.

PER CURIAM.

The Circuit Court of Appeals has certified to this Court the following questions:

"(1) Are the standards controlling the production of petroleum in the United States, which production affects (a) interstate commerce in petroleum, and (b) the national security and defense by prevention of waste of the natural resources of petroleum essential for the creation of power in the instruments used in such defense and in maintaining such security, sufficiently stated in the National Industrial Recovery Act to constitute legislation as a basis for the administrative regulation of such production?

"(2) Does the attempted creation of a code of fair competition for the petroleum industry under the provisions of Section 3 of Title I of the National Industrial Recovery Act, which code establishes definite and appropriate standards for the regulation of production of petroleum affecting interstate commerce and for preventing its waste as a natural resource contributing to the national defense and security, and authorizes administrative orders limiting the production of the individual producers to an amount less than they otherwise would be entitled to produce constitute the exercise of a legislative function which the Congress cannot delegate?"

The certificate, dated April 5, 1935, states that certain corporations engaged in the production of petroleum in California have appealed from an order of the District Court granting a preliminary injunction restraining them from producing crude petroleum from their respective wells in excess of amounts allocated by quotas and operating schedules ordered by the Administrator of the Code

of Fair Competition for the Petroleum Industry. This Court, by its order of April 9, 1935, afforded opportunity to counsel to file briefs upon the question whether the described appeal presents any question other than whether the District Court committed an abuse of discretion in granting an interlocutory injunction, referring to *Alabama* v. *United States*, 279 U. S. 229, and other decisions of this court. Counsel for the respective parties have filed briefs accordingly.

Meanwhile the Circuit Court of Appeals has amended its certificate so as to state that the appealing defendants had moved in the District Court to dismiss the bill of complaint upon the ground that it failed to state facts sufficient to constitute a cause of action and had filed an answer reserving that question; that the motion to dismiss was denied and exception reserved at the same time that the order for injunction was granted; that on the hearing in the District Court the question whether the creation of the Petroleum Code by the Executive constituted an exercise of an unlawful delegation of legislative power had been argued and that the contention of the appellants had been overruled. In that view the amended certificate submits that the certified questions are addressed to a power of the Court of Appeals on an appeal from the interlocutory order to decide the question as to the total absence of a cause of action.

This court is of opinion that, apart from the objectionable form of the certified questions, which are not aptly or definitely phrased, the question before the Court of Appeals upon the appeal from the interlocutory order is whether the District Court abused its discretion in granting an interlocutory injunction; that the Court of Appeals is not bound to decide, upon the allegations of the bill, an important constitutional question, as to which the Court of Appeals is in doubt, in advance of an appropriate determination by the District Court of the facts

of the case to which the challenged statute is sought to be applied.

Nor should this Court undertake to determine the constitutional validity of the statute upon such questions as those which have been certified. If this Court were to deal with the case in its present stage, it would be necessary to order up the entire record, so that the allegations of the bill, and the case as presented to the District Court, could be properly considered. That course would merely bring before this Court the interlocutory order and would result in unnecessary delay in the final determination of the cause. The certificate is therefore

Dismissed.

UNITED STATES v. CREEK NATION.

CERTIORARI TO THE COURT OF CLAIMS.

No. 2. Argued October 8, 1934.—Decided April 29, 1935.

1. By a treaty of 1833, and patent, the United States conveyed to the Creek Tribe of Indians in fee simple a large tract of land. By treaty of 1866, the Creeks receded half of the tract, the United States undertaking to survey the dividing line and guaranteeing the Creeks quiet possession of the other part. The survey, made in 1871, was recognized in an agreement between the Tribe and the United States, Act of March 1, 1889. By error of the Land Department, part of the unceded land was included (1872–73) in the survey of a tract assigned to the Sac and Fox Indians under a treaty of 1867; and later, in carrying out an agreement with those Indians, embodied in the Act of February 13, 1891, by which their lands were receded to the United States, the Creek lands so surveyed with them were erroneously assumed to be part of the Sac and Fox recession, and due to such error, were disposed of under the last mentioned agreement, partly by allotments in severalty to the Sacs and Foxes and partly by sales to settlers; and such dispositions were effectuated by patents signed by the President. The United States retained the proceeds of the dispositions. *Held:*

(1) That the claim of the Creek Tribe for compensation was a claim "arising under or growing out of" a "treaty or agreement" between the United States and that Tribe, or "arising under or growing out of" an "Act of Congress in relation to Indian Affairs,"—within the meaning of the Act of May 24, 1924, conferring jurisdiction on the Court of Claims to adjudicate. P. 108.

(2) The lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the Creek Tribe. P. 109.

(3) The taking was accomplished, not by the erroneous survey (1873), but by the disposals under the Act of 1891. P. 111.

(4) Though the disposals rested upon an erroneous application of the Act of 1891, that application was in effect confirmed by the United States, so that the matter stands as if the Act had directed the disposals. P. 111.

(5) Compensation should be based, not on the value of the lands at the time of the erroneous survey nor at the time of bringing the suit, but on the value at time of the disposals, with reasonable interest added, as a measure, to make up the full equivalent of value paid contemporaneously with the taking. P. 111.

(6) As shown by the past agreements between the parties, a reasonable rate of interest is 5%. P. 112.

2. Property of an Indian Tribe under guardianship of the United States cannot constitutionally be appropriated by the United States without just compensation. P. 110.

77 Ct. Cls. 159, reversed.

CERTIORARI, 292 U. S. 616, to review a judgment against the United States on a claim of the Creek Tribe of Indians.

Assistant Attorney General Sweeney, with whom *Solicitor General Biggs, Assistant Attorney General Blair,* and *Messrs. George T. Stormont* and *Wilfred Hearn* were on the brief, for the United States.

Mr. W. W. Spalding, with whom *Messrs. E. J. Van Court* and *Paul M. Niebell* were on the brief, for respondent.

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

This is a suit by the Creek Nation or Tribe of Indians against the United States to recover compensation for certain lands of that tribe charged to have been appropriated by the United States. The tribe obtained a judgment and we granted a petition by the United States for certiorari. The suit was brought in 1926 under the act of May 24, 1924, c. 181, 43 Stat. 139, which declares:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

In the course of the suit the United States set up certain cross-demands and recovered judgment thereon; but the judgment on the tribe's claim is all that is challenged now.

The principal facts relating to that claim were conceded below, as shown by the court's opinion and findings, and stand unquestioned here.

Under a treaty of 1833 [1] the United States granted to the Creek Tribe, by a patent conveying a fee simple, a large tract of land in Indian Territory, now Oklahoma. By a treaty of 1866 [2] the Creeks ceded to the United States the westerly half of that tract, but expressly re-

[1] Treaty of February 14, 1833, Arts. 2 and 3, 7 Stat. 417.

[2] Treaty of June 14, 1866, Arts. 3 and 8, 14 Stat. 785, 786, 788.

tained the easterly half; and the United States stipulated it would cause a north and south line separating the ceded from the unceded lands to be surveyed under the direction of the Commissioner of Indian Affairs, and guaranteed to the Creeks quiet possession of their unceded lands.

In 1871 one Bardwell, acting under the direction of the Commissioner of Indian Affairs, surveyed the divisional line. A controversy soon arose as to whether the line was surveyed too far to the east, and thereby encroached on unceded lands of the Creeks; but that controversy, if not terminated before, was put to rest and the line effectively recognized by an agreement made between the Creek Tribe and the United States in 1889,[3] wherein the tribe's ownership of the lands east of that line was expressly recognized.

In 1867[4] the United States entered into a treaty with the Sac and Fox Indians under which it assigned to them a tract of land within the area ceded by the Creeks and immediately west of the area retained by them.

In 1872 one Darling, a surveyor acting for the government, surveyed the Sac and Fox tract and erroneously extended his lines and closing corners eastward into the unceded Creek lands in disregard of the Bardwell dividing line. Darling's survey was approved by the Commissioner of the General Land Office in 1873; and as a result of this survey and its approval a strip of Creek lands between the Bardwell line and Darling's easterly closing corners, aggregating 5,575.57 acres, was erroneously included within the Sac and Fox tract as officially surveyed and platted, and thereafter was occupied by the Sac and Fox. In 1875 one Hackbusch, a government surveyor, subdivided the sections in the Sac and Fox lands into 40 acre tracts and followed Darling's lines into the unceded

[3] Act March 1, 1889, c. 317, 25 Stat. 757, 758.

[4] Treaty of February 18, 1867, Art. 6, 15 Stat. 495, 496.

Creek lands, thereby perpetuating Darling's error. Hackbusch's survey, like that of Darling, was approved by the Commissioner of the General Land Office.

By an agreement ratified in the act of February 13, 1891,[5] the Sac and Fox ceded to the United States the tract assigned to them under the treaty of 1867. In the agreement the United States stipulated it would make allotments in severalty to the Sac and Fox Indians out of lands within their cession; and the ratifying act required that these allotments be made and that the remaining lands be opened to settlement as public lands and sold to settlers at a stated price per acre, which was to be turned into the treasury as public money.

In carrying that act into effect the Indian and land bureaus of the United States erroneously treated the strip of unceded Creek lands between Bardwell's line on the west and Darling's closing corners on the east as part of the Sac and Fox cession, and accordingly allotted and patented part of the strip to Sac and Fox Indians, by way of fulfilling the Government's obligation to them; sold and patented other lands therein to settlers; and turned the purchase price received from such sales into the treasury as public money. These disposals included nearly all of the 5,575.57 acres in the strip, and the grantees have since been holding the same adversely to the Creek tribe.

In the court below, as its opinion shows, the parties were agreed that the lands in the strip were unceded Creek lands; and that as to such of them as were disposed of under the act of 1891 the Creek tribe is "entitled to compensation." But the parties were not agreed respecting the time as of which the value should be ascertained. The tribe contended for the value in 1926, when the suit was brought; while the Government stood for the value at the time of the appropriation, which it insisted was in 1873,

[5] C. 165, 26 Stat. 749, 750.

when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, at the time the lands were disposed of under the act of 1891.

The court below held the tribe entitled to the value of the lands, ruled the value at the time of suit should be allowed, found the value at that time was $30 an acre, and gave judgment accordingly. There was no finding of the value at either of the times named in the government's contention; but it is inferable from the record that the value was less at those times than when the suit was begun.

1. Counsel for the government, assuming that the present claim is merely for damages arising out of errors on the part of administrative officers, contend that it does not come within the terms of the jurisdictional act—" any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States." We think the contention is not tenable.

Counsel's assumption ignores several elements of the claim, such as the treaties of 1833 and 1866 and the acts of Congress of 1889 and 1891. It also neglects matters reflecting a confirmation of the acts of the administrative officers, such as the receipt by the United States of direct and material benefits from their acts and its retention of the benefits with knowledge of all the facts.

While the jurisdictional act is couched in general terms, there can be little doubt when it is read in the light of the circumstances leading to its passage that it is intended to include the present claim. The congressional committees on whose recommendation the act was passed were in possession of all data bearing on the claim. The facts

had been laid before them in letters from the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office.[6] In the letters these officers, besides reciting the facts in detail, expressed their own conclusions in the matter, which were to the effect that the settlers and allottees had acquired and improved the lands in good faith, and therefore deserved consideration; that the Creek tribe was "entitled to compensation" for the lands "lost" by it through what had been done; that the unfortunate situation "grew out of errors of representatives of the government," which made it reasonable to expect the government to bear the expense of an adjustment; and that there was need for legislation under which the matter could be examined and brought to an equitable and final solution. In view of this portrayal of the matter by the officers specially charged with the administration of Indian and public-land affairs, and the subsequent action of the committees in effecting the passage of the jurisdictional act, we regard it as reasonably manifest that the act is intended to provide for the adjudication of the present claim. The concessions made in the court below by those who were there representing the Government show rather plainly that they so understood the act.

2. A question is raised as to whether there was an appropriation or taking of the lands by the United States.

The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this

[6] Senate Report No. 2561, p. 54, 59th Cong., 1st Sess., and papers named in letter of Secretary of the Interior.

power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation." *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110, 113; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307-308.

Such was the situation when the lands in question were disposed of under the act of 1891. The disposals were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consummated by the issue of patents signed by the President.

True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose.[7] But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States in effect confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.

[7] *United States* v. *Minnesota,* 270 U. S. 181, 194–196, and cases cited.

We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe.[8]

3. Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error.

But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time, and not, as ruled below, on the value when the suit was begun.

But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking.[9] Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added.[10] The treaty

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[8] *United States* v. *Lynah*, 188 U. S. 445, 465; *United States* v. *North American Co.*, 253 U. S. 330, 333; *Phelps* v. *United States*, 274 U. S. 341, 343. And see *United States* v. *State Bank*, 96 U. S. 30, 36.

[9] *Jacobs* v. *United States*, 290 U. S. 13, and cases cited.

[10] *United States* v. *Rogers*, 255 U. S. 163, 169; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304–306.

of 1866, the act of 1889 and other statutes show that five per cent per annum is a reasonable rate as between the parties here.[11]

It follows that the judgment must be reversed, with directions for such further proceedings as may be necessary to bring the award of compensation into conformity with this opinion.

Judgment reversed.

VAN WART *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 95. Argued November 13, 1934.—Decided April 29, 1935.

1. Under the Revenue Act of 1924, the ward, not the guardian, is the "taxpayer." P. 115.
2. An attorney's fee paid by a guardian on behalf of and out of the income of his ward, who was not engaged in any business, for the conduct of litigation to recover income for the ward, *held* not deductible under § 214 (a) (1) of the Revenue Act of 1924 as an ordinary or necessary expense incurred in carrying on a business. *Id.*

69 F. (2d) 299, affirmed.

CERTIORARI, 293 U. S. 537, to review a judgment reversing a decision of the Board of Tax Appeals which reversed an order of the Commissioner disallowing a deduction from income tax.

Mr. Frederick R. Gibbs, with whom *Mr. Preston B. Kavanagh* was on the brief, for petitioner.

The guardian and not the ward is the taxpayer. 1924 Revenue Act, §§ 219 (a), (2), 219 (b), 200 (b), 225 (a), (b), 2 (a) (9); *Merchants Loan & Trust Co.* v. *Smietanka,*

[11] Creek Treaty of 1866, Art. 3, 14 Stat. 785, 787; Act of March 1, 1889, c. 317, 25 Stat. 757, 758, 759; U. S. C. Title 25, § 158.

255 U. S. 509, 516. *Busch* v. *Commissioner,* 50 F. (2d) 800, distinguished.

The attorney's fee is a necessary business expense of the guardian. The law demanded that he take appropriate action to recover the income for his ward and the conduct of the resulting litigation, through the Circuit Court of Appeals, of necessity required the employment of competent counsel and payment of reasonable charges for services rendered.

" Business " has been defined by this Court in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 171, as " a very comprehensive term and embraces everything about which a person can be employed."

The decision of the lower court is contrary to the decisions of the Circuit Court of Appeals for the Second Circuit and the Board of Tax Appeals, as well as the rulings of the Bureau of Internal Revenue. *Commissioner* v. *Wurts-Dundas,* 54 F. (2d) 515; *Commissioner* v. *Field,* 42 F. (2d) 820; *Walker* v. *Commissioner,* 63 F. (2d) 351; *Kenan* v. *Bowers,* 50 F. (2d) 112; *Lindley* v. *Commissioner,* 63 F. (2d) 807; Knox *v.* Commissioner, 3 B. T. A. 143; Franklin *v.* Commissioner, 11 B. T. A. 148; Grandin *v.* Commissioner, 16 B. T. A. 515; Wurts-Dundas *v.* Commissioner, 17 B. T. A. 881; Sparrow *v.* Commissioner, 18 B. T. A. 1; Chicago Title & Trust Co. *v.* Commissioner, 18 B. T. A. 395; Office Decision 537, C. B. 2, p. 176; I. T. 2238, C. B. IV–2, p. 50; I. T. 2124, C. B. IV–1, p. 138.

Assistant Solicitor General MacLean, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, John G. Remey,* and *W. Marvin Smith* were on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

The sole question for determination is whether an attorney's fee, paid by the guardian for conducting litiga-

tion to secure income for his ward, was a business expense within § 214 (a) (1), Revenue Act, 1924, and therefore deductible from the minor's gross income. The facts, as stated by the court below, were these—

"Catherine L. Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones, deceased. Dr. Roy M. Van Wart, Catherine's father, with whom she resided in Orleans Parish, Louisiana, after being confirmed by order of the district court for that Parish in accordance with the laws of Louisiana as her natural tutor or guardian, and after duly qualifying as such, demanded of the trustees under the will that they pay over to him the accrued income of the trust created in favor of his ward. The trustees, claiming among other things the right to keep possession of the accumulations of such income until Catherine should become of age, when they conceded she would be entitled to the corpus as well as all accumulated income, declined to comply with that demand. Thereupon suit was brought in the name of the minor, by her father as next friend, in the federal court for the district in West Virginia in which the testator was residing at the time of his death, against the trustees to compel distribution of the income involved in accordance with the guardian's previous demand. That suit finally was decided in favor of the plaintiff, it being held that the guardian was entitled to receive from the trustees his ward's accumulated income and future income as it annually accrued. *Van Wart* v. *Jones,* 295 F. 287. Accordingly, in 1924 the trustees paid over to Dr. Van Wart as guardian the accumulated income of $160,000 and current income of $80,000; and Dr. Van Wart, acting as guardian and by authority of the court of his appointment, paid out of the funds so received by him a fee of $30,000 to the attorneys who brought the suit for their services in the litigation. In the income tax return for 1924, which was

filed by the guardian on behalf of his ward, a deduction of the attorneys' fee was claimed."

Pertinent provisions of the Revenue Act of 1924 are in the margin.*

The Board of Tax Appeals held the attorney's fee was deductible as an ordinary and necessary expense in carrying on business. § 214 (a) (1). The Commissioner claimed it was personal expense of the minor taxpayer, excluded from deduction by § 215 (a) (1), and the court below upheld this view. It declined to follow *Commissioner* v. *Wurts-Dundas,* Circuit Court of Appeals, Second Circuit, 54 F. (2d) 515. Because of this conflict the cause is here.

We agree with the conclusion that the ward, not the guardian, was the taxpayer. The return was filed by him in her behalf; the taxable income was hers, not his. The

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* Revenue Act of 1924, c. 234, 43 Stat. 253:

"Sec. 2. (a) When used in this Act—

"(1) The term 'person' means an individual, a trust or estate, a partnership, or a corporation.

. . . . . .

"(9) The term 'taxpayer' means any person subject to a tax imposed by this Act.

"Sec. 214. (a) In computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . .

"Sec. 215. (a) In computing net income no deduction shall in any case be allowed in respect of—

"(1) Personal, living, or family expenses.

"Sec. 225. (a) Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

"(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife."

attorney's fee arose out of litigation conducted in the name of the ward. It was paid for her benefit out of her income.

In *Freuler* v. *Helvering,* 291 U. S. 35, 44, we said: "The whole of the minor's income received by his guardian is taxable to the minor irrespective of its accumulation in the guardian's hands, distribution to the minor or payment for his support or education. . . . Either the minor or his guardian must make the return, but in either case it embraces all the income and is the minor's individual return, not that of the guardian or the trust."

The ward was not engaged in any business. So far as appears the same thing is true of the guardian. See *Kornhauser* v. *United States,* 276 U. S. 145; *Commissioner* v. *Field,* 42 F. (2d) 820; *Hutchings* v. *Burnet,* 61 App. D. C. 109; 58 F. (2d) 514; *Walker* v. *Commissioner,* 63 F. (2d) 351; *Lindley* v. *Commissioner,* 63 F. (2d) 807. Moreover, guardianship is not recognized by the statute as a taxable entity.

The judgment under review must be

Affirmed.

HALLENBECK, RECEIVER, *v.* LEIMERT, RECEIVER.

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

No. 600. Argued April 5, 1935.—Decided April 29, 1935.

1. Overdraft checks, drawn on a bank affiliated with a clearing-house, were presented to the drawee, through a clearing-house settlement, by a member bank which had received them from an indorser bank for collection. The drawee failed to comply with a clearing-house rule requiring it to notify the member bank within a specified time in case of nonpayment, but returned the checks later, for reimbursement, to the indorser bank, which was neither a member nor

an affiliate of the clearing-house. *Held* that the checks were paid and the indorser not liable. P. 122.

2. An overdraft check, deposited by an indorser bank with a collecting bank was credited by the collector to the indorser's account, charged against the drawee's account, and sent to the drawee. The drawee accepted the check and gave no notice of its dishonor to the collecting bank, but later returned it to the indorser bank for reimbursement. *Held* that the check had been paid and the indorser was not liable. P. 122.

3. *Semble* that § 102, par. 1 of the Illinois Negotiable Instruments Law refers to the time for giving notice of dishonor, not to the time within which the drawee of a check dishonored may return it after tentative clearing-house settlement, nor to advice concerning overdrafts. P. 123.

72 F. (2d) 480, reversed.

CERTIORARI, 294 U. S. 699, to review the affirmance of a judgment recovered in an action on checks.

Messrs. Russell F. Locke and *George P. Barse,* with whom *Messrs. Raymond M. Ashcraft* and *F. G. Awalt* were on the brief, for petitioner.

Mr. Daniel M. Healy for respondent.

Whether the Central Bank was a holder or bearer of the checks depends on whether its conduct constituted final and irrevocable payment. If it did not, then the Central Bank was a holder or bearer, with all the rights of the prior holder in due course. *National Bank of Commerce* v. *Seattle,* 109 Wash. 312, 322; *First National Bank* v. *Bank of Cottage Grove,* 59 Ore. 388.

The Central Bank under the circumstances was a holder in due course, but if not a holder in due course, it certainly was a holder or bearer, at least up to the time when notice of non-payment was required by the clearing-house rules.

Four of the checks were endorsed by Ashland Bank to the Federal Reserve Bank, which, in turn, endorsed them payable to any bank or banker. The other check was

endorsed by Ashland Bank payable to the First National Bank, which endorsed it in blank. This made them payable to bearer. Negotiable Instruments Act, § 9, subsec. 5.

The Federal Reserve Bank and the First National Bank were holders in due course of the respective checks. Negotiable Instruments Act, § 58.

The fact that the Central Bank gave its check in settlement of the clearing-house balance, and that four of the checks were among those which went to make up this balance, does not constitute payment. After making such settlement, the Central Bank had the right to a reasonable opportunity to examine the checks and the accounts on which they were drawn, and dishonor the checks that were not supported by the account on which they were drawn. *Schneider* v. *Bank of Italy,* 194 Pac. 1021; *Columbia-K. Trust Co.* v. *Miller,* 215 N. Y. 191; *Hentz* v. *National City Bank,* 144 N. Y. 979; 5 Michie, Banks & Banking, 575.

Failure of the Central Bank to notify the clearing-house in the one case, and the First National Bank, in the other, of non-payment within the time limit prescribed by the rules of the clearing-house, did not constitute final and irrevocable payment as to the Ashland Bank, as the latter was not a member of the clearing-house, and, therefore, in no way affected by its rules.

The rules of the clearing-house are binding upon and for the benefit of its members alone and non-members cannot claim their benefit. 1 Morse, Banks & Banking (6th ed.) 810; 8 Michie, Banks & Banking, 165; Brady, Bank Checks (2d ed.), 503; *National Exchange Bank* v. *Ginn & Co.,* 114 Md. 181; *Merchants National Bank* v. *National Bank,* 139 Mass. 518.

It is to be observed in this respect that the Ashland Bank, so far as it is concerned in this transaction, was no more or better than an ordinary individual customer of the Federal Reserve Bank.

There was no duty owing from Central Bank to Ashland Bank under the clearing-house rules. Therefore, the only possible requirement was that of giving notice of non-payment of the checks as required by law. This was done. Central Bank was not required to give notice to all indorsers but only to those it intended to hold. The settlement remained conditional as to the indorsers who were members of the clearing-house until two thirty o'clock in the afternoon of the day the checks were presented; and notice not having been given by that time, they were discharged. As to non-members, it remained conditional until the expiration of the time prescribed by the Negotiable Instruments Law. Notice was given to Ashland Bank within that time.

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent, receiver of Central Bank, brought suit against petitioner, receiver of Ashland Bank, in the District Court, Northern District of Illinois, to recover upon five checks drawn upon the former and endorsed by the latter bank. Jury having been waived, the trial court made findings of fact with conclusions of law and entered judgment in favor of respondent here for the sum demanded. There is no bill of exceptions; the findings control.

From these it appears—

All the banks spoken of herein were located in Chicago. James G. Hodgkinson was vice-president and director of Ashland Bank; also vice-president of Hodgkinson & Durfee, Inc., which had a deposit account with Central Bank. Against this account he drew the corporation's five checks, and delivered them to Ashland Bank. It endorsed and deposited four of them with Federal Reserve Bank for collection, Saturday, April 23rd. The fifth check duly endorsed went for collection to the First National Bank.

The Federal Reserve and First National Banks were regular members of the Chicago Clearing House Association; Central Bank an affiliate; Ashland Bank was neither member nor affiliate. A rule of the Chicago Clearing House provided—

"In order that the member banks presenting such items may have an opportunity to give special instructions as to the protest of unpaid items, that notice of non-payment of any such items drawn on banks . . . which are . . . affiliated with members of the association . . . and which have their places of business located . . . on 12th Street or south thereof, be given by telephone before two-thirty o'clock (2:30) p.m. of the same day to the member banks presenting such items through the Clearing House . . ."

Early Monday morning, April 25th, The Federal Reserve Bank turned in the four deposited checks to the Chicago Clearing House. According to the rules and practices, Central Bank settled the indicated adverse balance at the Clearing House and before 11: 30 a. m. received the checks. Several hours later it learned that Hodgkinson & Durfee lacked funds to meet them.

On the same day First National Bank, which carried accounts with both Central and Ashland Banks, charged the check received from the latter against the former's account, and sent it by messenger to the drawee's place of business, where it was received and retained.

When the Central Bank ascertained the status of Hodgkinson & Durfee's account, it notified Hodgkinson. At 9: 30 a. m. the following morning, April 26th, the five checks were returned to Ashland Bank for reimbursement. This was refused. No notice was given by Central Bank to either Federal Reserve or First National Bank. They "got the money from the Central Bank and in turn gave the money to the Ashland Bank."

The trial court concluded the checks were not unconditionally paid; also that the notice to Ashland Bank on

April 25th under § 102, Negotiable Instruments Law; Par. 124, Cahill's Ill. R. S., sufficed to fix responsibility. Accordingly judgment went against petitioner.

The Circuit Court of Appeals affirmed, and among other things, said—

"It is conceded by both parties that, if payment were actually made by the bank on which the checks were drawn (in this case the Central Bank) or if, instead of actual payment, an unconditional credit had been given, then, though it were later discovered that there were insufficient funds on deposit in the account of the maker to cover the checks, the payment would be absolute and irrevocable. . . . The method of transacting business followed by the Clearing House Association contemplates that the members will immediately examine the various items which go to make up the balance and only the subsequent lapse of time without electing to dishonor the check causes the settlement to become final. In the case of members of the Clearing House, the time within which notice must be given is fixed by agreement. In the case of banks not members of the Clearing House, the provisions of the Negotiable Instruments Law must govern as to what length of time may elapse before the tentative payment becomes final and irrevocable. . . . The Ashland Bank was not a member of, or affiliated with, the Clearing House Association, and is vested with no rights based upon its rules. . . . The Central Bank having elected to recover from the Ashland Bank directly, all that was necessary to bring the giving of notice of dishonor within the provisions of the Negotiable Instruments Law was that notice be given 'before the close of business hours on the day following.' "

And it cited Cahill's Ill. Stat., 1933, c. 98, par. 124 (§ 102, Negotiable Instruments Law) which provides:

"Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

"1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following."

We think the conduct of Central Bank constituted final irrevocable payment of the five checks, as if cash had passed over the counter. And if this be correct, counsel do not maintain that the judgment below can be sustained.

Settlement at the Clearing House, in respect of the four checks turned in by the Federal Reserve Bank, was at first provisional, subject to be withdrawn or corrected upon notice given before 2: 30 o'clock. After this provisional settlement the drawee accepted delivery of the checks and gave no notice of dishonor prior to two-thirty o'clock. The time having expired, payment became absolute. The fifth check, presented by the First National Bank, after being charged to the drawee's account, was not dishonored, but upon presentation was accepted without reservation. Payment then became complete and irrevocable. Central Bank did not repudiate or question the charge against its account at the First National Bank. On the contrary this was ratified. See *National Bank* v. *Burkhardt,* 100 U. S. 686, 689; *American Nat. Bank* v. *Miller,* 229 U. S. 517, 520. Both collecting banks transmitted the proceeds received to Ashland Bank.

Apparently the argument in support of the judgment below is this—

The checks in the hands of the collecting banks were payable to bearer, and held in due course. The drawee bank did not in fact pay the checks, but after becoming holder, dishonored them. Thereafter, within the time prescribed by § 102, Negotiable Instruments Law, it gave notice to the first endorser and thus fixed the obligation to pay. Admitted payment to the collecting bank is excused upon the theory that this resulted from rules of the Clearing House, not applicable to Ashland Bank, a non-member.

Since payment was actually made to the collecting bank, and never repudiated, it seems impossible to conclude that the secondary liability assumed by endorsers remained in force. As the checks were not dishonored when presented, the endorser could only have been advised that when paid the drawee lacked funds to meet them.

The Ashland Bank is not seeking to enforce rules of the Clearing House. It asks that proper effect be given to actual payment made through compliance with those rules. The duty of the drawee bank was either to pay or refuse to pay when the holder presented and demanded final payment of the checks. It paid them. The tentative payments became final—as much so as if money had passed. No objection is made to the Clearing House rules and we find none.

Section 102 of the Negotiable Instruments Law refers to notice of dishonor, not to the time within which a dishonored check may be returned, nor to advice concerning an overdraft. It does not relate to tentative payments and is without application in circumstances like those here disclosed. At least that seems clear to us and there is no holding to the contrary by the courts of Illinois.

The record reveals no attempt to recover because of fraud, mutual mistake, or other similar circumstance.

The questioned judgment must be reversed. One will be entered here for the petitioner.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* RANKIN, EXECUTOR.

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

No. 582. Argued March 14, 15, 1935.—Decided April 29, 1935.

1. For the purpose of ascertaining the taxable gain from a sale of corporate shares made through a broker while he has them in a

marginal account with other lots of the same kind bought at different times and at different prices for the same customer, identification of the lot sold is not dependent on allocation of particular stock certificates, which may be impossible, but is satisfied if the customer, through the broker, designated the shares to be sold as those purchased on a particular date and at a particular price. P. 128.

2. It is only when such a designation has not been made at the time of sale, or is not shown, that there is room in such cases for applying the "First-in, first-out" regulation of the Treasury (Reg. No. 74, Art. 58), which provides: "When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock." P. 129.
3. So construed, the regulation affects at most the burden of proof, leaving the trader free to establish the identity of the shares by any relevant evidence; it does not create a conclusive presumption arbitrarily depriving him of any of the attributes of ownership, such as the right to decide which shares he will sell. P. 129.
4. Identification of shares sold with shares purchased, precluding application of the "First-in, first-out" rule, is not made out by proof of a mere intention of the trader not communicated to the broker. P. 130.
5. The Circuit Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact; the function of the court is to decide whether the correct rule of law was applied to the facts found, and whether there was substantial evidence before the Board to support the findings made. P. 131.
6. If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record. P. 131.
7. The Circuit Court of Appeals is not justified in reversing a decision of the Board of Tax Appeals, though it be based on an erroneous rule of law, if the findings of fact, governed by the correct rule of law, are sufficient to sustain the decision and have substantial support in the evidence. P. 132.

8. Cause remanded to the Circuit Court of Appeals for further consideration on the question whether a finding of the Board of Tax Appeals was without substantial support in the evidence. P. 133.
73 F. (2d) 9, reversed.

CERTIORARI, 294 U. S. 700, to review a judgment reversing a decision of the Board of Tax Appeals, 26 B. T. A. 1204, which upheld a determination of deficiency in income tax.

Assistant Attorney General Wideman, with whom *Solicitor General Biggs* and *Messrs. James W. Morris* and *J. P. Jackson* were on the brief, for petitioner.

Mr. John W. Townsend for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Revenue Act of 1928 (c. 852, §§ 22, 111, 112, 113), provides, as had earlier Revenue Acts, that in computing income from sales of property purchased after February 28, 1913, any excess of the amount realized over cost shall be gain and that any excess of the cost over the amount realized shall be loss. When gain or loss is to be determined on the sale of stock owned outright as an investment, the identification of the shares sold with those purchased ordinarily presents no difficulty. But when the taxpayer has engaged in marginal transactions on a stock exchange, the identification of sales and purchases is frequently impossible. It was, perhaps, primarily to deal with such cases that the Treasury adopted, in 1918,[1]

[1] Art. 4, ¶ 60, Regulations No. 33 (Revised), Revenue Acts of 1916 and 1917; Art. 39, Regulations Nos. 45, 62, 65 and 69, Acts of 1918, 1921, 1924 and 1926, respectively; Art. 58, Regulations Nos. 74 and 77, Acts of 1928 and 1932 respectively; Art. 22 (a)–8, Regulations No. 86, Act of 1934.

the so-called "First-in, first-out" rule. That rule appears in Article 58 of Regulations No. 74, under Revenue Act of 1928, as follows:

"When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale over cost or other basis of the stock will constitute gain."

Applying this rule, the Commissioner of Internal Revenue assessed against Richard B. Turner for the year 1928, a deficiency tax of $11,173.05 on account of gains from his operations on the stock exchange in United Gas Improvement Co. stock. Upon a redetermination by the Board of Tax Appeals, the Commissioner's action was sustained. 26 B. T. A. 1204. The Court of Appeals reversed the Board's decision and directed it to enter a new order in conformity with the court's opinion. 73 F. (2d) 9. Turner having died during the litigation, his executor, Rankin, was substituted. Writs of certiorari were granted in this case, and in *Snyder* v. *Commissioner,* decided this day, *post,* p. 134, in order to determine questions concerning the effect, validity, and applicability of the regulation. The facts found by the Board were these:

In 1926, Turner received in distribution of his father's estate $20,000 in bonds. Wishing to change his inheritance into stock, he opened a marginal account with a stock broker; sold the bonds; and, with the proceeds as margin, purchased, from time to time during that year, an aggregate of 1,200 shares of United Gas Improvement Company stock at a cost of $117,202.50. On this stock the broker received for him, later in 1926, 300 shares as a dividend. There were no further operations in 1926 or in 1927. His marginal account became active in 1928.

At the beginning of the year he was long 1,500 shares of this stock; in May he sold 300 shares for $44,619 net; in June, he bought 1,000 shares for $143,225; in October he sold 500 shares for $73,865; and, in November, 500 shares for $74,115. Thus, at the close of the year, he was long 1,200 shares.

In none of these transactions did the broker deliver to Turner, or Turner to the broker, any stock certificate. No specific certificate of stock was ever bought or sold by the broker for Turner; and none was earmarked or allocated for him in any manner. The purchases and sales affecting his account were made through the medium of street certificates handled by the broker; and the transactions were evidenced solely by debits and credits in his account on the broker's books. Turner first learned these facts after the deficiency assessment. He had always intended to retain ownership on margin of 1,200 shares of the stock, since he had faith in the company and desired to hold them in lieu of the bonds which he had received from the estate of his father. To his business associates, who acted for him in giving orders to the broker, he had made it plain that the 1,200 shares were in the nature of a permanent commitment on his part. An employee of the broker understood that the decedent desired to retain 1,200 shares of the stock to take the place of the bonds which he had received from his father.

On the above facts the Board concluded, as had the Commissioner, that it was impossible to determine the identity of the lots purchased and sold; and that, consequently, the "First-in, first-out" regulation should be applied. In reversing that order the Court of Appeals said: "We think the petitioner's [Turner's] communication to his broker of his intention to hold the 1,200 shares first purchased as an investment was in effect an order to his broker not to sell those shares, and when, two years later,

he ordered the broker to make two sales in lots of 500 shares each, they were, conformably with the original instructions, the 1,000 shares last purchased. The petitioner's instructions excluding from sale the shares first purchased were in effect an identification of the shares later sold as those last purchased.

"While the petitioner, in identifying his shares, might have been more specific in his instructions to his broker, those he gave stand uncontradicted; indeed, they have not been questioned. We think they were enough to take the case out of the rule and that, in consequence, the deficiency tax in issue is invalid to the extent that it is based on gains made in sales of U. G. I. shares reckoned on the purchase price of the original 1,200 shares."

First. The Commissioner contends that Turner's communication to his broker of his intention to keep 1,200 shares of United Gas Improvement Co. stock was ineffective to identify the shares to be sold, because, from the very nature of these marginal operations, the shares were incapable of identification by the broker or anyone else. The basis for this contention is the facts that in such transactions no certificate is issued in the name of the customer, or earmarked for or otherwise allocated to him; that all certificates are in the name of the broker or street names; and that all certificates for stock of the same kind are commingled and held by the broker for the common benefit of all dealing in that particular stock. The fallacy of this argument lies in the assumption that shares of stock can be identified only through stock certificates. It is true that certificates provide the ordinary means of identification. But it is not true that they are the only possible means. Compare *Richardson* v. *Shaw,* 209 U. S. 365; *Gorman* v. *Littlefield,* 229 U. S. 19; *Duel* v. *Hollins,* 241 U. S. 523. Particularly is this so when, as here, the thing to be established is the allocation of lots sold to lots purchased at different dates and different

prices.[2] The required identification is satisfied if the margin trader has, through his broker, designated the securities to be sold as those purchased on a particular date and at a particular price. It is only when such a designation was not made at the time of the sale, or is not shown, that the "First-in, first-out" rule is to be applied.[3]

Second. The validity of the regulation, thus construed, cannot seriously be questioned. The contention advanced by the taxpayers, both here and in the companion case of *Snyder* v. *Helvering,* that the regulation, as applied to marginal transactions, is invalid under the Fifth Amendment, because it creates a conclusive presumption, must rest wholly on the assumption that the shares traded on margin are incapable of identification. Since that assumption is erroneous, it is clear that no conclusive presumption is established. It is, at most, the burden of proof that is affected. For the margin trader, while being required to establish the identity of the shares in order to avoid the "First-in, first-out" rule, is left free to introduce any relevant evidence. Nor is he arbitrarily deprived of any of the important attributes of ownership, such as the "right to decide which stock he is going to

[2] The original regulation, Art. 4, ¶ 60, Regulation No. 33 (Revised), read, "When stock is sold from lots purchased at different times and at different prices and the identity of the lots can not be determined as to the dates of purchase, the stock sold shall be charged against the earliest purchases of such stock." It has been suggested that, "Under the language quoted from Regulations 33, ["as to the dates of purchase," omitted in subsequent regulations] it might be argued that the identification intended could have been accomplished merely by recording 'the dates of purchase,' rather than by requiring physical identification of the certificates." Wilkins, Identity of Marginal Transactions, Int. Rev. News, v. 4, no. 7, p. 5 (1931).

[3] Compare *Howbert* v. *Penrose,* 38 F. (2d) 577; *Skinner* v. *Eaton,* 45 F. (2d) 568; *Snyder* v. *Commissioner,* 54 F. (2d) 57; *Commissioner* v. *Merchants' & Manufacturers' Ins. Co.,* 72 F. (2d) 408.

sell." Indeed it is conceded, at least by the taxpayer in this case, that the regulation, as we now interpret it, " provides a useful and reasonable rule for ascertaining what stock was sold in cases where there is no proof, or lack of satisfactory proof, of the fact."

Third. If the facts found by the Board of Tax Appeals had been what the Court of Appeals assumed them to be, there would have been such an identification of shares sold with shares purchased as to preclude the Commissioner from applying the " First-in, first-out " rule. The Court of Appeals assumed that, " What Turner did in this case, acting and speaking through his attorney, was to communicate to his broker his intention to hold for investment the shares of U. G. I. he originally purchased." The facts found by the Board of Tax Appeals do not bear out this assumption of the court. The Board's findings were that, " The decedent [Turner] always intended to retain the ownership on margin of 1,200 shares of the United Gas Improvement Co. stock "; and that, " An employee of the broker understood . . . that the decedent desired to retain 1,200 shares to take the place of the bonds which he had received from his father." The difference between the Board's findings and the court's statement of the facts is obviously vital. The court held that Turner's communication of his intention " was in effect an order to his broker not to sell those shares "; that " when, two years later, he ordered the broker to make two sales in lots of 500 shares each, they were, conformably to the original instructions, the 1,000 shares last purchased." But if the employee was told, as the Board found, merely that Turner " desired to retain 1,200 shares [of the U. G. I. stock] to take the place of the bonds which he had received from his father," he would naturally believe that so long as any 1,200 shares of the stock were retained, it was immaterial to which of the lots the sales in 1928 were attributed; and hence there was no identi-

fication. Thus it was only by departing from the facts as found by the Board of Tax Appeals that the court found justification for reversing the Board's decision.

Fourth. The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact. "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided." *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 725. The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made. See *Phillips* v. *Commissioner,* 283 U. S. 589, 599, 600; *Burnet* v. *Leininger,* 285 U. S. 136, 138; *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289, 294.[4] Unless the finding of the Board involves a mixed question of law and fact, the court may not properly substitute its own judgment for that of the Board.[5] If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. Compare *Helvering* v. *Taylor,* 293 U. S. 507; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 308.[6] And

[4] Compare *Tracy* v. *Commissioner,* 53 F. (2d) 575, 578–9; *Slayton* v. *Commissioner,* 76 F. (2d) 497; *Heywood Boot & Shoe Co.* v. *Commissioner,* 76 F. (2d) 586.

[5] Compare *Bishoff* v. *Commissioner,* 27 F. (2d) 91, 92; *Washburn* v. *Commissioner,* 51 F. (2d) 949, 951; *Tricou* v. *Helvering,* 68 F. (2d) 280, 285.

[6] Compare *Royal Packing Co.* v. *Commissioner,* 22 F. (2d) 536, 538; *Commissioner* v. *Langwell Real Estate Corp.,* 47 F. (2d) 841, 842; *Independent I. & C. Storage Co.* v. *Commissioner,* 50 F. (2d) 31, 33; *Kansas City Southern Ry. Co.* v. *Commissioner,* 52 F. (2d)

the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.[7]

Fifth. The Court of Appeals did not comment on the difference between the Board's findings and its own statement of the facts. Apparently it assumed that there was no difference; and reversed the Board's order, believing that it rested upon an erroneous ruling of law. For the court said that the Board made its determination "on the theory that the U. G. I. stock, which from time to time he [Turner] purchased on margin and later sold, could be identified only by certificates; that as no certificates for shares were ever in his name, the shares sold could not be identified as shares purchased in any particular lot or at any particular time or price, and, accordingly, charged the shares sold against those earliest purchased within the 'First in, first out' rule."

There is nothing in the opinion of the Board to indicate that its decision was based upon the "theory" stated by the court. There is nothing in the record to indicate that any such contention had been made by the Government before the Board; and Turner's petition for review by the Court of Appeals did not claim that the Board had acted upon that "theory."[8] But even if the Board's decision

372, 379; *Houston* v. *Commissioner*, 53 F. (2d) 445; *Underwood* v. *Commissioner*, 56 F. (2d) 67, 73; *Eau Claire Book & Stationery Co.* v. *Commissioner*, 65 F. (2d) 125, 126.

[7] Compare *Kendrick Coal & Dock Co.* v. *Commissioner*, 29 F. (2d) 559, 564; *Francisco Sugar Co.* v. *Commissioner*, 47 F. (2d) 555, 558; *Belridge Oil Co.* v. *Helvering*, 69 F. (2d) 432.

[8] The Solicitor General stated in his petition to this Court for certiorari, that the question presented was "whether shares of stock held on margin are capable of identification so that a taxpayer selling part of his holdings may select, as his basis for determining gain or loss, the cost of any particular lot"; and counsel for the Government may have contended in the Court of Appeals, as he did here, that such identification is impossible. It is also true that the Board

had been based on an erroneous rule of law, that would not have justified its reversal, if the findings of fact, governed by the correct rule of law, were sufficient to sustain the decision and had substantial support in the evidence.[9]

Sixth. The Court of Appeals did not explicitly hold that the Board's finding as to Turner's communication to his broker was without substantial support in the evidence. The court, in its opinion, does state that, "The evidence shows conclusively that Turner was sentimental about keeping the original 1,200 shares as an inheritance from his father; that his 'intention' was to retain as an investment the shares originally purchased and sell in speculation the shares more recently acquired." It does not state that the evidence was equally conclusive as to the communication to the broker of this exact intention. There was, it is true, testimony to the effect that "from the very beginning West & Company knew Mr. Turner's intentions and knew he was keeping the first purchase of 1,200 shares"; and the failure of the Board so to find, was assigned as error by the taxpayer in his petition for review. But there was also testimony showing that Turner, during 1928, traded heavily in 20 other issues of stock. The Court of Appeals did not consider whether, in view of this and other evidence, the Board might reasonably have concluded that the testimony as to the broker's knowledge of Turner's intention was not entirely accurate, and that the broker's only clear understanding

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of Tax Appeals in other cases has approved the rule for which the Government is now contending. See Stryker *v.* Commissioner, 21 B. T. A. 561; Leng *v.* Commissioner, 22 B. T. A. 149; Seelye *v.* Commissioner, 29 B. T. A. 695; compare Kelchner *v.* Commissioner, 31 B. T. A. 262.

[9] Compare *Lewis-Hall Iron Works* v. *Blair,* 57 App. D. C. 364; 23 F. (2d) 972, 974–5; *Hurwitz* v. *Commissioner,* 45 F. (2d) 780, 781; *Dickey* v. *Burnet,* 56 F. (2d) 917, 918.

of Turner's intention was that, throughout his extensive trading, 1,200 shares of United States Gas Improvement Co. stock were to remain in his account. Since this question was not considered in the court below nor argued here, the case must be remanded to the Court of Appeals for further consideration.

Reversed.

MR. JUSTICE STONE thinks that the judgment of the Court of Appeals should be reversed and the order of the Board of Tax Appeals affirmed, on the grounds that the petitioner failed to show that the particular shares sold were capable of identification with respect to the date of their purchase, and that they could not be identified merely by designating them to the broker as the shares to be sold.

SNYDER *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 663. Argued March 15, 1935.—Decided April 29, 1935.

1. Shares traded in on margin are capable of identification for the purposes of the "First-in, first-out" rule of the Treasury (Reg. No. 74, Art. 58) but the mere intention of the trader to sell particular shares, without further designation, does not constitute sufficient identification. *Helvering* v. *Rankin, ante,* p. 123. P. 137.
2. A person who devotes no substantial part of his business day to stock transactions; who is not a trader on the exchange making a living in buying and selling securities; but who deals merely with the object of increasing, as far as his margin will permit, his holdings of a particular stock carried for his account by his brokers, is not engaged in market operations as a trade or business within the meaning of § 22 of the Revenue Act of 1928. P. 137.

3. Gains realized from sales of property purchased in previous years, measured, as prescribed by §§ 111–113 of the 1928 Act, by the excess of proceeds of sale over cost, constitute income taxable in the year in which the sales are made. P. 140.
4. Assuming that this rule is applicable only to the sale of capital assets, and not to sales made in the course of a business of trading on the stock exchange, it applies to a taxpayer who has failed to establish that the securities sold were held primarily for sale in the regular course of business. P. 140.
5. The Court rejects the contention in this case that the taxpayer's income realized during the taxable year from his stock transactions should not be measured by the difference between the sale and cost prices of securities sold, but by the result of all his market operations, purchases as well as sales, during the year, i. e., by taking the difference between the purchase price and the sales price of shares bought and sold during the year and deducting expenses, such as commissions, taxes and interest. P. 141.

73 F. (2d) 5, affirmed.

CERTIORARI, 294 U. S. 701, to review the affirmance of a decision of the Board of Tax Appeals, 29 B. T. A. 39, which sustained an income tax assessment.

Mr. Henry M. Ward for petitioner.

Assistant Attorney General Wideman, with whom *Solicitor General Biggs* and *Messrs. James W. Morris* and *J. P. Jackson* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case presents further questions regarding the application to marginal transactions on the stock exchange of Article 58 of Regulations No. 74, as well as some of those already considered in *Helvering* v. *Rankin,* decided this day, *ante,* p. 123.

Snyder was the salaried secretary of an insurance company. During 1928, as in previous years, he made on his individual account, at different dates and different prices,

many purchases and sales on margin of United Gas Improvement Company stock. In his Federal Income Tax return for the calendar year 1928 he reported, apparently, no profits from trading on the stock exchange. The Commissioner of Internal Revenue concluded that he had made large gains; determined that his net income was $197,495.85; and, after making the appropriate deductions, assessed a deficiency tax of $38,961.22. The large income computed by the Commissioner was the result of applying the sales made in 1928 against purchases in earlier years, in accordance with the "First-in, first-out" regulation and §§ 111–113 of the Act. The Board of Tax Appeals, 29 B. T. A. 39, and the United States Circuit Court of Appeals, 73 F. (2d) 5, affirmed the Commissioner's determination. The facts found by the Board of Tax Appeals, upon which the case was submitted, are these:

Snyder traded in United Gas Improvement Company stock for profit through brokers on margin; and increased his holdings by the method known as " pyramiding." On January 1, 1928, there stood to his credit 5,300 shares; and his debit balances aggregated $501,865.59. He purchased during the tax year 10,600 shares and sold 7,900. At the close of the year, 8,000 shares stood to his credit, and his debit balances aggregated $932,822.67. Upon rises in the market, paper profits had been used to increase his holdings. Upon declines in the market, when his margin fell below the required percentage, the brokers reduced his debit balances by sufficient sales to make up the deficiency in the margin. The purchases and sales were effected by the brokers transferring so-called " street certificates," each for 100 shares, in the name of some stock exchange concern, endorsed by it in blank. At no time was any stock certificate delivered by the brokers to Snyder, or by him to them; nor was any certificate earmarked for him or his account. The certificates were inextricably

mingled with other securities pledged with banks. They were at all times incapable of identification as having been bought or sold for the account of Snyder. The transactions between him and the brokers were reflected solely in entries in Snyder's account on the brokers' books; and no entry indicated that any particular lot theretofore purchased had been sold or retained. The only attempt at identification found by the Board, was the uncontradicted testimony of Snyder to the effect that " in each case where a sale was made it was his intention to sell the last acquired stock first and shortly thereafter to buy back an equivalent amount in order to increase his margin and acquire additional shares of the stock."

First. Snyder contends, in the alternative, that his intention to sell the last acquired stock first, constituted sufficient identification to make the " First-in, first-out " rule inapplicable; or else that the regulation as applied to marginal transactions on the stock exchange is invalid, because there is no possible means, other than the trader's intentions, of identifying the shares sold. What has already been said in *Helvering* v. *Rankin* is enough to dispose of both of these contentions. It is there determined that shares traded on margin are capable of identification for the purposes of the regulation; but that the mere intention of the trader to sell particular shares, without further designation, does not constitute sufficient identification.

Second. Snyder contends that the "First-in, first-out" regulation may not, consistently with the provisions of the Revenue Act of 1928, be applied to the facts of this case. The argument is that his market operations constituted a trade or business as those terms are used in § 22 (a) of the Act; that according to that section, and the applicable decisions of this Court, *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, gross income from such business, as well as net in-

come under § 23 of the Act, must be computed entirely with respect to transactions within the taxable year; and that §§ 111–113, upon which the Government relies, are not applicable because they relate only to "sales of property, including securities, held for investment," and have no application to sales made in the course of a "business of trading on the stock exchange." On this assumption, Snyder argues that the income realized during the taxable year from his stock transactions is not the aggregate of the gains and losses on each sale of securities, measured by the difference between the sale and cost prices of the securities sold, but the profit or loss realized as a result of all market operations, purchases as well as sales, made during the taxable year. Such profit or loss, he now suggests, must be computed "by taking the difference between the purchase price and the sales price of shares bought and sold during the year, deducting expenses, such as commissions, taxes and interest." Thus computed, he concludes, his market operations resulted in a gross income of $43,692; and adding his salary, insurance commissions and dividends, and deducting the expenses of his stock operations (interest paid brokers) his net taxable income was $39,682, and his total tax $1,897.77.

Third. Neither in the findings of the Board of Tax Appeals, nor in the facts upon which the case was submitted to it, is there any support for the controverted allegation in Snyder's petition that his market operations constituted a "business regularly carried on for profit." [1] It is true that a taxpayer may be engaged in more than one trade or business, as those terms are used in various

[1] The answer of the Commissioner denied that the "brokerage accounts . . . constituted a trade or business within the meaning of any provision of the Revenue Act of 1928." The Board of Tax Appeals made no specific finding on this issue; but the Court of Appeals assumed that the Board meant to find against the taxpayer, and concluded that the assumed finding was supported by the evidence.

provisions of the Revenue Acts; and that, in addition to other business activities, one may be "regularly engaged in the business of buying and selling corporate stocks." Compare *Dalton* v. *Bowers,* 287 U. S. 404; *Burnet* v. *Clark,* 287 U. S. 410. *Washburn* v. *Commissioner,* 51 F. (2d) 949. It is also true that the Department has ruled, and the Board has held, that a taxpayer who, for the purpose of making a livelihood, devotes the major portion of his time to speculating on the stock exchange may treat losses thus incurred as having been sustained in the course of a trade or business.[2] Snyder, however, did not allege or attempt to prove that he had devoted the major part, or any substantial part, of his business day to his stock transactions. Nor were there any facts adduced to show that he might properly be characterized as a "trader on an exchange who makes a living in buying and selling securities." *Bedell* v. *Commissioner,* 30 F. (2d) 622, 624; compare *Mente* v. *Eisner,* 266 Fed. 161. Indeed, according to his petition, his intention throughout the year 1928 was, by "taking advantage of the turns of the market," not to draw out cash profits from his operations, but "to increase the holdings of U. G. I. stock carried for his account by [his] brokers to as great an extent as the margin of his account permitted." There is no substantial evidence in the record to sustain a finding by the Board, had there been one, to the effect that Snyder's market operations constituted a trade or business within the meaning of § 22 of the Revenue Act of 1928.

Fourth. The attack upon the Commissioner's method of computing income falls with the unsupported allega-

[2] I. T. 1818, II–2 C. B. 39; Schwinn *v.* Commissioner, 9 B. T. A. 1304; Elliott *v.* Commissioner, 15 B. T. A. 494; Hodgson *v.* Commissioner, 24 B. T. A. 256; Schermerhorn *v.* Commissioner, 26 B. T. A. 1031. Compare *Black* v. *Bolen,* 268 Fed. 427; *Rogers* v. *United States,* 41 F. (2d) 865; Kunau *v.* Commissioner, 27 B. T. A. 509; Thiele *v.* Commissioner, 32 B. T. A. 134

tion that the stock transactions constituted a "business regularly carried on for profit." In his brief in support of his petition to this Court for certiorari, Snyder makes it clear, perhaps for the first time, that he is "insistent upon the point that the operations constitute a trade or business or transaction entered into for profit, not in order to deduct losses, but to emphasize the controlling rule that the law requires the tax to be computed on the segregated transactions of the year." But it is now too well settled for argument, that gains realized from sales of property purchased in previous years, measured, as prescribed by §§ 111–113 of the 1928 Act, by the excess of proceeds of sale over cost, constitute income taxable in the year in which the sales are made. *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 184–5; *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189, 192; *MacLaughlin* v. *Alliance Insurance Co.*, 286 U. S. 244, 250. The contention that the rule is applicable only to the sale of capital assets, and not to sales made in the course of a "business of trading on the stock exchange," need not be disposed of on its merits, but see *Gray* v. *Darlington*, 15 Wall. 63, 66; *Merchants' L. & T. Co.* v. *Smietanka*, 255 U. S. 509, 520, since Snyder has failed to establish that the securities sold were held primarily for sale in the regular course of business.[3] And obviously, whether or not the stock transactions constituted a trade or business, the computation of gross income therefrom by deducting from sales of the current year the cost of securities sold, as determined by the purchase prices of previous years, is not comparable to the unsuccessful attempt in *Burnet* v. *Sanford & Brooks*

[3] Compare *Hutton* v. *Commissioner*, 39 F. (2d) 459, where the deduction of brokers' commissions on purchases of securities, as business expenses, was disallowed. The Board found that the taxpayer was "engaged in the business of buying, holding and selling realty securities, etc."; but regarded the commissions as "capital expenditures." 12 B. T. A. 265. Compare Vaughan *v.* Commissioner, 31 B. T. A. 548; Keeney *v.* Commissioner, 17 B. T. A. 560.

Co., 282 U. S. 359, to offset gross income of the current year against losses or expenses of previous years.[4]

Fifth. Moreover, Snyder suggests no other practicable method of accounting which would reflect income for the year more fairly than the method adopted by the Commissioner.[5] He concedes that he is not a dealer in securities, in the sense of one who buys securities for the purpose of resale to customers; and that, consequently, he is not entitled to compute income on an inventory basis.[6] Compare *Lucas* v. *Kansas City Structural Steel Co.*, 281 U. S. 264, 268; *U. S. Cartridge Co.* v. *United States*, 284 U. S. 511, 520. His suggestion that gross income from trading be computed by deducting purchase prices from sale prices during the year would offer a feasible substitute only if it could be assumed that the number of purchases and sales would be approximately equal

[4] Proceeds from sales in the regular course of business constitute gross income of the business only to the extent that they exceed the cost of the goods sold. See *Spring City Foundry Co.* v. *Commissioner*, 292 U. S. 182, 185. Compare Washington Land Co. *v.* Commissioner, 10 B. T. A. 503; Atlantic Coast Realty Co. *v.* Commissioner, 11 B. T. A. 416; Stern *v.* Commissioner, 14 B. T. A. 838. See Art. 55, Regulations 74, Revenue Act of 1928.

[5] Snyder does not attempt to bring himself within the general rule of § 41 of the 1928 Act, to the effect that "net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of said taxpayer." Neither does he state that the method he now suggests was followed in his return.

[6] Article 105 of Regulations No. 74, permit dealers in securities to make returns on inventory basis. A dealer is defined as a "merchant of securities, . . . with an established place of business, regularly engaged in the purchase of securities and their resale to customers." Compare *Harriman National Bank* v. *Commissioner*, 43 F. (2d) 950; Pan-American Bank & Trust Co. *v.* Commissioner, 5 B. T. A. 839; Adirondack Securities Corp. *v.* Commissioner, 23 B. T. A. 61; Northeastern Security Corp. *v.* Commissioner, 29 B. T. A. 297; Lowell *v.* Commissioner, 30 B. T. A. 1297; Fried *v.* Commissioner, 31 B. T. A. 638; Brendle *v.* Commissioner, 31 B. T. A. 1188.

each year and that any differences would be averaged out in the course of a number of years. That assumption is unwarranted, particularly in view of Snyder's professed object "to accumulate as many shares of U. G. I. as he could." [7] His alternative suggestion, that, since purchases in fact exceeded sales during 1928, the "First-in, first-out" rule, if applied at all, should be confined to purchases and sales in the course of the year, adds nothing to the contentions that have already been considered in this case or in *Helvering* v. *Rankin*.

Affirmed.

MR. JUSTICE STONE concurs in the result, but thinks that the petitioner failed to show that the particular shares sold were capable of identification with respect to the date of their purchase, and that they could not be identified merely by the taxpayer's designation of them to the broker as the shares to be sold.

CALIFORNIA OREGON POWER CO. *v.* BEAVER PORTLAND CEMENT CO. ET AL.

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

No. 612. Argued April 5, 8, 1935.—Decided April 29, 1935.

1. A patent issued under the Homestead law, after the date of the Desert Land Act of 1877, for lands in the State of Oregon bordering on a non-navigable stream, does not, of its own force, invest the owner of the land with a common-law right to have the water flow *ut solebat*, as against an opposite riparian owner who seeks,

[7] In Snyder's computation, although he purports to take "the difference between the purchase price and sale price of shares bought and sold during the year," the cost of the last 1,500 shares bought in one of his two brokerage accounts during the year is deducted from the total cost of purchases in that account, because purchases exceeded sales by 1,500 shares.

by blasting in the bed of the stream, on his own side, to obtain stone for a dam and to free the channel for the use of adjudicated water rights and permits to appropriate issued by state authority. P. 153.

2. Water rights acquired in the so-called arid and semi-arid States and Territories by the application of the non-navigable waters on the public domain to beneficial uses in accordance with local rules, customs, laws and judicial decisions, were recognized and secured by the Act of July 26, 1866, § 9, the amending Act of July 9, 1870, § 17, and the Desert Land Act of 1877. P. 154.
3. The Desert Land Act of 1877, allowed entry and reclamation of arid lands within the States of California, Oregon, and Nevada (to which Colorado was later added), and the then Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, which have since become States. It contained a proviso to the effect that the right to the use of water by the claimant should depend upon *bona fide* appropriation, not to exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation, and declared that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." *Held*, that the effect was to sever all waters upon the public domain, not theretofore appropriated, from the land itself, and that a patent issued thereafter for lands in a desert-land State or Territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed. Pp. 155–158.
4. As owner of the public domain, the United States has power to dispose of the land and water together or separately. P. 162.
5. A fair construction of the provision of the Desert Land Act, *supra*, is that, for the future, the land should be patented separately, and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the States and Territories named. P. 162.
6. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged

by the customs, laws, and judicial decisions of the State of their location. P. 162.

7. If it be conceded that in the absence of federal legislation the State would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the State, and that it has done so by its legislation, cannot be doubted. P. 162.

8. Following the Desert Land Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated States, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. P. 163.

73 F. (2d) 555, affirmed.

CERTIORARI, 294 U. S. 701, to review the affirmance of a decree denying, for the most part, injunctive relief sought by the Power Company against interference with the normal flow of a stream bordering its land.

Mr. A. E. Reames for petitioner.

The common law was adopted on the admission of Oregon. *Shively* v. *Bowlby,* 152 U. S. 1, 52. See also, *U. S. Fidelity & G. Co.* v. *Bramwell,* 108 Ore. 261–289; *Fidelity Co.* v. *State Bank,* 117 Ore. 1, 5.

Oregon cases prior to the issuance of petitioner's patent decided that the common-law riparian doctrine was applicable to the conditions prevailing in Oregon, and applied the same, thereby supplementing and applying the provisions of the state constitution. *Taylor* v. *Welch,* 6 Ore. 199, 200–201; *Shively* v. *Hume,* 10 Ore. 76; *Hayden* v. *Long,* 8 Ore. 245; *Shaw* v. *Oswego Iron Works,* 10 Ore. 375–6; *Morgan* v. *Shaw,* 47 Ore. 333; *Weiss* v. *Oregon Iron & Steel Co.,* 13 Ore. 496.

In this period there was, of course, applied the doctrine of appropriation, arising out of the Acts of Congress, and the customs of the settlers, principally miners. But the right to appropriate was always held to be cut off by the

entry of the riparian lands, if they were subsequently patented to the entryman. And such rights of appropriation were only held to be superior to the riparian rights of the riparian owner, when the appropriator had, by adverse possession for the period of prescription, taken the water from the riparian owner or entryman. From such adverse use arose the expression "riparian doctrine, as modified by the doctrine of prior appropriation." But the Oregon court had never held that an appropriator could enter upon the lands of the riparian owner to make an appropriation, or deprive a riparian owner of the flow of the water through his lands, except by such adverse use for the period of prescription.

The patent relates back to the actual entry of the settler upon the land, and cuts off future appropriations of water belonging to the lands because of their riparian character. *Larsen* v. *Oregon Ry. & Nav. Co.,* 19 Ore. 240; *Faull* v. *Cooke,* 19 Ore. 455. See also, *Sturr* v. *Beck,* 133 U. S. 541–552; *Brown* v. *Baker,* 39 Ore. 66–75; dissent, *Hood River Case,* 114 Ore. 214–248; *Cole* v. *Logan,* 24 Ore. 304; *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690.

In legislative enactments of Oregon the riparian rights, arising from the location of the lands upon the streams, were recognized and dealt with.

Riparian rights are vested rights and are not lost by nonuser. *Yates* v. *Milwaukee,* 10 Wall. 497–501; *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690; *Hanson* v. *Thornton,* 91 Ore. 585; *Clark* v. *Cambridge & A. I. & I. Co.,* 45 Neb. 798; *Mansfield* v. *Balliett,* 58 L. R. A. 628–637; *Martha Lake Water Co. No. 1* v. *Nelson,* 152 Wash. 53; *Lux* v. *Haggin,* 69 Cal. 255; *Hindman* v. *Rizor,* 21 Ore. 112; *Fall River Valley Irr. Dist.* v. *Mt. Shasta Power Corp.,* 202 Cal. 56; *St. Germain Irrigating Co.* v. *Hawthorn Ditch Co.,* 32 S. D. 260; *Brewer-Elliott Oil & Gas Co.* v. *United States,* 270 Fed. 100; aff'd, 260

U. S. 77; *Hardin* v. *Jordan,* 140 U. S. 371, 384; *Thiesen* v. *Gulf, F. & A. R. Co.,* L. R. A. 1918 E, 718.

Legislative Acts impairing vested rights must be construed prospectively.

The Oregon Water Code, as construed in the *Hood River Case,* 114 Ore. 112, and in the opinion of the court below, is violative of the equal protection clause of the Fourteenth Amendment. It destroys the vested rights of petitioner, upon the ground that its riparian rights had not been used at the date of the enactment of the Code. It permits the riparian proprietor who had so used his right before the enactment of the Code to retain the priority of his right to the use of the waters as of the date when he acquired the riparian right.

The construction put by the state court upon the Water Code denies to petitioner the right of priority as of the date of its settlement upon the land, purely upon the ground that it had not put the water to a beneficial use before the enactment of the Code. In as much as there was never any law requiring the riparian proprietor to use the rights at any particular time, nor was any notice of any kind ever given that such an enactment as the Water Code, with its emergency clause, would cut off riparian rights that had not been so put to a beneficial use, petitioner's property is taken without an opportunity to make a use, which, under the Act, would save it from confiscation.

The Oregon Water Code, as construed in the *Hood River Case,* which construction was adopted in the court below, violates § 4 of Art. XI of the Oregon constitution, as construed in *Logan* v. *Spaulding Logging Co.,* 100 Ore. 731, which should have been followed.

Petitioner maintains that, properly construed, the Code has not impaired its rights in the least; but that, as construed in the decree under review, petitioner's vested rights have been destroyed without due process of law;

that they have been taken without compensation, and delivered to the respondent cement company, which seeks to use the same for the purposes for which the petitioner acquired them, namely: The manufacture of electrical power by the use of the waters of the stream, where it flows over and along petitioner's lands.

For the various constructions put upon the provisions of the Water Code by the Oregon court and by this Court, see: *In re Willow Creek,* 74 Ore. 592; *Pacific Livestock Co.* v. *Lewis,* 241 U. S. 440; *Re Water Rights of Hood River,* 114 Ore. 112; *Norwood* v. *Eastern Oregon Land Co.,* 112 Ore. 106; *Logan* v. *Spaulding Logging Co.,* 100 Ore. 731; *Harris* v. *Southeast Portland Lumber Co.,* 123 Ore. 549.

The legislature may declare what the law shall be in the future. But if it presume to declare the law as of the date of the enactment, it invades the province of the judiciary, and its definition of a vested riparian right should be disregarded by the courts.

The decision in *Hough* v. *Porter,* 51 Ore. 318, that lands patented after the date of the Desert Land Act are without riparian rights, because the Act severed such rights from the public land, is unsound. Congress did not in that enactment intend to interfere with the riparian doctrine as applied in the States. Cf. *Scott* v. *Lattig,* 227 U. S. 229; *United States* v. *Rio Grande Dam & Irr. Co.,* 174 U. S. 690.

Sturr v. *Beck,* 133 U. S. 541; *Faull* v. *Cooke,* 19 Ore. 455; *Larsen* v. *Oregon Ry. & Nav. Co.,* 19 Ore. 240; and *Brown* v. *Baker,* 39 Ore. 66, are all to the effect that rights by appropriation are cut off by the entry upon the lands for settlement followed by compliance with the law and the issuance of the patent.

It has been the constant policy of the Government of the United States to allow the citizens of the various States to work out their own system of law with relation

to water rights, without intervention or adverse legislation by the Federal Government. *United States* v. *Central Stockholders Corp.*, 52 F. (2d) 322.

In *Still* v. *Palouse Irr. & Power Co.*, 64 Wash. 606, the Supreme Court of Washington declined to follow *Hough* v. *Porter*, 51 Ore. 318. See also, *San Joaquin & Kings River Co.* v. *Worswick*, 187 Cal. 674.

The Oregon Water Code is not an exercise of the police power, and even if it were, vested rights could not be taken without compensation.

Property devoted to and held for a public use cannot be taken for another public use inconsistent with the public use to which the property is already devoted.

Mr. W. Lair Thompson for respondents.

A riparian owner may not ignore an adjudication of the relative rights to the use of the waters of a stream under the Oregon practice and then at a later date assert a right antedating the adjudication.

It is not a question of *res judicata*, but a question of the method of asserting a water right where the rights to the use of the waters of a stream have been adjudicated.

The proceeding is *in rem*, and a single claimant on a stream must claim all of his rights either as an appropriator or as a riparian owner. Petitioner's predecessor claimed and was awarded a right by appropriation and did not claim and was not in a position to claim a riparian right.

The common-law doctrine that the owner of riparian land may insist that the waters of the stream flow by his land unused by himself and to the exclusion of use by others, has never been adopted in Oregon. Neither the legislative nor the judicial history of Oregon will sustain the contention that the policy of this State has built up a rule of property sustaining the idle water doctrine.

The common-law doctrine of riparian rights and the doctrine of non-riparian use are so opposed that the adop-

tion of the latter is an immediate departure from the former. Oregon early adopted laws for the appropriation of water, and never, prior to patent from the United States to petitioner's predecessor in interest, did the Supreme Court of Oregon determine that the common law of riparian rights should be the rule in this State. After the issuance of patent to petitioner's predecessor, the water law of Oregon was in a state of flux until the Water Code of 1909 definitely limited water rights to such as had been put to a beneficial use prior to its enactment, or to such as might be thereafter acquired in conformity with the provisions of the Code. At all times beneficial use has been the measure of right and never has the court as a litigated question sustained the doctrine of continuous flow without use. Prior to March 11, 1921, when petitioner acquired its land, there was neither court decision nor legislation in Oregon to justify the contention that a rule of property had been established upon which petitioner could rely.

The Desert Land Act, passed March 3, 1877, by reserving for appropriation all waters of non-navigable lakes and streams upon all public lands, put an end to riparian claims to water flowing through lands patented after the date of the Act.

Ex parte Tyler, 149 U. S. 164, 192; *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 703, 706; *Gutierres* v. *Albuquerque Land & Irrigation Co.,* 188 U. S. 545, 555; *Boquillas* v. *Curtis,* 213 U. S. 339, 344; *Hough* v. *Porter,* 51 Ore. 318; *Wyoming* v. *Colorado,* 259 U. S. 419, 465; *Williams* v. *Altnow,* 51 Ore. 275, 296, 298; *Hill* v. *American Land & Livestock Co.,* 82 Ore. 202, 207; *Cook* v. *Evans,* 45 S. D. 31; *Haaser* v. *Englebrecht,* 45 S. D. 143; *San Joaquin & Kings River Co.* v. *Worswick,* 187 Cal. 674; *Still* v. *Palouse Irr. & Power Co.,* 64 Wash. 606; *Bernot* v. *Morrison,* 81 Wash. 538, 559.

The lands of petitioner were patented by the United States April 20, 1885, and at once became subject to the

laws of real property of Oregon. In the gradual development of a policy to govern water rights in the State, the Supreme Court of Oregon reached the conclusion, and definitely decided, that lands patented to citizens of Oregon after March 3, 1877, should not have a claim to water as riparian. It was for Oregon to determine what its water law should be and to what extent, if at all, it would recognize riparian rights. It concluded that it would not recognize riparian rights to lands patented after March 3, 1877, and has consistently and repeatedly so ruled. Even though its construction of the effect of congressional legislation should be erroneous, is its decision of landed rights or water rights in this State, as to property that is no longer a part of the public domain, to be overturned because the reason for the decision may have been erroneous? It seems to us there is involved merely a question of power, that the Supreme Court of Oregon had the power to decide, regardless of the wisdom or correctness of the reason for the decision.

The Oregon Water Code of 1909 did not deny to petitioner equal protection of the law or take its property without due process of law.

Without a vested water right, and with no damage to its side of the stream by the operations of respondent, and with a decree requiring respondent always to maintain the water at a level that will supply water on petitioner's side of the stream, petitioner has shown no damage that would justify injunctive relief.

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by petitioner in a federal district court for Oregon against respondents, to enjoin them from interfering with the waters of Rogue River, in the State of Oregon, in any such way as to lessen the volume which flows over and along petitioner's land, and particularly

from carrying on any drilling or blasting operations in the bed of the stream or removing rocks or other material therefrom. Following a trial, the district court made findings of fact and entered a decree denying the relief prayed for, except that respondents were enjoined from so carrying into effect their operations as to reduce the level of Rogue River below a designated elevation above sea level, and in another particular not necessary to be stated. The Circuit Court of Appeals affirmed the decree, 73 F. (2d) 555; and we brought the case here on certiorari.

Rogue River is a non-navigable stream, and in its course flows through and between lands of petitioner on the east bank of the river and lands of respondents upon the west bank, the thread of the stream being the boundary between the two. Petitioner's lands were acquired by a predecessor in interest in 1885 by patent from the United States under the Homestead Act of May 20, 1862. The lands were purchased by petitioner and conveyed to it in 1921. Petitioner is a public-service corporation engaged in manufacturing and supplying electrical current to its customers. The City of Gold Hill, a municipal corporation, owns the lands on the west side of the river, and the Beaver Portland Cement Company is in possession of them, together with certain adjudicated water rights and permits issued from the office of the state engineer, under a contract of sale from the city. The blasting complained of was all west of the thread of the stream, on respondents' property, and was for the double purpose of freeing the channel, incident to the use of the water rights adjudicated and permitted, and securing broken stone for a dam to be used in connection with a power plant which the cement company was about to build.

Neither petitioner nor any of its predecessors in interest has ever diverted the waters of the river for beneficial use on the real property or sought to make an actual appropriation thereof. The sole claim is based upon the

common-law rights of a riparian proprietor, which petitioner says attached to the lands when the patent was issued to its first predecessor in title.

Petitioner insists that prior to the adoption of the Oregon Water Code of 1909, *infra,* the common-law rule that the riparian owner was entitled to the natural flow of the stream across or along the border of his land in its accustomed channel was recognized and in full force in the State of Oregon. Respondents contend to the contrary. Both cite many Oregon decisions and argue the matter at length. But an examination of the authorities leaves the question in doubt. In dealing with cases where the parties making conflicting claims were both riparian owners, the doctrine of the common law seems to have been recognized. Other cases appear to accept what is called a modified form of the common-law rule; and still other decisions apparently enforce the rule of appropriation. It is suggested by respondent that, prior to the adoption of the Water Code in 1909, the policy in respect of water rights was developing and the law on the subject of riparian rights was in a state of flux. There appears to be reason in the suggestion. But, in view of the conclusion to which we have come, it is unnecessary to pursue the inquiry further.

In 1909, the Water Code was adopted by the state legislature. Ore. Laws, 1909, Chap. 216. The act provides that all water within the state shall be subject to appropriation for beneficial use; but nothing therein is to be construed to take away or impair any vested right. In respect of a riparian proprietor, a vested right is defined "as an actual application of water to beneficial use prior to the passage of this act . . . to the extent of the actual application to beneficial use." The Code provides for the adjudication of water rights upon a petition to the state engineer. And any court in which suit is brought to determine such rights may, in its discretion, transfer

the case to the state engineer for determination. But no decision of the state engineer is to become final until confirmed by the court designated as having jurisdiction under the act. The procedural provisions of the act have been sustained as constitutional by this court. *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440.

The court below held (1) that the homestead patent of 1885 carried with it the common-law right to have the stream continue to flow in its accustomed channel, without substantial diminution; but (2) that, while this was a substantial property right which could not be arbitrarily destroyed, it nevertheless was subject to the police power of the state and might be modified by legislation passed in the interest of the general welfare; and upon the latter ground the Water Code was upheld and the claims of respondents sustained.

First. The first question is of especial importance to the semi-arid states of California, Oregon and Washington, where climatic conditions in some sections so differ from those in others that the doctrine of the common law may be of advantage in one instance, and entirely unsuited to conditions in another. Probably, it was this diversity of conditions which gave rise to more or less confusion in the decisions—not only of Oregon, but of California—in respect of the subject. We have already spoken of the former; and one has only to compare the decision of the Supreme Court of California in *Lux* v. *Haggin,* 69 Cal. 255; 4 Pac. 919; 10 Pac. 674, with *Modoc L. & L. S. Co.* v. *Booth,* 102 Cal. 151; 36 Pac. 431, to realize that the rule with respect to the extent of the application of the common law of riparian rights is, likewise, far from being clear in the latter.

The question with which we are here primarily concerned is whether—in the light of pertinent history, of the conditions which existed in the arid and semi-arid land states, of the practice and attitude of the federal

government, and of the congressional legislation prior to 1885—the homestead patent in question carried with it as part of the granted estate the common-law rights which attach to riparian proprietorship. If the answer be in the negative, it will be unnecessary to consider the second question decided by the court below.

For many years prior to the passage of the Act of July 26, 1866, c. 262, § 9, 14 Stat. 251, 253, the right to the use of waters for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agriculture. *Jennison* v. *Kirk*, 98 U. S. 453, 457–458. The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well. *Basey* v. *Gallagher,* 20 Wall. 670, 683–684; *Atchison* v. *Peterson,* 20 Wall. 507, 512–513.

This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866, *supra. Atchison* v. *Peterson, supra.* Section 9 of that act provides:

" That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same

are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: . . ."

This provision was "rather a voluntary *recognition of a pre-existing right of possession,* constituting a valid claim to its continued use, than the establishment of a new one." *Broder* v. *Water Co.,* 101 U. S. 274, 276; *United States* v. *Rio Grande Irrigation Co.,* 174 U. S. 690, 704–705. And in order to make it clear that the grantees of the United States would take their lands charged with the existing servitude, the Act of July 9, 1870, c. 235, § 17, 16 Stat. 217, 218, amending the Act of 1866, provided that—

". . . all patents granted, or preëmption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory."

The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain. *Jones* v. *Adams,* 19 Nev. 78, 86; 6 Pac. 442; *Jacob* v. *Lorenz,* 98 Cal. 332, 335–336; 33 Pac. 119.

If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result. That

act allows the entry and reclamation of desert lands within the states of California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota,[1] with a proviso to the effect that the right to the use of waters by the claimant shall depend upon *bona fide* prior appropriation, not to exceed the amount of waters actually appropriated and necessarily used for the purpose of irrigation and reclamation. Then follows the clause of the proviso with which we are here concerned:

". . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." Ch. 107, 19 Stat. 377.

For the light which it will reflect upon the meaning and scope of that provision and its bearing upon the present question, it is well to pause at this point to consider the then-existing situation with respect to land and water rights in the states and territories named. These states and territories comprised the western third of the United States—a vast empire in extent, but still sparsely settled. From a line east of the Rocky Mountains almost to the Pacific Ocean, and from the Canadian border to the boundary of Mexico—an area greater than that of the original thirteen states—the lands capable of redemption, in the main, constituted a desert, impossible of agricultural use without artificial irrigation.

In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes. These

[1] Later to become the states of North and South Dakota.

western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wresting a living and creating homes from the raw elements about them, and threw down the gage of battle to the forces of nature. With imperfect tools, they built dams, excavated canals, constructed ditches, plowed and cultivated the soil, and transformed dry and desolate lands into green fields and leafy orchards. In the success of that effort, the general government itself was greatly concerned—not only because, as owner, it was charged through Congress with the duty of disposing of the lands, but because the settlement and development of the country in which the lands lay was highly desirable.

To these ends, prior to the summer of 1877, Congress had passed the mining laws, the homestead and preëmption laws, and finally, the Desert Land Act. It had encouraged and assisted, by making large land grants to aid the building of the Pacific railroads and in many other ways, the redemption of this immense landed estate. That body thoroughly understood that an enforcement of the common-law rule, by greatly retarding if not forbidding the diversion of waters from their accustomed channels, would disastrously affect the policy of dividing the public domain into small holdings and effecting their distribution among innumerable settlers. In respect of the area embraced by the desert-land states, with the exception of a comparatively narrow strip along the Pacific seaboard, it had become evident to Congress, as it had to the inhabitants, that the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the

transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend "Great American Desert," which was spread in large letters across the face of the old maps of the far west.

In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed. By its terms, not only all surplus water over and above such as might be appropriated and used by the desert-land entrymen, but "the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable" were to remain "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes." If this language is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed. While this court thus far has not found it necessary to determine that precise question, its words, so far as they go, tend strongly to support the conclusion which we have suggested.

In *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, the government sought to enjoin the irrigation company from constructing a dam across the Rio Grande in the Territory of New Mexico, and from appropriating the waters of that stream. The object of the com-

pany was to impound the waters and distribute the same for a variety of purposes. The company defended on the ground that the site of the dam was within the arid region, and that it had fully complied with the water laws of the Territory of New Mexico in which the dam was located and the waters were to be used. The supreme court of the territory affirmed a decree dismissing the bill. This court reversed and remanded the case, with instructions to inquire whether the construction of the dam and appropriation of water would substantially diminish the navigability of the stream, and, if so, to enter a decree restraining the acts of the appellees to the extent of the threatened diminution. The opinion, dealing with the question of riparian rights, said that it was within the power of any state to change the common-law rule and permit the appropriation of the flowing waters for any purposes it deemed wise. Whether a territory had the same power the court did not then decide. Two limitations of state power were suggested: first, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow—so far, at least, as might be necessary for the beneficial use of the government property; and second, that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. With these exceptions, the court, however, thought (p. 706) that by the acts of 1866 and 1877 "Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow," and that "the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries." And see

Bean v. *Morris,* 221 U. S. 485, 487; *Van Dyke* v. *Midnight Sun Mining & Ditch Co.,* 177 Fed. 85, 88–91.

In *Gutierres* v. *Albuquerque Land Co.,* 188 U. S. 545, it was held that the acts of 1866 and 1877 recognized, in respect of the public domain, the validity of the local customs, laws and decisions of the *territories* as well as of the states in respect of the appropriation of waters, and granted the right to appropriate such quantity as might be necessarily used to irrigate and reclaim desert land, and the right of the public to use the surplus for irrigation, mining, and manufacturing purposes subject to existing rights.

In *Boquillas Cattle Co.* v. *Curtis,* 213 U. S. 339, this court, while finding it unnecessary to decide whether lands in the arid regions patented after the Desert Land Act were accepted subject to the rule that priority of appropriation gives priority of right, said that the decision of the Supreme Court of Oregon to that effect in *Hough* v. *Porter, infra,* proceeded "on plausible grounds."

And in *Schodde* v. *Twin Falls Water Co.,* 224 U. S. 107, 122, an Idaho case which sharply presented conflicting claims under the common-law rule and the rule of appropriation, this court held that such common-law rights as were incompatible with the rule of prior appropriation for beneficial use could not coexist with the latter system.

Only four of the desert-land states have spoken upon the matter, and their decisions are not in harmony. The Supreme Court of Oregon in *Hough* v. *Porter,* 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083; 102 Pac. 728, held that the legal effect of the language already quoted from the Desert Land Act was to dedicate to the public all interest, riparian or otherwise, in the waters of the public domain, and to abrogate the common-law rule in respect of riparian rights as to all lands settled upon or entered after March 3, 1877. The supplemental opinion which deals with the subject beginning at p. 382 is well reasoned, and

we think reaches the right conclusion. Subsequent decisions in Oregon are to the same effect. *Hedges* v. *Riddle,* 63 Ore. 257, 259–260; 127 Pac. 548; *Hill* v. *American Land & Livestock Co.,* 82 Ore. 202, 207; 161 Pac. 403; *Allen* v. *Magill,* 96 Ore. 610, 618–619; 189 Pac. 986; 190 Pac. 726.

This view was followed by the Supreme Court of South Dakota in *Cook* v. *Evans,* 45 S. D. 31, 38; 185 N. W. 262; and *Haaser* v. *Englebrecht,* 45 S. D. 143, 146; 186 N. W. 572.

The Supreme Court of Washington in *Still* v. *Palouse Irrigation & Power Co.,* 64 Wash. 606, 612; 117 Pac. 466, gave a more limited construction to the Desert Land Act, holding that thereby Congress recognized and assented to the appropriation of water in contravention to the common-law right of the riparian owner only in respect of desert lands granted under the act. See, also, *Bernot* v. *Morrison,* 81 Wash. 538, 559–560; 143 Pac. 104.

In *San Joaquin & K. R. Canal Co.* v. *Worswick,* 187 Cal. 674, 690; 203 Pac. 999, the Supreme Court of California followed the Washington court in holding that the language of the Desert Land Act applied only to desert-land entries.

To accept the view of the Washington and California courts would, in large measure, be to subvert the policy which Congress had in mind—namely, to further the disposition and settlement of the public domain. It is safe to say that by far the greater part of the public lands in the desert-land states and territories susceptible of reclamation in 1877 was remote from the natural sources of water supply. But these lands were subject to entry, not only under the Desert Land Act, but under other acts as well. Congress must have known that innumerable instances would arise where lands thereafter patented under the Desert Land Act and other lands patented under the preëmption and homestead laws, would be in

the same locality and would require water from the same natural sources of supply. In that view, it is inconceivable that Congress intended to abrogate the common-law right of the riparian patentee for the benefit of the desert land owner and keep it alive against the homestead or preëmption claimant.

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell* v. *Johnson,* 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation.* It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location. If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted.

The proceedings in connection with the adoption of the Desert Land Act bear out this view. The bill which subsequently became the act was called up for consideration in the Senate on February 27, 1877. The report of the committee, among other things, said that the larger portions of the lands bordering on the streams had been appropriated; that the provisions of the bill would enable settlers by combined efforts to construct more extensive works and reclaim lands now worthless; that a system had already grown up in the states and territories included in the bill which recognized priority of appropriation as the rule governing the right to the use of water, limiting the amount to that actually used, and thus avoiding waste. Senator Sargent of California, who was in charge of the bill, in the course of the debate said that one great difficulty had been that "cattle-men go under a fictitious compliance with the terms of the pre-emption law and take their land along the margin of the streams, and then there is no possibility of getting water to the back country at all. I want to provide so that persons in the back country may go above such a person, for instance, on Humboldt River, and take the water out and conduct it on to the back lands." Cong. Record, vol. V, pt. 3, 44th Cong., 2d Sess., pp. 1965–1966. There is nothing in the language of the act, or in the circumstances leading up to or accompanying its adoption, that indicates an intention on the part of Congress to confine the appropriation of water in contravention of the common-law doctrine to desert-land entrymen.

Second. Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary

control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," *Kansas* v. *Colorado,* 206 U. S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See *Wyoming* v. *Colorado,* 259 U. S. 419, 465.[2]

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[2] In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards. Two examples may be cited:

The Reclamation Act of 1902, c. 1093, 32 Stat. 388, directed the Secretary of the Interior (§ 8) to proceed in conformity to the state laws in carrying out the provisions of the act, and provided that nothing in the act should be construed as affecting or intending to affect or in any way interfere with the laws of any state or territory "relating to the control, appropriation, use, or distribution of water used in irrigation."

The Act of June 21, 1906, c. 3504, 34 Stat. 325, 375, made an appropriation for constructing irrigation systems to irrigate lands of the Uncompahgre, Uintah, and White River Utes in Utah, with the proviso that "such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah," etc. This was amended by the Indian Appropriation Act of March 3, 1909, c. 263, 35 Stat. 781, 812, which again recognized the supremacy of the laws of Utah in respect of appropriation, and provided that the appropriation should "be used only in the event of failure to procure from the State of Utah or its officers an extension of time in which to make final proof for waters appropriated for the benefit of the Indians."

The public interest in such state control in the arid-land states is definite and substantial. In *Clark* v. *Nash*, 198 U. S. 361, 370, this court accepted that view to the extent of holding that in the arid-land states the use of water for irrigation, although by a private individual, is a public use; and sustained as constitutional a state statute which, for purposes of irrigation, permitted an individual to condemn a right-of-way for enlarging a ditch across the land of another. Mr. Justice Peckham, delivering the opinion of the court, said:

"The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous States of the West that they are in the States of the East. These rights have been altered by many of the Western States, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated."

For the foregoing reasons, we affirm the decree of the court below, passing without consideration the second question discussed by that court and upon which its decision rested, as to which we express no opinion.

Decree affirmed.

GEORGIA RAILWAY & ELECTRIC CO. ET AL. *v.* DECATUR.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 570. Argued April 3, 1935.—Decided April 29, 1935.

1. Where by state statute the basis for assessing a street railway company for the cost of paving a street between and along its

tracks is benefits resulting to the railway, but benefits are presumed from the assessment and the company attacking it must prove it an arbitrary abuse of legislative authority in that no benefit accrued to the railway, a refusal of a state court to admit in defense of a suit to collect the tax, any evidence tending to prove that no benefit resulted, on the ground that such evidence is immaterial, amounts to a denial of a hearing on the issue and violates the due process clause of the Fourteenth Amendment. P. 171.

2. In the present case, this Court is bound by the construction placed upon the state statute by the state court; the construction becomes part of the statute as though expressed there in appropriate words. P. 170.

3. Offer of street railway companies to surrender all of their railway properties in a city rather than pay an assessment for paving within and next to some of its rails, tends strongly to show that the assessment exceeded the entire value of the property with which the improvement was connected. P. 170.

179 Ga. 471; 176 S. E. 494, reversed.

APPEAL from the affirmance of a decree rendered against two street railway and power companies for the amount of a paving assessment, with interest.

Mr. Walter T. Colquitt for appellants.

Mr. James A. Branch, with whom *Messrs. William Schley Howard* and *Scott Candler* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Georgia Railway & Electric Company, which owned and operated street-car lines in the City of Decatur and between that city and other points in the state, leased its property in 1912 to the Georgia Railway & Power Company for the term of 999 years. By the terms of the lease, the latter company bound itself to pay all taxes, rates, charges, licenses, and assessments which

might be lawfully imposed and assessed against the property during the continuance of the lease.

By the terms of its charter and a consolidation agreement, the Georgia Power Company in 1927 became possessed of all the rights, franchises, etc., and subject to all the duties, liabilities, debts and obligations, of these two corporations; and thereupon their existence, with certain exceptions, ceased and became merged in the Georgia Power Company as a consolidated corporation.

On May 15, 1925, the City of Decatur, acting under a state statute,[1] ordained that a designated street over which the railway lines extended should be paved as a necessary improvement for travel and drainage; and that the cost of such pavement should be assessed in full against the Railway & Power Company for paving between the tracks and for two feet on each side thereof, the remaining cost to be assessed one-half against the real estate abutting on one side of the street where paved, and the other half against the real estate abutting on the other side. Upon the refusal of each of the three companies to pay the cost assessed for the track paving, the city filed a bill in equity against them seeking to recover the amount of the assessment, alleging the absence of all legal remedy.

In the trial court a demurrer to the bill was overruled and a motion to dismiss was denied. The motion to dismiss was based upon the ground, among others, that neither of the defendant companies had received any benefit from the paving, and that the assessment and ordinance were invalid as contravening the due process and equal protection of law clauses of the Fourteenth

[1] Ga. L. 1919, pp. 934 *et seq.;* Ga. L. 1924, pp. 534 *et seq.,* conferring upon the city power to improve its streets and make assessment for the cost of the improvements against abutting real estate and against any street railway or other railroad company having tracks running along or across such streets.

Amendment of the Federal Constitution. Thereafter, answers were filed, alleging that the assessment vastly exceeded the entire value of the street-railway property and lines located and operated within the city, and offering to surrender them to the city, together with the franchise under which they were constructed and operated, without the necessity of levy or sale; that the only reason why such offer was not accepted was because their entire value was less than the amount of the assessment; that the paving for which the assessment was made did not benefit the lines, property or franchise, but, on the other hand, was a detriment.

Appellants called a witness in support of the contention that their property was not benefited; but upon objection his testimony was excluded. They offered to prove by him that the pavement in question added nothing in value to the street-railway property, but on the contrary was a detriment to its operation; that it made it more difficult and expensive to maintain the track with the pavement than without it; that the railway does not use the pavement in any way; and that it adds nothing in the way of additional travel upon the street cars. The trial court sustained an objection to the offer on the ground " that the question of benefits by virtue of overruling the demurrer to the petition " became irrelevant and immaterial.

At the conclusion of the trial, a decree was rendered against the Georgia Railway & Power Company and the Georgia Power Company for the amount of the paving assessment, with interest, which was affirmed by the state supreme court on appeal. 179 Ga. 471; 176 S. E. 494. The ruling of the trial court excluding the evidence offered upon the subject of benefits was sustained on the ground that such evidence was immaterial to the consideration of the question; and the contention of the railway corporations in respect of the violation of the Federal Constitution was rejected as being without foundation.

As we read its decision, the court below held that the state statute which authorized, and the ordinance which directed, an assessment for the cost of improvements require, as the basis for their operation, the existence of benefits; and the case was dealt with in that view. The contention of the appellants, as stated by that court, was that the street railway received no benefit from the paving and assessment, and, therefore, there was an arbitrary abuse of legislative authority. But the court held that from the act of the city in adopting the ordinance a presumption arose that the paving was beneficial to the street railway company and the assessment legal. "The burden," it said, "of overcoming this presumption that the action of the city was not an arbitrary abuse of the legislative authority rests upon the plaintiffs in error." The fourth headnote, which as we understand is prepared by the court, reads in part: [2]

"When paving is done and assessment therefor regularly made in the manner provided in the city charter, a presumption arises that the paving and assessment were legal, and casts the burden of proof on one who attacks the assessment on the ground that the same was an arbitrary abuse of the legislative authority, *because of no benefit,* or that it is confiscatory."

In the body of the opinion, there is an excerpt from an earlier decision to the effect that the power to determine benefits to be received by the property of a street-railway company from local improvements is a legislative one; that this power was vested in the commissioners of the city; and that the question of benefits having been determined by the commissioners, could not be inquired into by the courts unless it is made to appear that there has been an arbitrary abuse of the power.

In this court, the city insists that, under Georgia law, "The general rule that assessments against abutting own-

[2] The italics are ours.

ers for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to railway companies having tracks in the street improved." And it seeks to sustain the assessment as an exercise of the police power and the alleged power of the state to alter or amend corporate charters. If the Georgia statutes had been thus construed by the state supreme court, a different question would be presented. The difficulty, however, is that the court, as we have said, construed the statute as contemplating the existence of benefits to the railway as a basis for the assessment, but required the railway companies to overcome a legislative presumption that such benefits existed by proof of an arbitrary abuse of the legislative authority "because of no benefit." By that construction we are bound, and in accordance with it must consider and determine the case. The construction becomes part of the statute as much as though it were found in appropriate words in its text. *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U. S. 162, 166; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32, *et seq.*

Under the statute and ordinance thus construed, if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain, *Myles Salt Co.* v. *Board of Comm'rs*, 239 U. S. 478, 485; the assessment amounts to confiscation. *Bush* v. *Branson*, 248 Fed. 377, 380–381. And this doctrine has been fully recognized in Georgia. *Savannah* v. *Knight*, 172 Ga. 371, 375; 157 S. E. 309. Moreover, the offer of appellants to surrender all their railway property within the city, including the franchise, strongly tended to show that the assessment exceeded the entire value of the property with which the improvement was connected; in which case, as the court below itself has held, there can be no presumption of benefit. *Holst* v. *LaGrange*, 175 Ga. 402, 404; 165 S. E. 217.

No question is raised as to the competency of the proof which was offered, and evidently there is none. The ruling was simply that it was immaterial. But the existence of benefits resulting from the improvement was material and was deemed so—else why require it, or why create an affirmative presumption in respect of it? Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution. *Saunders* v. *Shaw*, 244 U. S. 317, 319; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 19; *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 642; *Zeigler v. South & North Alabama R. Co.*, 58 Ala. 594, 599. Compare *Norwood* v. *Baker*, 172 U. S. 269, 278–279; *Road District* v. *Missouri Pacific R. Co.*, 274 U. S. 188; *Standard Pipe Line* v. *Highway District*, 277 U. S. 160.

The decree of the court below must be reversed and the cause remanded for further proceedings not inconsistent with the foregoing opinion.

Reversed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be affirmed.

The question is one of state power. Since the Constitution does not deny to the local authorities power to require the paving of appellants' right of way, as a police measure regulating the use of the public streets, see *Durham Public Service Co.* v. *Durham*, 261 U. S. 149; *Fort Smith Light Co.* v. *Paving District*, 274 U. S. 387, it would seem that the mere fact that the state court justified the exercise of the power on different or even untenable grounds would not present to us any substantial federal question.

In any case, the examination of the record makes it plain that the question considered in the opinion of this Court is unsubstantial. Appellant Georgia Power Company, which has taken over the rights and obligations of the other appellants, has a single franchise to supply electric power and to operate a street car line in Decatur and elsewhere, and is subject to a contract requiring it to maintain a five cent fare on its railway. See *Georgia Ry. Co.* v. *Decatur,* 262 U. S. 432; *Georgia Power Co.* v. *Decatur,* 281 U. S. 505. In an attempt to establish the arbitrary character of the assessment, appellant offered to prove that the railway could not operate its line in Decatur profitably under its contract for a five cent fare, and that it stood ready to surrender the franchise and discontinue operation. It further offered to show that no benefits were received by the Power Company or by any of its property as a result of the improvement. This general offer was explained and made specific by the proffered testimony of a witness, rejected as immaterial, that the pavement "added not one cent to the value of the street railway property at all." "On the contrary," in his opinion, "it was a detriment to the street railway operations." Traffic was not increased thereby. Indeed, the pavement would increase the labor and expense of keeping the track in good condition. While the five cent fare continued, the company would be unable to earn the cost of operation. Neither on the argument in this court nor, so far as appears, in any of the courts of Georgia, did the company suggest that it had additional or more persuasive evidence to offer.

Our decisions make it abundantly plain that this evidence, if received, could have no tendency to overcome the presumptive correctness of the legislative finding of benefit. A property owner does not establish want of assessable benefits by showing that a particular public improvement does not aid or facilitate the particular use

which he makes of the land, *Miller & Lux* v. *Sacramento Drainage District,* 256 U. S. 129; *Houck* v. *Little River Drainage District,* 239 U. S. 254, 264; *Valley Farms Co.* v. *Westchester County,* 261 U. S. 155, or demonstrate that the assessment is confiscatory by showing that the use which he makes of the land is unprofitable, *Durham Public Service Co.* v. *Durham, supra,* 153–155; *Fort Smith Light Co.* v. *Paving District, supra,* 390. The earning capacity of the property would seem especially irrelevant where the profit has been limited by the taxpayer's contract, whether entered into improvidently or to gain some collateral advantage.

The offer to surrender the unprofitable street railway, while retaining the profitable electric business, which in this case the Supreme Court of the State ruled were parts of an indivisible franchise, was rightly disregarded as without probative force. The Power Company could not, without the consent of the city, surrender the unprofitable part of its franchise and retain the profitable part. *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 543, 544. The city could not accept the offer without abrogating its contract. Neither the offer nor the refusal to accept it is evidence that the improvement was not of public benefit, which inured to the appellant as a property owner.

The Supreme Court of Georgia did not question the appellant's right to rebut the presumption of validity by evidence reasonably indicative of arbitrary action. On the contrary, it expressly recognized that right in its opinion in this case, 179 Ga. 471; 176 S. E. 494, as well as in an earlier opinion from which it quoted, *Georgia Power Co.* v. *Decatur,* 170 Ga. 699; 154 S. E. 268. The Court did no more than to hold that, treating the proffered testimony as accepted rather than rejected, it was insufficient to establish any inference of arbitrary oppression. Compare *Branson* v. *Bush,* 251 U. S. 182, 190, 191; *Mt. St.*

Mary's Cemetery Assn. v. *Mullins,* 248 U. S. 501; *Embree* v. *Kansas City Road District,* 240 U. S. 242. For that reason the testimony was correctly held to be "immaterial," and the error, if any, "harmless."

A street must be properly paved, for the safety and convenience of travelers, as well as for the good of abutting owners. A resolution of the city authorities that a new pavement has become necessary, and assessing the cost according to an estimate of benefits, is not to be undone because the railway is of the opinion that for the operation of its business the old pavement is good enough.

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

UNITED STATES *v.* ARIZONA.

No. 18, original. Argued March 4, 1935.—Decided April 29, 1935.

1. Assuming that the stretch of the Colorado River between Arizona and California involved in this case is navigable, Arizona owns the part of the bed that is east of the thread of the stream; and her jurisdiction in respect of the appropriation, use and distribution of an equitable share of the waters flowing therein is unaffected by the Colorado River Compact or the federal reclamation law. But the title of the State is held subject to the power granted to Congress by the commerce clause, and under that clause Congress has power to cause to be built a dam across the river in aid of navigation. P. 183.
2. Section 9 of the Act of March 3, 1899, forbidding the construction of any dam in any navigable river of the United States until the consent of Congress shall have been obtained, and until the plans shall have been submitted to and approved by the Chief of Engineers and the Secretary of War, applies not only to acts of private persons but also to the acts of government officers. P. 183.
3. There is no presumption that regulatory and disciplinary statutes do not extend to government officers. P. 184.

4. The authority given by § 25 of the Act of April 21, 1904, to the Secretary of the Interior to divert waters of the Colorado River for the purpose of providing irrigation for irrigable lands in the Yuma and Colorado River Indian Reservations in Colorado and Arizona, is not the "consent of Congress" required by § 9 of the Act of March 3, 1899, to legalize the construction of a dam across that river where navigable. P. 184.
5. The clause of § 1 of the Boulder Canyon Project Act empowering the Secretary to construct a main canal connecting the Laguna Dam "or other suitable diversion dam" with the Imperial and Coachella Valleys does not authorize the building of or in any respect apply to the proposed dam here in question. P. 186.
6. Under § 4 of the Act of June 25, 1910, no irrigation project contemplated by the Reclamation Act "shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States." *Held* that executive action under the National Industrial Recovery Act relied on by the Government in this case to sustain the right to construct the dam in question, was not approval by direct order of the President. P. 187.
7. The National Industrial Recovery Act did not repeal the requirement of § 4 of the Act of June 25, 1910. P. 188.
8. Section 202 of the National Industrial Recovery Act, directing the inclusion of river and harbor improvements in programs of public works prepared by the Administrator under the direction of the President, but with the proviso that no such improvements shall be "carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers," must be read in harmony with the settled policy of Congress established by the Rivers and Harbors Acts; and, when so read, the proviso requires that the recommendation of the Chief of Engineers be based on examinations, surveys and reports made in pursuance of those Acts and submitted to the Congress. P. 188.
9. The Recovery Act does not require that such recommendations of the Chief of Engineers be made to the Administrator instead of to Congress nor empower the Administrator to initiate the preliminary examinations, etc. P. 192.
10. The United States is without equity to enjoin a State from forcibly preventing the erection on her territory of a dam in navigable waters which has not been authorized by Congress. P. 192.

ORIGINAL SUIT by the United States to enjoin the State of Arizona from interfering with the construction by the Government of a dam across the Colorado River. The hearing was upon plaintiff's motion for a preliminary injunction and defendant's motion to dismiss the bill.

Assistant Attorney General Blair, with whom *Solicitor General Biggs* and *Mr. David B. Hempstead* were on the brief, for the United States.

The United States has constitutional power to construct the dam in aid of navigation and flood control.

The United States has constitutional power to construct the dam for the reclamation of the Colorado River Indian Reservation and public lands. *Shively* v. *Bowlby,* 152 U. S. 1, 47; *McGilvra* v. *Ross,* 215 U. S. 70; *Winters* v. *United States,* 207 U. S. 564; *United States* v. *Winans,* 198 U. S. 371. For cases in the lower courts following the *Winters* case, see *Conrad Inv. Co.* v. *United States,* 161 Fed. 829; *United States* v. *Morrison,* 203 Fed. 364, 365.

The project for irrigating the Colorado River Indian Reservation had been definitely initiated prior to the statehood of Arizona, beginning in 1865, and continued by the appropriation of many thousands of dollars, as shown by the appropriation acts. The diversion of water (and inferentially, the construction of diversion works) was specifically authorized by the Act of April 21, 1904 (c. 1402, 33 Stat. 189, 224), which authorized the Secretary of the Interior to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any land in the Colorado River Indian Reservation which might be made irrigable by works constructed under the Reclamation Act.

As to the Reservation, therefore, the preëxisting power to construct reclamation works would clearly not have been curtailed by admission of Arizona to the Union, whether or not the State consented to the continuance of

those powers. But the State did affirmatively consent, in a form which, to quote *United States* v. *Winans,* 198 U. S. 371, 384, "fixes in the land such easements as enable the rights to be exercised."

The federal authority to construct reclamation works for public lands is to be distinguished from the power to regulate the use of water. *Arizona* v. *California,* 283 U. S. 423. The United States is certainly free of the police regulations of a State in exercising the first function (*United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 703), which is all that is involved in the controversy in its present stage.

If the consent of Arizona were otherwise necessary for the construction of Parker Dam in aid of reclamation of Indian and public lands, that consent has been irrevocably given. Enabling Act, June 20, 1910, § 20, par. 7; Const., Arizona, Art. XX. The stipulation was for the protection of the right of use and development of federal property. If so, it was a valid provision.

The Secretary of the Interior has adequate statutory authority for the construction of the dam, and the contract of February 10, 1933, with the Metropolitan Water District is a valid exercise of that authority. Act of April 21, 1904, c. 1402, § 25, 33 Stat. 189, 224.

The statutory authority for the erection of works in a navigable river by an officer of the United States need not be specific, and is not invalid because it leaves to his discretion how and where the works shall be built. This was so in the case of the Boulder Canyon Project Act.

If the use of Parker Dam site, and the generation of power there for pumping water to the Colorado River Indian Reservation, is, in the Secretary's opinion, the most feasible way to carry out the "diversion of water" authorized by the 1904 statute, it is immaterial that the site itself is not within the limits of the reservation.

The Secretary had authority to finance construction by means of the contract of February 10, 1933, with the Metropolitan Water District.

Mr. James R. Moore, Special Assistant Attorney General of Arizona, with whom *Mr. John L. Sullivan*, Attorney General, and *Mr. Herman Lewkowitz* were on the brief, for Arizona.

Arizona owns in its sovereign capacity the east half of the bed of the Colorado River.

Concurrent consent of Congress and the State is a prerequisite to construction of a dam. *Pigeon River Improvement S. & B. Co.* v. *Cox,* 291 U. S. 138, 159; *Southlands Co.* v. *San Diego,* 211 Cal. 646.

The Administrator of Public Works (the Secretary of the Interior) is without authority to build the dam in the absence of a showing of prior approval of Congress. *Wisconsin* v. *Illinois,* 278 U. S. 399.

The United States has no constitutional authority to construct the dam for reclamation of public and Indian lands, without the consent of Arizona.

The United States, in the reclamation of public lands, acts in its proprietary capacity.

The United States can assert no rights under paragraph 7 of § 20 of the Act admitting Arizona as a State. *Coyle* v. *Smith,* 221 U. S. 559, 572; *United States* v. *Utah,* 283 U. S. 63, 75.

It clearly appears from the reading of the bill that the Metropolitan Water District of Southern California is the real party in interest.

The Secretary of the Interior has no authority to bind the United States in the exercise of its governmental functions.

Approval of construction of the dam by the Chief of Engineers and the Secretary of War is not the equivalent to consent of Congress. *Cobb* v. *Lincoln Park,* 202 Ill. 427; *Wisconsin* v. *Illinois,* 278 U. S. 399, 417.

MR. JUSTICE BUTLER delivered the opinion of the Court.

September 10, 1934, the United States, acting through Harold L. Ickes, Secretary of the Interior and Federal Emergency Administrator of Public Works, caused to be commenced the construction of the Parker Dam in the main stream of the Colorado River, the thread of which for a distance of about 237 miles is the boundary between Arizona and California. The site is 150 miles below the Boulder Dam, half a mile below the place where the Williams River flows into the Colorado, and 10 miles north of the Colorado River Indian Reservation. Its ends rest on public lands of the United States in Arizona and California. Arizona objects to the construction of the dam, asserts that it may not lawfully be built without her consent, and threatens the use of military force to stop the work. January 14, 1935, the United States filed its bill in equity perpetually to enjoin interference by the State. On plaintiff's motion this court directed defendant to show cause why a restraining order should not issue pending the final determination of the suit. Arizona filed a return consisting of an affidavit of the Governor setting forth the grounds on which the State claims the right to prevent the construction of the dam in the part of the river bed that is easterly of the thread of the stream, a motion to dismiss the bill, and a supporting brief. We heard counsel on plaintiff's application for a temporary injunction and defendant's motion to dismiss.

We come first to the question whether the complaint alleges facts sufficient to warrant an injunction against the State. The allegations will be better understood after brief reference to the Colorado River Compact [1] and the Boulder Canyon Project Act, 45 Stat. 1057.

The Compact was made by California, Colorado, Nevada, New Mexico, Utah and Wyoming. Arizona was

[1] Printed in California Statutes, 1929, c. 1, § 1.

not a party. It was made to provide an equitable apportionment of the waters of the Colorado River system among the interested States, establish relative importance of different beneficial uses and secure the development of the Colorado River basin, the storage of its waters and protection against floods. After apportionment between defined basins lying above and below Lee Ferry and a declaration that the Colorado has ceased to be navigable for commerce and that the use of its waters for purposes of navigation should be subservient to uses for domestic, agricultural and power purposes, the Compact authorizes the waters of the system to be impounded and used for the generation of power and declares that use subservient to uses for agricultural and domestic purposes. It was approved by § 13 (a) of the Boulder Canyon Project Act and, by presidential proclamation, it took effect June 25, 1929. 46 Stat. 3000. The Act authorizes the Secretary of the Interior to construct a dam and incidental works in the Colorado at Boulder Canyon adequate to create a reservoir having a capacity of not less than 20,000,000 acre feet "and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary . . . is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California." § 1.[2] In a suit in this Court against the Secretary of the Interior and the States which were parties, Arizona unsuccessfully sought to have ratification of the Compact decreed to be unconstitutional and to enjoin construction of the Boulder Dam and the doing

[2] By §§ 12 and 14 of the Boulder Canyon Project Act, the Reclamation Law is defined to mean the Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof and supplemental thereto, including the Boulder Canyon Project Act.

of anything under color of that Act. *Arizona* v. *California,* 283 U. S. 423.

The bill alleges that February 10, 1933, the United States, acting through the Secretary of the Interior, entered into a contract with the Metropolitan Water District of Southern California. The District agrees to pay to the United States the entire cost of the dam, assumed not to exceed $13,000,000. By the use of this money the United States agrees that, under the Reclamation Act, June 17, 1902, 32 Stat. 388, and supplemental Acts, particularly those of April 21, 1904, 33 Stat. 224, March 4, 1921, 41 Stat. 1404, and December 21, 1928 (The Boulder Canyon Project Act)[3] it will construct the Parker Dam. The District is to have one-half the power privilege and the right to divert specified quantities of water. The United States is to have the right to the rest of the power, to divert water, to transmit power at cost over the District's lines from Boulder to Parker, and, by means of canals, to connect Parker Dam with lands in the Colorado River Indian Reservation in Arizona and with other lands in that State and in California.

Parker Dam will intercept waters discharged at Boulder Dam and the inflow of tributaries of the Colorado below that dam; raise the river level 72 feet and create a reservoir about 20 miles long, having capacity of 717,000 acre feet, and permit generation of approximately 85,000 horsepower of electricity. Operated with Boulder Dam, it will

[3] Other amendatory and supplemental acts are: Acts of February 25, 1905, 33 Stat. 814; March 3, 1905, 33 Stat. 1032; April 16, 1906, 34 Stat. 116; June 12, 1906, 34 Stat. 259; June 27, 1906, 34 Stat. 519; June 11, 1910, 36 Stat. 465; June 25, 1910, 36 Stat. 835; February 21, 1911, 36 Stat. 925; February 24, 1911, 36 Stat. 930; August 13, 1914, 38 Stat. 686; June 12, 1917, 40 Stat. 149; October 2, 1917, § 10, 40 Stat. 300; February 25, 1920, § 35, 41 Stat. 450; May 20, 1920, 41 Stat. 605; June 10, 1920, § 17, 41 Stat. 1072; December 5, 1924, § 4, 43 Stat. 701; June 6, 1930, 46 Stat. 522.

"reregulate and equate, in aid of navigation and river regulation," the waters discharged at Boulder Dam for flood control, power generation and irrigation; allow, for generation of power, the discharge at Boulder Dam of water which otherwise would have to be retained there in storage and also conserve the waters there discharged.

The bill also alleges that heavy flash floods of the Williams River are a menace to the Colorado River Indian Reservation, to United States public lands and to navigation below Parker. The dam is designed to promote reclamation of the reservation lands and of public lands of the United States. The power privilege reserved by the United States is for the purpose of pumping water for irrigation of these lands.

To disclose grounds on which the United States claims the right to construct the dam, the bill sets out that at various times Congress has made appropriations amounting in all to more than $1,359,000 for construction of irrigation and diversion works for the reservation; [4] that the above mentioned Act of April 21, 1904, authorized the Secretary of the Interior to divert the waters of the Colo-

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[4] Act of March 2, 1867, 14 Stat. 514, appropriated $50,000 "For expense of collecting and locating the Colorado River Indians in Arizona, on a reservation set apart for them by" § 1, Act of March 3, 1865, 13 Stat. 559, "including the expense of constructing a canal for irrigating said reservation." For completing the canal, $50,000 was appropriated by the Act of July 27, 1868, 15 Stat. 222, and $20,000 by the Act of May 29, 1872, 17 Stat. 188.

Section 3, Act of April 4, 1910, 36 Stat. 273, appropriated $50,000 "For the construction of a pumping plant to be used for irrigation purposes on the Colorado River Reservation, together with the necessary canals and laterals, for the utilization of water in connection therewith, for the purpose of securing an appropriation of water for the irrigation of approximately one hundred and fifty thousand acres of land . . . to be reimbursed from the sale of the surplus lands of the reservation." To complete and maintain the work commenced by the 1910 Act, Congress has since appropriated $888,710.

rado and to reclaim, utilize and dispose of land in the reservation which might be made irrigable by works constructed under the Reclamation Act, and that the Boulder Canyon Project Act appropriated moneys for surveys of the Parker-Gila reclamation project, which, it is said, embraces the Indian reservation and certain public lands of the United States. And it is asserted that the Parker Dam project has been included by the Administrator in the comprehensive program of public works authorized by § 202, National Industrial Recovery Act, 48 Stat. 201; that, pursuant to that Act, the Chief of Engineers of the United States Army has recommended the construction and his recommendation has received the approval of the Secretary of War.

1. The bill alleges that the stretch of the Colorado between Arizona and California is navigable, and the motion to dismiss is dealt with on that basis. Arizona owns the part of the river bed that is east of the thread of the stream. *New Jersey* v. *Delaware,* 291 U. S. 361, 379 *et seq.* Her jurisdiction in respect of the appropriation, use and distribution of an equitable share of the waters flowing therein is unaffected by the Compact or federal reclamation law. But the title of the State is held subject to the power granted to Congress by the commerce clause, *United States* v. *Holt State Bank,* 270 U. S. 49, 54–55, and under that clause Congress has power to cause to be built a dam across the river in aid of navigation. The Boulder Canyon Project Act is an example of the exertion of that power. *Arizona* v. *California, supra,* 451, 455–457. But no Act of Congress specifically authorizes the construction of the Parker Dam. Subject to an exception with which we have no concern, § 9 of the Act of March 3, 1899, forbids the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States until the consent of Congress shall have

been obtained and until the plans shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War. 33 U. S. C., § 401. And § 12 makes violations of § 9 punishable by fine or imprisonment or both and provides for the removal of unauthorized structures. 33 U. S. C., § 406. These provisions unmistakably disclose definite intention on the part of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply only to work undertaken by private parties. But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and state officers. There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others. *Donnelley* v. *United States,* 276 U. S. 505, 516. If still in force, § 9 unquestionably makes "consent of Congress" essential to the valid authorization of the Parker Dam. There has been no express repeal of that section and, as will presently appear, it is not inconsistent with subsequent legislation on which plaintiff relies.

2. Plaintiff, unable to cite any statute specifically authorizing the Secretary to construct the dam, turns to § 25 of the Act of April 21, 1904, 33 Stat. 224. That section is a part of the reclamation laws which are enacted—not under the commerce clause, Art. I, § 8, cl. 3, but in the exertion of power granted by Art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all

needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *United States* v. *Hanson,* 167 Fed. 881, 883. *Kansas* v. *Colorado,* 206 U. S. 46, 88, *et seq.* The part of § 25 relied on follows: "That in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act . . . and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona, *the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River* and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain." The immediate question is whether the italicized clause can reasonably be construed as adequate to carry the burden that plaintiff would have us lay upon it. The purpose was not to prescribe or regulate the means to be employed to divert water from the Colorado but to extend the reclamation law to the Indian reservations named. It was merely to empower the Secretary, if the circumstances stated should arise, to reclaim lands in these reservations by use of water to be taken from that river. The authority granted was no more than permission to appropriate them for the purpose specified. No dam is shown to have been necessary. Water is frequently taken from streams for the purposes of irrigation without putting dams across them. Failure specifically to authorize a dam or even approximately to fix location or to require use calculated to aid navigation makes strongly against the plaintiff.

In support of the construction for which it contends, plaintiff asserts that it was under this Act that the Secretary of the Interior built the Laguna Dam across the

Colorado. But it does not appear that either riparian State objected or that the validity of his authority has ever been drawn in question. Congress has made appropriations for the benefit of the project of which it is a part [5] and so recognized and approved the building of the dam. *Wisconsin* v. *Duluth*, 96 U. S. 379, 386. There has been cited no other instance of the construction, without the consent of the Congress, of a dam across a navigable interstate river. Indeed, it is not certain that that part of the Colorado was then deemed to be navigable.[6] We find no merit in the contention that § 25 of the Act of April 21, 1904, is the "consent of Congress" required by § 9 of the Act of March 3, 1899. And plainly without force is the suggestion that by making appropriations for irrigation of lands in Indian reservations Congress authorized this dam.

3. The clause of § 1 of the Boulder Canyon Project Act empowering the Secretary to construct a main canal connecting the Laguna Dam "or other suitable diversion dam" with the Imperial and Coachella Valleys does not authorize the building or in any respect apply to the proposed Parker Dam. The latter is about 70 miles upstream from the Laguna and the canal proposed to be built to bring water to the valleys named.[7] The contract alleged to have been made by the United States and the Metropolitan Water District, a copy of which is attached to plaintiff's brief, shows that the purpose immediately to be served by the Parker Dam is to enable the United

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[5] See e. g., Acts of July 1, 1916, 39 Stat. 304; June 12, 1917, 40 Stat. 148, and July 1, 1918, 40 Stat. 674, making appropriations for the Yuma Project, Arizona-California, which includes the Laguna Dam. See e. g., Reclamation Service Report 13, p. 73, *et seq.*; Report 15, p. 68, *et seq.*

[6] See Art. IV (a), Colorado River Compact.

[7] Wilbur and Ely, The Hoover Dam Contracts, United States Department of the Interior, 1933, pp. II, 71, 325.

States in fulfillment of earlier contracts to deliver waters at that place into the aqueduct of the District. And while that instrument specifies other uses to which the United States may put the waters by means of the dam, transmission by canal to either of these valleys is not mentioned. Indeed, the plaintiff does not, and it could not reasonably, claim that § 1 of the Boulder Canyon Project Act authorizes the construction of this dam. Nor does it make any contention in respect of the allegation of the bill that § 11 of the Act authorizes surveys of the Parker-Gila reclamation project.

4. Parker Dam was not approved by the President as required by § 4 of the Act of June 25, 1910, 43 U. S. C., § 413. That section declares that no irrigation project contemplated by the Reclamation Act " shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States." The project in question rightly may be deemed to have been begun on the date, February 10, 1933, of the contract made by the United States and the Water District for the construction of the dam. There is no allegation that any project including the dam was ever recommended, submitted to or in any manner approved by the President. But plaintiff maintains that the approval required in the section has been given through executive action under the National Industrial Recovery Act. It relies on §§ 201 a, 202 and 203 of the Act and Executive Order No. 6252. The first of these authorizes the President to delegate any of his powers under Title II of the Act to such agents as he may designate. Section 202 provides that the Administrator under the direction of the President shall prepare a comprehensive program of public works " which shall include . . . construction of river and harbor improvements . . . *Provided,* That no river or harbor improvements shall be carried out unless they shall have heretofore

or hereafter been adopted by the Congress or are recommended by the Chief of Engineers . . ." Section 203 authorizes the President "through the Administrator . . . to construct . . . any public-works project included in the program prepared pursuant to section 202." The Executive Order delegates authority to the Administrator "to construct . . . any public-works project included in the program." The contract here involved was made more than four months before the passage of that Act. Plaintiff asserts that the project was included in the comprehensive program, that the Administrator commenced construction about September 10, 1934, and that on November 10 following, Arizona interfered forcibly to prevent plaintiff from doing the work. The alleged recommendation by the Chief of Engineers and approval by the Secretary of War were not made until January 5, 1935,[8] nine days before plaintiff filed its bill. These facts do not constitute approval "by direct order of the President" as required by § 4. Plaintiff does not allege or claim that the President has directly authorized the dam or specifically empowered the Administrator to include it in the comprehensive program. We find nothing in the Recovery Act that reasonably may be held to repeal the requirement of that section. It follows that the construction of the dam has not been authorized as required by the Reclamation Law.

5. Plaintiff's contention that the dam is being built under authority of the Recovery Act is without force.

The chronology just given, when taken in connection with the citations in the contract of the Acts relied on, shows the claim to be an afterthought born of the contro-

[8] The complaint does not show the date of the alleged inclusion of the dam in the comprehensive program of public works authorized by § 202 of the Recovery Act. It also fails to give the date of the recommendation of the Chief of Engineers and appoval by the Secretary of War. A copy of the certificate attached to the complaint furnishes that date, January 5, 1935.

versy disclosed by the complaint and about to be here submitted. Section 25 of the Act of April 21, 1904, does not authorize this dam. Plaintiff does not assert that it was otherwise adopted by Congress. It therefore remains only to consider whether the dam was recommended by the Chief of Engineers within the meaning of the proviso of § 202. When the Recovery Act was passed, the phrases "adopted by the Congress" and "recommended by the Chief of Engineers," when used in Acts of Congress relating to river and harbor improvements, had well-understood and definite technical meanings. The statutes, at least in the 40 years next preceding the passage of the Recovery Act, disclose: It has been the general, if not indeed the uniform, practice of Congress specifically to authorize all river and harbor improvements carried out by the United States,[9] and to base its action upon the recommendation of the Chief of Engineers.[10] That officer

[9] The Rivers and Harbors Acts prior to that of September 22, 1922, authorized surveys and improvements and made appropriations. A typical provision was: "That the following sums . . . are hereby appropriated . . . to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the construction, completion, repair, and preservation of the public works hereinafter named. . . ." Act of August 8, 1917, 40 Stat. 250. The Act of September 22, 1922, omitted appropriations and adopted specified improvements: "That the following works of improvement are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans recommended in the reports hereinafter designated. . . ." 42 Stat. 1038. The same language is used in § 1 of the Acts of March 3, 1925, 43 Stat. 1186; January 21, 1927, 44 Stat. 1010, and July 3, 1930, 46 Stat. 918. See also 79 Cong. Rec. p. 5454.

[10] ". . . The Committee on Rivers and Harbors has pursued an invariable rule of requiring all rivers and harbors projects to have the approval and recommendation of the Corps and Chief of Engineers before we considered them eligible for consideration." Remarks of chairman of that committee in the Committee of the Whole House

makes such recommendation only after preliminary examinations followed by surveys.[11] Congress expressly directs the making of these examinations and surveys [12] and prohibits any which it has not authorized.[13]

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considering bill for river and harbor improvements, 79 Cong. Rec., p. 5441, see also pp. 5460, 5465, 5466. Cf. § 9, Act of September 22, 1922 (33 U. S. C., § 568): "No project shall be considered by any committee of Congress with a view to its adoption, except with a view to a survey, if five years have elapsed since a report upon a survey of such project has been submitted to Congress pursuant to law."

[11] To secure greater uniformity in the recommendations and reports required of Chief of Engineers (See H. Rep. No. 795, 57th Cong., 1st session, p. 3), Congress created in his office a Board of Engineers for Rivers and Harbors, § 3, Act of June 13, 1902, 32 Stat. 372. Subsequent legislation in respect of this Board, material here, is found in § 3, Act of June 25, 1910, 36 Stat. 668; §§ 3 and 4, Act of March 4, 1913, 37 Stat. 825; § 2, June 5, 1920, 41 Stat. 1010; § 9, September 22, 1922, 42 Stat. 1043. 33 U. S. C., §§ 541, 542, 545, 546, 547, 568.

Preliminary examinations are first made, unless Congress expressly directs a survey and estimate, and if, upon such examination, the improvement is not thought advisable, no further action may be taken unless Congress so directs. 33 U. S. C., § 545. The subsequent detailed survey report is made by the district engineer, it is reviewed by the division engineer, by the Board of Engineers for Rivers and Harbors and finally by the Chief of Engineers who submits to Congress a report containing information of a character specified by the above statutes, together with his recommendation. As shown in footnote 10, a congressional committee may not consider a project with a view to its adoption if five years have elapsed since submission of a report on a survey. See 79 Cong. Rec., p. 5439, *et seq.* 1922 Report of Chief of Engineers, pp. 99, 100.

[12] Since September 22, 1922, the Acts authorizing preliminary examinations and surveys employ the following language: "The Secretary of War is hereby authorized and directed to cause preliminary examinations and surveys to be made at the following-named localities. . . ." § 12, 42 Stat. 1043.

[13] "That no preliminary examination, survey, project, or estimate for new works other than those designated in this or some prior Act

"As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is clearly shown." *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 396. In the light of that rule it is clear the general language of the Recovery Act on which plaintiff relies does not evidence intention on the part of Congress to change its well established policy. In respect of the required recommendation by the Chief of Engineers there is no inconsistency between the proviso and the statutes upon which rests the practice of his office. The Recovery Act may, and therefore it must, be read in harmony with the purposes evidenced by the provisions of the Rivers and Harbors Acts to which reference has been made. When so read the proviso requires that the recommendation of the Chief of Engineers be based on examinations, surveys and reports made in pursuance of these Acts and submitted to the Congress for its consideration when determining whether the project should be undertaken. The only change effected by the Recovery Act is that the improvement may be made if either "adopted by the Congress" or "recommended by the Chief of Engineers" whereas the prior practice required not only recommendation by the Chief of Engineers but also adoption by Congress; that is, the Recovery Act amounts merely to the adoption of projects that have been here-

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or joint resolution shall be made." § 12, Act of September 22, 1922, 42 Stat. 1043. Typical language in the Acts appropriating for rivers and harbors is: "That no funds shall be expended for any preliminary examination, survey, project, or estimate not authorized by law." It is found, for example, in the Act of April 26, 1934, 48 Stat. 639–640, making appropriations for the fiscal year ending June 30, 1935.

tofore or hereafter may be recommended to Congress by the Chief of Engineers under the established practice.[14]

In accordance with definite policy long pursued by it, the Congress has committed to the Secretary of War and Chief of Engineers all investigations, surveys and work in aid of navigation. The Recovery Act discloses no intention to require that the Chief of Engineers' recommendations in respect of proposed improvements shall be made to the Administrator instead of to the Congress. The provisions of the Act brought forward by plaintiff make no such change. Plainly they are not sufficient to empower the Administrator to initiate preliminary examinations and surveys or to determine whether the Parker Dam or any work in aid of navigation shall be undertaken.

It is not shown that Congress ever directed a preliminary examination or survey by the Chief of Engineers of any project that includes this dam. This is a condition precedent to the recommendation required by the proviso. Failure to allege compliance warrants the conclusion that the recommendation relied upon lacks the support of examination and survey by army officers and review by the board of engineer officers required by law.

6. As the complaint fails to show that the construction of the dam is authorized, there is no ground for the granting of an injunction against the State, and therefore the complaint must be

Dismissed.

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[14] When the Recovery Act was enacted, Congress had before it the report of the Chief of Engineers for the fiscal year ended June 30, 1932. This report disclosed (p. 3) that 954 projects authorized by Congress were in force, that active operations were in progress upon 361 (p. 4), that reports on 242 preliminary examinations and surveys had been transmitted to Congress during the past fiscal year (p. 6), and that the Chief of Engineers had under consideration 302 investigations authorized by river and harbor and flood control acts. (p. 22.)

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.*

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

No. 606. Argued March 15, 1935.—Decided April 29, 1935.

1. By long usage and under § 15 (5) of the Interstate Commerce Act, the unloading into pens of ordinary live stock consigned in carload lots to the Chicago stockyards, is a transportation service to be performed by the carrier without extra charge to the shipper or consignee. P. 198.
2. The boundary between the jurisdiction of the Interstate Commerce Commission and the jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act, with respect to live stock consigned to public stockyards, is where the transportation ends. P. 201.
3. A consignee of live stock, upon receiving cattle unloaded from the cars into the unloading pens, drove them over the property of the stockyards company, including a viaduct, directly into the consignee's plant. The Interstate Commerce Commission ruled that a yardage charge for use of the stockyards facilities was unlawful and ordered the carriers and the Yards Company to desist from exacting it, but no definite finding was made as to what constituted complete delivery or where transportation ended. *Held* that the order was invalid for want of basic findings. P. 201.
4. This Court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report, intended to serve as findings, may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. P. 201.
5. Lack of express finding by an administrative agency may not be supplied by implication. P. 202.

8 F. Supp. 825, reversed.

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* Together with No. 607, *Union Stock Yard & Transit Co.* v. *United States et al.* Appeal from the District Court of the United States for the Southern District of New York.

APPEALS from a decree of the District Court, constituted of three judges, dismissing a suit to enjoin enforcement of an order of the Interstate Commerce Commission.

Mr. Frank H. Towner, with whom *Messrs. Silas H. Strawn, Ralph M. Shaw, E. A. Boyd, P. F. Gault, Walter McFarland, J. N. Davis, Wallace Hughes, James Stillwell,* and *L. H. Strasser* were on the brief, for appellants in No. 606.

Mr. Charles E. Cotterill for appellant in No. 607.

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. Carl M. Owen, with whom *Mr. Harold J. Gallagher* was on the brief, for Hygrade Food Products Corp., appellee.

MR. JUSTICE BUTLER delivered the opinion of the Court.

These are separate appeals from a decree of a three judge court dismissing a suit to enjoin enforcement of an order of the Interstate Commerce Commission. 8 F. Supp. 825. The suit was brought by 24 railroads, appellants in No. 606, for convenience called "carriers," against the United States and Interstate Commerce Commission. Twenty-one are line carriers; the other three perform only switching service. The Union Stock Yard & Transit Company, appellant in No. 607, and the Hygrade Food Products Corporation, the complainant before the Commission and one of the appellees here, intervened.

By its complaint to the Commission the Hygrade Company attacked as unreasonable in violation of § 1 of the Interstate Commerce Act (Title 49, U. S. C.) the carriers' tariff charges applicable to switching livestock to

its packing plant. And it assailed as inapplicable the yardage charge collected by the Yards Company on livestock delivered at the stockyards. It claims that the service covered by the charge is included in transportation, §§ 1 (3), 15 (5); that, not being specified in carriers' tariffs, they are unlawful, § 6; and that the practice of the carriers and Yards Company in making the stockyards their depot for delivery of livestock pursuant to an arrangement by which the Yards Company imposes a yardage charge is an unjust and unreasonable practice in violation of § 1.

Subject to regulation by the Secretary of Agriculture under the Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C., c. 9, the Yards Company operates public stockyards in Chicago. The Hygrade Company in 1929 acquired and has since operated a packing plant that many years ago was established on the Chicago Junction Railway a short distance from the unloading pens in the stockyards. Tracks of the Junction Railway extend into, and are used to haul dead freight to and from, the Hygrade plant. The charge for switching livestock into the plant is $12 per car. To avoid that burden, the Hygrade Company elects, as did its predecessors, to have all livestock intended for slaughter at the plant shipped to the stockyards. These yards are livestock terminals of the carriers and are served by trains operated by them over the tracks of the Junction Railway. Each carrier's tariff specifies rates covering transportation of livestock to Chicago including delivery to consignee on the carrier's own line. But, as practically all shipments to Chicago are consigned to the public stockyards, there is little, if any, need or use of individual carrier unloading facilities.

To cover the movement over the Junction Railway to the public stockyards, western carriers add to the Chicago rate $2.70 and eastern carriers $1.35 per car. No additional charge is made for unloading. The carriers employ and pay the Yards Company for unloading the livestock

the amount—$1 per car—specified in its tariffs filed with the Interstate Commerce Commission. That work is accomplished by means of platforms and chutes down which the animals are driven from the cars into pens. These pens are not suitable places in which long to hold livestock. At peak periods of stock train arrivals these facilities are so much in use that the Yards Company is able to permit the animals to remain in the unloading pens only a short time—often not more than a few minutes. And, unless promptly taken away by consignee, the Yards Company transfers them to holding pens.

About 85 per cent. of all consignments to the Hygrade Company are so transferred. The others are by it taken from the unloading pens and driven through ways or alleys within the extensive yards properties over scales, where for the purpose of computing freight charges they are weighed, to and along an elevated runway over pens in the yards and the tracks of the Junction Railway, thence to and through a tunnel, under the proposed extension of Pershing Road (located along what was formerly a part of the Chicago River) ending at the Hygrade Company's plant which abuts on that highway. The Yards Company, in accordance with its tariffs filed with the Secretary of Agriculture, makes and collects a specified charge per head on all livestock received in the yards—being 35, 25, 12 and 8 cents respectively for cattle, calves, hogs and sheep. These charges apply to animals taken by the consignee immediately from unloading pens to its plant as well as to those transferred by the Yards Company to the holding pens, later to be taken by consignee. The tariffs of the Yards Company also specify charges for other services.[1] As to each carload, it makes a statement showing separately the carrier's charges and its own. It

[1] They include: Feed and feeding, bedding, dipping and spraying, immunizing and incidental care of swine, cattle testing, cleaning and disinfecting of pens, etc., branding, and other special services.

collects the total, accounts to the carriers for those covered by their tariffs filed with the Interstate Commerce Commission, and retains the balance.

The report of the Commission (195 I. C. C. 553) states: The stockyards are livestock terminals of the carriers. Consignees are entitled to delivery at suitable pens without charge for the mere placement therein of the livestock. The unloading pens are suitable for the accomplishment of proper delivery to consignee. The method of handling is efficient and satisfactory. The fact that the carriers have at Chicago destinations other places of delivery where no charge is made is not a legally sufficient reason for an extra charge at the stockyards. As to about 15 per cent. of all shipments consigned to complainant "it has taken delivery before the animals were placed in holding pens." There is no occasion for putting them in holding pens if prompt delivery is desired. The fact that other freight is subject to storage or demurrage charges only after the lapse of considerable time is not a sufficient reason why similar rules should apply in respect of yardage charges on livestock. After unloading, livestock requires unusual attention and care such as is not required by other freight.

The Commission concluded: The switching charge is not shown to be unreasonable or otherwise unlawful.

Prompt delivery does not require pens to be so equipped as to provide rest, feed and water for livestock. If placement into pens that are so equipped is desired, an extra charge therefor is not within the inhibition of § 15.

There are no services performed after unloading for which defendants may assess charges in instances where delivery is taken at the unloading pens. The livestock in carloads consigned to complainant at the yards is not subject to yardage charges in instances where delivery is so taken. Complainant is entitled to reparation.

The Commission ordered that the carriers and Yards Company cease and desist from practices which subject

complainant to payment of yardage charges on livestock, in instances where delivery is taken at the unloading pens, and that the proceeding may be reopened to ascertain the amount of reparation.

Appellants contend that transportation ends with unloading of livestock into suitable pens and that, for lack of essential findings of fact, the order is void.

Transportation of ordinary livestock in carload lots from and to points other than public stockyards has always been deemed to include furnishing of facilities at the place of shipment for loading and at destination for unloading and suitable ways for convenient ingress and egress. *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, 134–135. *Erie R. Co.* v. *Shuart,* 250 U. S. 465, 468. 2 Hutchinson, Carriers, 3d ed., § 510. Cf. *Norfolk & Western Ry.* v. *Public Service Comm'n,* 265 U. S. 70, 74. And, in the absence of understanding or agreement to the contrary, transportation includes loading and unloading. 4 Elliott, Railroads, 3d ed., § 2346. *Indiana Union Traction Co.* v. *Benadum,* 42 Ind. App. 121, 123; 83 N. E. 261. *Davis* v. *Simmons* (Tex. Civ. App.), 240 S. W. 970, 976. *Massey* v. *Texas & P. Ry. Co.* (Tex. Civ. App.) 200 S. W. 409, 410. *Benson* v. *Gray,* 154 Mass. 391, 394; 28 N. E. 275.

But for many years, in virtue of custom and as well by the terms of shipping contracts in general use, that burden has been laid upon shippers. 2 Hutchinson, Carriers, 3d ed., § 711. *London & L. Fire Ins. Co.* v. *Rome, W. & O. R. Co.,* 144 N. Y. 200, 205; 39 N. E. 79. Indeed, October 21, 1921, the Interstate Commerce Commission, acting under authority of § 15 (1) and following a form of clause submitted by shippers and carriers, prescribed a uniform livestock contract containing § 4 (a): "The shipper at his own risk and expense shall load and unload the live stock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or

is assumed by a lawful tariff provision." 64 I. C. C. 357, 363, App. F. But the practice has long been otherwise at the Chicago Union Stockyards. For more than 50 years prior to 1917 the carriers without any additional charge to shipper or consignee unloaded livestock into pens provided by the Yards Company. *Adams* v. *Mills,* 286 U. S. 397, 410. Paragraph (5) of § 15 enacted in 1920 made the practice general and compulsory in public stockyards throughout the United States. And the Yards Company has always collected a charge on all animals received in its yards. It may be assumed that shippers, commission men and packers, including the Hygrade Company, have had knowledge of this long existing practice.

Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills, supra.* While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock received.[2] The Packers and Stockyards Act, approved August 15, 1921, subjects public stock-

[2] Section 15 (5) of the Interstate Commerce Act, added by § 418 of the Transportation Act, 1920, 41 Stat. 486, provides:

"Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards." 49 U. S. C., § 15 (5).

yards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the receiving, holding and delivery of livestock.[3] Section 406 provides that the Act shall not affect the jurisdiction of the Commission or confer upon the Secretary concurrent jurisdiction over any matter within the jurisdiction of the Commission.[4]

There is here involved no question as to the adequacy of individual carriers' unloading or other facilities for the delivery of livestock. The Hygrade Company did not seek and the Commission did not grant relief upon the ground that the carriers failed to provide egress from the unloading pens in the public stockyards to the city streets by means of which consignee's animals might be removed to its plant. Consignee sought free delivery in cars switched into its plant, but the Commission found the switching charge not unreasonable. Consignee also sought free use of the Yards Company's properties, including the overhead runway to take its animals from holding pens as well as from unloading pens to its plant. The Commission held against it as to the first and in its favor as to the other of these demands.

Long continued practice and special conditions made unloading at these yards a transportation service to be performed by the carrier. *Adams* v. *Mills, supra,* 410. So the long established and uniform practice to provide a

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[3] " The term 'stockyard services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." 7 U. S. C., § 201 (b).

[4] " Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission." 7 U. S. C., § 226.

route via the overhead runway to the Hygrade plant distinguishes the use of the Yards Company's properties for this service from mere egress such as is included in transportation of livestock to destinations other than public yards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways. Transportation does not include delivery within the Hygrade plant or the furnishing of the properties, overhead runway and all, that are used for that purpose. Usage and physical conditions combined definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by § 15 (5). Like the railroads, public stockyards are public utilities subject to regulation in respect of services and charges. The statutes cited clearly disclose intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

The Commission's ruling that the imposition of the yardage charge on animals taken by consignee from holding pens does not violate the Act implies that as to those animals transportation ended at the unloading pens. On the other hand, its ruling that in the instances where consignee takes delivery at unloading pens the animals are not subject to the yardage charge suggests that delivery is not completed by unloading into suitable pens. That necessarily implies something more to be done or furnished by the carrier. But the Commission, in respect of the shipments covered by its order, made no definite finding as to what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to

constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida* v. *United States,* 282 U. S. 194, 215. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry.* v. *United States,* 282 U. S. 74, 86. *Interstate Commerce Comm'n* v. *Chicago, B. & Q. R. Co.,* 186 U. S. 320, 341.

Reversed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be affirmed.

The Interstate Commerce Commission found that the stockyards are the live stock terminals of the carriers; that a "yardage charge" per animal is assessed on all shipments of live stock delivered by the carriers at the stock yards; that the charge is imposed whether the live stock is taken by the consignee directly from the unloading pens or from the holding pens, to which the animals are taken if not immediately removed by the consignee upon arrival; and that appellee removes about 15% of all shipments consigned to it directly from the unloading pens. Upon the basis of these findings the Commission concluded that the yardage charge upon live stock removed from the holding pens is proper, but that the charge is improper and unlawful when made upon live stock received by the consignee and removed immediately upon arrival from the unloading pens and the yards.

These findings are thus the complete and obvious equivalent of a finding that a charge in addition to the scheduled tariff rate is imposed on consignees, including appellee, for the bare privilege of access to the unloaded live stock for the purpose of its immediate removal from the carriers' terminal. They are ample to raise the questions of law decided below and presented here, whether

the charge is lawful and whether the Commission has jurisdiction to forbid it. The precise point in space at which delivery is complete, or where transportation ends, is immaterial. For whether it ends when the cattle are placed in the unloading pens or only when the consignee removes the live stock from the terminal, the questions remain whether a charge levied upon the privilege of removal from the carriers' terminal is lawful and whether, in any case, the Commission has jurisdiction.

It appears that appellee drives the live stock to its place of business, in part over a viaduct, belonging to the stock yards, and in part through a tunnel, the ownership of which does not appear. But the order of the Commission does not require the use of either the viaduct or the tunnel for that purpose, or forbid a charge for their use. It only forbids yardage charges "where delivery was or is taken at the unloading pens." Appellants are thus left free, after removing the condemned charge, to provide any reasonable means of free access to the stock yards terminal for the purpose of proper removal of the live stock from the unloading pens. See *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 513; *Chicago, I. & L. Ry. Co.* v. *United States,* 270 U. S. 287, 292, 293.

In thus declaring that it is a part of the duty of a common carrier of live stock by rail to provide costless facilities for its delivery and immediate removal by the consignee on arrival at its destination, the Interstate Commerce Commission did not announce any novel rule of law. A carrier can no more lawfully add such a charge to the scheduled rate for the transportation service than it could demand a toll of a passenger, who had paid his fare, for alighting at or passing through its railway station upon arrival, or for removal of his hand bag delivered to him from its baggage car. This was specifically stated by this Court in *Covington Stock-Yards Co.* v. *Keith,* 139

U. S. 128, 135, in declaring unreasonable and unlawful any charge for delivery and prompt receipt of the live stock, made by a company whose stock yards had been designated by the rail carrier as its delivery station.

Section 1 of the Act to Regulate Commerce, as originally enacted in 1887, c. 104, 24 Stat. 379, continued this duty of common carriers by rail by providing that the charges for the transportation of passengers or property "or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just." The Act, as amended, amplifies this duty by providing in § 6 (1) of the Interstate Commerce Act that rate schedules shall "state separately all terminal charges," and by § 6 (7) which prohibits rail carriers from receiving any greater or different compensation for transportation of passengers or property "or for any service in connection therewith, between the points named in such tariffs than the rates" which are specified in the filed tariff. Section 1 (3) of the Act gives to the Commission jurisdiction over "terminal facilities of every kind used or necessary in the transportation of persons or property . . . including all freight depots, yards and grounds, used or necessary in the transportation or delivery of any such property," and further provides that the term "transportation" as used in the Act shall include "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery . . . and handling of property transported." The Commission is thus given jurisdiction over the terminal services of each carrier incidental to the transportation and delivery of freight which could in any wise affect the charges or rates for the transportation service which they undertake to render. Even storage of goods at destination is a part of the transportation service, in the sense of the federal act,

and subject to the jurisdiction of the Commission. *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632, 637; *Cleveland, C., C. & St. L. Ry. Co.* v. *Dettlebach,* 239 U. S. 588.

When Congress enacted the Packers and Stock Yards Act of 1921, c. 64, 42 Stat. 159, it gave to the Secretary of Agriculture regulatory jurisdiction over public stockyards, including specified stock yard services, but it was provided by § 406 (a) that "nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission."

This duty of the carrier, and the jurisdiction of the Commission to compel the performance of it, were recently recognized and reaffirmed by this Court in *Adams* v. *Mills,* 286 U. S. 397, 409–415, upholding a reparation award by the Commission against the carrier and the Chicago Stock Yards for an unloading charge not absorbed by the carrier or included in its schedule of tariffs. It was held that the yards used by the carrier as a place of delivery were terminals of the railroad company regardless of their ownership, see *Merchants Warehouse Co.* v. *United States, supra,* 513, that unloading the live stock was a transportation service for which no charge could be made which was not designated in the filed tariffs, and that the Commission had jurisdiction to forbid the unlawful practice and to order reparations for the overcharge. See also *Cleveland, C., C. & St. L. Ry. Co.* v. *Dettlebach, supra; Southern Ry. Co.* v. *Prescott, supra.*

To avoid these plain provisions of the statutes of the United States, and the unambiguous definition by this Court of the duty of a rail carrier of live stock, appellants rely on an ingenious interpretation of § 15 (5) of the Interstate Commerce Act. This section, so far as now material, provides that transportation by railroad of ordinary

live stock in carloads, received at public stockyards, shall include "all necessary service of unloading and . . . delivery at public stock yards of inbound shipments into suitable pens . . . without extra charge therefor to the shipper, consignee or owner. . . ." It is said that this legislation, by requiring the carrier to deliver the live stock into suitable pens and by prohibiting any extra charge for all necessary service of unloading the live stock, has left the carriers and the stock yards company, acting together or independently, free to charge the consignee or owner a toll for the privilege of removing his live stock from the stock yard terminal of the carriers.

In view of the consistent policy of the law, and the persistent but unsuccessful efforts of carriers and stock yards to impose forbidden charges for carrier service attending the unloading and delivery of the live stock, it would seem that the words, "all necessary service of unloading and . . . delivery" of live stock at a stock yard might fairly be taken to include all those incidental services at a terminal which the carrier is bound to render for its scheduled tariff and that "suitable pens" to which the carrier must make the delivery must at least be taken to mean pens to which the consignees may gain unimpeded access for the purpose of removing their stock. But if such is not the meaning of its language, and the statute speaks only of delivery of the live stock into the pens capable of holding them, it is difficult to see upon what principle of statutory construction it can be said that the section, by forbidding one unlawful practice, sanctions another which it does not mention. Its purpose was remedial, to remove an old evil, and not to sanction a crop of new ones by giving stock yards and rail carriers of live stock *carte blanche* to impose vexatious charges which for more than thirty years had been condemned by this Court as unlawful.

The section was added by way of amendment to the bill which became the Transportation Act of 1920, c. 91, 41 Stat. 456, in consequence of representations made to the Committee on Interstate and Foreign Commerce of the House in behalf of the American National Live Stock Association and the National Live Stock Shippers League. See 59 Cong. Rec. 674. Their representative made bitter complaint of the practices of carriers and stock yards, in adding terminal charges to the scheduled carrier rates, so that shippers could not know in advance the cost of the complete transportation service involved in taking live stock from the point of shipment into the hands of the consignee ready to receive it at point of delivery. The resolution of the Associations asked the enactment, as a part of the Interstate Commerce Act, of the rule of the *Covington Stock-Yards* case, and specifically "that there be one through rate on live stock for the whole services from point of origin to the destination at public stock-yards . . . which shall include unloading into suitable pens and delivery therein at such stock yards . . . including such facilities as are necessary or in use for making such delivery." See Hearings before the Committee on Interstate and Foreign Commerce on H. R. 4378, House of Representatives, 66th Cong., 1st Sess., pp. 139, 141, 874, 875, 881.

In introducing the amendment in the Senate, Senator Cummins, Chairman of the Interstate Commerce Committee, referred to the request of the Live Stock Association in emphasizing the purpose of the amendment, which he stated was to require the series of services rendered in connection with the transportation to be performed for a single scheduled rate. 59 Cong. Rec. 674. On the coming in of the conference report on the bill recommending it in its final form, the House Managers made a statement that the purpose of the amendment was to provide that

the " through rates on live stock should include unloading and other incidental charges." 59 Cong. Rec. 3264. The legislative history from beginning to end indicates unmistakably the single purpose to give the Commission authority to remove the very abuses described and forbidden by the Court in the *Covington Stock-Yards* case. It would be an incongruous result of this legislation if, by forbidding an unlawful charge for putting the live stock into the unloading pens, it had made lawful the same charge for taking it out, and had thus condemned the aggrieved shippers and consignees to the limbo from which they were earnestly striving to escape. An interpretation of a statute leading to an absurd result is to be avoided where reasonably possible, as it plainly is here. See *United States* v. *Katz,* 271 U. S. 354, 357; *Hawaii* v. *Mankichi,* 190 U. S. 197, 212.

It is true that yardage charges have been imposed by the appellant stock yard for many years. But, as already indicated, the Commission found that the charge is lawful when the live stock is removed from the unloading to the holding pens, as is done with most shipments. It does not appear how long and how extensively the charge has been applied to live stock immediately removed from the unloading pens by the consignees. In any case, long continuance of an unlawful practice can neither excuse nor sanction it. See *Merchants Warehouse Co.* v. *United States, supra,* 511; *Louisville & Nashville R. Co.* v. *United States,* 282 U. S. 740, 759; *American Express Co.* v. *United States,* 212 U. S. 522; *Los Angeles Switching Case,* 234 U. S. 294, 312, 313. I think that the Commission was right in forbidding the yardage charge as applied to live stock taken by the consignee from the unloading pens, and that its order should be left undisturbed.

In the present state of the case it is unnecessary to consider whether the reparations part of the order was rightly

directed to both the stock yards and the carriers, or should have been directed to the carriers alone.

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

AWOTIN *v.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO.

CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, OF ILLINOIS.

No. 661. Argued April 10, 1935.—Decided April 29, 1935.

1. Rev. Stats., § 5136, as amended, in providing that buying and selling of bonds, notes or debentures, commonly known as investment securities, by national banks shall be limited to buying and selling "without recourse," forbids not only the assumption of liability by technical endorsement of the securities sold but also by any form of agreement, such as a contract to repurchase them at maturity for the price paid the bank with accrued interest, by which the bank undertakes to save its purchaser from loss incurred by reason of his purchase. P. 211.
2. One who buys securities from a national bank accompanied by the bank's undertaking to repurchase them at maturity for the amount of the purchase price plus accrued interest, is charged with knowledge of the statutory prohibition against such agreements (R. S., § 5136, as amended) and may neither hold the bank to the forbidden contract by estoppel nor recover the purchase money upon tender of the securities to the bank. P. 213.
3. The opinion of the state court whose judgment is brought here for review does not reveal whether its rejection of the contention that it is the duty of the bank to make restitution of the purchase price was rested upon a state ground or its interpretation of R. S., § 5136. But this Court has jurisdiction to review the determination of the state court that the bank's contract to purchase the securities is invalid and to determine whether the federal statute precludes restitution of the purchase money. P. 213.

275 Ill. App. 530, affirmed.

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CERTIORARI, 294 U. S. 703, to review the reversal of a judgment recovered by the above named petitioner in an action against a national bank on its agreement to repurchase bonds which it had sold to him, and in general assumpsit for the money paid for them. The Supreme Court of the State denied leave to appeal.

Mr. Edward C. Higgins, with whom *Messrs. Samuel A. Ettelson* and *Herbert A. Salzman* were on the brief, for petitioner.

Mr. Daniel M. Healy filed a brief on behalf of respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on certiorari to review a determination of the Appellate Court, First District, of the State of Illinois, that respondent, a national banking association, has incurred no liability in consequence of the failure to perform its contract with the petitioner, declared by the court to be invalid because in violation of R. S. § 5136, as amended February 25, 1927, c. 191, § 2, 44 Stat. 1224, 1226.

On November 1, 1929, petitioner purchased of respondent at par thirty-five $1,000 Mortgage Bonds of the First National Company Collateral Trust. Contemporaneously with the purchase, and as an inducement and part consideration for it, respondent agreed in writing at petitioner's option to repurchase the bonds at maturity, at par and accrued interest. Petitioner's declaration in several counts set up, in special assumpsit, respondent's breach of the express contract to repurchase the bonds, and, in general assumpsit, the obligation of respondent to return the sum received for the bonds. Judgment of the trial court for petitioner on the pleadings, overruling the defense that the contract was *ultra vires* and void, was reversed by the Appellate Court, 275 Ill. App. 530, and the Supreme Court of the State denied leave to appeal.

Revised Statutes, § 5136, authorizes national banks to carry on a banking business and defines their powers. By the amendment of February 25, 1927, a proviso was added to paragraph (7), reading:

"*Provided,* That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person . . . or corporation, in the form of bonds, notes, and/or debentures, commonly known as investment securities, . . ." It is the contention of petitioner that respondent's contract to repurchase the bonds was incidental to its authority to do a banking business and was not forbidden by the proviso; that in any case respondent is estopped to set up its invalidity; and that, even if the contract is held to be invalid, respondent is bound to make restitution of the purchase price.

1. Petitioner insists that the words of the statute, "without recourse," must be taken to have only the technical legal significance in which they are used to limit the liability of an endorser of negotiable paper, as meaning without liability as an endorser or guarantor of the obligation of a third party, and that respondent did not assume that form of liability by agreeing to repurchase the bonds. But when the words are read in their context, and in the light of the evident purpose of the proviso, it is apparent that they were intended to have a broader meaning and one more consonant with all the different forms of business to which the proviso relates.

The evil aimed at is concededly a consequence of either an endorsement or guaranty by the bank of the paper which it sells. Both are forms of contingent liability inimical to sound banking and perilous to the interest of depositors and the public. But the liability is the same, in point of substance and of consequences, whether it ensues from technical endorsements of negotiable paper which the bank has sold, or from any other form of con-

tract by which the bank assumes the risk of loss which would otherwise fall on the buyer of securities, or undertakes to insure to the seller the benefit of an increase in value of securities which would otherwise accrue to the bank. See *Logan County National Bank* v. *Townsend,* 139 U. S. 67.

The proviso was the first express recognition of the authority of national banks to engage in the business of dealing in securities (see H. R. Report No. 83, p. 3; Sen. Report No. 473, p. 7, 69th Cong. 1st Sess.), and subjected the business to the limitation that it must be conducted without recourse. The limitation is expressly made applicable both to buying and selling "marketable obligations evidencing indebtedness in the form of bonds, notes or debentures." The words, if restricted in their meaning to the endorsement or guaranty of negotiable paper, could have no application to the purchase of such obligations, and normally would have none to the sale of bonds and debentures, which are usually negotiated without endorsement. A meaning is to be preferred, if reasonably admissible, which would permit their application, as the statute prescribes, to both forms of transactions and to all the specified classes of securities. Both the form and purpose of the statute impel the conclusion that the words were used in a broad and nontechnical sense, as precluding, at least, any form of arrangement or agreement in consequence of which the bank is obligated to save the purchaser harmless from loss incurred by reason of his purchase. See *Knass* v. *Madison & Kedzie Bank,* 354 Ill. 554; 188 N. E. 836; *Hoffman* v. *Sears Community Bank,* 356 Ill. 598; 191 N. E. 280; *Lyons* v. *Fitzpatrick,* 52 La. Annual, 697, 699; 27 So. 110; *Greene* v. *First National Bank,* 172 Minn. 310; 215 N. W. 213.

Respondent, by agreeing to repurchase the bonds at the same price petitioner had paid for them, plus their ac-

crued interest, undertook to save petitioner harmless from all risk of loss on his purchase, as effectively as if it had endorsed the bonds without restriction or had guaranteed their payment at maturity. The contract was therefore one which the statute prohibits and for the breach of which the law affords no remedy.

2. The petitioner, who was chargeable with knowledge of the prohibition of the statute, may not invoke an estoppel to impose a liability which the statute forbids. *Texas & Pacific Ry. Co.* v. *Pottorff,* 291 U. S. 245, 260; *California Bank* v. *Kennedy,* 167 U. S. 362; *Concord First National Bank* v. *Hawkins,* 174 U. S. 364, 369; *First National Bank* v. *Converse,* 200 U. S. 425, 439, 440; *Merchants' National Bank* v. *Wehrmann,* 202 U. S. 295, 302.

3. The state court rejected the contention that it was the legal duty of respondent to make restitution to petitioner of the purchase price of the bonds which it had received in consideration of its invalid contract. We do not stop to consider how far the court, as is contended, based its decision upon procedural grounds, for it considered the merits and declared that no right arose upon an implied assumpsit although respondent had received the benefit of a contract which was *ultra vires* and void.

The opinion does not disclose whether this conclusion was rested upon the court's interpretation of rules of state law governing the *quasi* contractual right to compel restitution of the purchase price, or upon the court's construction of R. S. § 5136. If our jurisdiction depended upon its decision of the federal question, the opinion fails to reveal whether it is the federal or the state question which was decided, see *Lynch* v. *New York,* 293 U. S. 52; compare *Logan County Bank* v. *Townsend, supra,* 72, 73. But we have jurisdiction of the cause to review the ruling of the state court that the express contract was rendered invalid by the federal statute. While we may not properly exercise our jurisdiction to review or set aside

the state court's application of local law to the *quasi* contractual demand, we may, in the present ambiguous state of the record, appropriately determine whether the federal statute precludes recovery of the purchase money. We think that such is its effect.

The invalidity of the contract was not due to the mere absence of power in the bank to enter into it, in which case restitution, not inequitable to the bank or inimical to the public interest, might be compelled. See *Logan County Bank* v. *Townsend, supra,* 74, 75; *Hitchcock* v. *Galveston,* 96 U. S. 341, 350. The contract is invalid because it is within the broad sweep of the statute which by mandatory language sets up definite limits upon the liability which may be incurred by a national bank, in the course of its business of dealing in securities, by confining the business to buying and selling "without recourse." The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of "recourse" growing out of the transaction of the business. See *Bank of United States* v. *Owens,* 2 Pet. 527, 537; *Brown* v. *Tarkington,* 3 Wall. 377, 381; *Thomas* v. *Richmond,* 12 Wall. 349, 356; *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227, 262. National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them. Such a construction of the statute is inadmissible.

Affirmed.

KIMEN *v.* ATLAS EXCHANGE NATIONAL BANK OF CHICAGO.

CERTIORARI TO THE APPELLATE COURT, FIRST DISTRICT, OF ILLINOIS.

No. 662. Argued April 10, 1935.—Decided April 29, 1935.

Decided upon the authority of *Awotin* v. *Atlas Exchange National Bank, ante,* p. 209.

275 Ill. App. 638, affirmed.

CERTIORARI, 294 U. S. 703, to review the reversal of a judgment in an action for breach of the bank's contract to repurchase bonds and in general assumpsit to recover the purchase price.

Mr. Edward C. Higgins, with whom *Messrs. Samuel A. Ettelson* and *Herbert A. Salzman* were on the brief, for petitioner.

Mr. Daniel M. Healy filed a brief on behalf of respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case, which comes here on certiorari to the Appellate Court of Illinois, First District, is a companion case to *Awotin* v. *Atlas Exchange National Bank of Chicago,* decided this day, *ante,* p. 209.

On November 2, 1929, petitioner purchased of respondent, a national banking association, four $1,000 mortgage bonds of the First National Company Collateral Trust. As an inducement and consideration for the purchase, the respondent agreed to repurchase the bonds at their maturity, at par and accrued interest. In a suit brought by petitioner, to recover for breach of the contract and in general assumpsit to recover the purchase price of the

bonds, the trial court gave judgment for petitioner, which was reversed by the Appellate Court, 275 Ill. App. 638 (opinion not reported), following its decision in *Awotin* v. *Atlas Exchange National Bank, supra.* The Supreme Court of the State denied leave to appeal. The issues raised are the same as those in the *Awotin* case. For the reasons stated in our opinion in that case, the judgment is

Affirmed.

HARTLEY, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 602. Argued April 11, 12, 1935.—Decided April 29, 1935.

1. Under the Revenue Acts of 1921 and 1924, the basis for computing gain or loss on the sale of property of an estate, and its depletion or depreciation, for the purposes of taxing income returnable by an executor, is its value at the decedent's death, rather than its cost to the decedent or its value on March 1, 1913, if acquired before that date. Pp. 217–218.
2. The reënactment, without material change, of the pertinent provisions of § 202 of the Revenue Act of 1921 was a congressional recognition and approval of the interpretation of the section by the treasury regulations, which gave them the force of law. P. 220.
3. The incorporation into § 113 (a) (5), Revenue Act of 1928, of the substance of the Treasury Regulation prescribing that gains or losses of an estate should be computed on the basis of the value of the property at the date of the decedent's death, was intended to clarify the law, not to change it. *Id.*

72 F. (2d) 352, affirmed.

CERTIORARI, 294 U. S. 700, to review the affirmance of a decision of the Board of Tax Appeals, 27 B. T. A. 952, sustaining a determination of income taxes by the Commissioner of Internal Revenue.

Mr. H. C. Fulton, with whom *Messrs. H. B. Fryberger* and *E. L. Boyle* were on the brief, for petitioner.

Mr. David E. Hudson, with whom *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *A. F. Prescott* were on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

The Court of Appeals for the Eighth Circuit, 72 F. (2d) 352, affirmed a ruling of the Board of Tax Appeals, 27 B. T. A. 952, and held that under § 202 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 229, and § 204 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 258, the basis for computing gain or loss on the sale of property, and its depletion or depreciation, for purposes of taxing income returned by the petitioner, an executor, is its value at the date of the decedent's death, rather than the cost to the decedent, or the value on March 1, 1913, if acquired before that date.

We granted certiorari to resolve a conflict of the decision below, and of the like decision, under § 202 of the 1918 Revenue Act, c. 18, 40 Stat. 1057, 1060, of the Court of Appeals for the Sixth Circuit in *Eldredge* v. *United States,* 31 F. (2d) 924, 930, with that of the Court of Claims in *McKinney* v. *United States,* 62 Ct. Cls. 180. See *Elmhirst* v. *United States,* 38 F. (2d) 915; *Myers* v. *United States,* 51 F. (2d) 145; compare *McCann* v. *United States,* 48 F. (2d) 446, each decided by the Court of Claims.

Petitioner's tax returns[1] were for the calendar years 1924 and 1925. Sections 202 (a), (b) and 214 (a) (8), (10)

[1] As permitted by § 702 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 879, petitioner elected to have his tax determined "in accordance with the law properly applicable," § 702 (b), rather than "in accordance with the regulations in force at the time such return was filed," § 702 (a).

of the 1921 Act, and § 204 (a), (b), (c) of the Revenue Acts of 1924 and 1926, c. 77, 44 Stat. 9, provide that the basis for computing gain or loss on the sale of property, and depreciation and depletion, shall be its cost, or its value on March 1, 1913, if acquired before that date. None of the acts specifically provides a basis for making the computations where return is made of income received by the estate of a decedent in the course of administration. But in the case of property acquired by "bequest, devise, or inheritance" § 202 (a) (3) of the 1921 Act and § 204 (a) (5) of the 1924 and 1926 Acts provide that the basis shall be the fair market value "at the time of acquisition."

The revenue acts consistently treat the estate of a decedent in the hands of an administrator or executor as a separate taxpayer. By § 2 of the 1921, 1924 and 1926 Acts the estate of a decedent is embraced within the term "taxpayer." Each Act specifically provides for taxation of the income of an estate during administration. § 219 of the 1921, 1924 and 1926 Acts. Each includes profits from the sale of property by the taxpayer in taxable income, § 213 of the 1921, 1924 and 1926 Acts, and provides for the deduction of losses from gross income in arriving at taxable income. § 214 of the 1921, 1924 and 1926 Acts. See *Merchants Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 516, 517. Each makes provision for the imposition of a tax upon the estates of deceased persons, and the "gross estate" which is the basis for computing the tax is the value of the decedent's property at the time of his death. § 402, 1921 Act; § 302, 1924 and 1926 Acts.

The Court of Claims held that the time of acquisition, indicated by § 202 (a) of the 1921 Act and § 204 (a) of the 1924 and 1926 Acts as the controlling date for calculating gain or loss to the estate in the course of administration, must be taken to be the date of acquisition

by the decedent rather than the time of acquisition by the executor or administrator on the decedent's death. This conclusion, it was thought, was compelled by the statutory command that the basis of computation shall be "cost," which could have no application to the acquisition by the executor or administrator, who is not a purchaser of the estate which he administers. *McKinney* v. *United States, supra,* 188. But this specification is not enough to restrict the effect of the general provisions of these revenue acts which impose a tax on the income, including capital gains, of taxpayers. The use of the word cost does not preclude the computation and assessment of the taxable gains on the basis of the value of property, rather than its cost, where there is no purchase by the taxpayer, and thus no cost at the controlling date. See *Heiner* v. *Tindle,* 276 U. S. 582, 585, 586; *Lucas* v. *Alexander,* 279 U. S. 573, 578, 579.

No plausible reason has been advanced for supposing that Congress intended the capital gains or losses of the estate of a decedent to be treated any differently from those resulting from the sale of property taken by "bequest, devise, or inheritance," as provided in § 202 (a)(3) of the 1921 Act and § 204 (a)(5) of the 1924 and 1926 Acts, or that it intended to bring gains or losses, accruing between the date of decedent's acquisition of the property and his death, into the computation of both the estate tax and the income tax assessed upon his administrator or executor. When it had a different purpose in the case of gifts inter vivos, not subject to a gift tax, it specifically directed that gains or losses to the donee should be computed on the basis of the cost of the property at the date of acquisition by the donor. § 202 (a)(2), 1921 Act; § 204 (a) (2) (4), 1924 and 1926 Acts; see *Taft* v. *Bowers,* 278 U. S. 470; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 462. The conclusion seems inescapable that the intended date of acquisition by an executor or administra-

tor, where the estate is the taxpayer, is the date of the decedent's death. *Brewster* v. *Gage,* 280 U. S. 327, 335.

Possibility of doubt was removed by treasury regulation. Article 343 of Regulation 45, under the 1918 Act, prescribed that gains or losses of an estate should be computed on the basis of the value of the property at the date of the decedent's death. This was carried forward by Art. 343 of Reg. 62 under the Act of 1921, of Reg. 62 under the Act of 1924, and of Reg. 69 under the Act of 1926. Following the decision of the Court of Claims in *McKinney* v. *United States, supra,* and with the purpose of conforming to it, the ruling was amended by T. D. 4011, VI–1 Cum. Bul. 77, on April 6, 1927, so as to make the cost to the decedent the basis of the computation. Doubts having been raised as to the ruling in *McKinney* v. *United States, supra,* by later decisions,[2] the amendment was revoked and Article 343 restored to its original form, T. D. 4177, VII–2 Cum. Bul. 134, on July 7, 1928. The substance of the regulation in its original and final form was carried into § 113 (a)(5) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 819, which directed that the basis for the computation of gains or losses upon property acquired by the decedent's estate from the decedent should be its value at the time of the decedent's death.

The reënactment of the pertinent provisions of § 202 of the Revenue Act of 1921 in the Acts of 1924 and 1926, without material change, was a congressional recognition and approval of the interpretation of the section by the treasury regulations, which gave them the force of law. *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289, 293, 294; *Brewster* v. *Gage, supra,* 337. The incorporation of the regulation in § 113 (a)(5) of the 1928 Act

[2] *Nichols* v. *United States,* 64 Ct. Cls. 241; *Bankers' Trust Co.* v. *Bowers,* 23 F. (2d) 941 (S. D., N. Y.); Straight *v.* Commissioner, 7 B. T. A. 177.

was intended to clarify, but not to change the law. See Report of House Committee on Ways and Means, No. 2, 70th Cong., 1st Sess., p. 18; Report of Senate Committee on Finance, No. 960, 70th Cong., 1st Sess., p. 26; Report of Joint Committee on Internal Revenue Taxation, H. R. Doc. 139, 70th Cong., 1st Sess., pp. 17, 18.

Affirmed.

DOLEMAN, ADMINISTRATOR, *v.* LEVINE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 574. Argued April 4, 1935.—Decided April 29, 1935.

Under the Longshoremen's & Harbor Workers' Compensation Act, made applicable to the District of Columbia as a compensation law, where several persons, as dependants or next of kin, are entitled to claim compensation under the Act, or damages under the District of Columbia death statute, on account of the death of an employee caused by the negligence of a stranger to the employment, an election by one of them to take compensation under the Compensation Act does not operate to assign to the employer the cause of action against the wrongdoer with the right to sue upon it in his own name; but it subrogates the employer to the right that the person so electing had to compel suit by the executor or administrator and to share in the recovery. *Aetna Life Insurance Co.* v. *Moses*, 287 U. S. 530, distinguished. P. 228.

64 App. D. C. 25; 73 F. (2d) 842, reversed.

CERTIORARI, 294 U. S. 703, to review the affirmance of a judgment sustaining a plea in abatement in an action under the Wrongful Death Act of the District of Columbia.

Mr. Nathan A. Dobbins, with whom *Mr. James C. Waters, Jr.,* was on the brief, for petitioner.

Mr. Wilson L. Townsend, with whom *Messrs. Edward S. Brashears* and *Albert F. Beasley* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted to resolve doubts as to the construction of § 33 of the District of Columbia Compensation Act (Longshoremen's & Harbor Workers Compensation Act, c. 509, 44 Stat. 1424, 33 U. S. C., §§ 901 *et seq.*, made applicable to the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600).

Doleman, petitioner's intestate, in the course of his employment within the District, was struck by the automobile of respondent and received injuries which caused his death. He left surviving him his widow, and, as his heirs at law and next of kin, a brother and a dependent father, who is his administrator. The widow elected to receive compensation from the employer under the provisions of the Compensation Act. The father elected not to receive compensation and brought the present suit as administrator to recover for the death under the provisions of the Wrongful Death Act of the District. Code of Law for the District of Columbia, Title 21, §§ 1–3. A like suit, brought by the employer against the respondent, is also pending. The Supreme Court of the District gave judgment for the defendant, sustaining a plea in abatement which set up the pendency of the suit brought by the employer and that the right to recover for the wrongful death had been assigned to the employer by operation of the provisions of the Compensation Act. The Court of Appeals affirmed, 64 App. D. C. 25; 73 F. (2d) 842, relying in part on its construction of the relevant provisions of § 33 of the Compensation Act and in part on our decision in *Aetna Life Insurance Co.* v. *Moses,* 287 U. S. 530.

The Compensation Act establishes a scheme for compensation of an injured employee by the employer, and for the payment of benefits to a specified class of his dependents when the injury causes death. Where some person

other than the employer is liable for damages for the injury, compensation is governed by § 33.[1] Section 33 (a)

[1] "Sec. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

"(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as 'representative') to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

"(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

"(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative. . . ."

authorizes "the person entitled to such compensation" to elect to receive compensation or to recover damages "against such third person," and § 33 (b) provides that acceptance of such compensation "shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

In *Aetna Life Insurance Co.* v. *Moses, supra,* the widow of an employee who was killed in the course of his employment, and who was also his administratrix and the sole beneficiary under both the Compensation and the Wrongful Death Acts, elected to receive compensation. It was conceded that the widow, before her election, was alone entitled to the benefit of the Wrongful Death Act, and the question was who, in consequence of her election, was the proper plaintiff to bring the action. This Court held, construing § 33 (a) and (b), that the Compensation Act, called into action by her election, operated to transfer to the employer all her right of recovery under the Wrongful Death Act. Since the transfer of her entire interest was effected by § 33 (b), which in terms declared that acceptance of compensation by the dependent "shall operate as an assignment," we thought that a complete and unqualified transfer was intended, which would authorize the employer to maintain the suit in his own name, without necessity of suing in the name of the administratrix as in the case of an assignment of a chose in action at common law.

Similarly, § 33 (c) provides in terms for the transfer to the employer of "all right of the legal representative" of the deceased employee to recover for the wrongful death, where the deputy commissioner for the compensation district determines that there is no person under the Compensation Act entitled to compensation, and the employer makes the payment of $1,000 into the special compensation fund as prescribed by § 44.

A different question is presented where the dependent who has elected to receive compensation is entitled to only a partial interest in the amount to be recovered for the death. Such is the case here. For the widow alone has elected to take compensation, and under the Wrongful Death Act, § 3, the proceeds of the recovery are required to be distributed among the next of kin, which includes both the widow and the father, where the decedent leaves no surviving child. Title 29, D. C. Code, §§ 284, 285, 288.

The right of the employer to reimbursement from the recovery is derived from his subrogation, under § 33 (b) of the Compensation Act, to the rights of the dependent widow to whom he is bound to pay compensation. Apart from statute, the indemnitor's right by subrogation to stand in the place of his indemnitee, who is entitled to a part only of the proceeds of a single cause of action, does not carry with it any authority to maintain the action in his own name. See *Mandeville* v. *Welch,* 5 Wheat. 277, 286; *Shankland* v. *Washington,* 5 Pet. 390; *Vinal* v. *West Virginia Oil & Oil Land Co.,* 110 U. S. 215. He is in the position of a partial assignee of the chose in action, and as such is entitled to his share of the proceeds of the action when recovered and may secure their recovery by resort to equity, in a suit joining proper parties, to compel action by the legal owner and appropriate distribution of the proceeds. See *Peugh* v. *Porter,* 112 U. S. 737, 742; *Fourth Street Bank* v. *Yardley,* 165 U. S. 634, 644; *Aetna Life Insurance Co.* v. *Moses, supra,* 542, n. 3.

Section 33 (b) purports only to assign to the employer "all right of the person entitled to compensation to recover damages against such third person." It operates to transfer to the employer only such rights as the dependent has. We do not doubt that this section, interpreted in the light of the indemnitor's common law right of subrogation, confirms that right and is sufficient to give

the employer as indemnity all the rights which the dependents electing to receive compensation otherwise would have to share in the benefits of the Wrongful Death Act. If they are entitled to the whole recovery, the employer may maintain the suit as in *Aetna Life Insurance Co.* v. *Moses, supra.* If their interest is less than the whole, the employer is entitled to receive their share in the proceeds of recovery and, if necessary, by appropriate proceedings to compel the administrator to bring the suit and account for its proceeds. But the section does not purport to split the cause of action. A purpose to do violence to the firmly grounded tradition of the unity of a cause of action at law, by casting on the defendant the burden of defending two suits, is hardly to be implied. See *Mandeville* v. *Welch, supra.*

Nor, on the other hand, does the language of the section admit of a construction which would operate to transfer rights in the chose in action which the dependent electing to receive compensation did not have, or to confer upon the employer the benefit of any part of the proceeds of the recovery for wrongful death which the dependent receiving compensation could not have demanded. If § 33 (d) and (e) refer, as the court below thought, to an assignment to the employer in the circumstances mentioned in § 33 (b) as well as in § 33 (c), they do not support any construction of § 33 (b) different from that already indicated. Section 33 (d) authorizes the employer "on account of such assignment," to compromise the claim for damages or to institute proceedings upon it. Its provisions are permissive only. It would plainly sanction a compromise or a suit by the employer in the case where the injury did not result in death or where, as in *Aetna Life Insurance Co.* v. *Moses, supra,* the entire interest in the right to recover is vested in the employer by operation of § 33 (b). But in a case like the present, where the right assigned to the employer is to receive a part only of the

proceeds of recovery for the wrongful death, the language falls short of conferring upon him authority to compromise or sue upon claims which "such assignment" does not operate to transfer. This conclusion is supported, if not compelled, by the clause of § 33 (a), which authorizes a dependent [2] of the deceased employee to elect whether to receive compensation or to recover damages against a third person, and by § 33 (e), which gives to the employer as indemnity the full benefit of "any amount recovered" by him, before turning over the balance to the personal representative of the deceased. There may be next of kin of the decedent entitled to share in the recovery for wrongful death who are not entitled to compensation, and others who elect, as provided in § 33 (a) to take their share of the recovery for wrongful death instead of compensation. A construction of § 33 which would require the use of their shares to indemnify the employer, for payments to others who have elected to receive compensation, is not to be favored in the absence of language plainly requiring it.

It is true that in the case where the injury causes the death of an employee having no dependents, and the employer pays $1,000 into the special compensation fund as required by § 44, the right of the legal representative to recover for the wrongful death is in terms assigned by § 33 (c) to the employer who is authorized by § 33 (e) to indemnify himself from the proceeds of recovery.

[2] Section 33 (a) gives the election to "the person entitled to such compensation," and makes no express provision for the case where there is more than one dependent. Since the statute preserves to "the" dependent the right of election to recover damages against the third person, and does not in terms give one dependent the right to elect for all, it must be deemed to give each dependent the right of election independently of the others, and the phrase "the person entitled to such compensation" must be taken to mean each or any dependent.

Whatever purpose may have inspired these provisions of § 33 (c),[3] explicitly limited to the single case of the payment by the employer of the $1,000 into the special fund, we can find in them no warrant for giving to § 33 (b) a construction which its language does not admit and which would authorize the employer to indemnify himself for payments to dependents, not necessarily limited to $1,000, at the expense of the next of kin who receive no benefit of the compensation payments.

We conclude that where the employer is given anything to recover by a suit brought directly against the wrongdoer, it is the full recovery to which the injured employee or his personal representative would be entitled. See *Aetna Life Insurance Co.* v. *Moses, supra,* 540. But where the right of the dependent, to which the employer is subrogated by § 33 (b), is only to a share of the proceeds of the recovery, the employer is not authorized to maintain the action for wrongful death. As statutory assignee of the rights of the dependent receiving compensation, he acquires only the rights of his assignor to compel the executor or administrator, by appropriate proceedings, to maintain the suit and to share in the proceeds of the recovery.[4]

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[3] It is to be noted that in the case of assignments under § 33 (c) indemnity to the employer cannot be at the expense of the dependents of the deceased.

[4] A like construction has been given to the similar, but not identical, compensation statute of New York. If the persons receiving compensation do not include all of the next of kin who are beneficiaries under the Wrongful Death Act, the employer or insurance carrier must prosecute his claim to share in the proceeds through the administrator as statutory trustee, and may compromise or release his own interest, but no other. *U. S. Fidelity & Guaranty Co.* v. *Graham & Norton Co.,* 254 N. Y. 50, 53; 171 N. E. 903; *Zirpola* v. *Casselman, Inc.,* 237 N. Y. 367, 375; 143 N. E. 222. But if all of the next of kin entitled to receive the benefit of the recovery for wrongful death elect to receive compensation, the employer or insur-

While it seems beyond the resources of judicial ingenuity to construe the statute so as to give it a wholly consistent and harmonious operation, we think the construction which we adopt conforms to its language and to the principles of the common law, in the light of which it must be interpreted. It does not deny to the employer subrogation to the rights of those dependents receiving compensation to share in the recovery for wrongful death, but it leaves undisturbed the rights of the next of kin who, as § 33 (a) permits, elect to receive the benefits of the Wrongful Death Act rather than compensation.

Reversed.

FEDERAL LAND BANK OF ST. LOUIS *v.* PRIDDY, CIRCUIT JUDGE.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 594. Argued April 5, 1935.—Decided April 29, 1935.

1. Rulings by a State court that a Federal Land Bank is a foreign corporation within the meaning of the State's attachment statute and that an attachment of its property was authorized by the state law, present local questions not open to review by this Court. P. 231.
2. Federal Land Banks are federal instrumentalities, with a governmental function; and the extent to which they are amenable to judicial process is a question of congressional intent. P. 231.
3. Section 4 of the Federal Farm Loan Act provides that Federal Land Banks "shall have power . . . to sue and be sued . . . as fully as natural persons"; they are given some of the characteristics of private business corporations, and the remedies afforded to their creditors by the Act are the same that it affords to creditors of Joint Stock Banks, which are privately owned corporations, organized for profit to their stockholders. Furthermore, the Act

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ance carrier may maintain the action against the wrongdoer. See *Zirpola* v. *Casselman, Inc., supra,* 373; *Travelers Insurance Co.* v. *Padula Co.,* 224 N. Y. 397; 121 N. E. 348.

expressly exempts Federal Land Banks, but not Joint Stock Banks, from taxation. *Held:*

(1) That the liability of Federal Land Banks to suit includes, by implication, the process of execution and attachment. P. 232.

(2) The question is reserved as to whether attachment would be allowable if shown to interfere with any function performed by such bank as a federal instrumentality. P. 237.

4. Immunity of corporate government agencies from suit and judicial process, and their incidents, is less readily implied than immunity from taxation. P. 235.

5. *Semble* that the Act passed by Congress in 1873, amending § 2 of the National Bank Act of 1864 by providing that no attachment or execution shall issue against a national bank in any state court before final judgment, was a recognition that the liability of such banks to suit "as fully as natural persons" under the Act of 1864, extended to such process by implication. P. 236.

189 Ark. 438; 74 S. W. (2d) 222, affirmed.

CERTIORARI, 294 U. S. 700, to review a judgment refusing a writ of prohibition to restrain a state judge from proceeding with an action against a Federal Land Bank, begun by attachment.

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

No appearance for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

A real estate broker brought suit in the Circuit Court for Pope County, Arkansas, against petitioner, incorporated under Act of Congress (Federal Farm Loan Act, July 17, 1916, c. 245, 39 Stat. 360), and domiciled in Missouri, to recover a brokerage commission. Pursuant to local law (Crawford & Moses' Digest, §§ 1159–1163), he began the suit by attachment of real estate of the petitioner in the county, as that of a foreign corporation.

Petitioner appeared specially in the circuit court and moved to vacate the attachment, on the grounds that it is

not a foreign corporation subject to attachment under the pertinent statutes of Arkansas, and that it is a federal instrumentality, immune from mesne process of attachment, by virtue of its organization and functions under the statutes of the United States. On denial of the motion, petitioner sought of the Supreme Court of the State a writ of prohibition directed to respondent, the Circuit Judge, which was denied. 189 Ark. 438; 74 S. W. (2d) 222. We brought the case here on certiorari.

The ruling of the state Supreme Court, that petitioner is a foreign corporation within the meaning of the Arkansas attachment statute, and that the attachment was authorized by local law, presents only a state question, which is not open for review here. The sole question for our consideration is whether the petitioner is exempt from attachment because it is a federal agency or instrumentality which Congress has not expressly subjected to judicial process.

Without now entering into a detailed examination of the subject, it is sufficient that this Court has already had occasion to consider the organization and functions of federal land banks, and to declare that they are instrumentalities of the federal government, engaged in the performance of an important governmental function. *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180; *Federal Land Bank* v. *Gaines*, 290 U. S. 247. As such, so far as they partake of the sovereign character of the United States, Congress has full power to determine the extent to which they may be subjected to suit and judicial process. See *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 677. Whether federal agencies are subjected to suit and, if so, the extent to which they are amenable to judicial process, is thus a question of the congressional intent. See *The Lake Monroe*, 250 U. S. 246, 249; *Sloan Shipyards* v. *U. S. Shipping Board*, 258 U. S. 549; *Missouri Pacific R. Co.* v. *Ault*, 256 U. S. 554, 559. If the

answer is not made plain by the words of the statute, it is necessary to ascertain, by examination of the purposes and organization of the federal farm loan system, whether immunity from attachment is granted by implication. See *Shaw* v. *Oil Corp.*, 276 U. S. 575.

Section 4 of the Federal Farm Loan Act provides that federal land banks "shall have power . . . to sue and be sued, complain, interplead, and defend, in any court of law and equity, as fully as natural persons." This express waiver of immunity from suit narrows the inquiry to the question whether liability to suit includes by implication judicial process of attachment and execution, which are usual incidents of suits against natural persons. For it is conceded that if the liability to suit includes liability to execution, it would equally include liability to process of attachment, by which the property seized is held subject to execution.

In interpreting § 4, it is to be borne in mind that federal land banks, although concededly federal instrumentalities, possess also some of the characteristics of private business corporations.[1] See *Federal Land Bank* v. *Gaines, supra,* 254. The statute does not contemplate that their stock is to be wholly, or even chiefly, government owned.[2] Its

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[1] The legislative history of the Federal Farm Loan Act shows that Congress understood that many of the activities of the federal land banks were to be of a private character. See Report, Joint Cong. Comm., H. R. Doc. No. 494, 64th Cong., 1st Sess., p. 6; Report of Senate Comm. on Banking and Currency, No. 144, 64th Cong., 1st Sess., p. 2; Remarks of Senator Hollis, sponsor of the bill, 53 Cong. Rec. 6854. For this reason the Senate gave extended consideration to the constitutionality of exempting federal land banks from state taxation. 53 Cong. Rec. 6961–6970, 7305–7318, 7372–7378.

[2] The original capitalization of the twelve federal land banks was $9,000,000, of which the Treasury subscribed $8,892,130. (Federal Farm Loan Board, Annual Report, 1917, p. 13.) As the national farm loan associations, made up of individual borrowers, were organized and borrowed from the banks, they were required to purchase

acquisition by private investors is permitted, § 5, and its subscription by the borrowing national farm loan associations is compulsory, § 7. The operations of the federal land banks are, in part at least, for profit. § 5. In the conduct of their business they may enter into contracts, § 4, borrow money, receive interest and fees, § 13, pay the expenses and commissions of agents, § 15, and pay dividends on their stock, § 5. While they are required to deposit in trust farm mortgages as security for farm loan bonds, § 13, they may acquire and dispose of property in their own right, including land. § 13. They thus have many of the characteristics of private business corporations, distinguishing them from the Government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an exclusively governmental purpose. This is a circumstance which gives some support to the inference that the intended scope of the liability to suit includes judicial process incident to suit. See *District of Columbia* v. *Woodbury,* 136 U. S. 450, 456; *Clallam County* v. *United States,* 263 U. S. 341, 345.

The implication finds support also in the fact that the remedies afforded by the Federal Farm Loan Act to creditors of federal land banks are identical with those given to creditors of joint stock land banks. Joint stock land

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stock in the banks. § 7. By this method the original Treasury subscription was almost wholly retired, and only $204,698 of the issued capital stock, $65,676,130, was Government owned in 1931. (Federal Farm Loan Board, Annual Report, 1931, p. 21.) Recent legislation has resulted in a large increase in the capital stock and surplus of the federal land banks, contributed by the Government. See Act of January 23, 1932, c. 9, 47 Stat. 12, 12 U. S. C. 698; Act of June 16, 1933, c. 100, 48 Stat. 274, 279; cf. Act of January 31, 1934, c. 7, 48 Stat. 344, 12 U. S. C. 1020 *et seq.* But the liability to judicial process cannot be thought to fluctuate with the varying amount of the government investment. See *Sloan Shipyards* v. *U. S. Shipping Board,* 258 U. S. 549, 566.

banks are privately owned corporations, organized for profit to their stockholders through the business of making loans on farm mortgages. § 16. There is nothing in their organization and powers to suggest that they are government instrumentalities. Section 16 declares that "except as otherwise provided, joint stock land banks shall have the powers of, and be subject to all the restrictions and conditions imposed on, Federal land banks by this Act, so far as such restrictions and conditions are applicable . . ." There is no other provision relating to their general corporate powers and liabilities. Section 29 provides that "upon default of any obligation, Federal land banks and joint stock land banks may be declared insolvent and placed in the hands of a receiver by the Farm Credit Administration [Federal Farm Loan Board] . . ." Except for § 4, subjecting federal land banks to suit, made applicable to joint stock land banks by § 16, there is no other remedy provided for creditors of either class of banks whose judgments are unpaid, and the receivership is available only through the favorable action of the Farm Credit Administration. In view of the character of the business of joint stock land banks, there is no ground for supposing that Congress intended to render their property immune from seizure by judicial process and thus to make a receivership, if permitted by the Farm Credit Administration, the sole means of compelling payment of judgments against them, or that it would have extended to them the provisions and restrictions of § 16 if it had been thought to exempt them from attachment and execution. The inference is strong that by treating the two types of corporations alike with respect to liability to suit and attachment, the one, as much as the other, was intended to be subject to judicial seizure of its property, such as is ordinarily incident to suits, to which both are expressly made subject.

It is of some significance, also, that Congress thought it necessary, by the terms of § 26, to exempt federal land

banks from taxation, a provision which is not made applicable to joint stock land banks. There is thus a specific grant of immunity from taxation, to a corporation having its own purposes as well as those of the United States, and interested in profits on its own account, see *Clallam County* v. *United States, supra,* 344, 345; compare *The Lake Monroe, supra,* 256, in contrast to the legislative silence as to attachment and execution in suits to which the bank is liable. This affords additional evidence of the congressional judgment that attachment and execution, as distinguished from liability to taxation, are not obstacles to the performance of the governmental functions committed to federal land banks. Had it been intended otherwise it would seem to have been at least equally necessary to provide specifically for immunity from attachment and levy, as was done in § 10 of the Federal Railroad Control Act, c. 25, 40 Stat. 451, 456, which subjected rail carriers under federal control to liability to suit. Immunity of corporate government agencies from suit and judicial process, and their incidents, is less readily implied than immunity from taxation. See *The Lake Monroe, supra; Sloan Shipyards* v. *U. S. Shipping Board,* 258 U. S. 549, 566–568; *Olson* v. *U. S. Spruce Corp.,* 267 U. S. 462; *U. S. Shipping Board* v. *Harwood,* 281 U. S. 519, 524–526; compare *The Davis,* 10 Wall. 15; *National Volunteer Home* v. *Parrish,* 229 U. S. 494; *Standard Oil Co.* v. *United States,* 267 U. S. 76, 79.

In prescribing liability to suit, the qualifying phrase "as fully as natural persons" is not customary in acts defining the powers and duties of private corporations, or usual in those creating corporations to perform federal functions.[3] It appears in § 8 of the National Banking

[3] See, e. g., the acts creating the Federal Reserve Banks, c. 6, § 4, 38 Stat. 251, 254, 12 U. S. C. 341; the War Finance Corporation, c. 45, § 6, 40 Stat. 506, 507, 15 U. S. C. 336; the Inland Waterways Corporation, c. 243, § 5, 43 Stat. 360, 362, 49 U. S. C. 155; the Fed-

Act, enacted in 1864, c. 106, 13 Stat. 99, 101, which authorized national banks "to sue and be sued, complain and defend, in any court of law and equity as fully as natural persons." In 1873 the National Banking Act was amended, c. 269, § 2, 17 Stat. 603, to provide that "no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any State, county or municipal court." (R. S. § 5242, 12 U. S. C. 91.) This amendment, which impliedly saved the right of execution upon judgments against national banks, while forbidding attachment, would seem to be a recognition by Congress that the liability of national banks to suit "as fully as natural persons" extends by implication to attachment and execution. See *Pacific National Bank* v. *Mixter,* 124 U. S. 721; *Van Reed* v. *People's National Bank,* 198 U. S. 554; compare *Earle* v. *Pennsylvania,* 178 U. S. 449, 454. The legislative history of this section of the National Banking Act suggests that the like provision, without the amendment, was incorporated in the Federal Farm Loan Act as sufficient to subject federal land banks to the same liability to attachment to which national banks were deemed to be subject before the amendment of the National Banking Act.

While none of these considerations, taken alone, may be enough to give clear indication of the congressional purpose, their cumulative effect is persuasive that federal land banks, like joint stock land banks, were intended to be subject to the incidents of suit, including attachment

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eral Intermediate Credit Banks, c. 252, § 201 (c), 42 Stat. 1451, 1454, 12 U. S. C. 1023; The China Trade Act Corporations, c. 346, § 6, 42 Stat. 849, 851, 15 U. S. C. 146; the National Volunteers' Home, R. S. § 4825; the Tennessee Valley Authority, c. 32, § 4, 48 Stat. 58, 60, 16 U. S. C. 831 c; the Reconstruction Finance Corporation, c. 8, § 4, 47 Stat. 5, 6, 15 U. S. C. 604, and the Home Owners Loan Corporation, c. 64, § 4 (a), 48 Stat. 128, 129, 12 U. S. C. 1463 (a).

and execution. In creating federal land banks as government instrumentalities, but with many of the purposes and activities of private corporations, in exempting them alone from taxation, and at the same time subjecting them, like joint stock land banks, to suit "as fully as natural persons," Congress cannot be thought to have intended that either class of banks should be immune from attachment, and their judgment creditors relegated to a receivership, allowed as a matter of grace, as the sole means of collecting their judgments.

In the present case it does not appear that the attachment would directly interfere with any function performed by petitioner as a federal instrumentality. We reserve the question whether a different result would be required if such an interference were shown.

Affirmed.

STELOS CO., *v.* HOSIERY MOTOR-MEND CORP. ET AL.*

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

No. 588. Argued April 4, 5, 1935.—Decided April 29, 1935.

1. As a ground for sustaining the judgment in his favor, a respondent in certiorari is entitled to reassert a defense made in, but not accepted by, the court below, and for this purpose he need not make a cross-application for the writ. P. 239.
2. Claim 23 of reissue patent No. 16,360, to Stephens, claiming a method for repairing runs in knitted fabrics, such as stockings, by stretching the fabric over a "suitable holder" and by use of a repairing device or needle having a hook and a pivoted latch, held "laterally out of alignment with the run," is invalid for want of proper disclosure and for lack of invention. Pp. 241, 243.

72 F. (2d) 405, affirmed.

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* Together with No. 653, *Hosiery Motor-Mend Corp. et al.* v. *Stelos Co., Inc.* Certiorari to the Circuit Court of Appeals for the Second Circuit.

CERTIORARI, 294 U. S. 702, to review the affirmance of a decree of the District Court, 60 F. (2d) 1009, dismissing the bill in a suit of the Stelos Company for alleged infringement of its patent. Both sides sought and obtained the writ.

Messrs. Henry Gilligan and *Vernon E. Hodges,* with whom *Mr. J. Preston Swecker* was on the brief, for Stelos Co., Inc.

Mr. Hugh M. Morris, with whom *Messrs. Julian S. Wooster, Donald Malcolm,* and *Noah A. Stancliffe* were on the brief, for Hosiery Motor-Mend Corp. et al.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This cause presents issues as to validity and infringement of claim 23 of the Stephens reissue patent, No. 16,360, for "an improvement in needles and its method of use." The Stelos Company, owner of the patent, sued Hosiery Motor-Mend Corporation and others for infringement. The District Court adjudged the claim invalid by reason of failure to make proper disclosure of the alleged invention, and anticipation; and also thought that if the claim were sustained the defendants did not infringe, and dismissed the bill.[1] The Circuit Court of Appeals held the prior art required so narrow a construction of the claim as to exclude the method charged as an infringement and affirmed the decree.[2] We granted certiorari [3] to resolve a conflict with a decision of the Court of Appeals of the District of Columbia.[4] In support of

[1] 60 F. (2d) 1009.
[2] 72 F. (2d) 405.
[3] 294 U. S. 702.
[4] *Finch Corp.* v. *Stelos Co.,* 60 App. D. C. 25; 46 F. (2d) 606.

the judgment the defendants might have urged the point as to invalidity, decided against them in the Circuit Court of Appeals, without applying for a cross-writ of certiorari.[5] Out of excess of caution, however, they prayed for the writ. Since both writs would run to but one judgment, and bring up the same record, we granted the prayer in No. 653.[6]

To knit is to form a fabric by the interlacing of a single yarn or thread in a series of connected loops. In knitted articles, of which a silk stocking is an example, a break in the thread anywhere in the fabric will cause a number of loops to pull out, leaving in their place parallel threads. The consequent defect is called a ladder or a run. The only possible method of repair consists in picking up the thread at the end of the run and reknitting by reforming the loops throughout the ladder, fastening the thread upon the completion of the operation. It has long been known that this could be accomplished by the use of a needle having a hook at the end resembling an ordinary crochet needle, but the task involved difficulties and the result was often unsatisfactory.

Stephens' patent is for an improved latch needle for this work, and for a method of executing the repair. Twenty-two claims for the needle are not in issue. Claim 23, which covers the method, is the basis of the suit. The method is stated in the patent to consist:

"in *stretching* the fabric over a *suitable holder,*

inserting a repairing device having a hook and *pivoted latch* through a loop formed in the run or raveling,

continuing this movement on through the fabric *while holding the device laterally out of alignment with the run or raveling* until the loop has slid back over the end of the latch and beneath the latter,

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[5] *Langnes* v. *Green,* 282 U. S. 531, 535.

[6] 294 U. S. 702.

then reversing the movement of the device through the loop,

catching the next forward thread in the hook while the loop is being pulled over the latch causing the latch to close over the thread and the loop to be cast off over the end of the device, the thread caught in the hook thereupon forming a new loop, taking the place of the first-described loop,

then reinserting the device into the fabric as before, and repeating the operation until the run or raveling has been repaired,

and finally fastening the thread."

In the commercial method practiced by the owner of the patent and its licensees, the fabric is stretched over the top of a china or porcelain egg-cup held in the left hand. The degree of stretching can in this way be adjusted for the first step in the process and increased or relaxed as the work progresses. The needle is held in the right hand at an angle to the plane of the fabric and worked back and forth through the material. Whether the needle is also inclined laterally out of the line of the run is disputed. The patentee says this is unnecessary and is not in fact practiced. The defendants disagree, and contend that a pivoted latch needle will not otherwise perform its function. The alleged infringers employ a metal holder shaped like an egg-cup and a sliding latch needle, which they punch through the material and draw back at approximately a right angle to the fabric.

Stephens, while in Mexico in 1921 or 1922, noticed a Mrs. DeMarr repairing runs by stretching stockings over her finger and reforming the loops with a latch needle. On her behalf he forwarded to a patent attorney a description and specification in his own handwriting and an application or patent was filed by Mrs. DeMarr. A half interest was assigned to Stephens. Certain prior patents

were cited against the claims and the application was abandoned. Shortly thereafter Stephens filed in his own name an application for patent of an improved pivoted latch needle and for an improved method of repairing runs. The method claim called for the use of a pivoted latch needle having all the features of that described in the application, and was accordingly rejected, *inter alia* because it was not a method claim since it required Stephens' specific construction of the needle. The applicant redrafted the claim to call merely for a pivoted latch needle and added the element that the needle should be held laterally out of alignment with the run. We think the method claim is bad for want of proper disclosure and as lacking invention.

1. The first step is described as "stretching the fabric over a suitable holder." It is now said that an egg-cup or something of like construction is the only suitable holder, because no other device affords a rest for the operator's hand and permits continuous stretching in varying degree during the repair operation. The patent drawings show no holder of any sort. The specifications merely say: "In other methods the fabric is stretched over the finger tip, making it difficult to insert the hook beneath the thread. This objection is obviated in the present invention by stretching the fabric over a porcelain dish, allowing sufficient depth for the free use of the needle." Obviously the phrase "a porcelain dish" is not descriptive of an egg-cup. There is nowhere any reference to the control of the degree of stretching which is now said to be essential and to be afforded only by such a holder. The patentee testified on the trial that he tried and discarded many types of holder until he hit upon this one. If so, why did he not describe or claim it? He did so in an application for patent filed much later. He is upon the horns of a dilemma; he either discovered this form of holder and its virtues prior to the application for this

patent or he found it later. If the first supposition be correct his application violated R. S. 4888;[7] if the second, his patent does not cover the egg-cup holder.

Nowhere does the claim or the specification disclose the element that the fabric must not be tautly stretched over the holder, or that it must be so held that the tension can be varied. It is said that the use of the present participle "stretching" rather than the past participle "stretched" makes the matter clear; but scrutiny of both claim and specification discloses no teaching as to the stretching of the fabric, or any regulation of the tension, or that it may not be tightly stretched over the holder and secured in that condition prior to commencing the repair. The specification of a "suitable" holder certainly covers none of these alleged essentials. These omissions emphasize the failure to make the fair disclosure demanded by R. S. 4888.

The patentee says that in the old finger method the needle necessarily was held nearly in the plane of the fabric, whereas in his method it is approximately at a right angle thereto, and operated by a punching motion. The description of the operation in the patent is almost identical with that of Mrs. DeMarr's abandoned application, drawn in Stephens' own hand, which was for the finger as contrasted with the punch method; and, so far as the angle at which the needle is to be held, is very similar to Pogson's disclosure in 1921, which Stephens says does not describe the punch method. When we come to the claim, we find the phrase " while holding the device laterally out of alignment with the run." This, we are told, is novel, and means that the needle is not to be used in or nearly parallel with the plane of the fabric,

[7] U. S. C. Tit. 35, § 33. Notice that defendants would defend on this ground was given in accordance with R. S. 4920; U. S. C. Tit. 35, § 69.

but at an angle thereto. "Laterally out of alignment to the run" is not equivalent to "at an angle to the plane of the fabric." That the applicant did not intend it to be so understood is shown by his repeated use of the word laterally, in the specifications, as the equivalent of off to one side; and by this sentence: "The clearance afforded . . . makes it possible to hold the needle down closer to the fabric. . . ." There is no disclosure of any up and down punch system, such as the defendants use.

2. Pivoted latch needles are old in the art. Holders which have an opening to give room for the insertion of a needle, such as that of an egg-cup, are old for use in darning. The method of reforming loops in knitted goods with pivoted latch needles was known prior to the application for this patent. The combination of the use of the egg-cup type holder and the pivoted latch needle did not entitle Stephens to a patent; and the addition of the element that the needle should be held at an angle to the plane of the fabric, if that is in fact what the claim means, is insufficient to raise the method to the dignity of invention.

Decree modified and, as modified, affirmed.

IVANHOE BUILDING & LOAN ASSN. *v.* ORR, TRUSTEE IN BANKRUPTCY.

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

No. 611. Argued April 5, 1935.—Decided April 29, 1935.

1. A creditor of a bankrupt, claiming on a bond secured by a mortgage on real estate not owned by the bankrupt and upon which the creditor has foreclosed, is not a "secured creditor" of the bankrupt within the meaning of §§ 1 (23) and 57 (e) of the Bankruptcy

Act, and is not precluded thereby from proving his claim for the principal of the bond and interest, though he may not collect and retain dividends which, with the fruits of the foreclosure, will exceed that amount. P. 245.

2. The case of a bankrupt indebted to a creditor on a bond secured by a mortgage on property of a third person which the creditor has foreclosed, is not a case of mutual debts between bankrupt and creditor, within the meaning of § 68 (a) of the Bankruptcy Act, and that section does not limit the creditor's proof of claim to the difference between the debt and the avails of the foreclosure. Pp. 246–247.

73 F. (2d) 609, reversed.

CERTIORARI, 294 U. S. 700, to review the affirmance of a judgment reducing a claim in bankruptcy.

Mr. Abraham Alboum, with whom *Mr. Maurice J. Zucker* was on the brief, for petitioner.

Mr. Saul Nemser, with whom *Mr. Charles E. Hendrickson* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In this case the question is whether a creditor of a bankrupt, who has recovered a portion of the debt owed him by foreclosure of a mortgage on property not owned by the bankrupt, may prove for the full amount of the debt, or only for the balance required to make him whole.

The owners of real estate in Newark, New Jersey, executed to the petitioner a bond in the penal sum of $23,000, conditioned for the payment of $11,500, secured by a mortgage on the land. The mortgagors subsequently conveyed the premises to the Eastern Sash and Door Company, which expressly assumed the mortgage debt. That company afterward conveyed to one Yavne. A default occurred and the petitioner filed a foreclosure bill against Yavne. The amount due was found to be $10,220.96.

with interest and costs. The property was sold by the sheriff and bid in by the petitioner for $100. Meanwhile the Sash and Door Company had been adjudicated a bankrupt. The petitioner presented a claim against the estate for $10,739.94, the amount then due on the bond less the $100 bid at the sale. It was stipulated that the mortgaged property acquired in foreclosure was worth $9,000. The referee reduced the claim to the difference,—$1,739.94,—and ruled the petitioner was not entitled to prove for any greater sum. The District Court and the Circuit Court of Appeals have held the referee's ruling was right.[1] The result appearing to be contrary to the weight of authority [2] we granted certiorari.[3]

Decision must be governed by relevant provisions of the Bankruptcy Act. The definition found in § 1 (23)[4] is:

"' Secured creditor ' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

Section 57 (e)[5] directs that " claims of secured creditors . . . shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities . . ."

Unless the petitioner was a secured creditor as defined by § 1 (23) it was not bound to have its security or the avails thereof valued and to prove only for the difference between that value and the face amount of the debt. Petitioner does not come within the definition, for at the date of bankruptcy it held no security against the bank-

[1] 73 F. (2d) 609.
[2] Rule 38, § 5 (b).
[3] 294 U. S. 700.
[4] U. S. C. Tit. 11, § 1 (23).
[5] U. S. C. Tit. 11, § 93 (e).

rupt company's property, nor security given by any other person who in turn was secured by the bankrupt's assets.[6] Sections 1 (23) and 57 (e) do not, therefore, forbid the proof of a claim for the principal of the bond with interest, though the petitioner may not collect and retain dividends which with the sum realized from the foreclosure will more than make up that amount. The court below was of this opinion, but thought that § 68 (a)[7] forbade proof of a claim for more than the balance of the debt after application of the avails of the foreclosure. That section directs, "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." The theory upon which this section was held to control the right to prove was thus stated:

"While the obligation of the bankrupt to pay the mortgage still remained, the mortgagee had gotten possession of the security, and, in enforcing this obligation against the bankrupt, the appellant-creditor [petitioner] must reduce its claim by the admitted value of the security less the $100 paid for it. The bankrupt owed the appellant [petitioner] the amount of the mortgage, and the appellant [petitioner] equitably owed the bankrupt the value of the security in his possession."

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[6] The point was involved and necessarily decided, though not adverted to, in *Hiscock* v. *Varick Bank*, 206 U. S. 28; see the same case below *sub nom. In re Mertens*, 144 Fed. 818, 820. See also *In re Headley*, 97 Fed. 765; *Swarts* v. *Fourth Nat. Bank*, 117 Fed. 1; *In re Noyes Bros.*, 127 Fed. 286; *In re Sweetser*, 128 Fed. 165; *Gorman* v. *Wright*, 136 Fed. 164; *Board of County Commissioners* v. *Hurley*, 169 Fed. 92; *In re Bailey*, 176 Fed. 990; *In re Keep Shirt Co.*, 200 Fed. 80; *In re Thompson*, 208 Fed. 207; *Young* v. *Gordon*, 219 Fed. 168; *In re Pan-American Match Co.*, 242 Fed. 995; *In re Anderson*, 11 F. (2d) 380; *Hampel* v. *Minkwitz*, 18 F. (2d) 3; *Bankers Trust Co.* v. *Irving Trust Co.*, 73 F. (2d) 296.

[7] U. S. C. Tit. 11, § 108 (a).

This novel application of § 68 (a) is, we think, inadmissible. A creditor holding security who realizes upon it, does not "owe" his debtor the amount realized. The well understood concept of mutual debts does not embrace such a situation as is here disclosed.

Judgment reversed.

BULL, EXECUTOR, *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 649. Argued April 9, 1935.—Decided April 29, 1935.

1. Moneys received by a deceased partner's estate as his share of profits earned by the firm before he died, are taxable as his income and also are to be included as part of his estate in computing the federal estate tax. P. 254.
2. Where the articles of a personal service partnership having no invested capital provide that in the event of a partner's death the survivors, if his representative does not object, shall be at liberty to continue the business for a year, the estate in that case to share the profits or losses as the deceased partner would if living, the profits coming to the estate from such continuation of the business are not to be regarded as the fruits of a sale of any interest of the deceased to the survivors, but are income of the estate, taxable as such; they are no part of the corpus of the estate left by the decedent upon which the federal estate tax is to be computed. P. 255.
3. Retention by the Government of money wrongfully exacted as taxes, is immoral and amounts in law to a fraud on the taxpayer's rights. P. 261.
4. A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction, and this even though an independent suit against the Government to enforce the claim would be barred by the statute of limitations. P. 261.
5. Recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely. P. 262.

6. The Government wrongfully collected and retained an estate tax on moneys earned for and paid to an estate in partnership transactions after the decedent's death, and which were not part of the *corpus* of the estate and were properly taxable only as income of the estate. Before the time allowed for claiming reimbursement had elapsed, the Government proceeded to assess and collect an income tax on the identical moneys. *Held:*

(1) That the taxpayer was entitled to recoup from the amount of the income tax the amount of the unlawful estate tax by suit for the difference in the Court of Claims, although suit to recover the unlawful tax independently had become barred. Pp. 261–262.

(2) A complaint by which the taxpayer prayed judgment in the alternative, either for the amount of the income tax or for what should have been credited against it on account of the estate tax, was sufficient to put in issue the right to recoupment. P. 263.

7. The Court of Claims is not bound by any special rules of pleading; all that is required is that the petition shall contain a plain and concise statement of the facts relied on and give the United States reasonable notice of the matters it is called upon to meet. P. 263.

79 Ct. Cls. 133; 6 F. Supp. 141, reversed.

CERTIORARI, 294 U. S. 704, to review a judgment rejecting a claim for money unlawfully exacted as taxes.

Mr. Loring M. Black, with whom *Mr. David A. Buckley, Jr.,* was on the brief, for petitioner.

The death of petitioner's testator worked a dissolution of the partnership, and the deceased partner's interest therein became an asset of the estate, and its value was determined by the Commissioner. It necessarily follows that whatever was received by the estate in liquidation of this capital asset was nothing more than the return of capital to the extent that it did not exceed the value at the beginning of the period. There was in effect a sale of the good will, contracts and other property of the partnership to the survivors, to be paid for by a share of the profits.

The relationship between the estate and the surviving partners was one of creditor and debtor. The profits

which were paid by the surviving partners from time to time to the estate represented payments on the amount of the debt. When final payment was made, the relationship was terminated and the estate's interest in the partnership as constituted at the time of the death of Archibald H. Bull was extinguished.

The partnership agreement provided the methods for liquidating a deceased partner's interest in the partnership, and any property coming to the estate as the deceased partner's interest, represented capital and was part of the *corpus* of the estate.

In carrying on the new partnership, certain profits were realized, and the estate received the same share of these profits as the decedent would have received if he had lived. In so far as the surviving partners were concerned, these profits represented income; and in so far as the estate was concerned, they represented capital—an amount received in liquidation of a capital asset. *United States* v. *Wood,* 8 F. Supp. 939; *United States* v. *Carter,* 19 F. (2d) 121; *Matter of Lee,* 215 App. Div. (N. Y.) 576.

The amount, being the value of property received by bequest, may not be taxed as income, because of statutory exemption. Rev. Act, 1918, § 213 (b) (3); *Brewster* v. *Gage,* 280 U. S. 334; *Burnet* v. *Whitehouse,* 283 U. S. 148, 151.

Having once been properly classed as *corpus,* the asset in question could not be classed as income, and any profit upon the sale or liquidation thereof is limited to the excess of the value at the time of death, as determined by the Commissioner. *Nichols* v. *United States,* 64 Ct. Cls. 241, 245.

The addition of the income tax amounts to double taxation, against which there exists a strong presumption. *United States* v. *Supplee-Biddle Co.,* 265 U. S. 189, 195, 196.

The returns to the estate being less than the value of the property as of the date of death, as determined by the Commissioner, there was no gain upon which to levy any income tax.

Mr. James W. Morris, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. J. Louis Monarch* were on the brief, for the United States.

The challenged tax is imposed upon partnership profits distributed to the estate of a deceased partner. Such profits are clearly income in the ordinary case, but petitioner contends that since the estate had the right to receive them, and such right was valued as a part of the decedent's gross estate for estate tax purposes, the receipts may not be taxed unless in excess of that value.

Upon analysis, it appears that the right of the estate to receive these profits was a proprietary right, which came into existence when the estate elected to have the business continued without the withdrawal of the decedent's interest. Hence, the right of the estate was not different in character from the right of the decedent while he was living.

Petitioner contends that only the excess of profits over the value of the decedent's interest in the business at the time of his death may be treated as taxable income. Even if that be true, the amount which the Commissioner has treated as income ($200,117.09) does represent only the excess of profits over what the court has found to be the value of the decedent's interest in the business at the time of his death ($24,124.20). The rule for which petitioner contends has accordingly been satisfied.

We submit, however, that there is no requirement of the statute or regulations that limits the taxable income to the excess over the value of the decedent's interest at death. The right to future profits is a right to receive income, and there is authority in the decided cases for

taxing income, properly so-called, even though the principal which produced it be a bequest, and also despite the fact that the transfer of the right to receive it had been taxed as part of the estate. Citations: *Helvering* v. *Butterworth,* 290 U. S. 365; *Burwell* v. *Mandeville's Executor,* 2 How. 560; *Burnet* v. *Logan,* 283 U. S. 404; *United States* v. *Wood,* 8 F. Supp. 939, 940; *Hill* v. *Commissioner,* 38 F. (2d) 165; cert. den., 281 U. S. 761; *Pope* v. *Commissioner,* 39 F. (2d) 420; *Ithaca Trust Co.* v. *United States,* 279 U. S. 151; *United States* v. *Carter,* 19 F. (2d) 121; *Irwin* v. *Gavit,* 268 U. S. 161; *Waud* v. *United States,* 71 Ct. Cls. 567.

Mr. Justice Roberts delivered the opinion of the Court.

Archibald H. Bull died February 13, 1920. He had been a member of a partnership engaged in the business of ship-brokers. The agreement of association provided that in the event a partner died the survivors should continue the business for one year subsequent to his death, and his estate should " receive the same interests, or participate in the losses to the same extent," as the deceased partner would, if living, " based on the usual method of ascertaining what the said profits or losses would be. . . . Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will . . . and all adjustments of profits or losses shall be made as of the date of such withdrawal." The estate's representative did not exercise the option to withdraw in thirty days, and the business was conducted until December 31, 1920 as contemplated by the agreement.

The enterprise required no capital and none was ever invested by the partners. Bull's share of profits from January 1, 1920, to the date of his death, February 13, 1920, was $24,124.20; he had no other accumulated profits

and no interest in any tangible property belonging to the firm. Profits accruing to the estate for the period from the decedent's death to the end of 1920 were $212,718.79; $200,117.90 being paid during the year, and $12,601.70 during the first two months of 1921.

The Court of Claims found:

" When filing an estate-tax return, the executor included the decedent's interest in the partnership at a value of $24,124.20, which represented the decedent's share of the earnings accrued to the date of death, whereas the Commissioner, in 1921, valued such interest at $235,202.99, and subjected such increased value to the payment of an estate tax, which was paid in June and August 1921. The last-mentioned amount was made up of the amount of $24,124.20 plus the amount of $212,718.79, hereinbefore mentioned. The estate tax on this increased amount was $41,517.45.[1]

"April 14, 1921, plaintiff filed an income-tax return for the period February 13, 1920, to December 31, 1920, for the estate of the decedent, which return did not include, as income, the amount of $200,117.09 received as the share of the profits earned by the partnership during the period for which the return was filed. The estate employed the cash receipts and disbursement method of accounting.

" Thereafter, in July 1925 the Commissioner determined that the sum of $200,117.09 received in 1920 should have been returned by the executor as income to the estate for the period February 13 to December 31, 1920, and notified plaintiff of a deficiency in income tax due from the estate for that period of $261,212.65, which was due in part to the inclusion of that amount as taxable income and in part to adjustments not here in contro-

[1] It will be noted there is an error in the figures set out in this finding, the total of the two smaller sums being $236,842.99, but the discrepancy is not material to any issue in the case.

versy. No deduction was allowed by the Commissioner from the amount of $200,117.09 on account of the value of the decedent's interest in the partnership at his death."

September 5, 1925, the executor appealed to the Board of Tax Appeals from the deficiency of income tax so determined. The Board sustained the Commissioner's action in including the item of $200,117.99 without any reduction on account of the value of the decedent's interest in the partnership at the date of death,[2] and determined a deficiency of $55,166.49, which, with interest of $7,510.95, was paid April 14, 1928.

July 11, 1928, the executor filed a claim for refund of this amount, setting forth that the $200,117.99, by reason of which the additional tax was assessed and paid, was corpus; that it was so originally determined by the Commissioner and the estate tax assessed thereon was paid by the executor; and that the subsequent assessment of an income tax against the estate for the receipt of the same sum was erroneous. The claim was rejected May 8, 1929. September 16, 1930, the executor brought suit in the Court of Claims, and in his petition, after setting forth the facts as he alleged them to be, prayed judgment in the alternative (1) for the principal sum of $62,677.44, the amount paid April 14, 1928, as a deficiency of income tax unlawfully assessed and collected, or (2) for the sum of $47,643.44 on the theory that if the sum of $200,117.99 was income for the year 1920 and taxable as such, the United States should have credited against the income tax attributable to the receipt of this sum the overpayment of estate tax resulting from including the amount in the taxable estate,—$34,035,[3] with interest thereon.

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[2] 7 B. T. A. 993.

[3] As appears from the quoted finding, the Court of Claims found the overpayment was $41,517.45.

The Court of Claims held that the item was income and properly so taxed. With respect to the alternative relief sought it said: "We cannot consider whether the Commissioner correctly included the total amount received from the business in the net estate of the decedent subject to the estate tax for the reason that the suit was not timely instituted." Judgment went for the United States.[4] Because of the novelty and importance of the question presented we granted certiorari.[5]

1. We concur in the view of the Court of Claims that the amount received from the partnership as profits earned prior to Bull's death was income earned by him in his lifetime and taxable to him as such; and that it was also corpus of his estate and as such to be included in his gross estate for computation of estate tax. We also agree that the sums paid his estate as profits earned after his death were not corpus, but income received by his executor and to be reckoned in computing income tax for the years 1920 and 1921. Where the effect of the contract is that the deceased partner's estate shall leave his interest in the business and the surviving partners shall acquire it by payments to the estate, the transaction is a sale, and payments made to the estate are for the account of the survivors. It results that the surviving partners are taxable upon firm profits and the estate is not.[6] Here, however, the survivors have purchased nothing belonging to the decedent, who had made no investment in the business and owned no tangible property connected with it. The portion of the profits paid his estate was, therefore, income and not corpus; and this is so whether we consider the executor a member of the old firm for the remainder

[4] 79 Ct. Cls. 133; 6 F. Supp. 141.

[5] 294 U. S. 704.

[6] *Hill* v. *Commissioner*, 38 F. (2d) 165; *Pope* v. *Commissioner*, 39 F. (2d) 420.

of the year, or hold that the estate became a partner in a new association formed upon the decedent's demise.

2. A serious and difficult issue is raised by the claim that the same receipt has been made the basis of both income and estate tax, although the item cannot in the circumstances be both income and corpus; and that the alternative prayer of the petition required the court to render a judgment which would redress the illegality and injustice resulting from the erroneous inclusion of the sum in the gross estate for estate tax. The respondent presents two arguments in opposition, one addressed to the merits and the other to the bar of the statute of limitations.

On the merits it is insisted that the Government was entitled to both estate tax and income tax in virtue of the right conferred on the estate by the partnership agreement and the fruits of it. The position is that as the contract gave Bull a valuable right which passed to his estate at his death the Commissioner correctly included it for estate tax. And the propriety of treating the share of profits paid to the estate as income is said to be equally clear. The same sum of money in different aspects may be the basis of both forms of tax. An example is found in this estate. The decedent's share of profits accrued to the date of his death was $24,124.20. This was income to him in his lifetime and his executor was bound to return it as such. But the sum was paid to the executor by the surviving partners, and thus became an asset of the estate; accordingly the petitioner returned that amount as part of the gross estate for computation of estate tax and the Commissioner properly treated it as such.

We are told that since the right to profits is distinct from the profits actually collected we cannot now say more than that perhaps the Commissioner put too high a value on the contract right when he valued it as equal to the amount

of profits received—$212,718.99. This error, if error it was, the Government says is now beyond correction.

While, as we have said, the same sum may in different aspects be used for the computation of both an income and an estate tax, this fact will not here serve to justify the Commissioner's rulings. They were inconsistent. The identical money,—not a right to receive the amount, on the one hand, and actual receipt resulting from that right on the other,—was the basis of two assessments. The double taxation involved in this inconsistent treatment of that sum of money is made clear by the lower court's finding we have quoted. The Commissioner assessed estate tax on the total obtained by adding $24,124.20, the decedent's share of profits earned prior to his death, and $212,718.79, the estate's share of profits earned thereafter. He treated the two items as of like quality, considered them both as capital or corpus; and viewed neither as the measure of value of a right passing from the decedent at death. No other conclusion may be drawn from the finding of the Court of Claims.

In the light of the facts it would not have been permissible to place a value of $212,718.99 or any other value on the mere right of continuance of the partnership relation enuring to Bull's estate. Had he lived, his share of profits would have been income. By the terms of the agreement his estate was to sustain precisely the same status *quoad* the firm as he had, in respect of profits and losses. Since the partners contributed no capital and owned no tangible property connected with the business, there is no justification for characterizing the right of a living partner to his share of earnings as part of his capital; and if the right was not capital to him, it could not be such to his estate. Let us suppose Bull had, while living, assigned his interest in the firm, with his partners' consent, to a third person for a valuable consideration, and in making return of income had valued or capitalized the right to profits which

he had thus sold, had deducted such valuation from the consideration received, and returned the difference only as gain. We think the Commissioner would rightly have insisted that the entire amount received was income.

Since the firm was a personal service concern and no tangible property was involved in its transactions, if it had not been for the terms of the agreement, no accounting would have ever been made upon Bull's death for anything other than his share of profits accrued to the date of his death,—$24,124.20,—and this would have been the only amount to be included in his estate in connection with his membership in the firm. As respects the status after death the form of the stipulation is significant. The declaration is that the surviving partners " are to be at liberty " to continue the business for a year, in the same relation with the deceased partner's estate as if it were in fact the decedent himself still alive and a member of the firm. His personal representative is given a veto which will prevent the continuance of the firm's business. The purpose may well have been to protect the good will of the enterprise in the interest of the survivors and to afford them a reasonable time in which to arrange for their future activities. But no sale of the decedent's interest or share in the good will can be spelled out. Indeed the Government strenuously asserted, in supporting the treatment of the payments to the estate as income, that the estate sold nothing to the surviving partners; and we agree. An analogous situation would be presented if Bull had not died, but the partnership had terminated by limitation on February 13, 1920, and the agreement had provided that, if Bull's partners so desired, the relation should continue for another year. It could not successfully be contended that, in such case, Bull's share of profit for the additional year was capital.

We think there was no estate tax due in respect of the $212,718.79 paid to the executor as profits for the period subsequent to the decedent's death.

The Government's second point is that if the use of profits accruing to the estate in computing estate tax was wrong, the statute of limitations bars correction of the error in the present action. So the Court of Claims thought. We hold otherwise.

The petitioner included in his estate tax return, as the value of Bull's interest in the partnership, only $24,124.20, the profit accrued prior to his death. The Commissioner added $212,718.79, the sum received as profits after Bull's death, and determined the total represented the value of the interest. The petitioner acquiesced and paid the tax assessed in full in August, 1921. He had no reason to assume the Commissioner would adjudge the $212,718.79 income and taxable as such. Nor was this done until July, 1925. The petitioner thereupon asserted, as we think correctly, that the item could not be both corpus and income of the estate. The Commissioner apparently held a contrary view. The petitioner appealed to the Board of Tax Appeals from the proposed deficiency of income tax. His appeal was dismissed April 9, 1928. It was then too late to file a claim for refund of overpayment of estate tax due to the error of inclusion in the estate of its share of firm profits.[7] Inability to obtain a refund or credit, or to sue the United States, did not, however, alter the fact that if the Government should insist on payment of the full deficiency of income tax, it would be in possession of some $41,000 in excess of the sum to which it was justly entitled. Payment was demanded. The petitioner paid April 14, 1928, and on June 11, 1928, presented a claim for refund, in which he still insisted the amount in question was corpus, had been so determined and estate tax paid on that basis, and should not be classified for taxation as income. The claim was rejected May 8, 1929, and the present action instituted September 16, 1930.

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[7] Revenue Act of 1924, §§ 1012 and 281, 43 Stat. pp. 342 and 301; Revenue Act of 1926, §§ 1112 and 319, 44 Stat. pp. 115 and 84.

The fact that the petitioner relied on the Commissioner's assessment for estate tax, and believed the inconsistent claim of deficiency of income tax was of no force, cannot avail to toll the statute of limitations, which forbade the bringing of any action in 1930 for refund of the estate tax payments made in 1921. As the income tax was properly collected, suit for the recovery of any part of the amount paid on that account was futile. Upon what theory, then, may the petitioner obtain redress in the present action for the unlawful retention of the money of the estate? Before an answer can be given the system of enforcing the Government's claims for taxes must be considered in its relation to the problem.

A tax is an exaction by the sovereign, and necessarily the sovereign has an enforcible claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the Government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic

means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer. Nevertheless he may be without a remedy. But we think this is not true here.

In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit

was not presented or action instituted for restitution within the period fixed by the statute of limitations. If nothing further had occurred Congressional action would have been the sole avenue of redress.

In July, 1925, the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claim was for income tax. The taxpayer opposed payment in full, by demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. *United States* v. *State Bank,* 96 U. S. 30. While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the *State Bank* case applies with equal force to this situation. "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. . . . In these cases, [cited in the opinion] and many others that might be cited, the rules of law applicable to individuals were applied to the United States" (pp. 35, 36).[8] A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. *United States* v. *Macdaniel,* 7 Pet. 1, 16, 17; *United States* v. *Ringgold,* 8 Pet. 150, 163–164. In the

[8] See also *McKnight* v. *United States,* 98 U. S. 179, 186.

latter case this language was used: "No direct suit can be maintained against the United States; but when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States." [9] If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.[10]

The circumstance that both claims, the one for estate tax and the other for income tax, were prosecuted to judgment and execution in summary form does not obscure the fact that in substance the proceedings were actions to collect debts alleged to be due the United States. It is

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[9] See also *The Siren*, 7 Wall. 152, 154.

[10] *Williams* v. *Neely*, 134 Fed. 1; *Conner* v. *Smith*, 88 Ala. 300; 7 So. 150; *Stewart* v. *Simon*, 111 Ark. 358; 163 S. W. 1135; *Beecher* v. *Baldwin*, 55 Conn. 419; *Blackshear* v. *Dekle*, 120 Ga. 766; 48 S. E. 311; *Aultman & Co.* v. *Torrey*, 55 Minn. 492; 57 N. W. 211; *Kaup* v. *Schinstock*, 88 Neb. 95; 129 N. W. 184; *Campbell* v. *Hughes*, 73 Hun (N. Y.) 14; 25 N. Y. S. 1021.

immaterial that in the second case, owing to the summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which if the United States had sued him for income tax he could have recouped against his liability on that score.

To the objection that the sovereign is not liable to respond to the petitioner the answer is that it has given him a right of credit or refund, which though he could not assert it in an action brought by him in 1930, had accrued and was available to him since it was actionable and not barred in 1925 when the Government proceeded against him for the collection of income tax.

The pleading was sufficient to put in issue the right to recoupment. The Court of Claims is not bound by any special rules of pleading; [11] all that is required is that the petition shall contain a plain and concise statement of the facts relied on and give the United States reasonable notice of the matters it is called upon to meet.[12] And a prayer for alternative relief, based upon the facts set out in the petition may be the basis of the judgment rendered.[13]

We are of opinion that the petitioner was entitled to have credited against the deficiency of income tax, the amount of his overpayment of estate tax with interest and that he should have been given judgment accordingly. The judgment must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

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[11] *United States* v. *Burns*, 12 Wall. 246, 254; *District of Columbia* v. *Barnes*, 197 U. S. 146, 153–154.

[12] *Merritt* v. *United States*, 267 U. S. 338, 341.

[13] *United States* v. *Behan*, 110 U. S. 338, 347.

ROBERTS, RECEIVER, ET AL. *v.* NEW YORK CITY ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 546. Argued April 2, 3, 1935.—Decided April 29, 1935.

1. In condemnation proceedings, as in lawsuits generally, the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. P. 277.
2. A mere underestimate of the compensation to be paid for property taken in condemnation will not characterize the proceeding, otherwise fair, as wanting due process; the error must be gross and obvious. P. 277.
3. The City of New York condemned and removed a spur of an elevated railway system, which, in operation, was no longer of value to the business and which had been found by state authority to be no longer a public convenience and necessity and to have become an obstruction to the public use of the street in which it stood. The state courts in determining damages, which were assessed against the owners of the abutting lots, allowed the company nothing on account of its franchise or its easement to use the street, and only the scrap value of the demolished structure. For so-called easements—i. e. the right to obstruct or impair each abutter's easements of light, air and access—which by the law of New York the Company had been obliged to acquire by purchase or condemnation as a condition to lawful erection and operation of the spur, the award was the amount judicially determined to be their value when the rights were acquired from the abutters years before—an amount much less than would be the cost of acquiring them anew, in changed conditions. *Held:*

   (1) Whatever the precise classification of the rights acquired from abutting owners, they are not separable from the franchise; and it can not be said that the state courts infringed the constitutional limitation, or even that they erred as a matter of law, in valuing them at no more than their original cost. P. 281.

   (2) It was not arbitrary or unreasonable, upon the evidence, to value the structure as scrap (since the value of the "easements" could be realized only by abandoning the spur), and to allow nothing on account of the railway's corporate franchise or its public easement in the street. P. 284.

4. Damages in condemnation are measured by the loss to the owner, not by the gain to the taker. P. 282.

265 N. Y. 170; 192 N. E. 188, affirmed.

CERTIORARI, 293 U. S. 554, to review a judgment sustaining an assessment of damages for the taking in condemnation by the City of a spur forming part of the elevated railway system of the Manhattan Railway Company. Reports of the earlier proceedings in the State Supreme Court at trial term and in the Appellate Division will be found in: 126 Misc. 879; 141 *id.* 565; 143 *id.* 129; 229 App. Div. 617; 238 *id.* 832.

Mr. Charles E. Hughes, Jr., with whom *Messrs. E. Myron Bull, Carl M. Owen, J. Osgood Nichols, Harold C. McCollom, Martin A. Schenck, Charles Franklin,* and *George Welwood Murray* were on the brief, for petitioners.

The decree below arbitrarily measured compensation by the value of the easements at the time of their acquisition by the railroad, rather than as of the time of the taking, and ignored the availability of this property for sale or for uses for other than railroad purposes.

That which the railroad acquired from the abutting owners was "an interest in real estate," an "easement."

The Federal Constitution requires that in condemnation, compensation must be measured by the value of the property at the time of the taking, and not by its cost or its value at the time of the owner's acquisition thereof. *Olson* v. *United States,* 292 U. S. 246.

The value of these private easements has always been judicially recognized to be the difference between the value of the abutting property when subject to the railroad's easements and its value when not so subject. *Pappenheim* v. *Metropolitan Elevated Ry. Co.,* 128 N. Y. 436, 449; *Matter of Brooklyn Union Elevated R. Co.,* 113 App. Div. 817, aff'd, 188 N. Y. 553; *Muhlker* v. *New*

York & Harlem R. Co., 197 U. S. 544, 571. This was the basis of the opinions of market value given by the undisputed testimony of the railroad's expert at the trial.

Even if the operation of the spur had been unprofitable, to limit consideration to the railroad's use of the property and ignore its availability for other uses or for sale, was a violation of the constitutional guaranty. *Olson* v. *United States*, 292 U. S. 246, 255, 256; *Boom Co.* v. *Patterson*, 98 U. S. 403, 408; *Goodin* v. *Cincinnati & Whitewater Canal Co.*, 18 Oh. St. 169, 181; *City & South London Ry. Co. and The Rector*, [1903] 2 K. B. 728; [1905] 1 A. C. 1; *Great Falls Mfg. Co.* v. *United States*, 16 Ct. Cls. 160, 198–199; aff'd, 112 U. S. 645. Distinguishing: *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195.

What the owner lost was property which has always been valued in relation to the abutting property. It so happens that the abutting property gains the equivalent. But an award measured by the difference between the value of the abutting property when subject to the railroad's easement and its value when not so subject would be in no sense measuring the compensation by what the taker gained rather than by what the owner lost. It would be the natural method of recognizing availability to the owner for a valuable use. This was its recognizable fair market value at and prior to the time of condemnation and it was precisely what the railroad would have had to pay in order to acquire the same property at the date of condemnation. See *In re East Galer Street*, 47 Wash. 603.

Of course the railroad could not have released the easements and still have continued to operate. But the railroad could have realized the value of the easements by an agreement made prior to, and as a condition of, the release.

This conception of the availability of these easements for sale to the abutting owners was by no means speculative; nor does it infringe the rule that the value to be

ascertained does not include "any element resulting subsequently to or because of the taking." *Olson* v. *United States,* 292 U. S. 246, 256. On the contrary, this availability existed prior to the condemnation and was taken away by the condemnation.

Section 237 of the New York Railroad Law gave to the railroad the right to abandon any portion of its right subject to the approval of the Public Service Commission. This obviously made possible a negotiation with the abutting property owners. It would have been entirely competent for the railroad company to go to the property owners and offer in effect to sell these private easements back to them.

The views of the public authorities on the desirability of restoring the street to unimpeded street uses make it reasonably certain that such approval would have been forthcoming. The relatively small number of abutting owners, and their active desire to secure the removal of the spur, satisfy every requirement of practicability of such a disposition.

This proceeding in fact was one whereby, at the instance of the abutting property owners, the structure was removed and the easements were restored to them, a part of the cost being imposed upon them.

The plan of the statutes and the action taken thereunder were such as to constitute the abutting owners, or the city as an intermediary, the 'willing purchaser' assumed in determining fair market value. A negotiated sale was feasible also under the statutes involved.

The statutes effected exactly the result which was intended, namely, that the properties, including the easements, should be taken, the easements and other benefits restored to the property owners, the cost imposed upon them, and the compensation fixed by the court, if it could not be arrived at by agreement. This plan was such as to provide for compensation based, as in the case

of any other property, on the fair market value between willing seller and willing purchaser at the time of vesting of title. Apart from our argument that the easements were prior to the condemnation available for disposition to the abutting property owners, the condemnation statutes themselves contemplated full compensation regardless of limitations, if any, arising from railroad use. *Matter of Ninth Avenue and Fifteenth Street,* 45 N. Y. 729, 732–5; *In re The City & South London Ry. Co. and The Rector,* [1903] 2 K. B. 728; [1905] 1 A. C. 1. See also *Brooklyn Park Comm'rs* v. *Armstrong,* 45 N. Y. 234.

Whether it be considered that the City took the easements directly for the purpose of what might be termed a resale, or whether it be considered that the City took them in reality as intermediary for the abutting owners, it is certain that the City took this form of property possessed by the Railway Company, which had a clearly available use and a clearly and readily ascertainable market value; and that unless the Railway Company shall be paid for what was thus transferred to the property owners, the result—contrary to the clear intention of the Legislature—will be to do what the law has always prohibited; that is, to "take the private property of one individual, without his consent, and give it to another." *New York & Oswego M. R. R. Co.* v. *Van Horn,* 57 N. Y. 473, 477; see also, *Matter of the Mayor of New York,* 186 N. Y. 237, 246. Distinguishing: *Heard* v. *Brooklyn,* 60 N. Y. 242.

There was no abandonment. The railroad could not have been compelled to abandon.

The easements were taken in perpetuity by the railroad and paid for on that basis, and there was no diminution of such payment by reason of the possibility of a reverter. *Hudson & Manhattan R. Co.* v. *Wendell,* 193 N. Y. 166, 179; *Miner* v. *New York Central & H. R. R. Co.,* 123

N. Y. 242; *New Mexico* v. *United States Trust Co.*, 172 U. S. 171.

Due process of law was denied by the judgment that only junk value should be paid for the railway structure, which had been found to be suitable and well adapted to its purpose, and that no compensation should be made for the railroad's franchise and rights in the street.

The railroad consistently opposed the removal of the spur.

The franchise was terminated only by this very condemnation. It is a strange doctrine that a structure which at the time of condemnation was properly in the street will be given only a nuisance value because by the consummation of the proceeding its maintenance became unlawful.

There has in fact never been any finding that the spur was an unprofitable venture. It produced an operating loss; but it was a part of a system operated at a profit. Even considered by itself, the spur was no inconsiderable property. Its use was increasing and was greater than in many earlier years.

The protection against confiscation by eminent domain of the whole category of properties not profitable in and of themselves, but provided under franchise requirements by railway and other public service corporations in response to public demand, is involved in the determination in this case that the structure, franchise and public easements may be taken without substantial compensation.

Where, as in the present case, the structure is found to be suitable and well adapted for its purpose, and used as part of a plant, so-called structural value, or the cost of reproduction less depreciation, is an important element which must be taken into consideration in ascertaining its value in condemnation.

The structure when taken was real estate. It was error to value it as detached junked personalty.

The acceptance of the franchise and the building of the structure under its requirement constituted a contract between the State and the railroad which was property protected by the Constitution.

A franchise "can no more be taken without compensation than can . . . tangible corporeal property." *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 329. Compensation may not be measured by regarding only the income produced by the spur considered by itself. It was an integral part of the profitably operated Third Avenue Line. The railroad under the City's grant acquired, as against the City, the right to occupy with its columns, station approaches and so forth, valuable street space.

Whether these public easements were of so distinct a nature that they should have been separately valued, or were, as the lower courts have held, so inseparable from the franchise that it and they must be considered as a single entity, they could not, we submit, be taken wholly without compensation.

Mr. Paxton Blair, with whom *Mr. Joseph F. Mulqueen, Jr.,* was on the brief, for the City of New York, respondent.

The failure of the railroad to appeal from the decision of the Public Service Commission disentitles it to relief in this Court. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 230; *Gorham Mfg. Co.* v. *State Tax Comm'n,* 266 U. S. 265, 269–270.

Under the doctrine of *Heard* v. *Brooklyn,* 60 N. Y. 242, the easements acquired by the railroad reverted automatically to the abutting owners when the operation of the railroad ceased. See also, *Drucker* v. *Manhattan Ry. Co.,* 213 N. Y. 543.

The theory of unjust enrichment may not be invoked to justify an increase in the awards.

In contending that the easements for which the railway company paid valuable consideration in the years 1888–1904 were taken at the time of the condemnation of the 42nd Street Spur, the petitioners appear to have lost sight of the distinction between the "taking" of a piece of property, and the termination of an incorporeal right. Cf. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 508. See also, *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89, 95.

The "most advantageous use" doctrine has no application to an elevated spur which under the law can be used for but a single purpose. *Olson* v. *United States,* 292 U. S. 246, 255; *Boom Co.* v. *Patterson,,* 98 U. S. 403, 408; *Matter of City of New York (Blackwell's Island Bridge Case),* 198 N. Y. 84, 87.

Mr. Wm. D. Mitchell, with whom *Messrs. Albert S. Wright* and *Ellwood Thomas* were on the brief, for Robert Walton Goelet et al., respondents.

In a condemnation case from a state court reaching this Court on the claim of denial of due process, the function of this Court is not to act as a court of appeal and error. It will not substitute its judgment for that of the state courts on disputed questions of fact or debatable questions of law. Notwithstanding the state courts may have committed errors of law or fact, or applied erroneous principles of valuation, if the record, as in this case, contains all the evidence proffered by the claimants, this Court should not hold that due process has been denied, unless on the whole record it concludes the award does not approximate fair compensation computed on correct principles. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 246; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 565; *Appleby* v. *Buffalo,* 221 U. S. 524; *McGovern* v. *New York City,* 229 U. S. 363, 370; *Seattle, R. & S. Ry. Co.* v. *Washington ex rel. Linhoff,* 231 U. S. 568;

O'Neill v. *Leamer,* 239 U. S. 244, 249; *Olson* v. *United States,* 292 U. S. 246, 259, note 3; *Los Angeles Gas & Electric Corp.* v. *Railroad Comm'n,* 289 U. S. 287, 304; *West Ohio Gas Co.* v. *Public Utilities Comm'n,* 294 U. S. 63, 79.

As the spur was found by the state tribunals, on abundant evidence, to be no longer a public convenience, and to have permanently ceased to produce enough revenue for the system of which it was a part to pay the cost of operation, and had ceased to have any value for railway purposes, the reproduction cost basis of valuation must be discarded. This leaves two possible theories of value:

One eliminates the so-called nuisance value, or "market value" arising from the possibility of exacting a price from the owners of abutting property for demolition. On this basis the value of the spur is limited to the scrap value of the structure, as the franchise, and so-called easements acquired from the abutting owners, expire with the abandonment of the spur.

The other theory includes such value as can be ascribed to the easements in the hands of the company, through possibility of sale to the abutting owners. This nuisance theory has not been sanctioned by any court. In this case it leads to the conclusion that the spur increased in value to a fantastic sum by virtue of the fact that its obsolescence for railway purposes placed the owners in a position to sell out to the abutting owners.

Assuming that possibility of sale to abutters must be considered, this record, containing all the proffered evidence on the point, does not warrant a finding that the true value of the easements exceeded the award.

The facts are such that a possibility of sale to abutting owners was wholly fanciful. The "market" was limited to a group whose agreement on price and apportionment among themselves was required and is shown to have been

impracticable. The property owners believed and insisted that the company was not entitled to be paid for the easements. Forcing unification of the property owners as buyers, through the City's power to levy assessments, may not be considered in ascertaining market value.

In a contest of endurance between the company, losing money in operation of the spur, and property owners suffering from it, the latter were in a better strategical position. At least one may only speculate as to which would first succumb. Only a speculative basis exists for a guess as to what, if anything, the property owners would have paid. On the whole record no one can say that it would have been more than the award. *McGovern* v. *New York,* 229 U. S. 363, 372; *New York* v. *Sage,* 239 U. S. 57; *Appleby* v. *Buffalo,* 221 U. S. 524; *Olson* v. *United States,* 292 U. S. 246.

No arbitrary rule was applied to the prejudice of the company. The New York courts did not hold as a matter of law that adjudicated value of the easements at the time of acquisition was the sole measure. The Appellate Division concluded first that this adjudicated value was the least which could be accepted. This was to the advantage of the company. It then examined the whole record to ascertain if a larger value should be awarded, and held that only a speculative basis for a larger value was shown. The Court of Appeals merely held on the whole record that the amount awarded was fair. The New York courts received and considered all evidence proffered by the petitioners on every theory they saw fit to urge.

On any theory of valuation open on this record, the franchise had no value and the structure only a scrap value. If the nuisance theory of possible sale to abutting owners be accepted, the award of that value presupposes a demolition of the structure. Rejecting the nuisance value, and considering the spur as valueless for operation, the result is the same.

Mr. Wm. H. Page, with whom *Mr. Richard M. Page* was on the brief, for Bowman Biltmore Hotels Corp. et al., respondents.

Petitioners are not entitled to any compensation for the rights to impair the abutting property owners' easements of light, air and access or for the franchise to construct, maintain and operate the spur because (1) there was no " taking " of said rights and franchise in the constitutional sense; (2) said rights and franchise were worthless because the spur was being operated at a loss; (3) the award therefor is in contravention of the rule laid down in *Muhlker* v. *New York & Harlem R. Co.,* 197 U. S. 544; and (4) said rights and franchise were acquired for railway purposes only under the authority of the Rapid Transit Act of 1875 which in effect limited their duration to such period of time as their exercise might be a matter of public convenience and necessity.

Messrs. Frank C. Laughlin and *Spotswood D. Bowers* submitted for Corn Exchange Bank, respondent.

The so-called easements were extinguished upon the removal of the spur, and any rights the claimants had reverted to the property owners, who then held their easements of light, air and access in their full integrity.

There is no warrant, in fact or law, for any award whatsoever to the claimants for these so-called easements.

Mr. Justice Cardozo delivered the opinion of the Court.

The 42nd Street spur of the elevated railroad system in the City of New York has been condemned for the purpose of demolition in proceedings duly instituted by officials of the city government. The fee owner of the spur, a receiver, a lessee, and trustees under mortgages are dissatisfied with the award of damages. The question is whether property interests have been taken without

compensation in violation of the restraints of the Fourteenth Amendment.

The length of the demolished structure was about nine hundred feet. At the east it was connected with the elevated station at 42nd Street and Third Avenue. At the west it had a terminal on Park Avenue opposite the Grand Central Station. For a number of years traffic upon the spur had been dwindling, especially so since the completion of the subways, receipts being less than the cost of operation. Traffic became so light that the spur ceased to contribute value to the business of the railroad, either as an independent unit or as a feeder to the system. With these developments a movement to take the structure from the highway acquired rapid headway. Travelers on 42nd Street, afoot or in vehicles, were impatient of obstructions that had ceased to be useful. Lot owners, contiguous to the railway and nearby, looked forward with eagerness to the removal of an unsightly edifice in the expectation of enhancing the value of their lots. The city too had an interest in the growth of taxable values as well as in the promotion of the safety of the streets. In 1919, the legislature of New York came to the relief of city, lot owners and travelers through the adoption of a statute. By Chapter 611 of the Laws of 1919, the Public Service Commission was empowered to determine whether the spur and its appurtenances were "necessary and convenient for the public service, or whether, even if necessary and convenient, such tracks, structure, station and appurtenances" constituted "an impediment or obstruction to the public street." Upon the certificate of the Commission as to the existence of either of these conditions, the city might condemn "the rights, easements and franchises of the said Manhattan Railway Company" through appropriate proceedings. See also L. 1923, c. 635.

At the end of a full hearing the Public Service Commission found and certified that the spur was no longer a public convenience and necessity, and also that it was an impediment and obstruction to the public use of the street. No appeal to the courts was taken by the company. Thereupon, the City of New York by its Board of Estimate and Apportionment resolved that condemnation proceedings should be begun. The resolution, adopted November 23, 1923, called for the condemnation of the structure of the spur and of all easements and franchises appurtenant thereto, title to vest in the city on December 7 of that year. The resolution was followed by a suit under the applicable statute for the determination of the damages to be paid to the owners of the property condemned. The trial court made an award in the sum of $975,438, with interest, stating the component items in an opinion. 126 Misc. (N. Y.) 879; 216 N. Y. S. 2. Cross-appeals followed to the Appellate Division of the Supreme Court, the city and abutting lot owners insisting that the award was too high, and the spur owner and its allies insisting that the damages were too low and that property had been taken without due process of law. *United States Constitution, Fourteenth Amendment.* Three items were in controversy: (1) the value of the franchise; (2) the value of the structure; and (3) the value of certain rights or privileges characterized as private easements. As to item (1), the ruling of the Appellate Division was that the franchise was without value, and had become a source of loss instead of gain; as to item (2), the ruling was that the structure was without value beyond what it would be worth as scrap when taken down; and as to item (3), the ruling was that the private easements must be paid for at not less than their value as judicially determined at the time of their acquisition, but that the evidence did not justify a finding that their value was any greater. *Matter of City of New York*

(*Manhattan Railway Co.*), 229 App. Div. 617; 243 N. Y. S. 665. The cause was remitted to the trial court, which heard additional evidence and made a new decree. As a result of that decree the value of the private easements was fixed at $539,117.41; the scrap value of the structure was fixed at $235; the value of the franchise nothing. 143 Misc. (N. Y.) 129; 257 N. Y. S. 37. There were cross-appeals to the Appellate Division, which affirmed without opinion (238 App. Div. 832; 262 N. Y. S. 973), and then to the Court of Appeals, where there was an affirmance by a divided court. 265 N. Y. 170; 192 N. E. 188. This court granted a writ of certiorari at the instance of the Receiver of the railway company and those allied with him in interest. 293 U. S. 554.

A statute of New York in force at the taking of the spur directs the court to " ascertain and estimate the compensation which ought justly to be made by the City of New York to the respective owners of the real property to be acquired." Charter of New York City, § 1001; L. 1915, c. 606. Cf. L. 1923, c. 635. Such a system of condemnation is at least fair upon its face. " If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages." *McGovern* v. *New York City,* 229 U. S. 363, 370. Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1),* 294 U. S. 63, 70. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action. The test has been differently phrased by different judges and in different contexts. At times we find the statement that the

Constitution is not infringed unless there has been "absolute disregard" of the right of the owner to be paid for what is taken. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 246; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 565; *Appleby* v. *Buffalo,* 221 U. S. 524, 532. At other times we are told that due process is not lacking unless "plain rights" have been ignored, with a reminder that much will be overlooked when there is nothing of unfairness or partiality in the course of the proceedings. *McGovern* v. *New York City, supra,* at p. 373. From the very nature of the problem these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differences of degree too subtle to be catalogued. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355; *Klein* v. *Board of Supervisors,* 282 U. S. 19, 23. Cf. *Davidson* v. *New Orleans,* 96 U. S. 97, 104. One cannot hope to mark its bearings in a sentence or a paragraph. Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. "It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment." *Seattle, R. & S. Ry. Co.* v. *Linhoff,* 231 U. S. 568, 570.

In the setting of this background we approach the consideration of the rulings that are here assigned as error.

1. First in importance is the appraisal of the private easements.

The franchise to maintain an elevated railway "with an interest in the street in perpetuity" (*People* v. *O'Brien,* 111 N. Y. 1, 38; 18 N. E. 692) dates from September 7, 1875. After the building of the road controversies developed between the company and abutting

owners. Out of them grew what came to be known as the elevated railroad lawsuits, "one of the most important and interesting chapters in the history of litigation" in New York. *Powers* v. *Manhattan Ry. Co.*, 120 N. Y. 178, 183; 24 N. E. 295. The foundation stone was laid by the Court of Appeals in *Story* v. *New York Elevated R. Co.*, 90 N. Y. 122, decided in 1882. The doctrine was there announced that appurtenant to lots abutting on a highway are certain private easements—easements of light and air and access—which may not be destroyed or impaired through the construction under legislative sanction of an elevated railroad without payment to the lot owners of the damage to their land and buildings. Many later cases enforced the same doctrine and indeed enlarged its scope, applying it to lots where the fee of the highway was vested in the city. *Lahr* v. *Metropolitan Elevated Ry. Co.*, 104 N. Y. 268; 10 N. E. 528; *Kane* v. *New York Elevated R. Co.*, 125 N. Y. 164; 26 N. E. 278. Cf. *Muhlker* v. *N. Y. & H. R. Co.*, 197 U. S. 544; *Sauer* v. *New York City*, 206 U. S. 536. In submission to these holdings the Manhattan Railway Company extinguished the damage claims of lot owners along many miles of track. It did this by purchase or condemnation or proceedings equivalent thereto, the amount to be paid being determined sometimes by a court, sometimes by agreement. Generally the extinguishment took the form of grants of the easements to the extent that they were affected by the then existing structure, the abutting owners being the grantors and the Manhattan the grantee. Irrespective of the form, the substance of the transaction was that "the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property." Per Pound, Ch. J., in the present case, 265 N. Y. at p. 180. What was conveyed was the right to persist in a course of conduct that otherwise would have been a wrong.

Even then the process of condemnation or its equivalent did not so obliterate the easements as to leave abutters helpless in the face of new encroachments. If the user was substantially aggravated, as, for example, by an added tier of tracks, there was another right to be extinguished. *Knoth* v. *Manhattan Ry. Co.*, 187 N. Y. 243; 79 N. E. 1015; *American Bank Note Co.* v. *New York Elevated R. Co.*, 129 N. Y. 252, 266; 29 N. E. 302. The company was under a continuing duty to rid its presence in the highway of the character of a trespass as against the title of abutters.

Whether these rights or interests, though easements in the ownership of the abutters, retained the same quality after release or conveyance to the railway, we do not now determine. They are spoken of in many cases as if their quality in the new ownership continued what it was before. See, e. g., *People ex rel. Manhattan Ry. Co.* v. *Barker*, 165 N. Y. 305; 59 N. E. 137, 151; *People ex rel. Manhattan Ry. Co.* v. *Woodbury*, 203 N. Y. 231; 96 N. E. 420. This may have been merely for convenience with the thought that the description was at least sufficiently accurate to serve the case at hand. Elsewhere the same interests are spoken of as "quasi-easements" (*American Bank Note Co.* v. *New York Elevated R. Co.*, *supra*, at p. 272) or by some other and equivalent term. *Matter of City of New York* (*Manhattan R. Co.*), 126 Misc. 879, 901; 216 N. Y. S. 2; 229 App. Div. 617, 625; 243 N. Y. S. 665; *Stevens* v. *New York Elevated R. Co.*, 130 N. Y. 95, 101; 28 N. E. 667. After acquisition by the railway, they are not susceptible of separation from the ownership of the franchise. *Kernochan* v. *New York Elevated R. Co.*, 128 N. Y. 559; 29 N. E. 65; *Drucker* v. *Manhattan Ry. Co.*, 213 N. Y. 543; 108 N. E. 74; *Heard* v. *Brooklyn*, 60 N. Y. 242.* They are not easements in gross assignable to strangers gen-

* Many decisions are collected in 40 Yale L. J. 779, 1074, 1309.

erally. 265 N. Y. at p. 181. They may be factors to be considered in determining the value of the franchise while the road is in operation, for they are effective as a release from liability for past or future damages. This is very far from saying that they contribute elements of value when operation has been proved to be impossible except at a continuing loss. Still less does it connote a value equivalent to the estimated present cost of condemning them anew.

We have said that there will be no attempt in this court to classify the rights acquired by the company as easements or as something else. For present purposes we accept the ruling of the state court that irrespective of their precise nature they had a value to be paid for upon the termination of the franchise and the removal of the structure by force of eminent domain. If all this be assumed, the petitioners fall short by a long interval of making out a defiance of constitutional restraints. Their argument, it seems, is this: property that is to be condemned must be paid for in accordance with the value at the time of the taking; these easements when acquired about half a century ago had a value then judicially determined of about half a million dollars; owing to changes in the neighborhood the same easements, if acquired in 1923, would have cost $3,600,000; an award has been made for the first amount only; the difference between the first amount and the second is an increment of value condemned without requital.

The argument misconceives the action of the courts below. The courts have not held that an increment of value in the easements or in anything else may be condemned without requital. What they have held is merely this, that there is no basis in the evidence for assigning any determinate value to the ownership of the easements in excess of the value belonging to them when they were acquired by the company. Even if there was error here

in the interpretation of the record, it was not so gross or obvious as to justify a holding that the restraints of the Constitution were forgotten or ignored. But in truth there was no error, or none to the prejudice of the owners of the property condemned. Much could be said in support of the position that the value of the so-called easements was nothing more than nominal. If so, the petitioners have been overpaid by more than half a million dollars. We do not go into that question now, for the city and the abutters are not petitioners in this court, and must acquiesce in the award as made. Problems open in the state court and there considered in the opinions (see especially the dissenting opinion in 265 N. Y. at p. 183) are beyond our jurisdiction here. Enough for present purposes that the award is not too low, though perhaps it is too high. Excess is not an error of which the owner may complain.

Too low it certainly is not. "The question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53. If we assume these easements to be property, what were they worth to the railway in 1923? The petitioners do not urge that it was practicable to find a buyer who would pay for the easements in connection with the franchise and with a view to continuing the operation of the road. The spur had proved to be a failure, a mere impediment to public travel. Substantial prices are not paid for the privilege of conducting a business at a loss. The petitioners do urge, however, that abutters would have been willing to pay for an abandonment of the road, and that such abandonment would have been equivalent to the surrender of the easements or to a deed of reconveyance. Voluntary abandonment was permissible (New York Railroad Law, § 237; also L. 1917, c. 788) until the franchise with its appurtenances was taken over by the city.

From this the conclusion is drawn that the easements are worth what the abutters would have paid for them. Implicit in such an argument are assumptions that would be worthy of scrutiny if the need for scrutiny were here. The inquiry would then be whether easements or quasi-easements inseparable from a franchise must be paid for as property at the peril of infringing the Fourteenth Amendment when their value for sale presupposes the abandonment of the franchise to which they are appurtenant. To carry the Amendment to that point approaches, though it may not touch, the acceptance of the nuisance value which Hough, J., on one occasion excluded from the reckoning with words of trenchant emphasis. *Consolidated Gas Co.* v. *New York City,* 157 Fed. 849, 874. For the time being and provisionally we put aside these doubts, resolving in favor of the company whatever problems they suggest. Granting that the value of the easements is whatever abutters would have paid for a surrender of the franchise, how much would this have been?

A sale to abutters was impracticable unless all or nearly all united. One owner could gain nothing from a reconveyance of the easements appurtenant to his lot without a like reconveyance to others along the line of the invading structure. The spur would have to come down altogether or not at all. The notion is almost fantastic that there would have been union among the owners upon a price of $3,600,000 or any comparable figure. Even if the value of their lots were to be enhanced to that extent, they would be no better off as the outcome of the bargain than they already were without it, and would be risking a huge outlay. They would be doing this though they denied that the easements were the kind of property for which they could be forced to pay a dollar if the case were brought into a court. In such circumstances union among the abutters was a shadowy and distant chance. *New*

York City v. *Sage*, 239 U. S. 57, 61; *Olson* v. *United States*, 292 U. S. 246, 256. "What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots." *New York City* v. *Sage*, *supra*, at p. 61. Discordant voices among the group would surely have been raised in protest if an attempt had been made by amicable treaty to get rid of the spur at the value put upon it by the railway. Perhaps the abutters would have paid something. But how much would it have been? The courts below have found in the evidence no basis for the belief that the price would have exceeded the value of the easements as judicially ascertained at the time of acquisition. 229 App. Div. at p. 629; 265 N. Y. at p. 181. We cannot say that this was error. Still less can we say that some other and higher figure was established with such persuasive power that the Constitution of the United States has been flouted in the refusal to accept it.

2. Objections are made by the petitioners to the valuations of the structure, the franchise, and the public easements in the highway.

The structure was appraised as junk, the city having undertaken to bear the cost of removal. Such an appraisal might be too low were it not for the award for the private easements. To realize the value of those easements, an abandonment of the spur was necessary. "The railroads could not release their rights to the abutting owners and continue to operate their railroads in the street." 265 N. Y. at p. 181. The structure in the circumstances had no value except as scrap.

The franchise was without value for reasons already stated, or so the triers of the facts might hold without

departing from the restraints of the Constitution of the nation.

With the value of the franchise gone, the public easements in the street, as distinguished from the private ones, had a worth that was merely nominal, at least for any showing to the contrary in the pages of this record.

Other objections have been considered without inducing a conviction that the petitioners have been the victims of any arbitrary rulings.

The judgment is *Affirmed.*

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

AERO MAYFLOWER TRANSIT CO. *v.* GEORGIA PUBLIC SERVICE COMMISSION ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 586. Argued April 4, 1935.—Decided April 29, 1935.

1. A state statute imposing upon private carriers operating motor vehicles in the business of transporting persons or property for hire over any public highway in the State an annual license fee of $25 per vehicle for the maintenance of the highways, *held* not unconstitutional in its application to a carrier operating such vehicles in interstate commerce. P. 289.
2. Imposition of a uniform state license fee of so much for each vehicle used by private carriers on the state roads does not create an undue burden upon interstate commerce as applied to an interstate carrier merely because that carrier has less occasion to use those roads than local carriers have. One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may. P. 289.
3. A Georgia statute (Ex. Sess., 1931, p. 99) imposing an annual license tax on private carriers by motor vehicle of $25 per vehicle using the state highways, the proceeds of which tax are applied to the upkeep of state highways, does not violate the equal protection clause of the Fourteenth Amendment by exempting:

(1) Vehicles engaged in hauling passengers or farm products between points not having railroad facilities, and not passing through or beyond municipalities having such facilities, with certain limitations as to the number of the passengers and the quantity of the freight, and

(2) Vehicles engaged exclusively in the transportation of agricultural or dairy products, whether the "vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer." P. 290.

Smith v. *Cahoon,* 283 U. S. 553, distinguished. P. 291.

4. A state legislature has a wide discretion in the classification of trades and occupations for the purpose of taxation and in the allowance of exemptions and deductions within reasonable limits. P. 292.
5. Exemption of private carriers of farm and dairy products from a tax, though one imposed for highway upkeep, stands on a different footing from an exemption from a general requirement that private carriers provide bonds to insure the safety of the public on the highways. P. 293.
6. Upon review of a judgment of a state court sustaining a state statute against objections based on the Federal Constitution, this Court will not entertain other objections, not raised in or passed upon by the state court and which involve doubtful provisions of the statute which the state court has never considered. P. 294.

179 Ga. 431; 176 S. E. 487, affirmed.

APPEAL from a judgment affirming the dismissal of the complaint in a suit to enjoin the Public Service Commissioners, and other officials of the State of Georgia, from enforcing an annual tax or fee on motor vehicles.

Messrs. Edgar Watkins, Jr., and *Edgar Watkins* for appellant.

Mr. B. D. Murphy, Assistant Attorney General of Georgia, with whom *Mr. M. J. Yeomans,* Attorney General, was on the brief, for appellees.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The validity of a statute of Georgia under the Commerce Clause (Article I, § 8, clause 3) and the Fourteenth

Amendment of the Constitution of the United States is challenged by the appellant, a private carrier for hire engaged in interstate commerce.

The statute is known as the "Motor-Carrier Act of 1931." Georgia Laws, Ex. Sess. 1931, p. 99. It prescribes a system of regulation for private carriers for hire. Common carriers are subject to the provisions of a separate statute. With exceptions to be stated later, every private carrier operating a motor vehicle in the business of transporting persons or property for hire over any public highway in the state must comply with certain conditions. The carrier must apply for and obtain from the Public Service Commission a certificate of public convenience and necessity (§ 4); must give a bond with adequate security for protection against damage caused by negligence (§ 7); must pay for the certificate a fee of $35 (§ 17); and at the same time and annually thereafter must pay a registration and license fee of $25 (§ 18) for every vehicle so operated. The fees when received by the Comptroller General of the state are to be transmitted to the State Treasurer who is to keep them in a separate fund. This fund is to be subject to the control of the State Highway Department and is to be devoted to the maintenance and repair of the highways of the state.

The exceptions to the foregoing requirements are stated in § 2. The act does not apply to a business conducted exclusively within the incorporated limits of any city or town. Cf. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 366. It does not apply to "cars and trucks hauling people and farm products exclusively between points not having railroad facilities, and not passing through or beyond municipalities having railroad facilities, where not more than seven passengers and/or one and one-half tons of freight are transported." § 2 (1). It does not apply to "motor-vehicles engaged exclusively in the transportation of agricultural and/or dairy products between any of the following points: farm, market, gin, warehouse, or mill,

where the weight of the load does not exceed 10,000 pounds, whether such motor-vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer." § 2 (2). Definitions of a "producer" and of "agricultural products," which are contained in the same subdivision, are quoted in the margin.* There are other exceptions in other subdivisions, but they are omitted from this summary, for the attack upon the statute is not aimed at their provisions.

The appellant, a private carrier for hire, is engaged in the transportation of household and office furniture between points in Georgia and other states, and is not within the range of any of the exceptions. It obtained a certificate of convenience and necessity, and paid the statutory fee therefor. It gave approved security for the protection of its customers and the public in the event of injury through negligence. All this it did before beginning the present suit, and in so doing took out of the case any question as to the validity of the statute in respect of those conditions. What it is contesting now is the validity of the requirement that for every motor vehicle it must pay an annual fee of $25 in order to obtain a license. Joining as defendants the Georgia Public Service Commission, the members thereof, and the Comptroller General of the state, it brought this suit to restrain

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*"... And the word 'producer' shall include a landlord where the relations of landlord and tenant or landlord and cropper are involved. The phrase 'agricultural products' as used in this Act shall include fruit, live stock, meats, fertilizer, wood, lumber, cotton, and naval stores, household goods and supplies transported to farms for farm purposes, and/or other usual farm and dairy supplies, and including products of grove and/or orchard, and also poultry and eggs, and also fish and oysters, and all country merchants in rural districts who handle poultry and farm products in pursuance to their own business, and not for hire, and timber and/or logs being hauled by the owner thereof, or his agents and/or employees between forest and mill or primary place of manufacture."

interference with its business by the arrest or prosecution of its drivers or otherwise as a consequence of its refusal to pay the annual fee. The trial court sustained a demurrer and dismissed the complaint. The Supreme Court of Georgia affirmed. 179 Ga. 431; 176 S. E. 487. The case is here upon appeal. Judicial Code § 237; 28 U. S. C., § 344.

First. The statute in imposing an annual license fee for the maintenance of the highways does not lay an unlawful burden on interstate commerce.

The fee is moderate in amount; it goes into a fund for the upkeep of highways which carriers must use in the doing of their business; it is exacted without hostility to foreign or interstate transactions, being imposed also upon domestic vehicles operated in like conditions.

Its validity in this aspect is attested by decisions so precisely applicable alike in facts and in principle as to apply a closure to debate. *Clark* v. *Poor,* 274 U. S. 554; *Hicklin* v. *Coney,* 290 U. S. 169, 173; *Sprout* v. *South Bend,* 277 U. S. 163, 171; *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92, 95; *Continental Baking Co.* v. *Woodring, supra;* cf. *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183.

The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. The fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. Cf. *Clark* v. *Poor, supra; Hicklin* v. *Coney, supra.* One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may.

Second. The exceptions permitted by the statute, in so far as they are challenged by the appellant, do not amount to a denial of the equal protection of the laws.

The statute makes an exception, as we have seen, for the benefit of vehicles engaged in hauling passengers or farm products between points not having railroad facilities, and not passing through or beyond municipalities having such facilities, with certain limitations as to the number of the passengers and the quantity of the freight. This is a reasonable exception. Travelers and farmers without convenient access to a railroad stand in need of other means of transportation. There might be hardship in adding to their burdens. The wear and tear upon a road is not likely to be heavy when the haul must begin at a town without railroad facilities, must end at a like town, and must not pass through any town which does have them. Not many carriers for hire will be tempted to do business in such neighborhoods exclusively. *Sproles* v. *Binford,* 286 U. S. 374, 394, supplies an apposite analogy.

Another exception, and one that more than any other has drawn the appellant's fire, is for the benefit of motor vehicles engaged exclusively in the transportation of agricultural or dairy products, whether the "vehicle is owned by the owner or producer of such agricultural or dairy products or not, so long as the title remains in the producer." The Supreme Court of Georgia, construing that provision in this case, has said that the final clause, "so long as the title remains in the producer," qualifies the entire exception, as indeed it obviously does. In an earlier case (*Nance* v. *Harrison,* 176 Ga. 674; 169 S. E. 22), the same court, familiar doubtless with local conditions, pointed out some of the considerations of policy that underlie the statute. The court observed (p. 682) that "many of the farm products must be brought from remote sections unaccommodated by the better system of roads—in some cases not even by a public road." This might make it necessary to offer some inducement to carriers "in order to insure adequate service in the transportation of such commodities." The court took notice of a common

opinion, "well justified by the facts," that the farm lands of the state had been "accustomed to bear an undue proportion of the taxes." The effect of the exception would be to equalize the burden. "Every one knows that as a general rule a tax of this kind finally reaches the consumer of the product, or user of the service; and hence an exemption of carriers of such products is to be taken as an exemption of the products themselves, and not of the carrier." The enumeration of rational bases of distinction was not put forward as exhaustive. The court expressed the belief that others could be added.

We think a classification thus designed to ameliorate the lot of the producers of farm and dairy products is not an arbitrary preference within the meaning and the condemnation of the Fourteenth Amendment. The plight of the Georgia farmer has been pictured by the state court in words already quoted. To free him of fresh burdens might seem to a wise statecraft to be a means whereby to foster agriculture and promote the common good. The case is very different from *Smith* v. *Cahoon,* 283 U. S. 553. There a Florida statute, similar to this one in many of its provisions, gave relief from its exactions to any transportation company engaged exclusively in the carriage of agricultural, horticultural, dairy or farm products, whether for the producer or for any one else. The attack was not directed, as in the case at hand, to an exemption of a particular class of carriers upon rational grounds of policy from the payment of an annual tax. What was complained of in that case was a release from the obligation imposed upon carriers in general to give a bond or insurance policy in promotion of the public safety. It was with reference to that exemption, not challenged by the appellant here, that the court condemned the statute. "So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes be-

tween private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right." 283 U. S. at p. 567; cf. *Nance* v. *Harrison, supra,* at p. 681.

Smith v. *Cahoon* has been considered in later cases in this court, and the limits of its holding, clear enough at the beginning, have been brought out in sharp relief. Thus, in *Continental Baking Co.* v. *Woodring, supra,* at p. 371, which came here from the State of Kansas, exemption from various forms of regulation, including the payment of a tax, was accorded to "the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle." The exemption was upheld. Again, in *Hicklin* v. *Coney, supra,* at p. 175, a statute of South Carolina gave exemption to "farmers or dairymen, hauling dairy or farm products; or lumber haulers engaged in transporting lumber or logs from the forests to the shipping points." The exemption was interpreted by the highest court of the state as limited to cases where the hauling was irregular or occasional and not as a regular business. We upheld the statute as thus interpreted though the effect was to relieve from the filing of a bond.

These cases and others like them (*American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89) are illustrations of the familiar doctrine that a legislature has a wide discretion in the classification of trades and occupations for the purpose of taxation and in the allowance of exemptions and deductions within reasonable limits. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 125; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 572; *Stebbins* v. *Riley,* 268 U. S. 137, 142; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159; *State Board of*

Tax Comm'rs v. *Jackson,* 283 U. S. 527. How far it may relieve a special group of carriers from the filing of a bond for the safety of the public, may depend on very different considerations, as, for instance, the extent or regularity of the traffic thus excepted. This will vary from state to state. The excepted carriers in Florida did business, it seems, "between fixed termini or over a regular route." *Smith* v. *Cahoon,* 283 U. S. at p. 566. There is nothing in the present record to advise us as to the extent or regularity of traffic in farm and dairy products by carriers in Georgia. Be that as it may, exemption from a tax stands upon a different footing, though the purpose of the tax is the upkeep of the highway. At such times the legislature may go far in apportioning and classifying to the end that public burdens may be distributed in accordance with its own conception of policy and justice. If its action be not arbitrary, the courts will stand aloof.

We have reserved up to this point the statement of a final objection to the statute now pressed by the appellant. The objection is aimed at the definition of agricultural products, already quoted in this opinion, and especially to the inclusion of household goods and supplies, and to the accompanying words of reference to the business of a country merchant. The clauses in question are awkward and obscure. Apparently, household goods and supplies are covered by the exception though moving *to* the farm, but only then, it seems, if transported to be used for farm purposes and in vehicles devoted to farm uses and no others. Indeed, all the enumerated articles grouped as agricultural are either products of a farm or incidental to its upkeep. Country merchants are exempted when they "handle poultry and farm products in pursuance to their own business, and not for hire." If the handling here referred to has to do with handling in the course of transportation, the exemption has been stated out of over-abundant

caution, for carriage not for hire, whether by country merchants or by others, is without the statute altogether.

We do not attempt to pass upon the meaning of the provisions considered in the foregoing paragraph, or upon their validity under the Fourteenth Amendment, or upon the propriety, if they are to any extent invalid, of severing them from other parts of the statute and upholding what remains. *Dorchy* v. *Kansas,* 264 U. S. 286, 290, 291. Cf. §§ 22 and 29 of the Motor Carrier Act of 1931. No question as to their meaning or validity was raised by the appellant in its petition or complaint. Other clauses of the statute were quoted and assailed as void. These were not even mentioned. No question as to the meaning or validity of these provisions was decided or referred to by the Supreme Court of Georgia. The opinion of that court summarizes the allegations of the complaint, and considers the objections there stated and no others.

This court is a court of review and limits the exercise of its jurisdiction in accordance with its function. *Edward Hines Trustees* v. *Martin,* 268 U. S. 458, 465; *Wilson* v. *McNamee,* 102 U. S. 572; *Old Jordan Mining Co.* v. *Société des Mines,* 164 U. S. 261, 265; *Bass, R. & G., Ltd.* v. *State Tax Comm'n,* 266 U. S. 271, 284, 285. The need of forbearance is commanding when the judgment brought before us comes from a state court and calls for the construction and application of the provisions of a local statute. In such circumstances we are deprived of an important aid to the wise performance of our duties if we proceed to a decision as to matters undetermined and unheeded in the judgment of the state tribunals. *Stephenson* v. *Binford,* 287 U. S. 251, 277.

The decree of the Supreme Court of Georgia is accordingly

Affirmed.

REALTY ASSOCIATES SECURITIES CORP. ET AL. *v.* O'CONNOR ET AL.

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

No. 625. Argued April 8, 9, 1935.—Decided April 29, 1935.

1. The compensation of referees in bankruptcy for performance of their public duties, is limited to what is clearly warranted by law. P. 299.
2. The provision in § 40 (a) of the Bankruptcy Act allowing the referee one-half of 1% upon the amount to be paid to creditors upon the confirmation of a composition, must be construed in harmony with the policy of Congress to prevent extravagance in bankruptcy administration. P. 299.
3. Bondholders of the bankrupt agreed to a composition providing for immediate payment of 15% of the par value of their bonds in cash; postponement of the time for paying the remaining principal; and reduction of interest rate, the interest to be paid only out of earnings, but to be cumulative and payable in full upon maturity of the principal. The composition also provided that they should be represented on the Board of Directors of the bankrupt company, and there were to be restrictions on the company's investments and creation of new debts. *Held,* that "the amount to be paid" upon which the referee's compensation should be computed under § 40 (a), *supra,* was not the full principal amount of the bonds, but was no more than the 15% cash plus the market value of the bonds as it would be after applying the 15% in reduction of the principal. P. 300.
4. General Order XLVIII (4), which fixes the commissions of referees in proceedings under § 74 of the Bankruptcy Act, can not control in the judicial determination of the compensation allowable in proceedings under § 12 of the act. P. 300.

74 F. (2d) 61, reversed; District Court, 6 F. Supp. 549, affirmed.

CERTIORARI, 294 U. S. 701, to review the reversal of an order of the Bankruptcy Court, 6 F. Supp. 549, fixing the compensation of a referee.

Mr. Alfred T. Davison for Realty Associates Securities Corp., petitioner.

Mr. James N. Rosenberg for Realty Associates, Inc., petitioner.

Mr. George C. Levin, with whom *Messrs. Sydney Krause* and *George J. Hirsch* were on the brief, for O'Connor, respondent.

Mr. Archibald Palmer for Eliza B. Carmen et al., respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The controversy is one as to the compensation of a referee in bankruptcy upon a composition with the creditors.

Realty Associates Securities Corporation was adjudged a bankrupt, July 10, 1933, upon the filing of a voluntary petition. At the same time the proceeding was sent to a referee in bankruptcy. The chief claims ($12,631,-949.67) were on bonds issued under indentures between the bankrupt and a trust company as trustee. The other claims were only $208,133.90, of which amount one for $207,583.95 is contested and undetermined. On February 16, 1934, the bankrupt made an offer to the creditors of terms of composition pursuant to the statute (Bankruptcy Act, 30 Stat. 549, c. 541, § 12; 11 U. S. C. § 30), which offer was accepted by the requisite majority. The District Judge found the composition to be for the best interests of the creditors (Bankruptcy Act, § 12 (d)) and confirmed it. By its terms, all creditors were to receive cash for fifteen per cent of the amount of their claims as filed and allowed. Holders of bonds (after crediting the cash) were to extend and otherwise modify the obligation for the remaining eighty-five per cent. Creditors not bondholders, an almost negligible number, were to receive

bonds in the treasury of the company reduced and modified in the same way. The time for the payment of the principal was postponed until October 1, 1943; the rate of interest was lowered from six per cent to five; the interest accruing semiannually before October, 1943 was to be payable only out of earnings, but the liability was to be cumulative, and upon maturity of the principal was to be discharged in full; the creditors were to be represented on the Board of Directors; and there were to be restrictions on investments and on the creation of new debts. The composition did not call for the cancellation or surrender of bonds then outstanding. There was, however, to be attached to each of them a rider, described as a "notation of reduction and modification," which was to be evidence of the foregoing changes. Cash in the requisite amount was deposited with the clerk of the court, and other instruments, so far as necessary, were signed and filed.

In the meantime a question had arisen as to the compensation payable to the referee. "Referees shall receive as full compensation for their services . . . one half of 1 per centum upon the amount to be paid to creditors upon the confirmation of a composition." Bankruptcy Act, § 40 (a); 11 U. S. C. § 68.* The creditors took the position that the percentage was to be computed upon the cash, and nothing else. The cash payments being

* "(a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of $15 deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them 1 per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition."

$2,091,129.04, the compensation on that basis would be $10,455.65. The referee maintained that he was entitled to a percentage not only on the cash, but also on the face amount of the principal payable upon the bonds nearly ten years thereafter. Figuring the total cash and bonds at $13,008,038.31, he arrived at a fee of $65,040.19. The District Judge followed an intermediate course. 6 F. Supp. 549. Testimony was received that the bonds were then selling in the market, after public notice of the composition, at 37% of par, and that their market value would be 22% when the principal had been reduced by a credit of 15% in cash. The District Judge estimated the bonds as equivalent to cash to the extent of 22% of the par value of the principal. The total fees thus figured were $24,064.87. An order was made accordingly.

The creditors took no appeal, acquiescing in the award, though some believed it to be too large. The referee, however, did appeal. The Court of Appeals for the Second Circuit sustained the position of the referee, one judge dissenting. 74 F. (2d) 61. The decision was that in figuring the commissions the bonds were to be reckoned as a payment of the full amount of the principal payable thereunder. On the petition of the bankrupt and a creditor a writ of certiorari issued from this court.

We think it an unreasonable view of the meaning of the statute (Bankruptcy Act, § 40; 11 U. S. C., § 68) that would treat the bonds of the bankrupt in the situation here developed as equivalent to cash.

In determining the effect of any particular composition, a "payment" or an "amount paid" must have a sensible construction, which may vary in one case and another according to the facts. Here, at the date of the bankruptcy, creditors were the owners of the bonds of the bankrupt, its promises, non-negotiable in form, for the payment of money, to the extent of nearly $13,000,000. At the date of the composition and afterwards, they held the same bonds, scaled down in amount as to principal

and interest, and with some of the terms varied, but still the same bonds with the promises to pay not fulfilled, nor even accelerated, but on the contrary deferred. Common sense revolts at the suggestion that creditors have been paid for this purpose or for any other when all that has happened is that they have been left in possession of the old promises of the debtor, reduced in amount and extended as to time.

Referees in bankruptcy are public officers (11 U. S. C. §§ 61, 64), and officers of a court. Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties. *United States* v. *Garlinger,* 169 U. S. 316, 321; *People ex rel. Rand* v. *Craig,* 231 N. Y. 216, 221. Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. Strengthening Procedure in the Bankruptcy System, Sen. Doc. No. 65, 72d Congress, 1st Sess., (1932), p. 53; also H. R. Rep. 65, 55th Congress, 2d Sess. (1898), p. 44. In response to those complaints, Congress has attempted in the enactment of the present statute to fix a limit for expenses growing out of the services of referees and receivers. Bankruptcy Act §§ 40, 48 (d) (e); 11 U. S. C. §§ 68, 76. The pay for referees is no longer involved in uncertainty as to the applicable percentage. By mischance there is still uncertainty at times as to the principal amount to which the rate is to be applied. In cases of composition the principal is "the amount to be paid to creditors upon the confirmation," and before we can compute what is due we must know what payment is. The ascertainment of that fact, like the ascertainment of facts generally in the discharge of the judicial function, is a process that must be flexible and broad enough to keep all the circumstances in view. In weighing their significance a court will not forget that Congress meant to hit the evil of extravagance, and that the meaning of its words, if doubtful, must be adapted

to its aim. If this is kept in mind, certain inferences will follow. One of them will be that a promise is not payment unless it would naturally be so regarded in the common speech of men, and that the extent of the payment, whether partial or complete, must be subject to a kindred test.

Viewing this case from that angle of vision, we hold that the referee had full compensation in the award of commissions that was made by the District Judge. Whether he was entitled to as much, we do not now determine, the creditors and the bankrupt, who were at liberty to oppose, having preferred to acquiesce. For present purposes it is enough that he was not entitled to more. The bonds had a value in the market that would have made it possible for a creditor to convert them into money at 22% of par. If present values were to be estimated, this was the present value of the promise of the debtor as of the date of composition. To find anything in addition would be to capitalize a hope.

The facts of the case before us define the scope of our decision. We are not required to adjudge the effect to be given to the acceptance of bonds or notes when made in different circumstances or with other possibilities of benefit. For like reasons there can be no profit in stating or analyzing the holdings in other federal courts. *In re Batterman,* 231 Fed. 699; *In re Mills Tea & Butter Co.,* 235 Fed. 815; *American Surety Co.* v. *Freed,* 224 Fed. 333; *In re J. B. White Co.,* 225 Fed. 796; *Kinkead* v. *J. Bacon & Sons,* 230 Fed. 362; *In re Columbia Cotton Oil & Provision Corp.,* 210 Fed. 824. They grew out of situations very different from this one, and are not consistent with one another. No principle of general application can be extracted from them.

The respondent referee invokes the analogy of General Order XLVIII (4), adopted April 24, 1933 (288 U. S. 636, 637), which fixes the commissions of referees in proceed-

ings under § 74 of the Bankruptcy Act. Section 74 (11 U. S. C. § 202) and the rules applicable thereto have relation to proceedings for the relief of a debtor not a bankrupt who seeks a composition or an extension of his debts. The present proceeding under § 12 of the act (11 U. S. C. § 30) is for a composition by a bankrupt. The general order was passed in the exercise of the rule-making power, and was directed to proceedings of a particular class. The jurisdiction that we now exercise is part of the judicial function, and is directed to proceedings of a different class. The one does not control the other. *Meek* v. *Centre County Banking Co.*, 268 U. S. 426, 434; *West Co.* v. *Lea*, 174 U. S. 590, 599.

We find no merit in the objection that there has been an omission of parties whose presence is essential to the exercise of our supervisory jurisdiction.

The decree of the Circuit Court of Appeals should be reversed, and that of the District Court affirmed.

Reversed.

ATLANTIC COAST LINE RAILROAD CO. *v.* FLORIDA ET AL.*

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

No. 344. Argued January 17, 18, 1935. Reargued March 4, 5, 1935.—Decided April 29, 1935.

Higher intrastate rates were substituted for lower intrastate rates by an order of the Interstate Commerce Commission upon the ground that the lower ones were so low as to result in unjust discrimination against interstate commerce. The order was upheld

* Together with No. 345, *Florida et al.* v. *United States et al.* Appeal from the District Court of the United States for the Northern District of Georgia.

by a decree of the federal District Court dismissing complaints of the State and interested shippers, seeking injunctions. This Court reversed the decree because the order was not supported by proper findings (282 U. S. 194), whereupon the Commission after reinvestigation made a new order, upon the same ground as before, which reinstated the higher rates for the future and which, being supported by adequate findings, was sustained in further litigation (292 U. S. 1). In the interim between the first order and the decree enjoining its execution the carrier had collected the higher rates. The State and other plaintiffs in the original suit, applied to the District Court for a supplementary decree requiring the carrier to return the excess of such collections over the lower rates. *Held:*

1. That the claim of restitution was without equity as to all or any part of such excess. Pp. 316–317.

2. A cause of action for restitution upon reversal of a judgment belongs to the class of actions for money had and received. The remedy is equitable in origin and function, and the claimant, to prevail, must show that the money was received in such circumstances that the possessor can not in equity and good conscience retain it. The question is not whether the law would put the defendant in possession of the money if the transaction were a new one, but whether the law will take it out of his possession after he has been able to collect it. P. 309.

3. Award of restitution after reversal of a judgment is *ex gratia*, resting in sound discretion, and will not be ordered where the justice of the case does not call for it. P. 310.

4. The Interstate Commerce Commission has jurisdiction, exclusive of that of any court, to set aside intrastate rates which discriminate unduly against interstate commerce, but its order is prospective only and it can not in such case give reparation for the past. P. 311.

5. The order that first substituted the higher rates in this case was voidable, not void, and the carrier was not at liberty to disobey it. P. 311.

6. The absence of an equity to restitution in this case is apparent from the findings of the trial court confirming the reports and findings of the Interstate Commerce Commission whereby it appears that the lower rates were discriminatory against interstate commerce, and therefore forbidden and declared unlawful under § 13 (4) of the Interstate Commerce Act, from the time of

the Commission's first order, and that the higher rates ordered by it would have been the only lawful ones through the period in question, but for a mere slip in procedure. P. 312.

7. The carrier's equity is reinforced by the fact that the lower rates would be confiscatory, if enforced by the State after suitable challenge by the carrier. P. 313.

8. Assuming that the carrier's only remedy under the state law for escaping the lower rates, though they were voluntarily initiated, was by administrative proceedings, followed, if necessary, by action in court, it does not follow that their confiscatory character is not to be considered as bearing on the carrier's equity in this case. P. 313.

9. In cases of this kind, the tests of conscience and fair dealing are the same whether the claim of restitution be based on contract or on statute. P. 314.

10. The power of the District Court to compel restitution is ancillary to the power to determine whether the challenged orders of the Commission should be vacated or upheld. P. 314.

11. In the exercise of this ancillary power, the court was not called upon to lend its aid to a forbidden practice and, in the absence of any equities of the State or the shippers, it should stay its hand, leaving the parties where it finds them. P. 314.

12. This mere inaction of the federal court is not an assumption of the rate-making power nor an encroachment upon the powers of the State. P. 315.

13. Restitution in this case is denied *in toto*, since the determination of the Interstate Commerce Commission, though not *res judicata* in respect of past transactions, is entitled to great weight as evidence of the reasonableness of the rates collected; and the claimants have failed to prove them unreasonable. P. 317.

Reversed.

CROSS-APPEALS from a decree of the District Court of three judges requiring the Railroad Company to refund to shippers (but in part only) moneys collected by it in excess of the lawful state rates, on intrastate consignments of lumber. The collections were made under color of an order of the Interstate Commerce Commission, sustained by the District Court, but adjudged invalid by this Court on appeal. 282 U. S. 194. See also 292 U. S. 1. After

the case had been argued at this Term, the Court called for reargument upon the following questions:

(1) Whether the District Court had jurisdiction to award restitution or should exercise such jurisdiction in a case of this character relating to intrastate rates. (2) If the District Court had such jurisdiction and should exercise it in a case of this character relating to the revenue needs of the carrier, what should be the measure of an award of restitution. And (3) In such an inquiry, what effect, evidentiary or otherwise, should be attributed to the proceedings before, and findings of, the Interstate Commerce Commission.

Messrs. Carl H. Davis and *Robert C. Alston* made the arguments at both hearings, on behalf of the Atlantic Coast Line Railroad Company, appellant in No. 344 and cross-appellee with the United States and the Interstate Commerce Commission in No. 345. *Messrs. W. E. Kay* and *Wm. Hart Sibley,* of counsel for the Atlantic Coast Line Railroad Company, were with them on the briefs. *Mr. Alfred P. Thom,* of counsel for the Atlantic Coast Line Railroad Company, also was on the original brief.

Messrs. C. G. Ashby and *Henry P. Adair* argued the case on the first hearing, for the Brooks-Scanlon Corporation, the Wilson Cypress Company, and the Cummer Cypress Company, which together with the State of Florida, the Florida Railroad Commission (individually and for the use and benefit of several shippers), and the Wilson Lumber Company, were appellees in No. 344 and cross-appellants in No. 345. The reargument was made by *Mr. Henry P. Adair* and *Mr. J. V. Norman,* the latter appearing as counsel for the Wilson Lumber Company. With *Messrs. Ashby, Adair,* and *Norman* on the briefs were *Mr. Cary D. Landis,* Attorney General of Florida, for the State of Florida; *Mr. Theodore T. Turnbull,* for the Florida Railroad Commission; and *Mr. August G.*

Gutheim, of counsel for the Brooks-Scanlon Corporation, the Wilson Cypress Company, and the Cummer Cypress Company.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Freight charges were collected by a railroad carrier in accordance with an order of the Interstate Commerce Commission after the refusal of a United States District Court to declare the order void. Later the decree was reversed by this court without considering the evidence on the ground that the findings of the Commission were incomplete and inadequate. *Florida* v. *United States,* 282 U. S. 194. Still later the Commission upon new evidence and new findings made the same order it had made before, this court confirming its action after appropriate proceedings. *Florida* v. *United States,* 292 U. S. 1. The question now is whether restitution is owing from the carrier for the whole or any part of the rates collected from its customers while the first order was in force. The narrative must be expanded to bring us to an answer.

For many years, beginning with 1903, the Atlantic Coast Line Railroad Company or its predecessor maintained a schedule of charges known as the Cummer scale for the transportation of logs in train and carload shipments within the state of Florida. In its inception this scale was established by agreement between the railroad company and one or more companies engaged in the sale of lumber. Later, in January, 1927, an order was made by the Railroad Commission of Florida whereby voluntary rates then in force, if not higher than the maximum rates approved by the Commission, were to be continued in effect as if officially prescribed. For the purpose of the present controversy we assume that by force of this order, the Cummer scale, even though less than compensatory, and even

though voidable through appropriate action, must be deemed to have been fixed by law for intrastate transactions.

In May, 1926, the Public Service Commission of Georgia filed a complaint against the Atlantic Coast Line Railroad Company with the Interstate Commerce Commission, the complaint being directed to the maintenance of the Cummer scale. In that proceeding the Railroad Commission of Florida intervened, and also important shippers affected by the challenged schedule. On August 2, 1928, the Interstate Commerce Commission made a decision (146 I. C. C. 717), amended and broadened on February 7, 1929, enjoining the maintenance of the schedule then in force on the ground (along with others) that the rates were so low as to result in unjust discrimination against interstate commerce. To avoid this discrimination a new schedule was established. Florida and the intervening shippers brought suits in a federal district court, made up of three judges in accordance with the statute (28 U. S. C. § 47), to vacate the orders of the Commission and restrain enforcement. The District Court dismissed the bills. 30 F. (2d) 116; 31 F. (2d) 580. Upon appeal to this court the decrees were reversed on the ground that the report of the Commission did not contain the necessary findings. 282 U. S. 194. It was not enough to find that the intrastate rates were unreasonably low. 282 U. S. at p. 214. It was not enough to state the conclusion that interstate commerce was unjustly affected. 282 U. S. at p. 213. It was necessary to find the facts supporting the conclusion, as, for instance, that the revenues of interstate commerce would probably be increased if the rates for intrastate hauls were established at a higher level. " In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." 282 U. S. at p. 215. The Com-

mission was to be free, however, to consider the facts anew and file its report in proper form. It " is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require." The mandate of reversal, giving effect to that decision, went down from this court on February 19, 1931, and on March 7, 1931 was filed in the court below.

In the interval between February 8, 1929, the effective date of the new schedule, and March 7, 1931, the railroad company had made collections in accordance with the order of the Commission, discarding the Cummer scale. Indeed, the Florida Commission, bowing to the authority of the Interstate Commerce Commission, had made an order in January, 1929, amended in April of that year, whereby the Cummer scale was declared to be suspended so long as the decree of the District Court remained in effect and unreversed. After the mandate of reversal the Interstate Commerce Commission listened to new evidence, made a new set of findings, and prescribed the same rate that it had put into effect before. 186 I. C. C. 157; 190 I. C. C. 588. The basis of the decision was the unjust discrimination suffered by interstate commerce through losses of revenue resulting from the local rates. Once more the order of the Commission (dated July 5, 1932, but not effective till February 25, 1933) was assailed by Florida and by shippers through suits in the District Court. The bills were dismissed, 4 F. Supp. 477, and this court affirmed. 292 U. S. 1. Both the findings of the Commission and the evidence back of the findings were now held to be sufficient.

In the meantime other proceedings had been taken in the District Court with a view to giving effect more completely to the mandate of reversal. In February and March, 1931, shippers of lumber, interveners in the earlier suits, petitioned for a decree of restitution to the extent of the difference between the rates that had been

paid from February 8, 1929, to March 7, 1931, under the order of the Commission, and the lower rates that would have been paid if there had been adherence to the Cummer scale. At the same time the State of Florida and its Railroad Commission petitioned for like relief in behalf of other shippers and consignees. An answer having been filed by the railroad company, the District Court appointed a master to take evidence and report. After intermediate proceedings which it is unnecessary to summarize, the master made a final report in March, 1933, recommending a decree of restitution for part but only part of the overcharges claimed. He found that the Cummer scale was unjust and noncompensatory, and if enforced against the will of the carrier would result in confiscation. He found that for the years in controversy a substituted rate should be established, and established at such a figure as would avoid unjust discrimination against interstate commerce. He found that this end could be attained by the adoption of a schedule higher than the Cummer scale but lower than the one promulgated by the Commission as operative thereafter. He advised restitution in the sum of $99,941.77, which was 34% of the amount ($293,946.38) demanded by the claimants. The District Court confirmed the report, one judge dissenting. The prevailing opinion gives expression to the hesitation of the court in thus departing from the findings of the federal commission. It observes, however, that there would be hardship to shippers and consignees in a sharp and sudden change of rates directed to a business in which freight charges are so large a part of the value of the product. "If the ideal rates be those fixed by the Commission, the ideal might with reason and justice have been approached less precipitately." The case is here on cross-appeals. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134; *Baltimore & Ohio R. Co.* v. *United States*, 279 U. S. 781. In No. 344, the appellant is the

railroad company, which declares itself aggrieved because restitution was not denied altogether. In No. 345, the appellants are the State of Florida and intervening shippers, who declare themselves aggrieved because restitution was not awarded on the basis of the Cummer scale.

Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. *Arkadelphia Co.* v. *St. Louis Southwestern Ry., supra; Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216; *Ex parte Lincoln Gas & Electric Light Co.,* 257 U. S. 6; cf. *Haebler* v. *Myers,* 132 N. Y. 363; 30 N. E. 963. Indeed, the concept of compulsion has been extended to cases where the error of the decree was one of inaction rather than action, as where a court has failed to set aside the order of a commission or other administrative body, the constraint of the order being imputed in such circumstances to the refusal of the court to supply a corrective remedy. *Baltimore & Ohio R. Co.* v. *United States, supra.* But the rule, even though general in its application, is not without exceptions. A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. *Moses* v. *Macferlan,* 2 Burr. 1005; *Bize* v. *Dickason,* 1 Term Rep. 285; *Farmer* v. *Arundel,* 2 Wm. Bl. 824; *Kingston Bank* v. *Eltinge,* 66 N. Y. 625.* The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. *Schank* v. *Schuchman,* 212 N. Y. 352, 358, 359; 106 N. E. 127; *Western Assurance Co.* v. *Towle,* 65 Wis. 247; 26

* Many cases are assembled in Keener on Quasi-Contracts, pp. 412, 417, and Woodward on Quasi-Contracts, § 2.

N. W. 104. The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. Cf. *Tiffany* v. *Boatman's Institution,* 18 Wall. 375, 385, 390. The ruling in *Western Assurance Co.* v. *Towle, supra,* gives point to the distinction. The plaintiff had paid money to the defendant upon a policy of insurance against fire. The payment was procured by false representations and false swearing as to the extent of the loss, which, if seasonably discovered, would have worked a forfeiture of the policy. The court held that in an action for money had and received, the plaintiff could recover "so much only as the amount paid exceeded the actual loss sustained by the insured"; in equity and good conscience the rest might be retained.

Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. "Restitution is not of mere right. It is *ex gratia,* resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip." *Gould* v. *McFall,* 118 Pa. St. 455, 456; 12 Atl. 336, citing *Harger* v. *Washington County,* 12 Pa. St. 251. There are other decisions to the same effect. *Alden* v. *Lee,* 1 Yeates (Pa.) 207; *Green* v. *Stone,* 1 Har. & J. (Md.) 405; *State* v. *Horton,* 70 Neb. 334; 97 N. W. 434; *Teasdale* v. *Stoller,* 133 Mo. 645, 652; 34 S. W. 873. "In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received." *Johnston* v. *Miller,* 31 Gel. & Russ. 83, 87.

We are thus brought to the inquiry whether the rates under the new schedule were collected in such circumstances as to move a court of equity, finding the proceeds

of collection in the possession of the carrier, to help the shippers and their representatives in getting the money back.

This court has held that the Interstate Commerce Commission has jurisdiction exclusive of that of any court to set aside intrastate rates which discriminate unduly against interstate commerce. *Board of Railroad Commissioners* v. *Great Northern Ry. Co.*, 281 U. S. 412. Even so, the substituted schedule is prospective only, and power has not been granted in such circumstances to give reparation for the past. 281 U. S. at p. 423; *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506, 511. What was done in this case must be considered in the light of that established rule. An order declaring the discrimination to be excessive and unjust was made by the Commission before the carrier attempted to collect the higher charges. Thereafter the order was adjudged void by a decision of this court (*Florida* v. *United States*, 282 U. S. 194; cf. *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499), but void solely upon the ground that the facts supporting the conclusion were not embodied in the findings. Void in such a context is the equivalent of voidable. *Toy Toy* v. *Hopkins*, 212 U. S. 542, 548; *Weeks* v. *Bridgman*, 159 U. S. 541, 547; *Ewell* v. *Daggs*, 108 U. S. 143, 148, 149. The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court. It would have exposed itself to suits and penalties, both criminal and civil, if it had followed such a path. See, e. g., Interstate Commerce Act, 49 U. S. C., § 16 (8) (9) (10) (11). Obedience was owing while the order was in force.

By the time that the claim for restitution had been heard by the master and passed upon by the reviewing court, the Commission had cured the defects in the form of its earlier decision. During the years affected by the

claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. It was foiled through imperfections of form, through slips of procedure (*Gould* v. *McFall, supra; Alden* v. *Lee, supra*), as the sequel of events has shown them to be. Unjust discrimination against interstate commerce, "forbidden" by the statute, and there "declared to be unlawful," (Interstate Commerce Act, § 13 (4); *Board of Railroad Commissioners* v. *Great Northern Ry. Co., supra,* at pp. 425, 430; *Florida* v. *United States,* 292 U. S. 1, 5) does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken. The word when it goes forth invested with the forms of law may fix the consequences to be attributed to the conduct of the carrier in reliance upon an earlier word, defectively pronounced, but aimed at the self-same evil, there from the beginning. The Commission was without power to give reparation for the injustice of the past, but it was not without power to inquire whether injustice had been done and to make report accordingly. Indeed, without such an inquiry and appropriate evidence and findings, its order could not stand, though directed to the years to come. Obedient to this duty, the Commission looked into the past and ascertained the facts. In particular it looked into the very years covered by the claims for restitution and found the inequality and injustice inherent in the Cummer rates during the years they were in suspense and during those they were in force. 186 I. C. C. 157, 166, 167, 168, 187. What it had stated in its first report (146 I. C. C. 717) was thus supplemented and confirmed by what it stated in the second. The two sets of findings tell us, when read together, that restitution is without support in equity and

conscience, whatever support may come to it from procedural entanglements.

The carrier's position takes on an added equity when the fact is borne in mind that the charges of the Cummer schedule are less than compensatory, and would result in confiscation if enforced by the power of the State after challenge by the carrier in appropriate proceedings. What those proceedings are has been a subject of dispute under the Florida decisions. For many years it was believed that a carrier objecting to a schedule as unreasonably low, might put another into effect without asking the consent of any one, and justify its conduct later if a contest should develop. *Pensacola & A. R. Co.* v. *State,* 25 Fla. 310; 5 So. 833; *Cullen* v. *Seaboard Air Line R. Co.,* 63 Fla. 122; 58 So. 182. The shippers and the state of Florida contend that by a very recent decision this practice has been ended. *Reinschmidt* v. *Louisville & Nashville R. Co.,* 118 Fla. 237; 160 So. 69. The present rule is said to be that the carrier must resort in the first place to an administrative remedy before the Railroad Commission of the state, and look to the courts afterwards. If all this be accepted, the conclusion does not follow that the confiscatory character of a schedule is not to be considered in determining the equity of the carrier's possession when higher rates have been collected under color of legal right and consignees or shippers are trying to regain what they have paid. In saying this we do not forget that the Cummer scale of rates was voluntary in origin. Later, by an order of the state commission, it became a scale prescribed by law. Whatever voluntary quality it then retained must be deemed to have departed when the carrier made common cause with the critics of the scale in contesting its validity.

The claim for restitution yields to the impact of these converging equities with all their cumulative power. It

would yield to such an impact though the action to which it is an incident were triable in a court of law. *Moses* v. *Macferlan, supra; Schank* v. *Schuchman, supra.* It must yield more swiftly and surely when the litigants are in a court of equity. *Tiffany* v. *Boatman's Institution, supra; Willard* v. *Tayloe,* 8 Wall. 557; *Mississippi & M. R. Co.* v. *Cromwell,* 91 U. S. 643, 645; *Deweese* v. *Reinhard,* 165 U. S. 386, 390. The right that equity declines to further may have its origin in contract. But also, and in typical instances, it has its origin in statute. *Tiffany* v. *Boatman's Institution, supra.* The tests of conscience and fair dealing will be the same in either case. This District Court whose decree we are reviewing was organized to pass upon the question whether the challenged order of the Commission should be vacated or upheld. 28 U. S. C. § 47. Whatever power it has to compel restitution by the carrier of items subsequently collected derives from that primary jurisdiction and is ancillary thereto. In the exercise of that power it is not required to lend its aid in perpetuating a forbidden practice. Florida has no equity other than the equities of the consignees and shippers. The consignees and shippers have no equity that can override a prohibition and a policy declared by act of Congress. To prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings. The blunders being now corrected, the verities of the transaction are revealed as they were from the beginning. We think the better view is that in the light of its present knowledge the court will stay its hand and leave the parties where it finds them.

To this the claimants answer that inaction in such circumstances is an assumption by the federal court of legislative powers and an unconstitutional encroachment upon the powers of a sovereign State. The argument

misses the significance of equitable remedies. The federal court by its inaction does not trench upon any jurisdiction, legislative or judicial, inherent in the state of Florida. It does not undertake to say that the rates collected by the carrier were lawful in the sense that a suit would lie to recover them if credit had been given to the shipper and a balance were now unpaid. All that the federal court does is to announce that it will stand aloof. It inquires whether anything has happened whereby a court of equity would be moved to impose equitable conditions upon equitable relief. In the course of that inquiry it perceives that the charges were collected under color of legal right, in circumstances relieving the carrier of any stigma of extortion. It discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays. Learning those things, it says no more than this, that irrespective of legal rights and remedies it will not intervene affirmatively, in the exercise of its equitable and discretionary powers, to change the *status quo*. This is not usurpation. It is not action of any kind. It is mere inaction and passivity in line with the historic attitude of courts of equity for centuries.

The claimants refer to cases in which this court has denied the power of the federal judiciary to take upon itself the functions of a rate-making body, charged with legislative duties. None of the cases cited controls the case at hand. A typical illustration is *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264. Rates prescribed by a state commission for the furnishing of gas were found by a federal court to be below the line of compensation. In the face of that finding the decree refused relief unless the complainant would consent to abide by a new schedule established by the court itself. Upon appeal to this court the condition was annulled.

We gave explicit recognition to the power of a court of equity to subject an equitable remedy to equitable terms. We held, however, that full protection could be accorded to seller and consumer if the regulatory Commission were permitted to discharge its proper function of prescribing a just schedule after the unlawful one had fallen. "In the circumstances there was no occasion for the court to draw upon its extraordinary equity powers to attach any condition to its decree, and the condition which it did attach was an unwarranted intrusion upon the powers of the Commission." 290 U. S. at p. 273.

A very different situation is shown to us here. A complex of colorable right and procedural mistake has brought about a situation in which the equities of the carrier, if they are not protected by the court, will be unprotected altogether. The rates now recognized as just are not a fabrication of the judges. They have not been fixed by a court to take effect thereafter. They are the rates prescribed for the future by the appointed administrative agency, and that on two occasions, after scrutiny and study of injustice suffered in the past. The court surveys the years and discerns the same injustice, dominant at the beginning as well as at the end. Indeed, nowhere in the record is there a suggestion on the part of any one that during this long litigation there has been any change of conditions whereby a discrimination against interstate commerce illegitimate at one time would be innocent at another. What was injustice at the date of the second order of the Commission is shown beyond a doubt to have been injustice also at the first. A situation so unique is a summons to a court of equity to mould its plastic remedies in adaptation to the instant need.

The case up to this point has been dealt with on the assumption that the award upon restitution is to be for the whole demand or nothing. There is, however, a possi-

bility between these two extremes, a possibility exemplified in the decree of the court below. The District Court, following the recommendation of the master, refused a decree of restitution for the full amount of the difference between the collections by the carrier and the rates of the Cummer scale, but did award restitution for 34% of that difference, or $99,941.77. We think the claim for restitution should have been rejected altogether. In thus holding we do not suggest that the determination of the Interstate Commerce Commission as to the rates to be operative thereafter had the force of *res judicata* in respect of past transactions. Cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 389; *State Corporation Commission* v. *Wichita Gas Co.*, 290 U. S. 561, 569. None the less, as the court below conceded, it was entitled to great respect, representing, as it did, the opinion of a body of experts upon matters within the range of their special knowledge and experience. *Illinois Central R. Co.* v. *Interstate Commerce Comm'n*, 206 U. S. 441, 454; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 665. This court has already held that their findings had support in the evidence before them. *Florida* v. *United States*, 292 U. S. 1, 12.

The present record does not satisfy us that a new scale should be set up to govern claims for restitution. The field of inquiry is one in which the search for certainty is futile. Opinions will differ as to the qualifications of experts, the completeness of their inquiry into operating costs, the accuracy of their methods of computation, the soundness of their estimates. There is a zone of reasonableness within which judgment is at large. *Banton* v *Belt Line Ry. Corp.*, 268 U. S. 413, 422, 423. Only by accident perhaps would two courts or administrative bodies draw the line within the zone at precisely the same points. In a sense, then, it is true that there is

support in fairness and reason for each of the two conclusions, the Commission's and the master's. More than this, however, must be made out to uphold the claims in suit. The claimants do not sustain the burden that is theirs by showing that the master set up a reasonable schedule. They must show that the other schedule, the one set up by the Commission, is unreasonable. In the absence of such a showing the carrier does not offend against equity and conscience in standing on its possession and keeping what it got.

The decree is reversed and the cause remanded with instructions to dismiss the claims.

Reversed.

MR. JUSTICE ROBERTS, dissenting.

A tariff of rates for intrastate carriage of logs, known as the "Cummer Scale," was in effect over lines of the Atlantic Coast Line Railroad in Florida. The Interstate Commerce Commission, upon complaint that these rates unduly discriminated against interstate commerce, held an investigation which eventuated in an order effective February 8, 1929 increasing the rates for the future to a parity with interstate rates. A statutory district court in the Northern District of Georgia dismissed a bill praying that it enjoin and set aside the order. This court reversed the decree, holding the order void for want of supporting findings, and the district court then entered an injunction. As a consequence of the error of the court, the Coast Line collected the higher rates from February 8, 1929 to March 7, 1931. The State on behalf of shippers and certain shippers in their own right prayed an award of restitution by the court whose error made possible the collection of the unauthorized charges. They were awarded sums representing the difference between what they paid and what the court found would have been a reasonable and non-confiscatory rate during the period. They were denied the full difference between the established State rate and

the unlawful rate fixed by the Interstate Commerce Commission.

I concur in the view that the decision below cannot stand, but think the direction to the District Court should be to enter judgment in favor of the claimants and against the railroad for the difference between the rates, exacted between February 8, 1929 and March 7, 1931, and the lawful Florida rates. To award less will, in my judgment, sanction unconstitutional encroachment by the Federal Government upon the sovereign rights of the State of Florida.

First. The Cummer Scale was, prior to the Interstate Commerce Commission's order, the lawful tariff for intrastate transportation in Florida. It had been in effect over portions of the lines of the Atlantic Coast Line in that State since 1903. It had been in force on all trackage of that railroad in Florida since 1914. Originally established by contract between the railroad and certain shippers, it was, in 1914, filed by the carrier as a rate schedule for trainload lots only. The Florida Railroad Commission disapproved the tariff as filed, and insisted that it apply also to carload lots. The Coast Line acquiesced and amended the tariff accordingly. In 1927 that commission, after notice and hearing, the Coast Line being represented, published a rule making all existing rates, whether voluntarily established or otherwise, commission rates, and prohibiting alteration or discontinuance of them save upon application to and approval by the commission. Compare *Western & Atlantic Railroad* v. *Georgia Public Service Comm'n,* 267 U. S. 493.

As the statutes of Florida stood prior to 1913, rate schedules promulgated by the commission were merely prima facie evidence of reasonableness. If the carrier exacted more than the scheduled rate and was sued for overcharge, it might overcome the prima facie case made by proof of the commission rate, by showing that the

amount collected was in fact reasonable.[1] By the act of June 7, 1913,[2] the law was amended. The supreme court of Florida has construed the amendment to make a rate prescribed after investigation and hearing, the lawful rate,[3] and the only rate the carrier may charge so long as the commission's order remains in force. We are bound by this construction of the local law.

Second. Since the federal courts respect a state law which requires persons to exhaust administrative remedies before resorting to the courts, they cannot, any more than can the state courts, inquire into the reasonableness of a Florida commission-made rate in a litigation seeking the recovery of overcharges. This is not to say that after the

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[1] *Pensacola & Atlantic R. Co.* v. *State*, 25 Fla. 310; 5 So. 833; *Cullen* v. *Seaboard Air Line Ry. Co.*, 63 Fla. 122; 58 So. 182; *La Floridienne* v. *Atlantic Coast Line R. Co.*, 63 Fla. 208; 58 So. 185.

[2] Ch. 6527, Laws of Florida, 1913, p. 403.

[3] *Louisville & N. R. Co.* v. *Speed-Parker, Inc.*, 103 Fla. 439, 448, 452, 453; 137 So. 724. *Reinschmidt* v. *Louisville & N. R. Co.*, 118 Fla. 237; 160 So. 69. In the latter case the court said [p. 240]:

"Where on the trial of a controversy over freight charges the nature and character of a particular shipment by rail is established by the evidence or has been admitted, and it appears that the Florida Railroad Commission has, after due notice and lawful hearing, prescribed and put into force a particular freight tariff and classification governing the freight charges to be imposed by the carrier for the haulage of a freight shipment of the particular nature and character shown or admitted by the evidence in the case, the Railroad Commission tariff is, as a matter of law, the only applicable and controlling tariff, and the court is without the right to enter upon any inquiry whether or not the prescribed Railroad Commission rate is just or reasonable or is otherwise proper as a proposition of administrative scientific rate making. Under the present law of Florida a rate cannot be collaterally attacked for unreasonableness after it is prescribed in due form of procedure by the Railroad Commission, nor attacked as a matter of law on grounds not going to the legality of the procedure by which the prescribed rate or classification was arrived at by the Railroad Commission in promulgating it."

exhaustion of the administrative remedy one aggrieved by a rate prescribed by state authority may not sue to set aside the rate as confiscatory. This he may do either in a state or a federal tribunal.[4] But such a suit is to set aside and enjoin the enforcement of the rate, which has the force of a statute until so overthrown. The carrier cannot avoid the mandatory quality of the state's regulation by pleading and proving in an action to recover overcharges that the rate in force at the time of the transaction was unreasonable, and that the higher charge exacted was in fact reasonable. A federal court is without power to fix reasonable rates; its jurisdiction ends with a decision that established rates are confiscatory and an injunction against their enforcement; it may not impose a different rate, since so to do would be to usurp the functions of the rate-making body established by state law.[5] This the court below essayed by substituting what it found to be reasonable rates for the established state rates which it thought unreasonably low, and awarding the claimants the difference between the rates so fixed and those collected under color of the void order.

Third. The constitutional power of Congress to regulate interstate commerce, and the incidental power to prevent unjust discrimination against that commerce by intrastate rates, is not self-executing, but must be exercised by appropriate legislation. Until Congress acts the States are free to regulate intrastate commerce as they see fit, subject only to the limitations set by the Four-

[4] Relief is granted in case of confiscatory rates not under the commerce clause but under the Fourteenth Amendment. See, for example, *Minnesota Rate Cases*, 230 U. S. 352, 433ff; *Northern Pacific* v. *North Dakota*, 236 U. S. 585; *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U. S. 396; *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Commission*, 274 U. S. 344.

[5] *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U. S. 264, 271, and cases cited.

teenth Amendment. By the Interstate Commerce Act the regulation of interstate rates was vested exclusively in the Interstate Commerce Commission.[6] This court held the legislation enabled the Commission to remove injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, and in so doing the Commission might require interstate carriers not to charge higher rates for transportation between specified interstate points than between specified intrastate points.[7] In further exercise of the power to regulate interstate commerce, Congress, by § 416 of the Transportation Act of February 28, 1920, which added paragraph (4) to § 13 of the Interstate Commerce Act, has declared that whenever the Commission finds that any intrastate rate causes an 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 discrimination against interstate or foreign commerce, it shall prescribe the rate or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, in order to remove the preference, prejudice or discrimination, and that its orders in that behalf shall be obeyed by the carriers, the law of any state, or the order or decision of any state authority, to the contrary notwithstanding. The section authorizes not only the removal of discrimination as between persons and places, but also such as imposes an undue revenue burden upon interstate commerce.[8]

Congress has provided for the setting aside of unlawful orders of the Commission by suits in equity in district

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[6] *Minnesota Rate Cases, supra,* 396, 399, 402–415.

[7] *Houston, E. & W. Texas Ry. Co.* v. *United States,* 234 U. S. 342.

[8] *Florida* v. *United States,* 282 U. S. 194, 211; *Florida* v. *United States,* 292 U. S. 1, 4, 5.

courts of the United States;[9] but it has never conferred upon any federal court jurisdiction to deal in the first instance with the matter of discrimination.[10] The federal courts lack power even to maintain by injunction a status or to enjoin a rate pending proceedings before the Commission looking to the entry of an order affecting intrastate rates.[11]

Fourth. The order of the Interstate Commerce Commission of August 2, 1928, being null and void, could not justify the carrier in thereafter collecting the increased rates therein named. When in May, 1926, the Georgia Railroad Commission complained to the Commission that certain of the Coast Line's rates on logs between points in Florida were unduly low as compared with interstate rates, the Commission was without power to enter an interlocutory order raising the intrastate rates. It was bound by the provisions of the Act to institute an inquiry and could enter an order only upon adequate evidence and findings which should be prospective in operation. August 2, 1928, it made such an order, which it declared effective February 8, 1929. The State of Florida, by its Railroad Commission, recognized that until that order was set aside, it must be obeyed, and consequently made its own orders No. 979 and No. 990, suspending the Cummer Scale so long as federal Commission's order should remain in force. Notwithstanding that order and an amendatory order were unsupported by appropriate findings, the district court which was asked to enjoin and set them aside held them valid.[12]

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[9] Act of October 22, 1913, c. 32, 38 Stat. 219; U. S. C., Tit. 28, §§ 41 (27) (28), 43–48. Supp. V, Tit. 28, §§ 41 (27), 44, 45, 45a, 46, 47a, 48.

[10] *Minnesota Rate Cases, supra,* 419; *Atlantic Coast Line R. Co.* v. *Trammell,* 287 Fed. 741, 743.

[11] *Board of Railroad Commissioners* v. *Great Northern Ry. Co.,* 281 U. S. 412.

[12] 30 F. (2d) 116; 31 F. (2d) 580.

We reversed the decree and condemned the final order as void.[13] If the district court had acted in accordance with law it would have set aside the order. Had it done so the Coast Line, in the absence of any action by the Florida Commission fixing other rates, would have been bound to collect only those specified in the Cummer Scale. In reliance upon the erroneous decision of the district court, however, the railroad exacted the increased rates approved by the Interstate Commerce Commission. The state of Florida and shippers protested that these were not lawful and pressed with vigor to have them set aside. Our decision reversing the district court's decree was rendered January 5, 1931. The Coast Line, taking the position that further action by the Interstate Commerce Commission might in some way cure the defect in its order, moved us to stay our mandate of reversal to the district court, or in the alternative, that we include in the mandate a direction to that court to maintain the status quo until the Commission should have opportunity to reopen its proceedings and properly determine the matter. We denied the motion for the obvious reason that neither we nor the court below could authorize the railroad to persist in charging rates which had been fixed by a void order. Upon the going down of our mandate the district court entered it as its decree in the cause; and the Coast Line, as it was bound to do, immediately reduced its rates to the level of the Cummer Scale. On April 6, 1931 the Commission reopened the proceedings, heard much new evidence in respect of the then existing situation (not that theretofore existing in May, 1926, the date of the original complaint), and upon adequate evidence and adequate findings ruled that the rates of the Cummer Scale then were and for the future would be unjustly discriminatory against interstate com-

[13] 282 U. S. 194.

merce. It entered an order July 5, 1932, raising the intrastate rates.[14] Thereupon the Coast Line put into force the higher rates prescribed. A statutory district court refused to enjoin and set aside the order,[15] and we affirmed its judgment.[16]

Fifth. Upon the entry of the decree in obedience to our mandate, the statutory district court had jurisdiction to entertain a prayer for restitution of the excess charges paid by shippers, parties to or represented in the cause, solely by force of its original erroneous judgment.[17] If the Coast Line, due to that court's error, had collected more than the legal rate, it owed an obligation to restore the excess to each of the complaining shippers. To refuse to consider their prayer would be to remit each of them to his separate action against the carrier for an overcharge; and to insist upon such a multiplicity of actions in the circumstances would be tantamount to a denial of justice.[18] But the fact that the court had jurisdiction to entertain the omnibus claim for restitution in no wise alters the legal nature of the claim of each plaintiff or the measure of the respondent's obligation. If each of the shippers instead of asking restitution of the district court had instituted his separate action either in a Florida state court or, because of diversity of citizenship and the amount in controversy, in a federal district court, he need only have offered the Cummer Scale and the order of the Railroad Commission of Florida making it the lawful established tariff. This would have made a prima facie case for the recovery of all excess charged over the

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[14] 186 I. C. C. 157. After a further hearing the order was confirmed on January 8, 1933; 190 I. C. C. 588.

[15] 4 F. Supp. 477.

[16] 292 U. S. 1.

[17] *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781.

[18] *Ibid.,* 786.

rates fixed by that scale. The defendant railroad company could not have offered the void decree of the Interstate Commerce Commission as an excuse for the overcharge. Neither a state court nor a federal court in such an action could have entertained a plea that some two years after the entry of the void order, the Interstate Commerce Commission had made another based on new evidence, and prospective only in operation. These facts would not tend to prove that the lawfully established Florida intrastate rates unduly discriminated against interstate commerce at the time of the collection of the challenged charge, or were then confiscatory.

As has been shown the Cummer Scale embodied the lawful rates for intrastate carriage. Until the federal Commission had raised those rates for the future by an order made in accordance with law, the scale remained in force, and the carrier was bound to observe it. The order of the Commission effective February 8, 1929 did not supersede it. The district court has no power to disregard it or to fix rates other than those contained in it. The rights of intrastate shippers are fixed by that scale, have never been abrogated, and must be recognized in every court, state or federal. For the district court or this court to refuse the complainants the full measure of those rights would be to set at naught the laws of Florida in violation of the Federal Constitution.

Sixth. Moreover this is not a case in which equitable considerations have any place. It is said that the Coast Line was compelled to exact the increased rates named in the Interstate Commerce Commission's order so long as that order stood unreversed, under pain of criminal prosecution, and that it would therefore be inequitable to compel it to restore what it thus unlawfully took. This argument overlooks the countervailing rights of the shippers and the state of Florida. The shippers, despite their efforts to set the order aside, were bound under similar pains

and penalties to pay the increased rates. Had it not been for the unlawful order they would have continued to pay rates named in the Cummer Scale until the Florida commission had itself altered them, or a court of competent jurisdiction, upon a finding that they were confiscatory, had set them aside. No such procedure was initiated by the carrier. What of the rights of the state of Florida? Its duly constituted authorities had prescribed rates which had the force of a statute until repealed or set aside. These rates had been fixed, we must presume, with no thought of discrimination against interstate commerce. The federal court for northern Georgia had erroneously approved the unlawful suspension of the state schedule. Has the State no equity to insist on behalf of its citizens that its rates shall be observed until they have been lawfully superseded?

It is urged that it now appears the Interstate Commerce Commission was right in holding the Florida rates unjustly discriminated against interstate commerce, and the order consequent upon this right conclusion was voided merely because of a procedural error. The answer is that the evidence in the two Commission hearings was different, and we may not assume that if the Commission had observed its duty to make adequate findings, it could have drawn support for such findings from the record on which the first order was based; and the second and valid order made in 1932 cannot apply retroactively to affect lawful state rates in force prior to its issuance. Nor is the contention sound that this court has now held the Commission's findings were supported by evidence. This is true with respect to the second order, but this court has never so held as to the first. In fact we refused to analyse the evidence, because that was the duty of the Commission, not of this court.[19] Of course that body properly may rely on the prior experience of carriers in making its orders for

[19] 282 U. S. 215.

their future conduct; but this does not justify a court in relying on the evidence taken by the Commission in an independent trial of a wholly different issue.

We are told that restitution is an equitable doctrine and that as the court, upon consideration of all the facts, should hold there was no inequity in the carrier's retaining what it had collected, refusal of a decree is merely to withhold action, as a court of equity is always free to do in such circumstances. But the weakness of this argument is, that by refusing relief the court in effect denies legal rights. It is not suggested that a dismissal of the motion will not be *res judicata* in any action hereafter brought to recover for overcharges; and if so, the decision in this case is an adjudication by a federal court that the collection of the increased rate was lawful, the invalidity of the Commission's order and the law of Florida to the contrary notwithstanding.

The burden is said to rest upon the claimants of restitution to show that the Interstate Commerce Commission's schedule was unreasonable. This is but to confuse the two orders. The first order was as matter of law unreasonable because without proper support. The second order was reasonable because it had such support in the record and findings. It confuses the issue to relate the propriety of the second order to the Commission's earlier void action. The same confusion persists in the carrier's assertion that § 13 (4) denounces unjust discrimination and the injustice exists whether the Commission has so found or not. The answer is that Congress has not vested courts with jurisdiction to determine whether state rates discriminate against interstate commerce, and the statutory district court had no more authority to investigate that question at the behest of any party before it than would any other state or federal court in an action for an overcharge. Congress has directed that the fact of

discrimination shall be ascertained solely by the Commission.

Finally, it is said that the Coast Line's equity is the greater because the state rates have been found to be confiscatory. No Florida court has so found. Confiscation was not and could not be the issue before the Interstate Commerce Commission in either the original or the reopened proceeding. Two scales of rates, both in themselves within the zone of reasonableness, may upon examination disclose undue discrimination. The confiscatory character of the intrastate rate may be and often is an element to be considered upon the issue of discrimination, but obviously the order of the Commission could not be based upon that alone. If the statement means that in the restitution proceeding the statutory district court found the state rates were so low as to be confiscatory, the answer is that in a suit to recover overcharges the court had no jurisdiction to investigate a claim of confiscation under the Fourteenth Amendment.

The case is not to be decided according to the character ascribed to the first order of the Commission. Whether called void or voidable, the order gave the railroad no right to collect the sums exacted. If, as must be conceded, the carrier took, under and by force of that order, money to which it was not in law entitled, the conclusion necessarily follows that it must restore what was so taken.

To hold that the claimants may not have restitution is to say that invalid, void or voidable orders of the Commission have precisely the same force and effect as orders lawfully made, if from extrinsic facts and matters not cognizable by the court the conclusion may be drawn that the Commission might have made a valid order in the circumstances. So to hold is to recognize in a restitution proceeding, a jurisdiction which in no other circumstances and in no other case could a federal court exercise;

and to permit that court to ignore and nullify action in a field within the State's sovereign power.

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, and MR. JUSTICE STONE, concur in this opinion.

RAILROAD RETIREMENT BOARD ET AL. *v.* ALTON RAILROAD CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 566. Argued March 13, 14, 1935.—Decided May 6, 1935.

1. The power of Congress to regulate interstate commerce is subject to the guaranty of due process in the Fifth Amendment. P. 347.
2. A railroad's assets, though dedicated to public use, remain the private property of its owners and can not be taken without just compensation. P. 357.
3. There is no warrant for taking the property or money of one interstate carrier and transferring it to another without compensation, whether the object of the transfer be to build up the transferee or to pension its employees. P. 357.
4. A declaration in a statute that invalid provisions shall not operate to destroy it entirely, creates a presumption of severability, but can not empower the court to rewrite the statute and give it an effect altogether different from that sought by the measure viewed as a whole. P. 361.
5. The Railroad Retirement Act of June 27, 1934, is unconstitutional because it contains inseverable provisions that violate the due process clause, and because it is not in purpose or effect a regulation of interstate commerce within the meaning of Art. I, § 8. Pp. 347, 362.
6. This Act purported to establish a compulsory retirement and pension system for all interstate carriers by railroad. A fund, to be deposited in the national treasury and administered by a governmental Board, was to be created and kept up by enforced contributions from all the carriers and their employees. The sums payable by employees were to be percentages of their current compensation, and the sums payable by each carrier double the total payable by its employees. The Board was to determine

from time to time the percentage requisite to produce the necessary funds; but pending its action, the Act fixed each employee's annual contribution at 2% of his compensation. The Act was sought to be sustained as a measure to promote efficiency, economy and safety in the operations of interstate railroads.

That the Act violates the due process clause is shown by the following considerations:

(1) All persons who were in carrier service within one year prior to the passage of the Act (about 146,000) would be entitled under it to pensions, whether reëmployed or not. Among them would be those who had been discharged for cause, or had been retired, or had resigned to take other gainful employment, or whose positions had been abolished, or whose employment was temporary. These persons were not in carrier service at the date of the Act, and it is certain thousands of them never again will be. To place such a burden upon the carriers is arbitrary in the last degree; and the claim that such largess would promote efficiency or safety in the future operation of the railroads is without rational support. P. 348.

(2) If any one of the million or more living persons who left the service more than a year before the date of the Act were reëmployed by any carrier, at any time, for any period, and in any capacity, his prior service would count, under the Act, in computing the annuity payable upon his attaining 65 years of age. This provision would impose vast future burdens never contemplated by the earlier contracts of employment, and would take from the railroads' future earnings to pay for services already fully compensated; as to some of the railroads it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. The contention that economy, efficiency or safety of operation would be thereby increased, is without rational basis. P. 349.

(3) Upon attaining 65 years of age, any person who had been in carrier service, however briefly, and even though he had been discharged for peculation or gross negligence, would be entitled to a pension. In thus substituting legislative largess for private bounty, the Act, instead of improving the kind of "morale" among the employees which works for efficiency, loyalty and continuity of service, would surely destroy it. P. 351.

(4) Were the Act upheld, thousands of employees in the service at its date would at once become entitled to annuities without

having contributed to the fund. This enormous exaction is plainly irrelevant to efficiency and safety of operation. The claim that it would prevent incompetent men being kept in service is a bare assumption without evidence to support it. P. 352.

(5) The Act would allow any employee who had served 30 years to retire on pension (reduced 1/15 for each year he lacked of 65), without regard to his competency and wholly at his own option. This again adds to the carriers' burden without promoting economy, efficiency or safety of their operations. P. 352.

(6) The Act would credit those who were in carrier employment at the date of its passage with their past service without requiring them to make corresponding contributions. There can be no constitutional justification for thus arbitrarily imposing upon the carriers vast additional liabilities in respect of transactions which were long ago closed and fully paid for on a basis of cost to which the carriers' rates and their fiscal affairs were adjusted. P. 353.

(7) The provision entitling representatives of employee organizations to retire from carrier service and receive pensions, by paying in future amounts equal to the sum of the contributions of an employee and of an employer, is arbitrary and unreasonable. P. 354.

(8) The scheme of pooling the contributions of all the carriers and treating all as though there were one employer, operates unconstitutionally (a) by discrimination against carriers having relatively few, if any, superannuated employees (p. 355); (b) by requiring solvent carriers to contribute for employees of the insolvent (p. 356); (c) by forcing carriers to pay for past service of employees of carriers no longer in existence (p. *id.*); and (d) by forcing them to insure repayment, to employees or their estates, of the amounts of the employees' contributions (p. *id.*).

(9) The provisions of the Act which disregard the private and separate ownerships of the several carriers, treat all as a single employer and pool their assets regardless of their individual obligations and of the varying conditions found in their respective enterprises, can not be reconciled with due process of law. P. 357.

That the Act is not a legitimate exercise of the power to regulate interstate commerce results from the considerations following:

(10) Its declared purposes to provide "adequately for the satisfactory retirement of aged employees"; "to make possible greater employment opportunity and more rapid advancement"; to provide "the greatest practicable amount of relief from unemploy-

ment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees," have obviously no reasonable relation to the business of interstate transportation. P. 362.

(11) As for the other declared purpose, viz., to promote efficiency and safety in interstate transportation, it is clear from overwhelming evidence and from the face of the Act that, though the plan might bring about social benefits to employees, it can have no relation to the promotion of efficiency, economy or safety by separating the unfit from the industry. P. 363.

(12) The power of Congress to regulate interstate commerce at the expense of the carriers can not be extended to regulations related merely to the social welfare of the worker, upon the theory that by engendering contentment and a sense of personal security they will induce more efficient service. P. 367.

(13) Safety Appliance Acts, Employers' Liability Acts, and Workmen's Compensation Acts afford no precedent or justification for the Act here in question, which seeks to attach to the relation of employer and employee a new incident, without reference to any existing obligation or legal liability, solely in the interest of the employee, with no regard to the conduct of the business, or its safety or efficiency, but purely for social ends. P. 368.

(14) Assuming that a pension system established voluntarily by a carrier may, by exciting the loyalty of employees, promote efficiency and continuity in service, it is palpable that this attitude and those effects are destroyed when the pension becomes an imposition planned by Congress and forced upon all employers in favor of all employees without regard to how long they have served, or how long for any one employer. P. 371.

(15) The fact that carriers for their own purposes have adopted voluntary pension systems can not extend the power to regulate interstate commerce and thus enable Congress to compel all carriers to accept any pension system it devises. P. 373.

Affirmed.

CERTIORARI, 293 U. S. 552, to review a decree of the Supreme Court of the District of Columbia enjoining the Railroad Retirement Board and its members from enforcing the Railroad Retirement Act. When the writ issued the case was pending on appeal in the United States

Court of Appeals for the District. The writ was therefore directed to that court.

Assistant Attorney General Stephens and *Mr. Harry Shulman,* with whom *Solicitor General Biggs* and *Messrs. Carl McFarland, Hammond E. Chaffetz,* and *Max Turner* were on the brief, for petitioners.

In the light of the history of retirement and pension systems, Congress was justified in regarding them as a means of promoting efficiency and economy.

The Retirement Act is calculated to overcome the defects of railroad pension plans. The chief defects in the carrier plans have been found to be: (1) That, due principally to requirements of continuity of service, they have largely failed to provide employees with old-age security. Under them, few employees become eligible for pensions. (2) The amounts of pensions paid have not been adequate. (3) Due to their continuity of service requirements, they discriminate against the lower-paid employees, among whom labor turnover is greatest. (4) They confer no enforceable rights. Employees thus have no assurance that, even if they ultimately satisfy the eligibility requirements, they will be retired on pension, or that, if retired on pension, their annuities will not be discontinued or diminished. (5) The carriers have failed to maintain reserve funds to insure their ability to pay pension costs; their practice is to charge pension payments against operating expenses each year as the payments are made. (6) Among other defects, and of first importance, the existing carrier plans have failed to eliminate the great amount of superannuation which exists in railroad personnel.

By way of contrast with these voluntary systems, the one established by the Retirement Act provides assurance to the employees of old age security. The elimination of the requirement of continuity of service removes the chief reason why few pensions may be earned under

the existing systems. It also removes the discrimination in favor of higher-paid classes with respect to the likelihood of obtaining any pension, and the amount of annuity received. Also the amounts of annuities received under the Retirement Act are likely to be greater than those under the existing pension systems. The fixing of the normal retirement age under the Act at 65, as compared with 70 under the existing carrier pension systems, will do much to remove the superannuation now existing in the industry. On the whole, the Retirement Act embodies the principles which are generally regarded as being essential to a sound retirement and pension plan; it may be expected to promote economy and improve employee morale, and promote the efficiency and safety of interstate transportation.

If there is a substantial basis for the judgment of Congress with respect to the need for, and the likely effect of, the Act, its action will not be held to be arbitrary. *Radice* v. *New York,* 264 U. S. 292, 294–295. That the benefits which respondents expected to derive from their voluntary pension plans (said to be greater continuity of service and improved employee loyalty) differ from those emphasized in the Act does not affect the Act's validity, so long as it is calculated in other ways to promote efficiency and safety. The Act is based upon a fundamentally different conception from that which appears to underlie the carriers' voluntary plans. Whereas the carriers seem to have regarded the pension as a gratuity in the nature of a reward for long, unbroken service, the Act emphasizes the systematic removal of superannuated workers and the improvement of employee morale and efficiency through providing definite assurance of old age security, and opening of paths to promotion and advancement.

It is clear from the mere examination of the Act that it was not adopted by Congress as a pretext for the ac-

complishment of unauthorized purposes. The Act sets up a retirement and pension system which will be sound and adequate, and which Congress reasonably believed will lead to increased efficiency and safety in interstate transportation. The purposes indicated in the Act of providing for the satisfactory retirement of aged employees and of making possible more rapid advancement of employees, and the reference in § 2 (a) to the "payment of annuities for relief of superannuated employees," are "not ends in and of themselves but means to the legitimate end of" promoting efficiency and safety in interstate transportation. Cf. *Stephenson* v. *Binford,* 287 U. S. 251, 272. The relief of unemployment is not one of the chief aims of the Act. Cf. *Arizona* v. *California,* 283 U. S. 423; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180. The reference to unemployment relief in § 2 (a) is but the expression of the hope that through the Act some such relief may incidentally be provided. *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 668–669.

Numerous cases decided since the enactment of the Transportation Act, 1920, disclose that concern for the preservation, promotion, and protection of the national transportation system has required the extension of federal "guardianship and control" beyond matters of interstate rates alone, to matters which previously might have been left unregulated or subject to state regulation. The broad scope of the authority of Congress in the field of labor conditions and relations is evidenced by the numerous enactments of Congress in this field which have met with the approval of this Court. *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33 (Safety Appliance Acts); *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612 (hours of service); *Wilson* v. *New,* 243 U. S. 332 (wages during emergency); *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548 (labor relations).

Approximately 60 per cent. of all operating expenses of interstate carriers are expended as direct labor costs. The power of Congress is not limited to the improvement of the physical facilities of the carriers, but Congress may deal also with the employees, who compose an important element of the national transportation system. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612, 618–619.

The lower court's classification of employees not engaged in interstate commerce or transportation, based presumably upon decisions under the Federal Employers' Liability Act, may be disregarded, since this Court has said that that Act does not mark the limits of the power of Congress under the Commerce Clause, *Illinois Central R. Co.* v. *Behrens,* 233 U. S. 473, 477. No showing is made that the employees referred to are not engaged in the transportation business of respondents or that their efficiency does not affect the efficiency of the national transportation system.

The *Employers' Liability Cases* do not hold that Congress lacks power to enact legislation applying to employees not directly engaged in interstate commerce. This is apparent from the numerous subsequent decisions of this Court sustaining legislation applicable to employees engaged in intrastate commerce and to employees generally. *Southern Ry. Co.* v. *United States,* 222 U. S. 20; *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612; *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548.

If Congress is authorized to provide for the compulsory retirement and pensioning of superannuated workers, clearly the manner in which the amount of annuities shall be determined rests in its sound discretion. Measurement of annuities according to years of service is eminently fair to the carriers. The fact that the Act draws

upon past facts, i. e., years of service prior to the Act, for the calculation of annuities does not render the statute retroactive. *Cox* v. *Hart,* 260 U. S. 427, 435; *Hawker* v. *New York,* 170 U. S. 189.

The fact that persons previously in the employ of the carriers who are reëmployed will receive credit toward their pensions for services rendered in the past is, in the light of the pertinent circumstances, not unreasonable. Nor is it unreasonable to provide for the payment of pensions to persons who are required to retire forthwith, and who will not contribute any substantial sums toward the costs of their annuities.

The considerations which led Congress to include persons in the service within a year prior to the Act appear in the legislative history of the Act.

As for payment of annuities to persons who have left the service prior to the retirement age, in the absence of such provision, employees who were laid off or discharged, even though this occurred on the very eve of retirement, would lose their pension rights. The purpose of the provision is to provide assurance of old-age security. Such provision is reasonable, not because of its effect upon employees after they have left the service but because it improves the morale of employees while they are in the service.

The justification for the provision entitling an employee to retire after 30 years of service is that employees who have completed 30 years of service may find it necessary, and it may be in the interest of the industry, for them to retire before age 65. The reduced amount of annuity in the case of retirement before age 65 may be expected to discourage such retirements unless they are reasonably necessary.

The inclusion of employee representatives does not burden the retirement fund. In any case, it is reasonably necessary if the policies of the Railway Labor Act

are not to be defeated; railway employees might be loath to surrender their rights under the Retirement Act in order to become employee representatives.

Because the Act provides for the payment of all contributions into a common fund; and because the amounts of annuities are made to depend on the service periods of the employees, time spent in the service of any carrier being made part of an employee's service period, respondents contend that there is an improper "mingling" and "pooling" of the "affairs and funds" and the service periods of their employees. There can be no objection to the mere establishment of a common fund from which annuities are to be paid. Respondents' objection is, rather, that the Act prescribes an improper measure for determining carrier contributions to the fund.

Since the railroads, as well as the public, have a common interest in the efficient performance of the transportation system as a whole, it can not matter that superannuated employees are unevenly distributed among them at the present time, or that the age classifications or average service periods of employees may differ with different carriers. The fact is, moreover, that there is strong evidence of the absence of any substantial differences between the age classifications and average service periods of the employees of the different carriers, so that in the long run it is not unlikely that costs under the Retirement Act will be distributed among the carriers very nearly in proportion to the annuities paid to their respective employees.

The legality of the pooling principle when reasonably applied is well settled. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Thornton* v. *Duffy,* 254 U. S. 361; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *New England Divisions Case,* 261 U. S. 184; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456; *Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U. S. 186.

The Retirement Act does not interfere with the right of the carriers to contract with their employees with reference to wages.

Messrs. Emmett E. McInnis and *Jacob Aronson,* with whom *Messrs. Sydney R. Prince, Robert V. Fletcher, Edward S. Jouett, Dennis F. Lyons,* and *Sidney S. Alderman* were on the brief, for respondents.

I. The Act has no reasonable relation to efficiency or safety in interstate transportation and hence is beyond the power of Congress.

Section 2 (a) shows the emphasis it gives to social and non-commerce objects, and the mandate of the last sentence of the section requires administration and construction in accordance with the real intents and purposes of the Act, to provide unemployment and old age relief. It shows the real intent is to achieve "the greatest possible use of resources" for those purposes, and that means "resources" of the railroads. The Government makes no contribution and the employees get theirs back.

The constitutionality of the Act depends on whether the means adopted are reasonably related to a legitimate end within delegated powers. The relation is not sufficient if it be only remote or unsubstantial, and that is a judicial question.

When the Act is analyzed, the persons to whom it applies and the occasions and conditions upon which it operates show that it is not in reality related to interstate transportation but only to broader social purposes. In last analysis only two theories are invoked in support of the Act in an attempt to relate it to the commerce power: (1) removal of "superannuated" employees; and (2) creation of employee contentment.

The theory of elimination of superannuation fails because,

(a) The evidence shows that in fact there is no excess superannuation among railroad employees.

(b) Removal of older employees has no reasonable relation to safety in interstate transportation. Older men cause fewer accidents than younger men.

(c) Removal from service on the arbitrary basis of mere age or service age, wholly disregarding fitness or unfitness, as this Act does, has no reasonable relation to either efficiency or safety.

(d) If removal of older men has any relation to efficiency or safety, that could be achieved by requiring their retirement. There is no justification for the pension requirement, which is the requirement that takes respondents' property. The "humane" reasons invoked for pensions after retirement are no basis of constitutional power to take property of carriers and give it to their employees.

The "contentment theory" is wholly fanciful and gives the Act no real, reasonable or substantial relation to either efficiency or safety in interstate transportation. If that theory were indulged as source of power to take property, there would be no limit to the extent to which carrier property could be taken and given to employees for their contentment, and constitutional limitations and guaranties would be wiped out.

The wholly different voluntary pension plans of carriers furnish no support for the Act or for the argument that the Act has reasonable relation to efficiency or safety in transportation.

The Act is not in reality a regulation of commerce, but is general social legislation not within powers delegated by the Constitution, and the guise of the commerce power is a mere pretext.

II. The Act is unconstitutional because it extends its provisions to all employees of carriers, including those not engaged in interstate commerce, those engaged exclu-

sively in intrastate commerce, and those not engaged in commerce at all. It thus violates the well settled rule of the *Employers' Liability Cases,* 207 U. S. 463.

III. The Act is unconstitutional because it grants pensions for services rendered prior to its enactment. At the instant of the approval of the Act, all past service of employees of all carriers for thirty years back was revitalized and became the basis of enormous bounties. The annuities for such prior service payable in 1935 alone amount to $68,749,000. They will steadily increase in succeeding years until 1953, when the portion of the aggregate of annuities payable in that year, based solely on service performed prior to the enactment of the Act, will amount to $137,435,000. On petitioners' own estimates, annuities to be paid employees for services performed prior to the enactment of the statute will aggregate $4,415,000,000, two-thirds of which is $2,943,000,000, and the present worth of this amount is $1,720,000,000. The authorities show that this retroactive feature of the Act, imposing such an obligation in respect of services rendered prior to the enactment, violates the Fifth Amendment.

IV. The Act is unconstitutional in that it unlawfully undertakes to mingle and pool the resources and obligations of the carriers among themselves and with others. The Act treats all carriers together as one employer and all employees of all carriers as the employees of one employer. It bases the pension upon the cumulative wages and length of service of each employee with any and all carriers. It pools the obligations and resources of each carrier with all others.

Upon fifty-six of the respondents, who have no employees seventy years of age or over, the Act imposes a burden of $33,000,000 for pensions to seventy-year old employees of other carriers. The Act imposes the obligations of insolvent carriers upon those who are solvent and

the obligations of abandoned carriers upon those who remain in existence.

V. The concept of "a national transportation system" written into the law by the Transportation Act, 1920, and the decisions by this Court under that Act, are no support for the Retirement Act. None of the provisions of the Transportation Act undertakes, as does this Act, to make carriers partners in business or to destroy the separate corporate entity of the carriers or to take the property of one carrier and give it to another.

VI. The Act violates the Fifth Amendment in requiring payment of pensions even to those who are not in railroad service at all. Their inclusion not only could have no reasonable relation to efficiency and safety in interstate transportation, but also violates the Fifth Amendment.

The Act is unreasonable in requiring pensions to be paid employees who left the service prior to the retirement age; in requiring the payment of a pension for 30 years of service regardless of the age of the employee; in including as the basis of the pension, service rendered prior to the passage of the Act; in pooling the obligations, funds, and affairs of all carriers; in discriminating against rail carriers by not including their competitors; in unlawfully requiring the railroads to insure the employees as to their contributions; and in authorizing unlimited and uncontrolled expenditures.

The Act is unreasonable and void because of the unconscionable cost imposed by it upon the railroads which are already in serious financial condition. The cost begins with $60,000,000 a year and increases year by year. In the tenth year it will aggregate $137,000,000. For prior service alone the cost will aggregate $2,943,966,000. This gives some idea of the still vaster sums which will be imposed on account of future service periods of pres-

ent employees and of future employees. The Act threatens the credit and the continued existence of the railroads.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The respondents, comprising 134 Class I railroads, two express companies, and the Pullman Company, brought this suit in the Supreme Court of the District of Columbia, asserting the unconstitutionality of the Railroad Retirement Act [1] and praying an injunction against its enforcement. From a decree granting the relief sought an appeal was perfected to the Court of Appeals. Before hearing in that tribunal the petitioners applied for a writ of certiorari, representing that no serious or difficult questions of fact were involved, and urging the importance of an early and final decision of the controversy. In the exercise of power conferred by statute [2] we issued the writ.[3]

The Act establishes a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. There is provision for the creation of a fund to be deposited in the United States treasury (§§ 5, 8) and administered by a Board denominated an independent agency in the executive branch of the Government (§ 9). The retirement fund for payment of these pensions and for the expenses of administration of the system will arise from compulsory contributions from present and future employees and the carriers. The sums payable by the employees are to be percentages of their current compensation, and those by each carrier double the total payable by its employees. The Board is to determine from

[1] Act of June 27, 1934, c. 868, 48 Stat. 1283.

[2] U. S. C. Tit. 28, § 347 (a).

[3] 293 U. S. 552.

time to time what percentage is required to provide the necessary funds, but, until that body otherwise determines, the employee contribution is to be 2% of compensation (§ 5). Out of this fund annuities are to be paid to beneficiaries.

The classes of persons eligible for such annuities are (1) employees of any carrier on the date of passage of the Act; (2) those who subsequently become employees of any carrier; (3) those who within one year prior to the date of enactment were in the service of any carrier (§ 1b).

To every person in any of the three categories an annuity becomes payable: (a) when he reaches the age of 65 years, whether then in carrier service or not (§ 3); if still in such service he and his employer may agree that he shall remain for successive periods of one year until he attains 70, at which time he must retire (§ 4); (b) at the option of the employee, at any time between the ages of 51 and 65, if he has served a total of 30 years in the employ of one or more carriers, whether continuously or not (§§ 3; 1f). The compulsory retirement provision is not applicable to those in official positions until five years after the effective date of the Act (§ 4).

The annuity is payable monthly (§ 1d). The amount is ascertained by multiplying the number of years of service, not exceeding 30, before as well as subsequent to the date the Act was adopted, whether for a single carrier or a number of carriers, and whether continuous or not, by graduated percentages of the employee's average monthly compensation (excluding all over $300). If one who has completed 30 years of service elects to retire before attaining the age of 65 years, the annuity is reduced by one-fifteenth for each year he lacks of that age, unless the retirement is due to physical or mental disability (§ 3).

Upon the death of an employee, before or after retirement, his estate is to be repaid all that he has contributed

to the fund, with 3% interest compounded annually, less any annuity payments received by him (§ 3).

The Supreme Court of the District of Columbia declared the establishment of such a system within the competence of Congress; but thought several inseparable features of the Act transcended the legislative power to regulate interstate commerce, and required a holding that the law is unconstitutional in its entirety. Our duty, like that of the court below, is fairly to construe the powers of Congress, and to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation. The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality. Even should we consider the Act unwise and prejudicial to both public and private interest, if it be fairly within delegated power our obligation is to sustain it. On the other hand, though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare.

The admitted fact that many railroads have voluntarily adopted pension plans does not aid materially in determining the authority of Congress to compel conformance to the one embodied in the Railroad Retirement Act; nor does the establishment of compulsory retirement plans in European countries, to which petitioners refer; for, in many of these, railroads are operated under government ownership, and none has a constitutional system comparable to ours.

The Federal Government is one of enumerated powers; those not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people. The Constitution is not a statute, but the supreme law of the land to which all

statutes must conform, and the powers conferred upon the Federal Government are to be reasonably and fairly construed, with a view to effectuating their purposes. But recognition of this principle can not justify attempted exercise of a power clearly beyond the true purpose of the grant. All agree that the pertinent provision of the Constitution is Article I, § 8, Clause 3, which confers power on the Congress " To regulate Commerce . . . among the several States . . ."; and that this power must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment.[4]

The petitioners assert that the questioned Act, fairly considered, is a proper and necessary regulation of interstate commerce; its various provisions have reasonable relation to the main and controlling purposes of the enactment, the promotion of efficiency, economy and safety; consequently it falls within the power conferred by the commerce clause and does not offend the principle of due process. The respondents insist that numerous features of the Act contravene the due process guaranty and further that the requirement of pensions for employees of railroads is not a regulation of interstate commerce within the meaning of the Constitution. These conflicting views open two fields of inquiry which to some extent overlap.[5] If we assume that under the power to

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[4] See *Gibbons* v. *Ogden,* 9 Wheat. 1, 196–7; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *Lottery Case,* 188 U. S. 321, 362–3; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311, 327.

[5] When the question is whether the Congress has properly exercised a granted power the inquiry is whether the means adopted bear any reasonable relation to the ostensible exertion of the power. *Mugler* v. *Kansas,* 123 U. S. 623, 661; *Hammer* v. *Dagenhart,* 247 U. S. 251, 276; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, 37. When the question is whether legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the

regulate commerce between the States Congress may require the carriers to make some provision for retiring and pensioning their employees, then the contention that various provisions of the Act are arbitrary and unreasonable and bear no proper relation to that end must be considered. If any are found which deprive the railroads of their property without due process, we must determine whether the remainder may nevertheless stand. Broadly, the record presents the question whether a statutory requirement that retired employees shall be paid pensions is regulation of commerce between the States within Article I, § 8.

1. We first consider the provisions affecting former employees. The Act makes eligible for pensions all who were in carrier service within one year prior to its passage, irrespective of any future reëmployment. About 146,000 persons fall within this class, which, as found below, includes those who have been discharged for cause, who have been retired, who have resigned to take other gainful employment, who have been discharged because their positions were abolished, who were temporarily employed, or who left the service for other reasons. These persons were not in carrier service at the date of the Act, and it is certain thousands of them never again will be. The petitioners say the provision was inserted to assure those on furlough, or temporarily relieved from duty subject to call, the benefit of past years of service, in the event of reëmployment, and to prevent the carriers from escaping their just obligations by omitting to recall these persons to service. And it is said that to attempt nicely to adjust the provisions of the Act to furloughed men

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principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia* v. *New York*, 291 U. S. 502, 525.

would involve difficulties of interpretation and inequalities of operation which the blanket provision avoids. We cannot accept this view. It is arbitrary in the last degree to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service, or who have elected to pursue some other calling, or who have retired from the business, or have been for other reasons lawfully dismissed. And the claim that such largess will promote efficiency or safety in the future operation of the railroads is without support in reason or common sense.

In addition to the 146,000 who left the service during the year preceding the passage of the Act, over 1,000,000 persons have been but are not now in the employ of the carriers. The statute provides that if any of them is reemployed at any time, for any period, however brief, and in any capacity, his prior service with any carrier shall be reckoned in computing the annuity payable upon his attaining 65 years of age. Such a person may have been out of railroad work for years; his employment may have been terminated for cause; he may have elected to enter some other industry, and may have devoted the best years of his life to it; yet if, perchance, some carrier in a distant part of the country should accept him for work of any description, even temporarily, the Act throws the burden of his pension on all the railroads, including, it may be, the very one which for just cause dismissed him. Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier. The

provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the Act denies due process of law by taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety. The petitioners say that one who is taken back into service will no doubt render more loyal service, since he will know he is to receive a bonus for earlier work. But he will not attribute this benefaction to his employer. The argument comes merely to the contentment and satisfaction theory discussed elsewhere. The petitioners also argue that if the provision in question threatens an unreasonable burden, the carriers have in their own control the means of avoidance, since no carrier need employ any person who has heretofore been in the railroad business. The position is untenable for several reasons. A carrier may wish to employ one having experience, who has been in another's service. Must it forego the opportunity because to choose the servant will impose a financial obligation arising out of an earlier employment with some other railroad? Would that promote efficiency and safety? The testimony shows that 22 per cent. of all railway employees have had prior service on some railroad. Must a carrier at its peril exercise, through dozens of employment agencies scattered over a vast territory, an unheard of degree of care to exclude all former railroad workers, at the risk of incurring the penalty of paying a pension for work long since performed for some other employer? So to hold would be highly unreasonable and arbitrary.

2. Several features of the Act, touching those now or hereafter in railroad employment, are especially challenged by the respondents.

No specified length of service is required for eligibility to pension, though the amount of the annuity is proportionately reduced if the total term of employment be less than 30 years. One may take a position with a carrier at twenty, remain until he is thirty, resign after gaining valuable skill and aptitude for his work, enter a more lucrative profession, and, though never thereafter in carrier employ, at 65 receive a pension calculated on his ten years of service. Or after ten years he may be discharged for peculation, and still be entitled to the gratuity. Or he may be relieved of duty for gross negligence, entailing loss of life or property, and yet collect his pension at 65. May these results be fairly denominated the indicia of reasonable regulation of commerce? May they be cited in favor of this pension system as an aid to economy, efficiency or safety? We cannot so hold. The petitioners' explanation of this feature of the Act is that no "real assurance" of "old-age security" is possible "when pension rights may be lost at any time by loss of employment"; that such a provision is reasonable "because it improves the morale of the employees while they are in the service." Assurance of security it truly gives, but, quite as truly, if "morale" is intended to connote efficiency, loyalty and continuity of service, the surest way to destroy it in any privately owned business is to substitute legislative largess for private bounty and thus transfer the drive for pensions to the halls of Congress and transmute loyalty to employer into gratitude to the legislature.

The Act assumes that, in fairness, both employer and employee should contribute in fixed proportions to a liberal pension. But we find that in contradiction of this recognized principle, thousands of those in the service at the date of the Act will at once become entitled to annuities, though they will have contributed nothing to the fund. The burden thus cast on the carriers is found to be for the first year of administration over $9,000,000,

and until the termination of payments to these annuitants not less than $78,000,000. All that has been said of the irrelevance of the requirement of payments based upon services heretofore terminated to any consideration of efficiency or safety applies here with equal force. The petitioners say that the retention of these men will be injurious and costly to the service. This view assumes they will be retained for years and are incompetent to do what they are now doing. Evidence is lacking to support either supposition. Next it is said "that they will receive from the fund more than they will have contributed is not significant for all retired employees receive more than they contribute." This attempted but futile justification is significant of the fault in the feature sought to be supported.

One who has served a total of 30 years is entitled to retire on pension at his election, at whatever his then attained age. Thus many who are experienced and reliable may at their own election deprive a carrier of their services, enter another gainful occupation, cease to contribute to the fund, and go upon the pension roll years before the fixed retirement age of 65. The finding is that there are not less than 100,000 in the service of the carriers between 51 and 65 years of age who have had 30 or more years of service. The option is not extended to them to retire on pension in order to improve transportation, for the choice is the employee's to be exercised solely on grounds personal to himself; and the provisions cannot promote economy, for the retiring worker's place will be filled by another who will receive the same wage. The court below properly found that "it is to the interest of the service of plaintiffs and is to the interest of the public that those of such employees who are competent and efficient be retained in carrier service for the benefit of their skill and experience." The petitioners say "clearly the provision in question is not arbitrary and unreason-

able so as to be unlawful"; but in support of this statement they adduce only the following considerations. As the pension is reduced 1/15th for each year the annuitant lacks of 65 at the date of retirement, his separation, it is said, will impose no greater burden on the fund than if he had waited until 65; the reduction in the amount payable will discourage early retirement, and so tend to counteract the loss of skilled workers; and, finally, "the justification for this provision is that employees who have completed thirty years of service may find it necessary, and it may be in the interest of the industry, for them to retire before age 65." We search in vain for any assertion that the feature under discussion will promote economy, efficiency or safety, and the absence of any such claim is not surprising. The best that can be said, it seems, is that the burden incident to the privilege of early retirement will not be as heavy as others imposed by the statute.

On June 27, 1934, when the Act was approved, there were 1,164,707 people in carrier employ. The Act, by conferring a statutory right to a pension, based in part on past service, gave the work theretofore performed by these persons a new quality. Although completed and compensated in full in conformity with the agreement of the parties, that work, done over a period of 30 years past, is to be the basis for further compulsory payment. While, as petitioners point out, the bounties are payable only in the future, any continuance of the relation, however brief, subsequent to the passage of the Act, matures a right which reaches back to the date of original employment. And to the amount payable in virtue of all these prior years' service, the employees contribute nothing. It is no answer to say that from the effective date of the law they will have to contribute from their wages half as much as do their employers. The future accrues its own annuities. The finding, accepted by the petitioners as veracious, is that the annuities payable for service performed prior to June

27, 1934, would in the year 1935 amount to $68,749,000 and would increase yearly until 1953, in which year the portion of the aggregate pension payments attributable to work antedating the passage of the Act would be $137,435,000. These figures apply only to pensions to those now employed and exclude payments to those who left the service during the year prior to the adoption of the Act, and to those former employees who may hereafter be reëmployed.

This clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation. The court below held the provision deprived the railroads of their property without due process, and we agree with that conclusion. Here again the petitioners insist that the requirement is appropriate, because, they say, it does not demand additional pay for past services, but expenditure "for a present and future benefit through improvement of the personnel of the carriers." But the argument ends with mere statement. Moreover, if it were correct in its assumption, which we shall presently show it is not, nevertheless there can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactions long closed on a basis of cost with reference to which their rates were made and their fiscal affairs adjusted.

The Act defines as an employee entitled to its benefits an official or representative of an employee organization who during or following employment by a carrier acts for such an organization in behalf of employees. Such an one may retire and receive a pension provided in future he pays an amount equal to the sum of the contributions of an employee and of an employer. The petitioners say the burden thus imposed is not great; but the provision exhibits the same arbitrary and unreasonable features

as those heretofore discussed, and seems irrelevant to any enhancement of safety or efficiency in transportation.

3. Certain general features of the system violate the Fifth Amendment. Under the statutory plan the draft upon the pension fund will be at a given rate, while the contributions of individual carriers to build up the fund will be at a disparate rate. This results from the underlying theory of the Act, which is that all the railroads shall be treated as a single employer. The report of the Senate subcommittee announced: [6]

"It is agreed that all railroads which have been subjected to the jurisdiction of Congress are to be treated together as one employer. All persons in the service of the railroads are to be regarded as employees of the one employer. . . . The old age pension or annuity is to be based upon the wages and the length of service upon all railroads, with specified maximum limits."

The petitioners themselves showed at the trial that the probable age of entry into service of typical carriers differs materially; for one it is 28.4, for another 32.4, for a third 29.3, and for a fourth 34.2. Naturally the age of a pensioner at date of employment will affect the resultant burden upon the contributors to the fund. The statute requires that all employees of age 70 must retire immediately. It is found that 56 of the respondents have no employees in that class. Nevertheless they must contribute toward the pensions of such employees of other respondents nearly $4,000,000 the first year and nearly $33,000,000 in the total. The petitioners admit that these are the facts, but attempt to avoid their force by the assertion that "the cost differentials which are involved are negligible as compared with the total cost." This can only mean that in view of the enormous total cost to all

[6] Cong. Rec., Vol. 78, p. 5699.

the railroads, the group thus discriminated against should not complain of the disregard of their ownership of their own assets, because in comparison with gross cost the additional payments due to the inequality mentioned are small.

The evidence shows that some respondents are solvent and others not, a situation which often may recur. The petitioners concede that the plan is intended to furnish assurance of payment of pensions to employees of all the carriers, with the result that solvent railroads must furnish the money necessary to meet the demands of the system upon insolvent carriers, since the very purpose of the Act is that the pension fund itself shall be kept solvent and able to answer all the obligations placed upon it.

In recent years many carriers subject to the Interstate Commerce Act have gone out of existence. The petitioners admit that the employees of these defunct carriers are treated upon exactly the same basis as the servants of existing carriers. In other words, past service for a carrier no longer existing is to be added to any service hereafter rendered to an operating carrier, in computing a pension the whole burden of payment of which falls on those carriers still functioning. And all the future employees of any railroad which discontinues operation must be paid their pensions by the surviving roads. Again the answer of the petitioners is that the amount will be negligible. The fact that millions of dollars are involved in other features of the Act will not serve to obscure this violation of due process.

All the carriers must make good the contributions of all employees, for § 3 directs that upon the death of an employee the Board shall pay to his estate from the fund what he has contributed to it with 3 per cent. interest compounded annually, less any payments he has received. The railroads are not only liable for their own contributions, but are, in a measure, made insurers of those of

the employees. This appears to be an unnecessarily harsh and arbitrary imposition, if the plan is to be what on its face it imports, a joint adventure with mutuality of obligation and benefit.

This court has repeatedly had occasion to say that the railroads, though their property be dedicated to the public use, remain the private property of their owners, and that their assets may not be taken without just compensation.[7] The carriers have not ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees.

The petitioners insist that since the adoption of the Transportation Act, 1920, and as the logical consequence of decisions of this court, we must recognize that Congress may deal with railroad transportation as a whole and regulate the carriers generally and in classes, with an eye to improvement and development of railway service as a whole; that the interstate carriers use common facilities, make through rates, and interact amongst themselves in various ways, with the result that where any link in the chain lacks efficiency the system as a whole is affected. The argument is that since the railroads and the public have a common interest in the efficient performance of the whole transportation chain, it is proper and necessary to require all carriers to contribute to the cost of a plan designed to serve this end. It is said that the pooling principle is desirable because there are many small carriers whose employees are too few to justify maintenance of a separate retirement plan for each. And finally, the

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[7] *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 40, and cases cited.

claim is that in fixing carrier contributions, any attempt to give consideration to difference in age, classification, and service periods of employees, would involve grave administrative difficulties and unduly increase the cost of administration. With these considerations in view the petitioners urge that our decisions sanction the exercise of the power involved in the pooling feature of the statute. They rely upon the *New England Divisions Case,* 261 U. S. 184. That case, however, dealt purely with rates; and while the policy of awarding a larger share of the division of a joint rate to the weaker carrier, in consideration of its need for revenue, was approved, the approval was definitely conditioned upon the circumstance that the share or division of the joint rate awarded to the stronger carrier was not so low as to require it to serve for an unreasonable rate. Thus the principle that Congress has no power to confiscate the property of one carrier for the benefit of another was fully recognized.

Dayton-Goose Creek Ry. Co. v. *United States,* 263 U. S. 456, approved the provision of the Transportation Act, 1920, which required the carriers to contribute " one-half of their excess earnings " to a revolving fund to be used by the Interstate Commerce Commission for making loans to carriers to meet capital expenditures and to refund maturing obligations, or to purchase equipment and facilities which might be leased to carriers. This case is relied upon as sustaining the principle underlying the pension act, but we think improperly. The provision was sustained upon the ground that it must be so administered as to leave to each carrier a reasonable return upon its property devoted to transportation, and the holding is clear that if this principle were not observed in administration, the Act would invade constitutional rights.

Atlantic Coast Line R. Co. v. *Riverside Mills,* 219 U. S. 186, which the petitioners cite, is even wider of the mark. There this court upheld the Carmack Amendment,

which made the initial carrier liable to the consignor for loss of goods contracted to be delivered over connecting lines. The legislation merely attached certain consequences to a given form of contract. It was recognized that initial carriers in fact enter into contracts for delivery of goods beyond their own lines and make through or joint rates over independent lines. This being so, it was held a proper exercise of the power of regulation to require one so contracting to be liable in the first instance to the shipper. So to regulate a recognized form of contract is not offensive to the Fifth Amendment.

It is claimed that several other decisions confirm the legality of the pooling principle, when reasonably applied. For this position petitioners cite *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Noble State Bank* v. *Haskell,* 219 U. S. 104, and *Thornton* v. *Duffy,* 254 U. S. 361. In the first of these the Washington workmen's compensation Act, which required employers in extra-hazardous employment to pay into a state fund certain premiums based upon the percentage of estimated pay roll of the workmen employed, was under attack. For the purpose of payments into the fund, accounts were to be kept with each industry in accordance with a statutory classification, and it was definitely provided that no class should be liable for the depletion of the accident fund by reason of accidents happening in any other class. The Act therefore clearly recognized the difference in drain or burden on the fund arising from different industries, and sought to equate the burden in accordance with the risk. The challenge of the employers was that the statute failed of equitable apportionment as between the constituted classes. But no proof was furnished to that effect, and this court assumed that the classification was made in an effort at fairness and equity as between classes. The Railroad Retirement Act, on the contrary, makes no classification, but, as above said,

treats all the carriers as a single employer, irrespective of their several conditions.

In the second case this court upheld a statute which required state banks to contribute a uniform percentage of their deposits to a state guaranty fund established for the purpose of making good losses to the depositors of banks which might become insolvent. The Act was sustained upon the principle that an ulterior public advantage may justify the taking of a comparatively insignificant amount of private property for what in its immediate purpose is a private use. It was further said that there may be cases other than those of taxation in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden which it is compelled to assume. These considerations clearly distinguish that case from the one now under discussion.

In the case last cited it was asserted that the workmen's compensation Act of Ohio unfairly discriminated because it allowed employers in certain cases to pay directly to workmen or their dependents the compensation provided by law, in lieu of contributing to the state fund established to secure such payments. This court held that the classification did not amount to a denial of due process.

We conclude that the provisions of the Act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process.

The Act is said to be unconstitutional because unreasonably and unconscionably burdensome and oppressive upon the respondents, and we are referred to a finding of the court below to which petitioners do not assign error.

The facts as found are: based upon present payrolls, the carriers' contributions for the first year will aggregate not less than $60,000,000; at the rates fixed in the Act, total employee and carrier contributions will, on the basis of present payrolls, be approximately $90,000,000 per year; unless the amount of the contributions is increased by the Board, the drain on the fund for payment of pensions will result in a deficit of over $11,000,000 by the year 1942. To keep the fund in operation it will be necessary for the Board to increase the percentages of contributions named in the Act. The petitioners' actuary testified that in the tenth year of operation the payments from the fund will be upwards of $137,000,000. The railroads' total contribution to pensions on account of prior service of employees in service at the date of the Act may amount to $2,943,966,000. We are not prepared to hold that if the law were in other respects within the legislative competence, the enormous cost involved in its administration would invalidate it; but the recited facts at least emphasize the burdensome and perhaps destructive effect of the contraventions of the due process of law clause which we find exist. Moreover they exhibit the inconsistency of the petitioners' position that the law is necessary because in times of depression the voluntary systems of the carriers are threatened by loss of revenue. It is difficult to perceive how the vast increase in pension expense entailed by the statute will, without provision of additional revenue, relieve the difficulty experienced by some railroads in meeting the demands of the plans now in force.

4. What has been said sufficiently indicates our agreement with the holding of the trial court respecting the disregard of due process exhibited by a number of the provisions of the Act. We also concur in that court's views concerning the inseverability of certain of them. The statute contains a section broadly declaring the intent that invalid provisions shall not operate to destroy

the law as a whole.[8] Such a declaration provides a rule which may aid in determining the legislative intent, but is not an inexorable command. *Dorchy* v. *Kansas,* 264 U. S. 286. It has the effect of reversing the presumption which would otherwise be indulged, of an intent that unless the act operates as an entirety it shall be wholly ineffective. *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184. But notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole. Compare *Hill* v. *Wallace,* 259 U. S. 44, 70. In this view we are confirmed by the petitioners' argument that as to some of the features we hold unenforcible, it is "unthinkable" and "impossible" that the Congress would have created the compulsory pension system without them. They so affect the dominant aim of the whole statute as to carry it down with them.

5. It results from what has now been said that the Act is invalid because several of its inseparable provisions contravene the due process of law clause of the Fifth Amendment. We are of opinion that it is also bad for another reason which goes to the heart of the law, even if it could survive the loss of the unconstitutional features which we have discussed. The Act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution.

Several purposes are expressed in § 2 (a), amongst them: to provide "adequately for the satisfactory retirement of aged employees"; "to make possible greater

[8] Sec. 14. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby.

employment opportunity and more rapid advancement;" to provide by the administration and construction of the Act " the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees." The respondents assert and the petitioners admit that though these may in and of themselves be laudable objects, they have no reasonable relation to the business of interstate transportation. The clause, however, states a further purpose, the promotion of " efficiency and safety in interstate transportation," and the respondents concede that an Act, the provisions of which show that it actually is directed to the attainment of such a purpose, falls within the regulatory power conferred upon the Congress; but they contend that here the provisions of the statute emphasize the necessary conclusion that the plan is conceived solely for the promotion of the stated purposes other than efficient and safe operation of the railroads. The petitioners' view is that this is the true and only purpose of the enactment, and the other objects stated are collateral to it and may be disregarded if the law is found apt for the promotion of this legitimate purpose.

From what has already been said with respect to sundry features of the statutory scheme, it must be evident that petitioners' view is that safety and efficiency are promoted by two claimed results of the plan: the abolition of excessive superannuation, and the improvement of morale.

The parties are at odds respecting the existing superannuation of railway employees. Petitioners say it is much greater than that found in the heavy industries. Respondents assert it is less, and the court below so found. The finding is challenged as being contrary to the evidence. We may, for present purposes, assume that " superannuation " as petitioners use the term, i. e., the

attainment of 65 years, is as great or greater in the railroad industry than in comparable employments. It does not follow, as contended, that the man of that age is inefficient or incompetent. The facts indicate a contrary conclusion. Petitioners say the seniority rules and the laying off of younger men first in reducing forces, necessarily tend to keep an undue proportion of older men in the service. They say this tendency has long been marked in the railroad industry and has been most noticeable in recent years of depression when forces have been greatly reduced. But what are the uncontradicted facts as to efficiency and safety of operation? Incontrovertible statistics obtained from the records of the Interstate Commerce Commission show a steady increase in safety of operation, during this period of alleged increasing superannuation.[9]

[9] Tables included in the record are as follows:

Year:

1905, 1	passenger	killed	for	each	1,376,000	carried.
1910, 1	"	"	"	"	3,000,000	"
1915, 1	"	"	"	"	4,954,000	"
1920, 1	"	"	"	"	5,673,000	"
1925, 1	"	"	"	"	5,237,000	"
1930, 1	"	"	"	"	11,658,000	"
1932, 1	"	"	"	"	17,921,000	"

Decrease in frequency, 77%.

Year	Total Frt. Psgr. and Motor Train Miles (Thousands)	Total Train Accidents	Frequency Per Million Train Miles
1923	1,207,714	27,497	22.77
1924	1,171,812	22,368	19.09
1925	1,187,731	20,785	17.50
1926	1,211,617	21,077	17.39
1927	1,184,455	18,976	16.02
1928	1,169,442	16,949	14.49
1929	1,178,585	17,185	14.58
1930	1,082,306	12,313	11.38
1931	951,220	8,052	8.46
1932	813,091	5,770	7.09

Decrease in frequency, 69%.

Indeed, one of the petitioners, and one of their most important witnesses, has written, referring to railroads:

"Experience seems to have proved, moreover, that older workers cause fewer accidents than do younger; hence there is little necessity for removing them on that ground." [10]

There is overwhelming evidence in the record to the same effect. All that petitioners offer on the subject in their brief is: "in an industry having as many hazardous

Year	Total man-hours worked by all employees (thousands)	Total employees killed and injured			Total casualty rate all employees per million man-hours
		Killed	Injured	Total	
1923	4,856,964	1,866	148,146	150,012	30.89
1924	4,473,186	1,403	120,912	122,315	27.34
1925	4,448,377	1,460	114,639	116,099	26.10
1926	4,557,537	1,528	107,218	108,746	23.86
1927	4,406,627	1,427	83,883	85,310	19.36
1928	4,191,065	1,187	66,744	67,931	16.21
1929	4,225,292	1,302	57,164	58,466	13.84
1930	3,641,412	898	33,184	34,082	9.36
1931	2,930,657	621	21,417	22,038	7.52
1932	2,286,561	532	16,359	16,891	7.39

Decrease in frequency, 76%.

Year	Man-hours worked by Trainmen (Thousands)	Number Trainmen Killed	Number Trainmen Injured	Total Trainmen's Casualties	Total Casualty Rate Per Million Man-hours
1923	915,084	896	35,342	36,238	39.60
1924	829,533	628	28,438	29,066	35.04
1925	831,682	691	28,297	28,989	34.86
1926	858,598	691	29,864	30,555	35.59
1927	812,853	639	24,462	25,101	30.88
1928	776,184	501	20,943	21,444	27.63
1929	785,504	587	19,116	19,703	24.96
1930	673,208	423	11,771	12,194	18.11
1931	546,277	292	8,259	8,551	15.65
1932	431,083	265	6,318	6,583	15.27

Decrease in frequency, 61%.

[10] Latimer, Industrial Pension Systems, Vol. II, 724.

occupations as the railway industry, improvement in personnel conditions is likely to mean increased safety." We think it not unfair to say that the claim for promotion of safety is virtually abandoned.

How stands the case for efficiency? Here again the record without contradiction demonstrates that in step with the alleged progressive superannuation on the railroads their operations have increased in efficiency.[11] The trial court found, and its finding is not assigned as error: "Railroads were, when the Act was enacted, and are now, operated efficiently and safely and more efficiently and much more safely than at any time in history."

Lastly the petitioners suggest that diminution of superannuation promotes economy, because younger and lower paid men will replace the retired older men. But the argument is based upon inadvertent disregard of the wage structure of the carriers, especially in the train and engine service, whereby contract compensation is based not on age but upon the nature of the duties performed. The replacement of one by another who is to do the same work will therefore beget no saving in wages.

When to these considerations is added that, as heretofore said, the Act disregards fitness to work, pensions the worker who retires at his option before any suggested superannuation, irrespective of skill or ability, pensions those who are presently compelled by the law to retire, irrespective of their fitness to labor, and grants annuities to those who are discharged for dishonesty or gross care-

[11] Thus it appears that the average speed of freight trains between terminals in 1928 was 10.9 miles per hour, in 1929 was 13.2 miles per hour, and in 1933 was 15.7 miles per hour. Excluding weight of locomotive and tender each freight train hour in 1923 produced 16,764 gross ton-miles; in 1929 produced 24,539 gross ton-miles; and in 1933 produced 27,343 gross ton-miles; and net ton-miles per freight train hour increased 41.2 per cent. from 1923 to 1933, and 3.7 per cent. from 1929 to 1933. Cost of transportation is also shown to have decreased in the same periods.

lessness, it becomes perfectly clear that, though the plan may bring about the social benefits mentioned in § 2a, it has and can have no relation to the promotion of efficiency, economy or safety by separating the unfit from the industry. If these ends demand the elimination of aged employees, their retirement from the service would suffice to accomplish the object. For these purposes the prescription of a pension for those dropped from service is wholly irrelevant. The petitioners, conscious of the truth of this statement, endeavor to avoid its force by the argument that social and humanitarian considerations demand the support of the retired employee. They assert that it would be unthinkable to retire a man without pension and add that attempted separation of retirement and pensions is unreal in any practical sense, since it would be impossible to require carriers to cast old workers aside without means of support. The supposed impossibility arises from a failure to distinguish constitutional power from social desirability. The relation of retirement to safety and efficiency is distinct from the relation of a pension to the same ends, and the two relationships are not to be confused.

In final analysis, the petitioners' sole reliance is the thesis that efficiency depends upon morale, and morale in turn upon assurance of security for the worker's old age. Thus pensions are sought to be related to efficiency of transportation, and brought within the commerce power. In supporting the Act the petitioners constantly recur to such phrases as "old age security," "assurance of old age security," "improvement of employee morale and efficiency through providing definite assurance of old age security," "assurance of old age support," "mind at ease," and "fear of old age dependency." These expressions are frequently connected with assertions that the removal of the fear of old age dependency will tend to create a better morale throughout the ranks of employees.

The theory is that one who has an assurance against future dependency will do his work more cheerfully, and therefore more efficiently. The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type, is in any just sense a regulation of interstate transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power. The answer of the petitioners is that not all such means of promoting contentment have such a close relation to interstate commerce as pensions. This is in truth no answer, for we must deal with the principle involved and not the means adopted. If contentment of the employee were an object for the attainment of which the regulatory power could be exerted, the courts could not question the wisdom of methods adopted for its advancement.

No support for a plan which pensions those who have retired from the service of the railroads can be drawn from the decisions of this court sustaining measures touching the relations of employer and employee in the carrier field in the interest of a more efficient system of transpor-

tation. The Safety Appliance Acts, the Employers' Liability Acts, hours-of-service laws, and others of analogous character, cited in support of this Act, have a direct and intimate connection with the actual operation of the railroads. No less inapposite are the statutes which deal with exchange of facilities, joint facilities, joint rates, etc. For these have an obvious and direct bearing on the obligations of public service incident to the calling of the railroads. The railway labor act was upheld by this court upon the express ground that to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation tended to prevent interruptions of service and was therefore within the delegated power of regulation. It was pointed out that the act did not interfere with the normal right of the carrier to select its employees or discharge them. *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570–1. The legislation considered in *Wilson* v. *New,* 243 U. S. 332, was drafted to meet a particular exigency and its validity depended upon circumstances so unusual that this court's decision respecting it cannot be considered a precedent here.

Stress is laid upon the supposed analogy between workmen's compensation laws and the challenged statute. It is said that while Congress has not adopted a compulsory and exclusive system of workmen's compensation applicable to interstate carriers, no one doubts the power so to do; and the Retirement Act cannot in principle be distinguished. The contention overlooks fundamental differences. Every carrier owes to its employees certain duties the disregard of which render it liable at common law in an action sounding in tort. Each state has developed or adopted, as part of its jurisprudence, rules as to the employer's liability in particular circumstances. These are not the same in all the states. In the absence of a rule applicable to all engaged in interstate transpor-

tation the right of recovery for injury or death of an employee may vary depending upon the applicable state law. That Congress may, under the commerce power, prescribe an uniform rule of liability and a remedy uniformly available to all those so engaged, is not open to doubt. The considerations upon which we have sustained compulsory workmen's compensation laws passed by the states in the sphere where their jurisdiction is exclusive apply with equal force in any sphere wherein Congress has been granted paramount authority. Such authority it may assert whenever its exercise is appropriate to the purpose of the grant. A case in point is the Longshoremen's and Harbor Workers' Compensation Act, passed pursuant to the delegation of admiralty jurisdiction to the United States. Modern industry, and this is particularly true of railroads, involves instrumentalities, tasks and dangers unknown when the doctrines of the common law as to negligence were developing. The resultant injuries to employees, impossible of prevention by the utmost care, may well demand new and different redress from that afforded in the past. In dealing with the situation it is permissible to substitute a new remedy for the common-law right of action; to deprive the employer of common-law defenses and substitute a fixed and reasonable compensation commuted to the degree of injury; to replace uncertainty and protracted litigation with certainty and celerity of payment; to eliminate waste; and to make the rule of compensation uniform throughout the field of interstate transportation, in contrast with inconsistent local systems. By the very certainty that compensation must be paid for every injury such legislation promotes and encourages precaution on the part of the employer against accident and tends to make transportation safer and more efficient. The power to prescribe an uniform rule for the transportation industry through-

out the country justifies the modification of common law rules by the Safety Appliance Acts and the Employers' Liability Acts applicable to interstate carriers, and would serve to sustain compensation acts of a broader scope, like those in force in many states. The collateral fact that such a law may produce contentment among employees,—an object which as a separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional. It is beside the point that compensation would have to be paid despite the fact that the carrier has performed its contract with its employee and has paid the agreed wages. Liability in tort is imposed without regard to such considerations; and in view of the risks of modern industry the substituted liability for compensation likewise disregards them. Workmen's compensation laws deal with existing rights and liabilities by readjusting old benefits and burdens incident to the relation of employer and employee. Before their adoption the employer was bound to provide a fund to answer the lawful claims of his employees; the change is merely in the required disbursement of that fund in consequence of the recognition that the industry should compensate for injuries occurring with or without fault. The Act with which we are concerned seeks to attach to the relation of employer and employee a new incident, without reference to any existing obligation or legal liability, solely in the interest of the employee, with no regard to the conduct of the business, or its safety or efficiency, but purely for social ends.

The petitioners, in support of their argument as to morale, rely upon the voluntary systems adopted in past years by almost all the carriers, and now in operation. The argument runs that these voluntary plans were adopted in the industry for two principal reasons—the creation of loyalty and the encouragement of continuity

in service. The petitioners quote from a statement by the National Industrial Conference Board the following:

"More specifically, the efficiency of the individual workers is stimulated by the feeling of security and hopefulness that results when the individual is relieved of the fear of destitution and dependency in old age and by the sentiment of loyalty and good will fostered by the pension plan, which thus operates as a spur to the ambition of the worker and incites him to more intensive and sustained effort. Similarly the efficiency of the organization as a whole is increased by the improvement of industrial relations, the development of a coöperative spirit, and the promotion of constancy and continuity of employment."

They assert that the Railroad Retirement Act, "although it embodies the first compulsory retirement and pension plan enacted in this country, is but the development of voluntary plans which have been in use in this country, particularly among the railroads, for more than a third of a century." The argument is self-contradictory. If, as is conceded, the purpose of the voluntary establishment of pensions is to create loyalty to the employer who establishes them, and continuity in his service, it seems axiomatic that the removal of the voluntary character of the pension and the imposition of it in such form as Congress may determine, upon all employers, and irrespective of length of service, or of service for the same employer, will eliminate all sense of loyalty or gratitude to the employer, and remove every incentive to continuance in the service of a single carrier. In fact the petitioners so admit, for they say in their brief:

"That the benefits which respondents expected to derive from their voluntary pension plans (said to be (1) greater continuity of service and (2) improved employee loyalty) differ from those emphasized in the Retirement Act does not affect the Act's validity, so long as it is calculated in other ways to promote efficiency and safety."

We are left to surmise what these "other ways" may be unless they are the contentment and assurance of security so much stressed in the argument. The petitioners, in effect, say: the carriers with certain objects and purposes have adopted voluntary systems; this proves that pensions are germane to the railroad business; Congress may legislate on any subject germane to interstate transportation; therefore Congress may for any reason or with any motive impose any type of pension plan. The contention comes very near to this,—that whatever some carriers choose to do voluntarily in the management of their business, at once invests Congress with the power to compel all carriers to do. The fallacy is obvious. The meaning of the commerce and due process clauses of the Constitution is not so easily enlarged by the voluntary acts of individuals or corporations.

Counsel for the petitioners admit that "it may well be" voluntary plans are intended to promote efficiency and safety by "inducing loyalty and continuity," and "it could also be true that these means were ignored in the Retirement Act." They add:

"Congress has deliberately chosen the means of providing old age security for all railroad employees, measured by years of service, but not dependent upon continuity of service with any particular carrier, as is required under the existing railway pension systems. If it were true, as claimed, that the Act will not encourage continuity of service and will remove the incentives for employee loyalty to employer, it has other virtues, as has been indicated; for example, it provides greater assurance to employees of old age security than has been the case under the carriers' pension plans, and is likely to be productive of efficiency through improvement of employee morale."

Certainly the argument is inconsistent with any thought that a plan imposed by statute, requiring the

payment of a pension, will promote the same loyalty and continuity of service which were the ends and objects of the voluntary plans. It is going far to say, as petitioners do, that Congress chose the more progressive method "already tried in the laboratory of industrial experience," which they claim has been approved and recommended by those qualified to speak. In support of the assertion, however, they cite general works dealing with voluntary pension plans, and not with any such compulsory system as that with which we are concerned. We think it cannot be denied, and, indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the Act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfilment of the railroads' duty to serve the public in interstate transportation.

The judgment of the Supreme Court of the District of Columbia is

Affirmed.

The CHIEF JUSTICE, dissenting.

I am unable to concur in the decision of this case. The gravest aspect of the decision is that it does not rest simply upon a condemnation of particular features of the Railroad Retirement Act, but denies to Congress the power to pass any compulsory pension act for railroad

employees. If the opinion were limited to the particular provisions of the Act, which the majority find to be objectionable and not severable, the Congress would be free to overcome the objections by a new statute. Classes of persons held to be improperly brought within the range of the Act could be eliminated. Criticisms of the basis of payments, of the conditions prescribed for the receipt of benefits, and of the requirements of contributions, could be met. Even in place of a unitary retirement system another sort of plan could be worked out. What was thus found to be inconsistent with the requirements of due process could be excised and other provisions substituted. But after discussing these matters, the majority finally raise a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of the congressional authority to regulate interstate commerce. In that view, no matter how suitably limited a pension act for railroad employees might be with respect to the persons to be benefited, or how appropriate the measure of retirement allowances, or how sound actuarially the plan, or how well adjusted the burden, still under this decision Congress would not be at liberty to enact such a measure. That is a conclusion of such serious and far-reaching importance that it overshadows all other questions raised by the Act. Indeed, it makes their discussion superfluous. The final objection goes, as the opinion states, " to the heart of the law, even if it could survive the loss of the unconstitutional features " which the opinion perceives. I think that the conclusion thus reached is a departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution.

First. In defining the power vested in Congress to regulate interstate commerce, we invariably refer to the classic statement of Chief Justice Marshall. It is the power " to prescribe the rule by which commerce is to be governed."

The power " is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. It is a power to enact " all appropriate legislation for the protection and advancement " of interstate commerce. *The Daniel Ball,* 10 Wall. 557, 564. " To regulate," we said in the *Second Employers Liability Cases,* 223 U. S. 1, 47, " in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large." And the exercise of the power, thus broadly defined, has had the widest range in dealing with railroads, which are engaged as common carriers in interstate transportation. As their service is vital to the nation, nothing which has a real or substantial relation to the suitable maintenance of that service, or to the discharge of the responsibilities which inhere in it, can be regarded as beyond the power of regulation. *The Shreveport Case,* 234 U. S. 342, 351; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478; *Colorado* v. *United States,* 271 U. S. 153, 163, 164; *N. Y. Central Securities Corp.* v. *United States,* 287 U. S. 12, 24, 25.

It was inevitable that, with the development of the transportation system of the country, requiring a vast number of employees, there should have been a growing appreciation of the importance of conditions of employment. It could not be denied that the sovereign power to govern interstate carriers extends to the regulation of their relations with their employees who likewise are engaged in interstate commerce. The scope of this sort of regulation has been extensive. There has been not only the paramount consideration of safety, but also the recognition of the fact that fair treatment in other respects aids in conserving the peace and good order which are essential to the maintenance of the service without disastrous interruptions, and in promoting the efficiency which inevi-

tably suffers from a failure to meet the reasonable demands of justice. An absolute duty to furnish safety appliances has been imposed, restrictions of hours of continuous service have been prescribed, standards of a day's work have been established for work and wages, the liability of carriers for injuries to employees has been regulated by the abrogation of the fellow servant rule and the limitation of defenses as to contributory negligence and assumption of risk, and provisions have been enacted to facilitate the amicable settlement of disputes and to protect employees in their freedom to organize for the purpose of safeguarding their interests. *St. Louis I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 221 U. S. 612; *Wilson* v. *New,* 243 U. S. 332; *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548.

The argument that a pension measure, however sound and reasonable as such, is *per se* outside the pale of the regulation of interstate carriers, because such a plan could not possibly have a reasonable relation to the ends which Congress is entitled to serve, is largely answered by the practice of the carriers themselves. Following precedents long established in Europe, certain railroad companies in the United States set up voluntary pension systems many years ago. It appears that the first of these was established in 1884, another was adpoted in 1900. By 1910, formal pension plans covered 50 per cent of all railroad employees, and, by 1927, over 82 per cent. In establishing these plans the carriers were not contemplating the payment of a largess unrelated to legitimate transportation ends. Their witnesses say the carriers aimed at loyalty and continuity of service. However limited their motives, they acted upon business principles. Pension plans were not deemed to be essentially foreign to the proper conduct of their enterprises. But if retirement or pension plans are not *per se* unrelated to the government

of transportation operations, Congress could consider such plans, examine their utility, and reach its own conclusions. If the subject matter was open to consideration, Congress was not limited to the particular motives which inspired the plans of the carriers.

The Government stresses the importance of facilitating the retirement of superannuated employees. The argument points to the conclusions of expert students as given in the testimony below, and to the reports of investigating committees and boards of leading business organizations. "*Employees' Retirement Annuities,*" Chamber of Commerce of the United States, 1932, pp. 7, 8; "*Elements of Industrial Pension Plan,*" National Industrial Conference Board, 1931, pp. 8, 10. Mr. Eastman, the Federal Coördinator of Transportation, in his affidavit on the hearing below, expressed the view that there was excessive superannuation among railroad employees. He says: "This excessive superannuation is detrimental to railroad service in several ways. Men who have grown old in the service decline in efficiency. The carrier pays in wages an amount out of proportion to the service rendered. These conditions exist upon the railroads at the present time. There is now a large body of superannuated employees in railroad service who, for the good of the service, ought to be retired. Pension systems, of one sort or another, have been in existence in the railroad industry for as long as 50 years. The need for them was recognized by the more progressive carriers at an early date. In late years particularly, with the voluntary systems in danger, the matter of retirement and pensions has been a crucial issue in railroad employment. Withdrawal or extensive curtailment of existing pensions in the railroad industry would impair the morale of railroad employees and play havoc with railroad labor relations. It would, in addition, increase the existing excessive superannuation among railroad employees and block the employment and promotion of younger men."

The carriers deny that there is excessive superannuation. They assert that the removal of older employees has no reasonable relation to either safety or efficiency. The opinion of the Court enters this field of controversy, reviews statistics as to the increase of safety and efficiency in operation during the period of the alleged increasing superannuation, and supports the finding that railroads are now operated more efficiently and safely than at any time in history. But that gratifying fact does not establish that further improvement is not needed or obtainable, or that a sound pension plan would not be of considerable benefit to the carriers' operations. At best, the question as to the extent of superannuation, and its effect, is a debatable one, and hence one upon which Congress was entitled to form a legislative judgment. As we said in *Radice* v. *New York,* 264 U. S. 292, 294: "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." See *Stephenson* v. *Binford,* 287 U. S. 251, 272.

Laying that question on one side, I think that it is clear that the morale of railroad employees has an important bearing upon the efficiency of the transportation service, and that a reasonable pension plan by its assurance of security is an appropriate means to that end. Nor should such a plan be removed from the reach of constitutional power by classing it with a variety of conceivable benefits which have no such close and substantial relation to the terms and conditions of employment. The appropriate relation of the exercise of constitutional power to the legitimate objects of that power is always a subject of judicial scrutiny. With approximately 82 per cent of

railroad employees, 90 per cent of those employed in cable, telephone and telegraph companies, and about one-half of those in the service of electric railways, light, heat and power companies under formal pension plans,[1] with the extensive recognition by national, state and local governments of the benefit of retirement and pension systems for public employees in the interest of both efficiency and economy,[2] it is evident that there is a widespread conviction that the assurance of security through a pension plan for retired employees is closely and substantially related to the proper conduct of business enterprises.

But with respect to the carriers' plans, we are told that as they were framed in the desire to promote loyalty and continuity of service in the employment of particular carriers, the accruing advantages were due to the fact that the plans were of a voluntary character. In short, that the reaction of the employees would be simply one of gratitude for an act of grace. I find no adequate basis for a conclusion that the advantages of a pension plan can be only such as the carriers contemplated or that the benefit which may accrue to the service from a sense of security on the part of employees should be disregarded. In that aspect, it would be the fact that protection was assured, and not the motive in supplying it, which would produce the desired result. That benefit would not be lost because the sense of security was fostered by a pension plan enforced as an act of justice. Indeed, voluntary plans may have the defect of being voluntary, of being subject to curtailment or withdrawal at will. And the danger of such curtailment or abandonment, with the consequent frustration of the hopes of a vast number of railroad workers and its effect upon labor relations in this enterprise of

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[1] Latimer, "Industrial Pension Plans," 1932, Vol. I, p. 55.

[2] "Public Service Retirement Systems," Bureau of Labor Statistics (U. S.) Bulletin No. 477, 1929.

outstanding national importance, might well be considered as an additional reason for the adoption of a compulsory plan. *Wilson* v. *New, supra,* pp. 347, 348. There was also testimony (by Mr. Eastman) that " the experience with the voluntary pension systems has been unsatisfactory," that " the depression brought clearly to light their many weaknesses and uncertainties."

The argument in relation to voluntary plans discloses the fundamental contention on the question of constitutional authority. In substance, it is that the relation of the carriers and their employees is the subject of contract; that the contract prescribes the work and the compensation; and that a compulsory pension plan is an attempt for social ends to impose upon the relation non-contractual incidents in order to insure to employees protection in their old age. And this is said to lie outside the power of Congress in the government of interstate commerce. Congress may, indeed, it seems to be assumed, compel the elimination of aged employees. A retirement act for that purpose might be passed. But not a pension act. The government's power is conceived to be limited to a requirement that the railroads dismiss their superannuated employees, throwing them out helpless, without any reasonable provision for their protection.

The argument pays insufficient attention to the responsibilities which inhere in the carriers' enterprise. Those responsibilities, growing out of their relation to their employees, cannot be regarded as confined to the contractual engagement. The range of existing federal regulation of interstate carriers affords many illustrations of the imposition upon the employer-employee relation of noncontractual incidents for social ends. A close analogy to the provision of a pension plan is suggested by the familiar examples of compensation acts. The power of Congress to pass a compensation act to govern interstate carriers and their employees engaged in interstate

commerce does not seem to be questioned. The carriers might thus be compelled to provide appropriate compensation for injuries or death of employees, although caused without fault on the carriers' part. A thorough examination of the question of constitutional authority to adopt such a compulsory measure was made some years ago by a commission constituted under a Joint Resolution of Congress, of which Senator Sutherland (now Mr. Justice Sutherland) was chairman.[3] 36 Stat. 884. Its elaborate and unanimous report, transmitted to Congress by President Taft with his complete approval, considered the constitutional question in all aspects, upheld the congressional power, and proposed its exercise. Sen. Doc. No. 338, 62d Cong. 2d sess. Among the principles announced was that "If the proposed legislation effectuates any constitutional power, it is not rendered unconstitutional because to a greater or less extent it may accomplish or tend to accomplish some other result which, as a separate and independent matter, would be wholly beyond the power of Congress to deal with." *Id.*, p. 26. The legislation was deemed to be a regulation of interstate commerce because, among other specified things, of its effect on the state of mind of the employee. On this point the commission said: "By insuring to every employee engaged in interstate commerce definite compensation in case of his injury, and to his widow and children, or other dependents, in case of his death, irrespective of fault, the mind of the employee will, to a great extent, be relieved from anxiety for the future and he will be able to render better and more efficient, and consequently safer, service." *Id.*, p. 28. The commission explicitly pointed out that the legislation which it recommended was not based

[3] The members of the commission were Senators George Sutherland and George E. Chamberlain, Representatives William G. Brantley and Reuben O. Moon, William C. Brown, president of the New York Central lines, and D. L. Cease, the editor of The Railroad Trainman.

on any wrong or neglect of the carrier, "but upon the *fact* of injury resulting from accident in the course of the employment," that is, that accidents should be regarded "as risks of the industry." *Id.*, p. 15. The circumstance that such a compensation measure has not been enacted by Congress is readily attributable to questions of policy rather than to any doubt of constitutional power.

The effort to dispose of the analogy serves only to make it the more impressive. Compensation acts are said to be a response to the demands which inhere in the development of industry, requiring new measures for the protection of employees. But pension measures are a similar response. If Congress may supply a uniform rule in the one case, why not in the other? If affording certainty of protection is deemed to be an aid to efficiency, why should that consideration be ruled out with respect to retirement allowances and be admitted to support compensation allowances for accidents which happen in the absence of fault? Compensation acts do not simply readjust old burdens and benefits. They add new ones, outside and beyond former burdens and benefits, and thus in truth add a new incident to the relation of employer and employee.

When we go to the heart of the subject, we find that compensation and pension measures for employees rest upon similar basic considerations. In the case of compensation acts, the carrier has performed its contract with the employee, has paid the agreed wages, has done its best to protect the employee from injury, is guilty of no neglect, but yet is made liable for compensation for injury or for death which ends the possibility of future service, because in the development of modern enterprises, in which accidents are inevitable, it has come to be recognized that the industry itself should bear its attendant risks. *New York Central R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219. An

attempted distinction as to pension measures for employees retired by reason of age, because old age is not in itself a consequence of employment, is but superficial. The common judgment takes note of the fact that the retirement of workers by reason of incapacity due to advancing years is an incident of employment and that a fair consideration of their plight justifies retirement allowances as a feature of the service to which they have long been devoted. This is recognized as especially fitting in the case of large industrial enterprises, and of municipal undertakings such as police and fire protection, where there are stable conditions of employment in which workers normally continue so long as they are able to give service and should be retired when efficiency is impaired by age. What sound distinction, from a constitutional standpoint, is there between compelling reasonable compensation for those injured without any fault of the employer, and requiring a fair allowance for those who practically give their lives to the service and are incapacitated by the wear and tear of time, the attrition of the years? I perceive no constitutional ground upon which the one can be upheld and the other condemned.

The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable.

Second. With this opinion as to the validity of a pension measure if it is reasonably conceived, we are brought to the question of due process,—whether the particular pro-

visions of the retirement act now before us violate the requirement of due process which, under the Fifth Amendment, limits the exercise of the commerce power.

The most serious of the objections, sustained by the Court on this score, relates to the establishment of a unitary or pooling system for all railroads. It is said that in this respect the plan disregards the private and separate ownership of the respective carriers, treating them as a single employer, and illustrations are given to show that unequal burdens are thus imposed.

The objection encounters previous decisions of this Court. We have sustained a unitary or group system under state compensation acts against the argument under the due process clause of the Fourteenth Amendment. *Mountain Timber Co.* v. *Washington, supra.* The Washington compensation act established a state fund for the compensation of workmen injured in hazardous employment, and the fund was maintained by compulsory contributions from employers in such industries. While classes of industries were established, each class was made liable for the accidents occurring in that class. The Court described the law as so operating that "the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors." *Id.*, pp. 236, 237. The statute was sustained in the view that its provisions did not rest upon the wrong or neglect of employers, but upon the responsibility which was deemed to attach to those who conducted such industries. The Court concluded "that the State acted within its power in declaring that no employer should conduct such an industry without making

stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur." *Id.,* p. 244. We followed the reasoning which had led to the upholding of state laws imposing assessments on state banks generally in order to create a guaranty fund to make good the losses of deposits in insolvent banks. *Noble State Bank* v. *Haskell,* 219 U. S. 104. See *Abie State Bank* v. *Bryan,* 282 U. S. 765.

But, aside from these analogies, this Court has directly sustained the grouping of railroads for the purpose of regulation in enforcing a common policy deemed to be essential to an adequate national system of transportation, even though it resulted in taking earnings of a strong road to help a weak one. This was the effect of the recapture clause of Transportation Act, 1920, which required carriers to contribute their earnings in excess of a certain amount in order to provide a fund to be used by the Interstate Commerce Commission in making loans to other carriers. *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456. A distinction is sought to be made because the carriers, which were required to contribute, were permitted to retain a reasonable return upon their property. But what the strong roads were compelled to contribute were their own earnings resulting from just and reasonable rates,—earnings which they were as clearly entitled to retain for their own benefit as the moneys which in the present instance are to be devoted to retirement allowances. The fact that the recapture provisions failed of their purpose and have been abandoned does not disturb the decision as to constitutional power. The principle that was applied had been made clear in the *New England Divisions Case,* 261 U. S. 184. Transportation Act, 1920, had introduced into the federal legislation a new railroad policy. To attain its purpose, " new rights

new obligations, new machinery, were created." "To preserve for the nation substantially the whole transportation system was deemed important." "The existence of the varying needs of the several lines and of their widely varying earning power was fully realized." To attain the object "two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak railroads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carriers' needs." *Id.*, pp. 189–191.

This object of adequately maintaining the whole transportation system may be served in more than these two ways. The underlying principle is that Congress has the power to treat the transportation system of the country as a unit for the purpose of regulation in the public interest, so long as particular railroad properties are not subjected to confiscation. In the light of that principle, and of applications which have been held valid, I am unable to see that the establishment of a unitary system of retirement allowances for employees is beyond constitutional authority. Congress was entitled to weigh the advantages of such a system, as against inequalities which it would inevitably produce, and reach a conclusion as to the policy best suited to the needs of the country. See *Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U. S. 186, 203; *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331, 343, 344.

Third. Questions are raised as to the classes of persons to be benefited. In considering these objections we should have regard to the explicit provision of the Act as to severability. It states that if "any provision," "or the

application thereof to any person or circumstances," is held invalid, " the remainder of the Act or application of such provision to other persons or circumstances shall not be affected." This, of course, does not permit us to rewrite the statute but it does allow the excision of invalid provisions, or inclusions, which can be severed without destroying its structure.

(1) The court below held the Act to be invalid in the view that its provisions were extended to persons not engaged in interstate commerce. In the special findings, classes of persons were listed, numbering 211,107, which were thought to fall within that description. It is manifest that the list was prepared under a misapprehension of the extent of the authority of Congress with respect to employees of interstate carriers and of the application of the decision in the first *Employers' Liability Cases,* 207 U. S. 463. Large numbers of employees were thus deemed to be improperly included whose work, while not immediately connected with the movement of traffic, did have such relation to the activities of the carriers in interstate commerce as to bring them within the range of congressional power. Thus the list embraced general officers and their staffs who were not in the operating departments connected with transportation, employees who dealt with the receipt and disbursement of moneys, some 86,493 employees in the maintenance-of-equipment departments, who were engaged in the reconstruction or major repair of equipment, withdrawn for that purpose from service, such as locomotives, cars, platform trucks, frogs, switches, etc., as distinguished from light or running repairs, and 36,996 employees whose duties lay in auditing, accounting, and bookkeeping. It should be observed that the decisions under the Second Employers' Liability Act of 1908, with respect to the necessity of the employee being engaged at the time of his injury in interstate transportation or in work so closely related to transportation as to

be a part of it, are based upon the limitations of that statute and do not define the scope of constitutional authority as to employees of interstate carriers. *Illinois Central R. Co.* v. *Behrens,* 233 U. S. 473, 477; *Chicago & Northwestern Ry. Co.* v. *Bolle,* 284 U. S. 74, 78.

Interstate carriers cannot conduct their interstate operations without general officers and their staffs, without departments for major repairs and those for administering finances and keeping accounts. General management is as important to the interstate commerce of the carriers as is the immediate supervision of traffic, and the proper maintenance of equipment and the handling of moneys and the keeping of books are as necessary as the loading and moving of cars. In the administration of the Act there would be ample opportunity to make all necessary distinctions between employees engaged in interstate commerce and any others who might be found to be otherwise exclusively employed, so as to exclude the latter from its benefits without impairing the general operation of the Act.

(2) A more serious objection relates to the eligibility for allowances of all those who were in the service within one year prior to the enactment, although they may never be reëmployed. Such persons may have been discharged for cause; in any event, for one reason or another, they had left the service and may not return.

I agree with the conclusion that the requirement that the carriers shall pay retiring allowances to such persons is arbitrary and beyond the power of Congress. But I think it clear that the provision for their benefit is within the clause as to severability. That application of the Act may be condemned and such persons may be excluded from benefits without destroying the measure as a whole.

Fourth. Other questions relate to the details of the pension plan—principally with respect to the basis of the retirement allowances and the method of their computation.

With the excision of those whose employment was terminated before the Act was passed, the plan would cover those in carrier service at that time and those subsequently employed. Retirement is compulsory at the age of 65, but the service may be extended by agreement for successive periods of one year each until the age of 70. An employee may retire upon completing 30 years of service, but in such case provision is made for reducing the annuity by one-fifteenth for each year below the age of 65. Annuities are calculated by applying graduated percentages of the employee's average monthly compensation (excluding all over $300) to the number of years of his service, not exceeding 30. The maximum annuity thus payable would be $1440, and to receive that amount, it would be necessary for the employee to have been in service 30 years and to have attained the age of 65, and to have been paid an average monthly compensation of $300. Contributions to the pension fund are to be made by employees of a certain percentage of their compensation and the contribution of each carrier is to be twice that of its employees.

An examination of pension plans in operation reveals a variety of possible methods, and Congress was entitled to make its choice. As a basis for the allowance, Congress could select either age or length of service or both. In the selection of any age, or any period of service, anomalies would inevitably occur in particular applications. Extreme illustrations can always be given of the application of regulations which require the drawing of a line with respect to age, time, distances, weights, sizes, etc. To deny the right to select such criteria, or to make scientific precision a criterion of constitutional authority, would be to make impossible the practical exercise of power. Compare *Sproles* v. *Binford,* 286 U. S. 374, 388, 389; *Stanley* v. *Public Utilities Commission of Maine, ante,* p. 76. Whatever may be said of the capacity of many men after they have attained 65 years, the fixing

of that age or a period of 30 years' service, or a combination of both, for general application, cannot be regarded as an arbitrary choice for railroad employees.

The principal criticism is the bringing into the reckoning of past periods of service—antedating the passage of the Act. The objection is strongly put with respect to those who were in the employment of the carriers when the Act was passed, and it is even more earnestly urged as to those who had left the service and later are reëmployed. It is said that the reckoning of their prior periods of employment compels payment for services fully completed and paid for before the enactment. But it seems to be assumed that Congress could compel the dismissal of aged employees, and if it has that power and also has power to establish a pension system, I can find no ground for erecting a constitutional limitation which would make it impossible to provide for employees who were thus severed from the service. The question simply is—What is a fair basis for computing a retirement allowance? Is the plan adopted by Congress destitute of rational support?

Congress could have provided for a retirement allowance in a flat sum, or could have based it upon the amount of compensation which the employee was receiving at the time of retirement, or upon the amount he had received for the preceding year or his average compensation of a longer time. Selecting a period not to exceed 30 years, or the period of service prior to age 65, merely gives a measure for the computation of the retirement allowance. It is in no proper sense a payment for the prior service, any more than would be the fixing of the allowance at a flat figure or on the basis of the last compensation received. The result in dollars and cents might not vary to any great extent whatever method of calculation was chosen.

The power committed to Congress to govern interstate commerce does not require that its government should be wise, much less that it should be perfect. The power

implies a broad discretion and thus permits a wide range even of mistakes. Expert discussion of pension plans reveals different views of the manner in which they should be set up and a close study of advisable methods is in progress. It is not our province to enter that field, and I am not persuaded that Congress in entering it for the purpose of regulating interstate carriers, has transcended the limits of the authority which the Constitution confers.

I think the decree should be reversed.

I am authorized to state that MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO join in this opinion.

PETERS PATENT CORP. *v.* BATES & KLINKE, INC.

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

No. 601. Argued April 12, 1935.—Decided May 13, 1935.

1. A sale by a patentee of all his interest in a pending suit to enjoin infringement and for an accounting, but passing no right in the patent, gives the purchaser no right to an injunction and hence no right to intervene. P. 394.
2. It is the right to an injunction which underlies the equitable jurisdiction in such suits. *Id.*
3. A plantiff in a suit to enjoin infringement of his patent and for an accounting, who sells his entire interest in the suit but retains the patent, can no longer maintain the suit. *Id.*

Certiorari to review 73 F. (2d) 303, dismissed.

CERTIORARI, 294 U. S. 700, to review the reversal of an interlocutory decree of injunction, 4 F. Supp. 259, in a patent case.

Mr. Harold E. Cole, with whom *Messrs. Benjamin A. Levy* and *Joseph B. Jacobs* were on the brief, for petitioner.

Mr. Herbert B. Barlow was on the brief for respondent.

PER CURIAM.

In this suit for injunction to restrain an alleged infringement of a patent, and for an accounting, the Circuit Court of Appeals, on November 10, 1934, vacated an interlocutory decree for injunction and directed the District Court to dismiss the bill. On February 4, 1935, this Court granted a writ of certiorari. Upon the argument at this bar, respondent suggested that there had been a change in conditions since the decision of the Court of Appeals and the case was continued to permit counsel to submit briefs upon the questions thus raised. Briefs have been submitted accordingly.

It appears that after the decree of the Court of Appeals, and on January 17, 1935, the Superior Court of the Commonwealth of Massachusetts, in a suit brought by petitioner (its name having been changed to the H. W. Peters Corporation), appointed a receiver "of the estate, property, moneys, debts and effects of every kind and nature" belonging to petitioner. Later, on February 25, 1935, after the writ of certiorari had been granted, the state court authorized the receiver "to sell at public sale all right, title and interest that the receiver may have" in the present suit, which was described as "pending in the United States Supreme Court entitled '*Peters Patent Corporation* v. *Bates & Klinke, Inc.,*' being No. 601 of the October Term, 1934." The sale was made accordingly and was confirmed by the state court on February 27, 1935. From the petition to confirm the sale it appears that the receiver stipulated that "he was not selling any right or title in and to any patents belonging to the plaintiff corporation."

Harriet E. Cole, the purchaser at the receiver's sale, has asked leave to intervene in this Court, but as she has not acquired through her purchase the title to, or an interest in, the patent, she is not entitled to seek an injunction to restrain infringement. *Crown Die & Tool Co.* v. *Nye Tool Works*, 261 U. S. 24, 38, 39; *Boomer* v. *United Power Press Co.*, 13 Blatch. 107, 112, 113; *Kaiser* v. *General Phonograph Supply Co.*, 171 Fed. 432, 433. The right to such an injunction underlies the equitable jurisdiction here invoked. *Root* v. *Railway Co.*, 105 U. S. 189. The motion for leave to intervene is denied.

By order of the state court, the receiver, as such, succeeded to the patent right and to the cause of action here involved. But the receiver, while retaining the patent, has disposed, with the approval of the state court, of his entire interest in the present suit against respondent. As the petitioner in these circumstances is not in a position to maintain this suit, the Court is of the opinion that the writ of certiorari should be

Dismissed.

HOLLINS *v.* OKLAHOMA.

CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF OKLAHOMA.

No. 686. Argued April 29, 30, 1935.—Decided May 13, 1935.

The evidence in this case shows that the petitioner, a negro, is entitled under the Fourteenth Amendment to a new trial because of the exclusion of negroes from jury service solely on account of their race or color.

56 Okla. Cr. 275, 284; 38 P. (2d) 36, reversed.

CERTIORARI, 294 U. S. 704, to review the affirmance of a conviction upon a charge of rape.

Mr. Charles H. Houston, with whom *Mr. William L. Houston* was on the brief, for petitioner.

Mr. Mac Q. Williamson, Attorney General of Oklahoma, with whom *Mr. Smith C. Matson,* Assistant Attorney General, was on the brief, for respondent.

PER CURIAM.

Petitioner was convicted in the District Court of Okmulgee County, Oklahoma, upon an information charging rape. At the trial, petitioner challenged the jury panel upon the ground that negroes for a long period had been excluded from jury service in that county solely on account of their race or color, and that this discrimination had deprived petitioner of the equal protection of the laws in violation of the Constitution of the United States. Evidence was taken by the trial court upon this issue, the challenge was overruled, and petitioner excepted. Upon appeal, the federal question was presented to the Criminal Court of Appeals and was decided against petitioner. This Court granted a writ of certiorari, April 1, 1935.

From its examination of the evidence, the Court is of the opinion that the case calls for the application of the principles declared in *Neal* v. *Delaware,* 103 U. S. 370, 397, and *Norris* v. *Alabama,* 294 U. S. 587.

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

Reversed.

TEXAS & NEW ORLEANS RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 670. Argued May 1, 1935.—Decided May 13, 1935.

Rate-fixing orders of the Interstate Commerce Commission sustained. 10 F. Supp. 198, affirmed.

APPEAL from a judgment of the District Court of three judges dismissing the bill in a suit to set aside two orders of the Interstate Commerce Commission.

Mr. Robert Wilkins Thompson, with whom *Messrs. Jules Henri Tallichet* and *T. D. Gresham* were on the brief, for appellants.

Mr. Nelson Thomas, with whom *Solictor General Reed, Assistant Attorney General Stephens,* and *Messrs. Elmer B. Collins* and *Daniel W. Knowlton* were on the brief, for the United States et al.

PER CURIAM.

This is a suit to restrain the enforcement of two orders of the Interstate Commerce Commission, made July 24, 1933, and December 11, 1933, respectively, relating to rates for the transportation of horses and mules, in carloads, in southwestern territory. 195 I. C. C. 417. Upon the hearing by the District Court, composed of three judges, the application for an injunction was denied and the amended bill of complaint was dismissed.

This Court, upon an examination of the record, agrees with the conclusion of the District Court that the orders in question were sustained by findings of the Commission acting within its statutory authority and that these findings were adequately supported by evidence. The decree is

Affirmed.

UNITED STATES EX REL. KASSIN *v.* MULLIGAN, U. S. MARSHAL, ET AL.

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

No. 569. Argued April 2, 1935.—Decided May 13, 1935.

1. The right of the defendant to a hearing before removal from one district to another for trial (R. S., § 1014) is not a constitutional right but one given by statute. P. 400.

2. In a removal proceeding under § 1014, the indictment, though not, strictly speaking, evidence, is enough to entitle the Government to removal, in the absence of evidence requiring a finding that the prosecution is groundless. P. 400.
3. In a removal proceeding under R. S., § 1014, the defendant has the right to introduce evidence in opposition to the showing against him, and to have that evidence considered by the commissioner, but the commissioner is without power to rule on disputed questions of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based, and he may not decide controverted or doubtful issues of fact. P. 401.
4. Revised Statutes, § 1014, is to be construed favorably to the Government's applications. P. 401.
5. In a removal proceeding under that section, arbitrary or capricious appraisal of evidence by the commissioner, or disregard by him of facts indubitably established by the evidence, is tantamount to a rejection of competent evidence and is in legal effect a denial of the right to be heard before removal. P. 402.
6. In habeas corpus to review a removal order made under § 1014, the District Court, and the Circuit Court of Appeals on appeal, are called upon to examine the evidence taken before the commissioner and to decide whether it was sufficient to require a finding that there was no substantial ground for bringing the petitioner to trial on any charge specified in the indictment. P. 402.
7. Reception by the commissioner of incompetent evidence introduced by the Government to impeach witnesses for the defendant, *held* not a ground in this case for setting the commitment aside. P. 402.

73 F. (2d) 274, affirmed.

CERTIORARI, 294 U. S. 699, to review the affirmance of a judgment of the District Court dismissing a writ of habeas corpus.

Mr. David P. Siegel for petitioner.

Assistant Solicitor General MacLean, with whom Solicitor *General Biggs* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* were on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner by writ of habeas corpus in the district court for southern New York sought to test the validity of his

commitment by a United States commissioner in proceedings for removal under R. S., § 1014, 18 U. S. C., § 591. After hearing upon the transcript of the proceedings before the commissioner, the district court dismissed the writ. The Circuit Court of Appeals affirmed. 73 F. (2d) 274. The questions presented are: Whether, as the Circuit Court of Appeals held, review of the commissioner's decision ends when the court is assured that he has honestly considered all the evidence presented to him. Is the evidence sufficient to warrant petitioner's removal? Should the commissioner's findings be set aside for error in the admission of evidence?

Petitioner and six others were indicted in the southern district of Florida for conspiracy, 18 U. S. C., § 88, to misapply, and for the misapplication of, funds of a bank in violation of 12 U. S. C., § 592. Overt acts alleged against him are that, under the name of Arthur Starke, he registered at a Jacksonville Beach hotel and rented a safe deposit box at a St. Augustine bank. He was found in the southern district of New York, and complaint was made to a commissioner in that district praying his arrest and removal for trial. He was brought before the commissioner and, at the hearing that followed, the United States produced a certified copy of the indictment and called witnesses whose testimony tended to prove that petitioner committed the overt acts and that on one occasion when he visited the safe deposit box a codefendant, Goldberg, was with him.

Petitioner admitted the overt acts. But he said: He had no connection with the conspiracy and did not know any of the persons accused. He went to Florida to engage in business with one Finberg, who died before the hearing, and for that purpose brought a large sum of money for the safe-keeping of which he hired the box. He assumed the false name at Finberg's suggestion in order to keep secret their connection. He had never been convicted of crime.

It was stipulated that, if called as witnesses, certain persons acquainted with petitioner would testify that his reputation for honesty and veracity was excellent. He introduced depositions of five persons implicated, three of whom were codefendants. They testified that they did not know petitioner or have any knowledge of his participation in the offenses charged. Two of them, professing to know all who were involved, definitely asserted that petitioner was not one of them. The other three did not know all the conspirators. Goldberg refused to depose; the other two defendants did not testify. The government called a special agent of the Department of Justice as a witness in rebuttal. The commissioner, notwithstanding objection that it was incompetent, received his testimony to the effect that both before and after giving their depositions two of the deponents, who had sworn that they did not know petitioner, had said that they did know him and that he had participated in the crimes. The commissioner found that there was probable cause to believe that petitioner had committed the offenses and held him to await the action of the district judge.

Removal from one federal district to another under § 1014* is unlike extradition or interstate rendition, in

* For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the dis-

that the protection owed by a sovereign to those within its territory is not involved. *Beavers* v. *Henkel,* 194 U. S. 73, 82–83. A person accused by indictment and found within the district where he is wanted is not entitled to a hearing in advance of trial. *Beavers* v. *Henkel, supra,* 84. The statute gives such a right to one otherwise accused. There is no constitutional right to a hearing in advance of removal. Undoubtedly, Congress has power to direct that accused persons be taken, immediately and without hearing, before the court for trial. *Hughes* v. *Gault,* 271 U. S. 142, 149, 152. But, as otherwise hardship and injustice might result, it has given a right to examination and hearing. *Beavers* v. *Henkel, supra,* 83. *Tinsley* v. *Treat,* 205 U. S. 20, 29. *Hughes* v. *Gault, supra.* In removal proceedings, the case of an indicted person is to be distinguished from that of one accused only by complaint filed with the commissioner. Identity being shown or admitted, the indictment without more prima facie requires the order of removal. *Greene* v. *Henkel,* 183 U. S. 249, 262. *Benson* v. *Henkel,* 198 U. S. 1, 10–12. *Hyde* v. *Shine,* 199 U. S. 62, 84. *Haas* v. *Henkel,* 216 U. S. 462, 481. Evidence is required to support the allegations of the complaint.

It may not with perfect accuracy be said, as in some removal decisions it has been said or implied, that the indictment is evidence of the facts that it alleges. But it fulfills the constitutional requirement (Amendment V), establishes probable cause (Amendment IV) and is itself authority to bring the accused to trial. In the absence of evidence requiring a finding that there is no ground for the prosecution, the government is entitled to an order for

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trict where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

removal. *Beavers* v. *Haubert,* 198 U. S. 77, 90. *Price* v. *Henkel,* 216 U. S. 488, 493. Cf. *South Carolina* v. *Bailey,* 289 U. S. 412, 420. The indictment is not conclusive, for under § 1014, the petitioner has the right to introduce evidence in opposition to the showing made against him. *Tinsley* v. *Treat, supra,* 32. But as the order of removal adjudges nothing affecting the merits of the case and amounts to no more than a finding that the accused may be brought to trial, the commissioner is without power to rule on disputed questions of law whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. *Henry* v. *Henkel,* 235 U. S. 219, 229. *Stallings* v. *Splain,* 253 U. S. 339, 344–345. *Morse* v. *United States,* 267 U. S. 80, 83. And for like reasons he may not decide controverted or doubtful issues of fact. *Rodman* v. *Pothier,* 264 U. S. 399, 402. In view of the delays and obstructions that it is possible for persons accused to obtain and interpose by misuse of the right to be heard before removal (cf. *Salinger* v. *Loisel,* 265 U. S. 224, 238), § 1014 is to be construed quite favorably to the government's applications. *Benson* v. *Henkel, supra,* 15. *Haas* v. *Henkel, supra,* 475.

The application for the writ of habeas corpus alleges that the evidence adduced by petitioner overwhelmingly established his innocence, completely destroyed the presumption of probable cause emanating from the indictment and established the lack of probable cause to believe him guilty. By reference, it includes a transcript of the evidence and asserts that the finding and order of the commissioner are contrary to law. Respondent's return puts in issue these allegations. The question so raised is whether petitioner is unlawfully deprived of his liberty. He was entitled to introduce evidence to prove the absence of probable cause and to have the commis-

sioner judicially consider it. We have held that exclusion of competent evidence is a denial of right given by § 1014. *Tinsley* v. *Treat, supra.* Equally repugnant to the statute is refusal to consider evidence in favor of the accused. Arbitrary or capricious appraisal of evidence or disregard of facts indubitably established is in legal effect failure to consider, the equivalent of the exclusion that we have condemned, and denial of the right to be heard before removal.

The lower courts were successively called on to decide on the merits of petitioner's claim. A memorandum opinion of the district court shows that it considered the evidence in detail and found that the commissioner's decision would have been amply justified even if he had not admitted the impeaching testimony introduced by the government in rebuttal. The Circuit Court of Appeals following its earlier decision, *United States* v. *Pulver,* 54 F. (2d) 261, declined to examine the evidence upon the ground that "our review of his [the commissioner's] decision ends as soon as we are assured that he has honestly considered all the evidence presented to him. No matter how flagrantly mistaken he may be in the result, a court will go no further." We disapprove that declaration. By the appeal that court was called on to examine the evidence and to decide whether it was sufficient to require a finding that there was no substantial ground for bringing the petitioner to trial on any charge specified in the indictment.

We find that the evidence fails by far to measure up to that standard, and approve the decision of the district court. The lower courts rightly held that the admission of the rebuttal testimony of which petitioner complains does not require that the commitment be set aside.

Affirmed.

STEWART *v.* KEYES ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 142. Argued December 6, 1934.—Decided May 20, 1935.

1. Land allotted and patented under § 28 of the Act of March 1, 1901 (Original Creek Agreement) in the right of a full-blood Creek Indian to his "heirs," without naming them, passes to them as an inheritance and not as an allotment in their own right. P. 406.
2. The restriction made by § 1 of the Act of May 27, 1908, on alienation of lands allotted to full-blood Indians of the Five Civilized Tribes, in Oklahoma, relates to land which the allottee took in his own right and not to land allotted in the right of a deceased ancestor and which came to him as an heir. P. 411.
3. The purpose of the provision of § 9 of the Act of May 27, 1908, "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," was to prescribe rules respecting future alienation by heirs—as well where they had become such before the Act as where they might become such thereafter. P. 412.
4. The proviso above quoted from § 9 of the Act of May 27, 1908, should be read in connection with the statutes whereby Congress authorized and recognized guardianships of estates of full-blood heirs who were minors or were mentally incompetent; and, so read, although couched in general terms, it does not require that a conveyance made by the guardian of a minor or incompetent heir pursuant to a sale directed and approved by the court having control of the guardianship shall also be approved by another court, of the same rank, having jurisdiction over the estate of the ancestor. Pp. 412, 414.
5. When Congress subjected Indian minors and incompetents of the Five Tribes and their estates to the guardianship laws of Oklahoma, it did not thereby incorporate those laws into the federal restrictions; it merely gave its assent to their application to such

Indians; and the laws remained state laws, as before, and as such were to be applied to these Indians. Apart from limitations expressly imposed by Congress, the state laws have the same application to Indian guardianships that they have when the wards are minors or incompetents of other races. P. 415.

6. Whether the proceedings in such Indian guardianships conform to the state statutes is a question of state, not federal, law. And, in the absence of congressional provision to the contrary, the time and mode of seeking the correction of errors believed to have been committed by the state courts in such proceedings, as also the effect of inaction in that regard, are all controlled by the state laws, as in the instance of other guardianship proceedings. P. 416.
7. As applied to a suit by a full-blood Creek Indian to recover an inherited allotment which, while he was of age but mentally incompetent, was sold and conveyed by his guardian with the approval of the Oklahoma County Court, but whose right of action became barred by the state statute of limitations, § 2 of the Act of Congress of April 12, 1926, purporting to lift the bar in such cases for a period of two years following the approval of that Act, is unconstitutional. P. 416.
8. As respects suits to recover real or personal property where the right of action has been barred by a statute of limitations and a later Act has attempted to repeal or remove the bar after it became complete, the rule sustained by reason and preponderant authority is that the removing Act can not be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law. P. 417.

167 Okla. 531; 30 P. (2d) 875, affirmed.

APPEAL from a judgment affirming a judgment for the defendants in a suit brought by Stewart, a full-blood Creek Indian, to recover an interest in land.

Mr. William Neff for appellant.

Mr. Richard H. Wills, with whom *Messrs. James C. Denton* and *A. M. Beets* were on the brief, for appellees.

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

This was a suit brought in a court of Seminole County, Oklahoma, by a full-blood Creek Indian to recover an

interest in land inherited from his grandmother, also a full-blood Creek Indian, and afterward sold by his guardian. The asserted grounds for a recovery were (1) that the proceedings whereby the plaintiff was adjudged an incompetent and subjected to guardianship on that basis, and also the proceedings leading to the sale, were invalid, because in some particulars irregular or not in accord with the laws of Oklahoma; (2) that the sale was in contravention of a controlling federal restriction on alienation; and (3) that an act of Congress of April 12, 1926, c. 115, § 2, 44 Stat. 239, permitted the suit to be brought within two years after the act's approval notwithstanding any bar which may have arisen under the state statutes of limitation before such approval.

The defendants answered and a trial was had at which judgment was given for them on a demurrer to the plaintiff's evidence. The Supreme Court of the State affirmed the judgment, 167 Okla. 531; 30 P. (2d) 875, and put its decision on the grounds (a) that the suit was barred by the state statutes of limitation and (b) that the act of Congress of April 12, 1926, relied on by the plaintiff as avoiding such a bar, could not be applied, because, if applied, it would deprive the defendants, who are holding under the guardian's sale, of vested rights without due process of law. The court's opinion did not mention the federal restriction on alienation set up by the plaintiff; but, of course, the judgment necessarily meant that the court regarded the asserted restriction as not requiring a different result.

The plaintiff brings the case here by appeal and complains that the Supreme Court of the State erred (1) in applying the state statutes of limitation over his objection that they could not be applied without bringing them into conflict with the federal statute restricting alienation, and (2) in holding the act of Congress of April 12, 1926, invalid as applied to the situation disclosed.

The facts in the light of which these complaints are to be considered are as follows:

The plaintiff and his grandmother were full-blood Indians of the Creek Tribe, enrolled as such, and entitled to share in the allotment of the tribal lands among the members. She died before receiving her allotment, and after her death the land in question, which was part of the tribal lands, was allotted and patented in her right, the patent being issued to her "heirs" without naming them. Under the applicable statute the heirs received the land as an inheritance from her and not as an allotment in their own right.[1] The plaintiff was one of the heirs. He also received an allotment in his own right; and thus, like many others, he had a personal allotment as well as an interest in inherited land.

Thereafter, in 1907, the county court of Hughes County, Oklahoma, regularly appointed John A. Jacobs guardian of the plaintiff's person and estate, he then being a minor and that being the county of his residence. In 1914 that court entered an order (1) reciting it was made after a hearing in the plaintiff's presence and at which he was examined; (2) finding he was then over the age of 21 years, but was incompetent to manage his own affairs and still in need of a guardian; (3) also finding Jacobs, the then guardian, was a proper person to be continued as such; (4) declining to accept a resignation tendered by Jacobs; and (5) ordering that the guardianship be continued and that thereafter Jacobs should act "as guard-

[1] The allotment in the right of the grandmother was made under § 28 of the act of 1901 which, after providing for the enrollment of all tribal citizens living on April 1, 1899, declares, "and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs . . . and be allotted and distributed to them accordingly."

ian for Noah Stewart, incompetent," and should "be governed by the laws relating thereto." [1a] Jacobs assented; and the subsequent proceedings were all entitled "In the Matter of the Guardianship of Noah Stewart, an Incompetent."

In May, 1916, the guardian by a verified petition requested the county court to authorize a sale of the plaintiff's interest in the inherited land for the purpose of securing money needed for his maintenance and support and for the improvement of his personal allotment. A month later the court entered an order reciting a hearing on that petition after lawful notice; finding the proposed sale was necessary for the purposes named; and directing the guardian to make the sale. Under that order the guardian made the sale at public auction to the highest bidder and reported it to the county court. July 11, 1916, the court entered an order (1) finding that due notice of the intended sale was given, that the sale was fairly conducted and legally made, and that the price was not disproportionate to the value of the property; (2) confirming and approving the sale; and (3) directing the guardian to execute a deed to the purchaser. The purchase price was paid to the guardian and he executed and delivered to the purchaser a deed, which was filed for record in the proper office July 12, 1916. The purchaser then entered into possession and he and his grantees remained in possession continuously thereafter. The defendants are the present claimants under the guardian's sale.

As part of the plaintiff's evidence it was stipulated that the Secretary of the Interior had never removed any restrictions on the alienation of the inherited land and that the same thing was true of the plaintiff's personal allot-

[1a] See *Mullen* v. *Glass,* 43 Okla. 549; 143 Pac. 679; *Yarhola* v. *Strough,* 64 Okla. 195; 166 Pac. 729; *Lytle* v. *Fulotka,* 106 Okla. 86; 233 Pac. 456; *Johnston* v. *Guy,* 165 Okla. 156; 25 P. (2d) 625.

ment. But the defendants, although joining in the stipulation, objected that the facts stipulated were immaterial.

August 4, 1917, the county court after a hearing entered an order adjudging that the plaintiff had become competent and discharging the guardian. The present suit was begun April 11, 1928.

The Supreme Court of the State in applying the state statutes of limitation said [p. 532]:

"Under the provisions of Section 1444, O. S. 1931, no action for the recovery of any estate, sold by a guardian, can be maintained by the ward, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof. The plaintiff could have commenced his action at any time within three years after August 4, 1917. Under the provisions of Section 100, O. S. 1931, any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within two years after the disability is removed. Under that statute the plaintiff could have brought his action within two years after August 4, 1917. Under the provisions of the second subdivision of Section 99, O. S. 1931, an action for the recovery of real property sold by a guardian, upon an order or judgment of a court directing such sale, brought by the ward or his guardian, must be brought within five years after the date of the recording of the deed made in pursuance of the sale. Under that statute the plaintiff could have brought his action within five years after the 12th day of July, 1916."

Under the state statutes thus described the court held that the plaintiff's asserted right to call in question the guardian's sale was barred before the suit was begun and

before the approval of the act of Congress of April 12, 1926.

1. Was the guardian's sale, as directed and approved by the county court, a forbidden alienation within the meaning of any then existing federal restriction? The plaintiff insists it was and points to the act of May 27, 1908, c. 199, 35 Stat. 312, as containing the restriction.

As a preliminary to considering that statute it will be helpful to refer to the conditions and legislation which preceded its enactment.

The Creek Tribe was one of the Five Civilized Tribes, each of which owned and occupied a tribal domain in the Indian Territory. Congress never provided a territorial government for that Territory, but ultimately did establish local courts therein and invested them with probate, as well as civil and criminal, jurisdiction. The laws for the Territory consisted largely of Arkansas statutes put in force therein by Congress; and these statutes included chapters providing comprehensively for the administration of estates of decedents, minors and incompetents, and for the sale of their property. At first the adopted Arkansas statutes were not intended to be fully applicable to Indians, but Congress soon made them applicable to all persons, "irrespective of race,"[2] and later on declared that the courts in the Territory should have "full and complete jurisdiction" of all "estates of decedents, guardianships of minors and incompetents, whether Indians, freedmen, or otherwise."[3]

November 16, 1907, the Territory of Oklahoma and the Indian Territory were admitted into the Union as the State of Oklahoma under an enabling act passed by Congress June 16, 1906, c. 3335, 34 Stat. 267, and amended

[2]Act of June 7, 1897, c. 3, 30 Stat. 62, 83.

[3]Act of April 28, 1904, c. 1824, § 2, 33 Stat. 573.

March 4, 1907, c. 2911, 34 Stat. 1286. The enabling act and the constitution of the new State united in declaring that, with exceptions not material here, " all laws in force in the Territory of Oklahoma " at the time of the State's admission should be " in force throughout the State " and that the " courts of original jurisdiction of such State " should be the successors of " all courts of original jurisdiction of said Territories."

The laws of the Territory of Oklahoma which were thus put in force " throughout " the new State included comprehensive provisions for the administration of estates of decedents, the appointment of guardians of minors and incompetents, and the management and sale of their property. In the Territory of Oklahoma jurisdiction over these subjects was vested in probate courts and by the constitution of the new State that jurisdiction was committed to county courts.

The lands of the Creek Tribe were allotted among its enrolled members pursuant to the act of March 1, 1901, c. 676, 31 Stat. 861, as modified and supplemented by the acts of June 30, 1902, c. 1323, 32 Stat. 500, and March 3, 1905, c. 1479, 33 Stat. 1071. Under these acts lands allotted to living members in their own right were subjected to specified restrictions on alienation; but those allotted in the right of deceased members were left unrestricted.[4]

The act of April 26, 1906, c. 2876, 34 Stat. 137, substituted a system of revised restrictions made applicable to all of the Five Civilized Tribes. In § 19 it dealt with restrictions relating to lands of living allottees, and in § 22 with those relating to inherited lands, including, as this court has held, lands allotted in the right of deceased members.[5] Under § 22 the right of full-blood Indian heirs to alienate the inherited lands was subjected to the

[4] *Skelton* v. *Dill,* 235 U. S. 206; *Adkins* v. *Arnold,* 235 U. S. 417, 420; *Talley* v. *Burgess,* 246 U. S. 104, 107.

[5] *Talley* v. *Burgess, supra,* 108.

restriction that the conveyance be approved by the Secretary of the Interior.

The act of May 27, 1908, c. 199, 35 Stat. 312, again revised the restrictions and practically substituted its § 1 for § 19 of the act of 1906, and its § 9 for § 22 of that act. Thus, like the act of 1906, it dealt with the restrictions relating to lands of living allottees separately from those relating to inherited lands.

In § 1 the act of 1908, after declaring that certain lands of designated classes of allottees "shall be free from all restrictions," provides—

"All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

Counsel for the plaintiff place some reliance on that restriction. But there is no basis for doing so. The plaintiff's relation to the land in question was that of an heir, and not that of an allottee.[6] The land was allotted in the right of his deceased grandmother; so she rather than he should be regarded as the allottee.

Section 9 relates to the alienation of inherited lands. So far as is material here it provides:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That no con-

[6] *Harris* v. *Bell,* 254 U. S. 103, 108.

veyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

While this provision, if taken literally, might be regarded as confined to subsequent deaths and resulting heirships, a reading of the entire act, including its introductory sentence, shows that the purpose was to prescribe rules respecting future alienation by heirs—as well where they had become such before the act as where they might become such thereafter. The provision has been so applied by this Court.[7]

The first sentence in the quoted part of § 9, where not restrained by the proviso, undoubtedly frees the inherited lands from all restrictions on alienation. But as respects an heir who is a full-blood Indian the proviso obviously restrains that sentence and, if taken literally, makes unlawful any conveyance of any interest of such an heir in the inherited lands unless the conveyance be approved by the court having jurisdiction of the settlement of the estate of the deceased allottee. Here the heir was a full-blood Indian. So the question arises, whether the proviso is intended to include a conveyance made pursuant to a guardian's sale, such as was directed and approved by the county court in this instance.

The proviso makes no mention of minors or incompetents under guardianship or of conveyances made by their guardians under the direction of courts having jurisdiction of their estates. Under other acts of Congress the persons and estates of Indian minors and incompetents in the Indian Territory and the State of Oklahoma have long been subjected to the jurisdiction of local courts; and that jurisdiction is recognized throughout the allotment statutes before described and in § 2 of the act of 1908. True,

[7] *Harris* v. *Bell*, 254 U. S. 103, 108, 114.

that jurisdiction could not be exercised otherwise than in keeping with the laws of Congress relating to such Indians and their lands; but this constitutes no reason for putting aside the statutes granting and recognizing the jurisdiction when a related statute is being examined and construed.

The court which would have jurisdiction of the settlement of the estate of the deceased allottee (plaintiff's grandmother) is either the same county court that directed and approved the guardian's sale or the county court in an adjoining county. So, the court named in the proviso and the one which directed and approved the guardian's sale were either identical or of the same rank.

A similar question respecting the construction and application of the proviso was considered by this court in 1920. The case involved a sale of inherited land by the guardian of minor heirs who were full-blood Creek Indians, the guardian having acted under the order of the court having control of the guardianship; and it was held that the proviso, rightly construed, did not include such a sale.

In that case the Court said:[8]

"If in this instance the same court had had jurisdiction of the guardianship of the minor heirs and of the settlement of the estate of the deceased allottee, no embarrassment would have ensued; but as that was not the case, the question arises, whether it was essential that the guardian's conveyance, directed and approved, as it was, by the court having control of the guardianship, should also be approved by the court having jurisdiction of the settlement of the deceased allottee's estate? The Circuit Court of Appeals answered in the negative; and, while the question is not free from difficulty, we think that solution of it is right.

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[8] *Harris* v. *Bell*, 254 U. S. 103, 112–113.

"Of course, the purpose in requiring any approval is to safeguard the interests of the full-blood Indian heir. Where he is a minor he can convey only through a guardian, and no court is in a better situation to appreciate and safeguard his interests than the one wherein the guardianship is pending. Besides, as a general rule, a guardianship carries with it exclusive power to direct the guardian and to supervise the management and disposal of the ward's property. It is so in Oklahoma. This rule is so widely recognized and so well grounded in reason that a purpose to depart from it ought not to be assumed unless manifested by some very clear or explicit provision. . . . The proviso does not mention minors under guardianship; and to regard its general words as including them will either take all supervision of the sale of their interest in inherited lands from the court in which the guardianship is pending, or subject that court's action to the approval of another court of the same rank. In either event conflict and confusion will almost certainly ensue and be detrimental to the minor heirs. But, if the proviso be regarded, as well it may, as referring to heirs not under guardianship . . . all full-blood heirs will receive the measure of protection intended. We think this is the true construction."

In principle what was said there is applicable here. That the Indian heir in that case was a minor and in this was an incompetent is not material. The important thing, both there and here, is that the conveyance was made under the direction of the court having jurisdiction of a pending guardianship over the heir's estate. The guardianships were alike in point of congressional authorization and recognition, had like purposes, and were attended by like measures of control.

Plainly the proviso should be read in connection with the statutes whereby Congress authorized and recognized such guardianships and in the light of familiar rules of

construction. Upon such a reading it becomes reasonably certain that the proviso, although couched in general terms, is not intended to include a conveyance made by the guardian of a minor or incompetent heir pursuant to a sale directed and approved by the court having control of the guardianship of the heir's estate.

The review which we have made of the federal restrictions shows that the guardian's sale was not a forbidden alienation under any of them.

2. We come then to the contention respecting the application of the state statutes of limitation. It proceeds on the assumption first, that the guardian's sale was in direct conflict with the federal restrictions on alienation; and, secondly, that the proceedings whereby the plaintiff was brought under guardianship as an incompetent, as also the later proceedings leading to the sale, were not in conformity with the state statutes and that these irregularities brought the sale in conflict with the restrictions.

We have already shown that the first assumption is not tenable. And we are of opinion the second is ill-grounded.

When Congress subjected Indian minors and incompetents and their estates to the laws of the State in respect of guardianships it did not thereby incorporate those laws into the federal restrictions. It merely gave its assent to their application to such Indians. The laws remained state laws, as before, and as such were to be applied to these Indians. Congress expressly imposed a limitation fixing stated ages of majority for them. This, of course, put that matter beyond the reach of the state statutes, and the courts of the State have so ruled. Apart from this limitation and some others not material here, the state laws have the same application to Indian guardianships that they have when the wards are minors or incompetents of other races.

Whether the proceedings in such Indian guardianships conform to the state statutes is a question of state, not federal, law. And, in the absence of congressional provision to the contrary, the time and mode of seeking the correction of errors believed to have been committed by the state courts in such proceedings, as also the effect of inaction in that regard, are all controlled by the state laws, as in the instance of other guardianship proceedings.

It follows from these considerations that, subject to a matter about to be considered, no federal statute or right was violated or infringed in applying the state statutes of limitation to this suit.

3. The remaining question is whether there was error in the ruling that the act of April 12, 1926, could not be given effect in this case without depriving the defendants of property contrary to the due process of law clause of the Constitution.

The defendants hold the rights transferred by the guardian's sale and deed. The deed was filed for record July 12, 1916, and the grantee then went into possession. The plaintiff had then attained his majority but was under guardianship as an incompetent. That disability and guardianship terminated August 4, 1917. The guardian's sale and deed were not challenged until April 11, 1928, when this suit was begun. In the meantime any right the plaintiff may have had to challenge the sale and deed had become barred by § 1444 and subdivision 2 of § 100 of the state statutes of limitation. The bar became effective July 12, 1921, if not August 4, 1920, in that under the operation of those statutes the guardian's sale and deed then ripened into an unassailable title.

Section 2 of the act of April 12, 1926, declares that—"No cause of action which heretofore shall have accrued to" any restricted Indian of any of the Five Civilized Tribes "shall be barred prior to the expiration of a

period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

We are of opinion that so much of the section as purports to free from any bar of the statutes of limitation a cause of action such as is here presented, notwithstanding the full period of limitation had run prior to the act's approval, falls nothing short of an attempt arbitrarily to take property from one having a perfect title and to subject it to an extinguished claim of another.

As respects suits to recover real or personal property where the right of action has been barred by a statute of limitations and a later act has attempted to repeal or remove the bar after it became complete, the rule sustained by reason and preponderant authority is that the removing act cannot be given effect consistently with constitutional provisions forbidding a deprivation of property without due process of law.[9] "The reason is," as this Court has said, "that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law." [10]

The state court so ruled in this suit and we sustain that ruling.

Judgment affirmed.

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[9] Cooley Const. Lim., 6th ed., p. 448.

[10] *Campbell* v. *Holt*, 115 U. S. 620, 623.

SUPERINTENDENT OF FIVE CIVILIZED TRIBES *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 817. Argued May 6, 7, 1935.—Decided May 20, 1935.

1. Income on funds derived from the restricted allotment of a full-blood Creek Indian which are in excess of his needs and are held by the United States in trust for him under the direction of the Secretary of the Interior, is subject to the federal income tax. Revenue Act, 1928, §§ 11 and 12. Pp. 419–420.
2. In this regard, the sweeping general terms of the taxing Act must prevail, as there is nothing in the Creek Agreement of 1901, the supplemental agreement of 1902, the Act of April 26, 1906, or the Act of May 27, 1908, which definitely expresses an intent to exempt such income from taxation. Pp. 420–421.
3. Taxation by the United States of income received from trust funds held for its Indian ward, who is a citizen of the United States, is not inconsistent with the relation of guardianship. P. 421.

75 F. (2d) 183, affirmed.

CERTIORARI * to review the affirmance of a decision of the Board of Tax Appeals sustaining an income tax assessment. 29 B. T. A. 635.

Messrs. Thomas J. Reilly and *Arthur F. Mullen,* with whom *Messrs. F. M. Goodwin* and *George F. Shea* were on the brief, for petitioner.

Assistant Attorney General Wideman, with whom *Solicitor General Reed* and *Messrs. J. W. Morris* and *J. P. Jackson* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Sandy Fox, for whom this suit was instituted, is a full-blood Creek Indian. Certain funds, said to have been

* See Table of Cases Reported in this volume.

derived from his restricted allotment, in excess of his needs, were invested. The proceeds therefrom were collected and held in trust under direction of the Secretary of Interior. The question now presented is whether this income was subject to the federal tax laid by the 1928 Revenue Act (c. 852, §§ 11, 12, 45 Stat. 791). The Commissioner, the Board of Tax Appeals and the court below answered in the affirmative.

Petitioner maintains that the court should have followed the rule which it applied in *Blackbird* v. *Commissioner,* 38 F. (2d) 976; also that it erroneously held Congress intended to tax income derived from investment of funds arising from restricted lands belonging to a full-blood Creek Indian.

Blackbird, restricted full-blood Osage, maintained that she was not subject to the federal income tax statute. The court sustained that view and declared:

"Her property is under the supervising control of the United States. She is its ward, and we cannot agree that because the income statute, Act of 1918 (40 Stat. 1057), and Act of 1921 (42 Stat. 227), subjects 'the net income of every individual' to the tax, this is alone sufficient to make the Acts applicable to her. Such holding would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by legislation they have been named and their interests specifically dealt with."

This does not harmonize with what we said in *Choteau* v. *Burnet* (1931), 283 U. S. 691, 693, 696:

"The language of §§ 210 and 211 (a) [Act 1918] subjects the income of 'every individual' to tax. Section 213 (a) includes income 'from any source whatever.'[1]

[1] Like provisions are in §§ 210 and 211 (a) Rev. Acts 1921, 1924, 1926, and §§ 11 and 12 (a) Act of 1928; § 213 (a) Acts 1921, 1924, 1926 and § 22 Act of 1928.

The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The Act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. . . . The intent to exclude must be definitely expressed, where, as here, the language of the Act laying the tax is broad enough to include the subject matter."

The court below properly declined to follow its quoted pronouncement in Blackbird's case. The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted. See *Irwin* v. *Gavit,* 268 U. S. 161; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232; *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84; *Pitman* v. *Commissioner,* 64 F. (2d) 740. The purpose is sufficiently clear.

It is affirmed that "inalienability and nontaxability go hand in hand; and that it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian."

The general terms of the taxing act include the income under consideration, and if exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs.

Neither the Creek agreement of 1901 nor the supplemental agreement (1902) conferred general exemption from taxation upon Indians; homesteads only were definitely excluded, although alienation of allotted lands was restricted.

The suggestion that exemption must be inferred from the Act of April 26, 1906 (34 Stat. 137) or May 27, 1908

(35 Stat. 312) is not well founded. The first of these extended restrictions upon the alienation of allotments for twenty-five years unless sooner removed by Congress, and provided: "Sec. 19. . . . That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee." This exemption related to land and not to income derived from investment of surplus income from land. Moreover, the Act itself was superseded by the second one, which did not contain the quoted provision, but declared: "Sec. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes. . . ."

We find nothing in either act which expresses definite intent to exclude from taxation such income as that here involved. See *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 581.

Nor can we conclude that taxation of income from trust funds of an Indian ward is so inconsistent with that relationship that exemption is a necessary implication. Nontaxability and restriction upon alienation are distinct things. *Choate* v. *Trapp,* 224 U. S. 665, 673. The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden.

Shaw v. *Gibson-Zahniser Oil Corp., supra,* held that restricted land purchased for a full-blood Creek—ward of the United States—with trust funds was not free from state taxation, and declared that such exemption could not be implied merely because of the restrictions upon the Indian's power to alienate. *Affirmed.*

SENIOR *v.* BRADEN ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 658. Argued April 9, 10, 1935.—Decided May 20, 1935.

1. Where the validity of a state tax is challenged under the Federal Constitution, this Court must determine for itself the nature and incidence of the tax. P. 429.
2. A resident of Ohio owned transferable trust certificates showing him to be a beneficiary under separate deeds of trust on several parcels of land, some situated within and some outside of the State. Each certificate declared him to be the owner of a specified fractional interest in the property held in the trust under which it was issued. Each trustee was bound by his declaration of trust to hold and manage the property for the use and benefit of certificate owners; to collect and distribute among them the rents; and in case of sale to make pro-rata distribution of the proceeds. Each trustee held only one parcel of land and in the management thereof was free from control by the beneficiaries. Each parcel had been assessed in the name of the legal owner or lessee for local real estate taxes, without deduction on account of any interest of the certificate owners. *Held,* the attempt of Ohio to subject the beneficial interests represented by the certificates to a tax imposed on "investments" and other intangible property, measured by a percentage of the income yield—investments being so defined by the statute as to include equitable interests in land and rents divided into shares evidenced by transferable certificates—is unconstitutional both in respect of such interests in land outside of the State and of those in land within the State. Pp. 428, 433.

128 Oh. St. 597, reversed.

APPEAL from a judgment of the Supreme Court of Ohio upholding the validity of an application of the state intangible property tax. For decisions of the lower state courts, see 48 Ohio App. 255; 30 Ohio N. P. 147.

Mr. Murray Seasongood, with whom *Mr. Lester A. Jaffe* was on the reply brief, for appellant.

The interest of a holder of a land trust certificate is an interest in real property. Opinions of Attorney General

of Ohio, 1926, p. 375 (No. 3640); *id.*, p. 528 (No. 3869); *Oak Bldg. & Roofing Co.* v. *Susor,* 32 Ohio App. 66; *Gilbert & Ives* v. *Port,* 28 Oh. St. 276; 2 Cincinnati L. Rev., p. 255; *Avery's Lessee* v. *Dufrees,* 9 Ohio 145; *Biggs* v. *Bickel,* 12 Oh. St. 49; *Bolton* v. *Bank,* 50 Oh. St. 290; *Zumstein* v. *Coal & Mining Co.,* 54 Oh. St. 264; *McCammon* v. *Cooper,* 69 Oh. St. 366; *Bank* v. *Logue,* 89 Oh. St. 288; *Brown* v. *Fletcher,* 235 U. S. 589; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *Narragansett Mutual Fire Ins. Co.* v. *Burnham,* 51 R. I. 371; *Bates* v. *Decree of Court,* 131 Me. 176; *Morrison* v. *Manchester,* 58 N. H. 538; *Dana* v. *Treasurer and Receiver General,* 227 Mass. 562; *Priestley* v. *Burrill,* 230 Mass. 452; *Williams* v. *Milton,* 215 Mass. 1; *Hecht* v. *Malley,* 265 U. S. 144; *Crocker* v. *Malley,* 249 U. S. 223; *Commissioner* v. *Brouillard,* 70 F. (2d) 154; *Tyson* v. *Commissioner,* 54 F. (2d) 29; *McCoach* v. *Minehill R. Co.,* 228 U. S. 295; *Emery, Bird, Thayer Realty Co.* v. *United States,* 198 Fed. 242; *Smith* v. *Loewenstein,* 50 Oh. St. 346; *Baker* v. *Commissioner of Corporations,* 253 Mass. 130; *Bartlett* v. *Gill,* 221 Fed. 476, aff'd 224 Fed. 927; *Wheless* v. *Wheless,* 92 Tenn. 293; *National Department Stores* v. *Board of Equalization,* 111 W. Va. 203; 1 Perry on Trusts, 7th ed., p. 7; Bogert, Handbook of the Law of Trusts, p. 427; 3 Pomeroy, Equity Jurisprudence, 4th ed., § 975, p. 2117; Salmond, Jurisprudence, 5th ed., § 90, p. 228; 4 Kent's Commentaries, p. 303; The Nature of the Rights of the Cestui Que Trust, 17 Col. L. Rev. 269, 289; Dean Pound, The Legal Estate, 26 Harv. L. Rev. 462, 464; Huston, The Enforcement of Decrees in Equity, c. 7, p. 87; *Rex* v. *Holland,* Style, 20, 21; Restatement of the Law of Trusts, A. L. I. (1930), § 126, The Nature of the Beneficiary's Interest.

Dean Stone, in 17 Col. L. Rev. 467, on The Nature of the Rights of the Cestui Que Trust, takes the opposite point of view, *i. e.,* that for many purposes an equitable

interest is a chose in action, no matter what may be the nature of the trust *res*. This Court has decided, however, that an equitable interest in property will be regarded as property of the same kind as the trust *res*, and not as a chose in action. *Brown* v. *Fletcher*, 235 U. S. 589. See also *Allen* v. *Commissioner*, 49 F. (2d) 716, 718.

Interests in real estate can not, under the due process and equal protection clauses of the Fourteenth Amendment, be taxed by a State in which the real estate is not located. *First National Bank* v. *Maine*, 284 U. S. 312, 326; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385; *City Bank Farmers Trust Co.* v. *Schnader*, 293 U. S. 112; *Frick* v. *Pennsylvania*, 268 U. S. 473, 488, 492; *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83, 93; *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 210; *First National Bank* v. *Maine*, 284 U. S. 312, 326, 327; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1; *Baldwin* v. *Missouri*, 281 U. S. 586; *Johnson Oil Rfg. Co.* v. *Oklahoma*, 290 U. S. 158; *Brooke* v. *Norfolk*, 277 U. S. 27; *Western Union* v. *Kansas*, 216 U. S. 1, 38; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 209, 211; *Pierson* v. *Lynch*, 237 App. Div. 763, aff'd per curiam, 263 N. Y. 533, certiorari dismissed as improvidently granted, 293 U. S. 52.

Ohio can not abritrarily tax some interests in real estate on a different basis from that on which it taxes others. To tax appellant on his interest in real estate, in addition to the tax paid on the real estate itself, is discriminatory. It is like valuing the property of one person, for purposes of taxation, higher than similar property. *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535; *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U. S. 239; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 446; *Cumberland Coal*

Co. v. *Board of Revision,* 284 U. S. 23. See also, *Chisholm* v. *Shields,* 67 Oh. St. 374.

It is unconstitutional discrimination to tax equitable interests in land "divided into shares evidenced by transferable certificates" and to exempt from taxation (a) the same equitable interests when not represented by such certificates; (b) legal interests in land, whether divided into shares or not, and whether represented by transferable certificates or not.

A State has no right to tax evidence of the interest in property, apart from the thing itself. *Selliger* v. *Kentucky,* 213 U. S. 200; *Cassidy* v. *Ellerhorst,* 110 Oh. St. 535; *State* v. *Davis,* 85 Oh. St. 43, 56; *Ball* v. *Towle Mfg. Co.,* 67 Oh. St. 306, 314.

If this were an income tax, it would violate the Fourteenth Amendment, inasmuch as the owners of equitable interests in real estate divided into shares represented by transferable certificates are the only persons in Ohio who are subjected to taxes on the "income yield" in addition to the customary property taxes levied and assessed on the real estate itself.

The tax is not an income tax, nor even a gross receipts tax, because it is not based on the income or gross receipts of the taxpayer. The conclusion must be that "income yield" was used as a basis for determining a property tax. This is evident from the report of the Special Joint Taxation Committee on the Revision of the Ohio Taxation System. *Friedlander* v. *Gorman,* 126 Oh. St. 163.

The real estate in which appellant has an interest has been taxed to the lessor or the lessee for its full value. To tax these particular equitable interests, in addition to the legal interests, when other real estate is not taxed on both, is double, discriminatory taxation and, therefore, unconstitutional.

Mr. John W. Bricker, Attorney General of Ohio, and *Mr. E. G. Schuessler,* Assistant Attorney General, with whom *Messrs. Louis J. Schneider, Walter M. Locke,* and *Thomas C. Lavery* were on the brief, for appellees.

No federal question is presented. The nature of the interest of the appellant in the several trust estates is purely a question of local law, and the decision of the Supreme Court of Ohio is not reviewable.

The syllabus of the opinion of the Supreme Court of Ohio shows that that court held that the interest of the appellant is not land or an interest in land, but consists of a bundle of equitable choses in action, *viz*: rights to participate in the net rental of the real estate being administered by the respective trusts, as to the taxation of which constitutional limitations upon the power to tax land or interests therein have no application.

In the case of intangible personal property, considerations applicable to ownership of physical objects are inapplicable, and taxation of such property at the place of domicile of the owner has been uniformly upheld. *State Tax on Foreign-Held Bonds,* 15 Wall. 300; *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58; *Blodgett* v. *Silberman,* 277 U. S. 1, 15; *Maguire* v. *Trefry,* 253 U. S. 12, 17; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 280; compare *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *First Nat. Bank* v. *Maine,* 284 U. S. 312.

It may be candidly admitted that, under the Fourteenth Amendment, the State of Ohio has no power to tax land or interests in land situated beyond its borders; nor has it power to tax land or interests in land situate within the State in any other manner than by uniform rule according to value, under Art. XII, § 2, of the Constitution of Ohio. From this it follows as a matter of course that if the property of the appellant which the appellees seek to tax in this case is land, or an interest in land, situated

within or without the State, their action is unconstitutional and should be permanently enjoined. If, however, the property of the appellant in the several trusts is unequivocally shown by the record in this case to be in fact a species of intangible personal property in the nature of a bundle of equitable choses in action, then the State of Ohio has the power to impose the tax which the appellees, pursuant to provisions of the General Code of Ohio, have sought to do, without offending either the due process clause of the Fourteenth Amendment or Art. XII, § 2 of the Constitution of the State of Ohio.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

January 1, 1932—tax listing day—§ 5328–1, the Ohio General Code [1] provided that all investments and other intangible property of persons residing within the State should be subject to taxation. Section 5323 so defined "investment" as to include incorporeal rights of a pecuniary nature from which income is or may be derived, including equitable interests in land and rents and royalties divided into shares evidenced by transferable certificates. Section 5638 imposed upon productive investments a tax amounting to five percentum of their income yield; and § 5839 defined "income yield" so as to include the aggregate income paid by the trustee to the holder, &c. Pertinent portions of §§ 5388 and 5389 are in the margin.[2]

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[1] By Act of June 29, 1931 (114 Laws p. 714) providing for levy of taxes on intangible property etc., the Ohio General Assembly amended §§ 5323, 5324, 5325, 5326, 5327, 5328, 5360, 5382, 5385, 5386, 5388, 5389 of the General Code and added supplemental §§ 5325–1, 5328–1, and 5328–2.

[2] "Sec. 5388. * * * Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be.

Appellant owned transferable certificates showing that he was beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land—some within Ohio, some without. On account of these beneficial interests he received $2,231.29 during 1931. The lands are adequately described in the margin.[3]

The tax officers of Hamilton County, where appellant resided, threatened to assess these beneficial interests, and then to collect a tax of five percentum of the income there-

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Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed. . . .

"Sec. 5389. * * * As used in Section 5388 of the General Code and elsewhere in this chapter, the 'true value in money' of any property means the usual selling price thereof at the time or times and place as of which it is required to be listed. . . .

"'Income yield' as used in section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following: . . . in the case of equitable interests, the cash distributions of income so made. . . ."

[3] Lincoln Inn Court, Cincinnati, Ohio; Clark-Randolph Building Site, Chicago, Illinois; Woman's City Club, Cincinnati, Ohio; Rockefeller Building, Cleveland, Ohio; Insurance Exchange Building, Boston, Massachusetts; City National Bank Building, Omaha, Nebraska; and Fidelity Mortgage Company, Cleveland, Ohio.

from. To prevent this, he instituted suit in the Common Pleas Court. The petition asked that § 5323, General Code, be declared unconstitutional and that appellees be restrained from taking the threatened action. The trial court granted relief as prayed; the Court of Appeals reversed and its action was approved by the Supreme Court.

With commendable frankness counsel admit that under the Fourteenth Amendment the State has "no power to tax land or interests in land situate beyond its borders; nor has it power to tax land or interests in land situate within the State in any other manner than by uniform rule according to value." Consequently, they say, "if the property of appellant, which the appellees seek to tax in this case, is land or interest in land situate within or without the State, their action is unconstitutional and should be permanently enjoined."

The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature. *Moffitt* v. *Kelly,* 218 U. S. 400, 404, 405; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 625, 626; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 280. If the thing here sought to be subjected to taxation is really an interest in land, then by concession the proposed tax is not permissible. The suggestion that the record discloses no federal question is without merit.

Three of the parcels of land lie outside Ohio; four within; they were severally conveyed to trustees. The declaration of trust relative to the Clark-Randolph Building Site, Chicago, is typical of those in respect of land beyond Ohio; the one covering East Sixth Street property, Cleveland, is typical of those where the land lies in Ohio, except Lincoln Inn Court, Cincinnati. Each parcel has been assessed for customary taxes in the name of legal owner or lessee according to local law, without

deduction or diminution because of any interest claimed by appellee and others similarly situated.

The trust certificates severally declare—That Max Senior has purchased and paid for and is the owner of an undivided 340/1275ths interest in the Lincoln Inn Court property; that he is registered on the books of the Trustee as the owner of 5/3250ths of the equitable ownership and beneficial interest in the Clark Randolph Building Site, Chicago; that he is the owner of 6/1050ths of the equitable ownership and beneficial interest in the East Sixth Street property, Cleveland. In each declaration the Trustee undertakes to hold and manage the property for the use and benefit of all certificate owners; to collect and distribute among them the rents; and in case of sale to make pro-rata distribution of the proceeds. While certificates and declarations vary in some details, they represent beneficial interests which, for present purposes, are not substantially unlike. Each trustee holds only one piece of land and is free from control by the beneficiaries. They are not joined with it in management. See *Hecht* v. *Malley,* 265 U. S. 144, 147.

The State maintains, that appellant's interest is "a species of intangible personal property consisting of a bundle of equitable choses in action because the provisions of the agreements and declarations of trust of record herein have indelibly and unequivocally stamped that character upon it by giving it all the qualities thereof for purposes of the management and control of the trusts. At the time the trusts were created, the interests of all the beneficiaries consisted merely of a congeries of rights etc., and such was the interest acquired by appellant when he became a party thereto. . . . The rights of the beneficiary consist merely of claims against the various trustees to the pro rata distribution of income, during the continuance of the trusts, and to the pro rata distribution of

the proceeds of a sale of the trust estates upon their termination."

Appellant submits that ownership of the trust certificate is evidence of his interest in the land, legal title to which the trustee holds. This view was definitely accepted by the Attorney General of Ohio in written opinions Nos. 3640 and 3869 (Opinions 1926, pp. 375, 528) wherein he cites pertinent declarations by the courts of Ohio and of other states. See also 2 Cincinnati Law Rev. 255.

The theory entertained by the Supreme Court concerning the nature of appellant's interests is not entirely clear. The following excerpts are from the headnotes of its opinion which in Ohio constitute the law of the case:

"Land trust certificates in the following trusts [the seven described above] are mere evidences of existing rights to participate in the net rentals of the real estate being administered by the respective trusts."

"Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Sec. 5323, General Code (114 Ohio Laws 715) does not provide for a tax against the equitable interests in land but does provide a tax against the income derived from such equitable interests."

Apparently no opinion of any court definitely accepts the theory now advanced by appellees, but some writers do give it approval because of supposed consonance with general legal principles. The conflicting views are elaborated in articles by Professor Scott and Dean Stone in 17 Columbia Law Review (1917) at pp. 269 and 467.

Maguire v. *Trefry,* 253 U. S. 12, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes; the securities (personalty) from which the income arose were

held in trust at Philadelphia; income from securities taxable directly to the trustee was not within the statute. The opinion accepted and followed the doctrine of *Blackstone* v. *Miller,* 188 U. S. 189, and *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54. Those cases were disapproved by *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204. They are not in harmony with *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, and views now accepted here in respect of double taxation. See *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312.

In *Brown* v. *Fletcher,* 235 U. S. 589, 597, 599, we had occasion to consider the claim that a beneficial interest in a trust estate amounts to a chose in action and is not an interest in the *res,* subject of the trust. Through Mr. Justice Lamar we there said:

"If the trust estate consisted of land it would not be claimed that a deed conveying seven-tenths interest therein was a chose in action within the meaning of § 24 of the Judicial Code. If the funds had been invested in tangible personal property, there is, as pointed out in the *Bushnell* case [*Bushnell* v. *Kennedy,* 9 Wall. 387, 393], nothing in § 24 to prevent the holder by virtue of a bill of sale from suing for the 'recovery of the specific thing or damages for its wrongful caption or detention.' And if the funds had been converted into cash, it was still so far property—in fact, instead of in action—that the owner, so long as the money retained its earmarks, could recover it or the property into which it can be traced, from those having notice of the trust. In either case, and whatever its form, trust property was held by the Trustee,—not in opposition to the *cestui que trust* so as to give him a chose in action, but—in possession for his benefit in accordance with the terms of the testator's will. . . .

"The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the Trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. *Ham* v. *Van Orden,* 84 N. Y. 257, 270; *Stringer* v. *Young, Trustee,* 191 N. Y. 157; 83 N. E. 690; *Lawrence* v. *Bayard,* 7 Paige 70; *Woodward* v. *Woodward,* 16 N. J. (Eq.) 83, 84. The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title and estate in and to property."

The doctrine of *Brown* v. *Fletcher* is adequately supported by courts and writers. *Narragansett Mutual Fire Ins. Co.* v. *Burnham,* 51 R. I. 371; 154 Atl. 909; *Bates* v. *Decree of Court,* 131 Me. 176; 160 Atl. 22; Bogert, Handbook of the Law of Trusts, 430; 3 Pomeroy Equity Jurisprudence, Fourth Edition, 1928, § 975, p. 2117; 17 Columbia Law Review, 269, 289. We find no reason for departing from it.

The challenged judgment must be

Reversed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be affirmed.

Tax laws are neither contracts nor penal laws. The obligation to pay taxes arises from the unilateral action of government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute the burden among those who must bear it. See *Alabama* v. *United States,* 282

U. S. 502, 507. To that obligation are subject all rights of persons and property which enjoy the protection of the sovereign and are within the reach of its power.

For centuries no principle of law has won more ready or universal acceptance. Even now that it is doubted, the doubt is rested on no more substantial foundation than want of "jurisdiction" to tax, and the assertion that the Fourteenth Amendment is endowed with a newly discovered efficacy to forbid "double taxation" when the sovereignty imposing the tax is that of two or more states. See *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 210; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 92; *Baldwin* v. *Missouri,* 281 U. S. 586, 593; compare *Burnet* v. *Brooks,* 288 U. S. 378, 400 *et seq.* But as no opinion of this Court has undertaken to define the taxation which is thus forbidden because it is double, or to declare that different legal rights founded upon the same economic interest may never, under any circumstances, be compelled to contribute to the cost of government of two states whose protection they respectively enjoy, it would seem still to be open to inquiry whether the particular tax now imposed infringes any constitutional principle capable of statement and definition.

When we speak of the jurisdiction to tax land or a chattel as being exclusively in the state where it is located, we mean no more than that, in the ordinary case of ownership of tangible property, the legal interests of ownership enjoy the benefit and protection of the laws of that state alone, and that it alone can effectively reach the interests protected for the purpose of subjecting them to the payment of the tax. Other states are said to be without jurisdiction, and so without constitutional power to tax, if they afford no protection to the ownership of the property and cannot lay hold of any interest in the property in order to compel payment of the tax. See *Union Tran-*

sit Co. v. *Kentucky,* 199 U. S. 195, 202; *Frick* v. *Pennsylvania,* 268 U. S. 473, 497.

But when new and different legal interests, however named, are created with respect to land or a chattel, of such a character that they do enjoy the benefits of the laws of another state and are brought within the reach of its taxing power, I know of no articulate principle of law or of the Fourteenth Amendment which would deny to the state the right to tax them. No one would doubt the constitutional power of a state to tax its residents on their shares of stock in a foreign corporation whose only property is real estate or chattels located elsewhere, *Darnell* v. *Indiana,* 226 U. S. 390; *Hawley* v. *Malden,* 232 U. S. 1; compare *Corry* v. *Baltimore,* 196 U. S. 466; *Kidd* v. *Alabama,* 188 U. S. 730; *Cream of Wheat Co.* v. *County of Grand Forks,* 253 U. S. 325, 329, or to tax a valuable contract for the purchase of land or chattels located in another state, see *Citizens National Bank* v. *Durr,* 257 U. S. 99, 108; compare *Gish* v. *Shaver,* 140 Ky. 647, 650; 131 S. W. 515; *Golden* v. *Munsiger,* 91 Kan. 820, 823; 139 Pac. 379; *Marquette* v. *Michigan Iron & Land Co.,* 132 Mich. 130; 92 N. W. 934, or to tax a mortgage of real estate located without the state even though the land affords the only source of payment, see *Kirtland* v. *Hotchkiss,* 100 U. S. 491; compare *Savings & Loan Society* v. *Multnomah County,* 169 U. S. 421; *Bristol* v. *Washington County,* 177 U. S. 133. Each of these legal interests, it is true, finds its only economic source in the value of the land, and the rights which are elsewhere subjected to the tax can be brought to their ultimate economic fruition only through some means of control of the land itself. But the means of control may be subjected to taxation in the state of its owner, whether it be a share of stock or a contract or a mortgage. There is no want of jurisdiction to tax these interests where they are owned, in the sense that the state

lacks power to appropriate them to the payment of the tax. No court has condemned such action as capricious, arbitrary or oppressive. The Fourteenth Amendment does not forbid it, for it is universally recognized that these interests of themselves are in some measure clothed with the legal incidents of property in the taxing state and enjoy there the benefit and protection of its laws.

Similarly, I do not doubt that a state may tax the income of its citizen derived from land in another state. The right to impose the tax is founded upon the power to exact it, coupled with the protection which the state affords to the taxpayer in the receipt and enjoyment of his income. *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 279. I can perceive no more constitutional objection to imposing such a tax than to the taxation of a citizen on income derived from a business carried on by the taxpayer in another state, and subject to taxation there, which we upheld in *Lawrence* v. *State Tax Comm'n, supra;* see *Cook* v. *Tait,* 265 U. S. 47, or to the tax on income derived from securities having a tax *situs* in another state, upheld in *Maguire* v. *Trefry,* 253 U. S. 12; see also *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54; compare *DeGanay* v. *Lederer,* 250 U. S. 376. The fact that it is now thought by the Court to be necessary to discredit or overrule *Maguire* v. *Trefry, supra,* in order to overturn the tax imposed here, should lead us to doubt the result, rather than the authority which plainly challenges it, and should give us pause before reading into the Fourteenth Amendment so serious and novel a restriction on the vital elements of the taxing power.

The present tax, measured by income, is upon intangible property interests owned by a citizen of Ohio. They are represented by transferable certificates, issued, by trustees of land, under contracts by which each trustee undertakes to hold the title of specified lands in trust for the benefit of the certificate holders; to receive the income and to

pay it over to them ratably, after meeting expenses and depreciation; and to receive and distribute ratably the proceeds of sale of the land if sold under existing options. In the event of default by the lessee, the trustee is given plenary authority to terminate the lease, take possession of the land and sell it, as fully as though it were the sole legal and equitable owner. The trustee is authorized to settle claims upon contract and tort made against the trustee or the trust estate, and is entitled to indemnity from the estate for all personal liability and expenses. It is authorized to borrow money and to give the trust estate as security.

The beneficiaries have no right to possession or to partition of the property, and can maintain no action at law with respect to it. They cannot be assessed, and incur no liability by virtue of the administration of the trust estate. The trust certificates are freely transferable, as are shares of stock in a corporation. The rights of the beneficiaries are so identified with the certificates that they may be transferred only on surrender of the certificate to the trustee. Certificates lost, stolen, or destroyed may be replaced by the trustee at its option and in its discretion. Compare *Selliger* v. *Kentucky,* 213 U. S. 200, 206.

There is thus created an active trust of land, under which the trustee is clothed with all the incidents of legal ownership, and which is given the status of a business entity separate and distinct, for all practical purposes, from the interests of the certificate holders. See *Crocker* v. *Malley,* 249 U. S. 223; *Hecht* v. *Malley,* 265 U. S. 144, 161; *Burk-Waggoner Oil Assn.* v. *Hopkins,* 269 U. S. 110. The beneficiaries have none of the incidents of legal ownership. They can neither take nor defend possession of the land. But they are clothed with rights *in personam,* in form both contractual and equitable, enforcible against the trustee by suit in equity for an accounting, to compel performance of the trust or to restrain breaches of it.

Such actions are transitory and maintainable wherever the trustee may be found. *Massie* v. *Watts,* 6 Cranch 148, 158–160; *Beattie* v. *Johnstone,* 8 Hare 169, 177; *Gardner* v. *Ogden,* 22 N. Y. 327, 333–339.

The owner of the certificates in Ohio is thus vested with valuable rights, differing from those of ordinary ownership, including those enforcible against the trustee within as well as without the State. They are brought within the control of the State. These rights, the physical certificates with which they are identified, and the receipt and enjoyment of their income by the owner, are each protected by Ohio laws. If we look to substance rather than form, to the principles which underlie and justify the taxing power, rather than to descriptive terminology which, merely as a matter of convenience, we may apply to the interest taxed, it would seem to be as much subject to the taxing power as any other intangible interest brought within the control and protection of the State, even though its ultimate economic enjoyment may be dependent wholly on property located and taxed elsewhere. See *Citizens National Bank* v. *Durr, supra; Maguire* v. *Trefry, supra,* 16.

It is unimportant what labels writers on legal theory, the courts of Ohio, or this Court may place upon this interest. The Fourteenth Amendment did not adopt as ultimate verities the quaint distinctions taken three centuries ago by Sir Edward Coke between things that savour of the realty and other forms of right, and between corporeal and incorporeal rights. In applying the Fourteenth Amendment we may recognize, what he failed to realize, that all rights are incorporeal, and that whether they are rightly subjected to state taxing power must be determined by recourse to the principles upon which taxes have universally been laid and collected, rather than by the choice of a label which, by definition previously agreed upon, will infallibly mark the interest as non-taxable.

In every practical aspect—and taxation is a practical matter—the trust certificate holder stands in the same relationship to the land as the stockholder of a land-owning corporation. It is not denied that the petitioner receives as much benefit and protection from the State of Ohio with respect to his certificates as does the owner of corporate stock, or that his interest is as much within the reach of the state power. Only by resort to subtle refinements of legal doctrine, devised without reference to the problems of taxation and irrelevant to them, or by treating the Fourteenth Amendment as an instrument for giving effect to our own peculiar convictions of what is morally or economically desirable, is it possible to sustain the taxation of the one and not the other.

Even though the tax be destroyed so far as it is imposed on petitioner's interest in the trusts of lands outside of Ohio, it cannot, for any reason advanced to support that conclusion, be deemed invalid as applied to appellant's interest in the Ohio trusts. The opinion of the Court suggests no other reason.

Whatever name we may give to the interest taxed, Ohio is not without jurisdiction of the land, the trustee, the certificates, or the owners of them. All are within the state. The objection to double taxation by a single sovereign is no more potent under the Fourteenth Amendment than the objection that a tax otherwise valid has been doubled. See *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 72; *Magnano Co.* v. *Hamilton,* 292 U. S. 40. The imposition of a tax on a particular interest in land already taxed *ad valorem* does not infringe any constitutional immunity. *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407, 413 and cases cited.

The fact that the certificates are taxed, and the owners of interests in trusts of land not represented by certificates are untaxed, plainly involves no forbidden discrimi-

nation. The owners of transferable certificates, representing an equitable interest in a trust of land divided into shares, enjoy privileges and advantages not attaching to other forms of ownership, which are an adequate basis for a difference in taxation. See *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 121; *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Home Insurance Co.* v. *New York,* 134 U. S. 594, 606; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 572; *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527, 537.

The judgment now given cannot rest on the Delphic concession of counsel, that the State has "no power to tax land or interests in land situate beyond its borders," and that, if situate within the State, there is no power to tax them "in any other manner than by uniform rule according to value." The concession, so far as it relates to the Ohio trusts, plainly has reference to requirements of the state and not the Federal Constitution. For the Fourteenth Amendment does not restrict a state to the taxation of all interests in land uniformly according to value.

We are not concerned with the validity of the tax under the state constitution. The state court has plenary power to settle that question for the litigants and for us, *Withers* v. *Buckley,* 20 How. 84, 89; *Pennsylvania College Cases,* 13 Wall. 190, 212; *Walker* v. *Sauvinet,* 92 U. S. 90; *Southwestern Oil Co.* v. *Texas, supra,* 119, as it has done by sustaining the tax. No concession of counsel about his theory of the law requires us to adopt his theory, however mistaken and irrelevant, for decision of the federal question which is alone before us. None can confer on us jurisdiction to review on appeal the decision of a state question by the highest court of the State, or excuse the abuse of power involved in our reversing its judgment on state grounds.

The objections to the tax affecting the Ohio trusts present no substantial federal question, or any which the

Court has deemed it necessary to consider. The tax affecting the extra-state trusts should be sustained as not infringing any constitutional guarantee.

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

HERNDON v. GEORGIA.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 665. Argued April 12, 1935.—Decided May 20, 1935.

1. An attack upon a statute upon the ground that it is in violation "of the Constitution of the United States," without further specification, does not raise a federal question. P. 442.
2. A ruling of a state trial court, sustaining an indictment against preliminary attack, which the Supreme Court of the State declined to consider because the ruling was not preserved in a bill of exceptions or assigned as error as required by the settled state practice, can not be considered here upon review of the latter court's judgment, as a basis for raising a federal question. P. 443.
3. An attempt to raise a federal question before a state Supreme Court upon a petition for rehearing after judgment, is too late, unless that court actually entertains the question and decides it. P. 443.
4. But a federal question first presented to the state court by petition for rehearing is in time if it could not have been raised earlier because the ruling of that court to which it is directed could not have been anticipated. P. 444.
5. A ruling is not to be regarded as unanticipated by the party where it is one that follows an earlier decision of the same court in a similar case. P. 446.

Appeal from 178 Ga. 832, 174 S. E. 597; 179 Ga. 597, 176 S. E. 620, dismissed.

APPEAL from the affirmance of a conviction under an indictment charging Herndon with an attempt to incite insurrection by endeavoring to induce others to join in combined resistance to the authority of the State in violation of § 56 of the Penal Code of Georgia.

Mr. Whitney North Seymour, with whom *Mr. Carol King* was on the brief, for appellant.

Mr. J. Walter LeCraw, Assistant Solicitor General, with whom *Mr. M. J. Yeomans,* Attorney General, *Mr. John A. Boykin,* Solicitor General, and *Mr. B. D. Murphy,* Assistant Attorney General, were on the brief, for the State of Georgia, appellee.

Mr. Justice Sutherland delivered the opinion of the Court.

Appellant was sentenced to a term of imprisonment upon conviction by a jury in a Georgia court of first instance of an attempt to incite insurrection by endeavoring to induce others to join in combined resistance to the authority of the state to be accomplished by acts of violence, in violation of § 56 of the Penal Code of Georgia.[1] The supreme court of the state affirmed the judgment. 178 Ga. 832; 174 S. E. 597, rehearing denied, 179 Ga. 597; 176 S. E. 620. On this appeal, the statute is assailed as contravening the due process clause of the Fourteenth Amendment in certain designated particulars. We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court.

It is true that there was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation " of the Constitution of

[1] " § 56. Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."

" Insurrection " is defined by the preceding section. " § 55. Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested, or intended to be manifested, by acts of violence."

the United States," and that this contention was overruled. But, in addition to the insufficiency of the specification,[2] the adverse action of the trial court was not preserved by exceptions *pendente lite* or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require. In that situation, the state supreme court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determination of the state court is conclusive here. *John* v. *Paullin,* 231 U. S. 583, 585; *Atlantic Coast Line R. Co.* v. *Mims,* 242 U. S. 532, 535; *Nevada-California-Oregon Ry.* v. *Burrus,* 244 U. S. 103, 105; *Brooks* v. *Missouri,* 124 U. S. 394, 400; *Central Union Telephone Co.* v. *Edwardsville,* 269 U. S. 190, 194–195; *Erie R. Co.* v. *Purdy,* 185 U. S. 148, 154; *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 308.

The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Texas & Pacific Ry. Co.* v. *Southern Pacific Co.,* 137 U. S. 48, 54; *Loeber* v. *Schroeder,* 149 U. S. 580, 585; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179, 181; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 454–455, and cases cited.

Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act

[2] *Maxwell* v. *Newbold,* 18 How. 511, 516; *Messenger* v. *Mason,* 10 Wall. 507, 509; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248; *Harding* v. *Illinois,* 196 U. S. 78, 85, 86–88.

in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. *Saunders* v. *Shaw,* 244 U. S. 317, 320; *Ohio* v. *Akron Park District,* 281 U. S. 74, 79; *Missouri* v. *Gehner,* 281 U. S. 313, 320; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 677–678; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 164; *Great Northern Ry.* v. *Sunburst Oil Co.,* 287 U. S. 358, 367. The whole point, therefore, is whether the ruling here assailed should have been anticipated.

The trial court instructed the jury that the evidence would not be sufficient to convict the defendant if it did not indicate that his advocacy would be acted upon immediately; and that—"In order to convict the defendant, . . . it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated." Petitioner urges that the question presented to the state supreme court was whether the evidence made out a violation of the statute as thus construed by the trial court, while the supreme court construed the statute (178 Ga., p. 855) as not requiring that an insurrection should follow instantly or at any given time, but that "it would be sufficient that he [the defendant] intended it to happen at any time, as a result of his influence, by those whom he sought to incite," and upon that construction determined the sufficiency of the evidence against the defendant. If that were all, the petitioner's contention that the federal question was raised at the earliest opportunity well might be sustained; but it is not all.

The verdict of the jury was returned on January 18, 1933, and judgment immediately followed. On July 5, 1933, the trial court overruled a motion for new trial. The original opinion was handed down and the judgment of

the state supreme court entered May 24, 1934, the case having been in that court since the preceding July.

On March 18, 1933, several months prior to the action of the trial court on the motion for new trial, the state supreme court had decided *Carr* v. *State,* 176 Ga. 747; 169 S. E. 201. In that case § 56 of the Penal Code, under which it arose, was challenged as contravening the Fourteenth Amendment. The court in substance construed the statute as it did in the present case. In the course of the opinion it said (p. 750):

"It [the state] can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. . . . 'Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.'"

The language contained in the subquotation is taken from *People* v. *Lloyd,* 304 Ill. 23, 35; 136 N. E. 505, and is quoted with approval by this court in *Gitlow* v. *New York,* 268 U. S. 652, 669.

In the present case, following the language quoted at an earlier point in this opinion to the effect that it was sufficient if the defendant intended an insurrection to follow *at any time,* etc., the court below, in its original opinion, (178 Ga. 855) added—"It was the intention of this law to arrest at its incipiency any effort to overthrow the state

government, where it takes the form of an actual attempt to incite others to insurrection." The phrase "at any time" is not found in the foregoing excerpt from the *Carr* case, but it is there in effect, when the phrase is given the meaning disclosed by the context, as that meaning is pointed out by the court below in its opinion denying the motion for a rehearing (179 Ga. 600), when it said that the phrase was necessarily intended to mean within a reasonable time—"that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection."

Appellant, of course, cannot plead ignorance of the ruling in the *Carr* case, and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below. It follows that his contention that he raised the federal question at the first opportunity is without substance, and the appeal must be dismissed for want of jurisdiction.

Dismissed.

MR. JUSTICE CARDOZO, dissenting.

The appellant has been convicted of an attempt to incite insurrection in violation of § 56 of the Penal Code of Georgia. He has been convicted after a charge by the trial court that to incur a verdict of guilt he must have advocated violence with the intent that his advocacy should be acted on immediately and with reasonable grounds for the expectation that the intent would be fulfilled. The appellant did not contend then, nor does he contend now, that a statute so restricted would involve an unconstitutional impairment of freedom of speech. However, upon appeal from the judgment of conviction the Supreme Court of Georgia repudiated the construction adopted at the trial and substituted another. Promptly thereafter the appellant moved for a rehearing upon the ground that the substituted meaning made the

statute unconstitutional, and in connection with that motion invoked the protection of the Fourteenth Amendment. A rehearing was denied with an opinion which again construed the statute and again rejected the construction accepted in the court below. Now in this court the appellant renews his plaint that the substituted meaning makes the statute void. By the judgment just announced the court declines to hear him. It finds that he was tardy in asserting his privileges and immunities under the Constitution of the United States, and disclaiming jurisdiction dismisses his appeal.

I hold the view that the protection of the Constitution was seasonably invoked and that the court should proceed to an adjudication of the merits. Where the merits lie I do not now consider, for in the view of the majority the merits are irrelevant. My protest is confined to the disclaimer of jurisdiction. The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. *Missouri* v. *Gehner,* 281 U. S. 313, 320; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 678; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 164; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 367; *Saunders* v. *Shaw,* 244 U. S. 317, 320. Within that settled doctrine the cause is rightly here.

Though the merits are now irrelevant, the controversy must be so far explained as to show how a federal question has come into the record. The appellant insists that words do not amount to an incitement to revolution, or to an attempt at such incitement, unless they are of such a nature and are used in such circumstances as to create "a clear and present danger" (*Schenck* v. *United States,* 249 U. S. 47, 52) of bringing the prohibited result to pass. He insists that without this limitation a statute so lack-

ing in precision as the one applied against him here is an unconstitutional restraint upon historic liberties of speech. For present purposes it is unimportant whether his argument be sound or shallow. At least it has color of support in words uttered from this bench, and uttered with intense conviction. *Schenck* v. *United States, supra;* cf. *Whitney* v. *California,* 274 U. S. 357, 374, 375; *Fiske* v. *Kansas,* 274 U. S. 380; *Gitlow* v. *New York,* 268 U. S. 652, 672, 673; *Schaefer* v. *United States,* 251 U. S. 466, 482. The court might be unwilling, if it were to pass to a decision of the merits, to fit the words so uttered within the framework of this case. What the appellant is now asking of us is an opportunity to be heard. That privilege is his unless he has thrown it away by silence and acquiescence when there was need of speech and protest.

We are told by the state that the securities of the Constitution should have been invoked upon the trial. The presiding judge should have been warned that a refusal to accept the test of clear and present danger would be a rejection of the restraints of the Fourteenth Amendment. But the trial judge had not refused to accept the test proposed; on the contrary, he had accepted it and even gone a step beyond. In substance he had charged that even a present "danger" would not suffice, if there was not also an expectation, and one grounded in reason, that the insurrection would begin at once. It is novel doctrine that a defendant who has had the benefit of all he asks, and indeed of a good deal more, must place a statement on the record that if some other court at some other time shall read the statute differently, there will be a denial of liberties that at the moment of the protest are unchallenged and intact. Defendants charged with crime are as slow as are men generally to borrow trouble of the future.

We are told, however, that protest, even if unnecessary at the trial, should have been made by an assignment of

error or in some other appropriate way in connection with the appeal, and this for the reason that by that time, if not before, the defendant was chargeable with knowledge as a result of two decisions of the highest court of Georgia that the statute was destined to be given another meaning. The decisions relied upon are *Carr* v. *State* (*No. 1*), 176 Ga. 55; 166 S. E. 827; 167 S. E. 103, and *Carr* v. *State* (*No. 2*), 176 Ga. 747; 169 S. E. 201. The first of these cases was decided in November, 1932, before the trial of the appellant, which occurred in January, 1933. The second was decided in March, 1933, after the appellant had been convicted, but before the denial or submission of his motion for a new trial. Neither is decisive of the question before us now.

Carr v. *State, No. 1,* came up on demurrer to an indictment. The prosecution was under § 58 of the Penal Code, which makes it a crime to circulate revolutionary documents.* All that was held was that upon the face of the indictment there had been a wilful incitement to violence, sufficient, if proved, to constitute a crime. The opinion contains an extract covering about four pages from the opinion of this court in *Gitlow* v. *New York, supra.* Imbedded in that long quotation are the words now pointed to by the state as decisive of the case at hand. They are the words of Sanford, J., writing for this court. 268 U. S. at p. 669. "The immediate danger is none the less real and substantial, because the effect of a given utterance

*"§ 58. If any person shall bring, introduce, print, or circulate, or cause to be introduced, circulated, or printed, or aid or assist, or be in any manner instrumental in bringing, introducing, circulating, or printing within this State any paper, pamphlet, circular, or any writing, for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State, or against the lives of the inhabitants thereof, or any part of them, he shall be punished by confinement in the penitentiary for not less than five nor longer than twenty years."

cannot be accurately foreseen." A state "cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

To learn the meaning of these words in their application to the Georgia statute we must read them in their setting. Sanford, J., had pointed out that the statute then before him, the New York criminal anarchy act, forbade the teaching and propagation by spoken word or writing of a particular form of doctrine, carefully defined and after such definition denounced on reasonable grounds as fraught with peril to the state. There had been a determination by the state through its legislative body that such utterances "are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power." 268 U. S. at p. 668. In such circumstances "the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition." 268 U. S. 670. In effect the words had been placed upon an expurgatory index. At the same time the distinction was sharply drawn between statutes condemning utterances identified by a description of their meaning and statutes condemning them by reference to the results that they are likely to induce. "It is clear that the question in such cases [i. e. where stated doctrines are denounced] is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to

language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results." pp. 670, 671. Cf. *Whitney* v. *California, supra; Fiske* v. *Kansas, supra.*

The effect of all this was to leave the question open whether in cases of the second class, in cases, that is to say, where the unlawful quality of words is to be determined not upon their face but in relation to their consequences, the opinion in *Schenck* v. *United States,* supplies the operative rule. The conduct charged to this appellant—in substance an attempt to enlarge the membership of the Communist party in the city of Atlanta—falls, it will be assumed, within the second of these groupings, but plainly is outside the first. There is no reason to believe that the Supreme Court of Georgia, when it quoted from the opinion in Gitlow's case, rejected the restraints which the author of that opinion had placed upon his words. For the decision of the case before it there was no need to go so far. Circulation of documents with intent to incite to revolution had been charged in an indictment. The state had the power to punish such an act as criminal, or so the court had held. How close the nexus would have to be between the attempt and its projected consequences was matter for the trial.

Carr v. *State, No. 2,* like the case under review, was a prosecution under Penal Code, § 56 (not § 58), and like *Carr* v. *State, No. 1,* came up on demurrer. All that the court held was that when attacked by demurrer the indictment would stand. This appears from the headnote, drafted by the court itself. After referring to this headnote, the court states that it may be "useful and salutary" to repeat what it had written in *Carr* v. *State, No. 1.* Thereupon it quotes copiously from its opinion in that case including the bulk of the same extracts from *Gitlow* v. *New York.* The extracts show upon their face that

they have in view a statute denouncing a particular doctrine and prohibiting attempts to teach it. They give no test of the bond of union between an idea and an event.

What has been said as to the significance of the opinions in the two cases against Carr has confirmation in what happened when appellant was brought to trial. The judge who presided at that trial had the first of those opinions before him when he charged the jury, or so we may assume. He did not read it as taking from the state the burden of establishing a clear and present danger that insurrection would ensue as a result of the defendant's conduct. This is obvious from the fact that in his charge he laid that very burden on the state with emphasis and clarity. True, he did not have before him the opinion in prosecution *No. 2,* for it had not yet been handed down, but if he had seen it, he could not have gathered from its quotation of the earlier case that it was announcing novel doctrine.

From all this it results that Herndon, this appellant, came into the highest court of Georgia without notice that the statute defining his offense was to be given a new meaning. There had been no rejection, certainly no unequivocal rejection, of the doctrine of *Schenck* v. *United States,* which had been made the law of the case by the judge presiding at his trial. For all that the record tells us, the prosecuting officer acquiesced in the charge, and did not ask the appellate court to apply a different test. In such a situation the appellant might plant himself as he did on the position that on the case given to the jury his guilt had not been proved. He was not under a duty to put before his judges the possibility of a definition less favorable to himself, and make an argument against it, when there had been no threat of any change, still less any forecast of its form or measure. He might wait until the law of the case had been rejected by the reviewing court before insisting that the effect would be an invasion

of his constitutional immunities. If invasion should occur, a motion for rehearing diligently pressed thereafter would be seasonable notice. This is the doctrine of *Missouri* v. *Gehner* and *Brinkerhoff-Faris Co.* v. *Hill.* It is the doctrine that must prevail if the great securities of the Constitution are not to be lost in a web of procedural entanglements.

New strength is given to considerations such as these when one passes to a closer view of just what the Georgia court did in its definition of the statute. We have heard that the meaning had been fixed by what had been held already in *Carr* v. *State,* and that thereby the imminence of the danger had been shown to be unrelated to innocence or guilt. But if that is the teaching of those cases, it was discarded by the very judgment now subjected to review. True, the Georgia court, by its first opinion in the case at hand, did prescribe a test that, if accepted, would bar the consideration of proximity in time. " It is immaterial whether the authority of the state was in danger of being subverted or that an insurrection actually occurred or was impending." " Force must have been contemplated, but . . . the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged." It would not be " necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly, or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite." On the motion for a rehearing the Georgia court repelled with a little heat the argument of counsel that these words were to be taken literally, without " the usual reasonable implications." " The phrase ' at any time,' as criticized in the motion for rehearing, was not intended to mean at any time in the indefinite future, or at any possible later time, however remote." " On the contrary the phrase ' at any time ' was necessarily intended, and should

have been understood, to mean within a reasonable time; that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection." "Under the statute as thus interpreted, we say, as before, that the evidence was sufficient to authorize the conviction."

Here is an unequivocal rejection of the test of clear and present danger, yet a denial also of responsibility without boundaries in time. True, in this rejection, the court disclaimed a willingness to pass upon the question as one of constitutional law, assigning as a reason that no appeal to the Constitution had been made upon the trial or then considered by the judge. *Brown* v. *State,* 114 Ga. 60; 39 S.E. 873; *Loftin* v. *Southern Security Co.,* 162 Ga. 730; 134 S. E. 760; *Dunaway* v. *Gore,* 164 Ga. 219, 230; 138 S. E. 213. Such a rule of state practice may have the effect of attaching a corresponding limitation to the jurisdiction of this court where fault can fairly be imputed to an appellant for the omission to present the question sooner. *Erie R. Co.* v. *Purdy,* 185 U. S. 148; *Louisville & Nashville R. Co.* v. *Woodford,* 234 U. S. 46, 51. No such consequence can follow where the ruling of the trial judge has put the Constitution out of the case and made an appeal to its provisions impertinent and futile. Cf. *Missouri* v. *Gehner, supra; Rogers* v. *Alabama,* 192 U. S. 226, 230. In such circumstances, the power does not reside in a state by any rule of local practice to restrict the jurisdiction of this court in the determination of a constitutional question brought into the case thereafter. *Davis* v. *Wechsler,* 263 U. S. 22, 24. If the rejection of the test of clear and present danger was a denial of fundamental liberties, the path is clear for us to say so.

What was brought into the case upon the motion for rehearing was a standard wholly novel, the expectancy of life to be ascribed to the persuasive power of an idea. The defendant had no opportunity in the state court to

prepare his argument accordingly. He had no opportunity to argue from the record that guilt was not a reasonable inference, or one permitted by the Constitution, on the basis of that test any more than on the basis of others discarded as unfitting. Cf. *Fiske* v. *Kansas, supra.* The argument thus shut out is submitted to us now. Will men "judging in calmness" (Brandeis, J., in *Schaefer* v. *United States, supra,* at p. 483) say of the defendant's conduct as shown forth in the pages of this record that it was an attempt to stir up revolution through the power of his persuasion and within the time when that persuasion might be expected to endure? If men so judging will say yes, will the Constitution of the United States uphold a reading of the statute that will lead to that response? Those are the questions that the defendant lays before us after conviction of a crime punishable by death in the discretion of the jury. I think he should receive an answer.

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

WISCONSIN *v.* MICHIGAN.

No. 15, original. Argued February 11, 1935 and April 8, 1935.—Decided May 20, 1935.

1. Where errors in the courses and distances in a decree describing the boundary between two States were due to the mutual mistake of counsel for the parties in preparing the decree for acceptance by the Court, the Court has jurisdiction to correct them in a subsequent suit between the same parties. P. 460.
2. A decree declaring the boundary of two States does not deprive the Court of jurisdiction thereafter to define, in a later suit between them, a portion of the boundary, the precise location of which was not an issue in the earlier litigation. P. 460.
3. The descriptions of the Green Bay section of the Michigan and Wisconsin boundary, the one given by the Act creating Wisconsin

Territory (April 20, 1836) as " . . . to a point in the middle of said lake [Michigan], and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menomonie river . . .", and the other by the Enabling Act (June 15, 1836) by which Michigan became a State, as " . . . thence, down the centre of the main channel of the same [Menominee River], to the centre of the most usual ship channel of the Green Bay of Lake Michigan; thence, through the centre of the most usual ship channel of the said bay to the middle of Lake Michigan . . .," are in effect the same. P. 460.

4. The evidence establishes that when these Acts were passed, there was no " main " or " most usual ship " channel in Green Bay; that it is impossible to identify any channel as the one intended by the Acts, and that neither State has exercised jurisdiction over the waters of the bay that are now in controversy (lying to the west of islands adjudicated to Wisconsin in an earlier case, 270 U. S. 314). *Held:*

   (1) That in accordance with the principles of international law, the presumed intent of Congress and the equality of the States under the Constitution, the two States should be allowed equal opportunities for navigation, fishing, and other uses. P. 461.

   (2) To this end, the boundary will be established through and along, or near, the middle of the waters of the bay that are here in controversy. P. 462.

5. Tracts called " Grassy Island " and " Sugar Island," in fact parts of the Michigan mainland, are adjudged to that State. P. 463.

6. The case is referred to the special master for preparation of the decree. P. 463.

THIS original suit to establish a part of the boundary between the two States was heard on exceptions to the report of the Special Master. An earlier case between the same parties is reported in 270 U. S. 295.

Mr. Adolph J. Bieberstein, with whom *Mr. James E. Finnegan,* Attorney General of Wisconsin, *Mr. Joseph G. Hirschberg,* Deputy Attorney General, and *Mr. J. E. Messerschmidt,* Assistant Attorney General, were on the brief, for plaintiff.

Mr. Meredith P. Sawyer, with whom *Mr. Harry S. Toy,* Attorney General of Michigan, and *Mr. Edward A. Bilitzke,* Assistant Attorney General, were on the brief, for defendant.

Mr. Justice Butler delivered the opinion of the Court.

This case concerns the Green Bay section of the boundary between these States. In *Michigan* v. *Wisconsin,* 270 U. S. 295, the entire boundary was involved. As to that section, the question was whether islands within the bay and other islands surrounded by its waters and those of Lake Michigan belonged to one or the other State. The territory of Wisconsin was created by an Act of April 20, 1836, c. 54, 5 Stat. 10. The stretch of boundary in question is described: ". . . to a point in the middle of said lake [Michigan], and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menomonie river. . . ." By the Enabling Act of June 15, 1836, c. 99, 5 Stat. 49, under which Michigan became a State, January 26, 1837, it is described in the reverse direction: ". . . thence, down the centre of the main channel of the same [Menominee river], to the centre of the most usual ship channel of the Green bay of Lake Michigan; thence, through the centre of the most usual ship channel of the said bay to the middle of Lake Michigan . . ."

As to the section there involved, we said:

"In determining the boundary through this section, the question is not embarrassed by differences of description. [p. 314] . . . The evidence shows that there are two distinct ship channels, to either of which this description might apply. From the mouth of the Menominee, the channel, according to the Michigan claim, proceeds across the waters of Green Bay in an

easterly direction until near the westerly shore of the Door County peninsula; thence, in close proximity to the shore, in a northerly direction to a point opposite Death's Door Channel (or *Porte des Morts*); thence through that channel into Lake Michigan. The channel claimed by Wisconsin, after leaving the mouth of the Menominee, turns to the north and pursues a northerly direction to a point opposite the Rock Island passage which lies between Rock Island and St. Martin's Island; thence through the Rock Island passage into Lake Michigan. The territory in dispute lies between these rival channels, and embraces two groups of islands: (1) Chambers Island, the Strawberry Islands, and a few others, small and unnamed, all within the main waters of Green Bay west of the Door County peninsula; and (2) Rock, Washington, Detroit and Plum islands, lying between Death's Door Channel and the Rock Island passage, at the north end of the peninsula. The evidence as to which of the two ship channels was the usual one at the time of the adoption of the Michigan Enabling Act is not only conflicting, but of such inconclusive character that, standing alone, we could base no decree upon it with any feeling of certainty. [p. 315] . . . But, it is not necessary, for . . . the title of Wisconsin to the disputed area now in question, is established by long possession and acquiescence; and this conclusion is justified by evidence and concessions of the most substantial character. [p. 316] . . . The result is that complainant has failed to maintain her case in any particular; and that the claims of Wisconsin as to the location of the boundary in each of the three sections are sustained." p. 319.

The decree (272 U. S. 398) defines the section:

" thence down the center of the main channel of the . . . Menominee, to the center of the harbor entrance of said Menominee River, thence in a direct line to the most usual ship channel of Green Bay, passing to the north of

Green Island and westerly of Chambers Island and through the Rock Island Passage into Lake Michigan, by courses and distances as follows: From a point midway between the outer ends of the Menominee River piers, thence east by south, seven and one-half miles to the center of the most usual ship channel of the Green Bay, thence along said ship channel north by east one-eighth east, eight and seven-eighths miles, thence continuing along said ship channel north by east seven-eighths east, twenty-seven miles, thence continuing along said ship channel, east one-fourth north, ten and one-fourth miles, thence east three-fourths north to the boundary between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan."

Michigan concedes that the first distance should be seven and one-eighth instead of seven and one-half miles. Wisconsin insists that the first course should be eliminated and a more northerly one substituted for it. The parties agree that the third course was intended to be " northeast seven-eighths east " instead of " north by east seven-eighths east." Wisconsin claims that, even if corrected as to the course and distance mentioned, the description would deprive her of about 35 miles of fishing area opposite the city of Menominee, which, as she says, has always been under her jurisdiction. And she prays that this description be changed so as to read:

" to the outer end of the piers at Menominee being the center of the harbor entrance of said Menominee River, thence in a direct line to a point half-way from Chambers Island to the Michigan mainland measured from the water's edge at the narrowest channel; thence in a direct line to the west end of the Whaleback Shoal; thence in a direct line to a point half-way from the water's edge adjacent to Boyer's Bluff to the water's edge on the Michigan mainland at the mouth of Bark River; thence in a direct line to a point half-way from the water's edge at

Boyer's Bluff to Driscoll Shoal; thence in a direct line to the light on St. Martin's Shoal; thence east three-quarters north to the boundary between the State of Michigan and the State of Wisconsin in the middle of Lake Michigan."

We appointed Frederick F. Faville special master. And, in accordance with our order, he has taken the evidence, made findings of fact, stated his conclusions of law and recommendations for a decree, all of which, with a transcript of the testimony, the maps, charts and other exhibits, are included in the report he has submitted to the court.

Michigan, while conceding the court has power to make the decree correspond with the opinion in *Michigan* v. *Wisconsin,* asserts that the boundary line here in controversy was involved in the former case and suggests that the court is without jurisdiction to establish any other line. The evidence shows, and the master found: After announcement of our decision, counsel for the parties agreed upon a form of decree to carry it into effect and consented that it be entered. Due to mutual mistakes, it was erroneous in the respects above indicated, and because of their consent it was adopted and entered by the court. The location of the boundary line dividing the waters of the bay between the States was not in issue. No evidence was offered for the determination of that question. It was all addressed to the controversy concerning the islands—the matter then in dispute. The master rightly concluded the court has jurisdiction to correct the decree (*Thompson* v. *Maxwell,* 95 U. S. 391, 397, 399) and to establish the true boundary line through Green Bay. *Hopkins* v. *Lee,* 6 Wheat. 109, 113, 114. *Oklahoma* v. *Texas,* 256 U. S. 70, 86.

The parties rightly assume that there is no difference between the description of the boundary through Green Bay given in the Act creating Wisconsin Territory and that specified in the Michigan Enabling Act. 270 U. S.

314. The evidence shows, and the master found: When these Acts were passed, there was no " main " or " most usual ship " channel. Movements of sailing vessels, then used, were not limited to any channel and, except to avoid islands, shoals and reefs, they went directly to their destinations. Ships came and went between Lake Michigan and Green Bay to and from the mouth of the Menominee, and the southerly end of the bay, the site of the city of Green Bay. They passed east and west of Chambers Island and through the Strawberry passage. Neither State has ever exercised jurisdiction over the triangular area at the mouth of the Menominee or over any other waters of the bay that are now in controversy.

As it is impossible to identify any channel in the bay as that indicated by the Acts referred to, the intention of Congress must be otherwise ascertained. By principles of international law, that apply also to boundaries between States constituting this country, it is well established that when a navigable stream is a boundary between States the middle of the main channel, as distinguished from the geographical middle, limits the jurisdiction of each unless otherwise fixed by agreement or understanding between the parties. That rule rests upon equitable considerations and is intended to safeguard to each State equality of access and right of navigation in the stream. *Iowa* v. *Illinois,* 147 U. S. 1, 7. This court has held that, on occasion, the principle of the *thalweg* is also applicable to bays, estuaries and other arms of the sea. *Louisiana* v. *Mississippi,* 202 U. S. 1, 50. *New Jersey* v. *Delaware,* 291 U. S. 361, 379. The doctrine of the *thalweg* is a modification of the more ancient principle which required equal division of territory, and was adopted in order to preserve to each State equality of right in the beneficial uses of the boundary streams as a means of navigation. *Minnesota* v. *Wisconsin,* 252 U. S. 273, 282. No right of either party to use the waters of the bay for

navigation is here involved. Questions of territorial jurisdiction in respect of fishing constitute the occasion of the present controversy. And it confidently may be assumed that, when fixing the boundary lines in the waters of the bay, Congress intended that Michigan and the State to be erected out of Wisconsin Territory should have equality of right and opportunity in respect of these waters, including navigation, fishing and other uses. On the facts found, equality of right can best be attained by a division of the area as nearly equal as conveniently may be made, having regard to the matters heretofore litigated and finally adjudged between these States. The rule that the States stand on an equal level or plane under our constitutional system (*Wyoming* v. *Colorado,* 259 U. S. 419, 465, 470) makes in favor of that construction of the boundary provisions under consideration. Cf. *Connecticut* v. *Massachusetts,* 282 U. S. 660, 670.

The pleadings reflect opposing claims as to the title to some part of tracts called "Grassy Island" and "Sugar Island," bordering on the north bank, and a short distance from the mouth, of the Menominee river. The master found that neither is an island and that each is a part of the mainland of Michigan, and concluded that both belong to that State. Wisconsin does not except to any of the findings or conclusions in respect of these tracts.

The decree to be entered in this case will establish the boundary through and along, or near, the middle of the waters of Green bay that are here involved. That line commences at a point midway between the piers at the harbor entrance of the Menominee River; thence east by south seven and one-eighth miles; thence approximately north by east one-eighth east, about eight and seven-eighths miles; thence to and along a line in or near the middle of the bay to a point west of the Rock Island passage; thence easterly by courses and distances to be designated through that passage to the boundary in the mid-

dle of Lake Michigan. The decree will appropriately define the tracts called "Grassy Island" and "Sugar Island" and declare them to belong to Michigan.

The case is referred to the special master, and he is directed to prepare and submit to the court a form of decree which will give effect to this decision. Inasmuch as the preparation of the decree may involve the ascertainment of physical facts and the formulation of technical descriptions, the master is authorized to hear counsel, take evidence and procure such assistance, if any, as may be necessary to enable him conveniently and promptly to discharge the duties here imposed upon him. He may call upon counsel to propose forms of decree. He is directed to give them opportunity to submit objections to the form prepared by him and to include the objections, if any, in his report.

It is so ordered.

UNITED STATES v. WEST VIRGINIA ET AL.

ON MOTIONS TO DISMISS THE BILL OF COMPLAINT.

No. 17, original. Argued May 2, 1935.—Decided May 20, 1935.

1. The original jurisdiction of this Court over suits brought by the United States against a State is only of those cases which are within the judicial power of the United States as defined by Art. III, § 2, of the Constitution. P. 470.
2. The original jurisdiction of this Court does not include suits by the United States against persons or corporations alone. *Id.*
3. To sustain jurisdiction over a suit brought in this Court by the United States against a State, the bill must present a "case" or "controversy" to which the State is a party and which is within the judicial power of the United States. *Id.*
4. In a suit by the United States against a State and private corporations, to enjoin the construction by the latter of a dam forming part of a hydro-electric project, the bill alleged the stream in question to be a navigable water of the United States, and that the dam would be an unlawful obstruction, since it had not been

authorized under the Act of March 3, 1899, nor had any license for the project been granted by the Federal Power Commission under the Federal Water Power Act. As grounds for joining the State, it was alleged that the State had licensed the project and, through its officials, was denying the navigability of the stream and claiming that the power to permit and control its use for the projected purposes resided in the State and not in the United States, and claiming that in so far as the Federal Water Power Act purports to confer upon the Federal Power Commission authority in the premises, the Act is an invasion of the sovereign rights of the State and a violation of the Federal Constitution. The bill did not assert any title of the United States in the bed of the stream, which might afford a basis for a suit to remove a cloud on title; nor allege any interference by the State, actual or threatened, with any other property of the United States, or with the navigable capacity of the waters in question or with the exercise of the power claimed by the United States or in behalf of the Federal Power Commission; nor any actual or threatened participation by the State in the construction of the dam, other than the granting of a permit, nor that it had issued any permit incompatible with the Federal Water Power Act, or intended to grant licenses in the future. *Held* that, against the State, the bill presented no question justiciable by a federal court. *United States* v. *Utah*, 283 U. S. 64, distinguished. Pp. 471, 474.

5. It does not appear in this case that the State has done more than issue such a license as the Federal Water Power Act makes prerequisite to a license from the Federal Power Commission. P. 473.
6. The Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955, is applicable only "in cases of actual controversy." It does not purport to alter the character of the controversies which are the subject of the judicial power under the Constitution. P. 475.

Bill dismissed.

On motions to dismiss a bill brought in this Court by the United States against the State of West Virginia and three private corporations, to enjoin the construction of a dam, part of a hydro-electric plant, in a river alleged to be navigable; and for a declaration of the rights of the United States to control the use of the stream, etc.

Mr. Homer A. Holt, Attorney General of West Virginia, for the State of West Virginia, defendant, in support of its motion to dismiss.

Messrs. Edward W. Knight and *Robert S. Spilman,* with whom *Mr. William L. Lee* was on the brief, for Electro Metallurgical Co. et al., defendants, in support of their motion to dismiss.

Mr. Huston Thompson, with whom *Solicitor General Reed* and *Assistant Attorney General Blair* were on the brief, for the United States, in opposition to the motions to dismiss.

There is a justiciable controversy between plaintiff and the defendant State of West Virginia, and between plaintiff and the corporate defendants. The controversy includes the question of whether the New and the Kanawha Rivers are navigable waters of the United States and whether the State of West Virginia has the exclusive right to the control of these rivers for the purpose of producing hydro-electric power therefrom or licensing others to do so and excluding the United States from licensing others to create hydro-electric power on these streams.

A justiciable controversy between plaintiff and the corporate defendants is conceded.

The State is an indispensable party. All the rights of the corporate defendants flow from permits issued by the State. The rights of the State and the corporate defendants dovetail and are integrated but are not in any way in conflict. A decree supporting the prayer of the petition with respect to the State alone would strike down many of the defenses of the corporate defendants but would not compel them or any one of them to take out a license from the Federal Power Commission without another court proceeding. They are, therefore, necessary parties,

not in conflict with the State or each other, but adverse to plaintiff. Thus, there is no misjoinder of parties.

The original jurisdiction of the Supreme Court does not exclude the corporate defendants under the exceptions in the Judiciary Act of 1789. No limitation has been put upon the type of parties defendant if the United States should bring a suit under the original jurisdiction of this Court.

This Court has entertained original jurisdiction in controversies between a State and the Federal Government where private parties were joined. It has taken jurisdiction in controversies between States where the United States intervened or was made a party and there were private parties.

In original proceedings brought by a State against a State in the Supreme Court other defendants have been joined. The fact that this Court has assumed original jurisdiction in some cases between States where the Federal Government has intervened and the rights of private interests have been determined, without their being made parties, does not exclude the corporate defendants in this case.

The Court is not called upon to render a declaratory judgment. Plaintiff maintains that there is a justiciable question presented by the bill, and therefore the question of a declaratory judgment need not be considered. The language of the bill is broad enough, however, to include a declaratory judgment and, there being a controversy presented, the Court could, if it were necessary, grant a decree under the Federal Declaratory Judgments Act (Act of June 14, 1934, c. 512, 48 Stat. 955; Jud. Code, § 274–d). This Act is for the purpose of regulating procedure, and not of limiting the exercise of original jurisdiction.

Section 26 of the Federal Water Power Act, granting jurisdiction in the District Court in equity to pass upon violations of that Act, does not deprive the Supreme Court of original jurisdiction in this case.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an original suit in equity, brought by the United States, in which relief by injunction is sought against the defendants, the State of West Virginia, Union Carbide and Carbon Corporation, a New York corporation, and its wholly owned subsidiaries, Electro Metallurgical Company and New-Kanawha Power Company, West Virginia corporations. The questions now presented are raised by separate motions, one by the State of West Virginia, the other by the corporate defendants, to dismiss the bill of complaint on the grounds that it does not state any justiciable controversy between the United States and the State of West Virginia, and that it appears upon the face of the bill of complaint that this Court has no original jurisdiction of the suit against the defendants or any of them.

The bill of complaint, filed January 14, 1935, contains allegations which, so far as now relevant, may be detailed as follows. The New River flows northwesterly across the State of West Virginia and near the center of the State joins the Gauley River to form the Kanawha River, which flows thence to the state boundary and into the Ohio River. The New and Kanawha Rivers are one continuous interstate stream, which throughout its course constitutes navigable waters of the United States. There are many locations for dam sites on the rivers; four dams have been constructed on the New River at points in Virginia and West Virginia, and a fifth at Hawks Nest, West Virginia, upon which the present litigation centers,

is now approaching completion. The United States has constructed ten dams on the Kanawha River for the purpose of improving navigation and is now engaged in construction work on two additional dams on the Kanawha River immediately below the Hawks Nest project, and has in contemplation the construction of a large reservoir at Bluestone, West Virginia, on the New River above the Hawks Nest project, for purposes of flood control, production of power and in aid of navigation. It is alleged that the New and Kanawha Rivers throughout West Virginia constitute a continuous stream which was in its natural condition and still is susceptible of navigation, and is a highway capable of being improved and used for purposes of interstate and foreign commerce; that any obstructions to its navigability will be removed or overcome by improvements initiated by the United States and now in operation or in the course of construction; that the Hawks Nest project will seriously obstruct navigation in the New and Kanawha Rivers, by producing fluctuations in the flow of New River; and that, upon the filing by New-Kanawha Power Company of a declaration of intention to construct the dam, pursuant to § 23 of the Federal Water Power Act, c. 285, 41 Stat. 1063, 1075, 16 U. S. C. 791, 817, the Federal Power Commission determined that the proposed Hawks Nest dam would affect the interests of interstate commerce and that under the Act the dam could not lawfully be built without a license from the Commission.

It is further alleged that the defendant, New-Kanawha Power Company, has obtained from the Public Service Commission of West Virginia a license or permit to construct the dam at Hawks Nest for power purposes. This permit was later transferred to the defendant, Electro Metallurgical Company; and the corporate defendants, acting under the state license, are now engaged in the construction of the dam. It is alleged that its construc-

tion is in violation of the Act of Congress of March 3, 1899, c. 425, § 9, 30 Stat. 1121, 1151; 33 U. S. C. 401, and the Federal Water Power Act, in that the plans for the project have not received the consent of Congress or the approval of the Chief of Engineers of the United States Army and the Secretary of War, and the defendants have received no license for the project from the Federal Power Commission.

The allegations with respect to the State of West Virginia are that the State challenges and denies the claim of the United States that the New River is a navigable stream; that the State asserts a right superior to that of the United States to license the use of the New and Kanawha Rivers for the production and sale of hydro-electric power, and denies the right of the Federal Power Commission to require a license for the construction and operation of the Hawks Nest project by the corporate defendants, and that the State asserts that, insofar as the Federal Water Power Act purports to confer upon the Federal Power Commission authority to license the project or to control the use of the river by the corporate defendants, the Act is an invasion of the sovereign rights of the State and a violation of the Constitution of the United States. The bill further elaborates, in great detail and particularity, but does not enlarge, these basic allegations.

It prays an injunction restraining the corporate defendants from constructing or operating the Hawks Nest project without a license from the Federal Power Commission. It also asks an adjudication that the New River is navigable waters of the United States and that the United States has the right to construct and operate, and to license others to construct and operate, dams and connected hydro-electric plants on the New and Kanawha Rivers. We are asked to declare that any right of the State of West Virginia to license the construction and operation of dams upon the rivers, or to sell or to license

others to sell power generated at such dams, is subject to the rights of the United States, and to enjoin the State from asserting any right, title or interest in any dam, or hydro-electric plant in connection with it, or in the production and sale of hydro-electric power on the New and Kanawha Rivers, superior or adverse to that of the United States, and from in any manner disturbing or interfering with the possession, use and enjoyment of such right by the United States.

It can no longer be doubted that the original jurisdiction given to this Court by § 2, Art. III of the Constitution, in cases "in which a State shall be a party," includes cases brought by the United States against a State. *United States* v. *Texas,* 143 U. S. 621; *United States* v. *Michigan,* 190 U. S. 379, 396; *Oklahoma* v. *Texas,* 252 U. S. 372; 258 U. S. 574, 581; *United States* v. *Minnesota,* 270 U. S. 181, 195; *United States* v. *Utah,* 283 U. S. 64; compare *Florida* v. *Georgia,* 17 How. 478, 494; *United States* v. *North Carolina,* 136 U. S. 211. But the original jurisdiction thus conferred is only of those cases within the judicial power of the United States which, under the first clause of § 2, Art. III of the Constitution, extends "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and . . . to controversies to which the United States shall be a party . . ." *Massachusetts* v. *Mellon,* 262 U. S. 447, 480–485; see *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 289. Our original jurisdiction does not include suits of the United States against persons or corporations alone, see *Ex parte Barry,* 2 How. 65; *Louisiana* v. *Texas,* 176 U. S. 1, 16; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 215 U. S. 216, 224; *Oklahoma* v. *Texas,* 258 U. S. 574, 581, nor is it enough to sustain the jurisdiction in such a case that a State has been made a party defendant. The bill of complaint must also present a

" case " or " controversy " to which the State is a party, and which is within the judicial power granted by the Judiciary Article of the Constitution.

Hence we pass directly to the question whether the bill of complaint presents a case or controversy between the United States and the State of West Virginia within the judicial power. The answer is unaffected by the fact, set forth in the bill of complaint, that the State, on its application to intervene in a suit, since discontinued, brought by the United States in the District Court for West Virginia to restrain the corporate defendants from constructing the dam, asserted its interest as a State in the development of power under state license at the Hawks Nest dam, particularly in the license fees and taxes to be derived from the project. The details of the attempted intervention at most serve only to support the allegations of the bill, that the State has asserted the right, through a license of the Hawks Nest project, to control the use of the rivers for power purposes.

At the outset, it should be noted that the bill in the present suit neither asks the protection nor alleges the invasion of any property right. It asserts no title in the United States to the bed of the stream, which might afford a basis for a suit to remove a cloud on title, as in *United States* v. *Utah, supra,* and *United States* v. *Oregon, ante,* p. 1. It alleges that the United States has built dams on the Kanawha River below the Hawks Nest project, and has acquired lands in pursuance of its plans for flood control, improvement of navigation, and the generation and sale of hydro-electric power on both rivers. But there is no allegation of any interference by the State, actual or threatened, with any of the land or property thus acquired.

The only right or interest asserted in behalf of the United States is its authority under the Constitution to

control navigable waters, and particularly the right to exercise that authority through the Federal Power Commission. Since that authority is predicated upon the single fact, fully alleged in the bill and admitted by the motions to dismiss, that the rivers are navigable waters of the United States, the power of the United States to control navigation, and to prevent interference with it by the construction of a dam except in conformity to the statutes of the United States, must be taken to be conceded. See *New Jersey* v. *Sargent,* 269 U. S. 328, 337. But the bill alleges no act or threat of interference by the State with the navigable capacity of the rivers, or with the exercise of the authority claimed by the United States or in behalf of the Federal Power Commission. It alleges only that the State has assented to the construction of the dam by its formal permit, under which the corporate defendants are acting. There is no allegation that the State is participating or aiding in any way in the construction of the dam or in any interference with navigation; or that it is exercising any control over the corporate defendants in the construction of the dam; or that it has directed the construction of the dam in an unlawful manner, or without a license from the Federal Power Commission; or has issued any permit which is incompatible with the Federal Water Power Act; or, indeed, that the State proposes to grant other licenses, or to take any other action in the future.

Section 28 of the Water Power Act of West Virginia, c. 17 of the Acts of 1915, which gives to the state Public Service Commission its authority, provides that "nothing contained in this act shall be construed to interfere with the exercise of the jurisdiction by the government of the United States over navigable streams." The bill seeks an injunction, against the corporate defendants, restraining only the construction of the dam without a

license from the Federal Power Commission. But § 9 (b) of the Federal Water Power Act requires that every applicant for a license shall present "satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power. . . ." The mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the federal license, cannot be said to involve any infringement of the federal authority. It does not appear that the State has done more.

We may assume, for present purposes, that the United States as sovereign has a sufficient interest in the maintenance of its control over navigable waters, and in the enforcement of the Federal Water Power Act, to enable it to maintain a suit in equity to restrain threatened unlawful invasions of its authority, see *Kansas* v. *Colorado,* 185 U. S. 125; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237; *Marshall Dental Manufacturing Co.* v. *Iowa,* 226 U. S. 460, 462; *Missouri* v. *Holland,* 252 U. S. 416, 431; see *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355, and that a cause of action within the jurisdiction of a federal district court is stated against the corporate defendants who are alleged to be engaged in building an obstruction in navigable waters of the United States.

But there is presented here, as respects the State, no case of an actual or threatened interference with the authority of the United States. At most, the bill states a difference of opinion between the officials of the two governments, whether the rivers are navigable and, consequently, whether there is power and authority in the

federal government to control their navigation, and particularly to prevent or control the construction of the Hawks Nest dam, and hence whether a license of the Federal Power Commission is prerequisite to its construction. There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. See *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 259. Until the right asserted is threatened with invasion by acts of the State, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court. See *Fairchild* v. *Hughes,* 258 U. S. 126, 129, 130; *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158, 162; *Massachusetts* v. *Mellon, supra,* 483–485; *New Jersey* v. *Sargent, supra,* 339, 340.

General allegations that the State challenges the claim of the United States that the rivers are navigable, and asserts a right superior to that of the United States to license their use for power production, raise an issue too vague and ill-defined to admit of judicial determination. They afford no basis for an injunction perpetually restraining the State from asserting any interest superior or adverse to that of the United States in any dam on the rivers, or in hydro-electric plants in connection with them, or in the production and sale of hydro-electric power. The bill fails to disclose any existing controversy within the range of judicial power. See *New Jersey* v. *Sargent, supra,* 339, 340.

The Government places its chief reliance upon the decision in *United States* v. *Utah, supra,* in which this Court took original jurisdiction of a suit, brought by the United States against the State, to quiet title to the bed of the

Colorado River. But the issue presented by adverse claims of title to identified land is a case or controversy traditionally within the jurisdiction of courts of equity. Such an issue does not want in definition. The public assertion of the adverse claim by a defendant out of possession is itself an invasion of the property interest asserted by the plaintiff, against which equity alone can afford protection. See *United States* v. *Oregon, supra.* A different issue, in point of definition of threatened injury and imminence of the controversy, is presented by rival claims of sovereign power made by the national and a state government. The sovereign rights of the United States to control navigation are not invaded or even threatened by mere assertions. It is, in this respect, in a position different from that of a property owner, who because of the adverse claims to ownership can neither sell his property nor be assured of continued possession. The control of navigation by the United States may be threatened by the imminent construction of the dam, but not by permission to construct it.

No effort is made by the Government to sustain the bill under the Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955. It is enough that that act is applicable only "in cases of actual controversy." It does not purport to alter the character of the controversies which are the subject of the judicial power under the Constitution. See *Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra.*

Since there is no justiciable controversy between the United States and the State of West Virginia, the cause is not within the original jurisdiction of this Court and must be

Dismissed.

MR. JUSTICE BRANDEIS is of opinion that the United States should be granted leave to amend its bill.

YOUNGSTOWN SHEET & TUBE CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 552. Argued April 30, 1935.—Decided May 20, 1935.

1. A shipper claiming that an order of the Interstate Commerce Commission infringes his right to reasonable and nondiscriminatory rates, and who was a party to the proceeding before the Commission, is entitled to sue to set the order aside under U. S. C., Title 28, §§ 46 and 47. P. 479.
2. In determining the reasonableness of a rate, the Commission may consider its effect upon an existing rate structure which it has found to be just and reasonable. P. 479.
3. Comparisons with other rates in the same or adjacent territory, though not conclusive of the reasonableness of the rate under investigation, have probative value. P. 480.
4. An order of the Commission fixing minimum rates on ex-river coal from points on the Ohio River to destinations in Northern Ohio, upon a finding that the minima fixed are reasonable and that lower rates would create discrimination against shippers in origin districts who can not use the water-rail route, and would tend to disrupt the rate structure and destroy proper differentials between various producing districts,—*held* essentially an order under § 15, rather than § 3, of the Interstate Commerce Act. P. 480.

7 F. Supp. 33, affirmed.

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

Mr. Frederick H. Wood, with whom *Messrs. J. C. Argetsinger, J. E. Bennett,* and *August C. Gutheim* were on the brief, for appellants.

Mr. Daniel W. Knowlton, with whom *Solicitor General Reed, Assistant Attorney General Stephens,* and *Messrs. Elmer B. Collins* and *Nelson Thomas* were on the

brief, for the United States and Interstate Commerce Commission, appellees.

Mr. John J. Fitzpatrick, with whom *Messrs. Leo P. Day, M. Carter Hall, Guernsey Orcutt, Charles R. Webber,* and *Frederic D. McKenney* were on the brief, for the railroad interveners.

Mr. Alex. M. Bull, with whom *Mr. Henry C. Hall* was on the brief, for the Trustees of Consolidation Coal Co., appellees.

Mr. Justice Roberts delivered the opinion of the Court.

This is a suit for the annulment of an order of the Interstate Commerce Commission fixing minimum rates on ex-river coal from Ohio River points to destinations in Northern Ohio. The District Court entered a decree of dismissal.[1] The appellants attack the rate order as based upon matters the Commission had no authority to consider, and as unsupported by evidence. The appellees oppose these charges and add that the appellants have no standing to maintain the suit.

Improvement of navigation on the Ohio River and its tributaries has recently made possible shipment of coal in barges from mines at or near the streams to river destinations, for use there or for transshipment by rail to inland points. Previously these mines, with others in the same producing territory, were dependent upon the railroads, and a system of rate relationships had been built up as between the producing localities.

In anticipation of shipment of coal from river points, the rail carriers filed schedules proposing a proportional rate of $1.02 on carloads from Conway and Colona, points on the Ohio River in Pennsylvania, to Youngstown, Ohio,

[1] 7 F. Supp. 33.

effective May 15, 1929. The Commission suspended them, and instituted an investigation. It found the proposed rate unreasonable, and declared a reasonable maximum would be 77 cents; but contented itself with ordering the scheduled rate of $1.02 cancelled, and did not require that a maximum rate of 77 cents be adopted.[2] Subsequently the Commission held an investigation respecting proposed schedules of rates on ex-river coal from points farther down the Ohio River to Canton, Massillon, Cleveland, Lorain and South Lorain, Ohio. It cancelled these and found lower rates would be reasonable, but did not prescribe them.[3] Upon the carriers' compliance with the views of the Commission, by the establishment of the suggested rates, tonnage began to move in quantity. Meantime the Ohio Public Utilities Commission permitted and authorized reductions in intrastate coal rates, with the result that the Interstate Commerce Commission instituted a 13th section proceeding, found the interstate rail rates from the Pittsburgh and Connellsville districts to Northeastern Ohio destinations reasonable, and required the restoration of the old intrastate rates to avoid discrimination against interstate commerce.[4] While that proceeding was pending, certain carriers prayed a rehearing of the two ex-river cases above mentioned. This was granted, the cases consolidated, further evidence received and an order made in which the rate from Colona and Conway to Youngstown was fixed at not less than 90 cents, that from the lower river points to Canton and Massillon at not less than $1.20, and to Cleveland and Lorain at not less than $1.45.[5]

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[2] 163 I. C. C. 3.

[3] 185 I. C. C. 211.

[4] 192 I. C. C. 413. This order was sustained, 6 F. Supp. 386; 292 U. S. 498.

[5] 197 I. C. C. 617.

The Commission finds: These prescribed minima are reasonable; lower rates would create undue discrimination against shippers in origin districts who cannot use the water-rail route, and would tend to disrupt the rate structure, and to destroy the proper differentials between various producing districts on shipments to Ohio destinations. These findings have ample support in the evidence.

1. The appellants were entitled to bring and maintain this suit to set aside the order.[6] They were parties to the proceeding before the Commission, had a pecuniary interest in the rates and were affected by the order. The authorities cited by the appellees are to be distinguished on the ground that the plaintiffs either had no legal interest or capacity to sue or failed to allege that the rates under attack were unreasonable or discriminated against them.[7]

2. The appellants' principal complaint is that the Commission raised the permissible minimum rate to prevent disruption of the existing rate structure and relationship of rates for carriage from various producing regions to Ohio destinations, and that an order grounded upon any such consideration is unauthorized and violates the principle announced in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499. The position is not well taken. This record exhibits a situation quite distinct from that

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[6] U. S. C. Tit. 28, §§ 46, 47; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Chicago Junction Case*, 264 U. S. 258, 266–269; *United States* v. *New River Co.*, 265 U. S. 533, 541; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268; *Assigned Car Cases*, 274 U. S. 564; *McLean Lumber Co.* v. *United States*, 237 Fed. 460, 464–468; *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 478.

[7] See *United States* v. *M. & M. Traffic Assn.*, 242 U. S. 178; *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143; *Sprunt & Son, Inc.* v. *United States*, 281 U. S. 249; *Moffat Tunnel League* v. *United States*, 289 U. S. 113.

disclosed in the cited case. In the first place the Commission here found the required minimum reasonable; in the second place, it had, after full investigation in this and the Ohio case,[8] held the existing rate structure—built upon certain reasonable key or controlling rates by application of proper differentials—just and reasonable, and the ex-river rates here in issue, in contrast, too low. Comparisons of other rates in the same or adjacent territory, while not a conclusive test of reasonableness of a rate under investigation, have probative value.[9] There was much other evidence bearing upon the character of the service and cost. The order of the Commission was based primarily upon the reasonableness of the minimum prescribed. The existing rate structure furnished support for the finding of reasonableness.

3. There is no merit in the contention that the order was a § 3 order and invalid for failure to afford the carriers an alternative of raising the contested rate or lowering others to remove discrimination. It is true the Commission found prejudice to shippers all rail, but in essence the order entered was a § 15 order and not one made under § 3.[10]

Decree affirmed.

UNITED STATES *v.* MACK ET AL.

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

No. 693. Argued May 1, 2, 1935.—Decided May 20, 1935.

1. Liability on a bond executed pursuant to § 26, Title II of the National Prohibition Act by the owner of a vessel seized while being used in the transportation of intoxicating liquors was con-

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[8] *Supra,* Note 4.

[9] *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, 500.

[10] Compare *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 145.

ditioned on the return of the vessel to the custody of the seizing officer "on the day of the criminal trial to abide the judgment of the court." *Held* not extinguished by the repeal of the Eighteenth Amendment,—it appearing that the condition for the return of the vessel was breached and that the crew had pleaded guilty and were sentenced for possession as an incident of the transportation, prior to the repeal of the Eighteenth Amendment. P. 483.

2. The contention that repeal of the Eighteenth Amendment extinguished the remedy on the bond because it ended the possibility of proceedings against the vessel itself, examined and rejected. P. 485.
3. The analogy of bail in civil and criminal cases considered and found to support the conclusion here reached. P. 486 *et seq.*
4. Laches within the term of the statute of limitations is no defense to an action at law; and, least of all is it a defense to an action by the sovereign. P. 489.

73 F. (2d) 265, reversed.

CERTIORARI, 294 U. S. 704, to review a judgment affirming a judgment dismissing the complaint in an action by the United States on a bond.

Assistant to the Attorney General Stanley, with whom *Solicitor General Reed* and *Messrs. Alexander Holtzoff* and *Carl McFarland* were on the brief, for the United States.

Mr. Louis Halle, with whom *Mr. Milton R. Kroopf* was on the brief, for respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

On July 31, 1930, an American motor boat, the Wanda, had on board a cargo of intoxicating liquors. The Collector of the Port of New York seized the vessel and arrested the crew for an offense against the National Prohibition Act. Thereupon the respondent Mack claiming to be the owner of the vessel gave a bond as principal with the other respondent as surety in the sum of $2,200, double the value of the vessel, conditioned that the bond should be void if the vessel was returned to the custody of the Collector on the day of the criminal trial to abide

the judgment of the court. A copy of the bond is printed in the margin.[1] The members of the crew were brought to

[1] "Know all men by these presents, that I, James A. Mack, of No. 4 Hickory Street, Wantagh, Long Island, N. Y., principal and Concord Casualty and Surety Company, of No. 60 John Street, New York City, a corporation, organized and existing under laws of New York State, surety, are held and firmly bound unto the United States of America in the penal sum of two thousand two hundred and 00/100 ($2,200.00) dollars (double the value of the vehicle or conveyance), money of the United States, for the payment of which well and truly to be made we bind ourselves jointly and severally, our heirs, executors, administrators, successors, and assigns firmly by these presents.

"Whereas, the following described vehicle or conveyance has been seized pursuant to section 26 of title II of the National Prohibition Act, to wit: The American motor boat 'Wanda.'

"And, whereas, the aforesaid principal has made application for the return of said vehicle or conveyance, claiming to be the owner thereof:

"Now, therefore, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which is hereby stipulated to be one-half of the penal sum of this bond, and its value on the date of its return as aforesaid, less depreciation due to reasonable wear and tear of ordinary use, and the said principal shall pay off any liens or encumbrances thereon except the following liens heretofore existing, namely: then this obligation to be void, otherwise to remain in full force and effect.

"Witness our hands and seals this 31st day of October 1930;

By JAMES A. MACK,
Principal Concord Casualty and Surety Company.
By JOHN A. MANNING,
Resident Vice President.
FRED M. NIELSEN,
"Attest: *Attorney in fact.*

"Approved this 1st day of November 1930.
H. C. STUART, *Assistant Collector.*"

trial on January 26, 1931, and upon a plea of guilty were sentenced. The vessel, however, was not returned by the owner, either then or at any other time, to the custody of the collector. Accordingly, on July 19, 1933, the United States of America filed its complaint against principal and surety to recover upon the bond, claiming $1,100, the value of the vessel, with interest from the date of the breach of the condition. A motion to dismiss the complaint was made in April, 1934, the defendants contending that through the repeal of the Eighteenth Amendment on December 5, 1933, liability on the bond had ended. The motion was granted by the District Court, 6 F. Supp. 839, and the Court of Appeals for the Second Circuit affirmed. 73 F. (2d) 265. A writ of certiorari brings the case here.

Penalties and forfeitures imposed by the National Prohibition Act for offenses committed within the territorial limits of a state fell with the adoption of the Twenty-first Amendment. *United States* v. *Chambers,* 291 U. S. 217. Our holding to that effect was confined to criminal liabilities, and had its genesis in an ancient rule. On the other hand, contractual liabilities connected with the Act continued to be enforcible with undiminished obligation, unless conditioned by their tenor, either expressly or otherwise, upon forfeitures or penalties frustrated by the Amendment. The courts below have held that liability upon the bond in suit was conditioned by implication upon the possibility in law of subjecting the delinquent vessel to forfeiture and sale, and that the possibility must be unbroken down to the recovery of judgment against the delinquent obligors. In opposition to that holding the Government contends that the bond is a contract to be enforced according to its terms; that liability became complete upon the breach of the express condition for the return of the delinquent vessel; and that the liability thus perfected was not extinguished or diminished by the

loss of penal sanctions. We think the Government is right.

By the provisions of the Prohibition Act an officer who seizes a vessel or other conveyance transporting intoxicating liquors must deliver it to the owner upon the execution of "a good and valid bond, with sufficient sureties, in a sum double the value of the property," to be approved by the officer and to be "conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court." National Prohibition Act, c. 85, 41 Stat. 305, 315, § 26; 27 U. S. C. § 40. No other condition is expressed in the statute. No other, we think, is to be implied. One of the essentials of jurisdiction *in rem* is that the thing shall be "actually or constructively within the reach of the court." *The Brig Ann,* 9 Cranch 289, 291; and see *Miller* v. *United States,* 11 Wall. 268, 294; *Strong* v. *United States,* 46 F. (2d) 257, 260. If the defendants had lived up to the requirements of the bond, the court would have been in a position after the plea of guilty by the crew to proceed against the vessel forthwith and in a summary way. *The Harbour Trader,* 42 F. (2d) 858. Without the presence of the vessel that opportunity would be lost. To give assurance that it would not be lost the bond was exacted by the statute and delivered by the owner. In the face of all this the argument is pressed that delay has extinguished the remedy on the bond by putting an end to the possibility of going against the boat. Thus the obligation is destroyed by force of the very contingency against which it was designed to give protection. We find no adequate reason for thus rewarding an offender. If the condition had not been broken, the Government would have received the value of the vessel, or at least that result would have ensued for anything to the contrary shown in this record. Principal and surety covenanted that in

the event of such a default the bond should become payable according to its terms. They must be held to their engagement. Cf. *United States* v. *John Barth Co.*, 279 U. S. 370; *Gulf States Steel Co.* v. *United States*, 287 U. S. 32; *United States* v. *Hodson*, 10 Wall. 395, 409; *Daniels* v. *Tearney*, 102 U. S. 415.

We have said that the bond may not be read by a process of construction as subject to conditions not expressed upon its face. In saying that we have no thought to pass upon the quantum of a recovery thereunder. There are decisions of other courts to the effect that the bond is one of indemnity, so that only the damages actually suffered by the omission to produce the boat for surrender at the appointed time will be owing upon default. See *United States* v. *Warnell*, 67 F. (2d) 831, 832; *United States* v. *Randall*, 58 F. (2d) 193, 194; cf. *United States* v. *Zerbey*, 271 U. S. 332, 340. If that is so, there is always the possibility of proving in mitigation or defense that the boat and those in charge of her were innocent, and hence there was no loss. We leave those questions open. It is one thing to show that if the boat had been on hand at the appointed time, no benefit to the Government would have resulted from her presence. Cf. *Taylor* v. *Taintor*, 16 Wall. 366, 369. It is quite another thing to show that there was damage at the date of breach, and damage for which the Government would have a remedy if the boat had been produced, but that owing to changed circumstances it would be useless to produce her now. Neither in the bond nor in the statute is there a disclosure of a willingness that the principal shall be thus permitted to take advantage of his wrong.

We are told that the bond is only a substitute for the vessel and hence is not enforceable unless there could be a decree *in rem* if the vessel were in court today. To speak of the bond as such a substitute is only a half truth. Un-

doubtedly the reason for the exaction of the bond was to put the Government in as good a position as it would have occupied if the *res* had been present at the time of the criminal trial, but this is far from saying that liability was meant to be conditioned upon control of the *res* thereafter as a continuing possibility. A bond such as this one has very little analogy to a form of bond common in the admiralty whereby the stipulators become bound to "pay the amount awarded by the final decree." Cf. *The Belgenland,* 108 U. S. 153; *The City of Norwich,* 118 U. S. 468, 489. Upon a bond so conditioned the liability of the stipulators is inchoate until perfected by a decree for the disposition of the *res* or of the proceeds of the bond accepted as a substitute. Here, on the contrary, the remedy is at law by an action on a contract, and not *in rem* or *quasi in rem* as if a suit had been brought in admiralty or in equity. The existence or non-existence of a cause of action at law growing out of a civil liability having its origin in contract is commonly dependent upon the state of facts existing when the action was begun. There is nothing to bring this case within any recognized exception.

Both sides make much of the analogy supplied by the responsibility of bail. The analogy exists, though it is far from being complete. Its implications give support on the whole to the position of the Government. At common law bail might be exonerated as of right by the surrender of their principal if their liability had not yet been "fixed." There was much learned disquisition as to the time when that event occurred. To avoid confusion of thought a distinction must be drawn between civil and criminal cases, for the function of bail in each is essentially diverse. *United States* v. *Ryder,* 110 U. S. 729, 736.

The rule in civil cases was that bail were not liable until a return of *non est inventus* to a *ca. sa.* against the

principal. *Cholmley* v. *Veal,* 6 Mod. 304; *Bernard* v. *McKenna,* 3 Fed. Cas., No. 1348; *Pearsall* v. *Lawrence,* 3 Johns. 514; 1 Tidd's Practice, 237, 238.[2] Upon such return liability was fixed, but not definitively and beyond remission. A first writ of *scire facias* must have issued, and in certain contingencies an *alias* writ, before the bail were to be cast in judgment. *Kirk* v. *United States,* 137 Fed. 753, 755; *McCombs* v. *Feeter,* 1 Wend. 19; *Cumming* v. *Eden,* 1 Cow. 70; 2 Tidd's Practice, 1038, 1039, 1040. By the indulgence of the court they might surrender the principal until the return day of the last writ, after which their liability became definitive and absolute. *Mannin* v. *Partridge,* 14 East 599, 600; *Beers* v. *Haughton,* 9 Pet. 329, 358. But remission of liability, even within those limits, was matter of indulgence only. 1 Tidd's Practice, 238, 239; 2 *id.,* 1044. "To many purposes, the bail is considered as fixed by the return of the *ca. sa.*" Marshall, Ch. J., in *Davidson* v. *Taylor,* 12 Wheat. 604. If surrender was allowable thereafter the privilege was given "as matter of favour, and not as matter pleadable in bar." *Ibid.* The court would exercise a sound discretion. *Morsell* v. *Hall,* 13 How. 212, 215. Accordingly the practice was to treat the liability as absolute if the situation had so changed that the bail were no longer able to make an effectual surrender, as where before the return of the *scire facias* the principal had died. "All the cases agree, that after the bail are fixed, *de jure,* they take the risk of the death of the principal. . . . The time which is allowed the bail, *ex gratia,* is at their peril, and they must surrender." Kent, Ch. J., in *Olcott* v. *Lilly,* 4 Johns. 407, 408. "In such a case the bail is considered as fixed by the

[2] ". . . the reason of it is, that I am not bound to render the principal till I know what execution the plaintiff will chuse; whether he will chuse to have his body, which he makes appear by suing a *capias;* for he might have sued an *elegit* or *fi'. fa'.*" Holt, Ch. J., in *Cholmley* v. *Veal, supra,* at p. 305.

return of the *ca. sa.*, and his [the principal's] death afterwards, and before the return of the *scire facias,* does not entitle the bail to an *exoneretur.*" *Davidson* v. *Taylor, supra.* Cf. *United States* v. *Costello,* 47 F. (2d) 684, 686; *Detroit Fidelity & Surety Co.* v. *United States,* 59 F. (2d) 565, 568; 2 Tidd's Practice, 1044. To follow this analogy through in its application to the case at hand: the respondents are no longer able by a surrender of the vessel to neutralize the consequences flowing from their default. Surrender after condition broken was never a strict defense. It has ceased in the present circumstances to commend the offenders to favor and indulgence. The forfeiture must stand.

If from civil cases we pass to criminal, the argument from analogy becomes even weaker for the respondents, and stronger for the Government. No longer is there need for a return to a *ca. sa.* The bail are bound at once upon the principal's default. " If the condition of the bail bond is broken by the failure of the principal to appear, the sureties become the absolute debtors of the United States for the amount of the penalty." *United States* v. *Zarafonitis,* 150 Fed. 97, 99; *United States* v. *Van Fossen,* 28 Fed. Cas., No. 16,607, at p. 358; *People* v. *Anable,* 7 Hill (N. Y.) 33. Collection may be enforced either by *scire facias* in the court which has possession of the record or by an ordinary suit in any other court of competent jurisdiction. *United States* v. *Zarafonitis, supra;* cf. *Davis* v. *Packard,* 7 Pet. 276, 285. True, an appeal *ad misericordiam* may result, as with civil bail, in a remission of the penalty. This power of remission has been exercised from distant times both in the English courts (*King* v. *Tomb,* 10 Mod. 278; *In re Pellow,* 13 Price 299) and here. *United States* v. *Kelleher,* 57 F. (2d) 684. For the courts of the United States it is now regulated by statute. R. S. § 1020; 18 U. S. C. § 601. One of the prescribed

conditions is that a trial can still be had. This appears from the statute which is quoted in the margin.[3] The trial, of course, must be a reality, not the shadow of a name. At best, remission of the forfeiture is granted as an act of grace. The remedy for that reason is by motion or petition, not by answer and a plea in bar. *Detroit Fidelity & Surety Co.* v. *United States, supra,* at 568; *United States* v. *Costello, supra; Southern Surety Co.* v. *United States,* 23 F. (2d) 55; *United States* v. *Dunbar,* 83 Fed. 151; *Hardy* v. *United States,* 71 Fed. 158. The respondents do not appeal for grace, if it be assumed that grace has any place in the enforcement of such a liability as theirs. They defend upon the ground that the obligation is extinguished.

The point is faintly made that the Government was at fault in failing to bring suit more promptly after the breach of the condition. The complaint was filed in July, 1933, while the Prohibition Act was still in force. Laches within the term of the statute of limitations is no defense at law. *Cross* v. *Allen,* 141 U. S. 528, 537; *Sprigg* v. *Bank of Mt. Pleasant,* 14 Pet. 201, 207. Least of all is it a defense to an action by the sovereign. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735, 736; *Dox* v. *Postmaster General,* 1 Pet. 318, 325.

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

Reversed.

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[3] "When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

Cf. New York Code of Criminal Procedure, §§ 595, 597.

ESCOE *v.* ZERBST, WARDEN.

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

No. 773. Argued May 6, 1935.—Decided May 20, 1935.

1. The federal District Court, acting on the request of a probation officer based on information received by him concerning a probationer's delinquency, is without power to revoke a suspension of sentence and commit the probationer to prison to serve the sentence, where the probationer was not "taken before the court" and afforded an opportunity to be heard in answer to the charges. Act of March 4, 1925, c. 521, § 2, as amended. P. 492.
2. This privilege of the probationer is not a right guaranteed by the Constitution, but is based upon the Act of Congress governing the procedure in such cases. P. 492.
3. The requirement of the Act of March 4, 1925, c. 521, § 2, that, upon the arrest of a probationer, he "shall forthwith be taken before the court," is mandatory in meaning as well as in form. P. 494.
4. *Habeas corpus* is a proper remedy to obtain the release of a probationer who has been committed without an opportunity to be heard. His discharge will be without prejudice to his arrest and commitment as a result of subsequent proceedings conforming to the statute. P. 494.
5. The contention that the district judge, in revoking probation on an *ex parte* showing in this case, has plainly indicated how his discretion will be exercised if a hearing is granted, is a *non sequitur* and affords no basis for denial of a hearing. P. 494.

74 F. (2d) 924, reversed.

CERTIORARI, 294 U. S. 704, to review a judgment affirming an order of the District Court dismissing an application for a writ of *habeas corpus*.

Mr. Seth W. Richardson submitted for petitioner.

Mr. Sanford Bates, with whom *Solicitor General Reed* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

Petitioner was convicted of a crime in the United States District Court for the Eastern District of Texas after indictment and a plea of guilty. He was sentenced, October 10, 1932, to imprisonment for four and a half years in the Penitentiary at Leavenworth, Kansas. On the same day the sentence was suspended for five years upon conditions of probation, and the defendant (the petitioner in this court) was placed in charge of the District Probation Officer for that length of time. One of the conditions was that the probationer would refrain from the violation of any state or federal penal laws. Another was that he would live "a clean, honest and temperate life."

In July, 1933, information was conveyed to the District Probation Officer that petitioner had broken these conditions. In a letter written by his father he was charged with drunkenness and the forgery of two checks. The officer made report of this information to the District Judge and requested a revocation of the order for suspension of sentence. On July 29, 1933, the District Judge issued a mandate for a warrant of arrest. On August 5, he signed an order that the suspension be revoked and that the defendant be committed to prison to serve the stated term. Upon arrest under the warrant the defendant was not brought by his custodian before any court or judge. He was transported at once to the penitentiary at Leavenworth, Kansas, and there imprisoned. Later, in December, 1933, he filed a petition for a writ of *habeas corpus* in the United States District Court for the District of Kansas, contending that his imprisonment was unlawful for the reason that probation had been ended without the opportunity for a hearing made necessary by statute. The District Judge dismissed the application for the writ, and the Circuit Court of Appeals for the Tenth Circuit

affirmed his order. 74 F. (2d) 924. A writ of certiorari issued from this court.

Upon the suspension of sentence in October, 1932, the applicable statute made provision as follows:

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." Act of March 4, 1925, c. 521, § 2, 43 Stat. 1260; 18 U. S. C. § 725.

An amendment of the statute in June, 1933 (Act of June 16, 1933, c. 97, 48 Stat. 256; 18 U. S. C. Supp. § 725) permits the execution of the warrant by a United States marshal as well as by a probation officer, but does not change the procedure otherwise. Under the statute as amended as well as in its original form, the probationer "shall forthwith be taken before the court." This mandate was disobeyed. The probationer, instead of being brought before the court which had imposed the sentence, was taken to a prison beyond the territorial limits of that court and kept there in confinement without the opportunity for a hearing. For this denial of a legal privilege the commitment may not stand.

In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of

its duration as Congress may impose. *Burns* v. *United States,* 287 U. S. 216. But the power of the lawmakers to dispense with notice or a hearing as part of the procedure of probation does not mean that a like dispensing power, in opposition to the will of Congress, has been confided to the courts. The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. If the statement of the Congress that the probationer shall be brought before the court is command and not advice, it defines and conditions power. *French* v. *Edwards,* 13 Wall. 506, 511. The revocation is invalid unless the command has been obeyed.

We find in this statute more than directory words of caution, leaving power unaffected. This is so if we consider the words alone, putting aside for the moment the ends and aims to be achieved. The defendant " shall " be dealt with in a stated way; it is the language of command, a test significant, though not controlling. *Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 534. Doubt, however, is dispelled when we pass from the words alone to a view of ends and aims. Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense. *Burns* v. *United States, supra,* at pp. 222, 223. It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. *Burns* v. *United States, supra.* That much is necessary, or so the Congress must have thought, to protect the individual against malice or op-

pression. Almost equally it is necessary, if we read aright the thought of Congress, for the good of the probation system with all its hopes of social betterment.

If these are the ends to be promoted by bringing the probationer into the presence of his judge, the Act is seen at once to be mandatory in meaning as well as mandatory in form. Statutes are not directory when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect. *French* v. *Edwards, supra; Lyon* v. *Alley,* 130 U. S. 177, 185; *Erhardt* v. *Schroeder,* 155 U. S. 124, 128, 130. Such is the situation here. When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to *habeas corpus* to put an end to the restraint. It is beside the point to argue, as the Government does, that in this case a hearing, if given, is likely to be futile because the judge has made it plain how his discretion will be exercised in that already he has canceled the suspension on the strength of an *ex parte* showing. The *non sequitur* is obvious. The judge is without the light whereby his discretion must be guided until a hearing, however summary, has been given the supposed offender. Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97, 116. Judgment ceases to be judicial if there is condemnation in advance of trial.

We hold that the attempted revocation is invalid for defect of power, and that, the suspension still continuing, the petitioner is entitled to be discharged from his confinement.

The discharge is without prejudice to his arrest and commitment as a result of subsequent proceedings conforming to the statute.

The judgment is reversed and the cause remanded with instructions that the writ must be sustained and the prisoner discharged.

Reversed.

A. L. A. SCHECHTER POULTRY CORP. ET AL. *v.* UNITED STATES.*

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

No. 854. Argued May 2, 3, 1935.—Decided May 27, 1935.

1. Extraordinary conditions, such as an economic crisis, may call for extraordinary remedies, but they can not create or enlarge constitutional power. P. 528.
2. Congress is not permitted by the Constitution to abdicate, or to transfer to others, the essential legislative functions with which it is vested. Art. I, § 1; Art. I, § 8, par. 18. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. P. 529.
3. Congress may leave to selected instrumentalities the making of subordinate rules within prescribed limits, and the determination of facts to which the policy, as declared by Congress, is to apply; but it must itself lay down the policies and establish standards. P. 530.
4. The delegation of legislative power sought to be made to the President by § 3 of the National Industrial Recovery Act of June 16, 1933, is unconstitutional (pp. 529 *et seq.*); and the Act is also unconstitutional, as applied in this case, because it exceeds the power of Congress to regulate interstate commerce and invades the power reserved exclusively to the States (pp. 542 *et seq.*).
5. Section 3 of the National Industrial Recovery Act provides that "codes of fair competition," which shall be the "standards of fair competition" for the trades and industries to which they relate, may be approved by the President upon application of representative associations of the trades or industries to be affected, or may be prescribed by him on his own motion. Their provisions

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* Together with No. 864, *United States* v. *A. L. A. Schechter Poultry Corp. et al.* Certiorari to the Circuit Court of Appeals for the Second Circuit.

are to be enforced by injunctions from the federal courts, and "any violation of any of their provisions in any transaction in or affecting interstate commerce" is to be deemed an unfair method of competition within the meaning of the Federal Trade Commission Act and is to be punished as a crime against the United States. Before approving, the President is to make certain findings as to the character of the association presenting the code and absence of design to promote monopoly or oppress small enterprises, and must find that it will "tend to effectuate the policy of this title." Codes permitting monopolies or monopolistic practices are forbidden. The President may "impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees and others, and in the furtherance of the public interest, and may provide such exceptions and exemptions from the provisions of such code," as he, in his discretion, deems necessary "to effectuate the policy herein declared." A code prescribed by him is to have the same effect as one approved on application. *Held:*

(1) The statutory plan is not simply one of voluntary effort; the "codes of fair competition" are meant to be codes of laws. P. 529.

(2) The meaning of the term "fair competition" (not expressly defined in the Act) is clearly not the mere antithesis of "unfair competition," as known to the common law, or of "unfair methods of competition" under the Federal Trade Commission Act. P. 531.

(3) In authorizing the President to approve codes which "will tend to effectuate the policy of this title," § 3 of the Act refers to the Declaration of Policy in § 1. The purposes declared in § 1 are all directed to the rehabilitation of industry and the industrial recovery which was the major policy of Congress in adopting the Act. P. 534.

(4) That this is the controlling purpose of the code now before the Court appears both from its repeated declarations to that effect and from the scope of its requirements. P. 536.

(5) The authority sought to be conferred by § 3 was not merely to deal with "unfair competitive practices" which offend against existing law, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the Presi-

dent would approve or prescribe, as wise and beneficent measures for the government of trades and industries, in order to bring about their rehabilitation, correction and improvement, according to the general declaration of policy in § 1. Codes of laws of this sort are styled " codes of fair competition." P. 535.

(6) A delegation of its legislative authority to trade or industrial associations, empowering them to enact laws for the rehabilitation and expansion of their trades or industries, would be utterly inconsistent with the constitutional prerogatives and duties of Congress. P. 537.

(7) Congress can not delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade and industry. P. 537.

(8) The only limits set by the Act to the President's discretion are, that he shall find, first, that the association or group proposing a code imposes no inequitable restrictions on admission to membership and is truly representative; second, that the code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them; and third, that it " will tend to effectuate the policy of this title,"—this last being a mere statement of opinion. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the " Declaration of Policy." P. 538.

(9) Under the Act, the President, in approving a code, may impose his own conditions, adding to or taking from what is proposed, as " in his discretion " he thinks necessary " to effectuate the policy " declared by the Act. He has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. P. 538.

(10) The acts and reports of the administrative agencies which the President may create under the Act have no sanction beyond his will. Their recommendations and findings in no way limit the authority which § 3 undertakes to vest in him. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial activities throughout the country. P. 539.

(11) Such a sweeping delegation of legislative power finds no support in decisions of this Court defining and sustaining the

powers granted to the Interstate Commerce Commission, to the Radio Commission, and to the President when acting under the "flexible tariff" provisions of the Tariff Act of 1922. P. 539.

(12) Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead, it authorizes the making of codes to prescribe them. For that legislative undertaking it sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion, found in § 1. In view of the broad scope of that declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. The code-making authority thus sought to be conferred is an unconstitutional delegation of legislative power. P. 541.

6. Defendants were engaged in the business of slaughtering chickens and selling them to retailers. They bought their fowls from commission men in a market where most of the supply was shipped in from other States, transported them to their slaughterhouses, and there held them for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. They were indicted for disobeying the requirements of a "Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York," approved by the President under § 3 of the National Industrial Recovery Act. The alleged violations were: failure to observe in their place of business provisions fixing minimum wages and maximum hours for employees; permitting customers to select individual chickens from particular coops and half-coops; sale of an unfit chicken; sales without compliance with municipal inspection regulations and to slaughterers and dealers not licensed under such regulations; making false reports and failure to make reports relating to range of daily prices and volume of sales. *Held:*

(1) When the poultry had reached the defendants' slaughterhouses, the interstate commerce had ended, and subsequent transactions in their business, including the matters charged in the indictment, were transactions in intrastate commerce. P. 542.

(2) Decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regu-

lation of transactions involved in that practical continuity of movement, are inapplicable in this case. P. 543.

(3) The distinction between intrastate acts that directly affect interstate commerce, and therefore are subject to federal regulation, and those that affect it only indirectly, and therefore remain subject to the power of the States exclusively, is clear in principle, though the precise line can be drawn only as individual cases arise. Pp. 544, 546.

(4) If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. P. 546.

(5) The distinction between direct and indirect effects has long been clearly recognized in the application of the Anti-Trust Act. It is fundamental and essential to the maintenance of our constitutional system. P. 547.

(6) The Federal Government can not regulate the wages and hours of labor of persons employed in the internal commerce of a State. No justification for such regulation is to be found in the fact that wages and hours affect costs and prices, and so indirectly affect interstate commerce; nor in the fact that failure of some States to regulate wages and hours diverts commerce from the States that do regulate them. P. 548.

(7) The provisions of the code which are alleged to have been violated in this case are not a valid exercise of federal power. P. 550.

76 F. (2d) 617, reversed in part; affirmed in part.

CERTIORARI,* on the petition of defendants in a criminal case, to review the judgment below in so far as it affirmed convictions on a number of the counts of an indictment; and, on the petition of the Government, to review the same judgment in so far as it reversed convictions on other counts. The indictment charged violations of a "Live Poultry Code," and conspiracy to commit them.

* See Table of Cases Reported in this volume.

Messrs. Joseph Heller and *Frederick H. Wood,* with whom *Mr. Jacob E. Heller* was on the brief, for A. L. A. Schechter Poultry Corp. et al.

Congress has set up no intelligible policies to govern the President, no standards to guide and restrict his action, and no procedure for making determinations in conformity with due process of law.

When Congress has prescribed (1) a reasonably intelligible policy; (2) a reasonably definite standard for administrative action in carrying out that policy, and (3) an administrative procedure complying with the requirements of due process of law, administrative action in accordance therewith does not involve any unconstitutional exercise of legislative power.

Such permissible administrative action is of two kinds: (a) when the policy which has been laid down by Congress is not to be effective at once or under all conditions and circumstances, a determination in accordance with the standard laid down by Congress as to when the conditions or circumstances have come into existence which Congress has said shall make the law operative, and (b) the carrying out of the policy of Congress by filling in details or making subordinate rules and regulations in accordance with the standard laid down by Congress. Examples of the first class are *Field* v. *Clark,* 143 U. S. 649 and *Hampton & Co.* v. *United States,* 276 U. S. 394. Examples of the second class are *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *United States* v. *Shreveport Grain & Elevator Co.,* 287 U. S. 77; *United States* v. *Grimaud,* 220 U. S. 506.

The Interstate Commerce Act and the Federal Radio Act provide clear standards for administrative action. *Chesapeake & Ohio Ry. Co.* v. *United States,* 283 U. S. 35; *Avent* v. *United States,* 266 U. S. 127; *New York Central Securities Corp.* v. *United States,* 287 U. S. 12; *Fed-*

eral Radio Comm'n v. *Nelson Bros. Co.,* 289 U. S. 266. Cf. *United States* v. *Chemical Foundation,* 272 U. S. 1. There the standards laid down by Congress were far more definite than mere public interest.

In each and all of these cases the statute had reference to a particular subject-matter fully described, defined and limited.

Furthermore, in nearly if not all of the cases in which this Court has passed upon alleged illegal delegations of legislative power, the legislation was operative either in a field where Congress is not required to accord judicial review (*Crowell* v. *Benson,* 285 U. S. 22, 50) or in a field of actual or natural monopoly (railroads and radio broadcasting). In a field of the former character the rights of private property may be seriously affected by governmental action; but no person has the constitutional right to protest against such government acts as are involved in tariff-making, the conduct of foreign relations generally, or the operation of government-owned property; or against those acts necessary to the carrying on of war, such as the seizure of enemy property. In cases of monopoly the right of government regulation is necessarily primary, and private rights subordinate.

If, in truth, the vast domain of all private business is open to regulation by Congress in the manner contemplated in the Recovery Act, then it is surely true that private citizens directly affected are entitled to have Congress itself lay down the legislative policies with definiteness, declare definite standards which are capable of guiding administrative action and properly restricting it, and to have provision made for quasi-judicial administrative procedure properly conforming to due process of law. Otherwise dictatorship is surely here, for the fact is that the Recovery Act attempts to override and ignore not only the limitations of the commerce clause, but the prohibition against illegal delegation of legislative power and the

constitutional guarantees of substantive due process under the Fifth Amendment as well. It is a bold and unparalleled piece of legislation of the most sweeping and drastic character.

It can not be denied that, if the past decisions of this Court still mean what they say, not even Congress (much less its delegates) has constitutional authority to fix minimum wages for purely private businesses, even when the declared purpose is protection of health and morals, and even when the regulation is restricted to women and children and to a field in which Congress has the unquestioned power of control. *Adkins* v. *Children's Hospital,* 261 U. S. 525. It can not be denied that the decisions of this Court with respect to maximum hours of labor go no further than to say that a legislature may restrict the hours of labor in limited situations to 8, 9 or 10 hours, and that the constitutionality of this restriction is definitely predicated solely upon a health relationship.

The Recovery Act throws overboard all these " old fashioned " limitations; it does not even restrict minimum wages to women or children; it does not restrict them to particular industrial applications; it takes no account of the health or morals factors. In its administration it is common knowledge that this bold attempt to dictate has spread out into every conceivable trade, industry, business or occupation, whether interstate or intrastate, even to barber shops and clothes pressing establishments. In the case of maximum hours of labor not the slightest attempt has been made in the statute, or in its administration, to relate the fixing of maximum hours to individual health. No consideration has been paid to the question whether or not the public has any real interest in the businesses, trades, occupations or industries regulated. The regimentation has been all pervasive and all inclusive, and liberty of contract has been utterly ignored.

It must be admitted that even in the case of public utilities having monopolistic privileges, such as the railroads, the electric and gas companies, etc., any power to fix minimum wages has been recognized only once by this Court, and then only as a purely temporary measure to tide over a special and limited situation. *Wilson* v. *New,* 243 U. S. 332. It is now proposed to discard all limitations under the theory of a general emergency, and to relate the fixing merely to the vague concept of public welfare.

The decision in the oil cases clearly demonstrates an illegal delegation of legislative power in § 3 of the Recovery Act. *Panama Refining Co.* v. *Ryan* and *Amazon Petroleum Corp.* v. *Ryan,* 293 U. S. 388, 418.

Closely in point are *People* v. *Klinck Packing Co.,* 214 N. Y. 121, and *Gibson Auto Co.* v. *Finnegan,* (Wis.) 259 N. W. 420.

The Recovery Act prescribes no constitutional method or procedure for ascertaining what are unfair methods of competition, and in this respect totally differs from the Federal Trade Commission Act.

Section 3 of the Recovery Act makes no provision for notice to persons in the industry, particularly those not members of the applicant trade or industrial association; and no provision whatsoever is expressly made for a hearing to determine whether the provisions in the proposed code are properly contained therein. No evidence is required to be taken and no findings of fact are required to be made by the President, except some that have no relation at all to the fairness or unfairness of most of the practices prohibited. The President is free to act in a purely arbitrary manner. He need not say why he acts. Nevertheless, as a result of the formulation of a code by an unofficial trade body in this manner and the approval thereof by the President, the wide range of prohibitions

contained in such a code as the Live Poultry Code, all become criminal offenses.

Section 7 requires certain labor provisions to be inserted in every code which the President approves. The statute can, however, be searched from beginning to end and no clue will be found to the problem of what other provisions may be inserted. It does not seem that it was intended that the provisions of the codes were to be restricted to what was deemed "unfair competition" at common law or to what have been declared "unfair methods of competition" by the courts in construing the Federal Trade Commission Act. The evident intention was to allow the freest latitude in formulating so-called codes of fair competition in order that the unofficial ideas of preponderant majorities in particular trades and industries, if they happened to coincide or could be made to coincide with the President's idea of "fair competition," might be enacted into law.

This Court has in no uncertain way prescribed the procedure required to make administrative action conform to due process of law. *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274; *Crowell* v. *Benson,* 285 U. S. 22; *Wichita R. & L. Co.* v. *Public Utilities Comm'n,* 260 U. S. 48, 59; *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190.

The President has made no findings of fact to bring his action in approving the code within any policy or standard which the Act may contain. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. See also *Florida* v. *United States,* 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454; *United States* v. *Chicago, M. & St. P. R. Co.,* 294 U. S. 50.

Furthermore, there are obviously no administrative findings of any kind whatsoever which relate the provisions of the Live Poultry Code to any of the alleged

policies set forth in § 1 of the Recovery Act. In none of the administrative documents referred to is there any statement that such findings as may have been made were made upon the basis of the "evidence" introduced at the public hearing.

If § 1 were the only guide, there is no action conceivable which the President could not take with respect to the regulation of industry and have it fit into one or more of the pigeon-holes provided in § 1. The alleged standards of § 1 do not in any way make more definite or limit the wholly unlimited authorization in § 7 for "maximum hours of labor" and "minimum rates of pay."

Certainly no decision of this Court, or of any other so far as we are aware, has ever held that hours of labor or rates of pay to workmen have any relation to the well-known concepts of "unfair competition" or "unfair methods of competition." See *Howe Scale Co.* v. *Wyckoff,* 198 U. S. 118; *Hanover Co.* v. *Metcalf,* 240 U. S. 403, 412; *Federal Trade Comm'n* v. *Gratz,* 253 U. S. 421, 427–8.

The Recovery Act authorizes the President to re-delegate the almost illimitable powers conferred on him by the Act to various commissions, bureaus, officers, and other agencies. The result is that these various bodies and functionaries have the power to make the laws of the United States. It is common knowledge that it is impossible for an ordinary citizen to know what these laws are, not only because of their tremendous volume, but also because they are constantly shifting and changing, and because nowhere can be found a comprehensive collection of the thousand and one enactments which are almost daily ground out by these agencies and which in many cases are unintelligible and inconsistent. See Report of the Special Committee of Administrative Law, 57th Annual Meeting of the American Bar Assn., pp. 215–216.

The scope of the Recovery Act is evidenced by the codes enacted thereunder.

In no less than 17 cases, the Recovery Act or its application has been declared unconstitutional during the past two years by United States District Courts from Florida to Idaho. *Purvis* v. *Bazemore,* 5 F. Supp. 230; *United States* v. *Suburban Motor Service Corp.,* 5 F. Supp. 798; *United States* v. *Lieto,* 6 F. Supp. 32; *United States* v. *Smith,* District Court, Eastern District of Texas, Feb. 26, 1934; *Hart Coal Corp.* v. *Sparks,* 7 F. Supp. 16; *United States* v. *Mills,* 7 F. Supp. 547; *United States* v. *Gearhart,* 7 F. Supp. 712; *United States* v. *Eason Oil Co.,* 8 F. Supp. 365; *United States* v. *Belcher,* 104 C. C. H., par. 7247; *United States* v. *Kinnebrew Motor Co.,* 8 F. Supp. 535; *United States* v. *George,* 104 C. C. H., par. 7298; *Table Supply Stores* v. *Hawking,* 9 F. Supp. 888; *United States* v. *Superior Products Co.,* 9 F. Supp. 943; *United States* v. *Weirton Steel Co.,* 10 F. Supp. 55; *United States* v. *National Garment Co.,* 10 F. Supp. 104; *The Acme, Inc.* v. *Besson,* 10 F. Supp. 1.

The briefest reflection convinces that if the theory is once accepted that the Constitution confers a power of undetermined extent to regulate anything and everything which " affects " interstate commerce, and that the question of what does affect it is to be determined as a matter of economic fact in each particular case, then the Constitution has been amended by statute into a document which would never have been adopted or ratified originally, and—what is more serious— the whole theory upon which our system of government is founded and upon which it has been maintained is gone.

Under the construction of the commerce clause now advanced by the Government, the United States loses its character as " a government of laws, and not of men," and the doctrine of enumerated powers is gone.

Acceptance of the Government's view as to the extent of the commerce clause is inconsistent with the maintenance of our dual system of government.

If the Government's view as to the scope of the commerce power be accepted, the field of individual liberty, heretofore regarded as secure from governmental encroachment in certain fundamental aspects, will be greatly restricted and potentially subject to complete extinction.

The minimum wage and maximum hour provisions of the code are beyond the purview of the commerce clause and are in contravention of the Fifth Amendment.

Production, whether by way of manufacture, mining, farming or any other activity, is not commerce and is not subject to regulation under the commerce clause. In so holding in previous cases this Court has been guided by the consideration that to hold otherwise would be destructive of our dual system of government and extend to the Federal Government the power to nationalize industry. *Gibbons* v. *Ogden,* 9 Wheat. 1, 189; *Kidd* v. *Pearson,* 128 U. S. 1; *United States* v. *Knight Co.,* 156 U. S. 1; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 178–179; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165; *Champlin Rfg. Co.* v. *Corporation Comm'n,* 286 U. S. 210; *Chassaniol* v. *Greenwood,* 291 U. S. 584, 587; *Hammer* v. *Dagenhart,* 247 U. S. 251.

The cases under the Interstate Commerce Act, Antitrust Act and Federal Trade Commission Act are not in point. *Swift & Co.* v. *United States,* 196 U. S. 375; *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; and *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, distinguished.

The argument that regulation of wages and hours may be sustained because of the necessity for uniformity in all the States, finds no support in the Constitution, and the conception of federal power upon which it rests has already been rejected by this Court. *McCulloch* v. *Mary-*

land, 4 Wheat. 316, 405; *Kansas* v. *Colorado,* 206 U. S. 46, 81–82.

In the final analysis the contention made rests upon a non-existent power in the Federal Government to enact any act deemed by it necessary or desirable to promote the general welfare.

The wage and hour provisions of the code are in violation of the Fifth Amendment.

The "straight killing" provision is void because neither a regulation of interstate commerce nor a regulation sustainable under any definition of fair competition, and because violative of the Fifth Amendment.

The code provisions forbidding the sale of unfit poultry, requiring inspection in accordance with local inspection laws, and forbidding sale to any persons other than those licensed under local license laws are not regulations of interstate commerce or within the purview of the commerce clause.

The code provision requiring filing of reports is not within the commerce clause.

The penal provision of the Recovery Act is wholly vague and indefinite and hence unconstitutional and void.

Mr. Donald R. Richberg and *Solicitor General Reed,* with whom *Assistant Attorney General Stephens* and *Messrs. Charles H. Weston, M. S. Huberman, Walter L. Rice, G. Stanleigh Arnold, Golden W. Bell, Carl McFarland,* and *Phillip Buck* were on the brief, for the United States.

The New York market dominates the live poultry industry, and determines the prices in other markets as well as the prices received by shippers and farmers.

Each of the practices which the Code regulates affects substantially the price, quality and volume of poultry shipped into this market. The sale of unfit poultry in

competition with wholesome grades brings down the price structure for all grades, the effect being disproportionate to the relative amount of unfit poultry sold. A principal reason is the resulting distrust on the part of the consumers, who are generally unable to distinguish good from unfit poultry before it is dressed. It is estimated that if unfit poultry could be excluded from the market by effectively prohibiting its sale in New York, there would be an increase of about 20 per cent. in the consumption and shipment of live poultry.

Failure to inspect, and sales to unlicensed dealers, produce the same consequences as does sale of unfit poultry, since these practices facilitate such sale. Selective killing, i. e., selling, likewise demoralizes the price structure by depressing the price for good poultry rejected from coops by the earliest purchasers at the slaughterhouse. The practice of selective killing or selling has also tended to prevent the development of grading before shipment on the basis of quality, and so has prevented an accurate price basis for poultry as sold by farmers or other shippers.

The payment of unduly low wages, and the exaction of a long working week, contribute in the same way to the adverse effects on the price structure, and the quality and volume of live poultry shipped into New York. Because of the unusually sharp competition in this industry, and the close margin on which slaughterhouse operators work, any saving in wage costs is translated into a reduction in price. The effect is to lower the price, to induce the sale of unfit and inferior grades of poultry by competitors, and so to cause a diversion of trade and shipments from live to dressed poultry, and to induce a progressive breakdown of the live poultry market.

The court below apparently proceeded on an *a priori* and erroneous distinction between the labor and other practices prohibited, with respect to their effect on inter-

state commerce. Although the question was treated as one of degree, the majority of the court did not suggest that there was no evidence to support the finding of the jury that violation of the labor provisions produced the same consequences as violation of the other provisions in question.

Under the decisions of this Court, the Code provisions which the petitioners violated are within the commerce power of the Congress. *Local No. 167* v. *United States,* 291 U. S. 293, indicates that, under the facts of this industry, the practices of the wholesale slaughterhouses are so closely related to the preceding interstate movement that, from the standpoint of federal regulation, whether under the Sherman Act or otherwise, it makes no difference what parts of their business are " in " interstate commerce, and what parts, if any, are on the fringe of such commerce but necessary to its proper functioning. Irrespective of the extent to which the slaughterhouse operators are engaged " in " interstate commerce, their practices are subject to federal regulation. The effect of those practices on the national price and on the interstate movement of poultry is no less than the effect of the local activities in a dominant market regulated under the Grain Futures Act, or the Packers and Stockyards Act, or the Sherman Act. *Board of Trade* v. *Olsen,* 262 U. S. 1; *Stafford* v. *Wallace,* 258 U. S. 495; *United States* v. *Patten,* 226 U. S. 525. Moreover, the effect of the practices on the quality of the goods shipped and on the trustworthiness of goods in interstate commerce affords an additional basis for federal regulation. *Thornton* v. *United States,* 271 U. S. 414; *United States* v. *Ferger,* 250 U. S. 199.

Citing and discussing: *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Federal Trade Comm'n* v. *Western Meat Co.,* 272 U. S. 554; *Northern Securities Co.*

v. *United States,* 193 U. S. 197; *Federal Trade Comm'n* v. *Royal Milling Co.,* 288 U. S. 212; *Federal Trade Comm'n* v. *Algoma Lumber Co.,* 291 U. S. 67; *Swift & Co.* v. *United States,* 196 U. S. 375; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *American Column & Lumber Co.* v. *United States,* 257 U. S. 377; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392; *Colorado* v. *United States,* 271 U. S. 153; *Florida* v. *United States,* 292 U. S. 1; *Federal Trade Comm'n* v. *Keppel & Bro.,* 291 U. S. 304; *Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342; *Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563.

Cases which hold that a state tax upon or regulation of manufacture or production does not burden interstate commerce because manufacture and production are not interstate commerce, do not fix the permissible limits of the commerce power of Congress. See *Kidd* v. *Pearson,* 128 U. S. 1; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165. Distinguished: *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *United Leather Workers* v. *Herkert & Meisel Co.,* 265 U. S. 457.

Petitioners are importers of poultry from other States and Congress may regulate their handling and sale of such poultry. *Leisy* v. *Hardin,* 135 U. S. 100, 110, 111; See also *Heymann* v. *Southern Ry. Co.,* 203 U. S. 270; *Rosenberger* v. *Pacific Express Co.,* 241 U. S. 48; *Baldwin* v. *Seelig, Inc.,* 294 U. S. 511; *Greater New York Live Poultry Chamber of Commerce* v. *United States,* 47 F. (2d) 156; *Swift & Co.* v. *United States,* 196 U. S. 375, 398–399; *Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

The intermediate delivery of the poultry to the receivers at the railroad terminals does not break the interstate character of the movement from shippers in other States

to slaughterhouse operators. *Binderup* v. *Pathé Exchange,* 263 U. S. 291, 309; *Peoples Natural Gas Co.* v. *Public Service Comm'n,* 270 U. S. 550.

Intrastate transactions can be regulated by the Federal Government where those transactions are so interwoven with interstate commerce that the latter can not be effectively regulated without control of the former. *Minnesota Rate Cases,* 230 U. S. 352; *Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342.

The minimum wage and maximum hour provisions of the Code are not controlled by the decision in *Hammer* v. *Dagenhart,* 247 U. S. 251. See also *Brooks* v. *United States,* 267 U. S. 432, 438.

Regulation may be valid when Congress intended to act and did act under its commerce power although regulation of the same kind could not be supported under this power when Congress intended to act and did act under some other power. Cf. *Board of Trade* v. *Olsen,* 262 U. S. 1; *Hill* v. *Wallace,* 259 U. S. 44. Legislation enacted for a purpose within constitutional power is valid although other ends not within such power were sought to be attained. *Stephenson* v. *Binford,* 287 U. S. 251, 276.

It is submitted that what practices and conditions materially affect interstate commerce, so as to be within federal control, is a question of fact. Trade practices and labor conditions, which in normal times would have only an indirect and incidental effect upon interstate commerce, may substantially burden interstate commerce during a period of overproduction, cutthroat competition, unemployment, and reduced purchasing power. See *Richmond Hosiery Mills* v. *Camp,* 7 F. Supp. 139, 144; *Southport Petroleum Co.* v. *Ickes,* 61 Wash. L. Rep. 577. The issue presented for determination here should not be prejudiced by the fact that, nearly twenty years earlier, when economic conditions were altogether different, a

bare majority of this Court concluded that a statute with wholly different objectives was not within the federal commerce power.

The provisions of the Code are supported also on an independent ground: they are in one aspect part of a comprehensive effort by Congress to remedy the breakdown of interstate commerce which culminated in 1933. In this view, practices which contribute to a sharp decline in wages, prices and employment, contribute to a frustration of commerce among the States and are subject to federal regulation in the interest of protecting and promoting that commerce. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, 260; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 372.

Congress alone could deal effectively with the causes contributing to the breakdown of interstate commerce. Nor could the situation have been met by separate action of the States. It would have been impossible to obtain prompt and uniform action by the individual state legislatures; and applied to interstate commerce, their legislation would be invalid. *Baldwin* v. *Seelig, Inc.,* 294 U. S. 511.

It was not intended that the Constitution should substitute for the barriers of the States the chaos of uncontrollable excesses of competition affecting commerce among the States. The solution which the framers of the Constitution provided was the regulatory power of the Federal Government. That power was meant to be exercised over " the commerce which concerns more States than one." *Minnesota Rate Cases,* 230 U. S. 352, 398; *Gibbons* v. *Ogden,* 9 Wheat. 1, 194. Congress must have power to deal with activities and practices which, because of their widespread character and effect, contribute substantially to the impairment of interstate commerce as a whole.

The contention is not that Congress may control any form of activity which may conceivably to some degree affect interstate commerce, or that an economic crisis confers such power. The contention rests upon the facts. The depressed state of the national economy made it evident that interstate commerce was demoralized and endangered by acts which under other conditions might not seriously affect it. Because of this effect and this danger, Congress could bring those acts within its regulatory power under the commerce clause. *Wilson* v. *New,* 243 U. S. 332, 348. This is but an application to an unusually exigent situation of the now familiar principle that the facts which call forth legislative measures may be determinative of the validity of an exercise of legislative power. *Stafford* v. *Wallace,* 258 U. S. 495, 513; *Nashville, C. & St. L. Ry. Co.* v. *Walters,* 294 U. S 405.

An additional basis on which the wage and hour provisions rest is that they are reasonable means for the prevention of labor disputes arising out of those subjects, and so are adapted to protecting interstate commerce from the burdens caused by labor disturbances. Cf. *In re Debs,* 158 U. S. 564; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Bedford Cut Stone Co.* v. *Stone Cutters Assn.,* 274 U. S. 37; *Pennsylvania R. Co.* v. *Railroad Labor Board,* 261 U. S. 72, 79; *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 565. The power to take preventive measures is as available as the power to provide remedies. See *Stafford* v. *Wallace,* 258 U. S. 495, 520; *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548.

The Recovery Act and the provisions of the Code fully satisfy the requirements of the due process clause of the Fifth Amendment. No effort was made by the petition-

ers to sustain the burden of demonstrating that the Recovery Act is arbitrary, capricious, or unreasonable in its provisions. The provisions of the Code are shown to bear a substantial relation to the regulation of interstate commerce. Moreover, the restrictions imposed by the Code embody the judgment of a substantial portion of the industry as to what is both necessary and reasonable.

The procedure followed in the adoption of the Code fully satisfies the requirements of the Act and of due process of law.

In *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, this Court did not pass upon the validity of § 3 (a) of the Recovery Act, but indicated that it presented a different problem of delegation from that raised by § 9 (c).

Section 3 (a) of the Recovery Act authorized the President to approve codes of " fair competition " after making certain prescribed findings. The words " fair competition " set the primary standard for presidential action. Fair competition—or the antithetical expression " unfair methods of competition "—has been used in the Federal Trade Commission Act and in the Tariff Act of 1922 as a basis for administrative and judicial action. *Federal Trade Comm'n* v. *Keppel & Bro.,* 291 U. S. 304; *Frischer & Co.* v. *Elting,* 60 F. (2d) 711, cert. den., 287 U. S. 649. Under the Recovery Act the President is to be guided in approving rules of fair competition by the codes submitted by representative groups in the industries affected. There is authority for such a resort to business experience and judgment. *St. Louis & Iron Mountain Ry. Co.* v. *Taylor,* 210 U. S. 281, 286–287; *Butte City Water Co.* v. *Baker,* 196 U. S. 119, 126–127; *Erhardt* v. *Boaro,* 113 U. S. 527.

It is not, of course, material that the rules of fair competition submitted by industry and approved by the President may be broader in scope than the " unfair

methods of competition" condemned by this Court under the Federal Trade Commission Act. The purpose of Congress in the Recovery Act clearly included the prohibition of practices regarded by industry as unfair because of their tendency to destroy the price structure without economic justification. Moreover, the codes were clearly intended to prohibit the practice now considered the most harmful and unfair of all methods of competition—the exploitation of employees through the cutting of wages and lengthening of hours of labor. See §§ 1, 4 (b), and 7. In determining whether a delegation of authority to the Executive is a valid one, the question is not whether the primary standard has the same meaning as in a prior statute, but whether there is an adequate policy or standard prescribed for the Executive. The standard in the Recovery Act would seem more definite than that in the Federal Trade Commission Act.

Fair competition is given further meaning and substance by the requirement in § 3 (a) that the codes will tend to effectuate the policy set forth in § 1 of the Act. All of the policies there set forth point toward a single goal—the rehabilitation of industry and the industrial recovery which unquestionably was the major policy of Congress in adopting the National Industrial Recovery Act. The requirement that the President find that codes of fair competition will tend to effectuate the policy there laid down both (1) sets a limit upon his power to approve codes and (2) gives additional substance and meaning to the phrase "fair competition" by serving as a guidepost to what the codes of fair competition contemplated by the Act were to include.

In many cases this Court has upheld standards no more specific than "unfair competition," when given content and meaning by other sections or by the general purpose of the statute in which they were used, e. g., *New York*

Central Securities Corp. v. *United States,* 287 U. S. 12 (public interest).

Other cases in which the use of general expressions as a standard has been upheld are: *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 285 (public convenience, interest or necessity); *Avent* v. *United States,* 266 U. S. 127, and *United States* v. *Chemical Foundation,* 272 U. S. 1 (in the public interest); *Colorado* v. *United States,* 271 U. S. 153, 168, and *Chesapeake & Ohio Ry. Co.* v. *United States,* 283 U. S. 34, 42 (certificates of public convenience and necessity); *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420 (just and reasonable commissions); *Wayman* v. *Southard,* 10 Wheat. 1 (in their discretion deem expedient); *Buttfield* v. *Stranahan,* 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Co.* v. *United States,* 204 U. S. 364 (unreasonable obstruction to navigation); *Mahler* v. *Eby,* 264 U. S. 32 (undesirable resident).

In many cases statutes containing grants of authority expressed in permissive language have been upheld, although in all of them the objection could have been made that the statute did not compel the administrative agency to act even after making findings or determining what was necessary to comply with the standard established. See *United States* v. *Grimaud,* 220 U. S. 506; *Interstate Commerce Comm'n* v. *Goodrich Transit Co.,* 224 U. S. 194; *Intermountain Rate Cases,* 234 U. S. 476; *First National Bank* v. *Union Trust Co.,* 244 U. S. 416; *Avent* v. *United States,* 266 U. S. 127; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Sproles* v. *Binford,* 286 U. S. 374; *New York Central Securities Corp.* v. *United States,* 287 U. S. 12.

In the case at bar the President is clearly to be guided by the policies and standards found in the Act in determining whether to approve codes; and he can not approve codes without making the findings required by Congress.

The precise degree of detail with which policies and standards must be defined varies with the subject regulated. This Court will not permit the doctrine of delegation so to restrict the power of Congress as to interfere with its ability to legislate. The leading decisions reflect the importance attributed to the necessity for the delegation. *Wayman* v. *Southard,* 10 Wheat. 1; *Field* v. *Clark,* 143 U. S. 649; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Co.* v. *United States,* 204 U. S. 364, 386; *United States* v. *Grimaud,* 220 U. S. 506; *Avent* v. *United States,* 266 U. S. 127, 130. See also *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U. S. 230, 245; *Mahler* v. *Eby,* 264 U. S. 32, 40; *United States* v. *Chemical Foundation,* 272 U. S. 1, 12; *Hampton & Co.* v. *United States,* 276 U. S. 394. The delegation in the Recovery Act would have been necessary in normal times because of the need for a flexible procedure which could have differentiated between industries; it was especially necessary in view of the emergency confronting Congress at that time, requiring immediate action in many fields. In the words of the Court, "Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility." *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421.

In other sections of the Recovery Act, Congress has clearly manifested its intention that the codes contain maximum hour and minimum wage provisions. §§ 7 (a), 7 (c), 4 (b). Since the policy of Congress as to the inclusion of such provisions is clearly expressed, the remaining question is what the maximum hours and minimum wages should be for each class of employment in each industry. The President is to determine these amounts in accordance with the limitations established by the Act. The determination of these amounts would seem clearly to be a matter of administrative detail.

Section 3 (a) of the Recovery Act requires the President to make certain findings of fact as a condition of his approval of codes. In approving the live poultry code, the President made the findings required.

The phrase " in or affecting interstate commerce " does not render § 3 (f) invalid for indefiniteness, since these words have been given meaning by judicial decision and, if any uncertainty as to their meaning exists, it arises from the nature of the constitutional limitations upon federal power. Such language, commonly used, as for example in the Sherman Act, has never been deemed to render a statute invalid for indefiniteness.

[The several remaining specifications of error were also argued briefly.]

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

Petitioners in No. 854 were convicted in the District Court of the United States for the Eastern District of New York on eighteen counts of an indictment charging violations of what is known as the " Live Poultry Code," [1] and on an additional count for conspiracy to commit such violations.[2] By demurrer to the indictment and appropriate motions on the trial, the defendants contended (1) that the Code had been adopted pursuant to an unconstitutional delegation by Congress of legislative power; (2) that it attempted to regulate intrastate transactions which lay outside the authority of Congress; and (3) that in certain provisions it was repugnant to the due process clause of the Fifth Amendment.

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[1] The full title of the Code is " Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York."

[2] The indictment contained 60 counts, of which 27 counts were dismissed by the trial court, and on 14 counts the defendants were acquitted.

The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the Code, but reversed the conviction on two counts which charged violation of requirements as to minimum wages and maximum hours of labor, as these were not deemed to be within the congressional power of regulation. On the respective applications of the defendants (No. 854) and of the Government (No. 864) this Court granted writs of certiorari, April 15, 1935.

New York City is the largest live-poultry market in the United States. Ninety-six per cent. of the live poultry there marketed comes from other States. Three-fourths of this amount arrives by rail and is consigned to commission men or receivers. Most of these freight shipments (about 75 per cent.) come in at the Manhattan Terminal of the New York Central Railroad, and the remainder at one of the four terminals in New Jersey serving New York City. The commission men transact by far the greater part of the business on a commission basis, representing the shippers as agents, and remitting to them the proceeds of sale, less commissions, freight and handling charges. Otherwise, they buy for their own account. They sell to slaughterhouse operators who are also called market-men.

The defendants are slaughterhouse operators of the latter class. A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the latter corporation and also guaranteed the credits of the former corporation which was operated by Martin, Alex and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the railroad terminals serving the City, but occasionally they purchase from commission men in Philadelphia. They buy the

poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery, by shochtim in defendants' employ. Defendants do not sell poultry in interstate commerce.

The "Live Poultry Code" was promulgated under § 3 of the National Industrial Recovery Act.[3] That section—the pertinent provisions of which are set forth in the margin [4]—authorizes the President to approve "codes of

[3] Act of June 16, 1933, c. 90, 48 Stat. 195, 196; 15 U. S. C. 703.

[4] "CODES OF FAIR COMPETITION.

"Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

"(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for

fair competition." Such a code may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or groups " impose no inequitable restrictions on admission to membership therein and are truly representative," and (2) that such codes are not designed " to promote monopolies or to eliminate or oppress small enterprises and will not operate to discrimi-

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such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

"(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

"(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

. . . . .

"(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense."

nate against them, and will tend to effectuate the policy" of Title I of the Act. Such codes "shall not permit monopolies or monopolistic practices." As a condition of his approval, the President may "impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." Where such a code has not been approved, the President may prescribe one, either on his own motion or on complaint. Violation of any provision of a code (so approved or prescribed) "in any transaction in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of not more than $500 for each offense, and each day the violation continues is to be deemed a separate offense.

The "Live Poultry Code" was approved by the President on April 13, 1934. Its divisions indicate its nature and scope. The Code has eight articles entitled (1) purposes, (2) definitions, (3) hours, (4) wages, (5) general labor provisions, (6) administration, (7) trade practice provisions, and (8) general.

The declared purpose is "To effect the policies of title I of the National Industrial Recovery Act." The Code is established as "a code of fair competition for the live poultry industry of the metropolitan area in and about the City of New York." That area is described as embracing the five boroughs of New York City, the counties of Rockland, Westchester, Nassau and Suffolk in the State of New York, the counties of Hudson and Bergen in the State of New Jersey, and the county of Fairfield in the State of Connecticut.

The "industry" is defined as including "every person engaged in the business of selling, purchasing for re-

sale, transporting, or handling and/or slaughtering live poultry, from the time such poultry comes into the New York metropolitan area to the time it is first sold in slaughtered form," and such " related branches " as may from time to time be included by amendment. Employers are styled " members of the industry," and the term employee is defined to embrace " any and all persons engaged in the industry, however compensated," except " members."

The Code fixes the number of hours for work-days. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty (40) hours in any one week, and that no employee, save as stated, " shall be paid in any pay period less than at the rate of fifty (50) cents per hour." The article containing " general labor provisions " prohibits the employment of any person under sixteen years of age, and declares that employees shall have the right of " collective bargaining," and freedom of choice with respect to labor organizations, in the terms of § 7 (a) of the Act. The minimum number of employees, who shall be employed by slaughterhouse operators, is fixed, the number being graduated according to the average volume of weekly sales.

Provision is made for administration through an " industry advisory committee," to be selected by trade associations and members of the industry, and a " code supervisor " to be appointed, with the approval of the committee, by agreement between the Secretary of Agriculture and the Administrator for Industrial Recovery. The expenses of administration are to be borne by the members of the industry proportionately upon the basis of volume of business, or such other factors as the advisory committee may deem equitable, "subject to the disapproval of the Secretary and/or Administrator."

The seventh article, containing " trade practice provisions," prohibits various practices which are said to consti-

tute " unfair methods of competition." The final article provides for verified reports, such as the Secretary or Administrator may require, "(1) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and (2) for the determination by the Secretary or Administrator of the extent to which the declared policy of the act is being effectuated by this code." The members of the industry are also required to keep books and records which " will clearly reflect all financial transactions of their respective businesses and the financial condition thereof," and to submit weekly reports showing the range of daily prices and volume of sales " for each kind of produce.

The President approved the Code by an executive order in which he found that the application for his approval had been duly made in accordance with the provisions of Title I of the National Industrial Recovery Act, that there had been due notice and hearings, that the Code constituted " a code of fair competition " as contemplated by the Act and complied with its pertinent provisions including clauses (1) and (2) of subsection (a) of § 3 of Title I; and that the Code would tend " to effectuate the policy of Congress as declared in section 1 of Title I." [5]

[5] The Executive Order is as follows:

" EXECUTIVE ORDER.

" Approval of Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York.

" *Whereas,* the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act having rendered their separate reports and recommendations and findings on the provisions of said code, coming within their respective jurisdictions, as set forth in the Executive Order No. 6182 of June 26, 1933, as supplemented by Executive Order No. 6207 of July 21, 1933, and Executive Order No. 6345 of October 20, 1933, as amended by Executive Order No. 6551 of January 8, 1934;

The executive order also recited that the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act had rendered separate reports as to the provisions within their respective jurisdictions. The Secretary of Agriculture reported that the provisions of the Code "establishing standards of fair competition (a) are regulations of transactions in or affecting the current of interstate and/or foreign commerce and (b) are reason-

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"*Now, therefore,* I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do hereby find that:

"1. An application has been duly made, pursuant to and in full compliance with the provisions of title I of the National Industrial Recovery Act, approved June 16, 1933, for my approval of a code of fair competition for the live poultry industry in the metropolitan area in and about the City of New York; and

"2. Due notice and opportunity for hearings to interested parties have been given pursuant to the provisions of the act and regulations thereunder; and,

"3. Hearings have been held upon said code, pursuant to such notice and pursuant to the pertinent provisions of the act and regulations thereunder; and

"4. Said code of fair competition constitutes a code of fair competition, as contemplated by the act and complies in all respects with the pertinent provisions of the act, including clauses (1) and (2) of subsection (a) of section 3 of title I of the act; and

"5. It appears, after due consideration, that said code of fair competition will tend to effectuate the policy of Congress as declared in section 1 of title I of the act.

"*Now, therefore,* I, Franklin D. Roosevelt, President of the United States, pursuant to the authority vested in me by title I of the National Industrial Recovery Act, approved June 16, 1933, and otherwise, do hereby approve said Code of Fair Competition for the Live Poultry Industry in the Metropolitan Area in and about the City of New York.

"FRANKLIN D. ROOSEVELT,
"*President of the United States.*"

"The White House,
April 13, 1934."

able," and also that the Code would tend to effectuate the policy declared in Title I of the Act, as set forth in § 1. The report of the Administrator for Industrial Recovery dealt with wages, hours of labor and other labor provisions.[6]

Of the eighteen counts of the indictment upon which the defendants were convicted, aside from the count for conspiracy, two counts charged violation of the minimum wage and maximum hour provisions of the Code, and ten counts were for violation of the requirement (found in the "trade practice provisions") of "straight killing." This requirement was really one of "straight" selling. The term "straight killing" was defined in the Code as "the practice of requiring persons purchasing poultry for resale to accept the run of any half coop, coop, or coops, as purchased by slaughterhouse operators, except for culls."[7] The charges in the ten counts, respectively, were

[6] The Administrator for Industrial Recovery stated in his report that the Code had been sponsored by trade associations representing about 350 wholesale firms, 150 retail shops, and 21 commission agencies; that these associations represented about 90 per cent. of the live poultry industry by numbers and volume of business; and that the industry as defined in the Code supplied the consuming public with practically all the live poultry coming into the metropolitan area from forty-one States and transacted an aggregate annual business of approximately ninety million dollars. He further said that about 1610 employees were engaged in the industry; that it had suffered severely on account of the prevailing economic conditions and because of unfair methods of competition and the abuses that had developed as a result of the "uncontrolled methods of doing business"; and that these conditions had reduced the number of employees by approximately 40 per cent. He added that the report of the Research and Planning Division indicated that the Code would bring about an increase in wages of about 20 per cent. in this industry and an increase in employment of 19.2 per cent.

[7] The prohibition in the Code (Art. VII, § 14) was as follows: "*Straight Killing.*—The use, in the wholesale slaughtering of poultry, of any method of slaughtering other than 'straight killing' or killing

that the defendants in selling to retail dealers and butchers had permitted "selections of individual chickens taken from particular coops and half coops."

Of the other six counts, one charged the sale to a butcher of an unfit chicken; two counts charged the making of sales without having the poultry inspected or approved in accordance with regulations or ordinances of the City of New York; two counts charged the making of false reports or the failure to make reports relating to the range of daily prices and volume of sales for certain periods; and the remaining count was for sales to slaughterers or dealers who were without licenses required by the ordinances and regulations of the city of New York.

First. Two preliminary points are stressed by the Government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.[8] The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the

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on the basis of official grade. Purchasers may, however, make selection of a half coop, coop, or coops, but shall not have the right to make any selection of particular birds."

[8] See *Ex parte Milligan*, 4 Wall. 2, 120, 121; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426.

imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment,—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The further point is urged that the national crisis demanded a broad and intensive coöperative effort by those engaged in trade and industry, and that this necessary coöperation was sought to be fostered by permitting them to initiate the adoption of codes. But the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes.

Second. The question of the delegation of legislative power. We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Art I, § 1. And the Congress is authorized "To make all laws which shall be necessary and proper for carrying into execution" its general powers. Art. I, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting

legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. *Id.*, p. 421.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations,—whether Congress in authorizing "codes of fair competition" has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

The aspect in which the question is now presented is distinct from that which was before us in the case of the *Panama Company*. There, the subject of the statutory prohibition was defined. National Industrial Recovery Act, § 9 (c). That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the range of discretion given to the President in prohibiting that transportation. *Id.*, pp. 414, 415, 430. As to the "codes of fair competition," under § 3 of the Act, the question is more funda-

mental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by "fair competition" as the term is used in the Act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction and expansion which are stated in the first section of Title I? [9]

The Act does not define "fair competition." "Unfair competition," as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. *Goodyear Manufacturing Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598,

[9] That section, under the heading "Declaration of Policy," is as follows: "Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

604; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118, 140; *Hanover Milling Co.* v. *Metcalf,* 240 U. S. 403, 413. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own,—to misappropriation of what equitably belongs to a competitor. *International News Service* v. *Associated Press,* 248 U. S. 215, 241, 242. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law.[10] *Id.,* p. 258. But it is evident that in its widest range, "unfair competition," as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The Government does not contend that the Act contemplates such a limitation. It would be opposed both to the declared purposes of the Act and to its administrative construction.

The Federal Trade Commission Act (§ 5) [11] introduced the expression "unfair methods of competition," which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words "unfair competition," in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition, its scope being left to judicial determination as controversies arise. *Federal Trade Comm'n* v. *Raladam Co.,* 283 U. S. 643, 648, 649; *Federal Trade Comm'n* v. *Keppel & Bro.,* 291 U. S. 304, 310–312. What are

[10] See cases collected in Nims on Unfair Competition and Trade-Marks, Chap. I, § 4, p. 19, and Chap. XIX.

[11] Act of September 26, 1914, c. 311, 38 Stat. 717, 719, 720.

"unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 453; *Federal Trade Comm'n* v. *Klesner*, 280 U. S 19, 27, 28; *Federal Trade Comm'n* v. *Raladam Co., supra; Federal Trade Comm'n* v. *Keppel & Bro., supra; Federal Trade Comm'n* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. To make this possible, Congress set up a special procedure. A Commission, a quasi-judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority. *Federal Trade Comm'n* v. *Raladam Co., supra; Federal Trade Comm'n* v. *Klesner, supra.*[12]

In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject

[12] The Tariff Act of 1930 (§ 337, 46 Stat. 703), like the Tariff Act of 1922 (§ 316, 42 Stat. 943), employs the expressions "unfair methods of competition" and "unfair acts" in the importation of articles into the United States, and in their sale, "the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States." Provision is made for investigation and findings by the Tariff Commission, for appeals upon questions of law to the United States Court of Customs and Patent Appeals, and for ultimate action by the President when the existence of any "such unfair method or act" is established to his satisfaction.

matter. We cannot regard the "fair competition" of the codes as antithetical to the "unfair methods of competition" of the Federal Trade Commission Act. The "fair competition of the codes has a much broader range and a new significance. The Recovery Act provides that it shall not be construed to impair the powers of the Federal Trade Commission, but, when a code is approved, its provisions are to be the "standards of fair competition" for the trade or industry concerned, and any violation of such standards in any transaction in or affecting interstate or foreign commerce is to be deemed "an unfair method of competition" within the meaning of the Federal Trade Commission Act. § 3 (b).

For a statement of the authorized objectives and content of the "codes of fair competition" we are referred repeatedly to the "Declaration of Policy" in section one of Title I of the Recovery Act. Thus, the approval of a code by the President is conditioned on his finding that it "will tend to effectuate the policy of this title." § 3 (a). The President is authorized to impose such conditions "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." *Id.* The "policy herein declared" is manifestly that set forth in section one. That declaration embraces a broad range of objectives. Among them we find the elimination of "unfair competitive practices." But even if this clause were to be taken to relate to practices which fall under the ban of existing law, either common law or statute, it is still only one of the authorized aims described in section one. It is there declared to be "the policy of Congress"—

"to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount

thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." [13]

Under § 3, whatever "may tend to effectuate" these general purposes may be included in the "codes of fair competition." We think the conclusion is inescapable that the authority sought to be conferred by § 3 was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve, or prescribe, as wise and beneficient measures for the government of trades and industries in order to bring about their rehabilitation, correction and development, according to the general declaration of policy in section one. Codes of laws of this sort are styled "codes of fair competition."

We find no real controversy upon this point and we must determine the validity of the Code in question in this aspect. As the Government candidly says in its

[13] See Note 9.

brief: "The words 'policy of this title' clearly refer to the 'policy' which Congress declared in the section entitled 'Declaration of Policy'—§ 1. All of the policies there set forth point toward a single goal—the rehabilitation of industry and the industrial recovery which unquestionably was the major policy of Congress in adopting the National Industrial Recovery Act." And that this is the controlling purpose of the Code now before us appears both from its repeated declarations to that effect and from the scope of its requirements. It will be observed that its provisions as to the hours and wages of employees and its "general labor provisions" were placed in separate articles, and these were not included in the article on "trade practice provisions" declaring what should be deemed to constitute "unfair methods of competition." The Secretary of Agriculture thus stated the objectives of the Live Poultry Code in his report to the President, which was recited in the executive order of approval:

"That said code will tend to effectuate the declared policy of title I of the National Industrial Recovery Act as set forth in section 1 of said act in that the terms and provisions of such code tend to: (a) Remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; (b) to provide for the general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups; (c) to eliminate unfair competitive practices; (d) to promote the fullest possible utilization of the present productive capacity of industries; (e) to avoid undue restriction of production (except as may be temporarily required); (f) to increase the consumption of industrial and agricultural products by increasing purchasing power; and (g) otherwise to rehabilitate industry and to conserve natural resources."

The Government urges that the codes will "consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems." Instances are cited in which Congress has availed itself of such assistance; as *e. g.*, in the exercise of its authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims,[14] or, in matters of a more or less technical nature, as in designating the standard height of drawbars.[15] But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The question, then, turns upon the authority which § 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make

[14] Act of July 26, 1866, c. 262, 14 Stat. 251; *Jackson* v. *Roby*, 109 U. S. 440, 441; *Erhardt* v. *Boaro*, 113 U. S. 527, 535; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126.

[15] Act of March 2, 1893, c. 196, 27 Stat. 531; *St. Louis, I. M. & So. Ry. Co.* v. *Taylor*, 210 U. S. 281, 286.

whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. See *Panama Refining Co.* v. *Ryan, supra,* and cases there reviewed.

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion. *First,* the President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code, "impose no inequitable restrictions on admission to membership" and are "truly representative." That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. *Second,* the President is required to find that the code is not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." And, to this is added a proviso that the code "shall not permit monopolies or monopolistic practices." But these restrictions leave virtually untouched the field of policy envisaged by section one, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make—that the code "will tend to effectuate the policy of this title." While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the "Declaration of Policy."

Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to

or taking from what is proposed, as "in his discretion" he thinks necessary "to effectuate the policy" declared by the Act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The Act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants,—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify or reject them as he pleases. Such recommendations or findings in no way limit the authority which § 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

Such a sweeping delegation of legislative power finds no support in the decisions upon which the Government especially relies. By the Interstate Commerce Act, Congress has itself provided a code of laws regulating the activities of the common carriers subject to the Act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the Act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88; *Florida* v. *United States*, 282 U. S. 194; *United States*

v. *Baltimore & Ohio R. Co.*, 293 U. S. 454. When the Commission is authorized to issue, for the construction, extension or abandonment of lines, a certificate of "public convenience and necessity," or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest," we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24, 25; *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 273; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42.

Similarly, we have held that the Radio Act of 1927 [16] established standards to govern radio communications and, in view of the limited number of available broadcasting frequencies, Congress authorized allocation and licenses. The Federal Radio Commission was created as the licensing authority, in order to secure a reasonable equality of opportunity in radio transmission and reception. The authority of the Commission to grant licenses "as public convenience, interest or necessity requires" was limited by the nature of radio communications, and by the scope, character and quality of the services to be rendered and the relative advantages to be derived through distribution of facilities. These standards established by Congress were to be enforced upon hearing, and evidence, by an administrative body acting under statutory restrictions adapted to the particular activity. *Federal Radio Comm'n* v. *Nelson Brothers Co.*, 289 U. S. 266.

[16] Act of February 23, 1927, c. 169, 44 Stat. 1162, as amended by the Act of March 28, 1928, c. 263, 45 Stat. 373.

In *Hampton & Co.* v. *United States,* 276 U. S. 394, the question related to the "flexible tariff provision" of the Tariff Act of 1922.[17] We held that Congress had described its plan "to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States." As the differences in cost might vary from time to time, provision was made for the investigation and determination of these differences by the executive branch so as to make "the adjustments necessary to conform the duties to the standard underlying that policy and plan." *Id.,* pp. 404, 405. The Court found the same principle to be applicable in fixing customs duties as that which permitted Congress to exercise its rate-making power in interstate commerce, "by declaring the rule which shall prevail in the legislative fixing of rates" and then remitting "the fixing of such rates" in accordance with its provisions "to a rate-making body." *Id.,* p. 409. The Court fully recognized the limitations upon the delegation of legislative power. *Id.,* pp. 408–411.

To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the

[17] Act of September 21, 1922, c. 356, Title III, § 315, 42 Stat. 858, 941.

nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

Third. The question of the application of the provisions of the Live Poultry Code to intrastate transactions. Although the validity of the codes (apart from the question of delegation) rests upon the commerce clause of the Constitution, § 3 (a) is not in terms limited to interstate and foreign commerce. From the generality of its terms, and from the argument of the Government at the bar, it would appear that § 3 (a) was designed to authorize codes without that limitation. But under § 3 (f) penalties are confined to violations of a code provision "in any transaction in or affecting interstate or foreign commerce." This aspect of the case presents the question whether the particular provisions of the Live Poultry Code, which the defendants were convicted for violating and for having conspired to violate, were within the regulating power of Congress.

These provisions relate to the hours and wages of those employed by defendants in their slaughterhouses in Brooklyn and to the sales there made to retail dealers and butchers.

(1) Were these transactions "*in*" interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other States. But the code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad

terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. *Brown* v. *Houston,* 114 U. S. 622, 632, 633; *Public Utilities Comm'n* v. *Landon,* 249 U. S. 236, 245; *Industrial-Association* v. *United States,* 268 U. S. 64, 78, 79; *Atlantic Coast Line* v. *Standard Oil Co.,* 275 U. S. 257, 267.

The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a "*current*" or "*flow*" of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here. See *Swift & Co.* v. *United States,* 196 U. S. 375, 387, 388; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 55; *Stafford* v. *Wallace,* 258 U. S. 495, 519; *Chi-*

cago Board of Trade v. *Olsen,* 262 U. S. 1, 35; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 439.

(2) Did the defendants' transactions directly "*affect*" interstate commerce so as to be subject to federal regulation? The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation "no matter what may be the source of the dangers which threaten it." *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 27. We said in *Second Employers' Liability Cases,* 223 U. S. 1, 51, that it is the "effect upon interstate commerce," not "the source of the injury," which is "the criterion of congressional power." We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *The Shreveport Case,* 234 U. S. 342, 351, 352; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 588. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act because the conspirators seek to attain their end by means of intrastate activities. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310; *Bedford Cut Stone Co.* v. *Stone Cutters Assn.,* 274 U. S. 37, 46.

We recently had occasion, in *Local 167* v. *United States,* 291 U. S. 293, to apply this principle in connection with

the live poultry industry. That was a suit to enjoin a conspiracy to restrain and monopolize interstate commerce in violation of the Anti-Trust Act. It was shown that marketmen, teamsters and slaughterers (shochtim) had conspired to burden the free movement of live poultry into the metropolitan area in and about New York City. Marketmen had organized an association, had allocated retailers among themselves, and had agreed to increase prices. To accomplish their objects, large amounts of money were raised by levies upon poultry sold, men were hired to obstruct the business of dealers who resisted, wholesalers and retailers were spied upon and by violence and other forms of intimidation were prevented from freely purchasing live poultry. Teamsters refused to handle poultry for recalcitrant marketmen and members of the shochtim union refused to slaughter. In view of the proof of that conspiracy, we said that it was unnecessary to decide when interstate commerce ended and when intrastate commerce began. We found that the proved interference by the conspirators "with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted" operated "substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry" while unquestionably it was in interstate commerce. The intrastate acts of the conspirators were included in the injunction because that was found to be necessary for the protection of interstate commerce against the attempted and illegal restraint. *Id.*, pp. 297, 299, 300.

The instant case is not of that sort. This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted, not upon direct charges of injury to interstate commerce or of interference with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of con-

spiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions—as to hours and wages of employees and local sales—"*affected*" interstate commerce.

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as *e. g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. As we said in the *Minnesota Rate Cases,* 230 U. S. 352, 410: "In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree

alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State." See, also, *Kidd* v. *Pearson,* 128 U. S. 1, 21; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259, 260.

The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 410, 411; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457, 464–467; *Industrial Association* v. *United States,* 268 U. S. 64, 82; *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 107, 108. In the case last cited we quoted with approval the rule that had been stated and applied in *Industrial Association* v. *United States, supra,* after review of the decisions, as follows: "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect

as plainly to cause it to fall outside the reach of the Sherman Act."

While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.

The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce. This appears from an examination of the considerations urged by the Government with respect to conditions in the poultry trade. Thus, the Government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 per cent. of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work, translates his saving into lower prices; that this results in demands for a cheaper grade of goods; and that the cutting

of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.

The Government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.

It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that

commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act,—the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting "the cumulative forces making for expanding commercial activity." Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution.

We are of the opinion that the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power.

The other violations for which defendants were convicted related to the making of local sales. Ten counts, for violation of the provision as to "straight killing," were for permitting customers to make "selections of individual chickens taken from particular coops and half coops." Whether or not this practice is good or bad for the local trade, its effect, if any, upon interstate commerce was only indirect. The same may be said of violations of the Code by intrastate transactions consisting of the sale "of an unfit chicken" and of sales which were not in accord with the ordinances of the City of New York. The requirement of reports as to prices and volumes of defendants' sales was incident to the effort to control their intrastate business.

In view of these conclusions, we find it unnecessary to discuss other questions which have been raised as to the validity of certain provisions of the Code under the due process clause of the Fifth Amendment.

On both the grounds we have discussed, the attempted delegation of legislative power, and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed.

No. 854—reversed.
No. 864—affirmed.

MR. JUSTICE CARDOZO, concurring.

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 440.

This court has held that delegation may be unlawful though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co.* v. *Ryan, supra.* I thought that ruling went too far. I pointed out in an opinion that there had been "no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases." 293 U. S. at p. 435. Choice, though within limits, had been given him "as to the occasion, but none whatever as to the means." *Ibid.* Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.

I have said that there is no standard, definite or even approximate, to which legislation must conform. Let me make my meaning more precise. If codes of fair competition are codes eliminating "unfair" methods of competition ascertained upon inquiry to prevail in one industry or another, there is no unlawful delegation of legislative functions when the President is directed to inquire into such practices and denounce them when discovered. For many years a like power has been committed to the Federal Trade Commission with the approval of this court in a long series of decisions. Cf. *Federal Trade Comm'n* v. *Keppel & Bro.*, 291 U. S. 304, 312; *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 648; *Federal Trade Comm'n* v. *Gratz*, 253 U. S. 421. Delegation in such circumstances is born of the necessities of the occasion. The industries of the country are too many and diverse to make it possible for Congress, in respect of matters such as these, to legislate directly with adequate appreciation of varying conditions. Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory; it is the *imprimatur* of the President that begets the quality of law. *Doty* v. *Love*, *ante*, p. 64. When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers.

But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though it is one that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry

affected. In that view, the function of its adoption is not merely negative, but positive; the planning of improvements as well as the extirpation of abuses. What is fair, as thus conceived, is not something to be contrasted with what is unfair or fraudulent or tricky. The extension becomes as wide as the field of industrial regulation. If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny.

The code does not confine itself to the suppression of methods of competition that would be classified as unfair according to accepted business standards or accepted norms of ethics. It sets up a comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption. One of the new rules, the source of ten counts in the indictment, is aimed at an established practice, not unethical or oppressive, the practice of selective buying. Many others could be instanced as open to the same objection if the sections of the code were to be examined one by one. The process of dissection will not be traced in all its details. Enough at this time to state what it reveals. Even if the statute itself had fixed the meaning of fair competition by way of contrast with practices that are oppressive or unfair, the code outruns the bounds of the authority conferred. What is excessive is not sporadic or superficial. It is deep-seated and per-

vasive. The licit and illicit sections are so combined and welded as to be incapable of severance without destructive mutilation.

But there is another objection, far-reaching and incurable, aside from any defect of unlawful delegation.

If this code had been adopted by Congress itself, and not by the President on the advice of an industrial association, it would even then be void unless authority to adopt it is included in the grant of power " to regulate commerce with foreign nations and among the several states." United States Constitution, Art. I, § 8, Clause 3.

I find no authority in that grant for the regulation of wages and hours of labor in the intrastate transactions that make up the defendants' business. As to this feature of the case little can be added to the opinion of the court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. Cf. *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system.

To take from this code the provisions as to wages and the hours of labor is to destroy it altogether. If a trade or an industry is so predominantly local as to be exempt

from regulation by the Congress in respect of matters such as these, there can be no "code" for it at all. This is clear from the provisions of § 7a of the Act with its explicit disclosure of the statutory scheme. Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder. A code collapses utterly with bone and sinew gone.

I am authorized to state that MR. JUSTICE STONE joins in this opinion.

LOUISVILLE JOINT STOCK LAND BANK *v.* RADFORD.

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

No. 717. Argued April 1, 2, 1935.—Decided May 27, 1935.

1. The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. P. 589.
2. Under the bankruptcy power, Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts; but it can not take for the benefit of the debtor rights in specific property acquired by the creditor prior to the Act. P. 589.
3. The Fifth Amendment commands that, however great the Nation's need, private property shall not be taken even for a wholly public use without just compensation. P. 602.
4. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public. Pp. 598, 602.
5. The provisions added to § 75 of the Bankruptcy Act by the Act of June 28, 1934, known as the Frazier-Lemke Act, operate, as applied in this case, to take valuable rights in specific property from one person and give them to another, in violation of the Constitution. P. 601.

6. The controlling purpose of this Act is to preserve to the mortgagor the ownership and enjoyment of his farm property. Its avowed object is to take from the mortgagee rights in the specific property held as security; and to that end to scale down the indebtedness to the present value of the property. P. 594.
7. Examination of the measures of relief extended to necessitous mortgagors by courts of equity and by statute, prior to the Frazier-Lemke Act, reveals no instance in which the mortgagee was compelled to relinquish the property to the mortgagor free of the lien unless the debt was paid in full. P. 579.
8. The right of the mortgagee to insist upon full payment before giving up his security has been deemed the essence of the mortgage. To protect this right he is allowed to bid at the judicial sale on foreclosure. Practically all the measures adopted in the States for the mortgagor's relief, including moratorium legislation in the present depression, resulted primarily in a stay, and the relief rested upon the assumption that no substantive right of the mortgagee was being impaired, since payment of the debt with interest would fully compensate him. Cf. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398. P. 580.
9. Although each of our national bankruptcy Acts followed a major or minor depression, none had, prior to the Frazier-Lemke Act, sought to compel a mortgagee to surrender to the bankrupt either the possession of the mortgaged property or the title, so long as any part of the debt remained unpaid, or to supply the bankrupt with capital with which to engage in business in the future, or to disturb even a mortgage of exempt property. P. 581.
10. No other bankruptcy Act has undertaken to modify in the interest of the debtor or of other creditors any substantive right of the holder of any mortgage valid under the federal law. P. 583.
11. In the exercise of the power to marshal liens, sell the property free, and transfer the lienors' rights to the proceeds of sale, there has been no suggestion that the sale could be made to the prejudice of the lienor, in the interest of the debtor or other creditors. P. 584.
12. A sale free from liens in no way impairs any substantive right of the mortgagor, and such a sale is not analogous to the sale to the bankrupt provided for by Paragraph 7 of the Frazier-Lemke Act. P. 585.
13. The provisions of prior bankruptcy Acts concerning compositions afford no analogy to Paragraph 7 of the Frazier-Lemke Act.

Never, so far as appears, has a composition affected a secured claim held by a single creditor. P. 585.

14. Although the original purpose of the bankruptcy Acts was the equal distribution of the debtor's property among his creditors, the power is not so limited; and its exercise has broadened, so that the discharge of the debtor has come to be an object of no less concern than the distribution of his property. P. 587.

15. The Court has no occasion in this case to decide whether the bankruptcy clause confers upon Congress, generally, the power to abridge a mortgagee's rights in specific property, since the Frazier-Lemke Act deals only with mortgages preëxisting. P. 589.

16. A bank, which ten years previously had made a long time loan of $10,000, interest at 6%, secured by mortgages on a Kentucky farm then worth presumably twice that sum, was obliged by defaults to foreclose in a state court. The mortgagor refused the bank's offer to take the farm in satisfaction of the debt, and, before a judicial sale was ordered, he took advantage of the Frazier-Lemke Act, meanwhile enacted, and was adjudged a bankrupt. The bank offered to pay into the bankruptcy court for the property over $9,000, which, if accepted, would have been returned to the bank in satisfaction of the debt; but this was refused. The property was appraised at $4,445. Upon the bank's refusing its assent to a "sale" of the property at that price, by the trustee to the bankrupt, upon the terms specified in Paragraph 3 of the Act, the court, proceeding under Paragraph 7, ordered that for a period of five years all proceedings to enforce the mortgages be stayed; and that the possession of the property remain in the bankrupt, "under control of the court," subject only to the payment of an annual rental to be fixed by the court. The rental for the first year was fixed at $325, but no other provision was made for taxes, insurance, and administrative charges. *Held:*

(1) That the Act as applied had taken from the bank the following property rights recognized under the law of Kentucky governing mortgages, viz.: (a) The right to retain the lien until the indebtedness thereby secured was paid. (b) The right to realize upon the security by a judicial public sale. (c) The right to determine when such sale shall be held, subject only to the discretion of the court. (d) The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair

competitive sale or by taking the property itself. (e) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt. Pp. 590, 594.

(2) No substitute for these rights is to be found in Paragraph 3 of the Act, which provides that at the request of the bankrupt, with the assent of the mortgagee, the trustee may make a "sale" of the property to the bankrupt at its so-called appraised value, in consideration of the bankrupt's implied agreement to pay 2½% within two years, 2½% within three years, 5% within five years, and the balance within six years, with interest on deferred payments at only 1% per annum. P. 591.

(3) No substitute for the rights taken is to be found in Paragraph 7. That section gives the bankrupt, without the mortgagee's consent, full possession for five years, with no monetary obligation beyond paying a reasonable rental fixed by the court. No other provision is made for insurance or taxes; and during the extension the bankrupt has the option of buying the property free, at any time, at its appraised or reappraised value; but he need not buy at all. The mortgagee is not only compelled to submit to the sale to the bankrupt, but to a sale made at such time as the latter may choose. He can not require a reappraisal when, in his judgment, the time comes to sell; he may ask for a reappraisal only if and when the bankrupt requests a sale. P. 592.

(4) While Paragraph 7 declares that the bankrupt's possession is "under the control of the court," this clause gives merely a supervisory power, which leaves the court powerless to terminate the bankrupt's option, unless there has been the commission of waste or failure to pay the prescribed rent. P. 593.

74 F. (2d) 576, reversed.

CERTIORARI, 294 U. S. 702, to review a judgment affirming orders of the District Court in proceedings taken by Radford under the amendment of June 28, 1934, to § 75 of the Bankruptcy Act.

Messrs. John W. Davis and *Wm. Marshall Bullitt*, with whom *Mr. John E. Tarrant* was on the brief, for petitioner.

The Frazier-Lemke Act is not a law "on the subject of bankruptcies"; does not deal with any subject over

which power is delegated to Congress; and is, therefore, in contravention of the Tenth Amendment.

Until this Act, the essential features of bankruptcy law were: First, on the part of the debtor—a surrender of his property and its ratable distribution among his creditors; and, second, on the part of the creditors—discharge of all claims against the debtor after distribution.

If it be that concentrated in the Federal Government is the power to control every situation involving non-paying debtors, then the commercial life of each State is subject, in large measure, to federal regulation; for example, Congress could divest state courts of jurisdiction over suits upon promissory notes between citizens of the same State; commercial controversies arising from breach of contract would fall under a like control; crimes such as the obtaining of goods or credits by false pretenses could be defined as crimes against the United States without regard for the powers reserved under the Tenth Amendment to the several States, and, indeed, the lines between state and federal governments could be largely redrawn. This all-embracing doctrine is without constitutional basis and should not, by this Court's sanction, now be written into the Constitution. *United States* v. *Fox,* 95 U. S. 670.

To effect distribution is the principal object of all bankruptcy laws, see *Straton* v. *New,* 283 U. S. 318, 320; *Bailey* v. *Glover,* 21 Wall. 342, 346; *Mayer* v. *Hellman,* 91 U. S. 496, 501; *Wiswall* v. *Campbell,* 93 U. S. 347, 350; *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300, 307; *Williams* v. *U. S. Fidelity & Guaranty Co.,* 236 U. S. 549, 554; *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 186; *In re California Pacific R. Co.,* Fed. Cas. No. 2,315.

For strong emphasis upon the necessity for distribution, see also *In re Reiman,* Fed. Cas. No. 11,673 at p. 495; *Leidigh Carriage Co.* v. *Stengel,* 95 Fed. 637, 647; *In re Swofford Bros. Dry Goods Co.,* 180 Fed. 549, 556; *In re*

Jordan, Fed. Cas. No. 7,514; *In re Vogler,* Fed. Cas. No. 16,986; 2 Story on the Constitution (5th ed.), § 1106; Levinthal, The Early History of Bankruptcy Law, 66 U. of Pa. L. Rev. at p. 225.

It was never the purpose of the Frazier-Lemke Act to distribute the farmer's assets, but only to scale down his debts, while permitting him to retain his assets. Sen. Rep. on S. 3580, May 28, 1934; H. Rep. on H. R. 9566, May 31, 1934; 78 Cong. Rec., p. 12,297, June 16, 1934.

The Frazier-Lemke Act is bottomed on principles entirely alien to established bankruptcy law. It is specifically directed against mortgagees and other secured creditors, and was enacted for the very purpose of depriving them of the collateral for which they had bargained and of giving it to the farmer-debtor. This is clearly shown by the legislative history of the Act. *In re Bradford,* 7 F. Supp. 665, 675.

The Circuit Court of Appeals erroneously relied upon supposed analogies to (1) the transfer of a creditor's lien to the proceeds of sale, and (2) " compositions " binding non-assenting creditors.

The Frazier-Lemke Act deprived the Land Bank of its property without due process of law by denying the Bank its fundamental right to have the mortgaged property applied to the payment of its debt. The power of Congress to legislate on the " subject of bankruptcies " is subject to the limitations of the Fifth Amendment. *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 192.

The fundamental law vests in a mortgagee the right to have the mortgaged property devoted exclusively to the satisfaction of the mortgage debt.

Congress under the power to pass laws on the subject of bankruptcies, can impair the obligation of contracts—for such is the very essence of bankruptcy law—yet it can not destroy vested rights of property, contrary to the law of the land. *Gunn* v. *Barry,* 15 Wall. 610; *In re Dillard,*

Fed. Cas. No. 3,912; *Loan Association* v. *Topeka,* 20 Wall. 655, 662, 664; *Ochoa* v. *Hernandez,* 230 U. S. 139, 161.

The Frazier-Lemke Act contains provisions so unreasonable, capricious and arbitrary that the Land Bank is deprived of its property without due process of law.

It discriminates between creditors before and after June 28, 1934, and between creditors secured by exempt property and those secured by non-exempt property. It makes no provision for a deficiency claim by the mortgagee against the bankrupt's estate. Interest on the mortgage debt is wiped out save for a negligible amount.

The fixing of the value of the debtor's property by appraisal at its "then fair and reasonable value, not necessarily the market value," is arbirtrary, capricious and unreasonable. All risk of a decline in value is placed on the creditor.

The arbitrary operation of this Act is illustrated by the possibility in many cases of a mortgagee or secured creditor being worse off than the unsecured creditor.

It also discriminates in the method of procedure as to the relative rights of secured and unsecured creditors in electing between (s) (3) and (s) (7); as to the reappraisal provisions; in the absence of any provision for a reappraisal of personal property pledged or unpledged; in its rigid fixation of terms by legislative fiat; in the terms of purchase; and in the terms of possession in interim.

The discrimination between debts contracted prior to June 28, 1934, and debts contracted thereafter is a violation of the due process clause of the Fifth Amendment. *Heiner* v. *Donnan,* 285 U. S. 312. See also *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32; *Bronson* v. *Kinzie,* 1 How. 311.

The Act is a legislative invasion of the judicial power contrary to Art. III, § 2, of the Constitution. *Ogden* v. *Saunders,* 12 Wheat. 213, 365; *Kilbourn* v. *Thompson,*

103 U. S. 168, 192; *Burt* v. *Williams,* 24 Ark. 91; *Riglander* v. *Star Co.,* 98 App. Div. 101, 103, 105, aff'd 181 N. Y. 531; *Bell* v. *Niewahner,* 54 App. Div. 530; *Barnes* v. *Barnes,* 53 N. C. 366, 374.

The Act can not be sustained on any doctrine related to an emergency.

Mr. William Lemke, Special Assistant Attorney General of North Dakota, and *Mr. Harry H. Peterson,* Attorney General of Minnesota, with whom *Mr. P. O. Sathre,* Attorney General of North Dakota, and *Messrs. David A. Sachs, Jr.,* and *Frank Rives* were on the brief, for respondent.

The power of Congress with respect to the "subject of bankruptcies" comprehends everything in the relations of an insolvent debtor and his creditors, extending to his and their relief. *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181; *Sturges* v. *Crowninshield,* 4 Wheat. 122; *In re Klein,* reported in a note to *Nelson* v. *Carland,* 1 How. 265, 277; *Everett* v. *Stone,* 3 Story 446; *In re Reiman,* 7 Ben. 455; *In re Reiman,* 12 Blatch. 562.

Bankruptcy is a legal method of dealing with the problems of the depression. See President Hoover's Message, Feb. 29, 1932, Sen. Doc. 65, 72d Cong., 1st Sess; Report of the Judicial Conference, October 5, 1931. Congress enacted several separate acts each dealing with its special problems arising from this depression. Bankruptcy Act, §§ 74, 75, 75 (s), 76, 77, 77B, 80. Each is part of the Bankruptcy Law; and all are to be construed together as the complete expression of Congress upon the subject of bankruptcy.

By a shift in procedure from mere liquidation, which has proved ruinous because of depression conditions, to composition, extension, reorganization and rehabilitation, attempt is made to protect the creditor to the full value of the bankrupt's estate, to relieve debtors from the terri-

ble burden of debt, and to discharge the debtor in a condition, financial and otherwise, to take his place in his calling or business.

The use of the power to enact laws on the subject of bankruptcies to accomplish these purposes is sustained by the repeated decisions of this Court. *Neal* v. *Clark,* 95 U. S. 704; *United States* v. *Fox,* 95 U. S. 670; *Traer* v. *Clews,* 115 U. S. 528, 541; *Wetmore* v. *Markoe,* 196 U. S. 68, 77; *Burlingham* v. *Crouse,* 228 U. S. 459, 473; *Williams* v. *U. S. Fidelity & Guaranty Co.,* 236 U. S. 549, 554–555; *Maynard* v. *Elliott,* 283 U. S. 273, 277.

Many decisions of this Court emphasize the importance of discharge favorable to resumption of vocation or business. *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181, 192; *Stellwagen* v. *Clum,* 254 U. S. 605, 617; *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 244; *Hardie* v. *Swofford Bros. Dry Goods Co.,* 165 Fed. 588.

The economic conditions and emergency are a sufficient basis for the Act. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 446.

In *Wilson* v. *New,* 243 U. S. 332, this Court held that the great national emergency growing out of a threatened national railway strike justified the enactment of the so-called Adamson Eight Hour Law. Congress may use its powers to legislate for the public welfare. *Reid* v. *Colorado,* 187 U. S. 137; *Lottery Case,* 188 U. S. 321; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Caminetti* v. *United States,* 242 U. S. 470; *Weber* v. *Freed,* 239 U. S. 325; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311; *Brooks* v. *United States,* 267 U. S. 432.

Congress may use both necessary and convenient means; and this is true even though they may partake of other governmental authority, such as the police power. Congress is the sole judge of the means to be used. *Hoke*

v. *United States,* 227 U. S. 308; *Seven Cases* v. *United States,* 239 U. S. 510.

Experience has demonstrated that 5 years is not uncommon for an equity receivership. Also that it takes substantially as long to administer an estate in bankruptcy as an equity receivership. Under the emergency conditions, Congress reasonably believed that bankruptcy cases would not be disposed of as quickly as in normal times.

That a power of such scope is not limited by the extent of its previous exercise, and is not exhausted by a partial exercise, would seem to be self-evident. *Taubel Co.* v. *Fox,* 264 U. S. 426.

That Congress had the power to pass the Frazier-Lemke Amendment to deal with the situation seems to be clear from the nature and the scope of the power itself. *In re Cope,* 8 F. Supp. 778; *In re Landquist,* 70 F. (2d) 929; *Detroit Trust Co.* v. *The Thomas Barlum,* 293 U. S. 23; *Schumacher* v. *Beeler,* 293 U. S. 367.

There is really nothing new in the law in question, except perhaps the application of well settled principles of bankruptcy law in a novel way. It preserves liens; vests title to the bankrupt's property in the trustee; and provides for appraisal.

Section 7 provides for a reappraisal at the request of the lienholder. In such case "the debtor may then pay the appraised price, if acceptable to the lienholder, into the court, otherwise the original appraisal price shall be paid into court." It is clear that this gives the lienholder an option to accept or reject the reappraisal price. With this option he can take advantage of increase in value during the 5 year stay period and can not lose anything by decrease in value during the period. He is protected against loss in value and given the right to increases in value.

All bankruptcy laws provide for conversion of the bankrupt's estate into cash and a distribution of the cash among the creditors as it may appear they are entitled. No law provides that the property as such shall be distributed, or that a creditor has a right to receive the property as such. Even in cases in which he is permitted to enforce his lien in the state courts, the creditor receives the cash proceeds of the sale and not the property. It may be true that he sometimes bids in the property at the sale, but in such cases the bid is for cash and the property applied in payment. *Burlingham* v. *Crouse,* 228 U. S. 459; *Williams* v. *U. S. Fidelity & Guaranty Co.,* 236 U. S. 549, 554–555; *Maynard* v. *Elliott,* 283 U. S. 273, 277.

This law in effect transfers the petitioner's lien from the property to the proceeds of the property, and compels the creditor to pursue his remedy in the bankruptcy court instead of in the state court.

The power to transfer a lien from property to the cash proceeds of a sale is settled, in bankruptcy and in equity. *Van Huffel* v. *Harkelrode,* 284 U. S. 225. See Bankruptcy Form 44, 172 U. S. 709; *First Nat. Bank* v. *Shedd,* 121 U. S. 74, 87; *Mellen* v. *Moline Malleable Iron Works,* 131 U. S. 352, 367; *Taubel Co.* v. *Fox,* 264 U. S. 426, 430–431.

Paragraph 3 is a modified composition. It is purely voluntary on both sides.

Under § 13 of the Act of 1898 the composition is based upon voluntary assent so far as concerns the majority of creditors. It is involuntary in every sense so far as it concerns the minority. They do not have the right to refuse to assent even as the lienholder has under the Frazier-Lemke Amendment, and yet they are bound,—this by the will of other creditors. *Wilmot* v. *Mudge,* 103 U. S. 217; *Cumberland Glass Co.* v. *DeWitt,* 237 U. S. 447;

Nassau Smelting Works v. *Brightwood,* 265 U. S. 269.

In so far as this matter is concerned, the law in question uses an old device of bankruptcy law to bring debtor and creditor together to save the former's property for him. Under the Act of 1898, § 70 (f), title to the property revests in the bankrupt upon the confirmation of the composition provided for in § 12. Under the Frazier-Lemke Act he becomes an owner by purchase, upon payment of the appraised value.

Paragraph 7 is an alternative in case the lienholder refuses his assent to a voluntary sale. First, it gives the bankrupt a right in the nature of an option to repurchase his property at any time within 5 years by payment into court of the appraisal price. Upon such payment by the bankrupt, " the court shall by order turn over full possession and title of said property to the debtor." Secondly, if the bankrupt fails to comply with the provisions of subsection 7, "the court may order the trustee to sell the property as provided in this title." It meets all the requirements of distribution and discharge. It makes certain the liquidation of the estate of the bankrupt so that distribution can be made. It provides for a sale in any event for that purpose. This is the limit of the rights of the creditor in bankruptcy. The time, manner and method of distribution are legislative and must be determined by Congress.

It is contended, however, that the bankrupt is not bound to buy during the time he holds possession, and that the matter of paying the appraisal price into court is purely optional with him. It is said that the Act confers rights and privileges on the bankrupt without imposing a corresponding liability on his part. The matter is purely legislative. In the exercise of admitted power, the legislature may confer such rights and privileges without imposing corresponding liabilities. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398.

Such a stay may be regarded as in aid of making a sale to the bankrupt. Options are commonly used for the purpose of aiding and facilitating sales of property. The delay incident to the stay is no different in its effect from the delay incident to extending credit; yet the latter is a recognized power in bankruptcy administration. In any event, the property is sold. There is authority for holding that the stay in its practical effects is not unlike the credit extended in *Traer* v. *Clews,* 115 U. S. 528. *In re Cope,* 8 F. Supp. 778.

It is the underlying principle of bankruptcy that a debtor may be discharged from his liabilities, after his property has been appropriated by his creditors, without the assent of his creditors. The application of the principle to a lienholder under the provisions of the law here in question is no different from the application of it to minority and non-assenting creditors in cases of composition. *In re Reiman,* 7 Ben. 455; *Wilmot* v. *Mudge,* 103 U. S. 217, 220; *Cumberland Glass Mfg. Co.* v. *DeWitt,* 237 U. S. 447; *Nassau Smelting Works* v. *Brightwood,* 265 U. S. 269; *In re Mirkus,* 289 Fed. 732.

The staying of proceedings in mortgage foreclosure is an appropriate remedy to protect the rights of the mortgagor under a constitutional statute. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398.

It is permissible in bankruptcy to permit the bankrupt to remain in possession of the property. Sometimes this is done in connection with administration until it becomes necessary to assert the rights of the trustee. *In re Reiman, supra; Sparhawk* v. *Yerkes,* 142 U. S. 1, 14; *In re Swofford Bros. Dry Goods Co.,* 180 Fed. 549; *Burlingham* v. *Crouse,* 228 U. S. 459.

There is a special reason why a farmer should be permitted to hold possession under the control of the court. The business which he has to transact is comparatively simple and it is an easy matter for the court to exercise

control and supervision over him. Then there is the fundamental reason: after a farmer is dispossessed he is practically impoverished and destroyed and the purposes of the law will be defeated in such cases.

The sale of the bankrupt's property to the bankrupt has been approved in many cases. *In re Reiman, supra; Traer* v. *Clews,* 115 U. S. 528; *Sparhawk* v. *Yerkes,* 142 U. S. 1, 14; *In re Cope,* 8 F. Supp. 778, 783; *In re Swofford Bros. Dry Goods Co.,* 180 Fed. 549. See *Prevost* v. *Gratz,* 6 Wheat. 481, 513; *Pewabic Mining Co.* v. *Mason,* 145 U. S. 349, 361–362.

In the case of the voluntary proceedings under this law, the arrangement is one for an extension of credit. In the case of the proceedings under § 7, the farmer or bankrupt is given 5 years within which to raise the appraised price of the farm to pay into court to regain full possession and title. This is the equivalent of an extension of credit. This, too, has been commonly resorted to in bankruptcy cases. *In re Reiman, supra; In re Mirkus,* 289 Fed. 732; *Traer* v. *Clews,* 115 U. S. 528; *In re Swofford Bros. Dry Goods Co.,* 180 Fed. 510; 42 C. J. 202; *Lowndes* v. *Chisholm,* 2 McCord's Ch. 455; *Prudential Ins. Co.* v. *Lemmons,* 159 S. C. 121.

The provision for revesting full possession and title in the farmer bankrupt after he has made his payments in full under the Frazier-Lemke Amendment is not a new idea in bankruptcy law. It is used in connection with compositions under § 12 of the Act of 1898.

The Fifth Amendment does not take away any power granted to Congress by the Constitution, though it may in some respect limit the manner in which the power may be exercised. *McCray* v. *United States,* 195 U. S. 27; *Billings* v. *United States,* 232 U. S. 261; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 24–25; *Magnano Co.* v. *Hamilton,* 292 U. S. 40. Under these cases, if the Court finds that the

Frazier-Lemke Amendment is a bankruptcy law, that settles also the question of whether or not it offends against the due process clause of the Fifth Amendment. Cf. *Child Labor Case,* 259 U. S. 20; *United States* v. *Doremus,* 249 U. S. 86; *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181.

If the law does not constitute an exercise of granted power, it is unauthorized by the Constitution and hence invalid. If it does, the Fifth Amendment is inapplicable. *Fox* v. *Standard Oil Co.,* 294 U. S. 87. This, we think, is the true distinction upon which many cases invoking the Fifth Amendment may be distinguished. *Ochoa* v. *Hernandez,* 230 U. S. 139; *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 203; *Loan Assn.* v. *Topeka,* 20 Wall. 655.

The bankruptcy power includes by necessity the power to impair the obligation of contracts. *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181, 188.

The petitioner has no rights in the bankrupt's property as such. In bankruptcy he has a right only to participate in the distribution of the bankrupt's estate after it has been converted into cash. Congress may legislate upon this matter and determine the manner and mode and time of the liquidation.

The bankruptcy proceedings terminate the rights of the parties as between themselves and place the whole matter in administration in bankruptcy. Petitioner claims that the denial of the right to foreclose its mortgage on the bankrupt's property in the state courts is a denial of due process. But enforcement of liens is a bankruptcy matter and Congress can confer jurisdiction on courts of bankruptcy to deal with it. *Van Huffel* v. *Harkelrode,* 284 U. S. 225; *Taubel Co.* v. *Fox,* 264 U. S. 426.

This disposes of petitioner's complaint of loss of interest during the option period and the insufficiency of the rental to pay taxes, insurance and repairs. There might

be some basis for petitioner's claim in ordinary proceedings, but not in bankruptcy. Furthermore, the rental fixed by the court is the compensatory equivalent for any alleged deprivation of the use of property, in the eyes of the law. *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Holding Co.* v. *Feldman; Levy Leasing Co.* v. *Siegel,* 258 U. S. 242; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *People* v. *La Fetra,* 230 N. Y. 429.

The creditor is given the full appraised value of the farm. Thereby nothing is taken from him. The proceedings in this respect constitute due process in ordinary proceedings at law and in equity.

Mr. Edwin A. Krauthoff, with whom *Messrs. Herbert C. Lust, David A. Sachs, Jr.,* and *Frank Rives* were on the brief, for respondent.

The Tenth Amendment has no bearing on the proceeding under review.

A uniform law on the subject of bankruptcies is not limited to a sale of assets, distribution of the proceeds, and dispossession of the debtor. It may include reasonable provisions for a moratorium to the debtor and a repurchase by him of property appertaining to the estate. *In re Landquist,* 70 F. (2d) 729; *In re Chicago, R. I. & P. Ry. Co.,* 72 F. (2d) 443; *In re Jackson,* Fed. Cas. No. 7,124; *Kunzler* v. *Kohaus,* 5 Hill 317; *In re F. A. Hall Co.,* 121 Fed. 992; *Hurley* v. *Devlin,* 151 Fed. 919, 921; *Silverman's Case,* Fed. Cas. No. 12,855; *In re Reiman,* Fed. Cas. No. 11,673; *United States* v. *Pusey,* Fed. Cas. No. 16,098.

The right to repurchase given to a farmer in the Frazier-Lemke Act is an exemption granted by Congress in the exercise of its constitutional powers on that subject. *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181, 186; *In re Smith,* Fed. Cas. No. 12,996; *Hurley* v. *Devlin,* 151 Fed. 919; *In re Reiman,* Fed. Cas. No. 11,675.

The United States is not limited in its enactment of bankruptcy laws to the English model prevailing in 1789.

Whether or not the moratorium or repurchase privileges of the Frazier-Lemke Act are so unreasonable or arbitrary as to violate the Fifth Amendment must necessarily depend upon the economic conditions existing at the time of their enforcement.

Federal courts are bound to take judicial notice of economic conditions. Judicial recognition of economic conditions that inspired this legislation are to be found in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *In re Radford,* 8 F. Supp. 489; *In re Cope,* 8 F. Supp. 778.

Section 75 (s) is a remedial law and as such is to be liberally construed to effect its purpose. *In re Chicago, R. I. & P. Ry. Co.,* 72 F. (2d) 443; *In re Landquist,* 70 F. (2d) 929; *Smith* v. *Smith,* 7 F. Supp. 490.

The Act merely affords to the farmer a "long chance" to reorganize himself. He is afforded no such opportunity as is any other class covered by the bankruptcy law. The purpose is to keep the farmer on his farm.

Interest on a secured claim stops with the filing of the petition in bankruptcy. *Sexton* v. *Dreyfus,* 219 U. S. 339. *In re Chandler,* 184 Fed. 887, 889; *In re Orne,* Fed. Cas. No. 10,581; *In re J. & S. Ferguson & Lyle,* 267 Fed. 817; *In re Vogler,* Fed. Cas. No. 16,986.

But under subdivision (7) a secured creditor will obtain interest. In this respect he is more fortunate than secured creditors under §§ 77 and 77B.

The "reasonable rental" referred to in § 75 (s) (7) requires an act of judicial determination, from all the facts submitted by all interested parties.

It is not unconstitutional to sell, or lease back, to the farmer, his own property.

The subsections relate to proceedings by consent and can raise no constitutional question. Generally speaking, the

lienholder can do what it wishes with its own property. But it is contended that if the lienholder does not consent to the sale, but objects, then it is mandatory upon the court to stay all proceedings for 5 years, and rent the property to the farmer for a "reasonable rental," with an option to purchase his own property at an appraised value, subsequently fixed by the court.

When it is considered that the lienholder has no constitutional right to bid in the property; that he has not even a statutory right at the present time to his lien, aside from the Frazier-Lemke Act, if the court desires to sell the property free of liens; that the lienholder has no constitutional right to interest after the filing of the petition; and that he has not even a statutory right to interest under the present law; it would seem that the constitutionality of the Act is clear, even if every other consideration were swept aside.

What rehabilitates the farmer rejuvenates the Nation.

Emergency calls forth the exercise of dormant power. An emergency is here. There is a distinct menace that ownership of farm lands will pass into the hands of a privileged few—that the owner-farmer will disappear and become a hired hand. If this happens, the Republic, as we know it, and as it was intended to endure, will be at an end.

Reasonable means are such as are adequate to meet the emergency while it is in existence, and which enable the Nation to exist as its founders intended it should.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case presents for decision the question whether sub-section (s) added to § 75 of the Bankruptcy Act [1] by

[1] Section 75 had been added to the Bankruptcy Act on March 3, 1933, by c. 204, 47 Stat. 1470.

the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, is consistent with the Federal Constitution. The federal court for western Kentucky, 8 F. Supp. 489, and the Circuit Court of Appeals for the Sixth Circuit, 74 F. (2d) 576, held it valid in this case; and it has been sustained elsewhere.[2] In view of the novelty and importance of the question, we granted certiorari.

In 1922 (and in 1924) Radford mortgaged to the Louisville Joint Stock Land Bank a farm in Christian County, Kentucky, comprising 170 acres, then presumably of the appraised value of at least $18,000.[3] The mortgages were given to secure loans aggregating $9,000, to be repaid in instalments over the period of 34 years with interest at the rate of 6 per cent. Radford's wife joined in the mortgages and the notes. In 1931 and subsequent years, the Radfords made default in their covenant to pay the taxes. in 1932 and 1933, they made default in their promise to pay the instalments of interest and principal. In 1933,

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[2] *Bradford* v. *Fahey,* 76 F. (2d) 628; *In re Cope* (D. C. Colo.), 8 F. Supp. 778; *Galloway* v. *Union Trust Co.* (D. C. E. D. Arkansas), 9 F. Supp. 575; *In re Plumer* (D. C. S. D. Cal.), 9 F. Supp. 923; *In re Cyr* (D. C. N. D. Ind.), 9 F. Supp. 697; *In re Jones* (D. C. W. Mo.), 10 F. Supp. 165. Compare *In re Bradford,* 7 F. Supp. 665, rev. in *Bradford* v. *Fahey, supra; In re Moore,* 8 F. Supp. 393; *Paine* v. *Capital Freehold Land & Trust Co.,* 8 F. Supp. 500; *In re Miner,* 9 F. Supp. 1; *In re Duffy,* 9 F. Supp. 166; *In re Doty,* 10 F. Supp. 195; *In re Payne,* 10 F. Supp. 649 (holding the Act unconstitutional).

[3] The Bank was organized under the Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360. Section 12 of the Act provided that loans should not exceed 50 per cent. of the value of the land mortgaged and 20 per cent. of the value of permanent insured improvements thereon. The Bank loaned the Radfords $8,000 in 1922 and an additional $1,000 in 1924. The stocks and bonds of the Bank are privately owned. The bonds "being instrumentalities of the Government of the United States" are tax exempt. Compare *Smith* v. *Kansas City Title Co.,* 255 U. S. 180; *Federal Land Bank* v. *Crosland,* 261 U. S. 374; Act of May 12, 1933, c. 25, § 29, 48 Stat. 46.

they made default, also, in their covenant to keep the buildings insured. The Bank urged the Radfords to endeavor to refinance the indebtedness pursuant to the provisions of the Emergency Farm Mortgage Act, May 12, 1933, c. 25, 48 Stat. 41.[4] After they had declined to do so, the Bank, having declared the entire indebtedness immediately payable, commenced, in June, 1933, a suit in the Circuit Court for Christian County against the Radfords and their tenant to foreclose the mortgages; and, invoking a covenant in the mortgage expressly providing therefor, sought the appointment of a receiver to take possession and control of the premises and to collect the rents and profits.

The application for the appointment of a receiver was denied, and all proceedings in the suit were stayed, upon request of the Conciliation Commissioner for Christian County appointed under § 75 of the Bankruptcy Act, as he stated that Radford desired to avail himself of the provisions of that section. Proceeding under it, Radford filed, in the federal court for western Kentucky, a petition

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[4] That Act empowered the Federal Land Banks and the Land Bank Commissioner to lend farmers 75 per cent. of the normal value of their land, at 4½ per cent. interest for the first five years and 5 per cent. thereafter; no repayment of principal to be required for 5 years. Act of May 12, 1933, c. 25, §§ 24, 32, 48 Stat. 43, 48; Act of June 16, 1933, c. 98, § 80, 48 Stat. 273; Act of Jan. 31, 1934, c. 7, § 10, 48 Stat. 347. Mortgage loans made to farmers by the institutions subject to the Farm Credit Administration outstanding June 30, 1934, aggregated $2,029,305,081. As of March 31, 1935, the loans had been increased to $2,661,558,017. Farm Credit Administration, Monthly Reports on Loans and Discounts, March, 1935. "The proceeds of the loans closed [in 1933–34] both by the land banks and by the Land Bank Commissioner were used principally to refinance existing indebtedness. Of the loans closed by the land banks, approximately 86.8 per cent. were used for this purpose, and of those closed by the Commissioner, 92 per cent. were so used." The Farm Real Estate Situation, 1933–34. Circular No. 354 of United States Department of Agriculture, April, 1935, p. 5.

praying that he be afforded an opportunity to effect a composition of his debts. The petition was promptly approved and a meeting of the creditors was held. But Radford failed to obtain the acceptance of the requisite majority in number and amount to the composition proposed. Then, the Bank offered to accept a deed of the mortgaged property in full satisfaction of the indebtedness to it and to assume the unpaid taxes. Radford refused to execute the deed; and on June 30, 1934, the state court entered judgment ordering a foreclosure sale.

Meanwhile, the Frazier-Lemke Act had been passed on June 28, 1934; and on August 6, 1934, and again on November 10, 1934, Radford filed amended petitions for relief thereunder. The second amended petition prayed that Radford be adjudged a bankrupt; that his property, whether free or encumbered, be appraised; and that he have the relief provided for in Paragraphs 3 and 7 of subsection (s) of the Frazier-Lemke Amendment. That Act provides, among other things, that a farmer who has failed to obtain the consents requisite to a composition under § 75 of the Bankruptcy Act, may, upon being adjudged a bankrupt, acquire alternative options in respect to mortgaged property:

1. By Paragraph 3, the bankrupt may, if the mortgagee assents, purchase the property at its then appraised value, acquiring title thereto as well as immediate possession, by agreeing to make deferred payments as follows: 2½ per cent. within two years; 2½ per cent. within three years; 5 per cent. within 4 years; 5 per cent. within 5 years; the balance within six years. All deferred payments to bear interest at the rate of 1 per cent. per annum.

2. By Paragraph 7, the bankrupt may, if the mortgagee refuses his assent to the immediate purchase on the above basis, require the bankruptcy court to

"stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or

any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be made within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, under the provisions of this Act. At the end of five years, or prior thereto, the debtor may pay into court the appraised price of the property of which he retains possession: *Provided,* That upon request of any lien holder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lien holder, into the court, otherwise the original appraisal price shall be paid into court and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this Act: *Provided, however,* That the provisions of this Act shall apply only to debts existing at the time this Act becomes effective."

Answering the amended petition, the Bank duly claimed that the Frazier-Lemke Act is, and the relief sought would be, unconstitutional. It prayed that Radford's amended petition be dismissed; that the Bank be permitted to pursue its remedies in the state court; and that it be allowed to proceed with the foreclosure sale in accordance with the judgment of that court. It refused to accept the composition and extension proposal offered by Radford; declined to consent to the proposed sale of that property to Radford at the appraised value or any value on the terms set forth in Paragraph 3; and also objected to his retaining possession thereof with the privilege of purchasing the same provided by Paragraph 7. The federal court overruled the Bank's objections; denied its prayers; adjudged Radford a bankrupt within the meaning of the Frazier-Lemke Act; and appointed a referee to take proceedings

thereunder. There was no claim that the farm was exempt as a homestead or otherwise.

The referee ordered an appraisal of all of Radford's property, encumbered and unencumbered. The appraisers found that " the fair and reasonable value of the property of the debtor on which Louisville Joint Stock Bank has a mortgage " and also the " market value of said land " was then $4,445.[5] The referee approved the appraisal, although the Bank offered in open court to pay $9,205.09 in cash for the mortgaged property; and counsel for the bankrupt admitted that the Bank had a valid lien upon it for the amount so offered to be paid, and that, under the law, if the Bank's offer to purchase the property were accepted, all the money paid in in cash would be immediately returned to it in satisfaction of the mortgage indebtedness.

The Bank refused to consent to a sale of the mortgaged property to Radford at the appraised value and filed written objections to such sale and to the manner of payments prescribed by Paragraph 3 of sub-section (s). Thereupon, the referee ordered that, for the period of five years, all proceedings for the enforcement of the mortgages be stayed; and that the possession of the mortgaged property, subject to liens, remain in Radford, under the control of the court, as provided in Paragraph 7 of subsection (s). The referee fixed the rental for the first year at $325; and ordered that for each subsequent year the rental be fixed by the court. It was stipulated, that the

[5] The appraisal dated December 1, 1934 recited originally that $4,445 was the " fair and reasonable value," without mentioning the market value. It was, by leave of court, amended on December 4, 1934 to read as stated in the text. Besides the mortgaged property, Radford had a one-half interest in a half-acre lot and house thereon appraised at $150; exempt personal property appraised at $568; and non-exempt personal property at $831.50. The amount of the indebtedness other than to the Bank, and the terms of the composition offered do not appear.

annual taxes and insurance premium amount to $105; and admitted that administration charges said to amount to $22.75 must be paid from the rental. All the orders of the referee were, upon a petition for a review, duly approved by the District Court; and its decree was affirmed by the Circuit Court of Appeals on February 11, 1935.

Since entry of the judgment of the Court of Appeals, this Court has held unconstitutional provisions of state legislation in some respects comparable to the Frazier-Lemke Act. *W. B. Worthen Co.* v. *Kavanaugh, ante,* p. 56. There we said: "With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor"; and, "So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." The Bank insists, among other things, that the Frazier-Lemke Act has been here applied with like result; that the provisions of the Act, even if applied solely to mortgages thereafter executed, would transcend the bankruptcy power; and that, in any event, to apply them to preëxisting mortgages violates the Fifth Amendment of the Federal Constitution. Radford contends that the Frazier-Lemke Act is valid because it is a proper exercise of the power conferred by Article I, § 8 of the Constitution, which declares: "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Before discussing these contentions, it will be helpful to consider the position occupied generally by mortgagees prior to the enactment here challenged.

First. For centuries efforts to protect necessitous mortgagors have been persistent. Gradually the mortgage of real estate was transformed from a conveyance upon condition into a lien; and failure of the mortgagor to pay on the day fixed ceased to effect an automatic foreclosure.

Courts of equity, applying their established jurisdiction to relieve against penalties and forfeitures, created the equity of redemption. Thus the mortgagor was given a reasonable time to cure the default and to require a reconveyance of the property. Legislation in many states carried this development further, and preserved the mortgagor's right to possession, even after default, until the conclusion of foreclosure proceedings.[6] But the statutory command that the mortgagor should not lose his property on default had always rested on the assumption that the mortgagee would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay. No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full.[7]

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[6] See Pomeroy's Equity Jurisprudence, §§ 162–3, 376, 381–2, 1180, 1186–1190, 1219; H. W. Chaplin, The Story of Mortgage Law, 4 Harv. Law Rev. 4; William F. Walsh, Development of the Title and Lien Theories of Mortgages, 9 New York University Law Quarterly Rev. 280.

[7] It is the general rule that a holder of the equity of redemption can redeem from the mortgagee only on paying the entire mortgage debt. *Collins* v. *Riggs,* 14 Wall. 491; *Jones* v. *Van Doren,* 130 U. S. 684, 692; *American Loan & Trust Co.* v. *Atlanta Electric Ry. Co.,* 99 Fed. 313, 315–6; *Lomas & Nettleton Co.* v. *Di Francesco,* 116 Conn. 253, 258; 164 Atl. 495; *Palk* v. *Lord Clinton,* 12 Ves. Jr. 48, 58. The rule is for the protection of the mortgagee, and unless waived by him, applies even when the redeemer has an interest in only part of the mortgaged property. *Bank of Luverne* v. *Turk,* 222 Ala. 549; 133 So. 52; *Quinn Plumbing Co.* v. *New Miami Shores Corp.,* 100 Fla. 413; 129 So. 690; *Shinn* v. *Barrie,* 182 Ark. 366; 31 S. W. (2d) 540. Recognized exceptions to the rule are based on the action of the mortgagee in himself causing the lien on a part of the mortgaged property to be extinguished, *Dexter* v. *Arnold,* 1 Sumner 109, 118; *Welch* v. *Beers,* 8 Allen 151; *George* v. *Wood,* 11

This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage. His position in this respect was not changed when foreclosure by public sale superseded strict foreclosure or when the legislatures of many states created a right of redemption at the sale price. To protect his right to full payment or the mortgaged property, the mortgagee was allowed to bid at the judicial sale on foreclosure.[8] In many states other statutory changes were

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Allen 41; *Meachem* v. *Steele,* 93 Ill. 135; *Coffin* v. *Parker,* 127 N. Y. 117; 27 N. E. 814; or on the right of eminent domain, *Dows* v. *Congdon,* 16 How. Pr. 571; *Mutual Insurance Co.* v. *Easton & Amboy R. Co.,* 38 N. J. Eq. 132. Where the right of redemption after foreclosure sale is based entirely on statute, a different rule may be prescribed. Compare *Northwestern Mutual Life Ins. Co.* v. *Hansen,* 205 Iowa 789; 218 N. W. 502; *Tuttle* v. *Dewey,* 44 Iowa 306; *State* v. *Carpenter,* 19 Wash. 378; 53 Pac. 342; see *Dougherty* v. *Kubat,* 67 Neb. 269, 273; 93 N. W. 317. For collections of cases, see 2 Jones, Mortgages (8th ed. 1928) §§ 1370–1377; 2 Wiltsie, Mortgage Foreclosure (4th ed. 1927) §§ 1196–1213, 1071.

[8] Compare *Pewabic Mining Co.* v. *Mason,* 145 U. S. 349, 361, 362; *Easton* v. *German-American Bank,* 127 U. S. 532; *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587, 590; *Buchler* v. *Black,* 226 Fed. 703; *Caldwell* v. *Caldwell,* 173 Ala. 216; 55 So. 515; *Felton* v. *Le Breton,* 92 Cal. 457; 28 Pac. 490; *Chillicothe Paper Co.* v. *Wheeler,* 68 Ill. App. 343; *Kock* v. *Burgess,* 176 Iowa 493; 156 N. W. 174; 158 N. W. 534; *McNair* v. *Biddle,* 8 Mo. 257; *Stover* v. *Stark,* 61 Neb. 374; 85 N. W. 286; *Paulson* v. *Oregon Surety Co.,* 70 Ore. 175; 138 Pac. 838; *Blythe* v. *Richards,* 10 Serg. & R. 261; *Archambault* v. *Pierce,* 46 R. I. 295; 127 Atl. 146. Some states have abolished by statute the general rule that a mortgagee, exercising a power of sale conferred in the mortgage, may not purchase at his own sale. See *Heighe* v. *Sale of Real Estate,* 164 Md. 259; 164 Atl. 671, 676; *Ten Eyck* v. *Craig,* 62 N. Y. 406, 421; *Galvin* v. *Newton,* 19 R. I. 176, 178; 36 Atl. 3; 2 Wiltsie, Mortgage Foreclosure (4th ed. 1927), § 869.

In England, the power conferred upon the court in foreclosure proceedings, to order a sale, instead of strict foreclosure (15 & 16 Vict., c. 86, § 48; 44 & 45 Vict., c. 41, § 25) will not be exercised over the mortgagee's objection, when the property is not likely to

made in the form and detail of foreclosure and redemption.[9] But practically always the measures adopted for the mortgagor's relief, including moratorium legislation enacted by the several states during the present depression,[10] resulted primarily in a stay; and the relief afforded rested, as theretofore, upon the assumption that no substantive right of the mortgagee was being impaired, since payment in full of the debt with interest would fully compensate him.

Statutes for the relief of mortgagors, when applied to preëxisting mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in *W. B. Worthen Co.* v. *Kavanaugh, ante,* p. 56, when it appeared that this substantive right was substantially abridged. Compare *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426.

Second. Although each of our national bankruptcy acts followed a major or minor depression,[11] none had, prior

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bring the full amount of the mortgage debt, *Merchant Banking Co.* v. *London & Hanseatic Bank,* 55 L. J. Ch. 479; *Provident Clerks' Mutual Assn.* v. *Lewis,* 62 L. J. Ch. 89; at least, not unless security is put up to protect the objecting mortgagee; *Cripps* v. *Wood,* 51 L. J. Ch. 584; or a bidding reserved sufficient to cover the amount due the mortgagee, *Whitfield* v. *Roberts,* 5 Jur. N. S. 113. Compare *Corsellis* v. *Patman,* L. R. 4 Eq. 156; *Wooley* v. *Colman,* L. R. 21 Ch. Div. 169; *Hurst* v. *Hurst,* 16 Beav. 372.

[9] See 3 Jones, Mortgages (8th ed. 1928), c. 30.

[10] See A. H. Feller, Moratory Legislation (1933), 46 Harv. Law Rev. 1061, 1081; Commerce Clearing House, Bank Law Federal Service—"L." Unit—128 C. C. H., pp. 7802–7809.

[11] See John Hanna, Agriculture and the Bankruptcy Act (1934), 19 Minn. Law Review 1. The first Bankruptcy Act, April 4, 1800,

to the Frazier-Lemke amendment, sought to compel the holder of a mortgage to surrender to the bankrupt either the possession of the mortgaged property or the title, so long as any part of the debt thereby secured remained unpaid. The earlier bankruptcy acts created some exemptions of unencumbered property;[12] but none had attempted to enlarge the rights or privileges of the mortgagor as against the mortgagee. The provisions of the acts, so far as concerned the debtor, were aimed 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," and to give him "a new opportunity in life and a clear field for future effort, unhampered by the pressure of discouragement and preëxisting debt." *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 244. No bankruptcy act had undertaken to supply him capital with which to engage in business in the future. Some States had granted to debtors extensive exemptions of unencumbered property from liability to seizure in satisfaction of debts; and these exemptions were recognized by the bankruptcy act of 1867, as well as that of 1898. But unless the mortgagee released his security, in order to prove in bankruptcy for the full amount of the debt, a

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c. 19, 2 Stat. 19, followed the minor depression of 1798. The second Bankruptcy Act, August 19, 1841, c. 9, 5 Stat. 440, followed the severe depression of 1837. The third Bankruptcy Act, March 3, 1867, c. 176, 14 Stat. 517, followed the financial disturbances incident to the Civil War. The fourth Bankruptcy Act, July 1, 1898, c. 541, 30 Stat. 544, followed the depression of 1893. Farmers were first brought within the scope of our bankruptcy laws by the Act of 1841, which made voluntary bankruptcy available to all. In the Act of 1867, farmers were not, as in the Act of 1898, excluded from involuntary bankruptcy.

[12] Act of 1800, c. 19, §§ 34, 35, 2 Stat. 19, 30, 31; Act of 1841, c. 9, § 3, 5 Stat. 440, 443; Act of 1867, c. 176, § 14, 14 Stat. 517, 522.

mortgage even of exempt property was not disturbed by bankruptcy proceedings. *Long* v. *Bullard,* 117 U. S. 617.[13]

No bankruptcy act had undertaken to modify in the interest of either the debtor or other creditors any substantive right of the holder of a mortgage valid under federal law. Supervening bankruptcy had, in the interest of other creditors, affected in some respects the remedies available to lien holders. In *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, where, in a proceeding for reorganization of a railroad under § 77 of the Bankruptcy Act, the District Court was held to have the power to enjoin temporarily the sale of pledged securities, this Court said: "The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. *Straton* v. *New,* 283 U. S. 318, 321, and cases cited." (p. 676.) "The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy." (p. 681.)

Bankruptcy acts had, either expressly, or by implication, as was held in *Van Huffel* v. *Harkelrode,* 284 U. S. 225, 227, authorized the court to direct, in the interest of other creditors, that all liens upon property forming a part of the bankrupt's estate be marshalled; that the property be sold free of encumbrances; and that the

[13] Compare Hook, Does the Frazier-Lemke Amendment Grant Relief as to Debts Secured by Liens on Exempt Property (1934), 11 American Bankruptcy Review 21.

rights of all lienholders be transferred to the proceeds of the sale—a power which "had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure." *First National Bank* v. *Shedd,* 121 U. S. 74, 87; *Mellon* v. *Moline Malleable Iron Works,* 131 U. S. 352, 367. Compare *Ray* v. *Norseworthy,* 23 Wall. 128, 135. But there had been no suggestion that such a sale could be made to the prejudice of the lienor, in the interest of either the debtor or of other creditors. By the settled practice, a sale free of liens will not be ordered by the bankruptcy court if it appears that the amount of the encumbrance exceeds the value of the property.[14] And the sale is always made so as to obtain for the property the highest possible price. No court appears ever to have authorized a sale at a price less than that which the lien creditor offered to pay for the property in cash.[15]

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[14] *Federal Land Bank* v. *Kurtz,* 70 F. (2d) 46; *New Liberty Loan & Savings Assn.* v. *Nusbaum,* 70 F. (2d) 49; *In re American Magnestone Co.,* 34 F. (2d) 681; *In re Fayetteville Wagon-Wood & Lumber Co.,* 197 Fed. 180; *In re Foster,* 181 Fed. 703; *In re Gibbs,* 109 Fed. 627; *In re Cogley,* 107 Fed. 73; *In re Shaeffer,* 105 Fed. 352; *In re Styer,* 98 Fed. 290; *In re Taliafero,* Fed. Cas. No. 13,736 (Chief Justice Waite); see *Kimmel* v. *Crocker,* 72 F. (2d) 599, 601; *In re National Grain Corp.,* 9 F. (2d) 802, 803; *In re Franklin Brewing Co.,* 249 Fed. 333, 335; *In re Roger Brown & Co.,* 196 Fed. 758, 761; *In re Pittelkow,* 92 Fed. 901, 903; *Citizens Savings Bank* v. *Paducah,* 159 Ky. 583, 585; 167 S. W. 870; *Dugan* v. *Logan,* 229 Ky. 5, 12; 16 S. W. (2d) 763. Compare *In re Sloterbeck Chevrolet Co.,* 8 F. Supp. 1023; *In re Carl,* 5 F. Supp. 215; *In re Civic Center Realty Co.,* 26 F. (2d) 825. Where the mortgaged property is sold free of liens for less than the amount of the liens, the bankrupt estate and not the lienholders must bear the costs of the sale. *In re Harralson,* 179 Fed. 490; *In re Holmes Lumber Co.,* 189 Fed. 178, 181. Compare *Rubenstein* v. *Nourse,* 70 F. (2d) 482; *In re Dawkins,* 34 F. (2d) 581.

[15] In English bankruptcy proceedings, where mortgaged property is sold under order of the Commissioners, the mortgagee is permitted to bid, to prevent a sacrifice of the property, sometimes even

Thus, a sale free of liens in no way impairs any substantive right of the mortgagor; and such a sale is not analogous to the sale to the bankrupt provided for by Paragraph 7 of the Frazier-Lemke Act.

Nor do the provisions of the bankruptcy acts concerning compositions afford any analogy to the provisions of Paragraph 7. So far as concerns the debtor, the composition is an agreement with the creditors in lieu of a distribution of the property in bankruptcy—an agreement which "originates in a voluntary offer by the bankrupt, and results in the main, from voluntary acceptance by his creditors." *Nassau Smelting & Refining Works* v. *Brightwood Bronze Foundry Co.,* 265 U. S. 269, 271; *Myers* v. *International Trust Co.,* 273 U. S. 380, 383. So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised by courts of law, *Head* v. *Amoskeag Manufacturing Co.,* 113 U. S. 9, 21; and of admiralty, *The Steamboat Orleans* v. *Phoebus,* 11 Pet. 175, 183. It is the same power, which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of reorganization approved by it as beneficial and assented to by the requisite majority of the creditors. *Shaw* v. *Railroad Co.,* 100 U. S. 605; *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.,* 271 U. S. 445. Compare *National Surety Co.* v. *Coriell,* 289 U. S. 426; *First National Bank* v. *Flershem,* 290 U. S. 504. In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composi-

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without previous leave of court. *Ex parte Ashley,* 3 Deac. & C. 510; *Ex parte Pedder,* 3 Deac. & C. 622; compare *Ex parte Davis,* 3 Deac. & C. 504; *Ex parte Bacon,* 2 Deac. & C. 181; *Ex parte Du Cane,* 1 Buck. 18; *Ex parte Marsh,* 1 Madd. 89.

tion is desired by the requisite majority and is approved by the court.[16] Never, so far as appears, has any composition affected a secured claim held by a single creditor. Compositions are comparable to the voluntary adjustment with the mortgagee provided for in Paragraph 3 of the Frazier-Lemke amendment. They are not analogous to the so-called adjustment compelled by Paragraph 7.

Third. The Bank contends that the Frazier-Lemke Act is void, because it is not a law "on the subject of Bankruptcies"; that it does not deal with that subject; and hence that it is in contravention of the Tenth Amendment, which declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The argument is that the essential features of a bankruptcy law are these: the surrender by the debtor of his property for ratable distribution among his creditors, except so far as encumbered or exempt, and the discharge by his creditors of all claims against the debtor; that, on the other hand, the main purpose, and the effect, of the Frazier-Lemke Act is to prevent distribution of the farmer-mortgagor's property; to enable him to remain in possession despite persisting default; to scale down the mortgage debt; and to give the mortgagor the option to acquire the full title to the property upon paying the reduced amount. Thus, it is urged, the Act effects a fundamental change in the relative rights of mortgagor and mortgagee

[16] The principle of composition was first applied to the interests of secured creditors in their security, by § 74, added to the Bankruptcy Act by Act of March 3, 1933, c. 204, § 1, 47 Stat. 1467 (individual debtors); by § 75, Act of March 3, 1933, c. 204, § 1, 47 Stat. 1470 (agricultural compositions); by § 77, Act of March 3, 1933, c. 204, § 1, 47 Stat. 1474 (railroads engaged in interstate commerce); by § 77B, Act of June 7, 1934, c. 424, § 1, 48 Stat. 912 (corporations); and by § 80, Act of May 24, 1934, c. 345, 48 Stat. 798 (public debtors). The constitutionality of such provision in § 74 was considered in *In re Landquist*, 70 F. (2d) 929, 933.

of real property as determined by the law of the State in which the property is located. The Bank argues that if the bankruptcy clause were construed to permit the making of such fundamental changes Congress could deal with every phase of the relations between an insolvent or non-paying debtor and his creditors; that it might, among other things, divest state courts of jurisdiction over suits upon promissory notes between citizens of the same State; that commercial controversies arising from breach of contract might be brought under like control; that the obtaining of goods or credits by false pretences, for example, could be made a crime against the United States, despite the rule declared in *United States* v. *Fox*, 95 U. S. 670; that the commercial and financial life of each State would be in large measure subject to federal regulation; and that the lines between State and Federal Government could thus be redrawn by Congress.

It is true that the original purpose of our bankruptcy acts was the equal distribution of the debtor's property among his creditors; and that the aim of the legislation was to do this promptly.[17] But, the scope of the bankruptcy power conferred upon Congress is not necessarily limited to that which has been exercised. The first act provided only for compulsory proceedings against traders,

[17] See *Bailey* v. *Glover*, 21 Wall. 342, 346; *Mayer* v. *Hellman*, 91 U. S. 496, 501; *Wiswall* v. *Campbell*, 93 U. S. 347, 350; *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 186; *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; *Williams* v. *U. S. Fidelity & Guaranty Co.*, 236 U. S. 549, 554; *Straton* v. *New*, 283 U. S. 318, 320. Also *In re California Pacific R. Co.*, Fed. Cas. No. 2,315; *In re Jordan*, Fed. Cas. No. 7,514; *In re Reiman*, Fed. Cas. No. 11,673; *In re Vogler*, Fed. Cas. No. 16,986; *Leidigh Carriage Co.* v. *Stengel*, 95 Fed. 637, 647; *In re Swofford Bros. Dry Goods Co.*, 180 Fed. 549, 556; Story on The Constitution (4th ed.) § 1106; Olmstead, Bankruptcy, A Commercial Regulation, 15 Harv. Law Rev. 829; Levinthal, The Early History of Bankruptcy Law, 66 U. of Pa. Law Rev. 223, 225.

bankers, brokers and underwriters. The operation of later ones has been gradually extended so as to include practically all insolvent debtors; to provide for voluntary petitions; and to permit compositions with creditors, even without an adjudication of bankruptcy. The discharge of the debtor has come to be an object of no less concern than the distribution of his property. *Hanover National Bank* v. *Moyses,* 186 U. S. 181. As was said in *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648: "The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution." [18]

It is true that the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none; and that the

[18] The oft-quoted definitions of the bankruptcy power indicate its broad scope. When in *In re Klein* (reported in a note to *Nelson* v. *Carland,* 1 How. 265, 277) the constitutionality of the Bankruptcy Act of 1841 was challenged because it brought within its scope insolvent debtors other than traders and provided for voluntary proceeding, Mr. Justice Catron, sitting in Circuit said: "I hold it [the bankruptcy power] extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress." Judge Blatchford when sustaining the provision for composition in *In re Reiman,* Fed. Cas. No. 11,673, p. 496, said that the subject of bankruptcy cannot properly be defined as "anything less than the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." And Mr. Justice Hunt, sitting in that case, on appeal to the Circuit Court said that "whatever relates to the subject of bankruptcy is within the jurisdiction of congress." Fed. Cas. No. 11,675, p. 501.

Frazier-Lemke Act is the first instance of an attempt, by a bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security. But we have no occasion to decide in this case whether the bankruptcy clause confers upon Congress generally the power to abridge the mortgagee's rights in specific property. Paragraph 7 declares that " the provisions of this Act shall apply only to debts existing at the time this Act becomes effective." The power over property pledged as security after the date of the Act may be greater than over property pledged before; and this Act deals only with preëxisting mortgages. Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.

Fourth. The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.[19] Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. Compare *Mitchell* v. *Clark,* 110 U. S. 633, 643. But the effect of the Act here complained of is not the discharge of Radford's personal obligation.

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[19] For instance, the war power, *Ex parte Milligan,* 4 Wall. 2, 119; *Ochoa* v. *Hernandez,* 230 U. S. 139, 153–4; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 155. The power to tax, *United States* v. *Railroad Co.,* 17 Wall. 322; *Boyd* v. *United States,* 116 U. S. 616; *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Blodgett* v. *Holden,* 275 U. S. 142, 147; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450; *Heiner* v. *Donnan,* 285 U. S. 312, 326. The power to regulate commerce, *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *Joint Traffic Assn.,* 171 U. S. 505, 571; *Carroll* v. *Greenwich Insurance Co.,* 199 U. S. 401, 410; *United States* v. *Lynah,* 188 U. S. 445, 471; *United States* v. *Cress,* 243 U. S. 316, 326. The power to exclude aliens, *Wong Wing* v. *United States,* 163 U. S. 228, 236, 237–8. Compare *Perry* v. *United States,* 294 U. S. 330.

It is the taking of substantive rights in specific property acquired by the Bank prior to the Act. In order to determine whether rights of that nature have been taken, we must ascertain what the mortgagee's rights were before the passage of the Act. We turn, therefore, first to the law of the State.

Under the law of Kentucky, a mortgage creates a lien which may be foreclosed only by suit resulting in a judicial sale of the property. Civil Code of Practice, §§ 375, 376; *Insurance Co. of North America* v. *Cheatham,* 221 Ky. 668, 672; 299 S. W. 545. While mere default does not entitle the mortgagee to possession, *Newport & Cincinnati Bridge Co.* v. *Douglass,* 12 Bush 673, 705, § 299 of the Code provides that, in an action for the sale of mortgaged property a receiver may be appointed if it appears " that the property is probably insufficient to discharge the mortgage debt," *Mortgage Union* v. *King,* 245 Ky. 691; 54 S. W. (2d) 49; and where there is (as here) a pledge in the mortgage of rents, issues and profits, and provision for appointment of a receiver, the mortgagee is entitled as of right to have a receiver appointed to collect them for his benefit, *Brasfield & Son* v. *Northwestern Mutual Life Ins. Co.,* 233 Ky. 94; 25 S. W. (2d) 72; *Watt's Administrator* v. *Smith,* 250 Ky. 617, 630; 63 S. W. (2d) 796. Under § 374 of the Code a sale may be ordered at any time after default. Under Carroll's Stat. (1930), §§ 2362, 2364, there must be an appraisal before the sale; and if the sale brings less than two-thirds of the appraised value the mortgagor may redeem within a year by paying the original purchase money and interest at 10 per cent. But inadequacy of price is not alone ground for setting aside a sale. *Kentucky Joint Land Bank* v. *Fitzpatrick,* 237 Ky. 624; 36 S. W. (2d) 25. No provision permits the mortgagor to obtain a release or surrender of the property before foreclosure without paying in full the indebtedness secured. Nor does any provision prohibit a mortgagee

from protecting his interest in the property by bidding at the foreclosure sale. Thus, the controlling purpose of the law of Kentucky was and is that mortgaged property shall be devoted primarily to the satisfaction of the debt secured; and the provisions of its law are appropriate to ensure that result.

For the rights acquired and possessed by the mortgagee under the law of Kentucky, the Act substituted only the following alternatives:

(A) Under Paragraph 3, the mortgagee may, if the bankrupt so requests, assent to a so-called sale by the trustee to the bankrupt at a so-called appraised value; and upon such assent an implied promise arises to purchase the property on the terms prescribed in that Paragraph. But, the transaction would not confer upon the mortgagee the ordinary fruits of an immediate sale; nor would the agreement of sale, if performed by the bankrupt, result in payment at the appraised value. The mortgagee would not get the ordinary fruits of an immediate sale on deferred payments; for the bankrupt would make no down payment at the time of taking possession and would give no other assurance that the payments promised would in fact be made. And, if all such payments were duly made, the sale would not be at the appraised value; for the value of money (even if there were no risk) is obviously more than one per cent.[20] By restricting, throughout the period of six years, the annual interest on the deferred payments to one per cent., a sale at much less than the appraised value is prescribed. The aggregate payments of principal and interest prescribed would in no year before the end of the sixth be as much

[20] In no state of the Union, in 1921, was the maximum lawful rate of interest less than 6 per cent. per annum; and in only two states was the legal rate as low as 5 per cent. Ryan, Usury and Usury Laws (1924), pp. 28–31. In Kentucky, 6 per cent. is both the legal and the lawful rate. Carroll's Ky. Stat. (1933), §§ 2218, 2219.

as six per cent. on the appraised value.[21] Moreover, before any deferred payment of the purchase price is made, there is serious danger that the Bank's investment might be further impaired. The mortgaged property might be lessened in value by waste. It might become burdened with the liens for accruing unpaid taxes; [22] for, while interest at the rate of 1 per cent. of the appraised value of the Radford farm is $44.45, the present annual taxes (plus insurance premium) are, as stipulated, $105. Thus if the alternative offered by Paragraph 3 were accepted, the transaction would result merely in a transfer of possession to the bankrupt for six years with an otherwise unsecured promise to purchase at the end of the period for a price less than the appraised value.

(B) If the mortgagee refuses to consent to the agreement to sell under Paragraph 3, he is compelled, by Paragraph 7, to surrender to the bankrupt possession of the property for the period of five years; and during those

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[21] The prescribed payment (interest) for the first year is 1 per cent. on the appraised value. The prescribed payment for the second year is 3½ per cent. thereof (1 per cent. for interest, 2½ per cent. on account of principal). The prescribed payment for the third year is 2½ per cent. of the principal and as interest 1 per cent. on 97½ per cent. of the principal. The prescribed payment for the fourth year is 5 per cent. on account of the principal and as interest, 1 per cent. on 95 per cent. of the principal. The prescribed payment for the fifth year is 5 per cent. on account of principal, and as interest, 1 per cent. on 90 per cent. of the principal. The prescribed payment at the end of the sixth year is 85 per cent. of the principal, and as interest 1 per cent. of 85 per cent. of the principal. The present value calculated on a 6 per cent. basis, of all deferred payments (principal and interest) would be only 76.6 per cent. of the appraised value. In other words, the agreement to sell if assented to by the mortgagee would require him to relinquish his security not for its appraised value in cash, but for deferred payments which, if met, would yield (on a 6 per cent. basis) only 76.6 per cent. of the appraised value.

[22] When the decree complained of was issued there had already been defaults in tax payments continuing more than two years. See page 1.

years, the bankrupt's only monetary obligation is to pay a reasonable rental fixed by the court. There is no provision for the payment of insurance or taxes, save as these may be paid from the rental received. During that period the bankrupt has an option to purchase the farm at any time at its appraised, or reappraised, value.[23] The mortgagee is not only compelled to submit to the sale to the bankrupt, but to a sale made at such time as the latter may choose. Thus, the bankrupt may leave it uncertain for years whether he will purchase; and in the end he may decline to buy. Meanwhile the mortgagee may have had (and been obliged to decline) an offer from some other person to take the farm at a price sufficient to satisfy the full amount then due by the debtor. The mortgagee cannot require a reappraisal when, in its judgment, the time comes to sell; it may ask for a reappraisal only if and when the bankrupt requests a sale. Thus the mortgagee is afforded no protection if the request is made when values are depressed to a point lower than the original appraisal. While Paragraph 7 declares that the bankrupt's possession is "under the control of the court," this clause gives merely supervisory power. Such control leaves the court powerless to terminate the option unless there has been the commission of waste or failure to pay the prescribed rent.

[23] This is the construction given to Paragraph 7 by both of the lower courts, by both of the parties in their briefs and oral arguments here, and, so far as appears, by all other courts and judges that have passed upon the Act, except District Judge Lindley, who, in *In re Miner*, 9 F. Supp. 1, held that Paragraph 7, as well as Paragraph 3, was conditioned upon the mortgagee's consent to a sale to the debtor at the appraised value. See also John Hanna, Agriculture and the Bankruptcy Act, 19 Minn. L. Rev. 1, 19, 20; Report of Judiciary Committee, No. 370, p. 2, 74th Congress, 1st Session, April 1, 1935, on H. R. 5452. We refrain from discussing this question of construction as well as some others raised which are deemed unfounded.

Fifth. The controlling purpose of the Act is to preserve to the mortgagor the ownership and enjoyment of the farm property. It does not seek primarily a discharge of all personal obligations—a function with which alone bankruptcy acts have heretofore dealt. Nor does it make provision of that nature by prohibiting, limiting or postponing deficiency judgments, as do some State laws.[24] Its avowed object is to take from the mortgagee rights in the specific property held as security; and to that end "to scale down the indebtedness" to the present value of the property.[25] As here applied it has taken from the Bank the following property rights recognized by the Law of Kentucky:

1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by a judicial public sale.

3. The right to determine when such sale shall be held, subject only to the discretion of the court.

4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the pro-

[24] This has been done by recent state legislation. Compare Arizona, 1933, c. 88; Arkansas, 1933, Act No. 57; see *Adams* v. *Spillyards*, 187 Ark. 641; 61 S. W. (2d) 686; California, 1933, c. 793; Idaho, 1933, c. 150; Kansas, 1935, H. B. 299; Louisiana, 1934, Act No. 28; Minnesota, 1933, c. 339; Montana, 1935, H. B. 16; Nebraska, 1933, c. 41; New Jersey, 1933, c. 22; see *Vanderbilt* v. *Brunton Piano Co.*, 111 N. J. L. 596; 169 Atl. 177; New York, 1933, c. 794; 1934, c. 277; 1935, c. 2; North Carolina, 1933, c. 36; North Dakota, 1933, c. 155; South Carolina, 1933, Act No. 264; South Dakota, 1933, c. 138, 1935, H. B. 109; Texas, 1933, c. 92; see *Langever* v. *Miller*, 124 Tex. 80; 76 S. W. (2d) 1025.

[25] See Senate Report No. 1215 on S. 3580, May 28, 1934, p. 3; House Report No. 1898 on H. R. 9865, June 4, 1934, p. 4, incorporating as a part thereof a memorandum of Representative Lemke.

ceeds of a fair competitive sale or by taking the property itself.

5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

Strong evidence that the taking of these rights from the mortgagee effects a substantial impairment of the security is furnished by the occurrences in the Senate which led to the adoption there of the amendment to the bill declaring that the Act "shall apply only to debts existing at the time this Act becomes effective." The bill as passed by the House applied to both preëxisting and future mortgages. It was amended in the Senate so as to limit it to existing mortgages; and as so amended was adopted by both Houses pursuant to the report of the Conference Committee.[26] This was done because, in the Senate, it was pointed out that the bill, if made applicable to future mortgages, would destroy the farmer's future mortgage credit.[27]

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[26] See Conference Report, June 18, 1934, 73d Cong., 2d Sess., 78 Cong. Rec., pp. 12,376, 12,491.

[27] Senator Bankhead said: "If it applied only to existing mortgages, I should be glad to support it; but here is a program presented, not limited to existing mortgages, but a permanent program for the composition of mortgages. When a farmer goes to his advancing merchant, or goes to his banker, or applies to an insurance company for a loan under this bill, I want to know, and I am enquiring with earnest anxiety about it, what effect is it going to have upon those credit facilities for the farmers of this country." *Id.*, p. 12,074.

Senator Fess: "It does seem to me that we might destroy the credit which he insists the farmers have, because everyone realizes that by the passage of this bill we may be making it impossible for the farmer in the future to borrow money." *Id.*, p. 12,075.

Representative Peyser expressed the same view: "I believe that many of the Members are overlooking a very vital point in connection with this legislation—that is the fact that you are removing from

Sixth. Radford contends that these changes in the position of the Bank wrought pursuant to the Act, do not impair substantive rights, because the Bank retains every right in the property to which it is entitled. The contention rests upon the unfounded assertion that its only substantive right under the mortgage is to have the value of the security applied to the satisfaction of the debt. It would be more accurate to say that the only right under the mortgage left to the Bank is the right to retain its lien until the mortgagor, sometime within the five-year period, chooses to release it by paying the appraised value of the property. A mortgage lien so limited in character and incident is of course legally conceivable. It might be created by contract under existing law.[28] If a part of the mortgaged property were taken by eminent domain a mortgagee would receive payment on a similar basis.[29] But the Frazier-Lemke Act does not purport to exercise the right of eminent domain; and neither the law of Kentucky nor Radford's mortgages contain any provision conferring upon the mortgagor an option to compel, at any time within five years, a release of the farm upon payment of its appraised value and a right to retain meanwhile possession, upon paying a rental to be fixed by the bankruptcy courts.

Equally unfounded is the contention that the mortgagee is not injured by the denial of possession for the five years,

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the farmer the possibility of securing any mortgage assistance in the future. I believe in the enactment of this law and the scaling down of values you are going to take away the possibility of help that may be needed by these farmers in the future." *Id.*, p. 12,137.

[28] Many instances can be found of mortgages which provide that parcels of the mortgaged property shall be released upon payment of fixed amounts or upon payment of their value upon an appraisal therein provided for. See 1 Jones, Mortgages (8th ed. 1928), § 98. Compare *Clarke* v. *Cowan*, 206 Mass. 252.

[29] See 2 Jones, Mortgages (8th ed. 1928), § 843.

since it receives the rental value of the property.[30] It is argued that experience has proved that five years is not unreasonably long, since a longer period is commonly required to complete a voluntary contract for the sale and purchase of a farm; or to close a bankruptcy estate; or to close a railroad receivership. And it is asserted that Radford is, in effect, acting as receiver for the bankruptcy court. Radford's argument ignores the fact that in ordinary bankruptcy proceedings and in equity receiverships, the court may in its discretion, order an immediate sale and closing of the estate; and it ignores, also, the fundamental difference in purpose between the delay permitted in those proceedings and that prescribed by Congress. When a court of equity allows a receivership to continue, it does so to prevent a sacrifice of the creditor's interest. Under the Act, the purpose of the delay in making a sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee.

Home Building & Loan Assn. v. *Blaisdell,* 290 U. S. 398, upon which Radford relies, lends no support to his contention. There the statute left the period of the extension of the right of redemption to be determined by the court within the maximum limit of two years. Even after the

[30] Counsel for the debtor suggests that the reasonable rental provided for in Paragraph 7, is more than the secured creditor ordinarily receives in bankruptcy, since interest on secured as well as unsecured claims ceases with the filing of the petition. But the rule relied upon applies only when the secured creditor, having realized upon his security, is seeking as a general creditor to prove for the deficiency against the bankrupt estate. *Sexton* v. *Dreyfus,* 219 U. S. 339. It has no application when the mortgagee has a preferred claim against proceeds realized by the trustee from a sale of the security free of liens. *Coder* v. *Arts,* 213 U. S. 223, 228, 245, affirming 152 Fed. 943, 950; *People's Homestead Assn.* v. *Bartlette,* 33 F. (2d) 561; *Mortgage Loan Co.* v. *Livingston,* 45 F. (2d) 28, 34.

period had been decided upon, it could, as was pointed out, "be reduced by order of the court under the statute, in case of a change in circumstances, ..." (p. 447); and at the close of the period, the mortgagee was free to apply the mortgaged property to the satisfaction of the mortgage debt. Here, the option and the possession would continue although the emergency which is relied upon as justifying the Act ended before November 30, 1939.[31]

Seventh. Radford contends further that the changes in the mortgagee's rights in the property, even if substantial, are not arbitrary and unreasonable, because they were made for a permissible public purpose. That claim appears to rest primarily upon the following propositions: (1) The welfare of the Nation demands that our farms be individually owned by those who operate them. (2) To permit widespread foreclosure of farm mortgages would result in transferring ownership, in large measure, to great corporations; would transform farmer-owners into tenants or farm laborers; and would tend to create a peasant class. (3) There was grave danger at the time of the passage of the Act, that foreclosure of farms would become widespread. The persistent decline in the prices of agricultural products, as compared with the prices of articles which farmers are obliged to purchase, had been accentuated by the long continued depression and had made it impossible

[31] As by § 75 the petition of the farmer-mortgagor may be filed at any time within five years after March 3, 1933, and the period of the possession and of the option extends for five years, the provision might bar enforcement of an existing mortgage until 1943.

Counsel for Radford contends that the five year provision of Paragraph 7 is not inflexible, because, under the rule of *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, it would cease to be effective on the termination of the emergency which is relied upon to justify the Act. But the Act does not make the five year option period dependent upon the continuance of a national emergency; and the options conferred upon the farmer-owner show that it was the needs of the particular debtor to which consideration was given.

for farmers to pay the charges accruing under existing mortgages. (4) Thus had arisen an emergency requiring congressional action. To avert the threatened calamity the Act presented an appropriate remedy. Extensive economic data, of which in large part we may take judicial notice, were submitted in support of these propositions.

The Bank calls attention, among other things, to the fact that the Act is not limited to mortgages of farms operated by the owners; that the finding of the lower courts that Radford is a farmer within the meaning of the Act does not necessarily imply that he operates his farm; and that at least part of it must have been rented to another, since a tenant is joined as defendant in the foreclosure suit. Section 75 of the Bankruptcy Act (to which this Act is an amendment), provides in sub-section (r) that "the term 'farmer' means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations." Thus, the Act affords relief not only to those owners who operate their farms, but also to all individual landlords the "principal part of whose income is derived" from the "farming operations" of share croppers or other tenants; and, among these landlords, to persons who are merely capitalist absentees.[32]

[32] In 1930, only 56 per cent. of the farm mortgage debt of the country rested on farms operated by their owners. The Farm Debt Problem, Letter from the Secretary of Agriculture, House Doc. No. 9, p. 9, 73d Cong., 1st Sess. Of the landlords of farms throughout the United States: "More than a third are engaged in agricultural occupations, nearly another third are retired farmers, and the remaining third are in non-agricultural occupations, mostly country bankers, merchants and professional men in the country towns and villages who have either come into farm ownership through inheritance or marriage, or have purchased farms for purposes of investment or speculation." Yearbook of Agriculture (1923), p. 538. "Furthermore, the percentage of cases in which landlords were remote from their farms is higher in some of the more recently developed farming regions than

It has been suggested that the number of farms operated by tenants was very large before the present depression; [33] that the increase of tenancy had been progressive for more than half a century; [34] that the increase has not been attributable, in the main, to foreclosures; [35] and that,

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in some of the older farming regions. Thus in eastern North Dakota 40 per cent. of the tenant farms were owned by landlords not residing in the same county and the proportion is nearly as large in central Kansas and in Oklahoma." *Id.*, p. 535.

[33] Of the 6,288,648 farms in 1930, 42.4 per cent. were operated by tenants. The percentage in Kentucky operated by tenants was 35.9 per cent.; in Iowa, 47.3 per cent.; in Georgia, 68.2 per cent. In the South, 1,790,783 families were working as tenant farmers. See Hearings, March 5, 1935, on S. 2367, the Bill to create the Farm Tenant Homes Corporation, pp. 6, 14, 15, 16, 18, 39, 70, 72, 75, and Sen. Rep. 446, 74th Cong., 1st Sess., April 11, 1935.

[34] During the half century prior to the present business depression, every decennial census recorded a progressive increase in farm tenancy. Of the 4,008,907 farms in the United States in 1880, 25.6 per cent. were operated by tenants; of the 6,448,343 farms in 1920, 38.1 per cent. were operated by tenants. Farm Tenure, Census of 1920, Agriculture, Vol. V, p. 133, T. 11. The percentage of improved farm land operated by owners in 1920 was only 46.8. Farm Ownership & Tenancy, Yearbook of Agriculture (1923), p. 509.

[35] "Causes underlying this upward trend of tenancy are complex and obscure. The trend has apparently continued through the various shades of adversity and prosperity. Farms operated by managers are not classed with tenancy. As has been pointed out before, the best, most productive lands have the greatest tenancy. Apparently tenancy does not thrive on poor lands. It is hardly thinkable that high productiveness is a result of tenancy. It is a fact, however, that the largest up-trend in the yield of corn per acre is in the area of greatest tenancy." Iowa Year Book of Agriculture (1931), p. 349. In Iowa, 1927, tenant operated acres were 53.9 per cent. of the total acres in farms. In 1930 the percentage was 54.8; in 1931, it was 55.4. In 1932 it was 57.7; in 1933, 58.6. *Id.* (1932) p. 168; (1933) p. 213. See also Yearbook of Agriculture (1923), pp. 539–547; Turner, Ownership of Tenant Farms in the United States. Bull. No. 1432, and Ownership of Tenant Farms in North Central States, Bull. No. 1433, U. S. Dep't of Agriculture (1926).

in some regions, the increase in tenancy has been marked during the period when farm incomes were large and farm values, farm taxes and farm mortgages were rising rapidly.[36]

We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the Act. Nor need we consider the occupations of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, shows that the gravity of the situation has been appreciated.[37] The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare *Ochoa* v. *Hernandez,* 230 U. S. 139, 161; *Loan Association* v. *Topeka,* 20 Wall. 655, 662, 664; *In re Dillard,* Fed. Cas. No. 3,912, p. 706. As we conclude that the Act as applied has done so, we must

[36] "The increase in tenancy in the West North Central States is without doubt the result of the price situation. Land bought in the period of high prices could not be paid for, with the result that it is now operated by tenants." Yearbook of Agriculture, 1932, p. 494. From 1910 to 1920, farm mortgage debt increased from $3,320,470,000 to $7,857,700,000. See The Farm Debt Problem, House Doc. No. 9, p. 5, 73d Cong., 1st Sess. In 1910 the total acreage of farm land was 878,798,325; in 1920, it was 955,883,715. Census of 1920, Agriculture, Vol. V, p. 32, T. 3. The greatly increased local tax rate, in connection with increased land values, has been suggested as being an important cause of increasing farm tenancy. Hearings on S. 2367, p. 16. The average value of farm property per acre in 1880, was $22.72; in 1920, $81.52; in 1930, $58.01. Census of 1930, Agriculture, Vol. II, p. 10, T. I. Farm property taxes in 1910 amounted to approximately $268 millions; in 1920, to $452 millions; in 1932, to $629 millions. See The Farm Debt Problem, *supra,* p. 21.

[37] See Note 4.

hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

Reversed.

HUMPHREY'S EXECUTOR *v.* UNITED STATES.*

CERTIFICATE FROM THE COURT OF CLAIMS.

No. 667. Argued May 1, 1935.—Decided May 27, 1935.

1. The Federal Trade Commission Act fixes the terms of the Commissioners and provides that any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. *Held* that Congress intended to restrict the power of removal to one or more of those causes. *Shurtleff* v. *United States,* 189 U. S. 311, distinguished. Pp. 621, 626.
2. This construction of the Act is confirmed by a consideration of the character of the Commission—an independent, non-partisan body of experts, charged with duties neither political nor executive, but predominantly quasi-judicial and quasi-legislative; and by the legislative history of the Act. P. 624.
3. When Congress provides for the appointment of officers whose functions, like those of the Federal Trade Commissioners, are of legislative and judicial quality, rather than executive, and limits the grounds upon which they may be removed from office, the President has no constitutional power to remove them for reasons other than those so specified. *Myers* v. *United States,* 272 U. S. 52, limited, and expressions in that opinion in part disapproved. Pp. 626, 627.

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* The docket title of this case is: *Rathbun, Executor,* v. *United States.*

The *Myers* case dealt with the removal of a postmaster, an executive officer restricted to executive functions and charged with no duty at all related to either the legislative or the judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate he is. That decision goes no farther than to include purely executive officers. The Federal Trade Commission, in contrast, is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the Government. Pp. 627–628.

4. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. P. 629.
5. The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. P. 629.
6. Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office. To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and the present decision that such power does not extend to an office

such as that here involved, there shall remain a field of doubt, such cases as may fall within it are left for future consideration and determination as they may arise. P. 631.

7. While the general rule precludes the use of congressional debates to explain the meaning of the words of a statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. P. 625.
8. Expressions in an opinion which are beyond the point involved do not come within the rule of *stare decisis*. P. 626.

CERTIFICATE from the Court of Claims, propounding questions arising on a claim for the salary withheld from the plaintiff's testator, from the time when the President undertook to remove him from office to the time of his death.

Mr. Wm. J. Donovan, orally (*Messrs. Henry Herrick Bond* and *Ralstone R. Irvine* were with him on the brief) for Humphrey's Executor.

It is our position that § 1 of the Act evidences, under the rule *expressio unius,* the purpose of Congress to limit the power of the President to remove except for the causes stated, and then only with notice and hearing.

There is an important distinction between this Act and the one in *Shurtleff* v. *United States,* in that this Act specifies the tenure of office. The failure of the Customs Administrative Act so to specify was cited in the earlier case as a controlling reason why this Court would not impute an intention of Congress to limit the President's power of removal. This Court pointed out that in the absence of such a limitation, the incumbent would hold office during life. The reason which this Court gave for its construction of the language in that Act is therefore entirely absent in § 1 of the Federal Trade Commission Act.

Congress specifically provided that the Federal Trade Commissioners shall " continue in office for their respective terms." The Government contends that this

language applies only to the first Commissioners and that the phrase is an expression of style without legal significance. It does seem to me that the fair intendment of that phrase was to apply not to a particular category of Commissioners but to all Commissioners who would serve, and this fact of continuance in office with a fixed tenure is a fundamental distinction between this case and the *Shurtleff* case.

An examination of the debates taking place during the consideration of the Federal Trade Commission Act will show that the *Shurtleff* case was never mentioned. The Customs Administrative Act was never referred to. As a matter of fact, the debates in Congress and the reports of the committees bearing upon the Federal Trade Commission Act show that the phrase "inefficiency, neglect of duty and malfeasance in office" was taken directly from the Interstate Commerce Act, which was passed sixteen years before the *Shurtleff* case was decided.

The Government says that the Federal Trade Commission and the Board of General Appraisers are not so unlike in nature as to call for a departure from the construction given in the *Shurtleff* case to the words in question, and that the two agencies are, in fact, strikingly similar in the relevant essentials of organization and functions.

However true that statement may be as to the present set-up of the Customs Court, it certainly is not an accurate statement of the situation as it existed at the time of the *Shurtleff* case; the legislative history of that Act shows this.

The Act of 1851 created 4 additional appraisers, whose duty it was to go from port to port to aid local appraisers in maintaining uniform appraisements throughout the country. They were removable at will by the President and were subordinate to and were regulated by the Secretary of the Treasury. The Customs Administrative Act,

1890, merely added to the functions previously performed by the general appraisers, the function of acting as a board of three to re-determine valuations made by a single appraiser. They were described in the Senate as taxing officers who had only the functions of such taxing officers—a purely executive office. The general appraisers were not to constitute an independent body. They were still subject to regulation by the Treasury; and the debates indicate no purpose to make their office more permanent in its nature than it had been before.

It was not until 1908 that the Board of General Appraisers was set up as an independent body, and it was not until 1926 that it was set up as a Court of Customs. Now, in contrast with the function of the general appraisers at the time of the *Shurtleff* case, that of the Federal Trade Commissioners is totally different.

As appears from the debates leading to the adoption of the Federal Trade Commission Act, it was intended to make this Commission independent of the Chief Executive. This Commission took over the duties of the Commissioner of Corporations. The duties of the Commissioner of Corporations were to inquire into the interstate activities of corporations and combinations and to report to the President.

In enacting the Federal Trade Commission Act, the proponents of the bill expressly declared that the President's domination of the Commissioner of Corporations had made that office ineffective for the purposes for which it was created. This is made clear in the report to the House by the author of the bill and chairman of the subcommittee of the House Interstate and Foreign Commerce Committee that had prepared it. He pointed out that in order to give dignity and standing to the Commission the bill was designed to confer upon it independent power and authority, and to do that it removed entirely from the control of the President and the Secretary of Com-

merce the investigations conducted by the Bureau of Corporations or the Commissioner of Corporations.

Again, the chairman of the Senate Interstate Commerce Commission, and the report of his Committee to the Senate, indicate the purpose to keep it free from the executive department of the Government and more particularly the office of the Attorney General. Sen. Rep. No. 597, 63d Cong., 2d Sess.

Up to now, I have been attempting to arrive at the intention of Congress by an examination of the debates and by an examination of the language of § 1, in which the words of limitation are used. But an examination of the Act in its entirety indicates that Congress intended the Commission to be free from the domination of the President because the duties and function of the Federal Trade Commission are inconsistent with an unrestricted power of removal in the President.

When acting as a Master in Chancery, it is clear that the Federal Trade Commission is acting as an agency of the Federal Court. Giving the President the unrestricted power of removal of the Federal Trade Commissioners would confer upon him the power to dominate that agency. Even when acting as a Master in Chancery, it should report a form of decree that is pleasing to him. However much it may be urged that such power should exist in the case of executive officers, it certainly was not the intention that such power should exist to control an agent of the court.

Under § 6 of the Act, the Federal Trade Commission has the duty to make certain investigations at the instance of Congress, to report its findings to Congress, to make special and annual reports to Congress and to submit recommendations for additional legislation. In making these reports, the Commission acts as an agency of Congress. This work undertaken by the Federal Trade Commission as a direct agent of Congress is perhaps the

most important single function performed by the Commission. The value of this work is directly dependent upon the maintenance of the Commission as an independent body.

The Government says that the power of removal is an executive function. They go to the point of asserting that this is unrestricted.

We say that the *Myers* case did not undertake to decide this question and that the Congress has the power to enact legislative standards for removal as well as for appointment, such standards to be applied by the President in the exercise of his executive power.

All legislative power given to the Federal Government is vested in the Congress. In this instance it has seen fit, in the Federal Trade Commission Act, to deal with unfair methods of competition in Commerce. This Court has held that it has the power to deal with such acts. It has also attempted to create an agency to aid the legislature in the preparation of legislation. There can be no doubt of the power of the legislative body to create such agencies as are necessary properly to advise it of facts that may be in aid of legislation. Consequently, there can be no doubt in this case that Congress had the right to create the Federal Trade Commission. This Court has held that it has that right. Since Congress has the right to legislate in this field, the Constitution specifically gives the Congress the power to pass all laws that are necessary and proper to carry out its purpose. Congress has believed that the success of the Federal Trade Commission Act is dependent upon maintaining the Commission as an independent body. To achieve this result they have attempted to place restrictions upon the President's power to remove without cause.

And, in limiting this power of removal, Congress has not infringed upon the constitutional powers of the President. Here it does not seek to participate in the execu-

tive power of removal. The executive act of removal remains in the President. Congress has merely enacted a legislative standard.

The fact that the Congress has repeatedly limited the President's freedom of choice in making nominations of executive officers has often been pointed out to this Court. These restrictions or limitations have been of different kinds and different forms. See dissenting opinion of Mr. Justice Brandeis in the *Myers* case, *supra.*

The enactment of a legislative standard to be met by appointees of the President has always been regarded both by the courts and the President as a legislative and not an executive function. No court has ever held that the enactment of such a legislative standard to be followed by the President in making nominations is an invalid limitation upon the appointing power of the Executive. And this in spite of the fact that the power of appointment is expressly vested in the President. The power of removal is not expressly vested. It is implied from his power as an executive and more particularly from his express power of appointment. Surely an implied power is no greater than one expressly conferred. It would seem that as Congress may limit the class from which appointments shall be made so also it could define the causes for removals.

The sole question determined in the *Myers* case was that Congress could not compel the President to *share* with the Senate his power to remove executive officers. The power of removal is exclusively an executive function and Congress of course has no authority to appropriate to itself a power given exclusively to the President.

This fundamental distinction between the *Myers* case and the enactment of a legislative standard which the President must follow in the exercise of his exclusive power of removal was expressly recognized by counsel for

the United States in the argument in the *Myers* case. Solicitor General Beck, pages 88 to 98.

In this case the Government changes its position and says: "A limitation of the grounds of removal is at least as substantial an interference with the executive power as is a requirement that the Senate participate in the removal." This is not so. If the Senate participates it can prevent removal regardless of the merit of the case. But where, as here, the President alone has the power to remove, any legislative standard must be reasonable in view of the nature and function of the office affected.

In the *Myers* case, this Court reviewed at length the debates in the First Congress in connection with the "Decision of 1789." It found that those debates and that decision constituted a declaration by Congress that the President and not the legislature had the power to remove an executive officer. We submit that a further examination of those debates will disclose that the extent to which Congress may restrict the President's power to remove other than purely executive officers is dependent upon the nature and function of the office involved.

From these debates it is clear that a very definite factor in the minds of many sponsors of the bill before the first Congress was the fact that the nature and function of the office of the Secretary of Foreign Affairs were politically executive. With respect to such an executive officer it was their view that the President and not the Congress had the power of removal.

The significance of the distinction is this: While Congress has power to create an executive political office, control of that office should be in the hands of the President in order not to circumscribe the power of the President to control his agents. But in the case of an office such as the Federal Trade Commission, the nature of which

is not political, the function of which is quasi-judicial and quasi-legislative, in order to safeguard its independence of political domination it is necessary and proper to enact legislative standards which the President must follow.

This distinction between such executive officers and other officers of the Government was expressly recognized by James Madison who was the leader in the debate in 1789. 1 Annals of Congress, Col. 611–612, 613, 614. See *Marbury* v. *Madison,* 1 Cranch 137, 161; *Matter of Hennen,* 13 Pet. 230, 260; *U. S. ex rel. Goodrich* v. *Guthrie,* 17 How. 284; *McAllister* v. *United States,* 141 U. S. 174; *United States* v. *Perkins,* 116 U. S. 483; *Blake* v. *United States,* 103 U. S. 227; *Wallace* v. *United States,* 257 U. S. 541; *Shurtleff* v. *United States,* 189 U. S. 311; *Reagan* v. *United States,* 182 U. S. 419; *Embry* v. *United States,* 100 U. S. 680; *McElratt* v. *United States,* 102 U. S. 426.

The assumption made in the *Shurtleff* case, *supra,* that Congress can compel the President to afford notice and hearing if he chooses to remove for causes stated in the statute, is a refutation of the Government's argument that the President's power cannot be limited in any respect. Once you concede the validity of the restriction of notice and hearing, the rest is a matter of degree. The question is whether the restriction is necessary and proper to achieve the legislative purpose of Congress. I submit that the value of the Federal Trade Commission is dependent upon its independence of executive control. Otherwise it would be in the status of the Bureau of Corporations, the essential weakness of which was executive control. To insure that independence, it is necessary and proper to provide that Commissioners should be removed only for inefficiency, neglect of duty or malfeasance in office. And such a restriction, as Mr. Madison suggests, is within the spirit of the Constitution.

Solicitor General Reed, with whom *Assistant Attorney General Sweeney* and *Messrs. Paul A. Sweeney* and *M. Leo Looney, Jr.,* were on the brief, for the United States.

Section 1 of the Federal Trade Commission Act does not deprive the President of the power to remove a Commissioner except for inefficiency, neglect of duty, or malfeasance in office. *Shurtleff* v. *United States,* 189 U. S. 311, determined the meaning of identical language contained in a similar statute. The same language is to be found in the Acts creating the Interstate Commerce Commission (Feb. 4, 1887, c. 104, § 11, 24 Stat. 379, 383), the United States Shipping Board (Sept. 7, 1916, c. 451, § 3, 39 Stat. 728, 729), and the United States Tariff Commission (Sept. 8, 1916, c. 463, § 700, 39 Stat. 756, 795).

The opinions in *Myers* v. *United States,* 272 U. S. 52, make it clear that the rule of construction announced in the *Shurtleff* case is controlling with respect to the Federal Trade Commission Act. See 272 U. S., at pp. 171–172, 262, n. 30.

The Federal Trade Commission Act was enacted in 1914, containing language identical with that which had been construed in the *Shurtleff* case. In adopting the language used in the earlier Act, Congress must be considered to have adopted also the construction given by this Court to that language and to have made it a part of the enactment.

Five years after the decision in the *Shurtleff* case, the Customs Administrative Act, there involved, was amended to provide that a General Appraiser could be removed for inefficiency, neglect of duty, or malfeasance in office, "and no other" cause. C. 205, 35 Stat. 403, 406. The history of this amendment reveals that it was adopted in order to change the meaning of the Act as previously construed by this Court.

In a number of other statutes as well, Congress has attempted by explicit language to limit the removal power

to specified causes and no others. They include the Acts creating a Commissioner of Mediation and Conciliation (c. 6, § 11, 38 Stat. 103, 108); the Board of Tax Appeals (c. 234, § 900 (b), 43 Stat. 253, 336); the Railroad Labor Board (c. 91, § 306 (b), 41 Stat. 456, 470); the United States Coal Commission (c. 248, § 1, 42 Stat. 1446); the Board of Mediation (c. 347, § 4, 44 Stat. 577, 579); and the National Mediation Board (c. 691, § 4, 48 Stat. 1193).

In the Federal Trade Commission Act, the provision that each Commissioner shall " continue in office " for the term specified, is used only with reference to the " first Commissioners." As to their " successors," the Act provides simply that they " shall be appointed for terms of seven years." The phrase " continue in office," applying as it does only to the original appointees, is obviously an expression of style without legal significance. The term prescribed is not a grant of tenure but a limitation. *Parsons* v. *United States,* 167 U. S. 324; *Burnap* v. *United States,* 262 U. S. 512, 515.

The specification of certain grounds for removal may serve to indicate a policy regarding the holding of office, guiding but not limiting the President's discretion in exercising the removal power. In addition, the specification has the effect of requiring notice and hearing if an officer is removed for one of the causes designated. *Shurtleff* v. *United States,* 189 U. S. 311, 317.

Statutes not infrequently enumerate powers which are not intended to be exclusive. *Springer* v. *Philippine Islands,* 277 U. S. 189, 206; *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648.

It is true, as the legislative history of the Act indicates, that the Commission was intended to be or to become an experienced and informed body, free from certain of the handicaps that were deemed to inhere in departmental

organization. But there is nothing in the language or the legislative history of the Act to suggest that these purposes were thought to require a limitation of the removal power to the causes named. Nor are the Federal Trade Commission and the Board of General Appraisers so unlike in nature as to call for a departure by the Court from the construction given in the *Shurtleff* case to the words in question. The two agencies are, in fact, strikingly similar in the relevant essentials of organization and functions.

The Act of 1890 provided for "general appraisers," from whose decisions appeals lay to a board consisting of three of the general appraisers; and from the decisions of the board an appeal could be taken to a circuit court. The general appraisers were authorized to administer oaths and to cite persons to appear before them. Not more than five of the nine general appraisers could be members of the same political party. The board of general appraisers has been characterized as a tribunal clothed with judicial power to determine the classification of imported goods and the duties which should be imposed thereon. *United States* v. *Kurtz,* 5 Ct. Cust. App. 144, 146; *Marine* v. *Lyon,* 65 Fed. 992, 994; compare *United States* v. *Lies,* 170 U. S. 628, 636. The nature of its functions is revealed by the fact that in 1926 the name of the board of general appraisers was changed to the United States Customs Court. Act of May 28, 1926, c. 411, 44 Stat. 669.

The independence which Congress sought for the Federal Trade Commission does not depend upon an implied limitation of the removal power such as that contended for by the plaintiff. The Commission was left free from the continuing supervision of a departmental head; its membership was required to represent more than one political party; and the terms of its members were arranged to expire at different times. In later Acts creating similar commissions, these factors alone have apparently been deemed sufficient to secure the objective of an inde-

pendent body. Compare, for example, the Acts creating the United States Employees' Compensation Commission (c. 458, 39 Stat. 742); the Federal Radio Commission (c. 169, 44 Stat. 1162); the Federal Power Commission (c. 572, 46 Stat. 797); The Federal Home Loan Bank Board (c. 522, § 17, 47 Stat. 725, 736); the Securities and Exchange Commission (c. 404, § 4, 48 Stat. 885); and the Federal Communications Commission (c. 652, § 4, 48 Stat. 1066). Each of these Acts provides that not more than a bare majority of the members of the Commission shall belong to the same political party; and each provides that the members of the Commission shall have overlapping terms. In none of these Acts did Congress impose any limitation on removal. The effect of this omission is that the power of removal is unrestricted, since the power to remove, at least in the absence of constitutional or statutory provision, is an incident of the power to appoint. *Parsons* v. *United States,* 167 U. S. 324; *Burnap* v. *United States,* 252 U. S. 512, 515; *Wallace* v. *United States,* 257 U. S. 541, 544. Whatever the reason for the omission in these Acts, it is clear at all events that it was not regarded as nullifying the other safeguards of independence which are included in these Acts as in the Federal Trade Commission Act.

It is submitted, therefore, that it is a settled rule of construction that the mere statutory enumeration of causes for which an appointee may be removed does not confine the exercise of the President's power to removal for one or more of those causes; that there is nothing in the language or history of the Federal Trade Commission Act to suggest that Congress departed from this established meaning.

The construction for which the plaintiff contends not only is at variance with the applicable decisions of this Court, but raises constitutional questions of a serious nature. In the case at bar such a construction "should

not be made in the absence of compelling language." *Missouri Pacific R. Co.* v. *Ault,* 256 U. S. 554, 559.

If the Court should be of the opinion that § 1 of the Federal Trade Commission Act deprives the President of the power to remove a Commissioner except for one or more of the causes stated, we submit that the provision is unconstitutional. *Myers* v. *United States,* 272 U. S. 52, 172.

A statute limiting the President's removal power to removal for certain causes is as unwarranted an interference with the executive power as is a statute requiring participation by the Senate in a removal. Participation by the Senate in removal is closely allied with the necessity of securing its advice and consent for the appointment of a successor to the officer removed. In fact, Senatorial approval of a subsequent appointment is regarded as tantamount to approval of the removal. *Wallace* v. *United States,* 257 U. S. 541; 258 U. S. 296. No such merging of Senatorial functions characterizes the requirement that the President may remove for certain causes only. The power of the President to remove an officer in whom he does not have adequate confidence is effectively thwarted, and the consent of the Senate to the appointment of a qualified successor is of no avail.

If Congress can provide that the President may remove only for inefficiency, neglect of duty, or malfeasance in office, it presumably could provide that he might remove only for malfeasance in office or only for neglect of duty. The result would be that the President would have no power, even with the aid of the Senate, to remove an admittedly inefficient officer in the executive branch of the Government.

Faithful execution of the laws may require more than freedom from inefficiency, neglect of duty, or malfeasance in office. Particularly in the case of those officers entrusted with the task of enforcing new legislation, such

as the Securities Act of 1933, which embodies new concepts of federal regulation in the public interest, faithful execution of the laws may presuppose wholehearted sympathy with the purposes and policy of the law, and energy and resourcefulness beyond that of the ordinarily efficient public servant. The President should be free to judge in what measure these qualities are possessed and to act upon that judgment. *Myers* v. *United States,* 272 U. S. 52, 135.

The so-called legislative functions performed by the Federal Trade Commission do not differ in nature from those performed by the regular executive departments. Reports to Congress on special topics are made by the Commission; but such reports are likewise made by the heads of departments.

The Federal Trade Commission is not a judicial tribunal. *Federal Trade Comm'n* v. *Eastman Kodak Co.,* 274 U. S. 619, 623. We need not consider, therefore, whether the President's power to remove a judge of a court not established under Art. III of the Constitution may be restricted by Congress. Cf. *McAllister* v. *United States,* 141 U. S. 174.

The so-called quasi-judicial functions of the Commission are not different from those regularly committed to the executive departments. Functions so committed include the determination of a wide range of controversies respecting such important matters as immigration, *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329; internal revenue and customs duties, *Blair* v. *Oesterlein Machine Co.,* 275 U. S. 220; *Louisiana* v. *McAdoo,* 234 U. S. 627; public-land claims, *United States* v. *Hitchcock,* 190 U. S. 316; pension claims, *Decatur* v. *Paulding,* 14 Pet. 497; use of the mails, *Houghton* v. *Payne,* 194 U. S. 88; practices at stockyards, *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; trading in grain futures, *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1.

It cannot be questioned that the head of a department, however numerous or important may be his functions of this kind, is subject to removal by the President without limitation by Congress, under the decision in the *Myers* case, *supra*. An attempt to distinguish, in respect of the President's removal power, between various administrative agencies would logically require distinctions also between the same agency at different times.

Mr. Justice Sutherland delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3 (a), c. 229, 43 Stat. 936, 939; 28 U. S. C. § 288), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground " that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to con-

sult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming and saying:

"You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign; and on October 7, 1933, the President wrote him:

"Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,' restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

The Federal Trade Commission Act, c. 311, 38 Stat. 717; 15 U. S. C. §§ 41, 42, creates a commission of five

members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides:

"Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. . . ."

Section 5 of the act in part provides:

"That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate circuit court of

appeals for its enforcement. The party subject to the order may seek and obtain a review in the circuit court of appeals in a manner provided by the act.

Section 6, among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Section 7 provides:

"That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

First. The question first to be considered is whether, by the provisions of § 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in *Shurtleff* v. *United States,* 189 U. S. 311. That case involved the power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Section 12 of the act provided for the appointment by the President, by and with the advice and con-

sent of the Senate, of nine general appraisers of merchandise, who "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court Shurtleff relied upon the maxim *expressio unius est exclusio alterius*; but this court held that, while the rule expressed in the maxim was a very proper one and founded upon justifiable reasoning in many instances, it "should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner." What the court meant by this expression appears from a reading of the opinion. That opinion—after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government—points out that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

"We think it quite inadmissible," the court said (pp. 316, 318), "to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. . . . We cannot bring ourselves to the belief that Congress ever

intended this result while omitting to use language which would put that intention beyond doubt."

These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, from among all other civil officers, appraisers alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

The government says the phrase "continue in office" is of no legal significance and, moreover, applies only to the first commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of

Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience." *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441, 454; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238–239.

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63d Cong., 2d Sess., pp. 10–11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said:

"The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and " independent of any department of the government. . . . a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

The debates in both houses demonstrate that the prevailing view was that the commission was not to be " subject to anybody in the government but . . . only to the people of the United States "; free from " political domination or control " or the " probability or possibility of such a thing "; to be " separate and apart from any existing department of the government—not subject to the orders of the President."

More to the same effect appears in the debates, which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy. *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 650.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection,* and free to exercise its judgment without the leave or hindrance

of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers* v. *United States,* 272 U. S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called " the decision of 1789 " in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis.* In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was

presented in the case of *Cohens* v. *Virginia,* 6 Wheat. 264, 399, in respect of certain general expressions in the opinion in *Marbury* v. *Madison,* 1 Cranch 137. Chief Justice Marshall, who delivered the opinion in the *Marbury* case, speaking again for the court in the *Cohens* case, said:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

And he added that these general expressions in the case of *Marbury* v. *Madison* were to be understood with the limitations put upon them by the opinion in the *Cohens* case. See, also, *Carroll* v. *Lessee of Carroll,* 16 How. 275, 286–287; *O'Donoghue v. United States,* 289 U. S. 516, 550.

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside *dicta,* which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include

all purely executive officers. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.*

* The provision of § 6 (d) of the act which authorizes the President to direct an investigation and report by the commission in relation to alleged violations of the anti-trust acts, is so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams* v. *United States,* 289 U. S. 553, 565–567), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in

the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see *O'Donoghue* v. *United States, supra,* at pp. 530–531.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have reëxamined the precedents referred to in the *Myers* case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed

from office by the President of the United States" certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the *Myers* case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the *Myers* case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611–612.

In *Marbury* v. *Madison, supra,* pp. 162, 165–166, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts" and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the "decision of 1789."

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President

alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered.

Question No. 1, Yes.
Question No. 2, Yes.

MR. JUSTICE MCREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in *Myers* v. *United States*, 272 U. S. 178, states his views concerning the power of the President to remove appointees.

MOBLEY *v.* NEW YORK LIFE INSURANCE CO.

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

No. 751. Argued May 6, 1935.—Decided May 27, 1935.

1. Repudiation of a contract by one of the parties to it, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and recover damages as upon total breach, must at least amount to an unqualified refusal, or declaration of inability, substantially to perform. P. 638.
2. A refusal by a life insurance company to pay a monthly disability benefit to an insured, based merely upon an honest, but mistaken.

belief that the degree of disability defined in the policy as conditioning his right to such payments no longer exists, is a breach of the disability clause but does not amount to a renunciation or repudiation of the policy. P. 638.

3. The evidence in this case shows that the life insurance company, in refusing to continue monthly disability payments, did not intend to break its promises to the insured. The fact that, when more fully informed, it allowed and tendered payment of the claims, shows adherence to, rather than repudiation of, the contracts; and its efforts to have the policies kept in force were inconsistent with purpose to renounce them. Pp. 634, 638.

4. Whether the doctrine of anticipatory breach applies to this class of cases, is not decided. P. 639.

74 F. (2d) 588, affirmed.

CERTIORARI, 294 U. S. 703, to review the affirmance of two judgments for the Life Insurance Company, on verdicts directed by the District Court, in actions on two policies, which had been removed from a state court and consolidated for trial.

Mr. Sidney C. Mize for petitioner.

Mr. William H. Watkins, with whom *Messrs. Louis H. Cooke* and *P. H. Eager, Jr.,* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In 1933 petitioner brought two actions against respondent in the circuit court of Harrison county, Mississippi. There being diversity of citizenship, defendant removed them to the federal court for the southern district of that State. The court consolidated the cases for trial and, at the close of the evidence, directed verdicts and entered judgments for defendant. The Circuit Court of Appeals affirmed. 74 F. (2d) 588. And, upon petitioner's claim that the decision in this case conflicts with that of the Circuit Court of Appeals for the Sixth Circuit in *Federal*

Life Ins. Co. v. *Rascoe,* 12 F. (2d) 693, and other cases, this court granted a writ of certiorari.

The first action, commenced July 25, is based on an alleged breach by anticipatory repudiation of an insurance policy for $5,000, issued August 7, 1928, by defendant on the life of plaintiff, payable to his wife as beneficiary and providing for monthly payments in case of disability. Plaintiff prays judgment for $33,980.[1] The other, commenced November 1, is based on a similar life policy for $2,000, dated April 9, 1925, and payable to his mother. The prayer is for $11,600.[2] His declarations may be construed to include demands for $70 per month during claimed expectation of life plus the face amounts of the policies, all reduced to present value. The insured seeks not payment of disability benefits as they mature according to the insurer's promises, nor the damages resulting from its failure regularly to pay installments when due. His claim, as indicated by the evidence offered, is at least for the present value of the monthly payments during his expectation of life, and also for the present worth of the face value of the policy.

The question first to confront us is whether the evidence is sufficient to warrant a finding that the company repudiated the policies.

There is no controversy as to the facts. Except as above stated, the policies are alike. Each was issued in consideration of specified premiums payable semi-an-

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[1] The record does not disclose how the amount, $33,980, was reached. Plaintiff's expectation of life was taken at 34½ years or 414 months. Payments of $50 per month would be $20,700. If the face of the policy, $5,000, be added, the total is $25,700. But it seems that payments of $70 instead of $50 per month were taken. Then the installments without discount would be $70 × 414 or $28,980, plus $5,000 equals $33,980.

[2] The declaration alleges an expectation of life of 40 years. Installments of $20 per month amount to $9,600. Adding $2,000, the face amount of the policy, produces the amount claimed.

nually in advance during the life of the insured. They provide: That whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, following any occupation or engaging in any business for remuneration, and the company receives proof that this disability will continue for life or that it has existed for the three months next preceding the proof, the company will pay monthly ten dollars per thousand of face value and waive premiums; that, before making any income payment or waiving any premium, the company may demand proof of continuance of total disability (but not oftener than once a year after disability has continued for two full years) and that, upon failure to furnish such proof, no further payments will be made nor premiums waived.

December 13, 1930, the plaintiff suffered an acute attack of appendicitis for which he submitted to surgery. March 30, 1931, not having regained his health, he claimed monthly payments for permanent and total disability. On the proof he submitted and a physical examination made in its behalf, the company allowed the claim, waived premiums, and paid him $70 per month—$50 under one policy and $20 under the other—from January 13. The company caused his condition quite frequently to be observed. Several times between June 13, 1931, and March 1, 1933, it concluded that he was not continuously and totally disabled. On each of these occasions it notified him that no further income payments would be made and that premiums would no longer be waived. But in every instance, upon his insistence that he continued to be disabled and after further investigation and consideration, the company changed its ruling, paid past due benefits, resumed monthly payments and waived premiums.

March 1, 1933, the company wrote him stating it appeared that for some time he had not been continuously disabled within the meaning of the policies, that no fur-

ther monthly payments would be made and that the premiums due on and after February 7 became payable according to the terms of the contracts. Then, through his attorney, plaintiff demanded payment of the policies in full "for the remainder of his natural expectancy, which is thirty-four years and six months from this date which under the terms of said policies will amount to $28,980," and warned that unless the matter was adjusted within seven days plaintiff would bring suit. March 17, the company wrote the attorney explaining that information obtained as a result of its customary investigation indicated that insured had sufficiently recovered to do some remunerative work, and that in view of the reports received it could not consider him totally disabled; and declared that it would adhere to its decision.

April 13, it notified plaintiff that the $5,000 policy had lapsed and urged him to apply for its reinstatement. Later, it wrote that, application for reinstatement not having been made, the value of the policy had been applied to continue the insurance in force until June 20, 1937. On June 9 it notified him that premium on the $2,000 policy was about to mature. July 8, his attorney wrote the company that, as plaintiff was totally and permanently disabled and had demanded the value of the disability benefits, it was not authorized to apply the value of the policy to purchase continued insurance and that he did not agree to that application.

July 12 the company notified plaintiff that it was willing to give further consideration to his claim for disability benefits and asked for a statement from his attending physician as to his condition since the early part of January, 1933. And it stated that one of its physicians would call to make a medical examination. The examination was made July 24. On the next day plaintiff commenced the first of these actions. The company received report of the examination July 28. It stated that from December

13, 1930, plaintiff had been prevented by disability from engaging in any occupation, that he would be permanently prevented from strenuous occupation, and gave details concerning his condition. The examiner made a supplemental report to the effect that plaintiff was not confined to his bed or house and was able to do some work but not hard work.

Thereupon the company reconsidered plaintiff's claim and, August 9, concluded that he continued to be totally and permanently disabled within the meaning of the policies. It caused to be tendered to him notices of waiver of premiums and checks to cover all disability payments accruing on both policies to and including July 13, 1933. He rejected the offers on the ground that the company was indebted to him as alleged in the declaration. Tenders of the disability benefits were thereafter regularly made on the thirteenth of each month to and including February 13, 1934, and have been kept good by payments into court. It is stipulated that plaintiff was continuously totally and permanently disabled from the date of the operation until the date of the trial.

The significance of the correspondence, the gist of which we have given, is to be ascertained having regard to the meaning of the provisions of the policies that are here involved. The insurer's promise to pay monthly benefits was conditioned on two events: the insured's disability as defined, and the specified proof. Its obligation was not an unqualified one to pay, or to pay on the mere occurrence of disability, but only after proof of that fact. Similarly its agreement to continue payments once begun was conditioned upon the persistence of insured's disability and, at the election of the insurer, proof of that fact by physical examination, but after two years not oftener than once a year. These conditions serve to define the insurer's promises but impose no obligation on the insured. By payment of the premiums he acquired the

options and privileges specified. He did not promise or in any manner bind himself to do or refrain from doing anything. The provision that the company may require proof of continuance of disability conditions the right of the insured to have future installments but imposes no obligation upon him. He was at liberty, without breach of contract, to refrain from making the claim or to refuse disclosure of his condition or to permit examination.

Repudiation by one party, to be sufficient in any case to entitle the other to treat the contract as absolutely and finally broken and to recover damages as upon total breach, must at least amount to an unqualified refusal, or declaration of inability, substantially to perform according to the terms of his obligation. *Roehm* v. *Horst,* 178 U. S. 1, 14, 15. *Smoot's Case,* 15 Wall. 36, 49. *Dingley* v. *Oler,* 117 U. S. 490, 503. *Kimel* v. *Missouri State Life Ins. Co.,* 71 F. (2d) 921, 923. Mere refusal, upon mistake or misunderstanding as to matters of fact or upon an erroneous construction of the disability clause, to pay a monthly benefit when due is sufficient to constitute a breach of that provision, but it does not amount to a renunciation or repudiation of the policy. *Daley* v. *People's Building, L. & S. Assn.,* 178 Mass. 13, 18; 59 N. E. 452. There is nothing to show that any refusal of the company to pay the monthly disability benefits was not made in good faith. Its position appears at all times to have been that, if plaintiff was disabled as defined in the policy, he was entitled to the monthly benefits and waiver of premiums. The fact that, with additional information and upon further consideration, it gave greater weight to his claims and decided that he was continuously disabled as defined in the policies and so entitled to the specified payments, goes to show adherence to, rather than repudiation of, the contracts. The company's efforts to have the policies kept in force were inconsistent with purpose to renounce them. The evidence

gives no support to the claim that it disregarded or intended to break its promises. We conclude that, as found by the lower courts—rightly declining to follow the decision of the Circuit Court of Appeals for the Sixth Circuit in *Federal Life Ins. Co.* v. *Rascoe, supra,* 696—the company did not repudiate the policies. In view of that fact, we need not, and therefore do not, decide whether the doctrine of anticipatory breach is applicable to the class of cases to which this one belongs. *Dingley* v. *Oler, ubi supra.*

Affirmed.

ICKES, SECRETARY OF THE INTERIOR, *v.* VIRGINIA-COLORADO DEVELOPMENT CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 23. Argued October 16, 1934.—Decided June 3, 1935.

1. Under R. S., § 2324, a default in performance of annual labor on a mining claim renders it subject to relocation by some other claimant; but it does not affect the locator's rights as regards the United States; and he is entitled to preserve his claim by resuming work after default and before relocation. P. 644.
2. The Secretary of the Interior has authority to determine that a claim is invalid for lack of discovery, for fraud, or other defect, or that it is subject to cancellation for abandonment. P. 645.
3. With respect to specified minerals, including oil shale, the Mineral Leasing Act of 1920 substituted a leasing system for the old system of acquisition by location. It excepts, however, valid claims existent at the date of the passage of the Act and thereafter "maintained" in compliance with the laws under which initiated, "which claims may be perfected under such laws." Plaintiff had valid oil shale placer locations, located in 1917 and sustained by performance of annual labor in the years following, until the year ending July 1, 1931, when there was a default, but with no intention to abandon the claims. Two months later, while plaintiff was preparing to resume work, the Land Department began adverse

proceedings in which it declared that, because of the default, the claims were void. *Held,* that the case was within the exception in the Mineral Leasing Act, and that the proceedings were without authority and were properly enjoined in a suit against the Secretary of the Interior. P. 645.

63 App. D. C. 47; 69 F. (2d) 123, affirmed.

CERTIORARI, 292 U. S. 620, to review the affirmance of a decree requiring the Secretary of the Interior to vacate adverse proceedings against plaintiff's oil shale locations and his decision declaring the locations void.

Assistant Attorney General Blair, with whom *Solicitor General Biggs* and *Mr. H. Brian Holland* were on the brief, for petitioner.

The question presented is the one which was reserved in *Wilbur* v. *Krushnic,* 280 U. S. 306, 317, 318.

The only requirement for the maintenance of a claim under the old mining law, once the claim had been perfected, was the requirement in R. S., § 2324 as to annual assessment work. The frequency with which "maintained," or equivalent expressions, such as "kept up," "kept alive," "preserved," are encountered in the opinions of this Court in connection with annual assessment work (see *Gwillim* v. *Donnellan,* 115 U. S. 45, 48; *El Paso Brick Co.* v. *McKnight,* 233 U. S. 250, 256; *Union Oil Co.* v. *Smith,* 249 U. S. 337, 349; *Cole* v. *Ralph,* 252 U. S. 286, 295) shows that those words had a well-understood meaning. This Court appears to have attributed this meaning to the word "maintained," in the Leasing Act. *Krushnic* case, *supra.*

The obligation to perform annual assessment labor was a condition subsequent to the right of exclusive possession granted by the United States. *Union Oil Co.* v. *Smith, supra; Black* v. *Elkhorn Mining Co.,* 163 U. S. 445, 450. Failure to comply with the condition opened the claim to relocation by another. It did not, however, result in

forfeiture of the claim as against the Government, for the Government had no direct interest in the matter, being concerned only with seeing that its mineral-bearing lands were kept open for private exploitation. Rev. Stats., § 2319; 30 U. S. C. 22; *Union Oil Co.* v. *Smith, supra,* p. 346; *Cole* v. *Ralph,* 252 U. S. 286, 294; *Chambers* v. *Harrington,* 111 U. S. 350, 353.

It may be assumed that the Government's interest in preventing its mineral lands from being monopolized by those who were unwilling or unable to develop them was sufficiently protected by exposing locators to the risk of having their claims appropriated by rival claimants. In any event, it is obvious that no good purpose was to be served by permitting repossession by the Government itself, when the Government had no intention of doing anything but reassign the land to some other private individual for his own use and benefit.

The Leasing Act effected a complete change of policy in respect of lands containing oil and oil shale. Relocation became impossible, the Government's offer to locators having been withdrawn. Thus the locator who fails to perform assessment work no longer runs the risk of having his claim appropriated by a rival claimant, and if the court below was correct in holding that the Government may not take advantage of the default, the right which was subject to a condition when initiated is now unconditional. Such a result would be out of harmony with the evident policy of both the old mining law and the 1920 Act. It would hinder the disposition of lands under the Act and deprive the Government of royalties, although the lands were not being diligently exploited by the claimant.

If the locator fails to perform annual labor, then, by the terms of the Leasing Act the United States is given the right to challenge the validity of the claim by reason of such default. The possibility of relocation is taken

away and the possibility of intervention substituted. The risk is substantially the same.

Under the decision below, the status of lands containing any of the minerals named in the Leasing Act would be extremely difficult of ascertainment if the title is clouded by notices of location made prior to 1920. The Government would be put to the necessity of establishing by evidence *aliunde* that the claims had been abandoned, for abandonment depends largely on intention, and mere absence or failure to work the claim for any definite time is not sufficient to prove that it has been abandoned. *Black* v. *Elkhorn Mining Co., supra; Peachy* v. *Frisco Gold Mines Co.,* 204 Fed. 659. See also Lindley, Mines, 3d ed., §§ 642–644.

The Secretary of the Interior had implied authority to institute proceedings to resume possession for the Government. *Cameron* v. *United States,* 252 U. S. 450, 459, 460, 461; Federal Shale Oil Co., 53 L. D. 213, 216–217.

Mr. Louis Titus, with whom *Mr. Charles L. Frailey* was on the brief, for respondent.

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

The Virginia-Colorado Development Corporation brought this suit to obtain a mandatory injunction against the Secretary of the Interior requiring him to vacate certain adverse proceedings and his decision declaring certain placer claims of the plaintiff to be void. Motion to dismiss the bill of complaint was denied and, on defendant's refusal to plead further, plaintiff obtained a decree which the Court of Appeals affirmed. 63 App. D. C. 47; 69 F. (2d) 123. This Court granted a writ of certiorari, 292 U. S. 620, in view of the question as to the construction of the Mineral Leasing Act, February 25, 1920, c. 85, 41 Stat. 437; 30 U. S. C. 181, 193.

The bill alleged that in June, 1917, under § 2324 of the Revised Statutes (30 U. S. C. 28), plaintiff located certain oil shale placer claims on mineral lands of the United States in Colorado and thereupon became the owner of the claims and entitled to their exclusive possession; that from that time until, and including, the year ending July 1, 1930, the annual assessment work required by the statute was performed on each of the claims; that during the year ending July 1, 1931, the assessment work was not performed and had not been resumed before September 4, 1931, or since, but that plaintiff then intended to resume work, and had made arrangements for that resumption which would have been had but for the action of defendant; that plaintiff had not abandoned, or intended to abandon, any of the claims and that no charge to that effect had been made; that about September 4, 1931, adverse proceedings were initiated by the Department of the Interior, through the General Land Office, with the filing of a "challenge" to plaintiff's title and right of possession and by "posting such challenge on the said claims"; that the challenge was based on the sole ground that plaintiff had not performed the annual assessment work and that "the United States resumed possession of said land."

Plaintiff further alleged that there had been "no relocation of any of the claims by any person since plaintiff's failure to perform the annual assessment work, and that there had been no application by anyone to lease any of the claims from the United States." Plaintiff recited the answer he had made to the challenge, in substance, that notwithstanding his failure to perform the described work, he had the right to retain possession of the claims and to resume work thereon "at any time prior to a valid subsequent location of said claims"; but that the Commissioner of the General Land Office had held that the claims were null and void, and his ruling had been af-

firmed by the Secretary of the Interior whose decision had been promulgated declaring that the United States had taken possession for its own purposes, thus in effect decreeing a forfeiture.

Plaintiff then set forth the provisions of the Mineral Leasing Act of February 25, 1920, which authorized the Secretary of the Interior to execute leases of mineral lands, but contained an exception as to valid claims existing on the date of the passage of the Act "and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." [1]

1. The character and extent of the right which plaintiff acquired by virtue of its location of the mining claims, in 1917, are well established. Restating the rule declared by many decisions, we said in *Wilbur* v. *Krushnic,* 280 U. S. 306, 316, that such a location, perfected under the law, "has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term." It is alienable, inheritable, and taxable. See *Forbes* v. *Gracey,* 94 U. S. 762, 767; *Belk* v. *Meagher,* 104 U. S. 279, 283; *Manuel* v. *Wulff,* 152 U. S. 505, 510, 511; *Elder* v. *Wood,* 208 U. S. 226, 232; *Bradford* v. *Morrison,* 212 U. S. 389,

[1] Section 37 of the Act of February 25, 1920, c. 85, 41 Stat. 437, 451 (30 U. S. C. 193) is as follows:

"Sec. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled 'Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming,' approved August 1, 1912 (Thirty-seventh Statutes at Large, p. 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

394. Under § 2324 of the Revised Statutes (30 U. S. C. 28), the owner is required to perform labor of the value of $100 annually, but a failure to do so does not *ipso facto* forfeit his claim, but only renders it subject to loss by relocation. The law is clear " that no relocation can be made if work be resumed after default and before such relocation." Thus, prior to the passage of the Leasing Act of 1920, the annual performance of labor "was not necessary to preserve the possessory right, with all the incidents of ownership above stated, as against the United States, but only as against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted." *Wilbur* v. *Krushnic, supra.*

There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. *Cameron* v. *United States,* 252 U. S. 450, 460; *Cole* v. *Ralph,* 252 U. S. 286, 296; *Black* v. *Elkhorn Mining Co.,* 163 U. S. 445, 450; *Brown* v. *Gurney,* 201 U. S. 184, 192, 193; *Farrell* v. *Lockhart,* 210 U. S. 142, 147.

2. The Leasing Act of 1920 inaugurated a new policy. Instead of the acquisition of rights by location, the Act provided for leases. But by express provision, the Act saved existing valid claims " thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws." § 37.[2] What then was the status of plaintiff's claims under this exception? They were originally valid claims. No question is raised to the contrary. There is no suggestion of

[2] See Note 1.

lack of discovery, fraud or other defect. There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion to dismiss, dispose of any such contention. Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture. *Wilbur* v. *Krushnic, supra.*

How could the valid claims of plaintiff be "thereafter maintained in compliance with the laws under which initiated"? Manifestly, by a resumption of work. Plaintiff was entitled to resume, and the bill alleged that plaintiff had made arrangements for resumption, and that work would have been resumed if the Department of the Interior had not intervened. Plaintiff's rights after resumption would have been as if "no default had occurred." *Belk* v. *Meagher, supra.* Such a resumption would have been an act "not in derogation but in affirmance of the original location," and thereby the claim would have been "maintained." As we said in *Wilbur* v. *Krushnic, supra,* p. 318, "Such resumption does not *restore* a *lost* estate . . .; it *preserves* an *existing* estate."

In this view, plaintiff came directly within the exception. The Government invokes the new policy of the Leasing Act abolishing the practice of location. But the saving provision of § 37 is a part of the policy of the Act. Its terms explicitly declare the will of Congress as to valid existing claims, with full understanding of the status of such claims under the prior law.

The Government refers to the reservation in the opinion in *Wilbur* v. *Krushnic, supra,* as to the maintenance of a claim by a resumption of work "unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened." But that was a reservation, not a decision, and it does not aid the Government in its contention here. To be effective, the

"challenge" to the "valid existence" of a claim must have some proper basis. No such basis is shown.

We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law. The decree is

Affirmed.

MINNIE *v.* PORT HURON TERMINAL CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 678. Argued April 12, 1935.—Decided June 3, 1935.

A longshoreman, while unloading a vessel in navigable water, was swept from the deck by the ship's hoist and precipitated upon the wharf, where he was hurt by the fall. *Held* that the cause of action was in admiralty. P. 648.

269 Mich. 295; 257 N. W. 831, affirmed.

CERTIORARI, 294 U. S. 704, to review a judgment of the Supreme Court of Michigan vacating an award of the state compensation commission.

Mr. Eugene F. Black, with whom *Mr. Jesse P. Wolcott* was on the brief, for petitioner.

Mr. Leo J. Carrigan filed a brief on behalf of respondents.

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

Petitioner, a longshoreman, was injured at Port Huron while unloading a vessel lying in navigable water. He was about his work on the deck of the vessel when he was struck by a swinging hoist, lifting cargo from a hatch, and was precipitated upon the wharf. He sought compensation under the compensation act of the State of Michigan. His employer, the Port Huron Terminal Company, contended that the accident occurred upon navi-

gable water and that the state law did not apply. The defense was overruled by the state commission in the view that the injury must have been occasioned by petitioner's fall upon the wharf and hence that the claim was within the state statute, although the injury would not have been received except for the force applied to his person while on the vessel. The Supreme Court of the State vacated the commission's award, holding that the federal law controlled. 269 Mich. 295; 257 N. W. 831. Because of an asserted conflict with decisions of this Court, a writ of certiorari was granted.

We have held that the case of an employee injured upon navigable waters while engaged in a maritime service is governed by the maritime law. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, 477. It is otherwise if the injury takes place on land. *State Industrial Comm'n* v. *Nordenholt Corp.,* 259 U. S. 263, 272, 273; *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 133. In the instant case, the injury was due to the blow which petitioner received from the swinging crane. It was that blow received on the vessel in navigable water which gave rise to the cause of action, and the maritime character of that cause of action is not altered by the fact that the petitioner was thrown from the vessel to the land.

We had the converse case before us in *Smith & Son* v. *Taylor,* 276 U. S. 179. There a longshoreman, employed in the unloading of a vessel at a dock, was standing upon a stage that rested solely upon the wharf and projected a few feet over the water to or near the vessel. He was struck by a sling loaded with cargo, which was being lowered over the vessel's side and was knocked into the water, where sometime later he was found dead. It was urged that the suit was solely for the death which occurred in the water and hence that the case was exclusively within the admiralty jurisdiction. We held the argument

to be untenable. We said: "The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. *The G. R. Booth,* 171 U. S. 450, 460. The substance and consummation of the occurrence which gave rise to the cause of action took place on land." *Id.,* p. 182.

If, when the blow from a swinging crane knocks a longshoreman from the dock into the water, the cause of action arises on the land, it must follow, upon the same reasoning, that when he is struck upon the vessel and the blow throws him upon the dock the cause of action arises on the vessel. Compare *Vancouver S. S. Co.* v. *Rice,* 288 U. S. 445, 448.

The decision in *L'Hote* v. *Crowell,* 286 U. S. 528, upon which petitioner relies, is not opposed. In that case, we dealt only with the determination of the question of the dependency of a claimant for compensation, holding that the finding of fact by the deputy commissioner against the claimant upon that issue should not have been disturbed. The writ of certiorari was limited to that question. 54 F. (2d) 212; 285 U. S. 533. The judgment is

Affirmed.

THE ADMIRAL PEOPLES.*

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

No. 696. Submitted April 12, 1935.—Decided June 3, 1935.

A passenger while disembarking from a ship over its gangplank, which projected above a dock, fell from the shore end of the gangplank to the dock and was injured by the fall. Negligence in failing to pro-

* The docket title of this case is: *Kenward* v. *The Admiral Peoples et al.*

vide a railing on the gangplank, in failing to have the plank flush with the dock or taper off to the dock level, and in failing to give warning of the step, was charged against the ship. *Held* that the gangplank was part of the ship, and the cause of action in admiralty. P. 651.

73 F. (2d) 170, reversed.

CERTIORARI, 294 U. S. 702, to review a judgment affirming a judgment sustaining an exception to a libel in admiralty.

Messrs. Andrew G. Haley and *John P. Hannon* submitted for petitioner.

Messrs. W. Lair Thompson and *Wallace McCamant* submitted for respondents.

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

Petitioner was a passenger on the steamship "Admiral Peoples" on her voyage from Wilmington, California, to Portland, Oregon. While disembarking at Portland petitioner was injured by falling from a gangplank leading from the vessel to the dock. This libel *in rem* against the vessel alleged that respondent placed the gangplank so that it sloped from the ship toward the dock at an angle of from ten to fifteen degrees; that it was approximately two feet in width and eighteen feet in length and was equipped with the usual rope railings which terminated approximately three feet from each end; that the level of the plank at the shore end was about six inches above the level of the dock, thereby creating a step from the plank to the dock; that upon instructions from one of respondent's officers, libelant proceeded along the plank and as she reached its lower end, being unaware of the step and having no warning, she fell from the plank and was " violently and forcibly thrown forward upon the

dock in such manner as to cause the injuries hereinafter set forth." Libelant alleged negligence in failing to provide a handrope or railing extending along either side of the gangplank to the shore end, in failing to have the plank flush with the dock or taper off to the level of the dock, and in failing to give warning of the step.

Respondent's exception to the libel, upon the ground that the case was not within the admiralty jurisdiction, was sustained by the District Court, and its judgment dismissing the libel was affirmed by the Circuit Court of Appeals. In view of an asserted conflict with other decisions of the federal courts,[1] we granted a writ of certiorari.

This is one of the border cases involving the close distinctions which from time to time are necessary in applying the principles governing the admiralty jurisdiction. That jurisdiction in cases of tort depends upon the locality of the injury. It does not extend to injuries caused by a vessel to persons or property on the land. Where the cause of action arises upon the land, the state law is applicable. *The Plymouth,* 3 Wall. 20, 33; *Johnson* v. *Chicago & Pacific Elevator Co.,* 119 U. S. 388, 397; *Cleveland Terminal & V. R. Co.* v. *Cleveland Steamship Co.,* 208 U. S. 316, 319; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59; *State Industrial Comm'n* v. *Nordenholt Corp.,* 259 U. S. 263, 272; *Smith & Son* v. *Taylor,* 276 U. S. 179, 181; compare *Vancouver S. S. Co.* v. *Rice,* 288 U. S. 445, 448.

The basic fact in the instant case is that the gangplank was a part of the vessel. It was a part of the vessel's equipment which was placed in position to enable its passengers to reach the shore. It was no less a part of the vessel because in its extension to the dock it pro-

[1] Compare *The Strabo,* 90 Fed. 110, 98 Fed. 998; *The H. S. Pickands,* 42 Fed. 239; *The Aurora,* 163 Fed. 633, 178 Fed. 587; *Aurora Shipping Co.* v. *Boyce,* 191 Fed. 960; *The Atna,* 297 Fed. 673; *The Brand,* 29 F. (2d) 792.

jected over the land. Thus, while the libelant was on the gangplank she had not yet left the vessel. This was still true as she proceeded to the shore end of the plank. If while on that part of the vessel she had been hit by a swinging crane and had been precipitated upon the dock, the admiralty would have had jurisdiction of her claim. See *Minnie* v. *Port Huron Terminal Co.*, decided this day, *ante*, p. 647. If instead of being struck in this way, the negligent handling of the vessel, as by a sudden movement, had caused her to fall from the gangplank, the cause of action would still have arisen on the vessel. We perceive no basis for a sound distinction because her fall was due to negligence in the construction or placing of the gangplank. By reason of that neglect, as the libel alleges, she fell from the plank and was violently thrown forward upon the dock. Neither the short distance that she fell nor the fact that she fell on the dock and not in the water, alters the nature of the cause of action which arose from the breach of duty owing to her while she was still on the ship and using its facility for disembarking.

This view is supported by the weight of authority in the federal courts. In *The Strabo*, 90 Fed. 110, 98 Fed. 998, libelant, who was working on a vessel lying at a dock, attempted to leave the vessel by means of a ladder which, by reason of the master's negligence, was not secured properly to the ship's rail and in consequence the ladder fell and the libelant was thrown to the dock and injured. The District Court, sustaining the admiralty jurisdiction, asked these pertinent questions (90 Fed. p. 113): "If a passenger, standing at the gangway, for the purpose of alighting, were disturbed by some negligent act of the master, would the jurisdiction of this court depend upon the fact whether he fell on the dock, and remained there, or whether he was precipitated upon the dock in the first instance, or finally landed there after first falling on some part of the ship? If a seaman, by the master's neglect,

should fall overboard, would this court entertain jurisdiction if the seaman fell in the water, and decline jurisdiction if he fell on the dock or other land? The inception of a cause of action is not usually defined by such a rule." The Circuit Court of Appeals of the Second Circuit, affirming the decision of the District Court (98 Fed. p. 1000), thought it would be a too literal and an inadmissible interpretation of the language used in *The Plymouth, supra,* to say that "if a passenger on board a steamship should, through the negligence of the owners, stumble on the ship upon a defective gangplank, and be precipitated upon the wharf, the injury would not be a maritime tort." "The language employed in the *Plymouth* decision," said the court, "and which was applicable to the circumstances of that case, does not justify such a conclusion." And, deciding the case before it, the Circuit Court of Appeals said: "The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water." See, also, *The Atna,* 297 Fed. 673, 675, 676; *The Brand,* 29 F. (2d) 792.

In *L'Hote* v. *Crowell,* 54 F. (2d) 212, a longshoreman, who had been working on a wharf in putting bales in a sling which was raised by the ship's tackle and then lowered into its hold, was riding on the last load when the sling struck against the rail or side of the ship, with the result that he fell to the wharf and was injured. The Circuit Court of Appeals of the Fifth Circuit said that he had "finished his work on the wharf and from the time he was lifted from it by the sling by means of the ship's tackle was under the control of an instrumentality of the ship"; and, in that view, the jurisdiction of admiralty was sustained. The ruling in that case was not disturbed by our decision on certiorari (as the Circuit Court of Ap-

peals in the instant case mistakenly supposed), as our writ was expressly limited to the question raised by the review of the deputy commissioner's finding as to the dependency of a claimant for compensation under the Longshoremen's and Harbor Workers' Compensation Act. 285 U. S. 533. We decided simply that the finding of the deputy commissioner, upon evidence, against the dependency of the claimant, was final, and accordingly we directed the affirmance of his order. 286 U. S. 528. See *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166.

We think that the libel presented a case within the jurisdiction of admiralty. The decree of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

BALTIMORE & CAROLINA LINE, INC. *v.* REDMAN.

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

No. 178. Argued December 6, 1934.—Decided June 3, 1935.

1. The right to trial by jury preserved by the Seventh Amendment is the right which existed under the English common law when the Amendment was adopted. P. 657.
2. The Amendment not only preserves that right but exhibits a studied purpose to protect it from indirect impairment through possible enlargements of the power of reëxamination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law." P. 657.
3. The aim of the Amendment is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court. P. 657.

4. The practice of reserving questions of law arising in trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved,—the reservation carrying with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as entering a verdict or judgment for one party where the jury has given a verdict for the other,—was well established when the Seventh Amendment was adopted and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury preserved and protected by that Amendment. P. 659.
5. In an action in a federal court in New York to recover damages for personal injuries alleged to have been sustained by the plaintiff through the defendant's negligence, the defendant, at the close of the evidence, moved for dismissal of the complaint and also for a directed verdict in its favor, basing both motions upon the ground that the evidence was insufficient to support a verdict for plaintiff. The court, as permitted by a New York statute and the common-law practice above mentioned, with the tacit consent of both parties, reserved the questions of law presented by the motions and submitted the case to the jury subject to the court's opinion upon them; and, after receiving a verdict for the plaintiff, it held the evidence sufficient, overruled the motions, and entered judgment on the verdict. *Held* that in reversing because as a matter of law the evidence was insufficient to sustain the verdict, the judgment of the Circuit Court of Appeals should embody a direction for a judgment of dismissal on the merits, and not for a new trial; and that such judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in its favor. P. 661.
6. *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, distinguished, and in part qualified. Pp. 657, 661.

70 F. (2d) 635, modified and affirmed.

CERTIORARI, 293 U. S. 577, to review the reversal of a judgment recovered by the plaintiff in an action for personal injuries.

Mr. George Whitefield Betts, Jr., with whom *Mr. William R. Meagher* was on the brief, for petitioner.

Mr. Martin A. Schenck, with whom *Mr. Frederick R. Graves* was on the brief, for respondent.

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

This was an action in a federal court in New York to recover damages for personal injuries allegedly sustained by the plaintiff through the defendant's negligence. The issues were tried before the court and a jury. At the conclusion of the evidence the defendant moved for a dismissal of the complaint because the evidence was insufficient to support a verdict for the plaintiff, and also moved for a directed verdict in its favor on the same ground. The court reserved its decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received from the jury a verdict for the plaintiff. No objection was made to the reservation or this mode of proceeding. Thereafter the court held the evidence sufficient and the motions ill-grounded, and accordingly entered a judgment for the plaintiff on the verdict.

The defendant appealed to the Circuit Court of Appeals, which held the evidence insufficient and reversed the judgment with a direction for a new trial.[1] The defendant urged that the direction be for a dismissal of the complaint. But the court of appeals ruled that under our decision in *Slocum* v. *New York Life Insurance Co.*[2] the direction must be for a new trial. We granted a petition by the defendant for certiorari because of the last ruling and at the same time denied a petition by the plaintiff challenging the ruling on the insufficiency of the evidence.[3]

The Seventh Amendment to the Constitution prescribes:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury

[1] 70 F. (2d) 635.

[2] 228 U. S. 364.

[3] 293 U. S. 541, 577.

shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law."

The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reëxamination existing under the common law, and to that end declares that " no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law."

The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.[4]

In *Slocum* v. *New York Life Insurance Co.* a jury trial in a federal court resulted in a general verdict for the plaintiff over the defendant's request that a verdict for it be directed. Judgment was entered on the verdict for the plaintiff and the defendant obtained a review in the court of appeals. That court examined the evidence, concluded that it was insufficient to support the verdict, and on that basis reversed the judgment given to the plaintiff on the verdict, and directed that judgment be entered for the defendant. A writ of certiorari then brought the case here. The question presented to us was whether, in the

[4] *Walker* v. *New Mexico & So. Pac. R. Co.*, 165 U. S. 593, 596; *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 497–499; *Dimick* v. *Schiedt*, 293 U. S. 474, 476, 485–486.

situation disclosed, the direction for a judgment for the defendant was an infraction of the Seventh Amendment. We held it was and that the direction should be for a new trial.

It therefore is important to have in mind the situation to which our ruling applied. In that case the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence or of any other matter; and the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence. A statute of the State wherein the case was tried made provision for reserving questions of law arising on a request for a directed verdict, but no reservation was made. The same statute also provided that where a request for a directed verdict was denied the party making the request could have the evidence made part of the record and that, where this was done, the trial court, as also the appellate court, should be under a duty " to enter such judgment as shall be warranted by the evidence." It was in conformity with this part of the statute that the court of appeals directed a judgment for the defendant.

We recognized that the state statute was applicable to trials in the federal courts in so far as its application would not effect an infraction of the Seventh Amendment, but held that there had been an infraction in that case in that under the pertinent rules of the common law the court of appeals could set aside the verdict for error of law, such as the trial court's ruling respecting the sufficiency of the evidence, and direct a new trial, but could not itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury.

A very different situation is disclosed in the present case. The trial court expressly reserved its ruling on the

defendant's motions to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties. After the verdict was given the court considered the motions pursuant to the reservation, held the evidence sufficient, and denied the motions.

The court of appeals held that the evidence was insufficient to support the verdict for the plaintiff; that the defendant's motion for a directed verdict was accordingly well taken; and therefore that the judgment for the plaintiff should be reversed. Thus far we think its decision was right. The remaining question relates to the direction which properly should be included in the judgment of reversal.

At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments.[5]

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[5] In *Carleton* v. *Griffin,* (1758) 1 Burrow's Rep. 549, a verdict for plaintiff was taken subject to the court's opinion on questions of law, which later on were ruled in favor of defendant, whereupon a judgment for him was directed. Other early cases similarly recognized and applied the practice. *Coppendale* v. *Bridgen,* (1759) 2 Burrow's

Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment.

This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of law,[6] and in one case where a verdict for the

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Rep. 814; *Bird* v. *Randall,* (1762) 3 Burrow's Rep. 1345; *Price* v. *Neal,* (1762) 3 Burrow's Rep. 1354; *Basset* v. *Thomas,* (1763) 3 Burrow's Rep. 1441; *Timmins* v. *Rowlinson,* (1765) 3 Burrow's Rep. 1603.

Law writers also have recognized it. 2 Tidd's Practice, (4th Am. ed.) 900; Tidd's Practice, (London, 1837 ed.) 538, 539; Starkie on Evidence, (10th Am. ed.) *809; 1 Archbold's King's Bench Practice, 188, 192; Thayer's Treatise on Evidence, 241.

Later English decisions not only show the practice but also illustrate various applications of it. In *Treacher* v. *Hinton,* (1821) 4 Barn. & Ald. 413, plaintiff was non-suited with liberty to move to enter verdict in his favor, and on his motion such a verdict was ordered entered as if given by the jury. In *Jewell* v. *Parr,* (1853) 13 C. B. 909, a verdict was directed for defendant with leave to plaintiff to move to enter verdict for him if the court should be of opinion there was not sufficient evidence to sustain the verdict for defendant; and on such a motion the court held the evidence insufficient and directed entry of verdict for plaintiff. In *Ryder* v. *Wombwell,* (1868) L. R. 4 Exch. Cas. 32, a verdict was taken for plaintiff with leave to defendant to move to enter non-suit if the court should be of opinion there was lack of evidence; and on such a motion the evidence was held insufficient and non-suit entered.

[6] *Brent* v. *Chapman,* 5 Cranch 358; *Chinoweth* v. *Haskell's Lessee,* 3 Pet. 92, 94, 96, 98; *Suydam* v. *Williamson,* 20 How. 427, 434.

plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant.[7]

Some of the States have statutes embodying the chief features of the common-law practice which we have described. The State of New York, in which the trial was had, has such a statute; and the trial court, in reserving its decision on the motions which presented the question of the sufficiency of the evidence, and in taking the verdict of the jury subject to its opinion on that question, conformed to that statute and the practice under it as approved by the Court of Appeals of the State.[8]

In view of the common-law practice and the related state statute, we reach the conclusion that the judgment of reversal for the error in denying the motions should embody a direction for a judgment of dismissal on the merits, and not for a new trial. Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor.

The court of appeals regarded the decision in *Slocum* v. *New York Life Insurance Co.* as requiring that the direction be for a new trial. We already have pointed out the differences between that case and this. But it is true that some parts of the opinion in that case give color to the interpretation put on it by the court of appeals. In this they go beyond the case then under consideration and are not controlling. Not only so, but they must be regarded as qualified by what is said in this opinion.

It results that the judgment of the court of appeals should be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial, and, as so modified, should be affirmed.

Judgment modified and affirmed as modified.

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[7] *Chinoweth* v. *Haskell's Lessee, supra.*

[8] New York Civil Practice Act, §§ 459, 461; *Bail* v. *New York, N. H. & H. R. Co.*, 201 N. Y. 355; 94 N. E. 863; *Dougherty* v. *Salt*, 227 N. Y. 200, 203; 125 N. E. 94.

WEST ET AL. *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF BALTIMORE.

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

No. 648. Argued April 10, 11, 1935.—Decided June 3, 1935.

1. Since by legislation prescribing the rates or charges of a public utility company the use of its property is taken, due process requires that the rates prescribed shall be such as to assure just compensation, i. e., a reasonable rate of return upon the then value of the property. P. 671.
2. Valuation of the property of a public utility for rate-fixing purposes is a matter of sound judgment involving facts. Actual cost, reproduction cost, and all other evidences of value, including price trends and levels, are to be given their proper weight in reaching the conclusion. P. 671.
3. The property of a telephone company,—a great, integrated aggregate of many and diverse elements, not primarily intended for sale in the market but for devotion to the public use now and for the indefinite future—is not susceptible of being valued like ordinary market commodities. P. 672.
4. While the owner of such a property must assume, and may not pass on to the public, the risk involved in any general decline of values, and may have the advantage also of a general rise in such values, it would be unfair to both owner and public, and also impracticable, to adjust valuations of the property, and the consequent returns, to sudden fluctuations of the prices of materials and labor. P. 673.
5. In a suit to enjoin the enforcement of rates alleged to be in violation of the due process clause of the Fourteenth Amendment, the function of the federal court is confined to the question of confiscation; the legislative finding is not to be set aside for mere errors of procedure. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287. P. 674.
6. Where the entire method used by a state commission in valuing the property of a public utility for rate purposes was necessarily erroneous and necessarily involved unjust and inaccurate results, it is not the function of the federal court, upon a claim of confiscation, to make a new valuation upon some different theory in an effort to sustain a procedure which was fundamentally faulty; it

should enjoin the enforcement of the rates. *Northern Pacific Ry. Co.* v. *Department of Public Works*, 268 U. S. 39; *Chicago, M. & St. P. Ry Co.* v. *Public Utilities Comm'n*, 274 U. S. 344. Pp. 674, 679.

7. A state commission sought to value the physical plant and property of a telephone company, for fixing rates, without recourse to a new appraisal and without giving weight to evidence of reproduction cost and accrued depreciation furnished by the company, by translating the value in dollars, as it had been established in 1923, and cost of subsequent net additions, into an amount of equivalent purchasing power as of December 31, 1932, by means of price indices. To this end, it selected sixteen commodity price indices, prepared to show price trends,—one of them covering as many as 784 commodities of different kinds and weighted, the others less comprehensive—and applied them to the old plant valuation and the costs of additions and the depreciation reserves. As the results varied widely, the commission weighted the indices, upon a principle not disclosed, and derived a "fair value index." This being similarly applied, yielded a figure which, with an addition for working capital, the commission adopted as its rate base. In some of the price indices prepared and used by the commission, price increases during 1930–1932 were disregarded. In the period covered, the price trend was ascending from 1923 to 1929. It then suffered a precipitate decline so that at December, 1932, the date of the commission's valuation, it was at the nadir. Subsequently it made a sharp recovery. By November 28, 1933, the date when the commission made its final report and rate-fixing order, it had risen (according to the all-commodities index of the United States Department of Labor) more than 13% over the price level of December 31, 1932. For this reason, the commission made an additional allowance of income to the company; but, judged by the same index, this was absorbed by continued rise of prices in 1934 and 1935. What the commission in effect did was to take the temporary low price level of December, 1932, and apply it for the indefinite future in ascertaining the so-called fair value of the company's plant and property.

Held that the method of valuation was inapt and improper and that the order fixing rates is repugnant to due process of law. Pp. 666, 668.

8. In appraising the property of a public utility company, the use of price indices to obtain the present value of specific property, separating from other sorts each kind of property so treated, and thus using the relation of values of specific articles as of two given dates,

is quite distinct from the application of general commodity indices to a conglomerate of assets constituting the entire plant. P. 677.

9. Objection by a public utility company to a valuation of its property by the use of commodity price indices, is not met by the fact that in an earlier suit between the same parties the court used such an index for that purpose. P. 677.

10. An appraisal by the court of the property of a public utility company at book cost less depreciation reserve, *held* in the circumstances of the case, arbitrary and erroneous. P. 678.

11. In a period of low prices, costs incurred when the price level was much higher are not a safe guide in appraising present value. P. 678.

7 F. Supp. 214, affirmed.

APPEAL from a decree of the District Court, of three judges, which, at the suit of the Telephone Company, enjoined the members of the Maryland Public Service Commission from enforcing an order purporting to fix the company's rates.

Messrs. Richard F. Cleveland and *John Henry Lewin*, with whom *Mr. Herman M. Moser* was on the brief, for appellants.

Mr. Charles McHenry Howard, with whom *Messrs. Raymond S. Williams, R. A. Van Orsdel, T. Baxter Milne, C. M. Bracelen*, and *John H. Ray* were on the brief, for appellee.

By leave of Court, *Messrs. Randolph Barton, Jr.*, and *Forrest Bramble* filed a brief on behalf of the Retail Merchants Association of Baltimore, as *amicus curiae*.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Early in 1933 the Public Service Commission of Maryland undertook an investigation of the rates and charges of the Chesapeake and Potomac Telephone Company of Baltimore, and after extended hearings entered an order

November 28, 1933, directing the company to put into effect January 1, 1934, reductions in its rates, sufficient to diminish annual net income by $1,000,000. The company filed a bill in the District Court for temporary and final injunction; the application for interlocutory relief was heard by a court of three judges. A stipulation was made that the cause should be treated as upon final hearing and a decree was entered enjoining enforcement of the order.[1] This appeal challenges the court's action.

The Commission determined the value of the property at December 31, 1932, as $32,621,190; estimated the net revenue for 1934 at $3,353,793; allowed for reasonable return 6% on value,—$1,957,271,—which the estimated revenue would exceed by $1,396,522. In view of the rise of the general price level during 1933, however, the Commission required a reduction of but $1,000,000. In computing net income the Commission accepted all the company's figures for current expense, except the annual allowance for depreciation; the amount claimed on this head being $2,173,000, and the sum allowed $1,720,724. The company insisted on a 7½ per cent. return.

The controversy in the District Court revolved around three matters—value, annual depreciation expense, and rate of return. The court found the value of the property to be $39,541,921, the necessary depreciation expense $2,000,000, the probable net return under the Commission's order $1,742,005, or at the rate of 4½ per cent., as against 6 per cent., which the court held was the limit below which the return could not be reduced without confiscation.[2]

All of the figures stated embrace both intrastate and interstate business, but the parties stipulated that in respect of value, expense and income, the former repre-

[1] *Chesapeake & Potomac Telephone Co.* v. *West*, 7 F. Supp. 214.

[2] The Commission also allowed a return of 6 per cent. upon the value of the property as determined by it.

sented 85 per cent. and the latter 15 per cent. of the total. As the Commission dealt with the property as a whole, the parties, their witnesses and the District Court found it convenient to do so, having in mind the fact that in the final result only 85 per cent. of the amounts involved reflected intrastate business and the Commission's order must be limited accordingly. For similar reasons, and with a similar reservation, we shall pursue the same course. For the purposes of this proceeding the Commission's order, therefore, is to be considered as requiring a diminution of income from intrastate operations by $850,000, rather than $1,000,000.

In 1916 the Commission valued the property and prescribed rates. In 1923 the company applied for an increase; the Commission after a hearing fixed value at approximately book cost, and refused to permit the rates to be raised. The District Court, pursuant to a bill filed by the company, found the actual value exceeded book value by some $6,000,000, and enjoined the Commission from enforcing the current rates.[3] The Commission acquiesced in the decision and passed an order adopting the court's finding of value and establishing new rates. So matters stood until the initiation of the present investigation.

The company's books accurately show installations and retirements of plant and from them historical cost is ascertained to be $50,025,278 as of December 31, 1933, with a depreciation reserve of $11,483,357. The Commission made no appraisal of the physical plant and property, but attempted to determine present value by translating the dollar value of the plant as it was found by the District Court in the earlier case at December 31, 1923, plus net additions in dollar value in each subsequent year, into an equivalent of dollar value at December 31, 1932.

[3] *Chesapeake & Potomac Telephone Co.* v. *Whitman,* 3 F. (2d) 938, 943, 953.

Its theory was this: Value signifies in rate regulation the investment in dollars on which a utility is entitled to earn. The dollars when invested were free units of exchange value having an earning significance then and now only because they are such units of exchange. When invested they represented in the plant so many poles, miles of wires, and other items of equipment; on the other hand the same dollar units then represented certain quantities of government bonds, apartment houses, automobiles, food and services, etc. The dollars invested in the company's plant had no value unless they were exchangeable for other requirements and desires of the stockholders, and the corresponding requirements and desires of all persons who use the dollar as a measure of value. Thus a regulating body, in finding value, must find a number of universal units of earning power and purchasing power; that is, exchangeable dollars invested in place of present exchangeable dollars. How shall the relation be ascertained?

The Commission thought it found the answer in commodity indices, prepared to show price trends. It selected sixteen of these, one covering as many as 784 commodities, falling into different classes, and weighted for averaging; others much less comprehensive; and its witness calculated by the use of each index the reduction in value of the company's assets considered as a conglomerate mass of dollar value from 1923, or subsequent date of acquisition, to 1932. As might be expected the results varied widely. The lowest value found by the use of any index was $24,983,624; the highest $36,056,408—48 per cent. higher. The Commission then weighted these sixteen indices upon a principle not disclosed, giving them weights of from one to four, and thus got a divisor of thirty-one for the total obtained by adding the weighted results of all. This gave what the Commission styled its "fair value index," which it applied to the 1923 value of

the property then owned and to cost of all net additions in subsequent years, to obtain value as of 1932. The result, after adding some $660,000 for working capital, was a rate base of $32,621,190. The company submitted proof of estimated reproduction cost and accrued depreciation. The Commission examined and criticized this evidence, but none was offered in opposition, and the valuation was based squarely on the figures obtained by the use of its index.

In the District Court the company offered evidence of historical cost and estimates of reproduction cost less depreciation; the Commission relied solely upon the figure resulting from trending the dollar value of plant owned in 1923 and cost of net additions subsequently made. The court held the indices used inappropriate for determining present value and discarded them. It purported to consider both book cost and reproduction cost; but, in fact, as plainly appears from the opinion,[4] derived present value by the use of two figures only,—book cost as at December 31, 1933 ($50,025,278) less the entire depreciation reserve shown by the books ($11,483,357),—and thus fixed value at $38,541,921. To this is added $1,000,000, for working capital (instead of $660,000 allowed by the Commission), giving a rate base of $39,541,921. Annual depreciation expense was raised from $1,352,284 as determined by the Commission to $2,000,000. The appellants charge that in all these respects the court's action was arbitrary and cannot stand. We are not satisfied with the methods pursued either by the court or the Commission.

First. The Commission took the value of the physical plant in 1923 (exclusive of the then depreciation reserve), $35,147,912, and trended it to $23,689,693 as of 1932. It took annual net additions to plant (exclusive of depreciation reserves) and similarly trended them. This gave

[4] 7 F. Supp. 219, 222, 228.

plant value exclusive of the plant represented in the depreciation reserve. It took the depreciation reserve as at 1923 (invested in plant) and the yearly net additions to the reserve and trended each figure to 1932 value. In this way it reduced the book reserve which, at cost, stood at $10,405,147, to $7,318,086, and deducted the latter from total plant value. A table found in the Commission's report showing the operation in detail is copied in the margin.[5]

This method is inappropriate for obtaining the value of a going telephone plant. An obvious objection is that the indices which are its basis were not prepared as an aid to the appraisal of property. They were intended merely to

[5] The table is as follows:

		Translator	Value Dec. 31, 1932
Value found by Court, as of Dec. 31, 1923	$36,122,912		
Less Working Capital	975,000		
Amount to be trended from Dec. 31, 1923	$35,147,912	67.4	$23,689,693
Net Additions, 1924	3,199,648	68.2	2,182,160
1925	3,493,429	68.4	2,389,505
1926	4,098,230	70.0	2,868,761
1927	2,837,050	72.6	2,059,698
1928	1,854,046	71.8	1,331,205
1929	2,205,132	72.7	1,603,131
1930	2,733,968	77.6	2,121,559
1931	1,459,483	86.4	1,260,993
1932	421,708	100.0	421,708
Totals	$57,450,606		$39,928,413
Depreciation Reserve			
Court's Value—Dec. 31, 1923	$6,614,963	67.4	$4,458,485
Net Additions, 1924	(3,556)	68.2	(2,425)
1925	200,429	68.4	137,093
1926	547,335	70.0	383,135
1927	804,711	72.6	584,220
1928	658,770	71.8	472,997
1929	823,816	72.7	598,914
1930	186,846	77.6	144,992
1931	229,100	86.4	197,942
1932	342,733	100.0	342,733
Totals	$10,405,147		$7,318,086

(Continued on next page.)

indicate price trends. Indeed the record shows that one index used by the Commission and given a weight of 3,—that of the Interstate Commerce Commission,—bears a notation that it should not be used " in the determination of unit reproduction costs " upon individual properties. Doubtless the authors of the other indices would have issued a similar warning, if they had supposed anyone would attempt such a use.

Again, the wide variation of results of the employment of different indices, already mentioned, impugns their accuracy as implements of appraisal. Sensible of this discrepancy, the Commission attempted a rule of thumb corrective, by weighting the several indices upon a principle known only to itself, and thus rendered its process of valuation even more dubious and obscure. The possible factors of error are increased by the use of some indices such as that constructed by the Commission's witness upon Western Electric prices. The evidence is that these apply to about 25 per cent. of the company's purchases; that during the period of rising prices, 1924–1929, they rose more slowly than prices of other commodities and manufactured articles; that though in 1930 other prices fell, Western Electric's were raised an average of 10 per cent. In constructing an index from these prices, the

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Depreciated Value of Property, as of December 31, 1932	$32,610,327
Add Working Capital	737,000
	$33,347,327
Deduct Pleasant Street Property	137,496
( ) Indicates Subtraction.	$33,209,831
Rate Base	$33,210,000
Value of Property—December 31, 1932, less Working Capital	$32,610,327
Deduct average increase in Depreciation Reserve less average increase in Fixed Capital	650,000
	$31,960,327
Add Allowance for Working Capital	660,863
Average value of Rate Base for 1933	$32,621,190

witness disregarded the increase during the period 1930–1932. The Commission gave the index a weight of 3 and applied it to all purchases of the company, although confessedly it was applicable to only one-fourth of them.

The established principle is that as the due process clauses (Amendments V and XIV) safeguard private property against a taking for public use without just compensation, neither Nation nor State may require the use of privately owned property without just compensation. When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value.[6] To an extent value must be a matter of sound judgment, involving fact data. To substitute for such factors as historical cost and cost of reproduction, a "translator"

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[6] *Railroad Commission Cases,* 116 U. S. 307, 331; *Dow* v. *Beidelman,* 125 U. S. 680, 691; *Georgia Railroad & Banking Co.* v. *Smith,* 128 U. S. 174, 179; *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 458; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 399; *Ames* v. *Union Pac. Ry. Co.,* 64 Fed. 165, 176; *Smyth* v. *Ames,* 169 U. S. 466, 526, 541–2, 544, 546; *San Diego Land & Town Co.* v. *National City,* 174 U. S. 739, 757; *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 442; *Stanislaus County* v. *San Joaquin C. & I. Co.,* 192 U. S. 201, 215; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 13, 18; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 41; *Lincoln Gas Co.* v. *Lincoln,* 223 U. S. 349, 358; *Minnesota Rate Cases,* 230 U. S. 352, 434, 454; *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 190; *Houston* v. *Southwestern Bell Telephone Co.,* 259 U. S. 318, 324, 325; *Bluefield Waterworks Co.* v. *Public Service Comm'n,* 262 U. S. 679, 690; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 481; *Board of Commissioners* v. *New York Telephone Co.,* 271 U. S. 23, 31; *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400, 408–409; *United Railways* v. *West,* 280 U. S. 234, 249; *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S. 133, 149; *Los Angeles Gas Co.* v. *Railroad Commission,* 289 U. S. 287, 305.

of dollar value obtained by the use of price trend indices, serves only to confuse the problem and to increase its difficulty, and may well lead to results anything but accurate and fair. This is not to suggest that price trends are to be disregarded; quite the contrary is true. And evidence of such trends is to be considered with all other relevant factors. *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461, 485; *Clark's Ferry Bridge Co.* v. *Public Service Comm'n,* 291 U. S. 227, 236.

A more fundamental defect in the Commission's method is that the result is affected by sudden shifts in price level. It is true that any just valuation must take into account changes in the level of prices.[7] We have therefore held that where the present value of property devoted to the public service is in excess of original cost, the utility company is not limited to a return on cost. Conversely, if the plant has depreciated in value, the public should not be bound to allow a return measured by investment. Of course the amount of that investment is to be considered along with appraisal of the property as presently existing, in order to arrive at a fair conclusion as to present value, for actual cost, reproduction cost and all other elements affecting value are to be given their proper weight in the final conclusion.[8]

But it is to be remembered that such a property as that here under consideration is a great integrated aggregate of many and diverse elements; is not primarily intended for sale in the market, but for devotion to the public use now and for the indefinite future; and has, so far as its market value is concerned, no real resemblance to a bushel of wheat or a ton of iron. While, therefore, the owner of such a property must assume and may not pass on to the pub-

[7] *Minnesota Rate Cases, supra,* 454; *McCardle* v. *Indianapolis Water Co., supra,* 410; *Los Angeles Gas Co.* v. *Railroad Commission, supra,* 311.

[8] *Los Angeles Gas Co.* v. *Railroad Commission, supra,* 306.

lic the risk involved in a general decline in values, and may have the advantage also of a general rise in such values, it would not only be unfair but impracticable to adjust the value and the consequent rate of return to sudden fluctuations in the price level. For in its essence this is the sort of aggregate whose value is not fairly or accurately reflected by such abrupt alterations in the market. A public service corporation ought not, therefore, in a rate proceeding, to be permitted to claim to the last dollar an increased value consequent upon a sudden and precipitate rise in spot prices of material or labor. No more ought the value attributable to its property to be depressed by a similar sudden decline in the price level. The present case affords an excellent example. As shown by the Commission's exhibits, the price trend was gradually ascending from 1923 to 1929. It then suffered a precipitate decline so that at December, 1932, the date of the Commission's valuation, it was at the nadir. Since then it has made a sharp recovery. The Commission recognized this. Its report and order were made November 28, 1933. At that time the price level, as shown by the all-commodities index of the United States Department of Labor, had risen 13.1 per cent. over that of December 31, 1932. For this reason the Commission, instead of cutting the net income of the company $1,396,000, allowed what has been called a " spread " or " cushion " of $396,000, by ordering a reduction of $1,000,000. The price level has since continued to rise. By the application of the same index a valuation would have been obtained at December 31, 1934, of $38,390,922, and at February, 1935 of $39,691,-038, or more than $1,000,000 greater than the amount fixed by the court as of December 31, 1933. It thus appears that the so-called spread or cushion has already been absorbed if judgment is to be based on rapid rise in spot commodity prices. What the Commission in effect did was to take the temporary low level of December, 1932,

and apply this low level for the indefinite future in ascertaining the so-called fair value of the company's plant and property. The experience of the two years which have elapsed since the Commission's order clearly indicates the impropriety of the use of its method in the appraisal of a property such as that of this company.

We agree, therefore, with the view of the District Court, that the method was inapt and improper, is not calculated to obtain a fair or accurate result, and should not be employed in the valuation of utility plants for rate making purposes. As that court observed, it is not the function of a tribunal inquiring into the question of confiscation to set aside the legislative finding for mere errors of procedure. The duty of a court is merely to ascertain whether the legislative process has resulted in confiscation. In *Los Angeles Gas & Electric Corp.* v. *Railroad Commission, supra,* this Court said:

"The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory." (p. 304.)

The language was used in respect of the claim that values of various elements had been ignored by the Commission. It was found, however, that though error might have been committed in respect of the items specified, other allowances neutralized the possible error. See, also, *Dayton, P. & L. Co.* v. *Public Utilities Comm'n,* 292 U. S.

290, 306. Nothing said in either of these cases justifies the claim that this court has departed from the principles announced in earlier cases as to the value upon which a utility is entitled to earn a reasonable return or the character of evidence relevant to that issue. It is apparent from what has been said that here the entire method of the Commission was erroneous and its use necessarily involved unjust and inaccurate results. In such a case it is not the function of a court, upon a claim of confiscation, to make a new valuation upon some different theory in an effort to sustain a procedure which is fundamentally faulty.

The principle applicable in circumstances such as this record discloses was announced in *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39. There a state commission set out to determine rates for intrastate transportation of logs in carloads. The carriers introduced evidence that existing rates did not yield any return on the property employed or defray the operating costs of the traffic and its proportionate taxes. The commission, without introducing evidence in contradiction of the proof submitted by the carriers as to actual operating costs, entered an order lowering the rates on the basis of a composite figure obtained largely from data in the reports submitted by the carriers and their exhibits in the proceeding, representing the weighted average operating cost per thousand gross-ton-miles of all revenue freight transported on the carriers' systems, including main line and branch line freight, interstate and intrastate, carload and less than carload. The supreme court of the State sustained the order, and this court reversed, holding that the error in the method pursued was fundamental and amounted to a denial of due process. It was said (p. 43):

"A precise issue was the cost on each railroad of transporting logs in carload lots in western Washington, the

average haul on each system being not more than 32 miles. In using the above composite figure in the determination of this issue the Department necessarily ignored, in the first place, the differences in the average unit cost on the several systems; and then the differences on each in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation is conducted. In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul; in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, car load and less than car load, are counted alike. The Department's error was fundamental in its nature. The use of this factor in computing the operating costs of the log traffic vitiated the whole process of reasoning by which the Department reached its conclusion.

". . . But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, courts may enquire into the method by which its conclusion was reached. An order based upon a finding made without evidence, *The Chicago Junction Case,* 264 U. S. 258, 263, or upon a finding made upon evidence which clearly does not support it, *Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 547, is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process."

To the same effect see *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Comm'n,* 274 U. S. 344, 351.

There is a suggestion in the report to the effect that the Commission's method was agreed to by both parties.[9] We find, however, in the District Court's opinion, a statement that the use of index figures was the subject of contest.[10] We think the apparent contradiction is explained by reference to the record, which discloses the company used price relation to obtain the present value of certain property, but separated from other sorts each kind of property so treated. This is comparable to the practice of the Interstate Commerce Commission in translating the value of specific railroad property, e. g., steel rails, by the use of the differential between the per ton price in 1914, the date of original appraisal, and the price prevailing at a later date.[11] In this sense the company employed price indices; but it is plain that such a use of relation of values of specific articles as of two given dates is quite distinct from the application of general commodity indices to a conglomerate of assets constituting an utility plant. Much is made of the fact that in the suit brought by the company in 1923 the District Court applied a price index to cost, and thus determined the then value of the property. But this fact cannot justify the application of the same procedure here, in the face of the challenge of its propriety. In the present case the company did not put into evidence any such price indices as

[9] " Both the Company and the Commission realized that to attempt to find the present day fair value of the Company's property by the usual method of taking an inventory of all items of property owned by the Company and pricing out those items at present day prices would not only take at least two years of constant work but would cost the Company not less than $300,000 and cost the State a very substantial sum. It was agreed that index numbers should be used in arriving at present day costs."

[10] 7 F. Supp. 233.

[11] Compare *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461, 486–7.

were used by the Commission but on the contrary offered evidence to show that the use of them as a sole criterion of value would be improper.

Second. As already stated, the District Court condemned the method pursued by the Commission, and adopted one of its own. This consisted in deducting the company's depreciation reserve from book cost and adding to the difference an allowance for working capital. It is true that the court discussed the company's evidence as to cost of reproduction new, less depreciation, but did so only to indicate its disapproval of certain large amounts embodied in the total claimed and to reconcile the figures with its own estimate. A careful reading of the opinion leaves no doubt that all other measures of value were discarded in favor of cost less depreciation reserve.

It is clear that in a period of low prices costs incurred when the price level was much higher are not a safe guide in appraising present value. The court so conceded. The depreciation reserve was built up on the straight line theory.[12] The company asserted that the amount of the reserve did not represent observed and accrued depreciation at the date of valuation,[13] as much of the total consisted of funds provided in anticipation of future depreciation and obsolescence. The court agreed and further found that on account of decreased demand for service, with consequent diminishment of obsolescence, the percentage of reserve had in recent years sharply increased. The question of going value was the subject of controversy. The court recognized that this element must be considered, but refused to make any separate allowance for it.

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[12] See *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 167–8.

[13] Compare *Clark's Ferry Bridge Co.* v. *Public Service Comm'n, supra,* 239.

What the court did in fact was this: It found that book cost less actual accrued depreciation would probably give too high a figure. It sought to correct the probable error by deducting from cost the entire depreciation reserve, though conceding this exceeded actual depreciation. It felt that this large deduction would also redress any excess of cost over present value; and finally it said the result of its method would be appropriate to allow for going value.

Two quotations from the opinion will illustrate the basis of the court's action.

"We are not unmindful that at the present time the depreciation reserve is slightly higher than normal and to the extent that it is, it is unfavorable to the company in the final result . . . But this disadvantage to the company is, we think, off-set by allowing it the full of its actual costs despite the generally lower trend of prices.[14]

"All relevant facts considered, we are of the opinion that a fair allowance for going value is made when we value the telephone property as a whole and as a going concern at its actual book costs less full depreciation." [15]

The opinion in essence consists of the conclusion, that, all the circumstances considered, it will be fair to appraise the property at cost less depreciation reserve. This rough and ready approximation of value is as arbitrary as that of the Commission, for it is unsupported by findings based upon evidence.

Third. For the reasons stated we cannot sustain the District Court's valuation. We have shown that the Commission's order violates the principle of due process, as the measure of value adopted is inadmissible. It is not our function, and was not the function of the court below, to do the work of the Commission by determining a rate

[14] 7 F. Supp. 228.

[15] 7 F. Supp. 226.

base upon correct principles. The District Court, upon finding that the Commission reached its conclusions as to fair value from data which furnished no legal support, should have enjoined enforcement of the rate order. The court's action was therefore right, regardless of the method it pursued in reaching the decision that the order was confiscatory.

The grounds upon which we decide the case render it unnecessary for us to consider the appellants' challenge of rulings of the District Court respecting working capital and annual depreciation allowance, or to discuss the rate of return to which the company is entitled in view of the agreement of the court and the Commission upon this point.

The decree is

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the decree should be reversed.

The suit is in equity, brought in a federal district court to set aside the legislative action of the State in prescribing telephone rates through the agency of its public service commission. The sole issue raised by the pleadings, and the only one presented to us and to the court below, is whether there is confiscation of appellee's property by reduction of its rates. It is not within the province of the federal courts to prescribe rates or to revise rates fixed by state authority, unless property is taken without due process in violation of the Fourteenth Amendment. *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 271, 272. This Court, in setting aside the order of the Commission and leaving the old rates in force, does not pass upon that issue. It does not hold that the rate fixed by the Commission will confiscate appellee's property, nor does it agree with the determination of the district court below that it will.

For it is declared that the district court has not followed the rules sanctioned by this Court for determining the fair value of the property of a public service company and, in consequence, its conclusion that there has been confiscation must be rejected. But, notwithstanding the errors of the district court, this Court upholds its decree. The order of the Commission is thus set aside, upon a ground not raised upon the record or considered by the court below. This is done not because the rate is confiscatory, but because the method by which the Commission arrived at its conclusion, which is now pronounced "inapt" and "erroneous," is declared to be unconstitutional.

The Fourteenth Amendment is thus said to be infringed, not because the appellee has been deprived of any substantive right, but because the Commission's action is deemed a denial of due process in the procedural sense. But not even the procedure is condemned because it lacks those essential qualities of fairness and justice which are all the Fourteenth Amendment has hitherto been supposed to exact of bodies exercising judicial or *quasi*-judicial functions. The Commission has punctiliously adhered to a procedure which acts only after notice and hears before it condemns. *Hurtado* v. *California,* 110 U. S. 516, 535, 536; *Holden* v. *Hardy,* 169 U. S. 366, 389–391; cf. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 457; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91. The sole transgression, for which its painstaking work is set at naught, is that, in the exercise of the administrative judgment of this body "informed by experience" and "appointed by law" to deal with the very problem now presented, see *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441, 454, it has relied upon a study of the historical cost and ascertained value of appellee's plant in the light of price indices, showing declines in prices, in arriving at the present fair value of the property, a procedure on which this

Court has hitherto set the seal of its approval. *Clark's Ferry Bridge Co.* v. *Public Service Comm'n,* 291 U. S. 227, 236; see also *St. Louis & O'Fallon Ry. Co.* v. *United States,* 279 U. S. 461.

In this state of the record it is unnecessary to consider whether the appellee has sustained the burden placed upon it of establishing confiscation, or to demonstrate, as I think may be done, that the facts found by the court below, and on which it acted, fall far short of showing that appellee's property is in any danger of confiscation. It is enough to point out that this Court has rejected the conclusions of the district court because it used book value as a measure of present fair value in times of falling prices, and that even with its findings of fair value, probable earnings and rate of depreciation, the district court found that the rate of return would be approximately 4½% on the property of one of the most stable of public utilities. If adjustment be made for a plainly excessive depreciation allowance, the rate of return on the court's figures would be raised to 5.10%.[1] The company supported its claim of confiscation by no evidence of the cur-

[1] The depreciation rate of 4% adopted by the Court in the place of the 3.45% allowed by the Commission is so plainly erroneous as to require its rejection. The Commission's conclusion was reached upon the ground that the abrupt cessation of expansion of the telephone business had greatly reduced the need for retiring property because inadequate to care for increased business. The district court conceded that the 1933 allowance at the 4.38% charged by the company was at least $1,250,000 higher than was necessary to maintain the customary 20% depreciation reserve against plant in service. The court nevertheless rejected the estimate of the Commission on the ground that "too much reliance must not be placed upon the experience of a single year." It thus concluded that a federal court may declare a rate order confiscatory because it differs with the Commission's predictions of future trends in the telephone business. It would seem hardly within the range of judicial omniscience to establish confiscation by overriding the Commission's determination that the telephone business is not likely markedly to expand in the near future.

rent yields of comparable investments and by no evidence of the rate of return generally obtaining in the money market.[2] The general conditions of the money market and the rate of return on invested capital may have a controlling influence in determining the issue of confiscation. *Bluefield Water Works Co.* v. *Public Service Comm'n,* 262 U. S. 679, 693; *United Railways* v. *West,* 280 U. S. 234, 249. There is at least grave doubt whether a return of 4½% is so out of line with the current yield on invested capital as to be deemed confiscatory. This doubt, if accepted principles be applied, must be resolved against the company, which has offered no evidence by which the doubt could be removed. Twenty-five years ago, in times far more prosperous than these, this Court unanimously declined to take judicial notice that an estimated net return of 4% would be confiscatory. *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 17.

In determining whether the procedure of the Commission involves any denial of federal right, open to review by collateral attack in the federal courts, it is important to consider a little more closely the nature of its "error." In 1925 the fair value of respondent's property as of 1923 was judicially determined by a federal district court of three judges, in a suit brought to set aside the Commission's determination. *Chesapeake & Potomac Telephone Co.* v. *Whitman,* 3 F. (2d) 938. The Commission had found the fair value of the property to be $24,350,000, about $1,500,000 more than net historical cost. The court

[2] The Commission introduced evidence that in 1932, 53.0% of 296 corporations, listed on the New York Stock Exchange and chosen at random, suffered a net loss, and that 65.9% earned less than 4% on their invested capital; 22.9% of the railroads listed on the Exchange suffered a net loss, and 89.6% earned less than 4% on their invested capital. Baltimore savings banks paid 3% in 1933; in December, 1933, prime commercial paper brought 1½%; call loans averaged 0.94%; United States Treasury Notes averaged 0.29% and Treasury Bonds 3.62%.

found the fair value to be $29,500,000, an increase of 21% over the Commission's valuation and of 29% over cost. The court arrived at the increase by precisely the same basic method which the Commission employed in the present case,[3] except that the Commission has applied it here with far greater care and thoroughness.

With this history before it the Commission, in its report in the present case states:

"Both the Company and the Commission realized that to attempt to find the present day fair value of the Company's property by the usual method of taking an inventory of all items of property owned by the Company and pricing out those items at present day prices would not only take at least two years of constant work but would cost the Company not less than $300,000 and cost the State a very substantial sum. It was agreed that index numbers should be used in arriving at present day costs." It is of no importance that the "agreement" to which the Commission refers was not formally spread upon the record, for the record itself shows that no objection was made to the introduction in evidence of the price indices offered both by the Commission and by appellee, and that no effort was made by either party to prove the value of appellee's property by engineers' appraisals of the whole property, or by estimates of present value based on expert observation or knowledge of the entire property. By common consent the case was tried before the Commission on the theory that present fair value for rate making purposes could be arrived at with substantial accuracy by the application of price indices to the 1923 value as it had been judicially ascertained, and to the cost of subsequent an-

[3] While not undertaking to declare the method universally applicable, it increased historical cost by an amount corresponding to the changes in the index of wholesale prices prepared by the Bureau of Labor Statistics.

nual additions to the property after deducting accrued depreciation.

The Commission did not adopt any single index. It prepared its own index for translating book value into present fair value, on the basis of an elaborate study of price indices of recognized merit.[4] The result of this study it adopted and applied as more trustworthy than the index prepared by appellee, the salient features of which will presently be considered.

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[4] Sixteen price indices were used by the Commission. Five of them related to commodity prices, and included the comprehensive and reliable index of wholesale prices prepared by the United States Bureau of Labor Statistics. Five indices of construction costs were included, prepared by trade journals and concerns allied with the construction industry. Two indices of the price of building materials were used. An index of general consumers' purchasing power, issued by the Federal Reserve Bank of New York, was added. A painstakingly prepared index of Baltimore wages was included in order to insure adequate representation of labor costs. To guard against any peculiarity in the price trends of telephone property, two specialized indices were also taken into consideration. One was the Interstate Commerce Commission index of telephone and telegraph property owned by railroads. That the Interstate Commerce Commission stated that "the indices represent territorial index factors and are not applicable for use in the determination of unit reproduction costs upon individual roads" does not lessen the value of the index as one element of the valuation or as a check on the results reached by other indices. Finally, an index based upon Western Electric prices for telephone equipment and apparatus was used (after elimination of a price rise in 1930, found by the Commission to be artificial). This index is incontrovertibly applicable to 25% of the company property. It is not to be wholly rejected because it is not a perfect and a certain measure of the whole property.

These results were averaged. Since some of the indices were more accurate than others, and since some were more directly applicable to telephone property, they were assigned greater weights. It is clear that these were the considerations which influenced the Commission's judgment as to the appropriate weighting. For example, the Bureau of Labor Statistics wholesale price index received a weight of four;

The Commission did not refuse to receive or to consider any of the evidence presented. Its decision and order were based upon an examination, commendable for thoroughness and skill, of all the evidence. Its error, if error there was, did not consist in receiving and considering the evidence submitted of indices showing changes in commodity and other prices. It would have been error for the Commission not to have considered it. In *St. Louis & O'Fallon Ry. Co.* v. *United States, supra,* this Court set aside a recapture order of the Interstate Commerce Commission on the sole ground that the Commission had failed to consider evidence before it tending to show that the reproduction cost of the structural property of the railroad was greater than original cost. The only evidence of this character disclosed by the record consisted of index figures showing the comparative price levels of labor and materials for 1914 and each of the subsequent recapture years.[5] The valuation of the property by the Commission was set aside by this Court on the ground that the Commission

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the Interstate Commerce Commission index of telephone and telegraph property and the index based on Western Electric prices each received a weight of three; all the other indices were given a weight of one to two. The results of the highest and lowest of the indices differed from the Commission average only by 10.6% and 23.4% respectively. Eleven of the sixteen indices separately considered gave results ranging between $30,000,000 and $34,600,000. There is plainly a rather close clustering about the average of $32,610,327 found by the Commission.

[5] Of the twenty-four structural property accounts of the O'Fallon Railroad, seventeen were trended from 1914 prices by the use of the wholesale price index of the Bureau of Labor Statistics, one by the National Industrial Conference Board's index of average hourly earnings on railways, and four by the use of an index of railway equipment prepared by the "President's Conference Committee of Federal Valuation," and two were continued at cost. None of the accounts was adjusted to current price levels by direct estimates or by direct pricing of the equipment, much of which was equipment purchased second-hand and long in service.

had failed to consider the evidence of increased value over cost. In *Clark's Ferry Bridge Co.* v. *Public Service Comm'n, supra,* 236, this Court held that the Supreme Court of Pennsylvania, in sustaining the action of a state commission, rightly rejected engineers' appraisals and estimates of value, in favor of a lower valuation by the Commission based on cost and a study of charts showing the price trends of labor and materials from 1924 to 1930 inclusive. In affirming the judgment of the state court, this Court expressly approved this method of arriving at fair value, although it was less meticulously and carefully applied than by the Commission in this case, and held that the evidence of cost and of price trends, of the same character as those on which the Commission acted here, outweighed engineering appraisals of the whole property, which the appellee here did not choose to offer.

The extent of the Commission's error thus appears to be that in considering all the evidence before it, in the manner approved by the *Clark's Ferry Bridge Co.* case, *supra,* it thought that the 1923 value of the appellee's plant and equipment, and actual cost of subsequent additions, reasonably adjusted so as to conform to generally recognized changes in the prices of labor and materials, as shown by reliable price indices, would afford a better guide to present fair value than the evidence offered by the company. The results thus obtained were checked against current wage scales in construction industries in Baltimore and vicinity, and against the prices of specific commodities entering into the construction of telephone equipment. The company's evidence consisted of its own price index, derived by appraising samples of its property, ranging from 1% to 20% of the total property of each type, and assuming similar appraisals for each intervening year since 1923. Its index was based in substantial part on monopoly prices charged appellee for equipment purchased from its affiliate, the Western Elec-

tric Company, which is subject to the same corporate control as appellee, and on its own labor costs for construction work as shown by its books at a time when it was engaged in no important construction. The Western Electric Company is shown to have increased its prices of equipment 10.2% in November, 1930, at the very time when prices of commodities and similar manufactures were declining. This increase is reflected in the index used by the company. Upon all the evidence, the Commission concluded that appellee did not sustain the burden resting on it, see *Western Distributing Co.* v. *Public Service Comm'n*, 285 U. S. 119, 124; *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 153; *Dayton Power & Light Co.* v. *Public Utilities Comm'n*, 292 U. S. 290, 308, of showing the reasonableness of the prices paid by it to its affiliate. The labor costs of the small amount of construction work carried on by the company were shown to be materially higher than those prevailing in the construction trades in Baltimore and vicinity. In 1930 (the date chosen by the company) they were about 147% of their 1923 level, while in December, 1932, (the valuation date) Baltimore wages generally were about 87% of that level. It is unnecessary to discuss other defects of appellee's proof so extreme as to discredit it.[6] Its reliance here upon its own proof is at most perfunctory. It seeks only to sustain the conclusions of the court below, which this Court rejects.

Public utility commissions, like other *quasi*-judicial and judicial bodies, must try cases on the evidence before them.

[6] In appellee's proof overhead during construction cost was estimated at 19% of the "directly distributed cost." Accrued depreciation was based on physical impairment rather than reduction in value and the element of obsolescence was ignored. "Going value" amounting to 10.7% of the swollen valuation thus obtained was added, with no showing of necessity of any additional or independent allowance for going value.

No basis has been suggested for declaring that the work of the Commission must be rejected because of its reliance upon evidence which it was bound to consider, unless we are also prepared to say that its result was wrong. If we are unable on any ground to find that confiscation will occur, I cannot say that actual cost or ascertained value of the structural equipment of the telephone company, trended in accordance with reliable price indices, is any less trustworthy evidence of present fair value than the more customary engineers' appraisals and estimates, which appellee did not think it worth while to offer, or that, in any case, such a determination infringes any constitutional immunity.

In assuming the task of determining judicially the present fair replacement value of the vast properties of public utilities, courts have been projected into the most speculative undertaking imposed upon them in the entire history of English jurisprudence. Precluded from consideration of the unregulated earning capacity of the utility, they must find the present theoretical value of a complex property, built up by gradual accretions through long periods of years. Such a property has no market value, because there is no market in which it is bought and sold. Market value would not be acceptable, in any event, because it would plainly be determined by estimates of future regulated earnings. Estimates of its value, including the items of " overheads " and " going concern value," cannot be tested by any actual sale or by the actual present cost of constructing and assembling the property under competitive conditions. Public utility properties are not thus created full fledged at a single stroke. If it were to be presently rebuilt in its entirety, in all probability it would not be constructed in its present form. When we arrive at a theoretical value based upon such uncertain and fugitive data we gain at best only an illusory certainty. No court can evolve from its inner consciousness

the answer to the question whether the illusion of certainty will invariably be better supported by a study of the actual cost of the property adjusted to price trends, or by a study of the estimates of engineers based upon data which never have existed and never will. The value of such a study is a question of fact in each case, to be ascertained like any other in the light of the record, and with some regard to the expert knowledge and experience of the Commission which, in the present case, are obviously great.

It is said that the price indices "were not prepared as an aid to the appraisal of property," that "they were intended merely to indicate price trends," a suggestion that seems to assume that known price trends are irrelevant to the determination of the present fair value of property whose cost is known. It is also said that the "wide variation of results of the employment of different indices . . . impugns their accuracy as implements of appraisal." The use of a single price index to the exclusion of all others, it is true, might well produce as inaccurate a result as if a single engineer's estimate were used to the exclusion of all others, and without test of its verity. But the record affords striking evidence of the accuracy of the composite index translators prepared and used by the Commission, quite apart from the relatively close agreement in the results obtained by the individual indices. From 1923 until 1930, when the Western Electric Company raised its prices, the Commission's index translator accurately reflected the changes in price actually paid by appellee for its purchased equipment, and the Commission and company indices were in close conformity. Eliminating these price changes and the excessive labor costs appearing in the company's own index, the resulting present fair value of appellee's equipment did not differ substantially from the Commission's valuation of it. So far as the results of the use of standard price indices are impugned by their variation, an examination of the present record will dis-

close that the results obtained by the application of price indices to the historical cost of plant are far less variable than engineers' valuations and in general are probably more trustworthy.[7] To speak of either class of evidence as so accurate as to require a commission as a matter of law to accept it, or so inaccurate as to require the rejection of a valuation based upon it, is to attribute to the valua-

[7] The lowest result obtained by the Commission in the use of the sixteen classes of price indices was 76.6% of the Commission's valuation. The highest was 110.6%. Against these differences of only 23.4% and 10.6%, the record shows that in rate cases before the Maryland Public Service Commission, the Company valuations based on engineering appraisals had exceeded the Commission's similar valuations by amounts ranging from 25.0% to 59.4%. The average was 41.3%. Most of the rate cases reported in the 1931 and 1932 Public Utility Reports were examined. In the 1931 reports the company valuations similarly exceeded commission valuations by amounts ranging from 2.1% to 71.2%. The average was 28.9%. In the 1932 reports the company valuations exceeded commission valuations by amounts ranging from 7.7% to 135.4%. The average was 57.4%.

An example of the variation in results obtained by an engineering appraisal of telephone property is found in the record in *New York Telephone Co.* v. *Prendergast,* 36 F. (2d) 54. The minority report of the Commission on Revision of the New York State Public Service Commission Law (1930) at page 266, summarizes the different estimates of fair value as of July 1, 1926, as follows:

	Valuation	*Increase over the Commission Valuation.*
Majority of Commission	$366,915,493	
Statutory Court	397,207,925	8.2%
Minority of Commission	405,502,993	10.5%
Master's report	518,109,584	41.2%
Company claim based on Whittemore appraisal	528,753,738	44.1%
Company claim based on Stone & Webster appraisal	615,000,000	67.1%

The comment of the report, page 265, is that " the variety of conclusions reached in the course of this case is dramatic evidence that the concept of ' fair value,' as an objective, provable fact is a judicial myth."

tion process a possibility of accuracy and certainty wholly fictitious. Present fair value at best is but an estimate. Historical cost appropriately adjusted by reasonable recognition of price trends appears to be quite as common sense a method of arrival at a present theoretical value as any other. For a period of twenty years or more of rising prices, commissions and courts, including this one, have regarded price variations as persuasive evidence that present fair value was more than cost. I see no reason for concluding that they are of less weight in times of declining prices.

If I am mistaken in this view, it does not follow that a like error of judgment by a state commission is a violation of the Constitution, and that a federal court can rightly set aside its order, even though there is no confiscation. It is true that in *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, this Court, in holding invalid an order arbitrarily lowering rates which the only evidence of probative value showed were already confiscatory, criticized the method adopted by the Commission and characterized its action as a denial of due process. But the Court was careful to point out (p. 44) that:

"The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent, *United States* v. *Abilene & Southern Ry.,* 265 U. S. 274, 288, or mere error in reasoning upon evidence introduced, does not invalidate an order."

And in *Chicago, M. & St. P. Ry. Co. v. Public Utilities Comm'n,* 274 U. S. 344, 351, where this Court set aside the rate fixed by a state commission as confiscatory, the method of valuation pursued by the commission was characterized as erroneous and open to review by this Court, as of course it is when the validity of the result is the subject of inquiry. But in no case hitherto has this

Court assumed to set aside a rate fixed by a state commission, not found to be confiscatory, merely for what it conceived to be an erroneous method of valuation. If such an error in the deliberations of a state tribunal is a violation of the Constitution, I should think that every error of a state court would present a federal question reviewable here. It would seem that doubts, if any, as to the scope of our review of the action of a state commission in a case like the present, had been put at rest by our decision, two terms ago, in *Los Angeles Gas. Co.* v. *Railroad Commission,* 289 U. S. 287. There the Commission made its valuation on the basis of prudent investment, a method repeatedly repudiated by this Court. It was argued that the erroneous method pursued by the Commission vitiated its order, whether confiscatory or not. The Court emphatically repudiated that argument, saying (pp. 304, 305):

"We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446. The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached. but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established."

Such should be our decision now.

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

NEW JERSEY *v.* DELAWARE.

No. 11, original. Decided February 5, 1934 (291 U. S. 361).—
Decree entered June 3, 1935.

DECREE.

This cause came on to be heard upon the pleadings, evidence and the exceptions filed by the parties to the report of the Special Master, and was argued by counsel. The Court now being fully advised in the premises and for the purpose of carrying into effect the conclusions set forth in the opinion of this Court, announced February 5, 1934 (291 U. S. 361);

It it now ORDERED, ADJUDGED AND DECREED as follows:

1. The report of the Special Master filed in this cause is hereby approved, and all exceptions thereto are hereby overruled.

2. Within the twelve mile circle (that is, within the circle the radius of which is twelve miles, and the center of which is the building used prior to 1881 as the court-house at New Castle, Delaware, certain arcs of which are hereafter described and determined), the Delaware River and the subaqueous soil thereof up to mean low water line on the easterly or New Jersey side is adjudged to belong to the State of Delaware, and the true boundary line between the States within said twelve mile circle is adjudged to be mean low water mark on the easterly or New Jersey side of the Delaware River.

3. Below said twelve mile circle the true boundary line between the States of New Jersey and Delaware is adjudged to be the middle of the main ship channel in Delaware River and Bay.

4. The real, certain and true boundary line separating the States of New Jersey and Delaware, in Delaware River and Bay thus determined is shown upon the annexed com-

posite map, made up of parts of charts Nos. 294 and 295 (published in September, 1933), and No. 1218 (published in August, 1932), of the United States Coast and Geodetic Survey, embracing the particular locality; said composite map is identified by title and date as follows:

"Map of
New Jersey-Delaware Boundary
in
Delaware River and Delaware Bay
To Accompany
The Decree of the Supreme Court of the United States
Being a composite map combining and reducing U. S. C. & G. S. Charts 294, 295 (Sept. 1933) and 1218 (Aug. 1932) to show boundary between New Jersey and Delaware settled by the final decree of the Supreme Court of the United States—pursuant to the opinion of the Court reported in 291 U. S. 361.
(Scale)
March 30, 1935 Sherman & Sleeper,
Engineers.
501 Cooper Street,
Camden, N. J."

Said boundary line is described as follows:

BEGINNING at a point in the middle of the main ship channel of the Delaware River in the extension southeastward of the Eastern Arc of the Compound Curve of the boundary between Delaware and Pennsylvania, as surveyed by W. C. Hodgkins of the U. S. Coast and Geodetic Survey and set forth in Appendix No. 8 of the Survey Report for 1893; said point being a corner between Pennsylvania and New Jersey.

Thence (1) southeastward along said arc extended to the mean low water line on the eastern bank of the Delaware River, which point is N 49° 50′ W True, 460 feet from Boundary Reference Monument No. 1 the position of which is Lat. 39° 47′ 43.211″, Long. 75° 24′ 16.047″.

Thence (2) along the mean low water line of the eastern bank of the Delaware River the several courses and distances thereof, the general direction being southwestward, crossing in a straight line the mouth of each intervening small estuary, to a point on the end of the spit extending southwestward from the fast land of Oldman's Neck, on the northwestern side of the mouth of Oldman's Creek; said point is located N 51° 38′ W True, 637 feet from Boundary Reference Monument No. 2 the position of which is Lat. 39° 46′ 23.552″, Long. 75° 26′ 49.560″.

Thence (3) southwestward in a straight line across the mouth of Oldman's Creek to a point on the mean low water line located N 51° 38′ W True, 183 feet from Boundary Reference Monument No. 2.

Thence (4) along the mean low water line of the eastern bank of the Delaware River, the several courses and distances thereof, the general direction being first southwestward, then southeastward, crossing in a straight line the mouth of each intervening small estuary, to a point located S 3° 57′ 55″ E True, 116 feet from Boundary Reference Monument No. 3 (which monument is U. S. Coast and Geodetic Survey Triangulation Station SALEM COVE NORTH) the position of which is Lat. 39° 34′ 40.915″, Long. 75° 30′ 46.942″.

Thence (5) southward in a straight line across the mouth of the Salem River to a point on the mean low water line of the Eastern bank of the Delaware River located N 3° 57′ 53″ W True, 108 feet from Boundary Reference Monument No. 4 (which monument is U. S. Coast and Geodetic Survey Triangulation Station SALEM COVE SOUTH) the position of which is Lat. 39° 34′ 03.753″, Long. 75° 30′ 43.614″.

Thence (6) along the mean low water line of the eastern bank of the Delaware River, the several courses and distances thereof, the general direction being first, southwestward, second, southeastward and lastly, southward,

crossing in a straight line the mouth of each intervening small estuary, to a point located S 80° 19′ W True, 55 feet from Boundary Reference Monument No. 5 the position of which is Lat. 39° 29′ 52.718″, Long. 75° 31′ 41.555″.

Thence (7) westward along the arc of a circle, the radius of which is 18216.16 meters or 59,764.2 feet and the center of which is the building used prior to 1881 as the County Courthouse at New Castle, Delaware, across Artificial Island, passing through Boundary Monument No. 6 on Artificial Island the position of which is Lat. 39° 29′ 47.255″, Long. 75° 32′ 33.640″; and continuing westward along the same arc extended to Turning Point No. 7 in the middle of the main ship channel of the Delaware River said Turning Point No. 7 being located S 86° 30′ W True, 1567 yards from said Boundary Monument No. 6.

Thence (8) in a straight line S 15° 11′ W True, 1603 yards to Turning Point No. 8 located N 89° 07′ E True, 997 yards from Reedy Island Jetty Middle Light.

Thence (9) in a straight line S 4° 56′ E True, 3341 yards to Turning Point No. 9 located N 51° 33′ E True, 1937 yards from Reedy Island Front Range Light.

Thence (10) in a straight line S 42° 01′ E True, 30,208 yards going from the Delaware River into Delaware Bay, and passing through a point located S 48° 06′ W True, 668 yards from Ship John Shoal Light, to Turning Point No. 10 located S 34° 24′ E True, 5106 yards from Ship John Shoal Light and in a straight line between Ship John Shoal Light and Elbow of Cross Ledge Light.

Thence (11) in a straight line S 34° 22′ E True, 12,995 yards to Elbow of Cross Ledge Light, being Turning Point No. 11.

Thence (12) in a straight line S 31° 44′ E True, along a straight line between Elbow of Cross Ledge Light and Brandywine Shoal Light, 18,124 yards to Turning Point

No. 12 located N 58° 16′ E True, 1612 yards from Fourteen Foot Bank Light.

Thence (13) in a straight line S 24° 06′ E True, be the distance more or less, through Delaware Bay and seaward to the limits of the respective States of New Jersey and Delaware in the Atlantic Ocean, said course passing through a point located S 65° 54′ W True, 1303 yards from Brandywine Shoal Light.

In the foregoing description the courses or bearings refer to the true meridian passing through the beginning of each course; the positions of the monuments are given on the North American Datum 1927; the names of lights and ranges are those given in the Light Lists, Atlantic and Gulf Coasts of the United States, corrected to January 15, 1934, and published by the Bureau of Lighthouses, with the exception of Reedy Island Jetty Middle Light which was not established until about July 12, 1934; the position of the lights in 1934 is used in computing the turning points of the various courses of the boundary and as reference points for these turning points and tie lines to the courses.

5. The court retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree, and for the purpose of a resurvey of said boundary line in case of physical changes in the mean low water line within said circle, or in the middle of the main ship channel below said circle, which may, under established rules of law, alter the location of such boundary line.

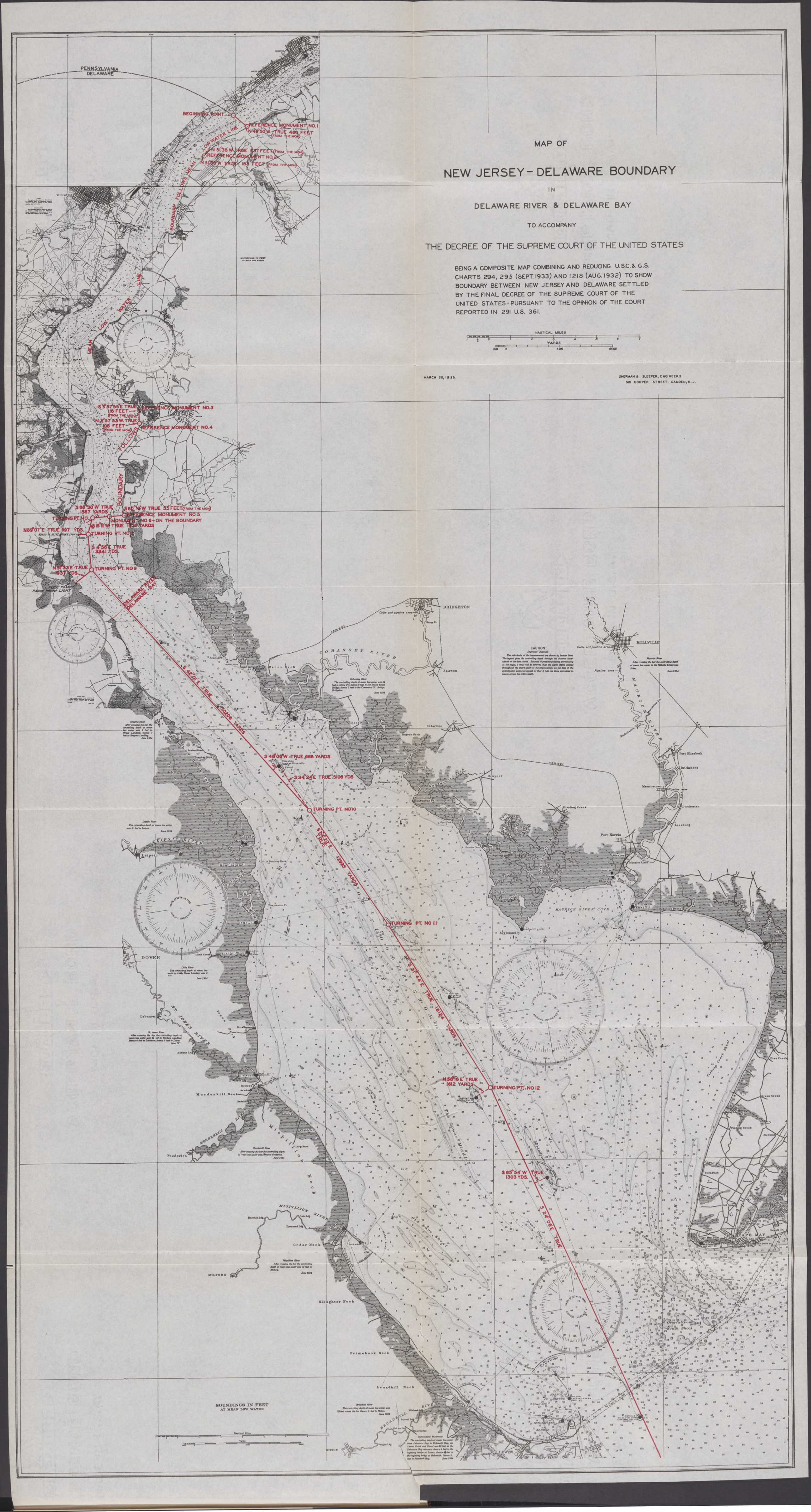
6. The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree;

and the State of New Jersey, its officers, agents and representatives, its citizens and all other persons are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of Delaware over the territory adjudged to the State of Delaware by this decree.

7. This decree is made without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states (*34 Stat. L. Pt. 1, Ch. 394, p. 858*).

8. The costs of this suit shall be equally divided between the parties.

[A copy of the map referred to in the foregoing decree is inserted on the next page.]


MAP OF
NEW JERSEY - DELAWARE BOUNDARY
IN
DELAWARE RIVER & DELAWARE BAY
TO ACCOMPANY
THE DECREE OF THE SUPREME COURT OF THE UNITED STATES
BEING A COMPOSITE MAP COMBINING AND REDUCING U.S.C.& G.S. CHARTS 294, 295 (SEPT. 1933) AND 1218 (AUG. 1932) TO SHOW BOUNDARY BETWEEN NEW JERSEY AND DELAWARE SETTLED BY THE FINAL DECREE OF THE SUPREME COURT OF THE UNITED STATES - PURSUANT TO THE OPINION OF THE COURT REPORTED IN 291 U.S. 361.
NAUTICAL MILES
YARDS
MARCH 30, 1935.
SHERMAN & SLEEPER, ENGINEERS.
501 COOPER STREET. CAMDEN, N.J.
PENNSYLVANIA
DELAWARE
BEGINNING POINT
REFERENCE MONUMENT NO.1
N 49°50' W TRUE 465 FEET
(FROM THE MON.)
N 5°38 W TRUE 827 FEET (FROM THE MON.)
REFERENCE MONUMENT NO.2
N 45°58' W TRUE 183 FEET (FROM THE MON.)
LOW WATER LINE
MEAN
BOUNDARY
COLLINS'S
S 3°57'55"E TRUE
118 FEET
(FROM THE MON.)
N 3°57'53"W TRUE
198 FEET
(FROM THE MON.)
REFERENCE MONUMENT NO.3
REFERENCE MONUMENT NO.4
TOLLGATE
S 86°30' W TRUE
1587 YARDS
TURNING PT. NO.7
S 86° W TRUE 55 FEET (FROM THE MON.)
REFERENCE MONUMENT NO.5
MONUMENT NO 6 - ON THE BOUNDARY
N 18° W TRUE 1503 YARDS
N89°07' E TRUE 897 YDS.
TURNING PT. NO.8
S 4°56' E TRUE
3341 YDS.
N 5° 33' E TRUE
837 YDS.
TURNING PT. NO 9
DELAWARE RIVER
DELAWARE BAY
S 3°56'E TRUE 10000.9 YARDS
S 45°06'W TRUE 868 YARDS
S 33°24'E TRUE 5106 YDS
TURNING PT. NO 10
S 5°54'E TRUE 12682 YARDS
TURNING PT. NO 11
S 31°44'E TRUE 11812 YARDS
N 56°18' E TRUE
1812 YARDS
TURNING PT. NO 12
S 85°54' W TRUE
1303 YDS.
S 2°28' E TRUE
SOUNDINGS IN FEET
AT MEAN LOW WATER
BRIDGETON
MILLVILLE
CAUTION
Improved Channels
DOVER
MILFORD
LEWES
CAPE MAY
MAURICE RIVER COVE
DELAWARE BAY
MAURICE RIVER
COHANSEY RIVER
St. JOHNES RIVER
MISPILLION RIVER
Slaughter Neck
Primehook Neck
broadkill Neck
Port Elizabeth
Port Norris
Fairton
Leipsic
Frederica
Milton

UNITED STATES *v.* OREGON.

No. 13, original. Decided April 1, 1935 (*ante*, p. 1).—Decree entered June 3, 1935

DECREE.

This cause came on to be heard by this Court upon the exceptions of the parties to the Report of the Special Master.

For the purpose of carrying into effect the conclusions of the Court as stated in its opinion, dated April 1, 1935, *ante*, p. 1, it is ORDERED, ADJUDGED AND DECREED as follows:

1. At the time of the admission of the State of Oregon into the Union, February 14, 1859, the United States of America was the owner in fee, and entitled to the possession of 81,786 acres, more or less, of unsurveyed land lying within the meander line boundary, as more specifically described in paragraph 13 of this decree, and divided for the purposes of this case into five divisions, (1) Lake Malheur; (2) Narrows; (3) Mud Lake; (4) Sand Reef; and (5) Harney Lake, and of all the surrounding region for many miles.

2. No part of the 81,786 acres within the meander line boundary constituted navigable waters on February 14, 1859, and the title and interest in no part passed from the United States of America to the State of Oregon upon her admission into the Union.

3. The United States of America has never in terms conveyed or otherwise disposed of any part of the area lying within the meander line boundary except such disposition as may have resulted (as matter of law) from its patents, grants and listings of land bordering on the meander line boundary but not lying within it.

4. The State of Oregon is the owner of upland having a frontage of 159.67 chains along the meander line in subdivision B of the Narrows Division (between the bridge and Mud Lake Division). 70.52 chains of this frontage are on the north boundary and 89.15 chains on the south boundary. The frontage of the State of Oregon on subdivision B of the Narrows Division constitutes 86.85% of the total frontage of 183.85 chains in that subdivision. The State of Oregon is the owner in fee simple absolute of the bed of subdivision B of the Narrows Division extending to the center line thereof and lying opposite and adjacent to her upland frontage (including stable lands, if any, lying within this area), subject to any rights with respect to ditches and canals retained by the United States by its patents of the upland, and subject to any easement for the flowage of water through the Narrows from the Malheur Division to the Mud Lake Division.

5. The United States of America has no right, title, or interest in the area known as the "Narrows Division" (R. S. § 2476), except the rights with respect to ditches and canals, if any, retained by its patents of adjacent uplands, and any easement for the flowage of water from the Malheur Division to the Mud Lake Division through the Narrows Division.

6. The United States of America is forever enjoined from asserting any estate, right, title, or interest in or against the estates, rights, titles, and interests owned and held by the State of Oregon in the Narrows Division, as determined in paragraph 4 of this decree.

7. The State of Oregon is the owner of upland having a frontage of 72.31 chains along the meander line in Mud Lake Division, which constitutes 8.96% of the total frontage of 806.94 chains on that division. In accordance with the findings of the Special Master, to which no exception is taken, it is decreed that the State of Oregon is the owner of a ratable portion of the bed of Mud Lake Division to

the extent of 8.96% of said bed (as 72.31 chains bears to 806.94 chains), allowing for equitable considerations which may affect this ratio, subject to any rights with respect to ditches and canals retained by the United States by its patents of the uplands on Mud Lake Division, and subject to any easement for the flowage of water from the Narrows Division to the Sand Reef Division.

8. The United States of America is forever enjoined from asserting any estate, right, title, or interest in or against the estates, rights, titles, and interests owned and held by the State of Oregon in the Mud Lake Division, as determined in paragraph 7 of this decree.

9. The surveys, as school lands, of Lots 1, 2, 3, Sec. 36, T. 26 S., R. 30 E. (north of Lake Malheur), in the Sand Reef Division; Lot 4 of this Sec. 36 and Lots 1, 2, 3, and 4 of Sec. 36, T. 27 S., R. 29½ E. in the Harney Lake Division, were approved subsequent to the establishment of the Lake Malheur Reservation by Executive Order No. 929, dated August 18, 1908, which appropriated these lots as a part of the Reservation, and no title or interest in them passed to the State of Oregon. Section 36, T. 26 S., R. 29 E., lying on the meander line boundary of Harney Lake, was surveyed as school lands, and the survey approved, prior to the establishment of the Lake Malheur Reservation. The State of Oregon claimed and received lieu lands elsewhere for a deficiency in this section, equivalent to the part thereof which lay within the meander line boundary, and it has no interest in the area within the meander line as an incident to its ownership of these uplands.

10. The State of Oregon has no right, title, or interest in or to any part of the area within the meander line boundary, including all stable lands above the water surface elevation of 4,093 feet above sea level, except as determined in paragraphs 4 and 7 of this decree.

11. Except as determined in paragraphs 4 and 7 of this decree, the United States of America is the owner in fee

simple absolute, and entitled to the possession, of all the area within the meander line boundary, but not including such parts, if any, as may have been, as matter of law, transferred by the United States of America by reason of and as an incident to patents of uplands bordering on the meander line boundary. As neither the patentees nor their successors in interest (except insofar as the State of Oregon is a successor in interest of some of the patentees) are parties to this suit, no determination is now made in respect of the rights, titles, and interests, if any, acquired by the patentees in the areas within the meander line boundary.

12. The State of Oregon is forever enjoined from asserting any estate, right, title, or interest in or to any of the area within the meander line boundary, except the estates, rights, titles, and interests determined in paragraphs 5 and 8 of this decree not to be owned by the United States.

13. The area within the meander line boundary comprises 81,786 acres, more or less, of unsurveyed lands in Harney County, Oregon, divided into five Divisions, shown in Appendix 2 of the Special Master's Report, Volume 2, pages 7 to 25, inclusive, and here described by metes and bounds as follows:

Lake Malheur Division (47,670.40 acres, more or less):

Begin at a point on the Neal Survey line of October, 1895, N. 88° W. 54.00 chs. from the NE. corner of Lot 9, Sec. 25, T. 26 S., R. 30 E., W. M. (South of Malheur Lake); thence approximately N. 42° W. 32.50 chs. across unsurveyed lands to the most easterly corner of Lot 1, Sec. 25, T. 26 S., R. 31 E., North of Malheur Lake; thence, in T. 26 S., R. 31 E. (North of Malheur Lake), N. 80°15′ W. 16.32 chs.; N. 65°30′ W. 7.00 chs.; N. 83°15′ W. 9.17 chs.; N. 5° W. 15.00 chs.; N. 00° 20.00 chs.; N. 9° E. 12.00 chs; N. 73° E. 15.50 chs.; N. 47°30′ E. 7.00 chs.; N. 14°30′ E. 11.00 chs.; N. 11°30′ E. 7.00 chs.; N. 65°30′ W. 4.00 chs.; S. 49°30′ W. 7.54 chs.; N. 63° W. 4.00 chs.; N. 55°30′ W.

5.00 chs.; N. 33° E. 6.65 chs.; N. 23° W. 3.00 chs.; N. 39° E. 9.00 chs.; N. 76° W. 3.00 chs.; N. 00° 4.00 chs.; N. 48°45′ E. 2.76 chs.; N. 41° E. 7.50 chs.; N. 62°30′ E. 6.00 chs.; N. 80° E. 6.00 chs.; S. 14° E. 11.00 chs.; S. 82°30′ W. 9.00 chs.; S. 72° E. 9.50 chs.; N. 55° E. 3.50 chs.; E. 00° 4.50 chs.; S. 25° E. 3.50 chs.; S. 32°30′ W. 11.95 chs.; S. 28° W. 5.00 chs.; S. 82°30′ E. 6.00 chs.; N. 53°30′ E. 8.73 chs.; N. 37° E. 6.50 chs.; E. 00° 5.00 chs.; N. 28° E. 7.00 chs.; N. 9° W. 5.50 chs.; N. 63°30′ W. 5.50 chs.; N. 29° E. 3.00 chs.; N. 61°30′ E. 4.00 chs.; N. 71° E. 4.50 chs.; S. 67° E. 4.50 chs.; N. 24° E. 3.50 chs.; S. 42° E. 1.70 chs.; N. 73° E. 4.00 chs.; S. 48° E. 5.00 chs.; S. 9° E. 4.00 chs.; N. 82°30′ E. 4.00 chs.; S. 3° E. 13.00 chs.; N. 44° E. 5.50 chs.; N. 22° E. 7.00 chs.; N. 47°30′ W. 9.00 chs.; N. 00° 5.00 chs.; N. 82°30′ E. 7.00 chs.; S. 78° E. 4.00 chs.; N. 84° E. 2.21 chs.;

Thence, in T. 26 S. R. 32 E. (North of Malheur Lake) N. 41° E. 5.50 chs.; S. 61° E. 8.00 chs.; S. 27° E. 9.00 chs.; N. 65°30′ E. 3.50 chs.; S. 63°30′ E. 4.00 chs.; N. 00° 7.00 chs.; N. 50° W. 5.00 chs.; N. 00° 3.00 chs.; S. 65° E. 6.00 chs.; N. 54° E. 3.50 chs.; S. 75°30′ E. 5.00 chs.; N. 85° E. 4.00 chs.; N. 60° E. 5.00 chs.; N. 2°30′ W. 8.00 chs.; N. 87° E. 3.00 chs.; S. 59° E. 5.50 chs.; N. 52° E. 4.00 chs.; S. 32° E. 5.00 chs.; N. 69° E. 5.00 chs.; N. 32° E. 4.50 chs.; S. 50° E. 6.00 chs.; N. 51° E. 3.50 chs.; N. 58° E. 5.50 chs.; N. 80° E. 6.00 chs.; S. 60°15′ E. 3.20 chs.; N. 8°30′ E. 2.00 chs.; N. 45°30′ E. 3.00 chs.; S. 64°30′ E. 2.50 chs.; N. 44° E. 5.00 chs.; S. 81° E. 2.50 chs.; S. 27°30′ E. 3.50 chs.; S. 67° E. 3.00 chs.; N. 30°30′ E. 5.00 chs.; N. 18°30′ E. 3.00 chs.; N. 77° W. 6.00 chs.; N. 48°30′ E. 7.00 chs.; S. 88° E. 8.50 chs.; S. 46° E. 8.00 chs.; N. 13° W. 4.50 chs.; N. 34°30′ W. 4.00 chs.; N. 46° E. 23.00 chs.; N. 13°30′ W. 1.89 chs.; N. 24°30′ E. 2.00 chs.; S. 88° E. 7.00 chs.; N. 35° W. 14.00 chs.; N. 7°30′ W. 3.00 chs.; N. 62° E. 7.00 chs.; S. 60° E. 8.50 chs.; N. 70°30′ E. 10.00 chs.; N. 84°30′ E. 6.00 chs.; N. 33°30′ E. 9.00 chs.; N. 23° W.

8.00 chs.; N. 23° E. 8.00 chs.; N. 35°30′ W. 8.00 chs.; N. 23° E. 6.00 chs.; S. 69°45′ E. 4.92 chs.; N. 33° E. 10.00 chs.; N. 83° E. 12.00 chs.; S. 53° E. 8.00 chs.; N. 28°30′ E. 7.00 chs.; N. 43°30′ W. 6.00 chs.; N. 33°30′ E. 2.00 chs.; S. 82°30′ E. 4.00 chs.; N. 69° E. 11.00 chs.; N. 26°30′ W. 4.50 chs.; N. 56°30′ W. 6.04 chs.; N. 31°30′ W. 7.50 chs.; N. 5°30′ E. 12.00 chs.; N. 32°30′ E. 16.00 chs.; S. 53°30′ E. 12.00 chs.; S. 16° W. 9.00 chs.; S. 5°30′ E. 9.00 chs.; S. 26°15′ E. 7.90 chs.; S. 00° 9.00 chs.; S. 9°30′ W. 7.00 chs.; S. 81°30′ E. 13.00 chs.; N. 22° E. 7.00 chs.; N. 5° E. 4.00 chs.; N. 18° E. 7.82 chs.; N. 4°30′ E. 4.80 chs.; N. 89° E. 14.07 chs.; N. 48°30′ E. 11.00 chs.; S. 36° E. 9.00 chs.; S. 21°30′ W. 5.35 chs.; S. 17° W. 31.00 chs.; N. 43°30′ E. 9.00 chs.; N. 51°30′ E. 6.50 chs.; S. 37° E. 6.00 chs.; N. 37°30′ E. 6.00 chs.; N. 52° E. 14.00 chs.; N. 55°30′ W. 18.90 chs.; N. 33° E. 3.00 chs.; N. 61°30′ E. 6.00 chs.; S. 37° E. 3.00 chs.; N. 39°30′ E. 10.00 chs.; S. 23°30′ E. 11.00 chs.; N. 47° E. 7.00 chs.; S. 52°30′ E. 8.00 chs.; N. 80° E. 4.16 chs.; N. 35° E. 21.00 chs.; N. 47°30′ W. 27.00 chs.; N. 26° W. 16.00 chs.; N. 45° E. 15.00 chs.; S. 20°30′ E. 9.00 chs.; S. 69° E. 6.00 chs.; S. 9° E. 14.00 chs.; N. 88° E. 14.00 chs.; N. 62° E. 4.00 chs.; N. 42°30′ W. 10.00 chs.; N. 31°30′ E. 6.00 chs.; S. 56° E. 9.30 chs.; N. 43° E. 9.00 chs.; S. 37° E. 10.00 chs.; S. 81°30′ E. 23.00 chs.; N. 84°30′ E. 5.00 chs.; N. 7° E. 11.00 chs.; N. 55° E. 13.00 chs.; N. 67°30′ E. 10.00 chs.; S. 24°30′ E. 3.50 chs.; S. 67°30′ E. 10.50 chs.; S. 43°30′ E. 8.00 chs.; S. 2°30′ W. 10.00 chs.; S. 45° W. 6.50 chs.; N. 42°30′ W. 9.00 chs.; S. 75°30′ W. 3.50 chs.; S. 00° 3.00 chs.; S. 39° E. 12.00 chs.; S. 17°30′ W. 8.00 chs.; S. 73°30′ E. 11.66 chs.; N. 26°30′ E. 13.00 chs.; N. 32° W. 8.00 chs.; N. 19° E. 16.00 chs.; N. 55°30′ W. 8.00 chs.; N. 22°30′ E. 23.00 chs.; N. 76°30′ E. 6.43 chs.;

Thence, in T. 25 S., R. 32 E. (North of Malheur Lake) N. 70° E. 6.00 chs.; N. 25° E. 13.00 chs.; N. 56° E. 15.00 chs.; N. 36° E. 17.00 chs.; N. 53° E. 27.70 chs.;

Thence, in T. 25 S., R. 32½ E., N. 80° E. 39.00 chs.; N. 45° E. 15.00 chs.; N. 44° W. 4.00 chs.; N. 48° W. 8.50 chs.; N. 38°30′ E. 12.00 chs.; N. 20° W. 5.00 chs.; N. 14° E. 5.00 chs.; N. 53° E. 8.00 chs.; N. 80° E. 5.00 chs.; N. 19° W. 10.00 chs.; N. 18°15′ E. 19.70 chs.; N. 50° E. 20.00 chs.; N. 68° E. 37.50 chs.; N. 50°15′ E. 39.10 chs.; S. 49°30′ E. 15.00 chs.; East 30.00 chs.; S. 48° E. 21.80 chs.; S. 60° E. 21.00 chs.; N. 23°30′ E. 11.50 chs.; S. 62°45′ E. 12.82 chs.; S. 12°30′ E. 31.00 chs.; S. 86°30′ E. 23.00 chs.; S. 63° E. 8.00 chs.; N. 20°30′ W. 24.00 chs.; N. 20° W. 4.00 chs.; N. 88° E. 9.00 chs.; N. 28° E. 12.00 chs.; N. 62°30′ E. 9.00 chs.; North 8.00 chs.; N. 65° W. 14.00 chs.; N. 40° E. 13.00 chs.; N. 45° E. 9.00 chs.; N. 71°30′ E. 18.00 chs.; N. 40° E. 12.00 chs.; S. 80° E. 20.00 chs.; S. 43° E. 20.00 chs.; S. 45°45′ E. 20.00 chs.; S. 29°45′ E. 15.00 chs.; S. 30° W. 36.00 chs.; N. 70° E. 12.00 chs.; N. 30° E. 20.00 chs.; N. 56° E. 17.20 chs.; S. 80° E. 30.00 chs.; S. 60° E. 20.00 chs.; S. 31° E. 34.00 chs.; N. 21° E. 9.00 chs.; S. 84° E. 12.70 chs.;

Thence, in T. 25 S., R. 33 E., N. 35°45′ E. 19.66 chs.; N. 56° E. 56.00 chs.; N. 24°30′ E. 12.00 chs.; N. 83° E. 8.00 chs.; East 9.00 chs.; S. 42° E. 11.00 chs.; S. 56° E. 20.00 chs.; S. 24° E. 27.00 chs.; S. 25° E. 21.00 chs.; S. 15° E. 18.00 chs.; S. 80°30′ E. 14.00 chs.; N. 12° E. 15.00 chs.; N. 9° W. 19.00 chs.; N. 73°15′ E. 18.32 chs.; S. 55° E. 23.00 chs.; S. 23° E. 11.00 chs.; S. 9°30′ E. 34.00 chs.; S. 1°30′ E. 14.00 chs.; S. 14° E. 9.57 chs.; S. 41° E. 6.00 chs.; S. 72°30′ E. 6.00 chs.; N. 80°30′ E. 39.39 chs.; S. 36° E. 55.00 chs.; S. 12° E. 36.20 chs.;

Thence, in T. 26 S., R. 33 E., S. 15° E. 50.00 chs.; S. 3° E. 29.90 chs.; S. 9°15′ E. 80.90 chs.; S. 10° W. 15.00 chs.; S. 50° W. 12.00 chs.; N. 50° W. 10.00 chs.; N. 73°30′ W. 21.80 chs.; N. 75° W. 25.00 chs.; S. 50° W. 26.00 chs.; West 15.00 chs.; N. 78°15′ W. 21.30 chs.; N. 75° W. 12.00 chs.; S. 5° W. 14.00 chs.; N. 70° W. 25.00 chs.; S. 50° W.

20.00 chs.; S. 72° W. 30.00 chs.; N. 55° W. 30.00 chs.; N. 67° W. 58.00 chs.

Thence, in T. 26 S., R. 32 E. (South of Malheur Lake), S. 65° W. 17.00 chs.; S. 20° W. 10.00 chs.; S. 75° W. 40.00 chs.; S. 60° W. 26.00 chs.; S. 50°15′ W. 62.40 chs.; S. 50° W. 10.00 chs.; S. 77° W. 25.00 chs.; S. 60° W. 20.00 chs.; S. 21°15′ W. 62.20 chs.; S. 12° W. 40.00 chs.; S. 35° W. 20.00 chs.; N. 82°30′ W. 20.50 chs.; N. 80° W. 12.00 chs.; S. 50° W. 20.00 chs.; S. 74° W. 31.00 chs.; S. 38°30′ W. 9.85 chs.; S. 47°30′ W. 5.00 chs.; S. 21°30′ W. 11.00 chs.; South 12.00 chs.; S. 26° E. 11.00 chs.; S. 19°30′ E. 14.00 chs.; S. 18°30′ W. 14.00 chs.; S. 18° E. 6.00 chs.; S. 45°30′ W. 17.85 chs.;

Thence, in T. 27 S., R. 32 E., S. 6° W. 8.00 chs.; S. 51° W. 3.50 chs.; West 10.00 chs.; S. 75° W. 20.00 chs.; N. 47° W. 22.80 chs.;

Thence, in T. 26 S., R. 32 E. (South of Malheur Lake), N. 30° W. 40.00 chs.; N. 68°30′ W. 15.00 chs.; N. 75° W. 40.00 chs.; S. 85°30′ W. 36.25 chs.;

Thence, in T. 26 S., R. 31 E. (South of Malheur Lake), S. 86° W. 30.00 chs.; N. 29°30′ W. 39.90 chs.; N. 8° E. 13.00 chs.; N. 22° E. 23.00 chs.; N. 48°45′ W. 7.80 chs.; N. 31°30′ W. 10.00 chs.; S. 61°30′ W. 7.00 chs.; N. 69° W. 12.00 chs.; S. 16° W. 27.00 chs.; S. 66° W. 5.90 chs.; West 30.00 chs.; N. 74° W. 52.20 chs.; S. 75° W. 11.00 chs.; S. 40° W. 22.00 chs.; West 12.00 chs.; S. 71° W. 45.80 chs.; N. 45° W. 70.00 chs.; N. 89° W. 30.20 chs.; N. 66° W. 34.00 chs.; West 23.00 chs.; N. 42° W. 5.00 chs.; N. 71°30′ W. 23.00 chs.; S. 87° W. 9.00 chs.; S. 55°30′ W. 16.00 chs.; N. 77° W. 18.00 chs.; S. 83°30′ W. 31.00 chs.; N. 79°30′ W. 7.88 chs.;

Thence, in T. 26 S., R. 30 E. (South of Malheur Lake), N. 88° W. 54.00 chs.; to the place of beginning;

Narrows Division (*295.60 acres, more or less*):

Begin at a point on the Neal Survey line of 1895 on the most Northwesterly corner of Lot 11, Sec. 25, T. 26 S., R. 30 E. Willamette Meridian; South of Malheur Lake;

Thence, in T. 26 S., R. 30 E. (South of Malheur Lake) S. 49°30′ W. 13.00 chs.; S. 65°15′ W. 18.05 chs.; S. 57° W. 13.00 chs.; S. 45° W. 19.00 chs.; S. 56° W. 7.00 chs.; S. 60°30′ W. 10.00 chs.; S. 30° W. 5.38 chs.; S. 27° W. 11.00 chs.; S. 64°30′ W. 8.50 chs.; N. 88° W. 13.00 chs.; S. 76° W. 5.00 chs.; N. 84° W. 8.45 chs.; S. 21° W. 4.70 chs.; S. 84°30′ W. 10.00 chs.; N. 84°30′ W. 14.00 chs.; N. 49° W. 8.00 chs.; West 4.00 chs.; to the most northwesterly corner of Lot 2, Sec. 27, T. 26 S., R. 30 E. (South of Malheur Lake);

Thence, N. 27° W. 31.40 chs. across unsurveyed land to the meander corner at the most southwesterly corner on the west boundary of Lot 2, Sec. 27, T. 26 S., R. 31 E. (North of Malheur Lake);

Thence, in T. 26 S., R. 31 E. (North of Malheur Lake) S. 72°30′ E. 8.00 chs.; S. 41° E. 11.00 chs.; S. 77° E. 5.00 chs.; North 5.00 chs.; S. 55°30′ E. 11.00 chs.; S. 76° E. 11.00 chs.; East 4.00 chs.; S. 57° E. 5.00 chs.; S. 81° E. 18.00 chs.; S. 82° E. 9.00 chs.; N. 65° E. 4.00 chs.; N. 40° E. 6.80 chs.; N. 22° E. 6.00 chs.; N. 36°30′ E. 6.00 chs.; N. 63°30′ E. 6.50 chs.; N. 39° E. 5.00 chs.; N. 63° W. 4.00 chs.; N. 72° W. 4.00 chs.; North 3.00 chs.; N. 37°30′ E. 8.00 chs.; North 4.00 chs.; N. 51° E. 5.00 chs.; N. 26° E. 7.00 chs.; N. 63° E. 13.00 chs.; N. 42°30′ E. 9.07 chs.; N. 62° E. 14.00 chs.; N. 27°30′ E. 8.00 chs.; North 4.00 chs.; to the most easterly corner of Lot 1, Sec. 25, T. 26 S., R. 31 E. (North of Malheur Lake);

Thence, S. 42° E. 32.50 chs. across unsurveyed land to the meander corner at the most northwesterly corner of Lot 11, Sec. 25, T. 26 S., R. 30 E. (South of Malheur Lake); the place of beginning.

Mud Lake Division (*1,466.00 acres, more or less*):

Begin at the meander corner at the most northwesterly corner of Lot 2, Sec. 27, T. 26 S., R. 30 E. (South of Malheur Lake);

Thence in T. 26 S., R. 30 E. (South of Malheur Lake) S. 9° E. 8.00 chs.; S. 26°30′ W. 8.18 chs.; S. 61°30′ W.

8.25 chs.; N. 45° W. 10.00 chs.; S. 28° W. 5.00 chs.; S. 7°30′ W. 20.00 chs.; S. 26° W. 15.00 chs.; S. 32° W. 12.00 chs.; S. 56° W. 11.00 chs.; S. 65° W. 16.80 chs.; S. 59° W. 20.00 chs.; N. 65°30′ W. 3.00 chs.; N. 88° W. 22.00 chs.; N. 64°30′ W. 12.00 chs.; N. 41°30′ E. 24.00 chs.; N. 50°30′ W. 6.00 chs.; N. 89° W. 19.00 chs.; N. 45° W. 6.00 chs.; N. 19°15′ W. 13.78 chs.; N. 35°30′ E. 8.00 chs.; N. 67° E. 10.00 chs.; N. 26° E. 6.00 chs.; N. 48° E. 8.00 chs.; N. 10° W. 8.00 chs.; N. 64°30′ W. 6.75 chs.; S. 54°30′ W. 5.00 chs.; S. 18°15′ W. 8.29 chs.; S. 57°30′ W. 4.00 chs.; S. 55° W. 16.00 chs.; S. 75° W. 10.00 chs.; S. 11° W. 8.00 chs.; S. 15° E. 17.00 chs.; S. 3° W. 26.00 chs.; West 18.00 chs.; N. 13° W. 40.00 chs.; N. 45°30′ W. 5.00 chs.; S. 46° W. 10.00 chs.; S. 17°30′ E. 22.00 chs.; S. 46° W. 13.00 chs.; S. 14°30′ W. 14.00 chs.; to the meander corner at the southwest corner of Lot 5, Sec. 32, T. 26 S., R. 30 E. (South of Malheur Lake);

Thence, N. 32°30′ W. 58.70 chs. across unsurveyed land to the meander corner at the most southwesterly corner of Lot 4, Sec. 32, T. 26 S., R. 31 E. (North of Malheur Lake);

Thence, S. 65° E. 13.00 chs.; East 6.50 chs.; N. 68°30′ E. 3.00 chs.; N. 9° E. 7.50 chs.; N. 69° E. 26.00 chs.; N. 45°30′ E. 8.00 chs.; N. 61°30′ E. 9.00 chs.; S. 42° E. 9.00 chs.; N. 81° E. 4.00 chs.; N. 24°30′ E. 11.00 chs.; S. 87° E. 3.00 chs.; S. 63°30′ E. 4.14 chs.; S. 66° E. 5.00 chs.; N. 55° E. 7.00 chs.; S. 82°30′ E. 3.60 chs.; N. 21°30′ E. 5.00 chs.; N. 37° W. 12.00 chs.; S. 86°15′ W. 8.53 chs.; North 12.00 chs.; N. 54°30′ E. 10.00 chs.; N. 83° E. 10.00 chs.; N. 53° E. 10.00 chs.; N. 26° E. 10.00 chs.; N. 57° E. 14.00 chs.; N. 61° E. 10.00 chs.; N. 36° E. 12.00 chs.; S. 75°30′ E. 14.00 chs.; S. 62° E. 9.00 chs.; S. 38° E. 3.62 chs.; S. 62°30′ E. 11.00 chs.; S. 72°30′ E. 9.00 chs.; S. 69° E. 20.00 chs.; S. 42°30′ E. 4.00 chs.; to the meander corner at the most southwesterly point on the west boundary of Lot 2, Sec. 27, T. 26 S., R. 31 E. (North of Malheur Lake);

Thence, S. 27° E. 31.40 chs. to the meander corner at the most northwesterly corner of Lot 2, Sec. 27, T. 26 S., R. 30 E. (South of Malheur Lake); the place of beginning.

Sand Reef Division (2,792.00 acres, more or less):

Begin at the meander corner at the southwesterly corner of Lot 5, Sec. 32, T. 26 S., R. 30 E. (South of Malheur Lake);

Thence, in T. 27° S., R. 30 E. (South of Malheur Lake), S. 68° E. 16.95 chs.; S. 20° E. 11.00 chs.; S. 36° E. 13.00 chs.; S. 41° E. 17.00 chs.; N. 66° E. 30.00 chs.; S. 51° E. 21.29 chs.; S. 15°30′ E. 17.00 chs.; S. 28° W. 26.00 chs.; S. 49°15′ W. 12.13 chs.; S. 49°15′ W. 36.65 chs.; S. 26° W. 21.00 chs.; S. 30°30′ E. 19.00 chs.; S. 8° E. 13.00 chs.; S. 9°15′ E. 45.20 chs.; S. 10° W. 18.00 chs.; S. 21° W. 13.00 chs.; N. 80° W. 21.00 chs.; N. 53° W. 21.00 chs.; N. 43° W. 25.00 chs.; N. 88°45′ W. 27.35 chs.; to the meander corner at the northwesterly corner of Lot 2, Sec. 18, T. 27 S., R. 30 E. (South of Malheur Lake);

Thence, in a northwesterly direction across unsurveyed land along the west base of The Sand Reef, on the 4,095 ft. contour line, a distance of approximately 303.75 chs. to the southwest corner of Lot 3, Sec. 36, T. 26 S., R. 30 E. (North of Harney Lake);

Thence, in T. 26 S., R. 30 E. (North of Malheur Lake) S. 89° E. 61.18 chs.; thence, in T. 26 S., R. 31 E. (North of Malheur Lake), north 52°30′ E. 8.00 chs.; south 78° E. 4.00 chs.; N. 68° E. 16.00 chs.; S. 44°30′ E. 6.50 chs.; S. 26° E. 6.00 chs.; S. 3° E. 10.00 chs.; S. 34°30′ E. 12.00 chs.; S. 48°30′ E. 8.50 chs.; East 4.00 chs.; N. 50° E. 17.00 chs.; N. 30° E. 14.00 chs.; N. 82° E. 9.21 chs.; to the southwest corner of Lot 4, Sec. 32, T. 26 S., R. 31 E. (North of Malheur Lake);

Thence across unsurveyed land S. 32°30′ E. 58.70 chs.; to the meander corner at the southwest corner of Lot 5, Sec. 32, T. 26 S., R. 30 E. (South of Malheur Lake); the place of beginning.

Harney Lake Division (29,562.00 acres, more or less):

Begin at the northwesterly corner of Lot 2, Sec. 18, T. 27 S., R. 30 E. (South of Malheur Lake);

Thence, in T. 27 S., R. 30 E. (South of Malheur Lake), S. 11° W. 41.40 chs.; S. 12° W. 20.22 chs.; West 3.00 chs.; S. 23°15′ W. 67.00 chs.; S. 22°30′ W. 26.00 chs.; thence, in T. 27 S., R. 29½ E., S. 25°30′ W. 21.00 chs.; S. 28° W. 9.00 chs.; S. 63°30′ W. 3.40 chs.; S. 2°30′ E. 12.00 chs.; S. 10°30′ W. 10.90 chs.; S. 23° W. 12.30 chs.; S. 30°30′ W. 22.00 chs.; S. 34°30′ W. 25.00 chs.; S. 37° W. 12.00 chs.; S. 22° E. 21.00 chs.; thence in T. 28 S., R. 29¾ E., S. 9°30′ E. 11.00 chs.; S. 12°30′ W. 9.00 chs.; S. 45° W. 11.00 chs.; S. 82°30′ W. 10.00 chs.; N. 74° W. 10.00 chs.; S. 79° W. 6.20 chs.; S. 79° W. 1.80 chs.; N. 36°30′ W. 8.60 chs.; N. 25°30′ W. 9.00 chs.; S. 84° E. 6.00 chs.; N. 45°30′ W. 6.00 chs.; N. 7°30′ W. 9.30 chs.; thence, in T. 27 S., R. 29½ E., N. 35°30′ W. 6.80 chs.; N. 46° W. 16.00 chs.; N. 56° W. 15.00 chs.; N. 65° W. 4.00 chs.; N. 77°30′ W. 10.50 chs.; S. 79° W. 17.00 chs.; S. 82°30′ W. 11.00 chs.; S. 85° W. 10.80 chs.; N. 86° W. 10.00 chs.; S. 79° W. 19.00 chs.; S. 73° W. 15.00 chs.; N. 80° W. 7.00 chs.; N. 53°30′ W. 4.00 chs.; N. 87° W. 4.80 chs.; S. 75° W. 12.00 chs.; S. 85° W. 19.50 chs.; N. 76° W. 8.00 chs.; N. 33° W. 44.00 chs.; N. 42° W. 26.00 chs.; N. 26° W. 8.00 chs.; N. 17°15′ W. 26.50 chs.; N. 17°30′ W. 9.70 chs.; S. 55°30′ E. 3.50 chs.; S. 55°30′ E. 9.00 chs.; N. 43°30′ W. 9.50 chs.; N. 64° W. 1.00 chs.; N. 64° W. 9.00 chs.; N. 76°30′ W. 15.00 chs.; N. 67°30′ W. 15.00 chs.; N. 82° W. 19.70 chs.; S. 15°30′ E. 3.40 chs.; S. 45° W. 14.00 chs.; S. 50° W. 20.00 chs.; S. 62°30′ W. 15.00 chs.; N. 76°30′ W. 14.70 chs.; N. 78° W. 4.00 chs.; N. 77° W. 23.40 chs.; N. 88° W. 9.90 chs.; N. 68° W. 16.80 chs.; N. 84°30′ W. 7.50 chs.; N. 88°30′ W. 2.40 chs.;

Thence, in T. 27 S., R. 29 E., N. 45° W. 42.00 chs.; N. 42° W. 8.50 chs.; N. 63°03′ W. 7.10 chs.; N. 70° W. 5.00 chs.; N. 42°30′ W. 31.00 chs.; N. 51° W. 16.49 chs.; N.

46°30′ W. 27.00 chs.; N. 39°45′ W. 20.00 chs.; N. 42°15′ W. 14.90 chs.; N. 15°15′ W. 38.00 chs.; N. 31°15′ W. 17.00 chs.; N. 4°43′ W. 29.52 chs.; N. 14° W. 14.00 chs.; N. 47°30′ E. 16.50 chs.; N. 8° E. 30.00 chs.; N. 31°30′ E. 30.09 chs.; N. 24° E. 33.00 chs.; N. 11° E. 30.00 chs.; N. 72° E. 11.00 chs.; N. 82° E. 6.10 chs.; N. 45° E. 18.36 chs.; S. 89°39′ E. 22.00 chs.;

Thence, in T. 26 S., R. 29 E., N. 57° E. 30.50 chs.; N. 52° E. 25.50 chs.; North 20.35 chs.;

Thence, in T. 26 S., R. 30 E. (North of Malheur Lake), N. 53°15′ E. 46.22 chs.; N. 66° E. 47.26 chs.; N. 55°15′ E. 14.08 chs.; N. 68°30′ E. 20.00 chs.; N. 79°15′ E. 10.00 chs.; N. 88°15′ E. 30.00 chs.; S. 81° E. 10.00 chs.; S. 76°15′ E. 21.12 chs.; S. 81° E. 20.00 chs.; S. 82°30′ E. 20.00 chs.; S. 80° E. 20.00 chs.; S. 75°30′ E. 27.09 chs.; S. 70° E. 38.00 chs.; S. 69° E. 19.85 chs.; S. 64° E. 40.00 chs.; S. 60° E. 51.40 chs.; S. 89° E. 20.39 chs.;

Thence, in a southeasterly direction across unsurveyed land, along the west base of the Sand Reef on the 4,095-ft. contour line, a distance of approximately 303.75 chains to the place of beginning.

14. The rights of persons not parties to this suit are not determined. It is not determined whether any part of the meander line boundary is or was in fact a true and correct meander line upon which the lands of such upland owners border, and no reference, here or in the Special Master's Report, to parts of such line shall be taken as an adjudication that the meander line in this respect is the true or correct boundary.

15. The counterclaim of the State of Oregon is hereby dismissed except as to matters determined in paragraphs 4 and 7 of this decree.

16. It is further decreed that each party pay its own costs and that each party pay one-half of the expenses incurred by the Special Master, and also one-half of the amount to be fixed by the Court as the compensation of the Special Master.

DECISIONS PER CURIAM, FROM APRIL 2, 1935, TO AND INCLUDING JUNE 3, 1935.*

No. 788. GENERAL CONSTRUCTION Co. *v.* FISHER ET AL. Appeal from the Supreme Court of Oregon. Jurisdictional statement submitted March 30, 1935. Decided April 8, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466, 472; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Lucas* v. *Howard,* 280 U. S. 526; *Lucas* v. *Reed,* 281 U. S. 699; *Alward* v. *Johnson,* 282 U. S. 509, 514; *Willcuts* v. *Bunn,* 282 U. S. 224, *et seq.; Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, 382. *Mr. Seth W. Richardson* for appellant. *Messrs. I. H. Van Winkle* and *Willis S. Moore* for appellees. Reported below: 149 Ore. 84; 39 P. (2d) 358.

No. —, original. EX PARTE GIBSON. April 8, 1935. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. George H. Gibson, pro se.*

No. —, original. EX PARTE VEACH. April 8, 1935. The motion for leave to file petition for writ of mandamus is denied. *Mr. Charles M. Veach, pro se.*

No. 858. WILSHIRE OIL Co., INC. ET AL. *v.* UNITED STATES ET AL. On certificate from the Circuit Court of Appeals for the Ninth Circuit. April 9, 1935. The Court desires counsel for the respective parties to file

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* For decisions on petitions for certiorari, see *post,* pp. 722, 731; for rehearing, p. 767.

briefs on or before April 25, 1935, upon the question whether the appeal described in the certificate presents any question other than whether the District Court committed an abuse of discretion in granting an interlocutory injunction. See *Alabama* v. *United States,* 279 U. S. 229; *United Drug Co.* v. *Washburn,* 284 U. S. 593; *Binford* v. *J. H. McLeaish & Co.,* 284 U. S. 598; *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; *Langer* v. *Grandin Farmers Coöperative Elevator Co.,* 292 U. S. 605; *Baldwin* v. *G. A. F. Seelig, Inc.,* 293 U. S. 522. [See *ante,* p. 100.]

No. 833. Texas Land & Cattle Co. et al. *v.* Fort Worth. Appeal from the Court of Civil Appeals, 2nd Supreme Judicial District, of Texas. Jurisdictional statement submitted April 13, 1935. Decided April 29, 1935. *Per Curiam:* The appeal herein is dismissed upon the ground that the judgment sought to be reviewed is joint and the record fails to disclose summons and severance. *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U. S. 169; *Capital National Bank* v. *Board of Supervisors,* 286 U. S. 550; *Fidelity Union Casualty Co.* v. *Hanson,* 287 U. S. 599; *Louisville & Nashville R. Co.* v. *Parker,* 287 U. S. 569; *Wagner Tug Boat Co.* v. *Meagher,* 287 U. S. 657; *Missouri State Life Ins. Co.* v. *Johnson,* 288 U. S. 609; *Morgenthau* v. *Stephens,* 294 U. S. 720. *Mr. U. M. Simon* for appellants. *Mr. R. E. Rouer* for appellee. Reported below: 73 S. W. (2d) 860.

No. 857. Home Cab Co. *v.* Wichita et al. Appeal from the Supreme Court of Kansas. Jurisdictional statement submitted April 13, 1935. Decided April 29, 1935. *Per Curiam:* The appeal herein is dismissed (1) for the

want of a properly presented federal question, *Dewey* v. *Des Moines,* 173 U. S. 193, 197–198; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 633–635; *New York* v. *Kleinert,* 268 U. S. 646, 650; *Whitney* v. *California,* 274 U. S. 357, 362–363; and (2) for the want of a substantial federal question, *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 353; *Chicago Great Western Ry.* v. *Kendall,* 266 U. S. 94, 99; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 526–527. *Mr. James G. Martin* for appellant. *Mr. Harry W. Hart* for appellees. Reported below: 141 Kan. 697; 42 P. (2d) 972.

No. —, original. Ex parte Rico Manufacturing Co., Inc. et al. May 6, 1935. The motion for leave to file petition for writ of mandamus is denied. *Messrs. James E. Dooley* and *Perley H. Plant* for petitioners.

No. 704. Allison *v.* Texas. Appeal from the Court of Criminal Appeals, of Texas. Argued May 3, 6, 1935. Decided May 13, 1935. *Per Curiam:* The appeal herein is dismissed (1) for the reason that the judgment of the state court sought to be reviewed is based upon a non-federal ground adequate to support it, *Stone* v. *State,* 48 Tex. Cr. 114; 86 S. W. 1029; *Farson Son & Co.* v. *Bird,* 248 U. S. 268, 271; *Doyle* v. *Atwell,* 261 U. S. 590, *McCoy* v. *Shaw,* 277 U. S. 302, and (2) for the want of a substantial federal question, *Watson* v. *Maryland,* 218 U. S. 173, 175–180; *Crane* v. *Johnson,* 242 U. S. 339, 342–344; *McNaughton* v. *Johnson,* 242 U. S. 344, 348–349; *Graves* v. *Minnesota,* 272 U. S. 425; *Hurwitz* v. *North,* 271 U. S. 40, 43. *Mr. Clarence E. Farmer,* with whom *Mr. G. R. Lipscomb* was on the brief, for appellant. *Mr. William McCraw,* Attorney General of Texas, *Mr. Will R. Parker,* District Attorney, *Messrs. Cecil C. Rotsch* and *Homer B. Green,* Assistant District At-

torneys, and *Mr. Lloyd W. Davidson,* State's Attorney, were on the brief for appellee. Reported below: 127 Tex. Cr. Rep. —; 76 S. W. (2d) 527.

No. 899. MISSISSIPPI CENTRAL RAILROAD CO. *v.* SMITH. Appeal from the Supreme Court of Mississippi. Jurisdictional statement submitted May 4, 1935. Decided May 13, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a final judgment. *Bruce* v. *Tobin,* 245 U. S. 18; *California National Bank* v. *Stateler,* 171 U. S. 447, 449; *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 255–256; *Western Public Service Co.* v. *Mitchell,* 289 U. S. 709. *Mr. Thomas Brady, Jr.,* for appellant. *Messrs. William H. Watkins* and *S. B. Laub* for appellee. Reported below: 173 Miss. 507; 154 So. 533; 159 So. 562.

No. —, original. EX PARTE UNITED STATES EX REL. DUKE. May 13, 1935. The motion for leave to file petition for writ of prohibition and/or mandamus is denied. *Mr. Jesse C. Duke, pro se.*

No. 923. NATIONAL ACCOUNTING CO. *v.* DORMAN, BANKING COMMISSIONER. Appeal from the District Court of the United States for the Eastern District of Kentucky. Jurisdictional statement submitted May 11, 1935. Decided May 20, 1935. *Per Curiam:* The order denying interlocutory injunction is affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *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; *Langer* v. *Grandin Farmers Coöperative Elevator Co.,* 292 U. S. 605; *Northwest Bancorporation* v. *Benson,* 292 U. S. 606; *Baldwin* v. *G. A. F. Seelig, Inc.,* 293

U. S. 522; *Wilshire Oil Co.* v. *United States, ante,* p. 100. *Messrs. Ernest Woodward, Fred R. Wright,* and *Ed C. O'Rear* for appellant. *Messrs. Bailey P. Wootten, Arthur Bensinger,* and *John S. Milliken* for appellee.

No. —, original. Ex parte Brummett. May 20, 1935. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. C. M. Brummett, pro se.*

No. —, original. Ex parte Lerner. May 20, 1935. The rule to show cause is discharged and the motion for leave to file petition for a writ of mandamus is denied. *Messrs. Emil Hersh, Herbert Morse,* and *I. J. Post* for petitioner.

No. 602. Hartley, Executor, *v.* Commissioner of Internal Revenue. May 20, 1935. Ordered that the opinion delivered in this cause on April 29, 1935, be modified as follows:

By adding at the end of line 2 on page 1 the words "and held";

By striking from lines 19 and 20 on page 1 the words "to which the Revenue Acts of 1921 and 1924 were respectively applicable";

By substituting for the words "1924 Act" wherever they occur, the words "1924 and 1926 Acts," and by making changes in punctuation and wording appropriate to the last mentioned modifications. [Opinion reported as modified, *ante,* p. 216.]

No. 787. United States *v.* Fidelity & Deposit Co. On petition for writ of certiorari to the Circuit Court of

Appeals for the Second Circuit. May 27, 1935. *Per Curiam:* The petition for a writ of certiorari herein is granted. It is ordered that the judgment of the Circuit Court of Appeals for the Second Circuit be, and it is hereby, vacated, and the cause is remanded to that court with directions to dismiss the appeal upon the ground that the judgment sought to be reviewed is joint and the record fails to disclose summons and severance. *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U. S. 169; *Wagner Tug Boat Co.* v. *Meagher,* 287 U. S. 657; *Missouri State Life Ins. Co.* v. *Johnson,* 288 U. S. 609; *Texas Land & Cattle Co.* v. *Fort Worth, ante,* p. 716. *Solicitor General Biggs* for the United States. No appearance for respondent. Reported below: 74 F. (2d) 296.

No. 974. ROSENTHAL *v.* LANGLEY ET AL. Appeal from the Supreme Court of Georgia. Motion submitted May 18, 1935. Decided May 27, 1935. *Per Curiam:* The motion for leave to proceed further in *forma pauperis* is denied. The motion 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) of the Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Ben E. Pierce* for appellant. No appearance for appellees. Reported below: 180 Ga. 253; 179 S. E. 383.

No. —, original. EX PARTE ALEOGRAPH CO. May 27, 1935. The motion for leave to file petition for writ of mandamus is denied. *Messrs. R. L. Batts* and *Frank H. Booth* for petitioner.

No. —, original. EX PARTE PORESKY. May 27, 1935. The motion for leave to file petition for writ of mandamus is denied. *Mr. Joseph Poresky, pro se.*

No. 976. BASS ET AL. *v.* MILLEDGEVILLE ET AL. Appeal from the Supreme Court of Georgia. Motion submitted May 29, 1935. Decided June 3, 1935. *Per Curiam:* The motion to substitute L. N. Jordan as a party appellee is granted. The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the reason that the judgment sought herein to be reviewed is based upon a nonfederal ground adequate to support it. *Utley* v. *St. Petersburg,* 292 U. S. 106, 111–112; *Wood* v. *Chesborough,* 228 U. S. 672 *et seq.; Preston* v. *Chicago,* 226 U. S. 447, 450. *Mr. John R. L. Smith* for appellants. *Mr. Daniel MacDougald* for appellees. Reported below: 180 Ga. 156; 178 S. E. 529.

No. 970. HOPKINS FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* CLEARY ET AL.;

No. 971. RELIANCE BUILDING & LOAN ASSN. *v.* SAME; and

No. 972. NORTHERN BUILDING & LOAN ASSN. *v.* SAME. Appeals from the Supreme Court of Wisconsin. Motions submitted May 31, 1935. Decided June 3, 1935. *Per Curiam:* The motions of the appellees to dismiss the appeals herein are granted and the appeals are dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeals were allowed as petitions for writs of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), writs of certiorari are granted. *Mr. Emery J. Woodall* for appellants. *Mr. Benjamin Poss* for appellees. Reported below: 217 Wis. 179; 257 N. W. 684.

No. —, original. Ex Parte Marine. June 3, 1935. Motion for leave to file petition for writ of mandamus denied. *Mr. Richard E. Marine, pro se.*

No. 16, original. Nebraska *v.* Wyoming. June 3, 1935. Answer of defendant is received and ordered to be filed.

No. 17, original. United States *v.* West Virginia et al. June 3, 1935. The motion for leave to file an amended and supplemental bill of complaint is denied. [*Ante,* p. 463.]

DECISIONS GRANTING CERTIORARI, FROM APRIL 2, 1935, TO AND INCLUDING JUNE 3, 1935.

No. 726. Payne *v.* United States. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. George E. Flood* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee* and *Wilbur C. Pickett* for the United States. Reported below: 73 F. (2d) 900.

No. 541. Douglas *v.* Willcuts, Collector. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. April 8, 1935. It appearing that a conflict of decisions has arisen since the order denying the petition for writ of certiorari herein was entered, it is ordered that the petition for rehearing herein be, and the same is hereby, granted. The order heretofore entered on January 7, 1935 [293 U. S. 626], denying the petition for writ of certiorari is vacated, and it is ordered that the petition for writ of certiorari in this case be, and the same is hereby, granted. *Mr. Clark R. Fletcher*

for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 73 F. (2d) 130.

No. 854. SCHECHTER ET AL. *v.* UNITED STATES; and No. 864. UNITED STATES *v.* A. L. A. SCHECHTER POULTRY CORP. April 15, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Joseph Heller* for Schechter et al. *Solicitor General Reed* for the United States. Reported below: 76 F. (2d) 617.

No. 817. SUPERINTENDENT OF FIVE CIVILIZED TRIBES *v.* COMMISSIONER OF INTERNAL REVENUE. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Thomas J. Reilly* for petitioner. *Solicitor General Reed* for respondent. Reported below: 75 F. (2d) 183.

No. 805. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* CITY BANK FARMERS TRUST CO. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. John MacC. Hudson* and *James W. Morris* for petitioner. *Mr. Russell L. Bradford* for respondent. Reported below: 74 F. (2d) 242.

No. 819. AMERICAN SURETY CO. *v.* WESTINGHOUSE ELECTRIC MANUFACTURING CO. ET AL. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Francis B. Carter* and *Francis B. Carter, Jr.,* for petitioner. *Messrs.*

William Fisher, W. H. Watson, and *S. Pasco* for respondents. Reported below: 75 F. (2d) 377.

No. 783. COMPAGNIE GENERALE TRANSATLANTIQUE *v.* ELTING, COLLECTOR OF CUSTOMS; and

No. 784. HAMBURG-AMERICAN LINE *v.* SAME. April 29, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Roger O'Donnell, William J. Peters,* and *Lambert O'Donnell* for petitioners. *Solicitor General Reed, Assistant Attorney General Sweeney,* and *Messrs. M. Leo Looney, Jr.,* and *Paul A. Sweeney* for respondent. Reported below: 74 F. (2d) 209.

No. 809. CHANDLER & PRICE CO. *v.* BRANDTJEN & KLUGE, INC., ET AL. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Wallace R. Lane* and *John F. Oberlin* for petitioner. *Mr. Dean S. Edmonds* for respondents. Reported below: 75 F. (2d) 472.

No. 820. BECKER STEEL CO. *v.* CUMMINGS, ATTORNEY GENERAL, ET AL. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. E. Crosby Kindleberger* for petitioner. *Solicitor General Reed, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for respondents. Reported below: 75 F. (2d) 1005.

No. 827. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HELMHOLZ. April 29, 1935. Petition for writ of certiorari to the United States Court of Appeals

for the District of Columbia granted. *Solicitor General Reed* for petitioner. *Messrs. James Quarles* and *Louis Quarles* for respondent. Reported below: 64 App. D. C. 114; 75 F. (2d) 245.

No. 847. URBAN PROPERTIES CO. *v.* IRVING TRUST CO., TRUSTEE. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Arthur F. Gotthold* for petitioner. *Mr. Wm. D. Whitney* for respondent. Reported below: 74 F. (2d) 654.

No. 831. ALEXANDER ET AL. V. HILLMAN ET AL. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. W. M. Robinson, Edwin W. Smith, Arthur S. Dayton,* and *E. C. Higbee* for petitioners. *Messrs. Edward W. Knight, George E. Alter,* and *Alexander J. Barron* for respondents. Reported below: 75 F. (2d) 451.

No. 832. ALEXANDER ET AL. *v.* HILLMAN ET AL. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. W. M. Robinson, Edwin W. Smith, Arthur S. Dayton,* and *E. C. Higbee* for petitioners. *Messrs. Edward W. Knight, George E. Alter,* and *Alexander J. Barron* for respondents. Reported below: 75 F. (2d) 451.

No. 834. MORRISSEY ET AL., TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Theodore B. Benson* for petitioners. *Solicitor General Reed, Assistant Attorney*

General Wideman, and *Messrs. James W. Morris, Norman D. Keller,* and *Carlton Fox* for respondent. Reported below: 74 F. (2d) 803.

No. 880. McCandless, Receiver, *v.* Furlaud et al. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Ralph Royall* for petitioner. *Messrs. Louis B. Eppstein, Ira W. Hirshfield,* and *Louis J. Altkrug* for respondents. Reported below: 75 F. (2d) 977.

No. 872. Bassick Manufacturing Co. *v.* R. M. Hollingshead Co. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. The Chief Justice took no part in the consideration or decision of this application. *Mr. Lynn A. Williams* for petitioner. *Messrs. Frank S. Busser, Leonard L. Kalish,* and *Charles N. Burch* for respondent. Reported below: 73 F. (2d) 543.

No. 906. Rogers et al. *v.* Alemite Corp. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. The Chief Justice took no part in the consideration or decision of this application. *Messrs. Leonard L. Kalish* and *W. G. Doolittle* for petitioners. No appearance for respondent. Reported below: 74 F. (2d) 1019.

No. 926. White, Former Collector of Internal Revenue, *v.* Poor et al., Executors. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the First Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Alexander Wheeler* for respondents. Reported below: 75 F. (2d) 35.

No. 850. RAYBESTOS-MANHATTAN, INC. *v.* UNITED STATES. May 20, 1935. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Charles H. LeFevre* and *Howard S. LeRoy* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 809; 10 F. Supp. 130.

No. 869. UNITED STATES *v.* ATLANTIC MUTUAL INSURANCE CO. May 20, 1935. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Reed* for the United States. *Mr. J. M. Richardson Lyeth* for respondent. Reported below: 80 Ct. Cls. 11.

No. 876. MCFEELY *v.* COMMISSIONER OF INTERNAL REVENUE. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. G. F. Snyder* for petitioner. *Solicitor General Reed* for respondent. Reported below: 74 F. (2d) 1017.

No. 879. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ST. LOUIS UNION TRUST CO. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Daniel N. Kirby* for respondent. Reported below: 75 F. (2d) 416.

No. 886. DiGiovanni et al. *v.* Camden Fire Insurance Assn. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Harry L. Jacobs* for petitioners. *Mr. James N. Beery* for respondent. Reported below: 75 F. (2d) 808.

No. 956. Moor *v.* Texas & New Orleans Railroad Co. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Thornton Hardie, Henry Eastman Hackney,* and *Ben R. Howell* for petitioner. *Messrs. Jules H. Tallichet, Maury Kemp,* and *M. Nagle* for respondent. Reported below: 75 F. (2d) 386.

No. 787. United States *v.* Fidelity & Deposit Co. See *ante,* p. 719.

No. 965. Legg *v.* St. John, Trustee. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. May 27, 1935. The motion for leave to proceed further herein *in forma pauperis* is granted. The petition for writ of certiorari is also granted. *Mr. Henry Roberts* for petitioner. No appearance for respondent. Reported below: 76 F. (2d) 841.

No. 898. Graham *v.* White-Phillips Co., Inc. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. James J. Barbour* and *W. Edgar Sampson* for petitioner. *Messrs. William L. Patton* and *Harold A. Smith* for respondent. Reported below: 74 F. (2d) 417.

No. 931. Del Vecchio et al. *v.* Bowers. May 27, 1935. Petition for writ of certiorari to the United States

Court of Appeals for the District of Columbia granted. *Mr. James E. McCabe* for petitioners. No appearance for respondent. Reported below: 64 App. D. C. 226; 76 F. (2d) 996.

No. 970. HOPKINS FEDERAL SAVINGS & LOAN ASSN. *v.* CLEARY ET AL.;

No. 971. RELIANCE BUILDING & LOAN ASSN. *v.* SAME; and

No. 972. NORTHERN BUILDING & LOAN ASSN. *v.* SAME. See *ante*, p. 721.

No. 990. MILLER *v.* IRVING TRUST CO, TRUSTEE. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Sol M. Stroock* for petitioner. No appearance for respondent. Reported below: 77 F. (2d) 1012.

No. 901. KLAMATH & MOADOC TRIBES OF INDIANS ET AL. *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Court of Claims granted. *Mr. G. Carroll Todd* for petitioners. *Solicitor General Reed, Assistant Attorney General Blair,* and *Messrs. George T. Stormont* and *Wilfred Hearn* for the United States. Reported below: 81 Ct. Cls. 79.

No. 918. BORAX CONSOLIDATED, LTD., ET AL. *v.* LOS ANGELES. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Gurney E. Newlin* for petitioners. *Mr. Loren A. Butts* for respondent. Reported below: 74 F. (2d) 901.

No. 937. HULBURD *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. John E. Hughes, Henry A. Gardner,* and *Alfred T. Carton* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman, Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 76 F. (2d) 736.

No. 938. UNITED STATES *v.* CONSTANTINE. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Reed* for the United States. No appearance for respondent. Reported below: 75 F. (2d) 928.

No. 939. GENERAL UTILITIES & OPERATING CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. R. Kemp Slaughter* and *Hugh C. Bickford* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Norman D. Keller* for respondent. Reported below: 74 F. (2d) 972.

No. 954. FOX FILM CORP. *v.* MULLER. June 3, 1935. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Messrs. Percy Heiliger* and *James D. Shearer* for petitioner. *Mr. Abram F. Myers* for respondent. Reported below: 194 Minn. —; 260 N. W. 320.

DECISIONS DENYING CERTIORARI, FROM APRIL 2, 1935, TO AND INCLUDING JUNE 3, 1935.

No. 812. O'NEAL *v.* CALIFORNIA. April 8, 1935. Petition for writ of certiorari to the District Court of Appeal, 3rd Appellate District, of California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. James B. O'Neal, pro se.* No appearance for respondent. Reported below: 2 Cal. App. (2d) 551; 38 P. (2d) 430.

No. 816. WILSON *v.* HAYNES. April 8, 1935. Petition for writ of certiorari to the Supreme Court of Iowa, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. E. J. Wilson, pro se.* No appearance for respondent. Reported below: 218 Iowa 1370; 256 N. W. 678.

No. 754. BOARD OF COUNTY COMMISSIONERS OF SWEETWATER COUNTY ET AL. *v.* BERNARDIN, RECEIVER. April 8, 1935. The motion of the State of Wyoming for leave to intervene in this case is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Mahlon E. Wilson* for petitioners. *Messrs. William E. Mullen, Bruce Johnstone, Guy M. Peters,* and *Arthur B. Schaffner* for respondent. Reported below: 74 F. (2d) 809.

No. 741. BARBOUR COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Addison S. Pratt* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *W. F. Wattles* for respondent. Reported below: 74 F. (2d) 163.

No. 743. FARMERS PEANUT CO. *v.* MONARCH REFRIGERATING CO. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. W. D. Pruden* and *P. W. McMullan* for petitioner. *Mr. F. S. Spruill* for respondent. Reported below: 74 F. (2d) 790.

No. 744. BLUM *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 745. ALSTRIN *v.* SAME;

No. 746. BENJAMIN F. STEIN *v.* SAME; and

No. 747. L. MONTEFIORE STEIN *v.* SAME. April 8, 1935. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. S. Sidney Stein* and *Preston B. Kavanagh* for petitioners. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, Lucius A. Buck,* and *J. P. Jackson* for respondent. Reported below: 64 App. D. C. 78; 74 F. (2d) 482.

No. 748. WAMPLER *v.* HILL, WARDEN. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wm. E. Leahy* and *Wm. J. Hughes, Jr.,* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, John H. McEvers,* and *Earl C. Crouter* for respondent. Reported below: 74 F. (2d) 940.

No. 749. DWIGHT BROS. PAPER CO. ET AL. *v.* GRIGSBY-GRUNOW CO. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Julius Moses* for petitioners. *Mr. Isaac B. Lipson* for respondent. Reported below: 74 F. (2d) 7.

No. 750. LOCKE *v.* UNITED STATES. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. F. W. Fischer* for petitioner. *Solicitor General Reed, Assistant Attorney General Stephens,* and *Mr. Carl F. McFarland* for the United States. Reported below: 75 F. (2d) 157.

No. 752. UNITED STATES EX REL. CHERAMIE *v.* FREUDENSTEIN, U. S. MARSHAL. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Hugh M. Wilkinson* and *John W. Harrell* for petitioner. *Solicitor General Biggs* and *Mr. Amos W. W. Woodcock* for respondent. Reported below: 74 F. (2d) 740.

No. 753. TANNER ET AL. *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. L. E. Heath* for petitioners. *Mr. B. G. O'Berry, Jr.,* for respondent. Reported below: 73 F. (2d) 382.

No. 755. COMMERCIAL CASUALTY INSURANCE CO. ET AL. *v.* HOAGE, DEPUTY COMMISSIONER, ET AL. April 8, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Stanley H. Fischer, Frank H. Myers,* and *Norman Fischer* for petitioners. *Mr. Crandal Mackey* for respondents. Reported below: 64 App. D. C. 158; 75 F. (2d) 677.

No. 762. CAIGAN ET AL. *v.* PLIBRICO JOINTLESS FIREBRICK CO. April 8, 1935. Petition for writ of certiorari

to the Circuit Court of Appeals for the First Circuit denied. *Mr. Israel Caigan* for petitioners. *Mr. John M. Raymond* for respondent. Reported below: 74 F. (2d) 316.

No. 763. CAIGAN ET AL. *v.* PLIBRICO JOINTLESS FIREBRICK CO. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Israel Caigan* for petitioners. *Mr. John M. Raymond* for respondent. Reported below: 74 F. (2d) 316.

No. 769. FENSKE BROS., INC. ET AL. *v.* UPHOLSTERERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL No. 18. April 8, 1935. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. David Silbert* and *Lewis F. Jacobson* for petitioners. No appearance for respondent. Reported below: 358 Ill. 239; 193 N. E. 112.

No. 779. OHIO CASUALTY INSURANCE CO. *v.* WELFARE FINANCE CO. April 8, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James R. Claiborne* for petitioner. *Messrs. Jacob Chasnoff, George C. Willson,* and *Hugo Monnig* for respondent. Reported below: 75 F. (2d) 58.

No. 840. WASHINGTON TIMES CO. *v.* MEYER. April 8, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Wilton J. Lambert, R. H. Yeatman, Elisha Hanson,* and *Eliot C. Lovett* for petitioner. No appearance

for respondent. Reported below: 64 App. D. C. 218; 76 F. (2d) 988.

No. 839. GRANT ET UX. *v.* UNITED STATES. April 15, 1935. 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. Ben H. Powell* for petitioners. No appearance for the United States. Reported below: 74 F. (2d) 302.

No. 849. SAXON, ANCILLARY ADMINISTRATOR, *v.* ATCHISON, TOPEKA & SANTA FE RY. CO. April 15, 1935. Petition for writ of certiorari to the Court of Civil Appeals, 8th Supreme Judicial District, of Texas, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Winbourn Pearce* for petitioner. No appearance for respondent. Reported below: 72 S. W. (2d) 327.

No. 722. SIMPSON ET AL. *v.* FAUQUIER NATIONAL BANK ET AL. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Fauquier County, Virginia, denied. *Messrs. E. E. Johnson* and *Burnett Miller* for petitioners. *Messrs. Walter B. Guy, Frederic B. Warder,* and *Louis H. Mann,* and *Mrs. Burnita Shelton Matthews,* for respondents. Reported below: 162 Va. 621; 175 S. E. 320.

No. 756. ACKERMANN, RECEIVER, *v.* GARY STATE BANK. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George P. Barse, George B. Springston, F. G. Awalt,* and *J. F. Anderson* for petitioner. *Mr. Kemper K. Knapp* for respondent. Reported below: 76 F. (2d) 833.

No. 757. BONNER *v.* UNITED STATES;

No. 758. CUNNINGHAM *v.* SAME; and

No. 759. MORROW *v.* SAME. April 15, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. D. A. McAskill* for Bonner. *Mr. Augustus McCloskey* for Cunningham. *Mr. Harold J. Bandy* for Morrow. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 74 F. (2d) 652.

No. 760. YOKOHAMA SPECIE BANK ET AL. *v.* MITSUI & CO., LTD. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Forrest E. Single* for petitioners. *Mr. Roscoe H. Hupper* for respondent. Reported below: 73 F. (2d) 526.

No. 761. BRITISH EMPIRE STEAM NAVIGATION CO., LTD. *v.* ELTING, COLLECTOR OF CUSTOMS. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Delbert M. Tibbetts* and *Richard L. Sullivan* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. M. Leo Looney, Jr.,* for respondent. Reported below: 74 F. (2d) 204.

No. 764. SEVALD, ADMINISTRATRIX, *v.* UNITED STATES. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Dominic P. Sevald* for petitioner. *Solicitor General Biggs* and *Messrs. Will G. Beardslee, John MacC. Hudson,* and *Randolph C. Shaw* for the United States. Reported below: 73 F. (2d) 860.

No. 765. ROTH *v.* BALDWIN, RECEIVER. April 15, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Alvin L. Newmyer* and *David G. Bress* for petitioner. *Messrs. Swagar Sherley, Frederick DeC. Faust,* and *Charles F. Wilson* for respondent. Reported below: 64 App. D. C. 90; 74 F. (2d) 1003.

No. 768. KESSLER *v.* BECK ET AL., RECEIVERS. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. H. F. Stambaugh* for petitioner. *Messrs. W. Walter Braham, J. Campbell Brandon, Lee C. McCandless, James E. Marshall,* and *Zeno F. Henninger* for respondents. Reported below: 74 F. (2d) 1016.

No. 771. CHANDLER, SPECIAL ADMINISTRATOR, *v.* MCCUEN; and

No. 772. SAME *v.* KENNEDY. April 15, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. R. C. Fulbright* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Messrs. John MacC. Hudson* and *James W. Morris* for respondents. Reported below: 73 F. (2d) 417.

No. 775. CURTIS, ADMINISTRATRIX *v.* CAMPBELL, ADMINISTRATOR. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Thomas J. Clary* for petitioner. *Messrs. Dwight E. Rorer* and *Chester N. Farr, Jr.,* for respondent. Reported below: 76 F. (2d) 84.

No. 776. BENITO TAN CHAT ET AL. *v.* ILOILO. April 15, 1935. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Clyde Alton Dewitt* and *Eugene Arthur Perkins* for petitioners. *Messrs. Fred W. Llewellyn* and *Arthur W. Brown* for respondent.

No. 780. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* STEPHENS NATIONAL BANK OF FREMONT. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Wymer Dressler, Robert D. Neely, Samuel H. Cady,* and *William T. Faricy* for petitioner. No appearance for respondent. Reported below: 75 F. (2d) 398.

No. 782. ROBBINS *v.* UNIVERSITY OF SOUTHERN CALIFORNIA. April 15, 1935. Petition for writ of certiorari to the District Court of Appeal, 2nd Appellate District, of California, denied. *Mr. W. G. McAdoo* for petitioner. *Mr. A. J. Hill* for respondent. Reported below: 1 Cal. App. (2d) 523; 37 P. (2d) 163.

No. 792. IRVING MILLEN *v.* CAPEN, SHERIFF; and

No. 793. MURTON MILLEN *v.* SAME. April 15, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. George Stanley Harvey* for petitioners. *Mr. Henry P. Fielding* for respondent. Reported below: 74 F. (2d) 342.

No. 808. BABB, TREASURER, *v.* LOUISVILLE ET AL. April 15, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lisle A. Smith* for petitioner. *Mr. Arthur B. Bensinger* for respondents. Reported below: 75 F. (2d) 162.

No. 774. DODGE, SPECIAL ADMINISTRATOR, ET AL. *v.* SCRIPPS, TRUSTEE, ET AL. April 15, 1935. Petition for writ of certiorari to the Supreme Court of Washington, denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Mr. William G. McAdoo* for petitioners. No appearance for respondents. Reported below: 179 Wash. 308; 37 P. (2d) 896.

No. 766. HIRSCH ET AL. *v.* UNITED STATES. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. David P. Siegel, Wm. E. Leahy,* and *Wm. J. Hughes, Jr.,* for petitioners. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 74 F. (2d) 215.

No. 770. YGLESIAS & CO., INC. *v.* ENEGLOTARIA MEDICINE CO., INC. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Ben A. Matthews* for petitioner. *Messrs. Henri Brown* and *Martin Travieso* for respondent. Reported below: 74 F. (2d) 635.

No. 778. SANDERS ET AL. *v.* HALL ET AL. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Finis E. Riddle* for petitioners. *Mr. Willard Brooks* for respondents. Reported below: 74 F. (2d) 399.

No. 785. GORMAN ET AL., EXECUTORS, ET AL. *v.* SHAFFER OIL & REFINING CO. ET AL. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for

the Tenth Circuit denied. *Mr. Wesley E. Disney* for petitioners. No appearance for respondents. Reported below: 74 F. (2d) 610.

No. 786. Elie Sheetz Candies Co. *v.* O'Connell, Receiver, et al. April 29, 1935. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Harry C. Barnes* for petitioner. *Mr. Henry O. Nickel* for respondents. Reported below: 358 Ill. 290; 193 N. E. 186.

No. 794. Elliott *v.* United States. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. Wolff Smith* for petitioner. *Solicitor General Reed* and *Messrs. Will G. Beardslee* and *Wilbur C. Pickett* for the United States. Reported below: 73 F. (2d) 374.

No. 798. Howard et al. *v.* United States. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William F. Waugh* for petitioners. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 75 F. (2d) 562.

No. 800. Burke-Divide Oil Co. *v.* Neal. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Henry M. Ward* and *John T. Beasley* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 73 F. (2d) 857.

No. 801. AMERICAN SURETY CO. *v.* STANDARD ASPHALT CO., INC. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. O. O. McCollum* and *Charles Cook Howell* for petitioner. *Mr. H. L. Anderson* for respondent. Reported below: 75 F. (2d) 1.

No. 803. FEDERAL CRUDE OIL CO. *v.* YOUNT-LEE OIL CO. ET AL. April 29, 1935. Petition for writ of certiorari to the Court of Civil Appeals, 9th Supreme Judicial District, of Texas, denied. *Messrs. W. D. Gordon* and *Nelson Phillips* for petitioner. *Messrs. R. L. Batts, Will E. Orgain,* and *Beeman Strong* for respondents. Reported below: 73 S. W. (2d) 969.

No. 814. ILLINOIS STOKER CO. *v.* K-B PULVERIZER CORP. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Henry Davis* and *A. M. FitzGerald* for petitioner. *Mr. Walter J. Rosston* for respondent. Reported below: 74 F. (2d) 824.

No. 657. DAOS ET AL. *v.* PHILIPPINE ISLANDS. April 29, 1935. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Silverio Daos* and *Carol King* for petitioners. *Messrs. Fred W. Llewellyn* and *Arthur W. Brown* for respondent.

No. 740. ONEIDA COMMUNITY, LTD. *v.* INTERNATIONAL SILVER CO. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harry D. Nims* and *Minturn*

deS. Verdi for petitioner. *Messrs. John P. Bartlett, Richard Eyre, Edward S. Rogers,* and *Ralph L. Scott* for respondent. Reported below: 73 F. (2d) 69.

No. 818. INTERNATIONAL SILVER CO. *v.* ONEIDA COMMUNITY, LTD. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Richard Eyre, John P. Bartlett, Edward S. Rogers,* and *Ralph L. Scott* for petitioner. *Messrs. Harry D. Nims* and *Minturn deS. Verdi* for respondent. Reported below: 73 F. (2d) 69.

No. 791. GUEST *v.* UNITED STATES. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wm. E. Leahy* and *Wm. J. Hughes, Jr.,* for petitioner. *Solicitor General Reed,* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 74 F. (2d) 730.

No. 795. UTAH COPPER CO. *v.* STEPHEN HAYS ESTATE, INC. ET AL. April 29, 1935. Petition for writ of certiorari to the Supreme Court of Utah denied. *Messrs. A. C. Ellis, Jr.,* and *C. C. Parsons* for petitioner. *Messrs. Carl A. Badger* and *H. Arnold Rich* for respondents. Reported below: 83 Utah 545; 31 P. (2d) 624.

No. 796. CORNELL ET AL. *v.* SEELEY ET AL. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. A. Keeling* for petitioners. *Mr. T. R. Boone* for respondents. Reported below: 74 F. (2d) 353.

No. 799. CLEVELAND & PITTSBURGH RAILROAD CO. ET AL. *v.* PITTSBURGH COAL CO. April 29, 1935. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. Frederic D. McKenney, John Spalding Flannery,* and *G. Bowdoin Craighill* for petitioners. *Messrs. Harold F. Reed, Don Rose,* and *John B. Eichenauer* for respondent. Reported below: 317 Pa. 395; 176 Atl. 7.

No. 804. MORSE *v.* PENNSYLVANIA RAILROAD CO. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clayton R. Lusk* for petitioner. *Messrs. Frederic D. McKenney, John Spalding Flannery, G. Bowdoin Craighill,* and *Irving B. Diven* for respondent. Reported below: 74 F. (2d) 677.

No. 806. SANTEE RIVER CYPRESS LUMBER CO. *v.* FORSHUR TIMBER CO. April 29, 1935. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. Marion W. Seabrook* for petitioner. *Mr. W. C. Wolfe* for respondent. Reported below: 178 S. E. 329.

No. 807. SQUIRE, SUPERINTENDENT OF BANKS OF OHIO *v.* LLOYDS CASUALTY CO. ET AL. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John W. Bricker* and *J. Roth Crabbe* for petitioner. *Mr. E. E. Stearns* for respondents. Reported below: 75 F. (2d) 295.

No. 810. WOLVERINE PETROLEUM CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 29, 1935.

Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Guy A. Thompson, Samuel A. Mitchell, Frank A. Thompson,* and *Truman Post Young* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Alexander F. Prescott, Jr.,* for respondent. Reported below: 75 F. (2d) 593.

No. 811. DAVIS *v.* SCHLENER, RECEIVER. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Manley P. Caldwell* for petitioner. No appearance for respondent. Reported below: 75 F. (2d) 371.

No. 813. SECOND JUDICIAL COURT OF MONTANA ET AL. *v.* MONTANA ET AL. April 29, 1935. Petition for writ of certiorari to the Supreme Court of Montana denied. *Mr. John W. Fisher* for petitioners. *Mr. Samuel T. Bush* for respondents. Reported below: 98 Mont. 278; 41 P. (2d) 26.

No. 815. TULSA *v.* SOUTHWESTERN BELL TELEPHONE CO. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Neal E. McNeill* and *Robert L. Davidson* for petitioner. *Messrs. Jacob Reyle Spielman, Arthur J. Biddison, Harry Campbell,* and *John H. Cantrell* for respondent. Reported below: 75 F. (2d) 343.

No. 821. W. AMES & CO. *v.* WALLACE, SECRETARY OF AGRICULTURE, ET AL. April 29, 1935. Petition for writ of certiorari to the United States Court of Appeals for the

District of Columbia denied. *Messrs. Daniel Thew Wright* and *R. Robinson Chance* for petitioner. *Solicitor General Reed, Assistant Attorney General Stephens,* and *Messrs. Carl F. McFarland* and *Moses S. Huberman* for respondents.

No. 825. WILEY *v.* UNITED STATES. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Emmett E. Doherty* for petitioner. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 75 F. (2d) 1023.

No. 828. NORFOLK & WASHINGTON STEAMBOAT CO. ET AL. *v.* UNITED STATES. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Edward R. Baird* and *George M. Lanning* for petitioners. *Solicitor General Reed, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 74 F. (2d) 977.

No. 829. MCCANNELL *v.* UNITED STATES. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Elliott Byrne* for petitioner. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 75 F. (2d) 195.

No. 830. TUCKER *v.* UNITED STATES. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Arthur A. Cocke* and *Albert L. Wilson* for petitioner. *Solicitor Gen-*

eral Reed and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 74 F. (2d) 939.

No. 835. FIDELITY STORAGE CO. ET AL. *v.* JAQUES. April 29, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Charles H. Merillat* for petitioners. *Messrs. W. W. Millan* and *R. E. L. Smith* for respondent. Reported below: 64 App. D. C. 177; 76 F. (2d) 427.

No. 843. BLOEDORN *v.* BLOEDORN. April 29, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. William C. Sullivan* for petitioner. *Mr. Crandal Mackey* for respondent. Reported below: 64 App. D. C. 199; 76 F. (2d) 812.

No. 863. POLLAK *v.* MCCULLOCH, RECEIVER. April 29, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel A. Ettelson* for petitioner. *Messrs. Guy M. Peters* and *James G. Condon* for respondent. Reported below: 74 F. (2d) 779.

No. 802. UJICH *v.* COMMISSIONER OF IMMIGRATION. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Carol King* and *Isaac Shorr* for petitioner. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 75 F. (2d) 1022.

No. 823. GUARANTEE TRUST CO. *v.* COLLINGS ET AL. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Clarence L. Cole* for petitioner. *Mr. Floyd H. Bradley* for respondents. Reported below: 76 F. (2d) 870.

No. 824. COOLEY *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Robert C. Cooley, pro se. Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 75 F. (2d) 188.

No. 826. TIPTON ET AL. *v.* IRVING TRUST CO., TRUSTEE. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert W. Lyons* for petitioners. *Mr. Wm. D. Whitney* for respondent. Reported below: 74 F. (2d) 45.

No. 856. JACKSON *v.* IRVING TRUST CO., TRUSTEE. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. C. Dickerman Williams* for petitioner. *Mr. Wm. D. Whitney* for respondent. Reported below: 74 F. (2d) 738.

No. 868. MINOT ET AL. *v.* IRVING TRUST CO., TRUSTEE. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George H. Engelhard* and *Carl S. Stern* for petitioners. *Mr. Wm. D. Whitney* for respondent. Reported below: 74 F. (2d) 659.

No. 836. FLINT HOSIERY MILLS, INC. *v.* FIREMAN'S FUND INSURANCE CO.; and

No. 837. SAME *v.* HOMELAND INSURANCE CO. May 6, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. C. L. Shuping* for petitioner. *Messrs. Julius C. Smith* and *Alex. W. Smith, Jr.*, for respondents. Reported below: 74 F. (2d) 533.

No. 838. G. E. PRENTICE MANUFACTURING CO. *v.* HOOKLESS FASTENER CO. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Drury W. Cooper* and *Robert Cushman* for petitioner. *Messrs. Charles Neave* and *Merrell E. Clark* for respondent. Reported below: 75 F. (2d) 264.

No. 845. WELCH ET AL. *v.* BRYAN, RECEIVER, ET AL. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Tom D. McKeown* and *Wm. P. Thompson* for petitioners. *Messrs. Grover C. Spillers* and *Charles L. Yancey* for respondents. Reported below: 74 F. (2d) 964.

No. 851. PATRICK MCGUIRL, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George E. H. Goodner* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 74 F. (2d) 729.

No. 867. SUDDUTH, ADMINISTRATRIX, *v.* YAZOO & MISSISSIPPI VALLEY RAILWAY CO. May 6, 1935. Petition

for writ of certiorari to the Supreme Court of Mississippi denied. *Mr. Marion W. Reily* for petitioner. *Messrs. H. D. Minor, Charles N. Burch, C. H. McKay, E. C. Craig, R. L. Dent,* and *A. S. Bozeman* for respondent. Reported below: 171 Miss. 619; 157 So. 527.

No. 875. HOGAN *v.* HAMBURG-AMERICAN LINE. May 6, 1935. Petition for writ of certiorari to the City Court of the City of New York, State of New York, denied. *Mr. Silas B. Axtell* for petitioner. *Mr. Wm. B. Devoe* for respondent. Reported below: 152 Misc. 405; 272 N. Y. S. 690.

No. 878. SOUTHWESTERN GAS & ELECTRIC CO. *v.* WILLIAMS. May 6, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William H. Arnold* and *David C. Arnold* for petitioner. *Mr. S. P. Jones* for respondent. Reported below: 76 F. (2d) 49.

No. 927. SULLIVAN *v.* CHICAGO & NORTH WESTERN RY. CO. May 13, 1935. Petition for writ of certiorari to the Supreme Court of Nebraska, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Amos Thomas* for petitioner. No appearance for respondent. Reported below: 128 Neb. 92; 258 N. W. 38.

No. 929. SOLOMON, ADMINISTRATOR, *v.* BENJAMIN. May 13, 1935. 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. Justus Chancellor* for petitioner. No appearance for respondent. Reported below: 75 F. (2d) 564.

No. 842. SIMMS OIL CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. J. Sterling Halstead, Edward Cornell, Harold C. McCollom,* and *Roger Hinds* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Carlton Fox* for respondent. Reported below: 74 F. (2d) 561.

No. 848. KRETNI DEVELOPMENT CO. *v.* CONSOLIDATED OIL CORP. ET AL. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. N. E. Corthell* and *A. W. McCollough* for petitioner. *Mr. G. T. Stanford* for respondents. Reported below: 74 F. (2d) 497.

No. 852. MCDONOUGH ET AL. *v.* OWL DRUG CO., BANKRUPT, ET AL. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Samuel T. Bush* and *Herbert W. Erskine* for petitioners. *Messrs. John Francis Neylan, Bartley C. Crum, George B. Thatcher, Wm. Woodburn,* and *Clarence A. Shuey* for respondents. Reported below: 75 F. (2d) 45.

No. 855. UNITED STATES *v.* ELLISON, ADMINISTRATRIX. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Solicitor General Reed* and *Messrs. Will G. Beardslee* and *Wilbur C. Pickett* for the United States. *Mr. Warren E. Miller* for respondent. Reported below: 74 F. (2d) 864.

No. 861. CHEMUNG CANAL TRUST CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William Flannery* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 74 F. (2d) 1009.

No. 862. ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* BOATMEN'S NATIONAL BANK OF ST. LOUIS. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. H. Kiskaddon* for petitioner. *Mr. Charles Claflin Allen, Jr.,* for respondent. Reported below: 75 F. (2d) 494.

No. 874. LYKES BROS. STEAMSHIP CO., INC. *v.* ESTEVES. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Newton Rayzor* for petitioner. No appearance for respondent. Reported below: 74 F. (2d) 364.

No. 888. BETTER PACKAGES, INC. *v.* L. LINK & CO., INC. ET AL. May 13, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Nelson Littell* and *Edmund Quincy Moses* for petitioner. *Mr. Frederic P. Warfield* for respondents. Reported below: 74 F. (2d) 679; 75 F. (2d) 1006.

Nos. 920 and 921. LOVELL, EXECUTOR, ET AL. *v.* UNITED MILK PRODUCTS CORP. ET AL. May 13, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for

the Sixth Circuit denied. *Messrs. W. T. Kinder* and *Clan Crawford* for petitioners. *Messrs. Newton D. Baker* and *Howard F. Burns* for respondents. Reported below: 75 F. (2d) 923.

No. 841. BROOKLYN ASH REMOVAL CO., INC. *v.* UNITED STATES. May 20, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frank L. Warfield* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 770; 10 F. Supp. 152.

No. 846. HOGAN, EXECUTRIX *v.* UNITED STATES ET AL. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harold C. Faulkner* for petitioner. *Solicitor General Reed, Assistant Attorney General Blair,* and *Messrs. Aubrey Lawrence* and *Elvon Musick* for respondents. Reported below: 72 F. (2d) 799.

No. 853. UNITED STATES *v.* GREAT NORTHERN RAILWAY CO. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Solicitor General Reed* for the United States. *Mr. Thomas Balmer* for respondent. Reported below: 73 F. (2d) 736.

No. 860. HILLSIDE LAND CO. ET AL. *v.* TOWNSHIP OF NORTH BERGEN. May 20, 1935. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Dougal Herr* for petitioners. *Mr. Cyral J. McCauley* for respondent. Reported below: 112 N. J. L. 576, 172 Atl. 585; 114 N. J. L. 156, 176 Atl. 192.

No. 865. HAMBURG-AMERICAN LINE *v.* ELTING, COLLECTOR OF CUSTOMS. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Roger O'Donnell, Lambert O'Donnell,* and *William J. Peters* for petitioner. *Solicitor General Reed, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *C. Keefe Hurley* for respondent. Reported below: 73 F. (2d) 272; 74 *id.* 209, 747, 1015.

No. 873. PURITY INVESTMENT CO. *v.* MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles C. Sullivan* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Alexander F. Prescott, Jr.,* for respondent. Reported below: 75 F. (2d) 30.

No. 881. ISAACS, TRUSTEE, *v.* HOBBS TIE & TIMBER CO. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William R. Watkins* for petitioner. *Messrs. John R. Duty, W. N. Ivie,* and *Claude Duty* for respondent. Reported below: 76 F. (2d) 209.

No. 890. DANIEL ET AL. *v.* LAYTON ET AL. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. W. S. Oppenheim* for petitioners. *Messrs. Lewis C. Jesseph* and *Fred P. Carr* for respondents. Reported below: 75 F. (2d) 135.

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No. 893. ROYAL UNION LIFE INSURANCE CO. *v.* GROSS ET AL.; and

No. 894. GREAT REPUBLIC LIFE INSURANCE CO. *v.* SAME. May 20, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Guy A. Miller* and *Hugh W. Darling* for Royal Union Life Insurance Co. *Mr. William E. Allen* for Great Republic Life Insurance Co. *Messrs. Joseph G. Gamble, R. L. Read,* and *Phineas M. Henry* for respondents. Reported below: 76 F. (2d) 219.

No. 895. STONE *v.* WRIGHT, RECEIVER. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. J. H. Everest* and *M. W. McKenzie* for petitioner. No appearance for respondent. Reported below: 75 F. (2d) 457.

No. 896. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* WETTERER. May 20, 1935. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, denied. *Messrs. Charles H. Woods* and *Homer W. Davis* for petitioner. *Mr. Richard J. Finn* for respondent. Reported below: 277 Ill. App. 275.

No. 897. SAN ANTONIO ET AL. *v.* SOUTHWESTERN BELL TELEPHONE CO. May 20, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Victor Keller* for petitioners. *Messrs. E. W. Clausen, J. C. Henriques, Nelson Phillips,* and *Wm. H. Duls* for respondent. Reported below: 75 F. (2d) 880.

No. 974. ROSENTHAL *v.* LANGLEY ET AL. See *ante*, p. 720.

No. 966. QUEEN *v.* UNITED STATES. May 27, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Brooks T. Sanders* for petitioner. No appearance for the United States. Reported below: 77 F. (2d) 780.

No. 979. DEKTOR *v.* OVERBROOK NATIONAL BANK ET AL. May 27, 1935. 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. *Messrs. Herman Steerman* and *Isidor Ostroff* for petitioner. No appearance for respondents. Reported below: 77 F. (2d) 491.

No. 980. TENNESSEE EX REL. FOX *v.* NEELY, WARDEN. May 27, 1935. Petition for writ of certiorari to the Supreme Court of Tennessee, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Silas Fox, pro se.* No appearance for respondent.

No. 822. DUWAMISH TRIBE OF INDIANS ET AL. *v.* UNITED STATES. May 27, 1935. Petition for writ of certiorari to the Court of Claims denied. The motion to remand is also denied. *Mr. Arthur E. Griffin* for petitioners. *Solicitor General Reed, Assistant Attorney General Blair,* and *Mr. George T. Stormont* for the United States. Reported below: 79 Ct. Cls. 530.

No. 871. BUSHMAN, ADMINISTRATOR, *v.* UNITED STATES. May 27, 1935. Petition for writ of certiorari to the Court of Claims denied. *Messrs. William P. Smith* and *John C. Evans* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 175; 8 F. Supp. 694.

No. 885. THE MANUEL ARNUS ET AL. *v.* UNITED STATES. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Crandall* for petitioners. *Solicitor General Reed, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney, M. Leo Looney, Jr.,* and *W. Marvin Smith* for the United States. Reported below: 75 F. (2d) 943.

No. 889. WEINBERGER BANANA CO., INC., *v.* PHOENIX ASSURANCE CO., LTD. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walker B. Spencer* for petitioner. No appearance for respondent. Reported below: 74 F. (2d) 539.

No. 891. CONTINENTAL BAKING CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 27, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. J. Nelson Anderson* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Alexander F. Prescott, Jr.,* for respondent. Reported below: 64 App. D. C. 112; 75 F. (2d) 243.

No. 900. SULLIVAN *v.* UNITED STATES. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Irving A. Jennings* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John H. McEvers* for the United States. Reported below: 75 F. (2d) 622.

No. 904. SKELLY *v.* UNITED STATES; and

No. 905. BERMAN *v.* SAME. May 27, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Mortimer H. Boutelle* and *J. B. Dudley* for petitioners. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 76 F. (2d) 483.

No. 907. OHIO CASUALTY INSURANCE CO. *v.* ROSAIA ET AL. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Henry Elliott, Jr.,* for petitioner. *Messrs. Elias A. Wright* and *Sam A. Wright* for respondents. Reported below: 74 F. (2d) 522.

No. 908. KUMAKI KOGA ET AL. *v.* CARR, DISTRICT DIRECTOR OF IMMIGRATION. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Arthur E. Cook* and *J. Edward Keating* for petitioners. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondent. Reported below: 75 F. (2d) 820.

No. 909. INTERNATIONAL SHOE CO. *v.* RUBINS ET AL. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Robert G. Dreffein* for petitioner. *Mr. A. Martin Curtis* for respondents. Reported below: 74 F. (2d) 432.

No. 912. DANCIGER OIL & REFINING CO. ET AL. *v.* BURROUGHS. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. George M. Nicholson* and *Thomas H. Owen* for petitioners. *Mr. Howard B. Hopps* for respondent. Reported below: 75 F. (2d) 855.

No. 913. WYNEKOOP *v.* ILLINOIS. May 27, 1935. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. Everett Jennings* and *Edward M. Keating* for petitioner. *Mr. M. S. Winning* for respondent. Reported below: 359 Ill. 124; 194 N. E. 276.

No. 915. PAPE *v.* ST. LUCIE INLET DISTRICT & PORT AUTHORITY ET AL. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Giles J. Patterson* for petitioner. *Messrs. D. C. Hull, Erskine W. Landis, T. P. Whitehair,* and *T. T. Oughterson* for respondents. Reported below: 75 F. (2d) 865.

No. 919. CHICAGO, ROCK ISLAND & GULF RAILWAY CO. *v.* FREDERICK. May 27, 1935. Petition for writ of certiorari to the Court of Civil Appeals, 7th Supreme Judicial District, of Texas, denied. *Messrs. Ben H. Stone, M. L. Bell, W. F. Dickinson, J. O. Gulcke,* and *R. A. Stone* for petitioner. *Mr. Herbert K. Hyde* for respondent. Reported below: 74 S. W. (2d) 275.

No. 932. RUDO *v.* A. H. BULL STEAMSHIP CO. ET AL. May 27, 1935. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Mr. Sol C. Berenholtz* for petitioner. *Mr. George Forbes* for respondents. Reported below: 168 Md. 281; 177 Atl. 538.

No. 941. E. R. SQUIBB & SONS *v.* MALLINCKRODT CHEMICAL WORKS. May 27, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William H. Davis* and *Clarence M. Fisher* for petitioner. *Messrs. Frank Y. Gladney* and *Lawrence C. Kingsland* for respondent. Reported below: 69 F. (2d) 685.

No. 911. HARGREAVES *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Wm. H. Neblett* for petitioner. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 75 F. (2d) 68.

No. 988. WILSON ET AL. *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Joseph R. Brown* for petitioners. *Solicitor General Reed* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 77 F. (2d) 236.

No. 996. MCRAE, ADMINISTRATRIX, *v.* UNITED STATES. June 3, 1935. 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. Thomas H. Peeples* for petitioner. No appearance for the United States. Reported below: 77 F. (2d) 88.

No. 943. NEW YORK CITY *v.* MURRAY, RECEIVER, ET AL. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. C. Dickerman Williams* and *Samuel Seabury* for petitioner. *Messrs. Edwin S. S. Sunderland, John W. Davis, Nathan L. Miller, Charles E. Hughes, Jr.,* and *Carl M. Owen* for respondents. Reported below: 76 F. (2d) 1002.

No. 859. BRAUN ET AL. *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Louis O. Bergh* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 211; 8 F. Supp. 860.

No. 866. EVERETT MILLS, INC. *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. O. Walker Taylor* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for the United States. Reported below: 80 Ct. Cls. 550; 9 F. Supp. 508.

No. 877. PRATT & WHITNEY CO. *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Karl D. Loos, Preston B. Kavanagh,* and *Preston C. King, Jr.,* for petitioner. *So-*

licitor General Reed, Assistant Attorney General Wideman, and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 676; 6 F. Supp. 574; 10 F. Supp. 148.

No. 883. MADISON *v.* UNITED STATES;
No. 884. STOHL *v.* SAME;
No. 892. FAULKNER ET AL. *v.* SAME;
No. 902. BALDWIN ET AL. *v.* SAME;
No. 903. KELLER ET AL. v. SAME; and
No. 1022. GREEN *v.* SAME. June 3, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William W. Ray* for Madison and Stohl. *Mr. Albert R. Barnes* for Faulkner et al. *Mr. J. D. Skeen* for Baldwin et al. *Mr. Harvey H. Cluff* for Keller et al. *Mr. John W. Mahan* and *Frances C. Elge* for Green. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for the United States. Reported below: 72 F. (2d) 810.

No. 887. UNITED STATES EX REL. TETONIS *v.* PERKINS, SECRETARY OF LABOR, ET AL. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Ward Bonsall* for petitioner. *Solicitor General Reed* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for respondents. Reported below: 75 F. (2d) 1022.

No. 914. SECURITY NATIONAL BANK *v.* NORTH CAROLINA EX REL. STATE HOSPITAL FOR THE INSANE AT RALEIGH. June 3, 1935. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. Willis Smith* for petitioner. *Mr. I. M. Bailey* for respondent. Reported below: 207 N. C. 697; 178 S. E. 487.

No. 916. CHICAGO, ROCK ISLAND & GULF RAILWAY CO. ET AL. *v.* TARRANT COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NUMBER ONE. June 3, 1935. Petition for writ of certiorari to the Court of Civil Appeals, 2nd Supreme Judicial District, of Texas, denied. *Messrs. M. L. Bell, Thomas P. Littlepage, Robert Harrison,* and *W. F. Peter* for petitioners. *Mr. Mark McGee* for respondent. Reported below: 76 S. W. (2d) 147.

No. 924. EARWOOD *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Thomas Howell Scott* and *Wm. T. Townsend* for petitioner. *Solicitor General Reed* and *Messrs. Will G. Beardslee, Randolph C. Shaw,* and *W. Marvin Smith* for the United States. Reported below: 76 F. (2d) 557.

No. 925. COLLINS *v.* WELSH. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harry H. Semmes* for petitioner. *Mr. Walter E. Hettman* for respondent. Reported below: 75 F. (2d) 894.

No. 928. DEERING ET AL. *v.* STITES ET AL. June 3, 1935. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Mr. Greenberry Simmons* for petitioners. *Messrs. Edward P. Humphrey* and *Allen P. Dodd* for respondents. Reported below: 257 Ky. 403; 78 S. W. (2d) 46.

No. 930. INDIANS OF CALIFORNIA *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. A. K. Shipe* for petitioners. *So-*

licitor General Reed, Assistant Attorney General Blair, and *Messrs. John MacC. Hudson* and *George T. Stormont* for the United States. Reported below: 80 Ct. Cls. 854.

No. 933. GARDNER-DENVER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Robert Ash* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Morton K. Rothschild* for respondent. Reported below: 75 F. (2d) 38.

No. 935. ROBERTSON *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 936. BROUSE ET AL. *v.* SAME. June 3, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Ashley M. Van Duzer* and *Robert W. Wales* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman, Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 75 F. (2d) 540.

No. 942. UNITED STATES *v.* SELLERS. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Reed* and *Messrs. Will G. Beardslee* and *Wilbur C. Pickett* for the United States. *Messrs. Stokes V. Robertson* and *Warren E. Miller* for respondent. Reported below: 75 F. (2d) 623.

No. 946. VARNELL *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit

denied. *Messrs. W. T. Kennerly* and *Clyde W. Key* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Lucius A. Buck* for respondent.

No. 947. JASPER COUNTY LUMBER CO. *v.* MCNEILL. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will E. Orgain* for petitioner. *Mr. M. G. Adams* for respondent. Reported below: 76 F. (2d) 207.

No. 948. OCEAN ACCIDENT & GUARANTEE CORP. *v.* J. L. BRANDEIS & SONS. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Dana B. Van Dusen* for petitioner. No appearance for respondents. Reported below: 75 F. (2d) 605.

No. 949. STATE PLANTERS BANK & TRUST CO. ET AL. *v.* FIRST NATIONAL BANK OF VICTORIA. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. George E. Allen* and *A. S. Buford, Jr.,* for petitioners. *Mr. John S. Eggleston* for respondent. Reported below: 76 F. (2d) 527.

No. 957. MODJESKI *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Townsend* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *M. H. Eustace* for respondent. Reported below: 75 F. (2d) 468.

No. 959. WANLESS IRON CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. L. Agatin* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman, Mr. J. Louis Monarch,* and *Miss Louise Foster* for respondent. Reported below: 75 F. (2d) 779.

No. 962. MILLEN ET AL. *v.* MASSACHUSETTS; and

No. 963. FABER *v.* SAME. June 3, 1935. Petitions for writs of certiorari to the Superior Court in and for the County of Norfolk, Massachusetts, denied. *Mr. George Stanley Harvey* for Millen et al. *Mr. Maurice Palais* for Faber. *Mr. Henry P. Fielding* for respondent. Reported below: 194 N. E. 463; 195 N. E. 541.

No. 968. ATLANTIC COAST LINE RAILROAD CO. *v.* CLAUGHTON. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. E. Kay* for petitioner. *Mr. Donald C. McMullen* for respondent. Reported below: 75 F. (2d) 626.

No. 969. LELY *v.* KALINOGLU. June 3, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. George C. Vournas, Hugh Reid,* and *W. Cameron Burton* for petitioner. *Mr. George C. Gertman* for respondent. Reported below: 64 App. D. C. 213; 76 F. (2d) 983.

No. 1002. WHEELER *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lin William Price* for petitioner. No appearance for the United States. Reported below: 77 F. (2d) 216.

No. 940. EZRA *v.* LAMONT ET AL. June 3, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Robert F. Greacen* for petitioner. *Mr. Jerome S. Hess* for respondents. Reported below: 241 App. Div. 805; 271 N. Y. S. 951.

No. 950. KELLY *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter P. Luck* for petitioner. *Solicitor General Reed* and *Mr. Amos W. W. Woodcock* for the United States. Reported below: 75 F. (2d) 1015.

No. 978. ESLICK *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lee Douglas* for petitioner. *Solicitor General Reed* and *Mr. Amos W. W. Woodcock* for the United States. Reported below: 76 F. (2d) 706.

No. 967. CENTURY ELECTRIC CO. *v.* UNITED STATES. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Chester A. Bennett* and *Roy M. Eilers* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Alexander F. Prescott, Jr.,* for the United States. Reported below: 75 F. (2d) 589.

No. 975. BALLOU ET AL. *v.* DAVIS, RECEIVER, ET AL. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr.*

Bernhardt Frank for petitioners. *Messrs. Lewis C. Jesseph* and *Fred P. Carr* for respondents. Reported below: 75 F. (2d) 138.

No. 987. TEXAS & PACIFIC RAILWAY CO. ET AL. *v.* LOUISIANA OIL REFINING CORP. ET AL. June 3, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Robert Wilkins Thompson, T. D. Gresham, J. H. Tallichet, C. M. Spence, G. B. Ross,* and *C. Huffman Lewis* for petitioners. No appearance for respondents. Reported below: 76 F. (2d) 465.

PETITIONS FOR REHEARING, FROM APRIL 2, 1935, TO AND INCLUDING JUNE 3, 1935.

No. 541. DOUGLAS *v.* WILLCUTS, COLLECTOR. *Ante,* p. 722. April 8, 1935. Petition for rehearing granted.

No. —, original. EX PARTE PORESKY. 294 U. S. 697. April 8, 1935. Petition for rehearing denied.

No. 383. SWINSON *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO. 294 U. S. 529. April 8, 1935. Petition for rehearing denied.

No. 733. PRICE *v.* UNITED STATES. 294 U. S. 720. April 8, 1935. Petition for rehearing denied.

No. 20. METROPOLITAN CASUALTY INSURANCE CO. *v.* BROWNELL, RECEIVER. 294 U. S. 580. April 15, 1935. Petition for rehearing denied.

No. 677. BARNES *v.* BOYD ET AL. 294 U. S. 723. April 15, 1935. Petition for rehearing denied.

No. 679. BUCHANAN ET AL. *v.* UNITED STATES. 294 U. S. 723. April 15, 1935. Petition for rehearing denied.

No. 688. GREEN *v.* CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. 294 U. S. 715, 734. April 29, 1935. Motion for leave to file second petition for rehearing denied.

No. 412. PANHANDLE EASTERN PIPE LINE CO. *v.* KANSAS HIGHWAY COMMISSION. 294 U. S. 613. April 29, 1935. Petition for rehearing denied.

No. 454. STEWART DRY GOODS CO. *v.* LEWIS ET AL.;
No. 455. LEVY ET AL. *v.* SAME;
No. 456. J. C. PENNEY CO. *v.* SAME; and
No. 457. KROGER GROCERY & BAKING CO. *v.* SAME. 294 U. S. 550. April 29, 1935. Petition for rehearing denied.

No. 766. HIRSCH ET AL. *v.* UNITED STATES. *Ante*, p. 739. May 6, 1935. Petition for rehearing denied.

No. 201 (October Term, 1925). MORSE *v.* UNITED STATES. 270 U. S. 151. May 13, 1935. Motion for leave to file petition for rehearing denied.

No. 758. CUNNINGHAM *v.* UNITED STATES. *Ante*, p. 736. May 13, 1935. Petition for rehearing denied.

No. 788. GENERAL CONSTRUCTION CO. *v.* FISHER ET AL. *Ante*, p. 715. May 13, 1935. Petition for rehearing denied.

No. 594. FEDERAL LAND BANK OF ST. LOUIS *v.* PRIDDY, CIRCUIT JUDGE. *Ante*, p. 229. May 20, 1935. Petition for rehearing denied.

No. 1045 (October Term, 1933). ALEOGRAPH CO. *v.* WESTERN ELECTRIC CO. 292 U. S. 656. May 27, 1935. The motion for leave to file petition for reconsideration of petition for rehearing is denied.

No. 830. TUCKER *v.* UNITED STATES. *Ante*, p. 745. May 27, 1935. Petition for rehearing denied. The motion for release from prison punishment pending appeal is also denied.

No. 2. UNITED STATES *v.* CREEK NATION. *Ante*, p. 103. May 27, 1935. Petition for rehearing denied.

Nos. 659 and 660. MOTLOW *v.* STATE EX REL. KOELN. *Ante*, p. 97. May 27, 1935. Petition for rehearing denied.

No. 663. SNYDER *v.* COMMISSIONER OF INTERNAL REVENUE. *Ante*, p. 134. May 27, 1935. Petition for rehearing denied.

No. 833. TEXAS LAND & CATTLE CO. ET AL. *v.* FORT WORTH. *Ante*, p. 716. May 27, 1935. Petition for rehearing denied.

No. 344. ATLANTIC COAST LINE RAILROAD CO. *v.* FLORIDA ET AL.; and

No. 345. FLORIDA ET AL. *v.* UNITED STATES ET AL.

Ante, p. 301. June 3, 1935. Motion for construction of opinion; motion for leave to file supplemental bill; and petition for a rehearing in these cases are severally denied.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 2, 1935, TO AND INCLUDING JUNE 3, 1935.

No. 713. Oglethorpe University *v.* Atlanta. Appeal from the Supreme Court of Georgia. April 8, 1935. Dismissed on motion of *Messrs. Edgar Watkins* and *Edgar Watkins, Jr.,* for appellant. *Messrs. J. C. Murphy* and *J. C. Savage* for appellee. Reported below: 180 Ga. 152; 178 S. E. 156.

No. 635. Hamburg-American Line *v.* Elting, Collector of Customs. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 8, 1935. Dismissed, per stipulation, on motion of *Messrs. Roger O'Donnell, Lambert O'Donnell,* and *William J. Peters* for petitioner. *Solicitor General Biggs, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for respondent. Reported below: 73 F. (2d) 272; 74 *id.* 209, 747, 1015.

AMENDMENTS OF BANKRUPTCY RULES.

ORDER.

It is ordered that Rule XXIX and Rule XLVIII, subdivision 4, of the General Orders in Bankruptcy be, and they hereby are, amended, effective immediately, to read as follows:

XXIX

PAYMENT OF MONEYS DEPOSITED

No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks. This general order shall not apply to proceedings under section 77 or section 77B of the Act.

XLVIII

4. The commissions of the referee and of the custodian or receiver shall not exceed those payable to referees and receivers under sections 40 and 48 of the Act in the event of a composition in bankruptcy, and the amount of the debts whose maturity is to be extended shall be included

for that purpose as part of "the amount to be paid creditors" within the meaning of those sections, but if the compensation so computed shall appear to be in excess of what is fair and reasonable it shall be correspondingly reduced, the intent of this provision being that the amount of such fees shall be subject at all times to the approval of the court. If the estate is liquidated under the provisions of subdivision (1) of section 74 of the Act, the referee shall return to the estate any commissions previously received and shall be entitled to commissions on all moneys disbursed to creditors by the trustee as provided in section 40 of the Act.

It is further ordered that the General Orders in Bankruptcy be, and they hereby are, amended by including therein a new Rule, numbered LII, to be immediately effective, and reading as follows:

LII

PROCEEDINGS UNDER SECTION 77B OF THE BANKRUPTCY ACT

The following additional rules shall apply to proceedings under section 77B of the Bankruptcy Act.

1. The clerk of the district court in which proceedings under section 77B are brought shall forthwith transmit to the Secretary of the Treasury copies of (a) the petition of the corporation, or of the creditors thereof desiring to effect a plan of reorganization; or (b) the answer, if any, of the corporation in those cases in which an involuntary proceeding is pending; (c) the order approving or dismissing the petition; (d) any order determining the time in which the claims and interests of creditors may be filed or evidenced and allowed, the division of creditors and stockholders into classes according to the nature of the respective claims and interests, and all orders extending the time in which such claims may be filed or evidenced; (e) any order for a hearing issued upon the report of the special master; (f) the plan of reorganization, amendments, or modifications; (g) any order (1) fixing the time for confirming the plan or dismissing the proceedings;

(2) adjudging the corporation to be solvent or insolvent; (3) confirming the plan or directing the liquidation of the estate; (h) such other papers filed in the proceedings as the Secretary of the Treasury may request of the clerk or the court may direct him to transmit. The clerk shall also transmit to the Collector of Internal Revenue for the district in which the proceedings are pending copies of the petition or answer above described in subdivisions (a) and (b):

Provided, however, that if the Secretary of the Treasury, upon receipt of the petition or answer, shall ascertain that the United States has no interest in the proceeding, he shall so notify the clerk, whereupon the clerk may dispense with the transmittal of further papers. All papers filed with the court shall have attached thereto such copies as the clerk may require for carrying out this general order.

2. Any order fixing the time for confirming any plan which deals with the interests or claims of the United States shall include a reasonable notice to the Secretary of the Treasury of at least thirty days.

3. The provisions of this general order shall not apply to any action heretofore taken; and failure to comply with any provision hereof, in any proceeding heretofore or hereafter instituted, shall not deprive the District Court of jurisdiction of such proceeding or invalidate any action taken by the Court, but shall be the subject of such consideration and remedial action as justice may require.

May 13, 1935.

APPOINTMENT OF COMMITTEE TO DRAFT UNIFIED SYSTEM OF EQUITY AND LAW RULES.

ORDER.

It is ordered:

1. Pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064, the Court will undertake the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.

2. To assist the Court in this undertaking, the Court appoints the following Advisory Committee to serve without compensation:

William D. Mitchell, of New York City, Chairman.

Scott M. Loftin, of Jacksonville, Florida, President of the American Bar Association.

George W. Wickersham, of New York City, President of the American Law Institute.

Wilbur H. Cherry, of Minneapolis, Minnesota, Professor of Law at the University of Minnesota.

Charles E. Clark, of New Haven, Connecticut, Dean of the Law School of Yale University.

Armistead M. Dobie, of University, Virginia, Dean of the Law School of the University of Virginia.

Robert G. Dodge, of Boston, Massachusetts.

George Donworth, of Seattle, Washington.

Joseph G. Gamble, of Des Moines, Iowa.

Monte M. Lemann, of New Orleans, Louisiana.

Edmund M. Morgan, of Cambridge, Massachusetts, Professor of Law at Harvard University.

Warren Olney, Jr., of San Francisco, California.

Edson R. Sunderland, of Ann Arbor, Michigan, Professor of Law at the University of Michigan.

Edgar B. Tolman, of Chicago, Illinois.

Charles E. Clark, of New Haven, Connecticut, is appointed Reporter to the Advisory Committee.

3. It shall be the duty of the Advisory Committee, subject to the instructions of the Court, to prepare and submit to the Court a draft of a unified system of rules as above described.

4. During the recess of the Court the Chief Justice is authorized to fill any vacancy in the Advisory Committee which may occur through failure to accept appointment, resignation, or otherwise.

5. The Advisory Committee shall at all times be directly responsible to the Court. The Committee shall not incur expense or make any financial commitments except upon the approval of the Court as certified by the Chief Justice or upon his order during a recess of the Court.

June 3, 1935.

AMENDMENTS OF RULES OF COURT.

ORDER.

It is ordered that Rule 4 of the Rules of this Court be, and it is hereby, amended to read as follows:

"4. THE LIBRARY

"1. The library for the bar shall be open to members of the bar of this court; to members of Congress, and to law officers of the executive or other departments of the Government, but books may not be removed from the building.

"2. The library shall be open during such times as the reasonable needs of the bar require and be governed by such regulations as the librarian, with the approval of the marshal, may make effective."

June 3, 1935.

ORDER.

It is ordered that paragraph 5 of Rule 13 of the Rules of this Court be, and it is hereby, amended to read as follows:

"5. The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties. He shall also deposit in the law library of Congress to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions and briefs therein."

June 3, 1935.

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1932, 1933, AND 1934

	ORIGINAL			APPELLATE			TOTALS		
Terms	1932	1933	1934	1932	1933	1934	1932	1933	1934
Total cases on dockets	21	19	18	1, 016	1, 113	1, 022	1, 037	1, 132	1, 040
Cases disposed of during terms	4	4	5	906	1, 025	926	910	1, 029	931
Cases remaining on dockets	17	15	13	110	88	96	127	103	109

	TERMS		
	1932	1933	1934
Distribution of cases disposed of during terms:			
Original cases	4	4	5
Appellate cases on merits	257	293	256
Petitions for certiorari	649	732	670
Cases remaining on dockets:			
Original cases	17	15	13
Appellate cases on merits	56	43	51
Petitions for certiorari	54	45	45

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