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UNITED STATES REPORTS

VOLUME 296

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1935

FROM OCTOBER 7, 1935, TO AND INCLUDING
(IN PART) JANUARY 6, 1936

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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, 1935.

DOUGLAS *v.* WILLCUTS, COLLECTOR OF INTERNAL REVENUE.

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

No. 1. Argued October 14, 1935.—Decided November 11, 1935.

1. Payments to a divorced wife under a decree for alimony are not regarded as income of the wife but as paid in discharge of the general obligation to support, which is made specific by the decree. P. 8.
2. In a decree of divorce and for alimony, a Minnesota court adopted a provision agreed to by the parties on the eve of the action, whereby securities were conveyed by the husband to a trustee from the income of which the wife, during her lifetime, was to receive annual payments "in lieu of, and in full settlement of alimony, and of any and all dower rights or statutory interests in the estate" of her husband, and "in lieu of any and all claims for separate maintenance and allowance for her support." The decree adjudged that the husband provide and create the trust fund as set out in the agreement, and that the wife have the provision made in the agreement "in lieu of all other alimony or interest in the property or estate" of her husband. *Held:*

   (1) That, by the law of Minnesota, the State court was not bound by the trust agreement but had full authority to make the allowance to the wife out of the husband's property and to set up a trust to give effect to the allowance; and, by adopting the terms of the trust agreement, it made them its own. P. 6.

33682°—36——1

(2) That the provision for annual payments adopted in the decree became an award of alimony, imposing upon the husband, in fulfilment of his statutory duty, the obligation of devoting the income, through the medium of the trust, to the use of the divorced wife. P. 8.

(3) That the income from the trust was not income of the wife but income taxable to the husband under Revenue Acts 1926, § 213, and 1928, § 22, defining gross income. P. 9.

3. Section 213, Revenue Act 1926, and § 22, Revenue Act 1928, defining gross income, are to be construed in the light of the evident intent of Congress to make full use of its power to tax income. P. 9.
4. The provisions of § 219, Revenue Act 1926, and §§ 161, 162, Revenue Act 1928, as to taxation of trusts, fiduciaries and beneficiaries, refer to cases where the income of the trust is no longer to be regarded as that of the settlor, and were not intended to apply to cases where such income would otherwise remain, by virtue of the nature and purpose of the trust, attributable to the creator of the trust and accordingly taxable to him. P. 9.
5. Section 219 (h), Revenue Act 1926, and § 167, Revenue Act 1928, define instances in which the grantor remains taxable, as in case of certain reservations for his benefit or provisions for the payment of premiums upon policies of insurance on his life, but are not to be regarded as excluding instances, not specified, where in contemplation of law the income remains in substance that of the grantor. P. 10.

73 F. (2d) 130, affirmed.

CERTIORARI, 295 U. S. 722, to review a judgment reversing one for the present petitioner in the District Court in a suit to recover moneys paid under protest as income tax.

Mr. Leland W. Scott, with whom *Mr. Clark R. Fletcher* was on the brief, for petitioner.

Assistant Attorney General Wideman, with whom *Solicitor General Reed* and *Messrs. Sewall Key, Norman D. Keller,* and *Arnold Raum* were on the brief, for respondent.

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

On September 12, 1923, petitioner, Edward B. Douglas, entered into an agreement with his wife and the Minneapolis Trust Company, by which he transferred securities in trust for his wife's benefit. Out of the income of the trust estate the trustee was to pay Mrs. Douglas annually the sum of $15,000, up to November 6, 1927, and thereafter $21,000. Deficiencies were to be made up in a prescribed manner. Excess income (in case the principal was not impaired) was to be paid to petitioner. On the death of his wife, he was to receive the property free of the trust. Petitioner reserved the right to designate securities for investment, subject, however, to the approval of the trustee acting in that respect on behalf of Mrs. Douglas.

The parties stipulated that the provisions for Mrs. Douglas were "in lieu of, and in full settlement of alimony, and of any and all dower rights or statutory interests in the estate" of her husband, and "in lieu of any and all claims for separate maintenance and allowance for her support."

Three days later, Mrs. Douglas obtained a decree of absolute divorce in a district court of the State of Minnesota. The decree provided:

"It Is Further Adjudged and Decreed that the defendant provide and create the trust fund as set out in that certain agreement between said parties and the Minneapolis Trust Company as trustee now on file with said trustee, and that the plaintiff have the provision therein made in lieu of all other alimony or interest in the property or estate of the defendant and that neither party have any costs or disbursements herein."

The question in this case relates to the net income of the trust which was distributed to Mrs. Douglas in the

years 1927 and 1928. The Commissioner of Internal Revenue determined that these amounts were income to the petitioner. Taxes assessed accordingly were paid by petitioner under protest, claim for refund was disallowed, and this suit was brought to recover the amount paid. Judgment for petitioner was reversed by the Circuit Court of Appeals. 73 F. (2d) 130. We granted certiorari (April 8, 1935) in view of an asserted conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit in the case of *Schweitzer* v. *Commissioner,* 75 F. (2d) 702, 705, 706.

Petitioner contends that the agreement created an irrevocable trust; that under the Revenue Acts petitioner and Mrs. Douglas were separate taxpayers, and that, having accepted the benefits of the trust, she was taxable upon the income she received as beneficiary. Revenue Acts, 1926, § 219; 1928, §§ 161, 162, 167; *Helvering* v. *Butterworth,* 290 U. S. 365, 369, 370. The Circuit Court of Appeals decided that the income was taxable to the petitioner, since it went to the discharge of his legal obligation; that is, the income was devoted to payments which petitioner was bound to make under the decree of the Minnesota court. 73 F. (2d) p. 133.

The authority of the district court is defined by statute. Mason's Minnesota Statutes, 1927, §§ 8601–8604. The court is empowered upon divorce for any cause, except that of the wife's adultery, to decree to the wife "such part of the personal and real estate of the husband, not exceeding in value one-third thereof, as it deems just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." The court may also decree "such alimony out of the estate, earnings and income of the husband as it may deem just and reasonable," but "the aggregate award and allowance made to the wife from the estate of the husband" is not "to exceed in

present value one-third of the personal estate, earnings, and income of the husband, and one-third in value of his real estate." *Id.*, § 8602. The court " may appoint trustees, whenever it is deemed expedient, to receive any money ordered to be paid to the wife, upon trust to invest the same, and pay over the income for the support of the wife, or of the wife and minor children of the parties, or any of them, in such manner as the court shall direct, or to pay over to the wife the principal sum in such proportions and at such times as the court shall order." *Id.*, § 8601. After a decree " for alimony, or other allowance for the wife and children," or " for the appointment of trustees to receive and hold any property for the use of the wife or children," the court may from time to time " revise and alter " the decree, with respect to the amount " of such alimony or allowance " and also with respect to " the appropriation and payment of the principal and income of the property so held in trust, and may make any order respecting any of the said matters which it might have made in the original action." *Id.* § 8603.[1]

[1] The text of these provisions is as follows:

" Sec. 8601. *Trustee of alimony.*—The court may appoint trustees, whenever it is deemed expedient, to receive any money ordered to be paid to the wife, upon trust to invest the same, and pay over the income for the support of the wife, or of the wife and minor children of the parties, or any of them, in such manner as the court shall direct, or to pay over to the wife the principal sum in such proportions and at such times as the court shall order, regard being had in all such cases to the situation and circumstances of such wife, and the children if there are any, provided for in the order; and such trustees shall give such bond, as the court shall require, for the faithful performance of their trust.

" Sec. 8602. *Property of husband—Permanent alimony.*—Upon a divorce for any cause except that of adultery committed by the wife, if the estate and property restored or awarded to her is insufficient for the suitable support of herself and such children of the marriage as shall be committed to her care and custody, or if there is no such estate and property, the court may further order and

The Supreme Court of the State has decided that the district court in exercising this authority is not precluded by stipulations and agreements of the parties, entered into pending the action (but not void by reason of having been made to facilitate the decree of divorce), from making such provision for the wife as the court may deem appropriate. Such stipulations or agreements do not control the court. The court may adopt or reject them as it deems best in the light of the situation of the parties. When such agreements are approved, and in effect are embodied in the decree, they do not detract from the authority of the court to alter or revise its decree and the provisions made for the wife's benefit. In *Warren* v.

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decree to her such part of the personal and real estate of the husband, not exceeding in value one-third thereof, as it deems just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case. The court may also, in the cases provided for in this section, decree to the wife such alimony out of the estate, earnings, and income of the husband as it may deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and other circumstances of the case, and may by its decree make the same a specific lien upon any specified parcels of his real estate, or authorize its enforcement by execution against his property, real and personal; but the aggregate award and allowance made to the wife from the estate of the husband under this section shall not in any case exceed in present value one-third of the personal estate, earnings, and income of the husband, and one-third in value of his real estate.

"Sec. 8603. *Order for alimony, etc., revised.*—After an order or decree for alimony, or other allowance for the wife and children, or either of them, or for the appointment of trustees to receive and hold any property for the use of the wife or children, the court, from time to time, on petition of either of the parties, may revise and alter such order or decree respecting the amount of such alimony or allowance, and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any order respecting any of the said matters which it might have made in the original action."

Warren, 116 Minn. 458; 133 N. W. 1009, the Court said (pp. 459, 460):

"It appears that the original judgment for alimony was based upon a stipulation of the parties, entered into pending the action, but not to facilitate the granting of the divorce, and plaintiff contends that the judgment so founded and entered became a contract between the parties, and is not subject to change by the court, except upon restoration of plaintiff to her position and rights before its entry. In this we are unable to concur.

"Stipulations and agreements of the kind, where not void by reason of having been entered into to facilitate a decree of divorce, become merged in the judgment when entered, and are not, in the absence of statute upon the subject, so far of a contractual nature as to preclude the court subsequently from changing and modifying the judgment, upon application of one of the parties. The court is not controlled by the stipulation, and may adopt or reject it as seems consistent and proper from the situation of the parties, as disclosed by the evidence on the trial. The fact that such stipulations are usually adopted by the court does not change the situation."

See, also, *Haskell* v. *Haskell,* 116 Minn. 10; 132 N. W. 1129; *Martinson* v. *Martinson,* 116 Minn. 128; 133 N. W. 460; *Sessions* v. *Sessions,* 178 Minn. 75; 226 N. W. 211; *Randall* v. *Randall,* 181 Minn. 18; 231 N. W. 413; *Erickson* v. *Erickson,* 181 Minn. 421; 232 N. W. 793.

As we have noted, this control over provisions for the benefit of the wife in connection with divorce applies by the express terms of the statute not only to "alimony" but also to "other allowance for the wife and children, or either of them," and to "the appointment of trustees to receive and hold any property for the use of the wife or children." See § 8603.

In the instant case, the trust agreement was made on the day that the suit for divorce was brought. The agree-

ment was manifestly made in contemplation of that suit. When the district court was shortly called upon to determine what provision should be made for the wife, the court was not bound by the trust agreement. Within the limits prescribed by the statute (and there is no suggestion that the provision here went beyond those limits) the court had full authority to make an allowance to the wife out of her husband's property and to set up a trust to give effect to that allowance. Being satisfied with the provision made by the trust agreement, the court incorporated that provision in its decree. The court did not approve the trust agreement as one deriving efficacy from the action of the parties. The court made its own requirement. The decree required the petitioner to " provide and create the trust fund." While the terms of the trust as set up in the trust agreement were approved, the court made those terms its own. It was from this action of the court that the trust derived its force.

Amounts paid to a divorced wife under a decree for alimony are not regarded as income of the wife but as paid in discharge of the general obligation to support, which is made specific by the decree. *Gould* v. *Gould,* 245 U. S. 151, 153; *Audubon* v. *Shufeldt,* 181 U. S. 575, 577. Petitioner's contention that the district court did not award alimony is not supported by the terms of the decree. It described the provision as made " in lieu of all *other* alimony or interest in the property or estate of the defendant." However designated, it was a provision for annual payments to serve the purpose of alimony, that is, to assure to the wife suitable support. The fact that the provision was to be in lieu of any other interest in the husband's property did not affect the essential quality of these payments. Upon the preëxisting duty of the husband the decree placed a particular and adequate sanction, and imposed upon petitioner the obligation to devote the

income in question, through the medium of the trust, to the use of his divorced wife.

No question is raised as to the constitutional power of the Congress to attribute to petitioner the income thus segregated and paid in discharge of his obligation, and that authority could not be challenged successfully. *Burnet* v. *Wells,* 289 U. S. 670, 677, 682, 684. The question is one of statutory construction. We think that the definitions of gross income (Revenue Acts, 1926, § 213; 1928, § 22) are broad enough to cover income of that description. They are to be considered in the light of the evident intent of the Congress "to use its power to the full extent." *Irwin* v. *Gavit,* 268 U. S. 161; *Helvering* v. *Stockholms Bank,* 293 U. S. 84, 89. We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & Maine Railroad,* 279 U. S. 732. See, also, *United States* v. *Mahoning Coal R. Co.,* 51 F. (2d) 208. The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered. *Burnet* v. *Wells, supra.* In the present case, the net income of the trust fund, which was paid to the wife under the decree, stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payment directly.

We do not regard the provisions of the statutes as to the taxation of trusts, fiduciaries and beneficiaries, (Revenue Acts, 1926, §§ 2, 219; 1928, §§ 161, 162) as intended to apply to cases where the income of the trust would otherwise remain, by virtue of the nature and purpose of the

trust, attributable to the creator of the trust and accordingly taxable to him. These provisions have appropriate reference to cases where the income of the trust is no longer to be regarded as that of the settlor, and we find no warrant for a construction which would preclude the laying of the tax against the one who through the discharge of his obligation enjoys the benefit of the income as though he had personally received it.

The decision in *Helvering* v. *Butterworth,* 290 U. S. 365, is not opposed. There the trust was testamentary and the only question was with respect to the liability for the tax as between the trustee and the beneficiary. The Court observed that " the evident general purpose of the statute was to tax in some way the whole income of all trust estates." The decision has no application to a case where the income is still taxable to the grantor. Nor are the provisions of the statutes (Revenue Acts, 1926, § 219 (h); 1928, § 167) defining instances in which the grantor remains taxable, as in case of certain reservations for his benefit or provisions for the payment of premiums upon policies of insurance on his life, to be regarded as excluding instances not specified, where in contemplation of law the income remains in substance that of the grantor. No such exclusion is expressed and we see no ground for implying it.

The decree of the Circuit Court of Appeals is

Affirmed.

BORAX CONSOLIDATED, LTD. ET AL. *v.* LOS ANGELES.

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

No. 34. Argued October 23, 1935.—Decided November 11, 1935.

1. Tide lands in California, which had not been granted by Mexico or subjected to trusts requiring a different disposition, passed to the State upon her admission to the Union. P. 15.

2. The Federal Government had no right to convey tideland which had vested in the State by virtue of her admission. P. 16.
3. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. The term does not include tidelands. P. 17.
4. The authority given the Land Department over surveys of "public lands" of the United States, and its authority under the preëmption law to patent lands "belonging to the United States," did not empower it to make a survey defining the boundary between an upland lot belonging to the United States, and tideland belonging to a State, which would be conclusive against the State or her grantee in a subsequent suit against one claiming the lot under a preëmption patent. *Knight* v. *United States Land Assn.*, 142 U. S. 160, distinguished. P. 16.
5. The question of the jurisdiction of the Land Department to act upon the subject matter—a patent of lands—is always open for judicial determination. P. 17.
6. Where the District Court, due to the error of deeming a United States survey and patent conclusive, failed to determine the boundary between tideland granted by a State and upland patented by the United States, in a suit to quiet title involving that question and others, the cause was properly remanded for a new trial. P. 21.
7. In a suit to quiet title brought by a party claiming tideland under grant from a State, against a party claiming under a patent from the United States which purports to convey, according to a plat of survey, land bordering on the ocean, the question whether a part of the tideland is erroneously included by the survey and patent is necessarily a federal question, since it concerns the validity and effect of an act done by the United States and involves the ascertainment of the essential basis of a right asserted under federal law. P. 22.
8. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. P. 22.
9. The tideland extends to the high water mark, which means, not a physical mark made upon the ground by the water, but the line of high water as determined by the course of the tides. P. 22.
10. At common law, ordinary high water mark is the boundary of tideland. P. 22.
11. The boundary is the mean high tide line, which is neither the spring tide nor the neap tide, but the mean of all the high tides. Pp. 22, 26.

12. In as much as the United States Coast and Geodetic Survey defines mean high water at any place as the average height of all the high waters at that place over a considerable period of time, and finds that, from theoretical considerations of an astronomical character, there should be a periodic variation in the rise of water above sea level having a period of 18.6 years, the Court approves a ruling that, in order to ascertain mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, an average of 18.6 years should be determined as nearly as possible. P. 26.

74 F. (2d) 901, affirmed.

CERTIORARI, 295 U. S. 729, to review the reversal of a decree of the District Court, which dismissed upon the merits a bill by the City to quiet title to land claimed to be tideland.

Mr. A. W. Ashburn, with whom *Mr. Gurney E. Newlin* was on the brief, for petitioners.

Mr. Loren A. Butts, with whom *Mr. Ray L. Chesebro* was on the brief, for respondent.

By leave of Court, *Messrs. Oscar Lawler* and *Eugene M. Prince* filed a brief as *amici curiae,* in support of certain contentions of respondent.

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

The City of Los Angeles brought this suit to quiet title to land claimed to be tideland of Mormon Island situated in the inner bay of San Pedro now known as Los Angeles Harbor. The City asserted title under a legislative grant by the State. Stats. Cal. 1911, p. 1256; 1917, p. 159.[1]

[1] The Act of 1911 (Stats. 1911, c. 656, p. 1256) provided: "There is hereby granted to the city of Los Angeles, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all tide lands and submerged lands, whether filled or unfilled, within the present boundaries of said city,

Petitioners claimed under a preëmption patent issued by the United States on December 30, 1881, to one William Banning. The District Court entered a decree, upon findings, dismissing the complaint upon the merits and adjudging that petitioner, Borax Consolidated, Limited, was the owner in fee simple and entitled to the possession of the property. 5 F. Supp. 281. The Circuit Court of Appeals reversed the decree. 74 F. (2d) 901. Because of the importance of the questions presented, and of an asserted conflict with decisions of this Court, we granted certiorari, June 3, 1935.

In May, 1880, one W. H. Norway, a Deputy Surveyor, acting under a contract with the Surveyor General of the United States for California, made a survey of Mormon Island. The surveyor's field notes and the corresponding plat of the island were approved by the Surveyor General and were returned to the Commissioner of the General Land Office. The latter, having found the survey to be correct, authorized the filing of the plat. The land which the patent to Banning purported to convey was described by reference to that plat as follows: "Lot numbered one, of section eight, in township five south, of range thirteen west of San Bernardino Meridian, in California, containing eighteen acres, and eighty-eight hundredths of an acre, according to the Official Plat of the Survey of the said Lands, returned to the General Land Office by the Surveyor General."

The District Court found that the boundaries of "lot one," as thus conveyed, were those shown by the plat

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and situated below the line of mean high tide of the Pacific ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions following, to wit:" The conditions which followed are not material here.

The granting clause above quoted is the same in the Act of 1917 (Stats. 1917, p. 159).

and field notes of the survey; that all the lands described in the complaint were embraced within that lot; and that no portion of the lot was or had been tideland or situated below the line of mean high tide of the Pacific Ocean or of Los Angeles Harbor. The District Court held that the complaint was a collateral, and hence unwarranted, attack upon the survey, the plat and the patent; that the action of the General Land Office involved determinations of questions of fact which were within its jurisdiction and were specially committed to it by law for decision; and that its determinations, including that of the correctness of the survey, were final and were binding upon the State of California and the City of Los Angeles, as well as upon the United States.

The Circuit Court of Appeals disagreed with this view as to the conclusiveness of the survey and the patent. The court held that the Federal Government had neither the power nor the intention to convey tideland to Banning, and that his rights were limited to the upland. The court also regarded the lines shown on the plat as being meander lines and the boundary line of the land conveyed as the shore line of Mormon Island. The court declined to pass upon petitioners' claim of estoppel *in pais* and by judgment, upon the ground that the question was not presented to or considered by the trial court, and was also of the opinion that the various questions raised as to the failure of the City to allege and prove the boundary line of the island were important only from the standpoint of the new trial which the court directed. 74 F. (2d) p. 904. For the guidance of the trial court the Court of Appeals laid down the following rule: The "mean high tide line" was to be taken as the boundary between the land conveyed and the tideland belonging to the State of California, and in the interest of certainty the court directed that "an average for 18.6

years should be determined as near as possible by observation or calculation." *Id.,* pp. 906, 907.

Petitioners contest these rulings of the Court of Appeals. With respect to the ascertainment of the shore line, they insist that the court erred in taking the "mean high tide line" and in rejecting "neap tides" as the criterion for ordinary high water mark.

1. The controversy is limited by settled principles governing the title to tidelands. The soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed. *Martin* v. *Waddell,* 16 Pet. 367, 410; *Pollard* v. *Hagan,* 3 How. 212, 229, 230; *Goodtitle* v. *Kibbe,* 9 How. 471, 478; *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 65, 66; *Shively* v. *Bowlby,* 152 U. S. 1, 15, 26. This doctrine applies to tidelands in California. *Weber* v. *Harbor Commissioners, supra; Shively* v. *Bowlby, supra,* pp. 29, 30; *United States* v. *Mission Rock Co.,* 189 U. S. 391, 404, 405. Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland, but held the former only in trust for the future States that might be erected out of that territory. *Knight* v. *United States Land Assn.,* 142 U. S. 161, 183. There is the established qualification that this principle is not applicable to lands which had previously been granted by Mexico to other parties or subjected to trusts which required a different disposition,—a limitation resulting from the duty resting upon the United States under the treaty of Guadalupe Hidalgo (9 Stat. 922), and also under principles of international law, to protect all rights of property which had emanated from the Mexican Government prior to the treaty. *San Francisco* v. *Le Roy,* 138 U. S. 656, 671; *Knight* v. *United*

States Land Assn., supra; Shively v. *Bowlby, supra.* That limitation is not applicable here, as it is not contended that Mormon Island was included in any earlier grant. See *DeGuyer* v. *Banning,* 167 U. S. 723.

It follows that if the land in question was tideland, the title passed to California at the time of her admission to the Union in 1850. That the Federal Government had no power to convey tidelands, which had thus vested in a State, was early determined. *Pollard* v. *Hagan, supra; Goodtitle* v. *Kibbe, supra.* In those cases, involving tidelands in Alabama, the plaintiffs claimed title under an inchoate Spanish grant of 1809, an Act of Congress confirming that title, passed July 2, 1836, and a patent from the United States, dated March 15, 1837. The Court held that the lands, found to be tidelands, had passed to Alabama at the time of her admission to the Union in 1819, that the Spanish grant had been ineffective, and that the confirming Act of Congress and the patent conveyed no title. The Court said that "The right of the United States to the public lands, and the power of Congress to make all needful rules for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy." *Pollard* v. *Hagan, supra.* See also *Shively* v. *Bowlby, supra,* at pp. 27, 28; *Mobile Transportation Co.* v. *Mobile,* 187 U. S. 479, 490; *Donnelly* v. *United States,* 228 U. S. 243, 260–261.

2. As to the land in suit, petitioners contend that the General Land Office had authority to determine the location of the boundary between upland and tideland and did determine it through the survey in 1880 and the consequent patent to Banning, and that this determination is conclusive against collateral attack; in short, that the land in controversy has been determined by competent authority not to be tideland and that the question is not open to reëxamination. Petitioners thus invoke the rule

that " the power to make and correct surveys belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding." R. S., §§ 453, 2395–2398, 2478; 43 U. S. C. 2, 751–753, 1201. *Cragin* v. *Powell,* 128 U. S. 691, 698, 699; *Heath* v. *Wallace,* 138 U. S. 573, 585; *Knight* v. *United States Land Assn., supra; Stoneroad* v. *Stoneroad,* 158 U. S. 240, 250, 252; *Russell* v. *Maxwell Land Grant Co.,* 158 U. S. 253, 256; *United States* v. *Coronado Beach Co.,* 255 U. S. 472, 487, 488.

But this rule proceeds upon the assumption that the matter determined is within the jurisdiction of the Land Department. *Cragin* v. *Powell, supra.* So far as pertinent here, the jurisdiction of the Land Department extended only to " the public lands of the United States." The patent to Banning was issued under the preëmption laws, which expressly related to lands " belonging to the United States." R. S. 2257, 2259. Obviously these laws had no application to lands which belonged to the States. Specifically, the term " public lands " did not include tidelands. *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 284. " The words ' public lands ' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall* v. *Sanger,* 92 U. S. 761, 763; *Barker* v. *Harvey,* 181 U. S. 481, 490; *Union Pacific R. Co.* v. *Harris,* 215 U. S. 386, 388.

The question before us is not as to the general authority of the Land Department to make surveys, but as to its authority to make a survey, as a basis for a patent, which would preclude the State or its grantee from showing in an appropriate judicial proceeding that the survey was in-

accurate and hence that the patent embraced land which the United States had no power to convey. Petitioners' argument in substance is that while the United States was powerless as against the State to pass title to tidelands in the absence of a survey (*Pollard* v. *Hagan, supra*), the question whether or not the land was tideland would be foreclosed by a departmental survey, although erroneous. This contention encounters the principle that the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always one for judicial determination. "Of course," said the Court in *Smelting Co.* v. *Kemp,* 104 U. S. 636, 641, "when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed." The Court added that questions of that sort "may be considered by a court of law"; for in such cases "the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." *Id.* See, also, *Polk* v. *Wendall,* 9 Cranch 87, 99; *Moore* v. *Robbins,* 96 U. S. 530, 533; *Wright* v. *Roseberry,* 121 U. S. 488, 519; *Doolan* v. *Carr,* 125 U. S. 618, 625; *Hardin* v. *Jordan,* 140 U. S. 371, 401; *Crowell* v. *Benson,* 285 U. S. 22, 58, 59. Here, the question goes to the existence of the subject upon which the Land Department was competent to act. Was it upland, which the United States could patent, or tideland, which

it could not? Such a controversy as to title is appropriately one for judicial decision upon evidence, and we find no ground for the conclusion that it has been committed to the determination of administrative officers.

Petitioners urge a distinction in that at the time of the survey no private right in the property had yet attached and the question lay between the Federal Government and the State of California. But the distinction is immaterial. If tideland, the title of the State was complete on admission to the Union. No transfer to private parties was necessary to perfect or assure that title and no power of disposition remained with the United States.

To support their contention as to the conclusiveness of the survey and patent, petitioners largely rely upon our decision in *Knight* v. *United States Land Assn., supra.* But that decision is not in point, as it related to land which, albeit tideland, had been the subject of a Mexican grant made prior to statehood. What had there been done by the Federal Government was found to be in pursuance of the duty of the United States, imposed by the treaty of Guadalupe Hidalgo and the principles of international law, to protect the rights of property which had previously been created by the Mexican Government. The contest related to land in Mission Creek, an estuary of the bay of San Francisco. The plaintiffs claimed under a tideland grant from the State. The defendant's claim rested upon the title of the City of San Francisco as successor to the Mexican pueblo of that name. Following the procedure prescribed by statute with respect to the confirmation of such titles (Acts of March 3, 1851, 9 Stat. 631; July 1, 1864, 13 Stat. 332), the City had obtained a confirmatory decree from the United States Circuit Court in May, 1865. The statutes required that such a decree should be followed by a survey under the supervision of the General Land Office, and patent was to issue to the successful claimant when such survey had been finally ap-

proved. *Id.* Accordingly, after the decree in favor of the City, a survey was made, which was approved by the Surveyor General and the Commissioner of the General Land Office. The line of that survey ran along the line of ordinary high water mark of the bay of San Francisco, but in the case of the estuary followed the tideline up the creek and, crossing over, ran down on the other side. The City objected to that method, insisting that the line should have crossed the mouth of the estuary, and, on appeal, that contention was sustained by the Secretary of the Interior. A second survey was made pursuant to that decision and a patent was issued. 142 U. S. pp. 162–172. The plaintiffs contended that the first survey was correct and the second unauthorized. Reviewing that branch of the case, the Court decided that the Secretary of the Interior had power to set aside the first survey and direct another, and that the departmental action in that particular was unassailable. But that conclusion was not sufficient to meet the plaintiffs' claim under the state grant, unless it could be held that title to the land had not passed to the State. Upon that question the court found that the case of *San Francisco* v. *LeRoy,* 138 U. S. 656, 670, 672, was "directly in point," as the Court had there decided that "if there were any tide lands within the pueblo the power and duty of the United States under the treaty to protect the claims of the City of San Francisco as successor to the pueblo were superior to any subsequently acquired rights of California." 142 U. S. pp. 183-185. In discharge of that duty, provision had been made by Congress for the investigation and confirmation of the property rights of pueblos equally with those of individuals. The rights of the pueblo "were dependent upon Mexican laws, and when Mexico established those laws she was the owner of tide lands as well as uplands, and could have placed the boundaries of her pueblos wherever she thought proper." It was for the United States to ascertain those boundaries

when fixing the limits of the claim of the City as successor to the pueblo. *Id.*, pp. 186, 187. The obligation of protection was "political in its character, to be performed in such manner and on such terms as the United States might direct." Accordingly, Congress had established a special tribunal to consider claims derived from Mexico, had authorized determinations by the court upon appeal, and "had designated the officers who should in all cases survey and measure off the land when the validity of the claim presented was finally determined." *Id.*, pp. 202, 203. The survey upon which the patent rested in the *Knight* case was thus made pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had not passed to the State. See *Shively* v. *Bowlby, supra,* pp. 30, 31; *United States* v. *Coronado Beach Co., supra.*

The distinguishing features of the instant case are apparent. No prior Mexican grant is here involved. We conclude that the State was not bound by the survey and patent, and that its grantee was entitled to show, if it could, that the land in question was tideland.

In this view it is not necessary to consider whether the lines designated in the plat of the Norway survey as "meander" lines were intended as boundaries.

3. As the District Court fell into a fundamental error in treating the survey and patent as conclusive, it was not incumbent upon the Court of Appeals to review the evidence and decide whether it showed, or failed to show, that the land in question was tideland. The court remanded the cause for a new trial in which the issues as to the boundary between upland and tideland, and as to the defenses urged by petitioners, are to be determined. In that disposition of the case we find no error.

4. There remains for our consideration, however, the ruling of the Court of Appeals in instructing the District

Court to ascertain as the boundary "the mean high tide line" and in thus rejecting the line of "neap tides."

Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird,* 137 U. S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States,* 260 U. S. 77, 87; *United States* v. *Holt Bank,* 270 U. S. 49, 55, 56; *United States* v. *Utah,* 283 U. S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney* v. *Keokuk,* 94 U. S. 324, 338; *Shively* v. *Bowlby, supra,* p. 40; *Hardin* v. *Jordan,* 140 U. S. 371, 382; *Port of Seattle* v. *Oregon & Washington R. Co.,* 255 U. S. 56, 63.

The tideland extends to the high water mark. *Hardin* v. *Jordan, supra; Shively* v. *Bowlby, supra; McGilvra* v. *Ross,* 215 U. S. 70, 79. This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. Inst. lib. 2, tit. 1, § 3; Dig. lib. 50, tit. 16, § 112. But by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." *Blundell* v. *Catterall,* 5 B. & A. 268, 292. It is the land "between ordinary high and low-water mark, the land over which the daily tides

ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails." *United States* v. *Pacheco,* 2 Wall. 587, 590.

The range of the tide at any given place varies from day to day, and the question is, how is the line of "ordinary" high water to be determined? The range of the tide at times of new moon and full moon "is greater than the average," as "high water then rises higher and low water falls lower than usual." The tides at such times are called "spring tides." When the moon is in its first and third quarters, "the tide does not rise as high nor fall as low as on the average." At such times the tides are known as "neap tides." "Tidal Datum Plane," U. S. Coast and Geodetic Survey, Special Publication No. 135, p. 3.[2] The view that "neap tides" should be taken as the ordinary tides had its origin in the statement of Lord Hale. *De Jure Maris,* cap. VI; Hall on the Sea Shore, p. 10, App. xxiii, xxiv. In his classification, there are "three sorts of shores, or *littora marina,* according to the various tides," (1) "The high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoxials"; (2) "The spring tides, which happen twice

[2] See "The Tide," H. A. Marmer, Assistant Chief, Division of Tides and Currents, U. S. Coast and Geodetic Survey, pp. 9, 10. "There is generally an interval of one or two days between full moon or new moon and the greatest range of the tide. And a like interval is found between the first and third quarters of the moon and the smallest tides." *Id.,* p. 11.

The origin of the terms spring and neap tides "is probably due to the fact that as the moon leaves the meridian of the sun in her orbital transit round the earth and approaches the quarters the tides begin to 'fall off' or are 'nipped,' and neap tides ensue. As she leaves the quarters for the meridian they begin to 'lift,' or 'come on,' or 'spring up,' and when the meridian is reached spring tides ensue." "A Practical Manual of Tides and Waves," W. H. Wheeler, p. 49.

every month at full and change of the moon"; and (3) "Ordinary tides, or nepe tides, which happen between the full and change of the moon." The last kind of shore, said Lord Hale, "is that which is properly *littus maris*." He thus excluded the "spring tides" of the month, assigning as the reason that "for the most part the lands covered with these fluxes are dry and maniorable," that is, not reached by the tides.

The subject was thoroughly considered in the case of *Attorney General* v. *Chambers*, 4 De G. M. & G. 206. In that case Lord Chancellor Cranworth invited Mr. Baron Alderson and Mr. Justice Maule to assist in the determination of the question as to "the extent of the right of the Crown to the seashore." Those judges gave as their opinion that the average of the "medium tides in each quarter of a lunar revolution during the year" fixed the limit of the shore. Adverting to the statement of Lord Hale, they thought that the reason he gave would be a guide to the proper determination. "What," they asked, are "the lands which for the most part of the year are reached and covered by the tides?" They found that the same reason that excluded the highest tides of the month, the spring tides, also excluded the lowest high tides, the neaps, for "the highest or spring-tides and the lowest high tides (those at the neaps) happen as often as each other." Accordingly, the judges thought that "the medium tides of each quarter of the tidal period" afforded the best criterion. They said: "It is true of the limit of the shore reached by these tides that it is more frequently reached and covered by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short, and on one day it is reached. This point of the shore therefore is about four days in every week, *i. e.* for the most part of the year, reached and covered by the tides." *Id.*, p. 214.

Having received this opinion, the Lord Chancellor stated his own. He thought that the authorities had left the question "very much at large." Looking at "the principle of the rule which gives the shore to the Crown," and finding that principle to be that "it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil," the Lord Chancellor thus stated his conclusion: "Lord Hale gives as his reason for thinking that lands only covered by the high spring-tides do not belong to the Crown, that such lands are for the most part dry and maniorable; and taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the Crown's right is limited to land which is for the most part not dry or maniorable. The learned Judges whose assistance I had in this very obscure question point out that the limit indicating such land is the line of the medium high tide between the springs and the neaps. All land below that line is more often than not covered at high water, and so may justly be said, in the language of Lord Hale, to be covered by the ordinary flux of the sea. This cannot be said of any land above that line." The Lord Chancellor therefore concurred with the opinion of the judges "in thinking that the medium line must be treated as bounding the right of the Crown." *Id.*, p. 217.[3]

This conclusion appears to have been approved in Massachusetts. *Commonwealth* v. *Roxbury,* 9 Gray 451, 483; *East Boston Co.* v. *Commonwealth,* 203 Mass. 68, 72; 89 N. E. 236. See, also, *New Jersey Zinc Co.* v. *Morris Canal Co.,* 44 N. J. Eq. 398, 401; 15 Atl. 227; Gould on Waters, p. 62.

In California, the Acts of 1911 and 1917, upon which the City of Los Angeles bases its claim, grant the "tide-

[3] See, also, *Tracey Elliott* v. *Earl of Morley,* Ch. Div. 51 Sol. Journal (1907), 625.

lands and submerged lands" situated "below the line of mean high tide of the Pacific Ocean."[4] Petitioners urge that "ordinary high water mark" has been defined by the state court as referring to the line of the neap tides.[5] We find it unnecessary to review the cases cited or to attempt to determine whether they record a final judgment as to the construction of the state statute, which, of course, is a question for the state courts.

In determining the limit of the federal grant, we perceive no justification for taking neap high tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is actually covered by the tides most of the time. In order to include the land that is thus covered, it is necessary to take the mean high tide line which, as the Court of Appeals said, is neither the spring tide nor the neap tide, but a mean of all the high tides.

In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey,[6] that "Mean high water at any place is the average height of all the high waters at that place over a considerable

[4] See Note 1.

[5] See *Teschemacher* v. *Thompson*, 18 Cal. 11, 21; *Ward* v. *Mulford*, 32 Cal. 365, 373; *Eichelberger* v. *Mills Land & Water Co.*, 9 Cal. App. 628, 639; 100 Pac. 117; *Forgeus* v. *County of Santa Cruz*, 24 Cal. App. 193, 195; 140 Pac. 1092; *F. A. Hihn Co.* v. *City of Santa Cruz*, 170 Cal. 436, 442; 150 Pac. 62; *Oakland* v. *Wood Lumber Co.*, 211 Cal. 16, 23; 292 Pac. 1076; *Otey* v. *Carmel Sanitary District*, 219 Cal. 310, 313; 26 P. (2d) 308. In a number of cases the state court has referred to the limit of the shore as the "ordinary" high water mark. See *Wright* v. *Seymour*, 69 Cal. 122, 126; 10 Pac. 323; *Long Beach Co.* v. *Richardson*, 70 Cal. 206; 11 Pac. 695; *Oakland* v. *Oakland Water Front Co.*, 118 Cal. 160, 183; 50 Pac. 277; *Pacific Whaling Co.* v. *Packers' Association*, 138 Cal. 632, 635, 636; 72 Pac. 161; *People* v. *California Fish Co.*, 166 Cal. 576, 584; 138 Pac. 79. See, also, *Strand Improvement Co.* v. *Long Beach*, 173 Cal. 765, 770; 161 Pac. 975; *Miller & Lux* v. *Secara*, 193 Cal. 755, 761, 762; 227 Pac. 171.

[6] "Tidal Datum Plane," Special Publication No. 135, p. 76.

period of time," and the further observation that "from theoretical considerations of an astronomical character" there should be a "a periodic variation in the rise of water above sea level having a period of 18.6 years," [7] the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, "an average of 18.6 years should be determined as near as possible." We find no error in that instruction.

The decree of the Court of Appeals is

Affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that *Knight* v. *United States Land Assn.*, 142 U. S. 161, is controlling and that the decree of the District Court should be affirmed.

GRAHAM v. WHITE-PHILLIPS CO., INC.

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

No. 29. Argued October 23, 24, 1935.—Decided November 11, 1935.

1. A construction of the Illinois Uniform Negotiable Instrument Act, by the Appellate Court of Illinois, not approved by the state Supreme Court otherwise than by a naked denial of an application for review of the case by certiorari, is not binding on the federal courts. P. 30.
2. One who purchases a stolen negotiable bond in good faith before maturity, for a valuable consideration, may be a holder in due course despite the fact that notice of the theft had previously come to him, if, through forgetfulness or negligence, he had it not in mind when purchasing. Illinois Negotiable Instrument Act, § 52 (4); § 56, construed. P. 31.

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[7] *Id.* p. 81.

3. This is the better doctrine which should be accepted by the federal courts in the absence of an authoritative ruling in the State whose laws apply. P. 32.

74 F. (2d) 417, affirmed.

CERTIORARI, 295 U. S. 728, to review a judgment reversing a decree of the District Court in favor of the petitioner. The proceeding originated in the state court, where the petitioner and respondent here were interpleaded, and was removed to the District Court on the ground of diversity of citizenship.

Mr. James J. Barbour, with whom *Mr. W. Edgar Sampson* was on the brief, for petitioner.

Mr. William L. Patton, with whom *Mr. Harold A. Smith* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By an appropriate proceeding, the Treasurer of Illinois sought an adjudication determining the ownership of eight one thousand dollar negotiable coupon bonds issued by the State. They were stolen from their lawful owner, petitioner Graham, August 30, 1930, and on Sept. 22, 1930, were purchased for a fair price in the ordinary course of its business by respondent's Chicago office from Connolly, listed dealer at St. Paul, Minnesota. No circumstance suggests conscious wrongdoing by the purchaser.

Three days after the theft, petitioner caused the Foreman corporation to send printed notices of it, with adequate descriptions of the bonds, to dealers throughout the country.

Accepting the record upon the view most favorable to the petitioner, we may assume, as the Circuit Court of Appeals did, that the notice was received by respondent's main office in Davenport, also at the Chicago branch, prior to the purchase; there was absence of ordinary care upon

the part of the Chicago branch in not making more elaborate provision for dissemination of the knowledge given by the notice; that respondent paid full value; at the time of the purchase it had no actual knowledge of the theft; it made no investigation to ascertain whether the bonds were stolen, other than to inquire concerning the status of the party offering them; the information given by the notice had been forgotten.

The District Court declared, as conclusion of law:

"The respondent, The White-Phillips Company, Inc., by reason of having actually received, prior to its purchase of the securities here involved, a notice that the same had been stolen as hereinabove set forth, did not, by the purchase of said bonds, become a holder thereof in due course, but that at such time the said respondent had knowledge of such facts that its action in taking such securities amounted to bad faith."

Decree went for petitioner here, which upon appeal, after a painstaking review of the authorities, was reversed. The cause was remanded for further proceedings.

The Illinois Negotiable Instrument Act provides:

"Holder in Due Course Defined. Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

"Notice of Infirmity—What Constitutes. Sec. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The court below rightly concluded that the narrow question is this: "Did appellant have actual knowledge

of the infirmity or defect, or knowledge of such facts that its action in taking the instrument amounted to bad faith?" It ruled, that, as a purchaser of negotiable instruments in good faith, before maturity and for a valuable consideration, respondent should be protected against a charge of bad faith which has no fact support other than the receipt of a notice circulated generally among dealers which stated that certain bonds of a large issue had been stolen.

Petitioner insists, that under the authoritative construction placed upon the Illinois Negotiable Instrument Law by her Supreme Court, since respondent had received information of the defective title, there was bad faith as matter of law, and no title passed. He strongly relies upon *Northwestern National Bank* v. *Madison & Kedzie State Bank*, 242 Ill. App. 22, and the denial of certiorari therein.

Under *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, a definite construction of the negotiable instrument law by the State Supreme Court, binding upon the local tribunals, must be accepted by the federal courts. But we cannot think that the ruling and action in the *Northwestern Bank* case amount to such a construction. That cause, decided by the Appellate Court, First Division, October, 1926, involved title to stolen bonds held by one claiming as a bona fide purchaser, after receipt of notice of the theft. The court there said: "The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in the line of his duties, we think the bank is estopped from claiming that it did not have actual knowledge of the defect in the title to the bonds it subsequently received." The State Supreme Court denied an application for certiorari without more. The argument is that this amounted to approval of the construction placed upon the statute by the Appellate Court. The point is not well taken.

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National Bank v. *Uptown State Bank,* 273 Ill. App. 401, (1934) construed the statute differently, and made no reference to the earlier case. We cannot know upon what ground certiorari was denied. The Illinois Supreme Court has declared that "Whether one has notice of a certain fact is a question of fact and not of law"; *Paine* v. *Sheridan Trust & Savings Bank,* 342 Ill. 342, 348; 174 N. E. 368; also that denial of certiorari does not import approval of the reasons assigned by the lower court. *People ex rel. Hoyne* v. *Grant,* 283 Ill. 391, 397; 119 N. E. 344.

The Appellate Courts in Illinois are inferior tribunals and a statute provided that their opinions "shall not be binding authority in any case or proceeding other than that in which they may be filed." Illinois Constitution, 1870; Article VI, § 11; Cahill's Illinois Rev. Stats. 1933, c. 37, par. 49.

No authoritative construction of the negotiable instrument law of Illinois supports petitioner's position. And the court below rightly undertook to determine for itself the meaning and effect of the pertinent sections.

As with other enactments, the negotiable instrument law must be interpreted in view of the intended end—here, the free circulation of negotiable paper—and the meaning attributed by the courts to the language employed.

In a contest over title to stolen negotiable bonds, the Supreme Court of Michigan recently considered the Uniform Negotiable Instrument Law of that State. *Merchants National Bank* v. *Detroit Trust Co.* (1932), 258 Mich. 526–536, 537; 242 N. W. 739. It held that one may purchase stolen negotiable bonds and acquire valid title as a holder in due course, although before the purchase, notice of the theft had come to him; but he may not willfully close his eyes to the notice, or resort to trick or artifice to avoid knowledge of its contents, or purposely forget

it. He must act in good faith. Concerning *Northwestern National Bank* v. *Madison & Kedzie State Bank, supra,* it said:

"As far as we have been able to determine this case stands alone. It estops the purchaser from showing good faith at the time the bonds are acquired. It makes notice of theft conclusive evidence of *mala fides.* It overlooks the well-established rule that though one has received actual notice, if by forgetfulness or negligence he does not have it in mind when he acquires the bonds, he may still be a good-faith purchaser. It has been said that the test is one of simple honesty and good faith."

It approved *Lord* v. *Wilkinson,* 56 Barb. (N. Y.) 593, which rejected an instruction that " The defendants, once having had notice, are bound by it, although the notice may have been forgotten," and declared:

" If the rule is well founded, that notice once given is good forever—that knowledge acquired when notice is given, is conclusive evidence of knowledge possessed when the notes were bought—then this charge is correct. But if the *bona fides* of the defendants must be judged of from their acts, purposes and knowledge as they existed upon the day of the purchase, then the notice served is only *prima facie* or presumptive evidence of *mala fides,* and may be rebutted by proof that the notice was lost, or its existence and contents forgotten."

The doctrine approved in Michigan should be accepted by the federal courts, in the absence of an authoritative ruling in the state whose laws apply. It accords with what this court said in *Goodman* v. *Simonds,* 20 How. 343–365, 366, 367; *Murray* v. *Lardner,* 2 Wall. 110; *Vermilye & Co.* v. *Adams Express Co.,* 21 Wall. 138–146; *Shaw* v. *Railroad Co.,* 101 U. S. 557–564; and *King* v. *Doane,* 139 U. S. 166–173. Also with the view long enforced in England. *Raphael* v. *Bank of England* (1855),

33 Eng. Law and Eq. R., 276; *London Joint Stock Bank* v. *Simmons,* Appellate Cases 1892, 201, 219; *Venables* v. *Baring Bros. & Co.* (1892), 3 Ch. Div. 527. Likewise with the conclusions of many state courts and writers of text books, as is pointed out in Daniel on Negotiable Instruments, 7th ed. (1933), §§ 885, *et seq.,* and the accompanying notes.

The challenged judgment must be affirmed. The cause will be remanded to the District Court for further proceedings.

Affirmed.

ATLANTA, BIRMINGHAM & COAST RAILROAD CO. *v.* UNITED STATES ET AL.

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

No. 9. Argued October 15, 1935.—Decided November 11, 1935.

1. In a suit by a railroad company to set aside an order of the Interstate Commerce Commission, concerning accounting and involving a valuation of the railroad's property, *held* that the court is without power to weigh the evidence that was before the Commission in making its valuation. P. 38.
2. The evidence before the Commission in this case supports its finding that the value of the railroad property in question did not exceed the value of its stocks issued in a reorganization following the liquidation of the former owner, the preferred stock being appraised at par and the valuation of the no-par common stock being limited to the amount which, in the reorganization, another railroad company paid and agreed to pay for it, for the extinguishment of liens on the property. P. 36.

Affirmed.

APPEAL from a decree of the District Court, of three judges, which dismissed a bill to annul an order of the Interstate Commerce Commission.

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Mr. Carl H. Davis, with whom *Messrs. John A. Hynds, Robert C. Alston,* and *Wm. Hart Sibley* were on the brief, for appellant.

Mr. Carl McFarland, with whom *Solicitor General Reed, Assistant Attorney General Dickinson,* and *Messrs. M. S. Huberman, Daniel W. Knowlton,* and *Nelson Thomas* were on the brief, for the United States et al.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, was brought in August, 1934, by the Atlanta, Birmingham & Coast Railroad Company, in the federal court for northern Georgia, to enjoin and annul an order of the Interstate Commerce Commission dated July 9, 1934, concerning accounting. Accounting for Capital Items (In re Atlantic Coast Line R. Co. and Atlanta, Birmingham & Coast R. Co.) 201 I. C. C. 645. The United States was named as defendant; and the Commission intervened. The defendants answered. The District Court dismissed the bill. The case is here on appeal.

The plaintiff is the company formed to take over, under an order of the Commission dated December 21, 1926, the properties of the Atlanta, Birmingham & Atlantic Railway, upon its reorganization. Reorganization and Control of Atlanta, Birmingham & Atlantic Ry., 117 I. C. C. 181, 439. That order authorized the new company to issue for the properties $5,180,300 in preferred stock and 150,000 shares of no-par common stock; and authorized the Atlantic Coast Line, in consideration of the transfer to it of all the common stock, to guarantee 5 per cent. dividends on the preferred and to agree to extinguish all prior liens on the property, which aggregated $4,248,413.76. See *United States* v. *Atlanta, Birmingham & Coast R. Co.,* 282 U. S. 522.

The accounting rules promulgated by the Commission July 1, 1914, pursuant to § 20 of the Interstate Commerce Act, provide generally that the investment account shall show the "actual money costs" to the "accounting carrier"; and specifically as to Account 41, "Cost of Road Purchased":

"This account shall include the cash cost of any road or portion thereof purchased. . . . Where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash basis."

In opening its books of account as of January 1, 1927, the company contended that the value of "Road and Equipment" must be ascertained in the usual manner; and that the value should be entered at $24,010,135.47, which amount was (with net additions made thereafter) the final single sum value of the properties as of June 30, 1914, found by the Commission in its report made in the Valuation Proceeding (75 I. C. C. 645) in 1923; and it presented to the Commission the following balance sheet:

Assets:	
Account 701—Road and Equipment	$24,010,135.47
Other Assets	2,698,817.73
Total	$26,708,953.20
Liabilities:	
Account 751—Capital stock account:	
Preferred stock	$5,180,300.00
Common stock	21,528,653.20
Total	$26,708,953.20

The Commission refused to approve the balance sheet proposed. Reorganization and Control of Atlanta, Birmingham & Atlantic Ry., 158 I. C. C. 6. It insisted that the item "Road and Equipment" be reduced to $6,729,896.03 and that the item "Common Stock" be reduced to $4,248,413.76; and it held that these reductions were

required by the following condition incorporated in the order of December 21, 1926, which authorized the issue of the stock.

"*Provided, however,* and authority to issue said stock is granted upon the express condition, that, for the purposes of the accounting, as provided in the classification of investment in road and equipment in the text of account 41, 'Cost of road purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its par value; and that the cash value of the common stock must be reckoned on a basis not in excess of the amount received therefor."

The company then brought the suit described in *United States* v. *Atlantic, Birmingham & Coast R. Co.,* 282 U. S. 522. The District Court sustained in that case the plaintiff's claim; but we held that its decree must be reversed and the bill dismissed for lack of jurisdiction, since no order requiring the accounting had been entered by the Commission.[1]

Thereafter, on March 26, 1932, the Commission instituted, of its own motion, an enquiry into the methods to be employed by the company in accounting for its liability for capital stock and for its investment in road and equipment. The company renewed the contentions theretofore made by it. Much evidence bearing upon the value of the properties was introduced both by it and by the Commission. On June 9, 1934, the Commission entered the order here under review, accompanied by an elaborate report. It adhered to the view that the condition contained in the order of December 21, 1926, required that the common stock liability be limited to $4,248,413.76; and the value of "Road and Equipment"

[1] In that case, the applicable statutes, and the Commission's rules governing the accounting involved, are set forth in detail.

be set at $6,729,896.03. But it nevertheless made a valuation of the properties based on the evidence introduced; and it added an independent ground for its decision: that, upon valuing the properties, it found that the market or fair cash value of the properties in question did not exceed the sum of $9,428,713.76, as of January 1, 1927; that sum being equal to the par value of the preferred ($5,180,300) and $4,248,413.76. The order entered required the company to state its accounts in accordance with the above findings.

The plaintiff then brought this suit, claiming that the valuation thus made by the Commission is arbitrary, unreasonable, unsupported by the evidence, and contrary to the evidence; and that it is void, among other reasons, (*a*) because the Commission's valuation ignores the elements of value of the property for rate-making purposes; (*b*) that it ignores the reproduction value of the properties; and (*c*) that it violates paragraph 5 (1) of § 19a of the Act to Regulate Commerce as amended, which declares that "all final valuations by the Commission . . . shall be prima facie evidence of the value of the property in all proceedings under the Act."

The pleadings, with exhibits annexed, occupy 155 pages of the printed record in this Court; the narrative statement of the evidence 154 pages; and there are 15 other exhibits, most of them extensive. Besides, there is a stipulation of counsel by which reference may be made to much other evidence, including that in various proceedings before the Commission and in the federal courts concerning the properties now vested in the company and its relations to the Atlantic Coast Line.[2]

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[2]Among these were Atlanta, Birmingham & Atlantic R. R. (Valuation Docket No. 1), 75 I. C. C. 645; Reorganization and Control of Atlanta, Birmingham & Atlantic Ry., 117 I. C. C. 181, 439; 158 I. C. C. 6; *Atlanta, B. & C. R. Co.* v. *United States*, 28 F. (2d) 885;

The District Court, in dismissing the bill, declared that it was unnecessary to pass upon the soundness of the ground originally taken by the Commission, since, on the evidence in the proceeding under review, it had made a valuation of the properties as of January 1, 1927; had made that valuation an independent ground of its decision and order; and had appraised the properties "at such a value as that subtraction of the par of the preferred stock gives the same figures for the common stock as were reached originally by the Commission." The Court added: "We do not discover any breach of law in arriving at the value. As a finding of fact it is binding in this court. In either view of the transaction of reorganization, the figure set up by the Commission in the attacked order is unassailable." We agree with the District Court.

This Court is without power to weigh the evidence. *Virginian Ry.* v. *United States,* 272 U. S. 658, 665. The report of the Commission (201 I. C. C. 645–671) makes it clear that there was ample evidence to support its finding and order. It appeared, among other things, that the railroad had been an enterprise peculiarly disastrous to investors; that for the period from 1916 to 1926 the operating expenses had largely exceeded the operating revenues; that the net railway operating income for the year 1926 was the highest since 1917; and that these earnings, if capitalized at 5 per cent., would indicate a value of only $2,908,300. The Commission concluded that "an immediate measure of value of the non-par stock would be the amount contemporaneously paid and agreed to be paid for it by the Coast Line Company." (201 I. C. C. 665.) In reaching its conclusion, it considered the report

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37 F. (2d) 401; Consolidation of Railroads, 63 I. C. C. 455; Finance Docket No. 5454, I. C. C., Reorganization and Control of Atlanta, Birmingham & Atlantic Ry., decided April 9, 1928. (Not reported.)

filed in 1923 in the Valuation Proceeding, and also the evidence as to the cost of reproduction, and said: "Clearly, the only pertinent value is that for purposes of sale or exchange. Cost of reproduction is to be given little, if any, weight in determining such value, in the absence of evidence that a reasonably prudent man would purchase or undertake the construction of the properties at such a figure." (201 I. C. C. 670.)

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ST. LOUIS UNION TRUST CO. ET AL.

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

No. 25. Argued October 24, 25, 1935.—Decided November 11, 1935.

1. Some years before his death, decedent conveyed property in trust to pay the income to his daughter during her life, with remainder over to persons named. The indenture also provided (1) that if the trustee should exercise a discretionary power given him to terminate the trust, or (2) the daughter should die before the grantor did, the property should be transferred to the grantor, to be his absolutely. Neither of the contingencies had taken place when the grantor died. *Held* that the transfer was not "intended to take effect in possession or enjoyment at or after his death," within the meaning of § 302 (c), Revenue Act of 1924. P. 40.
2. That which gives rise to the estate tax laid by § 301 (a) of the Revenue Act of 1924, is the death of the decedent, with the resulting transfer of his estate, either by will or the law relating to intestacy. When, therefore, § 302 (c) includes within the purview of § 301 (a) a transfer *inter vivos* "intended to take effect in possession or enjoyment at or after his death," it does so upon the theory that such a transfer in effect is testamentary—that is to say, a substitute for either a disposition by will or a passing in virtue of intestacy. P. 41.
3. In this case the grantor had retained no right in the trust estate which was the subject of testamentary disposition; and his death

passed no interest to any of the beneficiaries of the trust; it did not enlarge the interests conveyed by the indenture, but simply extinguished a mere possibility of reverter. *Klein* v. *United States*, 283 U. S. 231, distinguished. P. 43.

75 F. (2d) 416, affirmed.

CERTIORARI, 295 U. S. 727, to review a judgment of the Circuit Court of Appeals sustaining an order, 28 B. T. A. 107, disapproving a deficiency tax assessment.

Mr. David E. Hudson, with whom *Solicitor General Reed*, *Assistant Attorney General Wideman*, and *Messrs. Sewall Key* and *Maurice J. Mahoney* were on the brief, for petitioner.

Mr. Daniel N. Kirby for respondents.

By leave of Court, *Mr. Garret W. McEnerney* filed a brief as *amicus curiae*, supporting the contentions of respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The decedent, several years prior to his death, transferred to a trustee certain securities in trust, to be held, managed and disposed of as an active trust, the net income thereof to be paid to the decedent's daughter during her life, with remainder over to the persons named. The trustee was given discretionary power to terminate the trust whenever the trustee might deem it wise to do so, whereupon the estate was to revert to the grantor. The indenture contained a further provision that if the daughter predecease the grantor, the trust shall terminate and the trust estate be transferred, paid over and delivered to the grantor, to be his absolutely. It is this latter provision which gives rise to the question we are called upon to consider. By the terms of the indenture, the grantor recited that it was his intention to make for the

benefit of his daughter "an absolute and irrevocable gift and settlement of the property . . . so that the grantor shall during the life of his said daughter have no further individual or beneficial interest therein." The grant was final and absolute in terms, and beyond the power of the grantor to revoke or alter. At the death of the grantor, neither of the contingencies upon which the trust estate would revert to the grantor had taken place.

The commissioner assessed a deficiency tax against the estate upon the view that the grantor, having reserved the right to a revestment in him of the trust property, title to which he had conveyed, upon the happening of either of the contingencies mentioned, the transfer to the trustee was one "intended to take effect in possession or enjoyment at or after his death" within the meaning of § 302 (c), Revenue Act of 1924, c. 234, 43 Stat. 253, 304.*

The Board of Tax Appeals decided against the commissioner's view, 28 B. T. A. 107, and its holding was upheld by the court below. 75 F. (2d) 416.

The substantive provision of the act which imposes the tax is § 301 (a); and by that provision the tax is laid "upon the transfer of the net estate of every decedent dying after the enactment of this act." The event which gives rise to the tax is the *death* of the decedent, with the resulting *transfer* of his estate either by will or the law relating to intestacy. When, therefore, § 302 (c) includes within the purview of § 301 (a) a transfer *inter vivos* "intended to take effect in possession or enjoyment at or after his death," it does so upon the theory that such a transfer in effect is testamentary—that is to

* Sec. 302 provides that there shall be included in the gross estate the value of all property—

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, . . . "

say, a substitute for either a disposition by will or a passing in virtue of intestacy.

"But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (Bromley *v.* McCaughn, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The 'generating source' of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax, Chase Nat. Bank *v.* United States, 278 U. S. 327, 338; Reinecke *v.* Northern Trust Co., 278 U. S. 339, 346; Saltonstall *v.* Saltonstall, 276 U. S. 260, 271; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. Compare Tyler *v.* United States, 281 U. S. 497, 503. Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other *in consequence of the death which happens afterward.*" (Ital. added.) *Heiner* v. *Donnan,* 285 U. S. 312, 322–323.

The property brought into the estate by subdivision 302 (c) for the purpose of the tax is, as said by this court in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348,

". . . either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. . . . In the light of the general purpose of the statute and the language of [§ 301 (a)] explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be

reached by the phrase in [§ 302 (c)] 'to take effect in possession or enjoyment at or after his death,' include any others than *those passing from the possession, enjoyment or control of the donor at his death* and so taxable as transfers at death under [§ 301 (a)]. That doubt must be resolved in favor of the taxpayer." (Ital. added).

If, therefore, no interest in the property involved in a given case pass "from the possession, enjoyment or control of the donor at his death," there is no interest with respect to which the decedent has created a trust intended to take effect in possession or enjoyment at or after his death. The grantor here, by the trust instrument, left in himself no power to resume ownership, possession or enjoyment except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition on his part was concerned. After the execution of the trust he held no right in the trust estate which in any sense was the subject of .testamentary disposition. His death passed no interest to any of the beneficiaries of the trust, and enlarged none beyond what was conveyed by the indenture. His death simply put an end to what, at best, was a mere possibility of a reverter by extinguishing it—that is to say, by converting what was merely possible into an utter impossibility. This is well stated by the court below (75 F. (2d) at page 418):

"It was only in the case of the happening of certain contingencies over which he had no control that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the trust still continued; and the second was a termination by the trustee of the trust during the lifetime of the grantor. Neither of these contingencies occurred, and there was, during the decedent's lifetime, nothing more than a possibility that either would occur. In no proper sense was there an enlargement of the interests of the

beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert into an impossibility."

It is not, in reason, possible to find in the circumstances anything which suggests that the death of the grantor, whenever it might happen, would effect any change, or was intended to effect any change, in the extent or quality of the estates conveyed in trust. The only death which could have had any such effect was that of the daughter, the grantee; and that event did not take place.

In that connection see *Matter of Barstow,* 230 App. Div. (N. Y.) 371, 372–3, 244 N. Y. S. 588; aff'd 256 N. Y. 647; 177 N. E. 177. There the donor transferred irrevocably certain property to a trustee to be held in trust for the benefit of two daughters, with the condition that upon the death of both, the fund then in the hands of the trustee was to be transferred back to the donor if then living. The donor died leaving her daughters still living. The court held that the transfer took place when the deed of trust was executed and not when the donor died.

"Mrs. Barstow could do nothing to change the effect of the deed. The corpus was beyond her control, except for the happening of the contingency that she might survive the two life tenants, and then she would have been revested with the corpus. The rights of the beneficiaries did not depend upon the death of the donor. The term of the trust was not measured by the life of the donor, but by the lives of her two daughters. They had an interest in principal and income, provided one or both survived the donor. They took a vested estate subject to being divested if the donor survived both daughters. If we 'are to view the sequence of events in the order of the actual rather than the possible' (Matter of Schmidlapp, 236 N. Y. 278, 286), then we have not only a right, but are bound to conclude that because Mrs. Barstow died before

the termination of the trust which she created, the transfer took place when the deed was executed, and not when she died. There was the contingency that she might survive her daughters, but that did not depend upon any affirmative or volitional act of the donor."

We think it unnecessary further to review the decisions which support our conclusion. In addition to those already cited, the following are in point: *May* v. *Heiner,* 281 U. S. 238, 243; *Coolidge* v. *Long,* 282 U. S. 582; *McCormick* v. *Burnet,* 283 U. S. 784, reversing the Circuit Court of Appeals for the Seventh Circuit (43 F. (2d) 277), and in effect affirming the Board of Tax Appeals, 13 B. T. A. 423, 437; Duke *v.* Helvering, 23 B. T. A. 1104, 1113, aff'd 62 F. (2d) 1057, and affirmed by an equally divided court in 290 U. S. 591; Wallace *v.* Helvering, 27 B. T. A. 902, 910, 913, aff'd 71 F. (2d) 1002, certiorari denied 293 U. S. 600; *St. Louis Union Trust Co.* v. *Becker,* 76 F. (2d) 851.

The case of *Klein* v. *United States,* 283 U. S. 231, which is strongly relied upon by the Government, does not support its position. There the grantor, 15 months prior to his wife's death, conveyed to his wife by deed a life estate in certain lands. But in the event that she survived the grantor " and in that case only " she was to take the lands in fee simple. The effect of this deed, we held, was that only a life estate was vested, the remainder being retained by the grantor; and whether that should ever become vested in the grantee depended upon the condition precedent that the grantor die during the life of the grantee. The grantor having died first, his death clearly effected a transmission of the larger estate to the grantee. But here the grantor parted with the title and all beneficial interest in the property, retaining no right with respect to it which would pass to anyone as a result of his death. Unlike the *Klein* case, where the death was the generating source of the title, here, as the court below

said, the trust instrument and not the death was the generating source. The death did not transmit the possibility, but destroyed it.

Judgment affirmed.

MR. JUSTICE STONE, dissenting.

Decedent, in making disposition of his property by his trust deed, retained a valuable interest in the property by which he postponed final disposition of it until his death. I think that the value of that interest was rightly subjected to the tax imposed by § 302 (c). This conclusion is strengthened and not avoided by construing the section as imposing a tax on the value of the interest which is shifted from donor to donee on the former's death. Although the tax is a death tax, § 302 (c) nevertheless applies to any interest in gifts *inter vivos* which, by their provisions, are "intended to take effect in possession or enjoyment at or after death," and such gifts are subjected to the tax as a death tax if they are not complete until the donor's death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 345; *Klein* v. *United States*, 283 U. S. 231. The decedent's death, operating upon his gift *inter vivos* not complete until his death, is the event which calls the statute into operation. *Klein* v. *United States, supra*, 234.

The section, in its scope and purpose, is thus similar to § 302 (d) which includes in the decedent's taxable estate the value of his interest held as joint tenant or tenant by the entirety, although created by deed *inter vivos*. *Tyler* v. *United States*, 281 U. S. 497; *Phillips* v. *Dime Trust & S. D. Co.*, 284 U. S. 160. Both provisions prevent tax evasion by subjecting to the death tax, forms of gifts *inter vivos* which may be resorted to, as a substitute for a will, in making dispositions of property operative at death. See *Tyler* v. *United States, supra*, 505.

Compare No. 10, *Helvering* v. *City Bank Farmers Trust Co.*, decided this day, *post*, p. 85.

It seems plain that the gift here was not complete until decedent's death. He did not desire to make a complete gift. He wished to keep the property for himself in case he survived his daughter. He kept this hold upon it by reserving from his gift an interest, terminable only at his death, by which full ownership would be restored to him if he survived his daughter. If he had reserved a power to revoke the trust, if he survived her, *Reinecke* v. *Northern Trust Co., supra,* would have made the gift taxable, as would *Klein* v. *United States, supra*, if he had reserved a remainder in himself with gift over, if he did not survive his daughter. Instead, by using a different form of words, he attained the same end and has escaped the tax.

Having in mind the purpose of the statute and the breadth of its language it would seem to be of no consequence what particular conveyancers' device—what particular string—the decedent selected to hold in suspense the ultimate disposition of his property until the moment of his death. In determining whether a taxable transfer becomes complete only at death we look to substance, not to form. *Klein* v. *United States, supra,* 234; *Chase National Bank* v. *United States,* 278 U. S. 327, 335; *Reinecke* v. *Northern Trust Co., supra,* 345; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271. However we label the device it is but a means by which the gift is rendered incomplete until the donor's death. The extent to which it is incomplete marks the extent of the "interest" passing at death, which the statute taxes.

The judgment should be reversed.

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, and MR. JUSTICE CARDOZO join in this opinion.

BECKER, COLLECTOR OF INTERNAL REVENUE, *v.* ST. LOUIS UNION TRUST CO. ET AL., EXECUTORS.

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

No. 262. Argued October 25, 1935.—Decided November 11, 1935.

1. Some years before his death, decedent, by declarations of trust, transferred property irrevocably to himself as trustee for the benefit of his children. The instruments provided in each case that if the beneficiary should die before the settlor, the trust estate should revert to the settlor absolutely, but if the settlor should die first, the property should thereupon become the beneficiary's absolutely. In either of such cases, the trust was to cease. *Held*, that the transfers were not intended to take effect in possession or enjoyment after the grantor's death, within the meaning of § 302 (c), Revenue Act of 1926. *Helvering* v. *St. Louis Union Trust Co.*, *ante*, p. 39. P. 50.
2. The legal title, possession and control of property may by declaration of trust be passed irrevocably from the grantor to himself as trustee, with the same effect as if the trustee receiving the conveyance had been another person. P. 50.
3. Decedent, 76 years of age and in excellent health, attending regularly to business and apparently not looking forward in any way to his death, set up trusts for his children, who were all past 21 years of age. So far as appeared, his objects were to make them allowances so that he might be relieved of care in their regard, and to reduce his personal surtaxes. *Held*, that the evidence was insufficient to show that the transfers were made in contemplation of death. Revenue Act, 1926, § 302 (c). P. 51.
4. The record in this case does not show that the Commissioner of Internal Revenue rested his assessment upon a finding that the transfers in question were made in contemplation of death. P. 52.

76 F. (2d) 851, affirmed.

CERTIORARI * to review the reversal of a judgment of the District Court in favor of the Collector in a suit to recover money exacted as an additional estate tax.

* See Table of Cases Reported in this volume.

Mr. David E. Hudson, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* were on the brief, for petitioner.

Mr. Crawford Johnson, with whom *Mr. Thomas S. McPheeters* was on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The decedent in 1921 executed separate declarations of trust in favor of each of his four children, conveying to himself as trustee certain securities. He died in 1928, at which time the entire trust estate conveyed by the four trusts amounted to nearly a million dollars, which amount was included by the Commissioner of Internal Revenue as a part of the gross estate of the decedent and an additional estate tax assessed accordingly. The executors, having paid the additional tax, brought this action in a federal district court sitting in Missouri to recover the amount. The district court denied recovery upon the grounds that the transfer effected by each declaration of trust was made in contemplation of death and that it was intended to take effect in possession or enjoyment at or after decedent's death.

The Court of Appeals, after a very full review of the facts and authorities, reversed the judgment. 76 F. (2d) 851. The case is here on certiorari.

The declarations of trust were in identical terms. By each the grantor declared that he held in trust for the person named certain property which was described. A copy of one of them is set forth in the opinion of the court below. The trust instrument gave the trustee usual discretionary power with respect to sale of the trust property, reinvestment of proceeds, collection of rents, income and profits, payment of taxes and expenses incident to the

care, preservation and management of the property; and provided that he should pay to the beneficiary an allowance of $300 a month, which might be increased or decreased from time to time in his discretion. Income not distributed was to be added to the principal. The final clause of the declaration provided:

"6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease."

The government presents for our determination two questions—whether, under the provisions of § 302 (c), Revenue Act of 1926, a transfer of the property under each of the instruments here involved, (1) was intended to take effect in possession or enjoyment at or after the death of the grantor; (2) was made in contemplation of death.

First. The first of these questions is settled by our decision just rendered in the case of *Helvering* v. *St. Louis Union Trust Co., ante,* p. 39. By the declaration of trust here under review, the legal title, possession and control of the trust estate passed irrevocably from the grantor as an individual to himself as trustee. The effect is no different than if the trustee had been another person. Cf. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 346. By the final paragraph of the declaration, quoted above, the grantor does not retain any interest in the property, but, recognizing the completeness of the transfer, he provides that the property shall revert to him in case the beneficiary shall predecease him. The provision that the trust estate shall "revert" in case of the predecease of the beneficiary removes any doubt as to the completeness of the transfer, if otherwise there would be any. The

question, therefore, is whether the mere possibility of a reverter stamps the transfer as one intended to take effect in possession or enjoyment at or after the death of the grantor. The decision just rendered answers this question in the negative.

Second. The transfer to the trustee was complete and became effective when made, seven years before the death of the decedent. The factor which brings a gift *inter vivos* within the reach of § 302 (c) with respect to transfers made in contemplation of death " is to be found in the transferor's motive." *United States* v. *Wells,* 283 U. S. 102, 117. " Death must be ' contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. . . . The question, necessarily, is as to the state of mind of the donor. . . . If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive." p. 118. The opinion proceeds to give illustrations of those motives which have reference to life rather than to death—as, for example, the desire to be relieved of responsibility; to have children independently established with competencies of their own. In each case the circumstances are to be scrutinized in order to discover the dominant motive of the donor in the light of his bodily and mental condition. p. 119.

In the present case the district court found that the motive of decedent was to decrease his income tax by distributing a portion of his property among the four trusts and, at the same time, to make provision for the distribution of the property to his children at decedent's death, and concluded therefrom that the transfer was made in contemplation of death. The Circuit Court of Appeals reached the opposite conclusion. It found on the evidence that the decedent, in making the trusts, was

actuated by two motives—(1) to make his children independent; (2) to avoid high surtaxes on his income; and that both of these motives were associated with life. Evidence that the decedent was in any way influenced in what he did by the thought of death, that court said, was entirely lacking.

It is true that the decedent at the time of making the trusts was 76 years of age. But the evidence shows clearly that he was in excellent health, attending regularly to business, apparently was not looking forward in any way to his death, came of a very long-lived family, expected to live well beyond the age of 90, and in fact lived seven years after making the trusts. The beneficiaries were all past 21 years of age, and the record shows only that the grantor's objects were to make them allowances in order to get rid of the nuisance of treating them as children, make them independent so they would know what they were to get each year, and, as he had ample income of his own, to avoid the high surtax and make each of his children pay a tax on the independent income received.

We are unable to find anything in the record which conflicts with the statement of the court below that evidence that decedent was in any way influenced by the thought of death was wholly lacking. The government argues that the finding of the trial court in respect of the matter is the same as that of the commissioner, and that this circumstance gives additional weight to that court's finding. Our attention has not been called to anything in the record which shows that the commissioner's determination rested upon such a finding. The petition alleges that the reason which brought about the commissioner's determination was that the transfer was one which "did not take effect in possession or enjoyment until at or after the death of the decedent," and that he so advised the respondents by letters. The answer affirmatively alleges that the commissioner's rea-

sons were "that there had been no transfer of such property during the lifetime of the decedent; that such property was transferred at and as a result of the death of the decedent; and that such transfer was intended to take effect at or after the death of the decedent," and that the commissioner advised respondents accordingly. We are unable to find anything in the record which justifies the conclusion that the commissioner specifically determined that the transfers were made in contemplation of death, or, indeed, that there was any evidence before him on that subject.

In this state of the record it cannot be said that the finding of the trial court in this regard obtains any support from the determination of the commissioner. The situation simply is that the findings of the lower courts upon the matter are in conflict; and a careful examination of the evidence contained in the record convinces us that the finding of the trial court was erroneous, and we so hold.

Judgment affirmed.

The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE CARDOZO dissent for reasons stated in their dissent in *Helvering* v. *St. Louis Union Trust Co., ante,* p. 46.

CHANDLER & PRICE CO. *v.* BRANDTJEN & KLUGE, INC. ET AL.

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

No. 11. Argued October 16, 17, 1935.—Decided November 11, 1935.

1. On application to intervene in equity, it is the better practice to present the applicant's proposed answer. P. 56.
2. In a patent infringement suit brought against the user of a machine, the manufacturer of the accused article was permitted to in-

tervene. It thereupon answered, jointly with the defendant, denying infringement and challenging the plaintiff's patent, and furthermore set up, separately, a counterclaim against the plaintiff for infringement of another patent, owned solely by the intervener. There was no suggestion that the defendant had any interest in the counterclaim, or that the issues tendered by or that might arise out of it could not be adjudged in a separate suit. *Held:*

(1) That the facts alleged in the petition for intervention were insufficient to show that the intervener was the real party in interest or entitled to intervene as a matter of equitable right. P. 56.

(2) The counterclaim was rightly dismissed; the intervener is limited to the field of litigation open to the original parties. P. 57.

(3) Equity Rule 30 does not authorize one given the privilege to intervene as party defendant to set up and enforce against the plaintiff a counterclaim not available to the original defendant and in which that defendant has no interest. P. 58.

(4) Equity Rule 37, declaring that anyone claiming "an interest in the litigation" may be permitted to assert his right by intervention, means an interest in matters then in controversy between the plaintiff and original defendant; the purpose for which permission to intervene may be given is that the applicant may be put in position to assert in that suit a right of his in respect of something there in dispute between the original parties. P. 59.

75 F. (2d) 472, affirmed.

CERTIORARI, 295 U. S. 724, to review the affirmance of a decree dismissing a counterclaim set up by an intervener in a patent infringement suit.

Mr. Wallace R. Lane, with whom *Mr. John F. Oberlin* was on the brief, for petitioner.

Mr. Dean S. Edmonds for Brandtjen & Kluge, Inc., respondent.

No appearance for Joseph Freeman, Inc., respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Brandtjen & Kluge, Inc., brought this suit in the District Court for Eastern New York against Joseph Freeman, Inc. The bill alleges that plaintiff is the owner of

patent No. 1,363,200 for "Improvements in Automatic Feed and Delivery for Platen Presses," that defendant is using an infringing printing press, and prays injunction and accounting. Before answer by defendant, the Chandler & Price Company applied to the court for leave to intervene as a party defendant. The substance of the facts it alleges in order to show that it has an interest in the litigation (Equity Rule 37) is as follows: Petitioner is engaged in manufacturing and selling printing presses. It made and sold to defendant the one of which the bill complains, and intends openly to defend this suit. After it put its machine upon the market, plaintiff threatened to sue users for infringement, and as a consequence petitioner's customers required it to give bonds for their protection. Before bringing this suit, plaintiff's counsel wrote defendant enclosing a copy of plaintiff's patent and asked defendant to respect their client's rights. That letter having been referred to petitioner, its counsel inquired of plaintiff's counsel whether suit would be brought against defendant (a user of one press) in the Eastern District of New York rather than directly against petitioner (a manufacturer and seller) in the Northern District of Ohio. Plaintiff's counsel answered that decision to sue defendant in the New York district had been reached, and promised to serve a copy of the bill upon petitioner's counsel. Shortly after commencement of suit that was done. Plaintiff's threats to bring infringement suits against users injured petitioner's business and unnecessarily harassed its customers. Although long before commencement of the suit its device had been shown to plaintiff's counsel and plaintiff knew that it was being sold throughout the United States, plaintiff did not sue petitioner. Defendant has not sufficient interest in the result of the litigation to defend this suit on its own account. Petitioner's intervention is necessary for the protection of its interest.

Contrary to the better practice, the application for intervention did not present a proposed answer. Cf. *Toler* v. *East Tennessee, V. & G. Ry. Co.*, 67 Fed. 168, 174. *Stallings* v. *Conn*, 74 F. (2d) 189, 191. It did not suggest that, independently of defendant or otherwise, petitioner sought opportunity in this suit to enforce a claim for patent infringement against the plaintiff. After hearing, the court granted the leave applied for. Thereupon, the defendant and intervenor filed an answer in which jointly they deny infringement and assert invalidity of plaintiff's patent. And in the same answer the intervenor separately sets up a counterclaim against the plaintiff for infringement of patent No. 1,849,314 for "Improvements in Sheet Transferring Mechanism for Printing Presses," owned solely by it, and prays decree against plaintiff for injunction and accounting. Maintaining that it states a cause of action to which the original defendant is a stranger, plaintiff moved to dismiss the intervenor's counterclaim. The District Court granted the motion. The Circuit Court of Appeals affirmed. 75 F. (2d) 472.

The order granting intervention is not here challenged. The sole question is whether intervenor may bring into this suit a controversy between it and plaintiff in which defendant has no interest.

Intervenor insists that it, rather than the defendant sued, is the real party in interest and that its counterclaim should be permitted so that the entire controversy between the real parties may be settled in a single suit. But intervenor's legal position in relation to the case differs essentially from what it would have been had the bill named it as a defendant and alleged a cause of action against it in the infringement suit. Undoubtedly in such a case the petitioner, whether or not suable in that district (§ 48, Judicial Code) would have had the right to enter its appearance and make its defense, and also to set up counterclaim against plaintiff. *Leman* v. *Krentler-*

Arnold Co., 284 U. S. 448, 451. *General Electric Co.* v. *Marvel Co.*, 287 U. S. 430, 435. Here plaintiff's alleged cause of action is use by the defendant of a single machine alleged to infringe patent No. 1,363,200 belonging to plaintiff. Defendant has no interest in patent No. 1,849,-314 owned by intervenor and made the basis of the counterclaim in question. The bill neither alleges any cause of action nor prays judgment against the intervenor. Petitioner was not sued and, until granted leave to intervene, it was a stranger to the suit. The facts alleged in its application were not sufficient to show that as a matter of equitable right petitioner is entitled to intervene. *Western Union Telegraph Co.* v. *United States & M. T. Co.*, 221 Fed. 545, 552. *United States Trust Co.* v. *Chicago Terminal T. R. Co.*, 188 Fed. 292, 296. *Toler* v. *East Tennessee, V. & G. Ry. Co., supra*, 171-172. *Chester* v. *Life Assn. of America*, 4 Fed. 487, 491. The showing presents a situation familiar in patent infringement cases brought against a user where the maker of the accused article is upon its application and in the discretion of the court permitted to intervene. *Curran* v. *St. Charles Car Co.*, 32 Fed. 835, 836. *Foote* v. *Parsons Non-Skid Co.*, 196 Fed. 951, 953. *Continuous Extracting Corp.* v. *Eastern Cotton Oil Co.*, 264 Fed. 340. *Baldwin* v. *Abercrombie & Fitch Co.*, 227 Fed. 455; 228 Fed. 895, affirmed *sub nom. Abercrombie & Fitch Co.* v. *Baldwin*, 245 U. S. 198, 200. See *Angier* v. *Anaconda Wire & Cable Co.*, 48 F. (2d) 612, 613. The record discloses no foundation for the claim that the defendant sued is not, or that the intervenor is, the real defendant in interest.

There is no suggestion that defendant has any interest in the counterclaim or that the issues between intervenor and plaintiff that are tendered by, or that might possibly arise out of, the counterclaim may not be adjudged in a separate suit. The intervenor was not entitled to come into the suit for the purpose of having adjudicated a con-

troversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not by the intervenor be so enlarged. It is limited to the field of litigation open to the original parties. *Curran* v. *St. Charles Car Co., supra,* 837. *Powell* v. *Leicester Mills,* 92 Fed. 115. *Atlas Underwear Co.* v. *Cooper Underwear Co.,* 210 Fed. 347, 355. *Leaver* v. *K. & L. Box & Lumber Co.,* 6 F. (2d) 666. *De Sousa* v. *Crocker First Nat. Bank,* 23 F. (2d) 118, 122. *Board of Drainage Comm'rs* v. *Lafayette Southside Bank,* 27 F. (2d) 286, 296. *Tretolite Co.* v. *Darby Petroleum Corp.,* 5 F. Supp. 445, 446. The decisions of the District Court and the Circuit Court of Appeals in *United States Expansion Bolt Co.* v. *H. G. Kroncke H. Co.,* 216 Fed. 186; 234 Fed. 868, are disapproved to the extent, if at all, that they tend to support intervenor's contention that it is entitled to set up the counterclaim.

The intervenor invokes Equity Rule 30 and insists that counterclaims there referred to are not restricted to those required or permitted to be set up by a defendant sued, in contradistinction to an intervenor as party defendant under Rule 37. And it further insists that, by virtue of the leave to intervene and in view of the answer interposed, it is a defendant within the meaning of Rule 30. That rule declares: "The defendant by his answer shall set out . . . his defense to each claim asserted in the bill . . . The answer must state . . . any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him . . ." It is true, as suggested by the intervenor, that this rule does not expressly make a distinction between a defendant named in the bill and one who, leave having been granted, intervenes as a party defendant. But the context makes

against construing the word "defendant" as used in the rule to include one permitted to intervene. See *Allington* v. *Shevlin-Hixon Co.*, 2 F. (2d) 747, 749. The statement that defendant shall set up his "defense to each claim asserted in the bill" is inconsistent with the construction for which the intervenor here contends. Intervention necessarily is subsequent to the commencement of the suit. As shown above, this bill does not make the intervenor a party or allege aught against it. It is plain that the rule does not authorize one given the privilege to intervene as party defendant to set up and enforce against the plaintiff a counterclaim not available to the original defendant and in which it had no interest. Construction of the rule that denies intervenor the right to set up the counterclaim in question is supported by Equity Rule 37 which declares: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention . . ." It is essential that the applicant shall claim an interest in the matters there in controversy between the plaintiff and original defendant. The purpose for which permission to intervene may be given is that the applicant may be put in position to assert in that suit a right of his in respect of something there in dispute between the original parties. Intervenor's counterclaim, involving nothing in which defendant is concerned, does not constitute the interest referred to in Rule 37.

Exclusion from the litigation of that demand is consonant with reason and in the interest of justice. Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill. *Leaver* v. *K. & L. Box & Lumber Co., supra. Gregory* v. *Pike,* 67 Fed. 837, 845. In the absence of language definitely requiring it, the construction of Rule

30 for which the intervenor contends cannot reasonably be sustained. The counterclaim against the plaintiff was rightly dismissed.

Affirmed.

RAYBESTOS-MANHATTAN, INC. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 20. Argued October 22, 1935.—Decided November 11, 1935.

Pursuant to a consolidation agreement, two corporations conveyed their property to a new corporation in return for shares of its capital stock, issued not to the two corporations but directly to their stockholders in proportion to their holdings in those corporations. *Held*—

That the transaction was subject to a stamp tax under § 800 of the Revenue Act of 1926, not only on the original issue of the shares, but also on the transfers necessarily involved, whereby the rights to receive the shares, inherent in the two corporations by operation of law, were transferred by the agreement to the stockholders. P. 62.

80 Ct. Cls. 809; 10 F. Supp. 130, affirmed.

CERTIORARI, 295 U. S. 727, to review a judgment of the Court of Claims denying recovery of money exacted by the United States as stamp taxes.

Mr. Charles H. LeFevre, with whom *Mr. Howard S. LeRoy* was on the brief, for petitioner.

Mr. A. F. Prescott, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case we granted certiorari to review a judgment of the Court of Claims, to settle a doubtful point of federal law, of importance in the administration of the

revenue acts, and to resolve a conflict of the decision below with that of the Court of Appeals for the Third Circuit in *MacLaughlin* v. *Westmoreland Coal Co.*, 73 F. (2d) 1004, affirming 8 F. Supp. 963, on opinion below.

The question presented is whether the issue by petitioner of its shares of stock to the stockholders of two other corporations in exchange for the assets of those corporations, pursuant to a plan for their consolidation, involved a "transfer" taxed by § 800 (A) (3) of the Revenue Act of 1926. 44 Stat. 9, 99, 101. The Court of Claims held that it did, and denied recovery of the tax, which petitioner had paid under protest. 80 Ct. Cls. 809; 10 F. Supp. 130.

Section 800, Schedule (A) (2) of the 1926 Act imposes a stamp tax at a specified rate on the original issue of shares of corporate stock. By § 800 (A) (3) a like tax is laid "On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or . . . of interest in property . . . in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation . . . or by any paper or agreement or memorandum or other evidence of transfer or sale . . ." Section 800 imposes liability for the tax upon the transferor, the transferee and the corporation whose stock is transferred.

Petitioner was organized under the laws of New Jersey as a step in carrying out a plan and agreement for the consolidation of three other corporations. Two of the corporations conveyed their property to petitioner in return for a specified number of its shares of capital stock, issued not to the two corporations, but directly to their stockholders in proportion to their holdings. The Government and the taxpayer are not in accord as to the precise interpretation to be placed upon the contracts which resulted in the consolidation, but accepting the

taxpayer's contention for purposes of decision, we assume that it was agreed by all concerned that the shares of petitioner were to be issued directly to the stockholders of the two corporations without further intervention by the latter.

Liability for the tax levied on the original issue of stock is conceded, but it is denied that the transaction involved any taxable transfer within the purview of Schedule (A) (3). It is said that the petitioner was subject to the tax imposed by this schedule only if there was a transfer of the right to receive the stock to be issued by petitioner for the assets of the two corporations; that as neither of them was entitled, under the agreement, to receive the certificates for the newly issued shares, which were to be issued directly to their stockholders, neither corporation can be said to have transferred rights to receive stock. We think the statute is not to be read so narrowly.

The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another. See *Provost* v. *United States,* 269 U. S. 443, 458, 459. While the statute speaks of transfers, it does not require that the transfer shall be directly from the hand of the transferor to that of the transferee. It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another. Even the ownership of a share of stock, transfer of which is admittedly taxed, is not transferred directly from one to another as is title to a chattel or to real estate. Transfer of title to the shares is effected by a form of novation by which the right of the shareholder is surrendered to the corporation in return for its recognition of a new shareholder designated by the transferor

and the issue to him of a new certificate of stock. It is relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation.

The subject of the tax is not alone the transfer of ownership in shares of stock. It embraces transfers of rights to subscribe for or receive shares or certificates, whether made upon the books of the corporation " or by any paper, agreement, or memorandum or other evidence of transfer . . ." In the present case the generating source of the right to receive the newly issued shares of petitioner was the conveyance to it of the property of each of the corporations to be consolidated. The new shares could not lawfully be issued to any other than the grantor corporation without its authority, and that authority could not be exercised for the benefit of third persons other than its own assenting stockholders. The consolidation agreement thus imposed the duty on petitioner to issue the new shares upon receipt of the property, and at the same time made disposition to the stockholders of the two corporations of the correlative right to receive the stock.

We think that this effective disposition of the right to receive the stock involved a taxable transfer quite as much as if the several legal relationships of the parties had been established at different times and by separate documents. It is not doubted that there would have been a taxable transfer if each corporation had conveyed its property to petitioner in exchange for its shares of stock to be issued as the grantor might direct, and had later ordered the certificates to be issued to its stockholders. The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements. But we do not discern even a technical difference of any significance between such a transaction and that now before us, where the same duty to issue the stock is created

and the same shift of the beneficiaries of it is effected simultaneously in a single document. No convincing reason is suggested why the Act should be thought to tax the one and not the other.

The statute is thus not restricted in its application to rights to demand delivery of the stock such as the agreement vested in the stockholders of the two corporations. It embraces the more general one, inseparable from the transaction by which the obligation to issue the stock was created and which inhered in the two corporations by operation of law. Income is not any the less taxable income of the taxpayer because by his command it is paid directly to another in performance of the taxpayer's obligation to that other. See *Douglas* v. *Willcuts,* decided this day, *ante,* p. 1; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & Maine R. R.,* 279 U. S. 732. Here the power to command the disposition of the shares included the right to receive them and the exercise of the power which transferred the right is subject to the tax.

Affirmed.

DI GIOVANNI ET AL. *v.* CAMDEN FIRE INSURANCE ASSN.

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

No. 28. Argued October 23, 1935.—Decided November 11, 1935.

A fire insurance company sued two defendants in the federal district court for the cancellation of two policies, one issued to both defendants, insuring a building, the other issued to one of them insuring personal property in the building. The bill alleged that defendants procured the policies by misrepresentations; caused the property to be over-insured by the plaintiff and other insurers; and then caused it to be destroyed by fire, all in execution of a

conspiracy. It alleged also that defendants were about to begin actions at law against plaintiff to recover the amounts of the policies, but did not show that by agreement or by local law and procedure both actions could not be disposed of by a single trial in a state court. It was conceded that no action at law could be maintained on either or both of the policies in the federal court, because each was for less than the jurisdictional amount. *Held:*

1. The alleged fraud and destruction of property are available as defenses to actions at law upon the policies. P. 68.

2. The bill cannot stand as a bill *quia timet,* there being no danger that the defense at law may be lost or prejudiced. P. 68.

3. Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give. P. 69.

4. If a plaintiff is entitled to be heard in the federal courts, he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford. P. 69.

5. Want of the jurisdictional amount in controversy, which deprives a federal court of its authority to act at law, is not ground for invoking its equity powers. P. 69.

6. Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same, is a recognized ground for equitable relief in the federal courts; but this remedy rests in sound discretion, and a theoretical inadequacy of legal remedy may be outweighed by other considerations. P. 70.

7. Equity not infrequently withholds relief which it is accustomed to give, where it would be burdensome to the defendant and of little advantage to the plaintiff. P. 71.

8. The grounds for equitable relief to a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real and substantial and its necessity must affirmatively appear. P. 72.

9. The policy of Congress to leave original jurisdiction over cases involving less than the jurisdictional amount exclusively to the state courts should be recognized by the federal courts in cases within their discretionary powers. P. 73.

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10. The threatened injury to the plaintiff of having to defend two suits at law in this case is of too slight moment to justify an exercise of its discretion by the federal court, granting an equitable remedy which would entail denial of a jury trial to the defendants and withdraw from the jurisdiction of the state courts suits which could not otherwise be brought into the federal courts. P. 74.

75 F. (2d) 808, reversed.

CERTIORARI, 295 U. S. 728, to review the reversal of a decree of the District Court dismissing a bill to cancel policies of fire insurance.

Mr. Harry L. Jacobs, with whom *Mr. James Daleo* was on the brief, for petitioners.

Mr. Walter A. Raymond, with whom *Mr. Fenton Hume* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a suit in equity, brought in the District Court for Western Missouri by respondent, a New Jersey fire insurance company, against petitioners, citizens of Missouri, to cancel two insurance policies. One, for $3,000, was issued to petitioners, who are husband and wife, to insure them against loss by fire of a building which they held as tenants by the entirety. The other, for $1,500, was issued to the husband to insure his personal property located in the building. On motion to dismiss the bill of complaint for want of equity and want of jurisdiction the district court dismissed the suit on the ground that the amount in controversy did not exceed $3,000. Its decree was reversed by the Court of Appeals for the Eighth Circuit, 75 F. (2d) 808. This Court granted certiorari to settle an important question of federal law affecting the jurisdiction of federal courts.

The bill of complaint alleges that the petitioners procured the two policies from respondent by representing

that they would not effect insurance on the property in excess of a stated amount; that thereafter they did effect insurance with respondent and other companies in excess of that amount, and in excess of the value of the insured property, and then caused the property to be destroyed by fire, all in execution of a conspiracy between them. It avers that petitioners have filed proofs of loss with respondent, and that they threaten to and are about to begin suits at law against respondent to recover the full amounts of its policies.

As the two policies are separate contracts, with different beneficiaries, insuring different properties, it is conceded that no suit at law could be maintained upon them in the federal courts since neither exceeds $3,000, the amount requisite for the jurisdiction of the federal courts, and the two independent causes of action upon them could not be joined in a single suit at law. The Court of Appeals held that the jurisdictional requirement was satisfied by the expedient of seeking cancellation of the two policies in a single suit in equity, wherein their amounts might be united. It recognized that jurisdiction cannot ordinarily be conferred on a federal court by joining in a single suit separate causes of action in none of which is the amount involved more than $3,000 although their aggregate exceeds that sum. *Walter* v. *Northeastern R. Co.,* 147 U. S. 370; *Citizens' Bank* v. *Cannon,* 164 U. S. 319. But it applied the doctrine sanctioned by this Court in *Woodmen of the World* v. *O'Neill,* 266 U. S. 292; and *McDaniel* v. *Traylor,* 212 U. S. 428, that in a bill to restrain the maintenance of vexatious suits by numerous parties pursuant to a conspiracy among them, the allegations of conspiracy are sufficient to "tie together" the amounts involved in the several suits so that their aggregate is deemed to be the amount in controversy. The Court of Appeals thought that the equity powers of the district court were rightly invoked by the allegations that

the two policies were obtained by fraud, and by the prayer for their cancellation; and that the right to this relief was not defeated by the existence of an adequate remedy at law, since it would be necessary to establish the defense to the policies in two suits at law instead of in one in equity, and more especially because the adequate remedy at law which will prevent resort to equity in the federal courts is that available in the federal courts at law, where the suits could not be heard for want of the jurisdictional amount.

We address ourselves only to the question whether the equitable relief is warranted, leaving aside doubts whether the present case, by the allegation that the insurance was effected and the loss caused pursuant to a conspiracy, is brought within the peculiar doctrine of *Woodmen of the World* v. *O'Neill, supra,* where the conspiracy was to abuse the processes of the courts by the prosecution of groundless suits.

1. This Court has recently pointed out that equity will not compel the cancellation and surrender of an insurance policy procured by fraud where the loss has occurred and a suit at law to recover the amount of the loss is pending or threatened. *Enelow* v. *New York Life Insurance Co.,* 293 U. S. 379. The alleged fraud of petitioners, as well as their alleged destruction of the property insured are defenses available in suits at law upon the policies. While equity may afford relief *quia timet* by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced, no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent, and there is no showing that the defenses cannot be set up and litigated as readily in a suit at law as in equity. See *Enelow* v. *New York Life Insurance Co., supra,* 384, 385.

2. Section 24 of the Judicial Code, 28 U. S. C. § 41, restricts the jurisdiction of the district courts whether at law or in equity to controversies in which the amount involved exceeds $3,000. Section 267 of the Judicial Code, 28 U. S. C. § 384, forbids the maintenance of suits in equity in the courts of the United States "in any case where a plain, adequate and complete remedy may be had at law." It is true, as this Court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law. See *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121; *Smyth* v. *Ames,* 169 U. S. 466; *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378. This follows from the nature of "equity jurisdiction" of the federal courts. Whether a suitor is entitled to equitable relief in the federal courts, other jurisdictional requirements being satisfied, is strictly not a question of jurisdiction in the sense of the power of a federal court to act. It is a question only of the merits; whether the case is one for the peculiar type of relief which a court of equity is competent to give. See *Pennsylvania* v. *Williams,* 294 U. S. 176, 181, 182. If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford. Otherwise the suitor in the federal courts might be entitled to a remedy in equity which the federal courts of law are competent to give, or, on the other hand, be obliged to forego his right to be heard in the federal courts in order to secure an equitable remedy which state courts of law do but the federal courts of law do not give. See *Stratton* v. *St. Louis Southwestern Ry.,* 284 U. S. 530, 533, 534; *Matthews* v. *Rodgers,* 284 U. S. 521, 529. But want of the jurisdictional amount in controversy which deprives

a federal court of its authority to act at law is not ground for invoking its equity powers. The statute forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibition of Congress, applicable alike to suits at law and in equity. See *Healy* v. *Ratta,* 292 U. S. 263.

3. As the nature of the relief sought, cancellation of the insurance policies, and the inability of the federal courts to hear the suits at law for want of the jurisdictional amount, do not warrant equitable relief, it is evident that the remedy which respondent seeks depends on the slender thread of its right to ask the federal court of equity to save it the possible inconvenience of trying two law suits instead of one. Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same, is a recognized ground for equitable relief in the federal courts. See *Ogden City* v. *Armstrong,* 168 U. S. 224; *Hale* v. *Allinson,* 188 U. S. 56. But the award of this remedy, as of other forms of equitable relief, is not controlled by rigid rules rigidly adhered to regardless of the end to be attained and the consequences of granting the relief sought. It rests in the sound discretion of a court of equity and a theoretical inadequacy of the legal remedy may be outweighed by other considerations. In *Hale* v. *Allinson, supra,* where this Court denied relief to a single plaintiff who sought to unite in a suit in equity claims founded upon the statutory liability of numerous stockholders of a corporation, it was careful to point out, 72–78:

"In any case where the facts bring it within the possible jurisdiction of the court, . . . the decision must depend largely upon the question of the reasonable con-

venience of the remedy, its effectiveness and the inadequacy of the remedy at law. . . . Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; . . . The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction."

Lord Hardwick, in laying down the principles which should guide the award of a bill of peace, the progenitor of the modern bill to avoid multiplicity of suits, thought that there was no occasion for the relief where the asserted right could be established by " one or two actions at law." *Lord Tenham* v. *Herbert,* 2 Atk. 483. While it need not be said that under no circumstances could the maintenance of two suits with common issues be so burdensome or inconvenient as to justify equitable relief, see *McHenry* v. *Hazard,* 45 N. Y. 580; compare *Empire Engineering Corp.* v. *Mack,* 217 N. Y. 85, 95; 111 N. E. 475, it is nevertheless true that the necessity of maintaining two suits involving the same issue seems rarely to have been burdensome enough to impel a plaintiff to seek equitable relief. Equity not infrequently withholds relief which it is accustomed to give where it would be burdensome to the defendant and of little advantage to the plain-

tiff. See *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338, and cases cited; cf. *Willard* v. *Tayloe*, 8 Wall. 557; *Hennessy* v. *Woolworth*, 128 U. S. 438; *McCabe* v. *Matthews*, 155 U. S. 550, 553. The present case is different from *Woodmen of the World* v. *O'Neill*, *supra*, where twenty-five groundless suits were being prosecuted against the complainant, and relief of the respondent from the not very certain risk that it may have to try two suits at law upon its two contracts would, without more, hardly compensate for depriving the petitioners of their right to a trial by jury.

The bare fact that a plaintiff is threatened with two suits on the same document and having common issues has been held not to be enough to call for their trial in a single suit in equity. *Druon* v. *Sullivan*, 66 Vt. 609; 30 Atl. 98. There appears to be no case in this court where the relief has been granted in such a case and there are numerous cases where equitable considerations were thought to require denial of the relief even though more than two suits were involved. See *Matthews* v. *Rodgers*, *supra*, 529, 530, and cases cited.

The grounds for relief to a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real and substantial and its necessity must affirmatively appear. See *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 285, 286; *Dalton Adding Machine Co.* v. *State Corporation Comm'n*, 236 U. S. 699, 700, 701. Respondent's bill of complaint does not show that petitioners are unwilling to abide the result of a trial of one suit as controlling both; or unwilling to try first the suit in which they would be joint plaintiffs, or that in that case the judgment would not be *res adjudicata* in a subsequent suit, or in any case would not suffice to dispose of both; or that upon appropriate application the state court would not direct the trial of the controlling case first. Where the burden of which the plaintiff com-

plains is so slight he should make a more persuasive showing that it can be avoided only by resort to equity. See *Galion Iron Works* v. *Ohio Corrugated Culvert Co.,* 244 Fed. 427.

Finally it is to be noted that this tenuous ground for the exercise of equity powers is put forward as the sole medium by which suits may be withdrawn from the jurisdiction of the state courts which could not have been removed to or otherwise brought into the federal courts. While the consequences of the court's grant of equitable relief cannot affect its power, they nevertheless have an important bearing on the exercise of the judicial discretion which must guide a court of equity in determining whether it should grant or withhold a remedy which it is within its power to give. Its discretion may properly be influenced by considerations of the public interests involved. See *United States ex rel. Greathouse* v. *Dern,* 289 U. S. 352, and cases cited. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judicial sections of the Constitution. Congress, by its legislation, has declared its policy that cases involving less than the jurisdictional amount be left exclusively to the state courts, except that a judgment of the highest court of the State adjudicating a federal right may be reviewed by this Court. See *Healy* v. *Ratta, supra,* 269, 270. Courts of equity, in the exercise of their discretionary powers, should recognize this policy by scrupulous regard for the rightful independence of the state governments; and a remedy infringing that independence, which might otherwise be given, should be withheld if sought on slight or inconsequential grounds. See *Williams* v. *Pennsylvania,* 294 U. S. 176, 185; *Matthews* v. *Rodgers, supra,* 575; cf. *Central Kentucky Natural Gas Co.* v. *Railroad Commission of Kentucky,* 290 U. S. 264, 271–273; *Kennedy* v. *Tyler,* 269 U. S. 13.

We think the threatened injury to respondent is of too slight moment to justify a federal court of equity, in the exercise of its discretion, in according a remedy which would entail denial of a jury trial to the petitioners and withdraw from the jurisdiction of the state courts suits which could not otherwise be brought into the federal courts.

Reversed.

BECKER STEEL COMPANY OF AMERICA *v.* CUMMINGS, ATTORNEY GENERAL, ET AL.

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

No. 13. Argued October 17, 1935.—Decided November 11, 1935.

1. A suit in the District Court by a non-enemy claimant against the Alien Property Custodian and the Treasurer of the United States to recover the proceeds of property which was seized and disposed of under the Trading with the Enemy Act, is in substance a suit against the United States, authorized by § 9 (a) of that statute. P. 78.
2. The question whether such a suit may be maintained where the money demanded had been disbursed before suit begun, *held* not a question of the jurisdiction of the District Court, in the strict sense of its power or authority as a federal court to decide whether suit would lie, but a question of the proper construction of the statute, which that court had power to determine. P. 78.
3. Section 9 (a) of the Trading with the Enemy Act, which provides the only remedy allowed the non-enemy owner of property seized by the Alien Property Custodian upon an erroneous determination of enemy ownership, must be construed to avoid doubts of the constitutionality which would arise if the remedy were inadequate. P. 79.
4. The implication that by the appropriation of private property to public use the United States intends to make just compensation must enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. P. 79.
5. Only compelling language in a statute will be construed as withdrawing or curtailing the privilege of suit against the United

States in recognition of an obligation imposed by the Constitution. P. 80.

6. In a suit in the District Court under § 9 (a) of the Trading with the Enemy Act, a non-enemy, upon establishing his claim to property that was erroneously seized and sold by the Alien Property Custodian, is entitled to judgment upon the claim even though the proceeds are no longer "held" by the Custodian or Treasurer. *Escher* v. *Woods,* 281 U. S. 379. P. 80.
7. Section 7 (c) of the Act provides that, in the event of sale of the property by the Custodian, the claimant's remedy shall be limited to and enforced against the "net proceeds" received and "held" by the Custodian or the Treasurer. *Held* that "net proceeds" means no more than gross proceeds of the sale less charges which may rightly be deducted; and the limitation of the remedy to the net proceeds "held" by the Custodian or Treasurer refers, not to the net proceeds so held at the moment of entry of the decree, but to the proceeds so held at any time and not lawfully disbursed. P. 81.

75 F. (2d) 1005, reversed.

CERTIORARI, 295 U. S. 724, to review the affirmance of a decree of the District Court (10 F. Supp. 343) dismissing a suit against the Attorney General, as Alien Property Custodian, and the Treasurer of the United States.

Mr. E. Crosby Kindleberger for petitioner.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed, Assistant Attorney General MacLean,* and *Messrs. Wendell Berge* and *Paul A. Sweeney* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a suit against the Attorney General, as Alien Property Custodian, and the Treasurer of the United States, brought in the District Court for Southern New York under § 9 (a) of the Trading with the Enemy Act,

40 Stat. 411, as amended, 41 Stat. 977, 42 Stat. 1511,[1] to recover a balance of the proceeds of sale of certain shares of stock seized and sold by the Alien Property Custodian. An earlier suit brought for the same purpose was dismissed on the ground that the attempted revivor against the then Alien Property Custodian and Treasurer was too late. 66 F. (2d) 497; cf. *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530.

The complaint alleges, among other things not now material, that the petitioner, owner of the shares seized,

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[1] Relevant portions of the Trading with the Enemy Act are:

"Sec. 7 (c) . . . The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." [40 Stat. 1020.]

"Sec. 9 (a). That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or

was not an enemy alien; that the Alien Property Custodian, predecessor in office of the Attorney General now acting in that capacity, sold the stock for $20,000, the balance of which, after paying expenses of the sale amounting to $3,887.84, he turned over to the petitioner. Judgment is demanded for the amount paid out as expenses.

The district court granted a motion to dismiss the bill of complaint for want of jurisdiction. 10 F. Supp. 343. Its order was affirmed by the Court of Appeals for the Second Circuit on the opinion of the district court. 75 F. (2d) 1005. This Court granted certiorari because of the nature and importance of the question involved and to resolve an alleged conflict of the decision below with that of the Court of Appeals for the Ninth Circuit in *Vowinckel* v. *Sutherland,* 24 F. (2d) 196.

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other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated." [42 Stat. 1511.]

The trial court held, as is conceded here, that the suit brought against officers of the government in their official capacities is in substance a suit against the United States authorized, if at all, by § 9 (a) of the Trading with the Enemy Act. See *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591; *Henkels* v. *Sutherland,* 271 U. S. 298. That section provides that the non-enemy claimant "may institute a suit in equity . . . in the district court . . . to establish the interest, right, title . . . so claimed," and that "if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States." These provisions the district court construed as granting the privilege of suit to a non-enemy only when the money or property demanded is "held" by the Alien Property Custodian or the Treasurer of the United States at the time of suit, and concluded that it lacked jurisdiction to entertain the suit since the money demanded had been disbursed before suit.

The Government urges that these clauses must be read with the requirement of § 9 (a) that after suit instituted the money or property claimed shall be retained in the custody of the Alien Property Custodian or of the Treasurer of the United States until final judgment, and also with the provision in § 7 (c) that the remedy given by the act "in the event of sale or other disposition of such property by the Alien Property Custodian shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer."

The question thus presented is not one of jurisdiction of the district court in the strict sense of its power or authority as a federal court to decide whether the suit would lie. Cf. *Sperry Gyroscope Co.* v. *Arma Engineering Co.,* 271 U. S. 232; *Smyth* v. *Asphalt Belt Ry. Co.,* 267

U. S. 326; *Timken Co.* v. *Pennsylvania R. Co.*, 274 U. S. 181, 185; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305. It had power to determine whether the suit was one permitted by the statute and the only question presented now is whether its decision is erroneous.

Section 7 of the Trading with the Enemy Act conferred on the Alien Property Custodian authority summarily to seize property upon his determination that it was enemy owned, and such a seizure was lawful even though the determination were erroneous. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554; *Stoehr* v. *Wallace*, 255 U. S. 239; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51. But in thus authorizing the seizure of property as a war measure Congress did not attempt the confiscation of the property of citizens or alien friends. See *Henkels* v. *Sutherland, supra*, 301. Instead by § 9 (a) it gave to the non-enemy owner the right to maintain a suit for the recovery of the seized property or its proceeds, and at the same time, by the all-inclusive language of § 7 (c) it denied to him any other remedy.

The seizure and detention which the statute commands and the denial of any remedy except that afforded by § 9 (a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it. See *Henkels* v. *Sutherland, supra; Central Union Trust Co.* v. *Garvan, supra*, 566, 569; *Stoehr* v. *Wallace, supra*, 246. Plainly inadequate would be a remedy which could be availed of only while the Custodian or Treasurer continued to retain possession of the seized property or its proceeds, and which would be lost whenever he disposed of the property and proceeds, whether lawfully or not. In determining whether the remedy given is thus restricted it must be presumed that Congress intended that it should be constitutionally sufficient. The implication that by the appropriation of private property to public

use the United States undertakes to make just compensation for it, see *United States* v. *Lynah,* 188 U. S. 445, 471; *Jacobs* v. *United States,* 290 U. S. 13; *Perry* v. *United States,* 294 U. S. 330; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. See *Lynch* v. *United States,* 292 U. S. 571, 586, 587; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489. Hence § 9 (a) must be broadly construed to give effect to its remedial purpose, see *Miller* v. *Robertson,* 266 U. S. 243, 248; *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 471, 472.

In the present state of the record it is unnecessary to inquire whether the effect of the act is to sanction in every case the sale of the property of a non-enemy giving him recourse only to the proceeds of sale. See *Sielcken-Schwarz* v. *American Factors,* 60 F. (2d) 43, 44. That question was not raised or considered below. The issue now presented is much narrower, whether the failure of the Custodian to retain possession of the seized property or its proceeds precludes all inquiry as to the propriety of the disposition which he has made of them. Such, we think, is not the effect of the provisions in §§ 7 and 9, construed in the light of constitutional obligations which we must assume Congress did not intend to ignore. Section 9 (a) is specific in permitting the non-enemy claimant to institute a suit to establish the interest, right or title claimed. "If so established" the court in terms is directed to order the satisfaction of the claim from property "held" by the Custodian or Treasurer. But these words do not deny the right to establish the claim or to

enter judgment upon it when established, even though the property is no longer held by the Custodian. Directions that the money or property be retained and used for satisfying the decree in a pending suit are not the equivalent of a command that the suit be dismissed if the property is not so retained. If they were we should be forced to the conclusion, although the court below did not go so far, that the claim could be defeated by the waste or dissipation of the seized property by the Custodian at any time before judgment, after suit brought, as well as before.

Nor does the provision in § 7 that the remedy in the event of sale is to be limited to the net proceeds of sale "received therefrom and held" by the Custodian preclude inquiry whether amounts expended were lawfully charged against the gross proceeds. *Escher* v. *Woods,* 281 U. S. 379. "Net proceeds of sale" thus means no more than gross proceeds less charges which may be rightly deducted and we think that the direction that the remedy is to be limited to net proceeds "held" by the Custodian must be taken, not in the narrow and restricted sense as indicating only the proceeds retained by him at the precise moment of entering the decree, but as signifying proceeds held by him at any time and not lawfully disbursed. Such a construction does no violence to the language of the act and conforms to and is supported by its dominant purpose, often recognized by this Court, to give to citizens and alien friends an adequate remedy for invasions of their property rights in the exercise of the war powers of the Government. Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies.

In *Escher* v. *Woods, supra,* the Custodian had paid the proceeds of sale of non-enemy property into the treasury

of the United States after deducting 2% which he had paid into a fund to be used for paying the expenses of his office during the period of administration; expenses not shown to be rightly chargeable against the proceeds of sale. In allowing recovery of the amount improperly deducted the right to recover was not thought to turn on whether the expenses had or had not been in fact paid out by the Custodian. This Court placed its decision on the broad ground that under the statute the unlawfulness of the charges made by the custodian against the proceeds of sale of non-enemy owned property is open to judicial inquiry and that the limitation of recovery to net proceeds did not permit an unauthorized outlay to be deducted from the proceeds of sale.

We intimate no opinion as to the lawfulness of the deducted expenditures. We decide only that the right to challenge them is not lost because they have been made.

We do not pass upon the validity of the defense of the Statute of Limitations and others, the possibility of which is suggested by the allegations of the bill of complaint. Even if raised by the government's motion to dismiss for want of " jurisdiction of the persons of the defendants or of the subject matter of the action " they were not considered below or urged here. Whether, in a suit brought under the Trading with the Enemy Act against the Alien Property Custodian, these defenses go to the jurisdiction, as has been held in the case of the defense of the Statute of Limitations in a suit against the United States under the Tucker Act, see *Compagnie Generale* v. *United States,* 51 F. (2d) 1053, 1056; cf. *Finn* v. *United States,* 123 U. S. 227, or whether they go only to the merits, are questions which have never been decided. They have not been argued here. We think we should not undertake to decide them in the present posture of the case. *Scott* v. *Armstrong,* 146 U. S. 499, 512, 513.

Reversed.

MR. JUSTICE ROBERTS, dissenting.

Although I do not disagree with the opinion of the Court respecting the meaning of the word "held" as found in § 9 (a) of the Trading with the Enemy Act, I think we should not decide the point in this case. The order of the District Judge dismissing the action for want of jurisdiction was right notwithstanding he may have been in error as to the necessity of actual possession of the property or its proceeds by the Government's representatives at the date of suit.

The action is clearly one against the United States [1] and consent to be sued evidenced by Act of Congress is essential to jurisdiction. The question is whether such consent has been given. Whatever view may be taken of the nature of the action as disclosed by petitioner's pleading the answer must be in the negative.

The Government has consented to be sued as is evidenced by § 9 (a). It appears by petitioner's own declaration, however, that it availed itself of the privilege of suit thus granted and recovered a judgment for the full amount of the proceeds of the stock which had been seized by the Alien Property Custodian. The present action is a second suit to recover another judgment for a portion of the same money embraced in the former judgment. I fail to find any indication in the Act that Congress intended to afford a claimant two suits and two judgments for the same moneys.

Entirely apart from the provisions of the Trading with the Enemy Act, however, the District Court is without jurisdiction to permit a second action for a sum admittedly embraced in a judgment which is of record in that court.

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[1] *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 602; *Von Bruning* v. *Sutherland*, 58 App. D. C. 258; 29 F. (2d) 631; *Henkels* v. *Sutherland*, 271 U. S. 298, 301.

Suit cannot be maintained under the Tucker Act as amended.[2] The six year limitation on suits against the Government is not merely a defence to be pleaded or waived but is jurisdictional.[3] The sale of the property by the Custodian and the recovery of the first judgment for the proceeds of the sale both occurred more than six years prior to the institution of this action. Moreover, the express provision of § 7 of the Trading with the Enemy Act, that the sole relief and remedy of any person having a claim under the Act shall be that afforded by the Act, precludes a suit for the property or the proceeds of it under the Tucker Act.[4]

The complaint asserts that the judgment recovered for the entire proceeds of the sale of plaintiff's stock has been formally released and satisfied. The satisfaction is said to have been obtained by duress. If the present proceeding be viewed as an action on the judgment the satisfaction is a bar to its maintenance; if treated as an appeal to the equity powers of the Court to set aside the release and satisfaction the Tucker Act is not a consent to the prosecution of such an action in the District Court.[5]

I think it idle to remand the case to the District Court merely because of an erroneous reason assigned in support of the order of dismissal, since the suit will again have to be dismissed for the lack of jurisdiction. I should, therefore, affirm the order of the District Court.

MR. JUSTICE SUTHERLAND concurs in this opinion.

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[2] U. S. Code, Tit. 28, § 41 (20).

[3] *Ford* v. *United States,* 116 U. S. 213; *Finn* v. *United States,* 123 U. S. 227; *United States* v. *Wardwell,* 172 U. S. 48; *Campagnie Generale* v. *United States,* 51 F. (2d) 1053, 1056.

[4] Compare *Johnson* v. *United States Shipping Board,* 280 U. S. 320; *Mara* v. *United States,* 54 F. (2d) 397.

[5] *United States* v. *Jones,* 131 U. S. 1; compare *Holmes* v. *United States,* 78 Fed. 513; *New England Furniture & Carpet Co.* v. *United States,* 2 F. Supp. 650.

Syllabus.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CITY BANK FARMERS TRUST CO., TRUSTEE.

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

No. 10. Argued October 15, 1935.—Decided November 11, 1935.

1. Section 302 (d), Revenue Act of 1926, which includes in the gross estate any interest in property of which the decedent has at any time made a transfer, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, "either by the decedent alone or in conjunction with any other person, to alter, amend, or revoke," applies to a transfer which was complete when made but subject to be altered or revoked by the transferor with the consent of another person who was himself a beneficiary of the transfer. P. 87.
2. When the language of a statute is plain, there is no occasion for construction or for referring to committee reports. P. 89.
3. As applied to transfers in trust made after its enactment, § 302 (d) is not arbitrary or unreasonable. P. 89.
4. The purpose of Congress in adding clause (d) to the section as it stood in an earlier Act, was to prevent avoidance of the tax by the device of joining with the grantor in the exercise of the power of revocation someone who he believed would comply with his wishes. Congress may well have thought that a beneficiary who was of the grantor's immediate family might be amenable to persuasion, or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estate. P. 90.
5. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. P. 90.

74 F. (2d) 242, reversed.

CERTIORARI, 295 U. S. 723, to review a judgment affirming an order of the Board of Tax Appeals, 29 B. T. A. 1141, overruling an increase of estate tax assessment.

Mr. David E. Hudson, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. Russell L. Bradford, with whom *Messrs. Carl Taylor* and *George H. Craven* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Revenue Act of 1926, § 302 (d),[1] provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

The questions for decision are whether the section requires inclusion in the gross estate of the value of the corpus of a trust established in 1930 where the creator reserved a power to revoke or modify, to be exercised jointly with a beneficiary and the trustee; and whether, if such value is to be included in the gross estate, the section offends the Fifth Amendment.

By a writing dated February 21, 1930, Gertrude Feldman James, a non-resident citizen, transferred securities to the respondent as trustee, the trust to last during the lives of her two daughters or the survivor of them. The

[1] C. 27, 44 Stat. 9, 70; U. S. C. App., Tit. 26, § 1094.

income was to be paid to her until her death, or until the termination of the trust, whichever should first occur. After her death, her husband surviving, the income was to be paid to him. If he did not outlive her, or upon his death, the income was to be distributed amongst their issue per stirpes. At the termination of the trust the corpus was to be delivered to the husband, if he were alive; if not, to the settlor, if living, or, if she were dead, to the beneficiaries at that time entitled to receive the income; if there were none such, to the heirs at law of the husband. The trust was irrevocable save that the settlor reserved the right to modify, alter or revoke it, in whole or in part, or to change any beneficial interest, any such revocation or alteration to be effected with the written consent of the trustee and her husband or, if the husband were dead, of the trustee and her husband's brother. If they could not agree the decision of the husband or of the brother, as the case might be, was to be final. Samuel James, the husband, survived the grantor, whose death occurred before the termination of the trust, and he is in receipt of the income.

The petitioner included the value of the corpus of the trust in Mrs. James' gross estate and determined a deficiency of tax. The Board of Tax Appeals reversed, holding that § 302(d) did not apply.[2] The Circuit Court of Appeals affirmed the Board's decision.[3] We granted the writ of certiorari because the decision below conflicts with that in another circuit.[4] We hold that the section covers this case and as so applied is valid.

The Circuit Court of Appeals thought our decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, required the language of the Act to be construed as tantamount to

[2] 29 B. T. A. 1141.

[3] 74 F. (2d) 242.

[4] *Commissioner* v. *Strauss*, 77 F. (2d) 401.

"in conjunction with any person not a beneficiary." So limited it is inapplicable to the trust in question.[5]

The *Reinecke* case involved § 402 (c) of the Revenue Act of 1921[6] (substantially § 302 (c) of the Revenue Act of 1926) which directed the inclusion in the gross estate of all property "To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . ." It was held that a gift beyond the power of the grantor to alter, amend or revoke could not be said to take effect in possession or enjoyment at or after his death. Conversely, one which he alone held the power to revoke or modify came within the section, since, at his death, substantial interests passed from his control and were for the first time confirmed in others. The case involved nothing more than a determination whether the transfers were complete when made. If they were the statute did not reach them. Here we have a different problem, for § 302 (d) of the 1926 Act on its face embraces Mrs. James' transfer, although complete when made and thereafter beyond her own unfettered control.

The respondent says that the section ought to be construed in the light of the analogous § 219 (g).[7] The latter, part of the income tax title, is "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any

[5] Compare *White* v. *Poor*, 75 F. (2d) 35 (No. 36 of this term, *post*, p. 98), and *Helvering* v. *Helmholz*, 75 F. (2d) 245 (No. 14 of this term, *post*, p. 93); *Lit* v. *Commissioner*, 72 F. (2d) 551; *Commissioner* v. *Stevens*, 79 F. (2d) 490.

[6] C. 136, 42 Stat. 227.

[7] C. 27, 44 Stat. 9, 34; U. S. C. App., Tit. 26 § 960.

part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." The two sections have a cognate purpose but they exhibit marked differences of substance. The one speaks of a power to be exercised with one not a beneficiary; the other of a power to be exercised with any person. The one refers to a power to revest the corpus in the donor; the other has no such limitation.[8] It is true, the Report of the Ways and Means Committee on § 302 (d) said " this provision is in accord with the principle of Section 219 (g) of the bill which taxes to the grantor the income of a revocable trust." [9] But to credit the assertion that the difference in phraseology is without significance and in both sections Congress meant to express the same thought, would be to disregard the clear intent of the phrase " any person " employed in § 302 (d). We are not at liberty to construe language so plain as to need no construction,[10] or to refer to Committee reports where there can be no doubt of the meaning of the words used.[11] The section applies to this transfer.

We are next told that if the Act means what it says it taxes a transfer as one taking effect at death though made prior to death and complete when made; that to do this is arbitrary and deprives the taxpayer of property without due process.

The section was first introduced into the Revenue Act of 1924, and reënacted in that of 1926. Mrs. James created her trust in 1930. She was, therefore, upon notice of the law's command, and there can be no claim that the statute is retroactive in its application to her transfer.

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[8] Compare *Porter* v. *Commissioner*, 288 U. S. 436.

[9] H. R. No. 179, 68th Cong., 1st Sess., p. 28.

[10] *Hamilton* v. *Rathbone*, 175 U. S. 414, 419; *Thompson* v. *United States*, 246 U. S. 547, 551.

[11] *Wilbur* v. *Vindicator Gold Mining Co.*, 284 U. S. 231, 237.

The inquiry is whether it is arbitrary and unreasonable to prescribe for the future that, as respects the estate tax, a transfer, complete when made, shall be deemed complete only at the transferor's death, if he reserves power to revoke or alter exercisable jointly with another.

The respondent insists that a power to recall an absolute and complete gift only with the consent of the donee is in truth no power at all; that in such case the so-called exercise of the power is equivalent to a new gift from the donee to the donor. And so it is claimed that the statute arbitrarily declares that to exist which in fact and law is nonexistent. The position is untenable. The purpose of Congress in adding clause (d) to the section as it stood in an earlier act was to prevent avoidance of the tax by the device of joining with the grantor in the exercise of the power of revocation someone who he believed would comply with his wishes. Congress may well have thought that a beneficiary who was of the grantor's immediate family might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estate. Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted are appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed.

Illustrations are not lacking of cases falling on either side of the line.

Congress may require that property transferred in contemplation of death, although the transfer is so remote in time as not to comply with the requirements of a gift *causa mortis,* shall nevertheless be treated as part of the estate for purposes of taxation: this for the prevention of evasion and the giving of practical effect to the exercise of admitted power.[12] This is true despite the fact that the statutory prescription embraces gifts *inter vivos* which are in fact fully executed, irrevocable and cannot be defeated.[13]

Although property received by gift from another is capital in the hands of the donee, the gain upon a sale may be measured by the cost to the donor rather than the value at the time of acquisition by the donee.[14]

It is competent for Congress, in order to avoid the evasion of tax, to declare that when one has placed his property in trust subject to a right of revocation in himself and another who is not the beneficiary he shall, nevertheless, be deemed to control the property in such sense that the income therefrom shall be treated as his income for the levying of a tax.[15] So also where an irrevocable trust is established to pay for insurance on the settlor's life, to collect the policy upon his death, and to hold or apply the proceeds for the benefit of his dependents, Congress may declare the income of the trust fund taxable to the settlor as part of his own income.[16]

In the instances cited the power to levy an excise upon the testamentary transfers or to tax income was conceded.

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[12] *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Milliken* v. *United States,* 283 U. S. 15, 20; *United States* v. *Wells,* 283 U. S. 102, 116.

[13] *United States* v. *Wells, supra.*

[14] *Taft* v. *Bowers,* 278 U. S. 470, 483.

[15] *Reinecke* v. *Smith,* 289 U. S. 172, 177.

[16] *Burnet* v. *Wells,* 289 U. S. 670.

To effectuate the exercise of this admitted power and to prevent evasion Congress was held to have acted reasonably in including within the sweep of the statute a status or an act not normally within its reach.

There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity. Thus it has been held that an act creating a conclusive presumption that a gift made within two years prior to death was made by the donor in contemplation of death, and requiring the value of the gift to be included in computing the estate of the decedent subject to transfer tax, is so grossly unreasonable as to violate the due process clause of the Fifth Amendment.[17] In the same category falls a statute seeking to tax the separate income of a wife as income of her husband.[18]

In view of the evident purpose of Congress we find nothing unreasonable or arbitrary in the provisions of § 302 (d) of the Revenue Act of 1926 as applied in the circumstances of this case. It was appropriate for Congress to prescribe that if, subsequently to the passage of that Act, the creator of a trust estate saw fit to reserve to himself jointly with any other person the power of revocation or alteration, the transaction should be deemed to be testamentary in character, that is, treated for the purposes of the law as intended to take effect in possession or enjoyment at the death of the settlor.

The judgment is

Reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER are of opinion that the judgment should be affirmed.

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[17] *Heiner* v. *Donnan,* 285 U. S. 312. Compare *Schlesinger* v. *Wisconsin,* 270 U. S. 230.

[18] *Hoeper* v. *Tax Commission,* 284 U. S. 206.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HELMHOLZ.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 14. Argued October 15, 16, 1935.—Decided November 11, 1935.

1. Members of a family—the two parents and their children—transferred the stock of the family corporation under a trust instrument, which provided for paying the net dividends to them and their issue during the existence of the trust, and for disposition of the shares upon its termination. The trust was to terminate (1) If the parents had died, upon the death of their last surviving grandchild; or (2) upon delivery to the trustee of a writing, signed by all of the then beneficiaries, declaring it at an end; or (3) upon unanimous vote of the directors of the corporation, so declaring; or (4) if the corporation were dissolved for any cause provided by law; and upon the happening of any of these events, the stock was to be distributed among the beneficiaries then entitled to receive the dividends. Upon the extinction of the issue of the parents, they being then also dead, the stock was to be turned over to a charitable trust. *Held,* that none of these provisions for termination of the trust was a power to " alter, amend or revoke " the transfer within the meaning of the Revenue Act of 1926, § 302 (d). P. 96.
2. A provision in a trust indenture that the trust shall terminate when all beneficiaries join in so declaring, merely expresses a condition which the law itself imposes; this is not a power " to alter, amend or revoke," within the meaning of § 302 (d), Revenue Act, 1926. P. 97.
3. Section 302 (d) of the Revenue Act of 1926 would violate the Fifth Amendment if applied to a transfer in trust, made before its enactment, which was complete when made, and which left no power in the grantor to revoke, alter or amend without the consent of other beneficiaries of the trust. P. 98.

75 F. (2d) 245, affirmed.

CERTIORARI, 295 U. S. 724, to review the affirmance of a decision of the Board of Tax Appeals, 28 B. T. A. 165, disapproving an increase of estate tax assessment.

Mr. David E. Hudson, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. James Quarles, with whom *Messrs. Louis Quarles* and *James T. Guy* were on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

This case, like *Helvering* v. *City Bank &c. Tr. Co., ante,* p. 85, arises under § 302 (d) of the Revenue Act of 1926. The respondent is administrator and sole beneficiary of the estate of his wife, Irene C. Helmholz. In 1918 she, her father and mother and her brothers and sisters joined in an indenture conveying to a trustee all of the shares of stock in the Patrick Cudahy Family Company. Her contribution was 999 shares, the dividends from which the trustee was to receive, and pay, less expenses, to Mrs. Helmholz for life, remainder to her appointee by will and remainder to her issue; and in event she or any other subscriber should die without issue the net dividends on the stock delivered to the trustee by such decedent were to be paid "to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation."

The paragraph of the indenture relative to the termination of the trust is:

"Fifth: The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of the Patrick

Cudahy Family Company and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said the Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereof other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.

" The term of the primary trust hereby created shall also terminate upon the dissolution of said the Patrick Cudahy Family Company in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets of shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

" The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said the Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to have and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration pre-

scribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided."

Irene C. Helmholz left a will bequeathing all her property to respondent. The Supreme Court of Wisconsin held this a valid exercise of her power of appointment under the trust deed. [*First Wisconsin Trust Co.* v. *Helmholz,* 198 Wis. 573; 225 N. W. 181.] The petitioner determined that the value of the 999 shares should be included in her gross estate. The Board of Tax Appeals reversed this determination.[1] The United States Court of Appeals for the District of Columbia, to which an appeal was taken pursuant to stipulation for hearing by that court, affirmed the Board.[2] We granted certiorari.

What is said in *Helvering* v. *City Bank &c Tr. Co., supra,* shows that the transfer was complete when the trust was created in 1918. The features which differentiate this case are the absence of a reserved power of revocation or alteration and the retroactive operation of the Act. Either requires a decision that the corpus of the trust may not be included in the gross estate.

The words of § 302 (d) are, " where the enjoyment [of the transfer] was subject at the date of his death to any change *through the exercise of a power,* either by the decedent alone or in conjunction with any person, *to alter, amend or revoke . . .*" The agreement under consideration contains no such power as that described. Like every well drawn instrument it embodies provisions for the termination of the trust. An examination of paragraph Fifth shows that these were, in the main, such as any far-sighted settlor would employ. Since the beneficiaries were the issue of Patrick and Anna Cudahy it was natural to provide that upon the extinction of issue the trust

[1] 28 B. T. A. 165.

[2] 64 App. D. C. 114; 75 F. (2d) 245.

should terminate and the principal be turned over to a secondary charitable trust. Inasmuch as the corpus comprised only the shares of a corporation there was nothing out of the ordinary in requiring that the trust terminate upon dissolution of the company and that the proceeds of liquidation be distributed amongst the then beneficiaries. It was not unnatural to direct that the trust should end if the managers of the company should unanimously so decide. And termination upon the death of the last surviving grandchild of Patrick and Anna Cudahy, they being then deceased, is certainly not unusual.

The petitioner, however, pitches upon the only remaining event of termination, asserting it to be the equivalent of a power to revoke, or to amend, to be exercised by the settlor with others. This is found in the clause providing that the delivery to the trustee of a writing signed by all the then beneficiaries (other than testamentary appointees) declaring such purpose, shall be effective to end the trust. He points out that such a writing might have been executed by Mrs. Helmholz and her co-beneficiaries while she was alive, with the effect of revesting in her the shares which she had delivered into the trust. This argument overlooks the essential difference between a power to revoke, alter or amend, and a condition which the law imposes. The general rule is that all parties in interest may terminate the trust.[3] The clause in question added nothing to the rights which the law conferred. Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust.

Another and more serious objection to the application of § 302 (d) in the present instance is its retroactive oper-

[3] Restatement of the Law of Trusts, §§ 337, 338. We are referred to no authority to the contrary in Wisconsin, the place of the transaction.

ation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. If § 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531.

The judgment is

Affirmed.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE CARDOZO concur in the result on the ground last stated in the opinion.

WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* POOR ET AL., EXECUTORS.

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

No. 36. Argued Ocober 16, 1935.—Decided November 11, 1935.

Decedent, in her lifetime, conveyed property to herself and two others as trustees upon a trust which was terminable by joint action of the three trustees but which she, herself, reserved no power to modify. She resigned as trustee; but later, upon the resignation of her successor, was reappointed under a clause of the trust instrument providing that such vacancies could be filled by the other trustees with the approval of the beneficiaries. *Held:*

1. That the power thus acquired to participate in terminating the trust, not being in any sense a power reserved by her in the trust instrument, was not a power "to alter, amend or revoke," within the meaning of § 302 (d), Revenue Act, 1926. P. 101.

2. If that section, enacted after the date of the transfer, were deemed applicable, it would violate the Fifth Amendment. *Helvering* v. *Helmholz*, *ante*, p. 93. P. 102.

75 F. (2d) 35, affirmed.

CERTIORARI, 295 U. S. 726, to review a judgment affirming a judgment against the Collector in a suit to recover money exacted as part of an estate tax.

Mr. David E. Hudson, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. Harry LeBaron Sampson, with whom *Messrs. Alexander Wheeler* and *Edwin A. Howes* were on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case presents questions similar to those in *Helvering* v. *Helmholz, ante,* p. 93.

In 1919 Adelaide J. Sargent conveyed property to three trustees, who were herself, Arthur H. Sargent (her son), and a third person not connected with the family. Contemporaneously the trustees executed a declaration of trust by the terms of which they were to pay one-half the net income to Mrs. Sargent during her life and the other half, until her death, and after that event the whole in equal shares, to such of her three children as should be living at the time of each payment, and to the appointees of any deceased child, and in default of appointment, to the living issue of a deceased child. The trust was to terminate upon the death of the last survivor of the settlor and her three children, and thereupon the corpus was to be divided in specified shares amongst the issue, next of kin, or appointees of the children. Each child was given a general power of appointment by will over one-third of the principal. Mrs. Sargent died January 22, 1931, leaving her three children to survive her. Her will was probated and the respondents are her executors. The declaration of trust contains a power to terminate, in these words:

"This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, and a like share shall be paid over and conveyed to the appointees by will of each of her children who shall then have died making such appointment, or failing such appointment, to the issue of such deceased child then living, such issue taking by right of representation."

No power was reserved by Mrs. Sargent to modify the terms of the trust, and the recited power was never exercised.

The agreement directed that if any trustee should die, resign or be unable to act, a successor should be appointed by the surviving trustees by a written instrument approved by the then living children of Mrs. Sargent. In 1920 the settlor resigned as trustee and a daughter was appointed to fill the vacancy. After serving for one year she resigned and Mrs. Sargent was appointed to fill the vacancy thus occasioned and continued as a trustee until her death. The decedent's son, who was a trustee, had a vested interest in an undivided share of the income and a power to appoint by will his share of the income and one-third of the corpus.

The Commissioner of Internal Revenue ruled that the value of the trust principal should be included in the gross

estate. The respondents paid the tax under protest and filed a claim for refund, which the Commissioner rejected. They brought suit in the District Court, which held the transfer did not come within § 302 (c) of the Revenue Act of 1926, as one made in contemplation of death, and was not taxable under § 302 (d).[1] The court also ruled that to impose an excise tax on the transfer by a statute enacted after the transfer was complete would constitute a taking of property without due process in violation of the Fifth Amendment.

The petitioner appealed from a judgment in favor of the respondents, and the Circuit Court of Appeals affirmed, holding that the power in question was not a power to alter, amend or revoke within the meaning of § 302 (d).[2]

As in *Helvering* v. *Helmholz, supra,* the declaration of trust in this case, technically speaking, contained no power to revoke, amend or alter the trust. What the instrument did was to make it possible for the trustees acting jointly to terminate the trust at any time. The petitioner insists that as Mrs. Sargent was one of the trustees named in the declaration the power to terminate, which he views as the equivalent of a power to alter, amend or revoke, was, strictly speaking, lodged in the settlor and two other persons. He says, therefore, that these facts make the transaction taxable under § 302 (d). The respondents reply that if the section be strictly construed it applies only to a transfer where the enjoyment thereof is subject to a power to " alter, amend or revoke " and that the instant transfer was subject to no such power, but to a power to terminate. The circumstances about to be mentioned render it unnecessary to consider either contention.

Mrs. Sargent resigned as a trustee in 1920 and was succeeded by her daughter, one of the beneficiaries. When,

[1] 8 F. Supp. 995.

[2] 75 F. (2d) 35.

a year later, the daughter resigned a new trustee could be appointed only by the written nomination of the two remaining trustees with the approval of all the beneficiaries of the trust. By such concerted action Mrs. Sargent was again appointed a trustee. She then acquired any power for the future to participate in a termination of the trust, solely by virtue of the action of the other trustees and the beneficiaries and not in any sense by virtue of any power reserved to herself as settlor in the original declaration of trust. We think, therefore, that neither technically nor in substance does the power to terminate as it existed from 1921 to the date of Mrs. Sargent's death fall within § 302 (d).

What has been said in the *Helmholz* case requires a ruling that the section, if held to apply to this transfer, offends the due process clause of the Fifth Amendment.

Judgment affirmed.

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

McFEELY *v.* COMMISSIONER OF INTERNAL REVENUE.*

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

No. 24. Argued October 24, 1935.—Decided November 11, 1935.

1. The meaning of the term Capital Assets defined in the Revenue Act of 1921, § 206 (a) (6), as property "acquired and held" by the taxpayer for more than two years, was not changed by omis-

* Together with No. 110, *United States* v. *First National Bank of Boston et al.*, and No. 111, *Helvering, Commissioner of Internal Revenue,* v. *Lee,* certiorari to the Circuit Court of Appeals for the First Circuit; No. 439, *Rand* v. *Helvering, Commissioner of Internal Revenue,* certiorari to the Circuit Court of Appeals for the Eighth Circuit;

sion of the word "acquired" in the corresponding sections of the Acts of 1924, 1926, and 1928; that word in the earlier Act was surplusage. P. 107.

2. In common understanding, to "hold" property is to own it; and the length of time for which property has been "held" by its owner is computed from the date when he acquired it. P. 107.
3. Property acquired from a decedent through intestacy or general bequest is acquired and "held" from the date of the death, rather than from the date of distribution. Construing § 101 (c) (8), Revenue Act, 1928. P. 107.
4. This is true as to personal property whether, under local law, the title passes from the decedent to the legatee or next of kin at death, subject to a withholding of possession for the purposes of administration, or goes first to the personal representative, for the purposes of administration, and then passing to the beneficiary, relates back to the date of the death. P. 107.
5. The repetition in a later Revenue Act of a provision in earlier Revenue Acts which has received a uniform administrative interpretation by the Commissioner of Internal Revenue, amounts to confirmation of that interpretation. P. 108.
6. The Revenue Acts of 1924 and 1926, in dealing with the subject of capital gain or loss, defined Capital Assets as property "held" by the taxpayer for more than two years, and prescribed as the basis for determining gain or loss from a sale of property acquired by bequest, devise or inheritance, the value of the property at the time of such acquisition, i. e., at the date of the death. The Revenue Act of 1928, § 101 (c) (8), reënacted this definition of Capital Assets, but apparently because of doubts as to what might in fact be the moments of acquisition by persons holding various relations to decedents' estates, arbitrarily fixed basis dates for determining gain or loss at the time of the decedent's death for some cases, and at the time of distribution to the taxpayer, for others. Revenue Act, 1928, § 113 (a)(5). *Held,* that this alteration in basis dates does not imply an intention to make similar alterations of the origin date of the holding period prescribed for

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and No. 494, *Dibblee* v. *Commissioner of Internal Revenue,* certiorari to the Circuit Court of Appeals for the Ninth Circuit.

No. 137. *Ogle* v. *Helvering, Commissioner of Internal Revenue.* Certiorari to the Circuit Court of Appeals for the Second Circuit. Judgment reversed per stipulation of counsel to abide the decision in No. 439, *Rand* v. *Helvering, Commissioner of Internal Revenue, supra.*

Capital Assets. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, distinguished. P. 108.

7. A taxing statute, if of doubtful intent, should be construed favorably to the taxpayer. P. 111.

74 F. (2d) 1017, reversed.

76 *id.* 200, affirmed.

76 *id.* 203, affirmed.

79 *id.* 24, reversed.

75 *id.* 617, reversed.

CERTIORARI * to review judgments of the Circuit Courts of Appeals in five cases involving the right of taxpayers to have their income assessed at the special rate of 12½%, rather than the normal and surtax rates, in respect of gains from sales of stock which they had acquired from decedents through intestacy or by general bequest.

In No. 24, the judgment, 74 F. (2d) 1017, sustained an order, 29 B. T. A. 998, approving an additional assessment on gain from a sale by the donee of a widow, who had elected to take against her husband's will.

In No. 110, the judgment, 76 F. (2d) 200, reversed a judgment of the District Court, 7 F. Supp. 915, upholding an additional tax on gains from sales of stock willed to trustees by a residuary bequest. The suit was brought by them to recover the money paid.

In No. 111, the judgment, 76 F. (2d) 203, reversed an unreported Board of Tax Appeals order approving an additional tax on gains from sales of stock by a residuary legatee.

In No. 439, 79 F. (2d) 24, the judgment affirmed an unreported Board of Tax Appeals order approving an additional assessment on gains from the sale of stock acquired under the intestate laws.

In No. 494, the judgment, 75 F. (2d) 617, reversed 29 B. T. A. 1070, approving an additional assessment on gains from the sale of stock acquired by general bequest.

* 295 U. S. 727; also, *post*, pp. 564–566.

Mr. H. B. Wassell, with whom *Mr. G. F. Snyder* was on the brief, for petitioner in No. 24.

Assistant Attorney General Wideman, with whom *Solicitor General Reed* and *Messrs. James W. Morris, John MacC. Hudson,* and *Lucius A. Buck* were on the briefs, for petitioners in Nos. 110 and 111, and respondent in Nos. 24, 439, and 494.

Mr. Robert Driscoll, with whom *Messrs. J. B. Faegre, Leland W. Scott, Hayner N. Larson, Albert J. Dibblee,* and *Clark R. Fletcher* were on the briefs, for petitioners in Nos. 439 and 494.

Mr. George S. Fuller for respondents in No. 110.

Mr. Hugh W. McCulloch for respondent in No. 111.

Mr. Justice Roberts delivered the opinion of the Court.

These cases were brought here on writs of certiorari to resolve a conflict between Circuits with respect to the application of § 101 of the Revenue Act of 1928,[1] which permits taxpayers, at their option, to pay at the rate of twelve and one-half per cent. on capital net gains. Subsection (c) (8), so far as material, is: "'Capital assets' means property held by the taxpayer for more than two years . . ." Whether property acquired from a decedent through intestacy, or a general bequest, is, within the meaning of the clause, held by the taxpayer from the date of the decedent's death or from the date of distribution, is the matter in dispute.

The taxpayers are: in Nos. 110, 111, and 494, residuary legatees, in No. 24 the donee of a widow who elected to take against her husband's will, and in No. 439 one of

[1] C. 852, 45 Stat. 791, 811.

those entitled under the intestate laws. In each case the taxpayer sold the asset more than two years after the death of the decedent from whom title was derived but less than two years after distribution by the estate's representatives. In each a return was made of the profit on the sale as capital net gain taxable at twelve and one-half per cent., but the Commissioner refused to recognize the correctness of the returns and calculated the tax at the normal and surtax rates payable on ordinary income.

The Board of Tax Appeals sustained the Commissioner in four of the cases.[2] In No. 110 the tax was paid and judgment recovered in a suit for refund.[3] The Circuit Courts of Appeals of the Third, Eighth, and Ninth Circuits affirmed the action of the Board; that of the First Circuit reversed the Board in No. 111 and affirmed the judgment of the District Court in No. 110.[4]

The Commissioner contends that until actual distribution property cannot be said to be held by one having an interest in a decedent's estate, and, even if this be not true, § 113 (a) (5), making value at the date of distribution the basis for calculating gain in such cases, requires that the word "held" in § 101 (a) (8) be construed to set the same date as the time at which the holding shall begin.

The taxpayers on the other hand assert that property is, in contemplation of law, held from the date of acquisition; and one deriving property from a decedent's estate through devise, bequest or intestacy acquires the property at the date of death and holds it from that date; that so all prior acts using similar phraseology have been interpreted by the Treasury; that the reënactment of these

[2] 29 B. T. A. 998; 29 B. T. A. 1070. Two of the Board's decisions are not reported.

[3] 7 F. Supp. 915.

[4] 74 F. (2d) 1017; 79 F. (2d) 24; 76 F. (2d) 200; 76 F. (2d) 203; 75 F. (2d) 617.

without significant change constitutes a legislative confirmation of the administrative interpretation; and that § 113, having to do with the basis for the calculation of the tax, cannot alter the plain meaning of § 101 which prescribes the length of time property must be held to constitute it a capital asset. We conclude that the date of the decedent's death is that from which the period of holding should be computed.

In the Revenue Act of 1921, the first which granted a special rate of tax on capital net gain, § 206 (a) (6) defined capital assets as "property acquired and held by the taxpayer . . . for more than two years."[5] From the corresponding sections of the Revenue Acts of 1924, 1926, and 1928, the word "acquired" was omitted. "Acquired" in the phrase "acquired and held" was mere surplusage and doubtless was elided from the later acts for that reason.[6] As indicated in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 469, the omission did not change the meaning of capital assets as defined in the earlier act.

In common understanding, to hold property is to own it. In order to own or hold one must acquire. The date of acquisition is, then, that from which to compute the duration of ownership or the length of holding. Whether under local law title to personal property passes from a decedent to the legatee or next of kin at death subject to a withholding of possession for purposes of administration,[7] or passes to the personal representative for the purposes of administration,—the title of the beneficiary, though derived through the executor relating back to the

[5] 42 Stat. 233.

[6] *First National Bank* v. *United States*, 76 F. (2d) 200, 202.

[7] The taxpayers in Nos. 24, 110, 111 and 439 contend that such is the law in Pennsylvania, Massachusetts, New Hampshire and Minnesota, where the devolutions in those cases respectively occurred. See *Roberts* v. *Messinger*, 134 Pa. 298, 309; 19 Atl. 625; *Lathrop* v. *Merrill*, 207 Mass. 6, 10; 92 N. E. 1019; *Carter* v. *Whitcomb*, 74

date of death,[8]—is for present purposes immaterial. In either case, the date of acquisition within the intent of the Revenue Act is the date of death.[9]

The Commissioner has heretofore administered the section upon this theory. As respects the Revenue Act of 1921, he so ruled in 1923,[10] and again in a very full memorandum in 1924.[11] It was stated in briefs and at the bar that these rulings have never been cancelled or revoked, and the statement was not challenged. The repetition of the definition without material change in the subsequent acts, including that of 1928, amounts to a confirmation of the administrative interpretation.[12] There is nothing in the section, its history, or the administrative practice, to enlarge or alter the connotation commonly ascribed to the word "held."

The Commissioner says, however, that Congress has undoubted power to set the date of distribution as the *terminus a quo,* and that an examination of the whole statute discloses that the purpose was to alter the pre-existing rule to that end.

In support of this argument it is pointed out that § 113,

N. H. 482, 484; 69 Atl. 779; *Granger* v. *Harriman,* 89 Minn. 303; 94 N. W. 869. The opinion of the Circuit Court of Appeals in No. 494 discloses that the taxpayer asserted that the law of California was the same. The Court, however, did not discuss or decide the point, and we are referred to no pertinent authorities.

[8] See *Brewster* v. *Gage,* 280 U. S. 327, 334, and cases cited.

[9] *Brewster* v. *Gage, supra.* The question there decided arose under the Act of 1921 and was distinct from that now presented; but as concerns date of acquisition, which necessarily determines duration of holding, the decision is authority here.

[10] I. T. 1600, C. B. II–1, p. 36; I. T. 1719, C. B. II–2, p. 45.

[11] I. T. 1889, C. B. III–1, p. 70. He had made the same ruling under the Revenue Act of 1918: O. 1012, C. B. No. 2, January–June 1920, p. 34. And he so ruled in answer to an inquiry respecting the 1921 Act: Prentice Hall Tax Service, 1923, 2703–4.

[12] *Helvering* v. *Bliss,* 293 U. S. 144.

which prescribes the basis for determining capital gain or loss, radically altered preëxisting law on the subject in such a way as to show an intent to change the normal meaning of the word "held" in § 101 (c) (8). In the Revenue Acts of 1924 and 1926 the sections dealing with the basis for calculating capital gain or loss provided that in the case of property acquired by bequest, devise, or inheritance, the basis should be the fair market price or value of such property at the time of such acquisition.[13] As we have seen, in common understanding, with which the administrative interpretation was in accord, the time of acquisition in such cases is the time of the decedent's death. The date for ascertaining the basic value, and the date of commencement of the two year holding period were, therefore, under these Acts, identical. Committee Reports indicate that by reason of doubt as to what is in fact the moment of acquisition by persons having various relations to a decedent's estate, Congress resolved arbitrarily to fix the basis for the calculation of capital gain or loss.

In consequence the Act of 1928, for the language used in the earlier acts, substituted this:

"Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." § 113 (a) (5).

[13] R. A. 1924, § 204 (a) (5), 43 Stat. 258; R. A. 1926, § 204 (a) (5), 44 Stat. 14.

No change was made in the phraseology of § 101 (c) (8) from that used in prior acts defining capital assets as "property held by the taxpayer . . . for more than two years." The argument for the Commissioner is that the alteration of the basis date necessarily implies an intent to make a similar alteration in the origin date of the holding period. We think the argument cannot prevail. The Committee Reports disclose no purpose to alter the rule laid down in the earlier statutes and reënacted in § 101 (a) (8). Congress must be taken to have been familiar with the existing administrative interpretation. The fact that the two sections deal with the same general subject—capital gains—is cited in support of the Commissioner's position that they ought to be consistently applied. There is, however, nothing novel in the naming of arbitrary "basis" dates differing from the admitted dates of acquisition. The outstanding example is the use of March 1, 1913, value in certain cases for property theretofore acquired. Indeed, sub-paragraphs (A), (B), and (C) of § 101 (c) (8) fix arbitrary dates for calculation of the period of holding of capital assets, which differ from the time of actual acquisition, showing that Congress, had it desired to change the connotation of the word "held," as used in § 101 (c) (8), could readily have done so.

Counsel urge that *Helvering* v. *New York Trust Co., supra,* requires us to construe § 101 (c) (8) as fixing the same date for the beginning of the holding period as § 113 (a) (5) sets for determining the basis. We think, however, that the case is not authority here. The Act of 1921 exhibited an inconsistency in that while a donee was not permitted to tack his tenure to that of his donor, he was required to use his donor's basis. This inconsistency flowed from a literal reading of the separate sections dealing with these two subjects. Such a result the court held would run counter to the very policy and purpose of

the capital gains rate reduction, which was to encourage sales of capital assets, and would penalize the taxpayer making such sales. The departure from the strict terms of the act was justified in order to secure him the benefit intended to be conferred. The court was careful to say "The rule that where a statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one . . ." That rule was held inapplicable for the reasons stated.

Here the rule obtains that a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer.[14] To depart from the literal meaning of § 101 (c) (8) would be to penalize the taxpayer by lengthening the period during which the capital asset must be held in what is really a single ownership to obtain the advantage of the reduced tax. Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express.

The instant case is much closer to *Helvering* v. *Bliss,* 293 U. S. 144, where the Government asserted that a section in terms applicable to the taxpayer's right to make a deduction from gross income should be modified in meaning and effect by another dealing with a related topic,—related in the sense that both sections bore on the ultimate amount of the tax—independent, however, in the sense that one related to the deduction permitted in ascertaining taxable income, while the other fixed the rate of tax on a portion of such income. We refused to modify the obvious meaning of the applicable section to accord, as was claimed, with the other.[15]

[14] *Crooks* v. *Harrelson,* 282 U. S. 55, 61.

[15] Compare *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, where the taxpayer's plea for modification of the meaning of one section based upon the inconsistency with another was denied. In that case both sections had to do with depletion, the one with the calculation of the amount thereof, the other with the apportionment of depletion between the lessor and lessee.

A further argument of the Commissioner is that, since under § 101 (c) (8) (B) the period for which the taxpayer has held property, however acquired, is to include any period during which such property was held by any other person if, under § 113, the property has, for purposes of determining gain or loss, the same basis in the taxpayer's hands as it would have in the hands of such other person, it is impossible to construe § 101 independently of § 113. It is said that Congress has clearly indicated the successor in title should not have the benefit of his predecessor's tenure when he was not required to use the predecessor's basis, and, therefore, tenure and basis are so connected in the two sections that the one may not fairly be construed without reference to the other. The argument is not convincing.

The reference in sub-paragraph (B) is not to paragraph (a) (5) of § 113 but to the entire section, which embodies a number of instances of the arbitrary fixing of basis dates for ascertaining capital gain or loss. Sub-paragraph (B) has, on its face, no relevance to the facts in the cases here for decision.

We are of opinion that § 101 (c) (8) is clear on its face; that it deals solely with the tenure necessary to claim a rate of twelve and one-half per cent. on capital net gain as distinguished from the normal and surtax rate upon ordinary gain; that § 113 (a) (5) deals only with the basis for the calculation of the tax in cases falling under § 101 (c) (8); that the sections are not inconsistent and that each should be read as affecting the subject to which alone it applies.

No. 24. Judgment reversed.
No. 110. Judgment affirmed.
No. 111. Judgment affirmed.
No. 439. Judgment reversed.
No. 494. Judgment reversed.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE CARDOZO think that the judgment in each of these cases should go for the Government on the ground succinctly stated in the opinion of the Circuit Court of Appeals of the Second Circuit, in *Ogle* v. *Helvering*, 77 F. (2d) 338.

SCHUYLKILL TRUST CO. *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 3. Argued October 14, 1935.—Decided November 11, 1935.

1. A corporation made liable in the first instance for a state tax on its shares, which it may pay from its funds or collect from the shareholders, but for which no lien is given either to the corporation or to the State, has a standing to contest the validity of the tax. P. 118.
2. Much weight attaches to the characterization of a state tax, or the interpretation of a state law, by the State Supreme Court, but where a federal question is involved, this Court must determine for itself the true nature of the tax by ascertaining its operation and effect. P. 119.
3. A Pennsylvania tax, levied in the first instance on a trust company and in terms a tax upon its shares, was measured by so much of the company's net assets as remained after deducting the amounts represented by shares owned by it in Pennsylvania corporations which were already taxed or were exempted by the state law. No corresponding deduction was made on account of nontaxable bonds of the United States and of its instrumentalities, or on account of national bank shares already taxed as permitted by R. S., § 5219. *Held* invalid as discriminating against the federal securities and national bank shares. Pp. 119, 120.
4. Whether a federal question, urged to this Court on an appeal from the Supreme Court of a State, was raised in that court, is itself a federal question which this Court must decide by an examination of the record. P. 121.

315 Pa. 429; 173 Atl. 309, reversed.

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APPEAL from a judgment affirming a judgment for a tax entered by the Court of Common Pleas of Pennsylvania, 38 Dauphin Co. Rep. 22, upon an appeal from a tax assessment.

Mr. John Robert Jones for appellant.

Mr. Manuel Kraus, Deputy Attorney General of Pennsylvania, with whom *Mr. Charles J. Margiotti,* Attorney General, was on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellant, a trust company organized under the laws of Pennsylvania, challenges a statute of the State as construed and applied in the assessment of a tax for the year 1930, denominated a tax on shares. From a settlement made against the company by the Department of Revenue an appeal was taken to the Court of Common Pleas of Dauphin County, which, after trial without a jury, entered judgment in favor of the Commonwealth.[1] The Supreme Court of Pennsylvania affirmed the judgment.[2] The appellant's contention is that the Act, as so construed and applied by the Department and the courts, discriminates against United States Government bonds, bonds of federal instrumentalities, and national bank stocks, included in the appellant's assets. The appellee replies that the tax is upon the shares of stock as such, and not upon the assets which represent their value; that, in fact, no tax whatever, much less a discriminatory tax, has been levied upon exempt assets of the company.

Prior to the year 1907 Pennsylvania trust companies were liable for what is known as a capital stock tax, levied upon the corporation. In the administration of

[1] 38 Dauphin County Reports, 22.

[2] 315 Pa. 429; 173 Atl. 309.

that form of exaction certain securities, such as United States bonds and national bank shares, are eliminated from tax by deduction of their value from the value of the total assets of the corporations which own them. The deduction of exempt securities is made to avoid double taxation, the theory being that the shares issued by a corporation and its capital stock are identical, so that taxation of the one is taxation of the other.[3]

On June 13, 1907, the General Assembly adopted an act prescribing another method of taxation in the case of trust companies. Its pertinent provisions are copied in the margin.[4] This statute in terms lays a tax upon shares rather than upon corporate assets. The value of each share is to be ascertained by adding the value of capital stock paid in, surplus, and undivided profits, and dividing the total by the number of outstanding shares. Thus the exaction is measured by the value of the company's net assets. This involves the exclusion of corporate liabilities from the measure of value to which the rate is to be applied.[5] By successive amendments it was di-

[3] *Commonwealth* v. *Standard Oil Co.*, 101 Pa. 119, 145; *Commonwealth* v. *Fall Brook Coal Co.*, 156 Pa. 488; 26 Atl. 1071; *Commonwealth* v. *Pennsylvania R. Co.*, 297 Pa. 308, 314; 147 Atl. 242; *Commonwealth* v. *Eastern Securities Co.*, 309 Pa. 44; 163 Atl. 157.

[4] "Section 1. That from and after the passage of this act, every company . . . shall . . . make to the Auditor General a report in writing . . . setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided; and thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. . . ." [L. 1907, Act No. 512, p. 640.]

[5] *Commonwealth* v. *Union Trust Co.*, 237 Pa. 353, 355, 356; 85 Atl. 461.

rected that the value of each share of stock should be ascertained by adding together *so much of* the amount of capital stock paid in, surplus, and undivided profits *as is not invested in the shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, or relieved from the payment of capital stock tax or tax on shares,* and dividing the sum by the number of outstanding shares.[6] These amendments were combined with the original act, in a single statute of April 25, 1929.[7]

Obviously, the theory of the amendments was that as trust companies, so long as they had been liable for capital stock tax, had been exempted from payment of tax reckoned upon assets which had already paid a tax or were exempt from tax,—that is, the stock of corporations of Pennsylvania which had paid a capital stock tax or whose shares had been taxed or had been exempted from tax,—it was proper, in levying a tax upon the shares of trust companies reckoned upon the net assets of those companies, to exempt from such net assets so much thereof as represented shares of corporations which had already paid a tax or, under the policy of the Commonwealth, had been exempted.

The impost as laid by the Act of 1907 was a true tax on shares and not a tax upon the assets of trust companies. Such an exaction is not a tax upon United States securities owned by the corporation whose shares are taxed or upon securities exempt from taxation because issued by instrumentalities of the Federal Government.[8]

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[6] Act of July 11, 1923, P. L. 1071–72. Act of May 7, 1927, P. L. 853, 855.

[7] P. L. 673. The Act of April 9, 1929, P. L. 343, §§ 807 and 1705 (the so-called Fiscal Code), did not alter the substance of the law but merely affected the executive agencies which were to administer it.

[8] *Van Allen* v. *Assessors,* 3 Wall. 573; *Cleveland Trust Co.* v. *Lander,* 184 U. S. 111; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103.

It will be observed that by the amendments to the Act of 1907 the measure of the tax is not in any sense the value of the shares as such, but a value reflected by *so much* of the net assets as is not represented by shares of Pennsylvania corporations already taxed or exempt from tax. In the administration of the act as amended the procedure which has been followed and approved [9] is first to deduct the liabilities from the total assets, thus arriving at the net assets. The theory has been that exempt shares owned by the trust company must be shown to have been actually purchased out of capital stock or surplus in order to obtain a deduction of their full value from the gross assets. If the company is unable to demonstrate that they were purchased in that manner, then a proportional method of deduction is adopted. This is to apply to the taxed value of all such exempt securities a fraction the numerator of which is the net assets and the denominator the gross assets. The result of applying this fraction to the taxed value of exempt shares is said to give the proportion of those exempt shares attributable to capital, surplus, and undivided profits, and the quotient is accordingly deducted from the value of the net assets to obtain the measure of the tax on all the shares, and this, divided by the number of outstanding shares, gives the measure of the tax for each share. In the instant case the trust company held amongst its assets shares of Pennsylvania corporations, exempt from tax, of the value of $135,787. It also held shares of the Philadelphia National Bank of the value of $20,202. These were found by the Department of Revenue to have been taxed at a total taxable value of $71,373. Applying the fractional formula mentioned, it was found that $8,886 of their taxable value should be attributed to capital, surplus and undivided profits, and deducted from the

[9] *Commonwealth* v. *Hazelwood Savings & Trust Co.*, 271 Pa. 375; 114 Atl. 368.

amount of the net assets. As the net assets had been ascertained to be $467,714 the deduction brought this figure down to $458,028, to which the rate of tax of five mills was applied.

It should be stated that under the Act the corporation is required to make a report as the basis for the calculation of the tax, and, upon that report, the Department of Revenue settles the tax which is assessed against the corporation. The trust company, and not the stockholders, is liable in the first instance for the tax. Though given the right to pay the tax from its funds or to collect the amount from its stockholders, neither the company nor the Commonwealth is given any lien upon the stock for the amount of the tax. As the obligation to pay the Commonwealth is that of the company, its interest and its right to contest are beyond question.

In specifications of objection filed with its appeal from the tax settlement in the Court of Common Pleas, the trust company insisted that all exempt shares (including the shares of the Philadelphia National Bank) should be deducted from the gross assets in full. This would exempt their full value rather than a proportion of their taxed value as ascertained by the use of the proportional method above described. The further objection was made that the method of settlement adopted resulted in discrimination against exempt securities issued by the United States or other federal instrumentalities, and that these should have been deducted at their full value from the gross assets before any computation of the tax. The Common Pleas Court overruled these objections (without discussing the treatment of the national bank shares), saying, with respect to United States bonds and like exempt securities, that as the tax was a tax upon shares, and not upon the assets of the trust company, those securities had not in fact been taxed. In affirming the judgment the Supreme Court of Pennsylvania said that as

the specifications of objections had not covered the point as to national bank shares and the court below had not discussed that matter it was not open in the appellate court. As respects United States bonds, and other Federal securities, it concurred in the view of the lower court.

First. The appellant insists that as merely a portion of the net assets of the corporation is taken as the basis or measure of the tax, it cannot be upon the shares as shares. The appellee relies upon the statement of the Supreme Court of Pennsylvania that the levy is upon the shares and not upon assets. The appellant asks us to find to the contrary. We give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the State, but where a federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law. We must determine for ourselves the true nature of the tax by ascertaining its operation and effect.[10]

It is clear that the tax is not measured by each shareholder's aliquot proportion of all the assets of the company. If amongst those assets are found shares of stock of Pennsylvania corporations which, or whose shares, have been declared exempt by the State, this exemption is effected in the instant case by taking them wholly or partially out of the net assets which are the base for the tax. The appellant says this demonstrates that the tax is one upon assets. If the appellant is right the exaction operates as a discrimination against Government securities and other assets exempt under federal law. *Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313. If the tax is one truly upon that independent property evidenced by the ownership of a share of corporate stock its collection does not discriminate against United States securities.[11]

[10] *Senior* v. *Braden,* 295 U. S. 422, 429.

[11] See note 8, *supra.*

We think that the issue of discrimination is not to be resolved by a choice between the two contentions as to the nature of the tax. The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders. The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax them twice. If to measure the shareholder's tax by inclusion of these taxed or exempted securities found amongst the company's assets would be to tax the shareholder in virtue of the company's ownership of those securities, it seems clear that to refuse to exempt United States securities from the measure of the tax is to lay a tax reckoned upon their value. To put it otherwise, if to exclude securities already taxed or exempted from tax pursuant to the policy of the Commonwealth avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership. If the burden of the tax be lifted in respect of some securities (as it is by confession from those issued by certain Pennsylvania corporations) it must necessarily fall on the remaining securities owned by the company. If the tax is lifted from the shares of certain trust companies because those companies own only stocks already taxed or relieved from taxation by the State, and shares in other trust companies are taxed amongst whose assets there are United States bonds or other securities entitled to exemption because issued by federal instrumentalities, which are figured in the base of the tax, it is impossible to avoid the conclusion that the law discriminates in favor of the former and against the latter solely by reason of ownership of such federal securities.

Second. It is indisputable that the shares of stock of the Philadelphia National Bank owned by the appellant

were included in the base or measure of the tax. It is undenied that these shares had been taxed to the trust company, as permitted by R. S. 5219, and in accordance with the applicable statutes of Pennsylvania;[12] and it must be conceded that having once been taxed to their owner, the trust company, they may not again be made the base or measure of a tax to that company's stockholders. *Bank of California* v. *Richardson,* 248 U. S. 476. The trial court seems to have excluded them upon the theory that they were not within the intent of the taxing statute, which the court thought meant to exempt only shares of Pennsylvania corporations which had been taxed or relieved from tax by local law. This view the trial court appears to have abandoned in a later case,[13] where it was held that stock of a federal reserve bank was within the meaning of the Pennsylvania act and entitled to exemption. This later decision was affirmed by the Supreme Court of Pennsylvania.[14]

We are told that the matter is not open here for the reason that it was not raised on appeal to the Dauphin County court, was not discussed by that court, and consequently the Supreme Court refused to consider it. Whether the point was in fact raised in the court below is itself a federal question, and we are bound to examine the record to resolve it.[15] It appears that in the specifications of objection filed in Dauphin County court complaint was made that whereas there should have been a flat deduction of all shares of corporations theretofore taxed or exempted from tax, shares of the Philadelphia

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[12] Act of July 15, 1897, P. L. 292, as amended by Act of April 25, 1929, P. L. 677.

[13] *Commonwealth* v. *Provident Trust Co.,* 40 Dauphin County (Pa.), 146, 177.

[14] 319 Pa. 385; 180 Atl. 16.

[15] *Carter* v. *Texas,* 177 U. S. 442, 447; *Ward* v. *Love County,* 253 U. S. 17, 22.

National Bank were included in shares granted only a proportional deduction. It further appears that in accordance with Pennsylvania practice, after the trial of the cause to the court without a jury the appellant submitted requests for conclusions of law. Amongst these were requests 10 and 16, which referred specifically to the Philadelphia National Bank stock, and severally requested the court to find (a) that these shares having been once taxed under another act, to the trust company as owner, could not be taxed a second time, and (b) that the failure to deduct the full value of the shares from the net assets of the trust company operated to discriminate and impose a tax upon the shares of stock in violation of R. S. 5219, they having once been taxed under another statute. The court answered both these requests in writing, " Refused." The refusal of the requests was made the subject of exceptions which quoted the requests and the answers of the court verbatim. The exceptions were overruled by the court and errors were assigned to the Supreme Court of Pennsylvania to the overruling of the exceptions applicable to the refusal of the requests in question, which were again quoted verbatim, with the answer of the court to the request and the overruling of the corresponding exception. In addition to these assignments of error the appellant in the statement of questions involved, required by the rules of the Supreme Court of Pennsylvania to be made a part of the brief on appeal, amongst others set forth the following question: "Are assets consisting of national bank shares to be eliminated from consideration in determining the taxable value to which the rate of tax is to be applied by deducting their actual value from the value of the net assets? Answer of the court below No."

We think that notwithstanding the Dauphin County court, in its opinion, failed to discuss this matter, as the Supreme Court of Pennsylvania points out, the question was sharply presented to that court and decided by it, and

that the rights of the appellant were specifically preserved and pressed at every stage of the proceeding. We find, therefore, that the question is here for decision. It might well be disposed of by reference to what has already been said with respect to bonds of the United States and like securities. The discrimination here disclosed is, however, more obvious than in the case of the other securities mentioned. The Commonwealth of Pennsylvania elected to exempt certain shares of stock of its own corporations because they had already been taxed. It exempted them because to include them in the base would be in effect to tax them a second time. The shares of the Philadelphia National Bank had also been taxed pursuant to R. S. 5219, and if they were to be treated on an equal footing with shares of domestic corporations the State was bound to afford them a similar exemption from a second exaction.

Third. The appellant argues that if, as declared by the Supreme Court of Pennsylvania, the tax is one upon shares as such, it cannot be laid or collected by the Commonwealth in respect of 166 shares of stock of the appellant which by confession are owned by individual citizens and residents of states other than Pennsylvania, for the reason that such shares have no taxable situs in Pennsylvania. In view of the grounds of our decision we find it unnecessary to pass upon this contention.

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

Reversed.

MR. JUSTICE CARDOZO, dissenting.

I think the judgment under review is right in so far as it permits the inclusion of government bonds as factors of value in the assessment of the tax, and wrong only in so far as it violates a provision of § 5219 of the United States Revised Statutes by the inclusion of shares in the Philadelphia National Bank.

The tax in controversy is not laid upon the capital of the trust company. It is laid upon the shares, payment being made in the first instance by the corporation as the agent of the shareholders with a remedy over for moneys so advanced. *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 518; *Commonwealth* v. *Merchants & Manufacturers National Bank,* 168 Pa. 309; 31 Atl. 1065; affirmed 167 U. S. 461; *Commonwealth* v. *Mortgage Trust Co.,* 227 Pa. 163; 76 Atl. 5; *Commonwealth* v. *Union Trust Co.,* 237 Pa. 353; 85 Atl. 461; *Northern Trust Co.* v. *McCoach,* 215 Fed. 991; cf. *National Bank* v. *Commonwealth,* 9 Wall. 353, 362; *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440, 444, 445. The tax being laid upon the shares, and not upon the capital, the Constitution does not make it necessary in the assessment of the tax to reduce the value of the shares to the extent that bonds of the national government are included in the capital. This is settled law. *Van Allen* v. *Assessors,* 3 Wall. 573; *Cleveland Trust Co.* v. *Lander,* 184 U. S. 111; *Des Moines Bank* v. *Fairweather,* 263 U. S. 103, 112; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 390.

The argument for the appellant is that the tax might have been lawful if the shares had been valued without any deductions growing out of the nature of the capital, but that the moment a deduction was allowed in respect of any class, there was an unlawful discrimination against government securities unless the deduction was enlarged and made applicable to them. The attack is thus confined to amendments of the act which were placed upon the statute books in three years (1923, 1927, 1929), for there was no deduction of any kind under the act as first adopted in 1907. These amendments provide that the assessment shall be reduced by deducting therefrom (1) such part of the assets of the trust company as is invested in shares of other corporations taxed by the Com-

monwealth of Pennsylvania upon capital or shares (1923, July 11, P. L. 1071, 1072, reënacted by 1927, May 7, P. L. 853, 855; 1929, April 25, P. L. 673, 675), and (2) such part as is invested in the shares of other corporations relieved by the Commonwealth from a capital tax or a tax on shares (1927, May 7, P. L. 853, 855; 1929, April 25, P. L. 673, 675). The purpose of the first deduction is to avoid double taxation or something akin thereto. Cf. *Commonwealth* v. *Fall Brook Coal Co.*, 156 Pa. 488, 495; 26 Atl. 1071; *Commonwealth* v. *Lehigh Coal & Navigation Co.*, 162 Pa. 603, 609; 29 Atl. 664. The purpose of the second is to promote the policy of the Commonwealth whereby particular kinds of business (i. e., the business of manufacturing corporations, laundering corporations and corporations for the processing and curing of meats) are relieved from the payment of taxes imposed on other corporations to the extent that the business so favored is carried on in Pennsylvania.* *Dupuy* v. *Johns*, 261 Pa. 40, 46; 104 Atl. 565.

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* The following is the text of the statute which defines the corporations entitled to such relief:

"And provided further, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships, and joint-stock associations, organized for laundering, for the processing and curing of meats, their products and by-products, or for manufacturing purposes, which is invested in and actually and exclusively employed in, carrying on laundering, the processing and curing of meats, their products and by-products, or manufacturing within the State, excepting companies engaged in the brewing or distilling of spirits or malt liquors, and such as enjoy and exercise the right of eminent domain; but every corporation, limited partnership, or joint-stock association organized for the purpose of laundering, or processing and curing meats, their products and by-products, or manufacturing, shall pay the State tax of five mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the laundering or manufacturing business, or the business of processing and curing meats, their products and by-

At the time of the assessment the appellant was the owner of shares in corporations that paid a tax upon their capital to the Commonwealth of Pennsylvania. Purdon's Pennsylvania Statutes, Title 72, § 1871. These shares will be described for convenience as investments in class number 1. Except for certain shares in the Philadelphia National Bank, which will be separately considered, the assets did not include an interest in corporations that paid a tax upon their shares as distinguished from one upon their capital. The appellant was also the owner, or so it will be assumed, of shares of stock in manufacturing corporations that were relieved from any tax. These shares will be described for convenience as investments in class number 2. The holding now is that the deduction of the shares of either of these classes is an act of discrimination forbidden by the national constitution unless investments in obligations issued by the national government are accorded the same favor.

I read the cases otherwise. The statute was not passed as an act of "unfriendly discrimination" (*Adams* v. *Nashville,* 95 U. S. 19; *Mercantile Bank* v. *New York,* 121 U. S. 138, 161; *Aberdeen Bank* v. *Chehalis County, supra,* at p. 461) against the national securities, nor was it passed in aid of classes of investments with which the national securities are in substantial competition. In the absence of one or other of these motives or results the prejudice, if

products, in addition to the local taxes assessed upon its property in the district where located; it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the laundering or manufacturing plant and business, or the plant and business used in the processing and curing of meats, their products and by-products: Provided further, In case of fire and marine insurance companies, the tax imposed by this section shall be at the rate of three mills upon each dollar of the actual value of the whole capital stock: Provided, That nothing in this act shall be so construed as to apply to building and loan associations chartered by the State of Pennsylvania." Purdon's Penn. Statutes, Title 72, § 1892.

any, is too remote to be forbidden. There is no room in the solution of problems of this order for doctrinaire definitions, heedless of practical results. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523, 524. "In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other." *Metcalf & Eddy* v. *Mitchell, supra,* at p. 523. A sterile formalism would quickly lead to an impasse, the activities of the states checked because of an indirect effect upon the agencies of the federal government, and the federal activities checked for fear of a like effect upon the agencies of the states. One must view the subject in a large way, if government is to go on at all. *Educational Films Corp.* v. *Ward, supra,* at p. 390 and cases there cited; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 489; *Trinityfarm Co.* v. *Grosjean,* 291 U. S. 466; *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 226; *Helvering* v. *Powers,* 293 U. S. 214, 225.

"Unfriendly discrimination" might be inferred if securities of every kind were excluded from the reckoning with the single exception of the obligations of the national government. That would be an extreme case, the conclusion hardly doubtful. Even though hostility were not so pointed as in the case supposed, there might still be an invidious distinction if securities in substantial competition with evidences of indebtedness issued by the national government had been given a preferred position. Nothing of the kind appears. "For reasons of public policy and not as an unfriendly discrimination" (*Aberdeen Bank* v. *Chehalis County, supra,* at p. 461), the value of a share in a trust company is to be ascertained by excluding from the assets the shares in other corporations that are liable to the state for a tax upon their capital. Let it be assumed, for illustration, that a trust company is the owner of shares of stock in a department store doing business in Philadelphia. Under the statutes of Pennsylvania a bus-

iness of that kind pays a tax upon its capital. A trust company does not. If it did, a hardship akin to that of double taxation would result if its interest in the department store were made use of to magnify its burden. But the process of taxation does not end at that point. By the plan of the statute the assessor passes over the trust company and lays the tax upon the shareholders. The same considerations of fair dealing and equality are then applicable to them. So at least the legislature of Pennsylvania might not unreasonably believe. Never before has it been held that out of deference or favor toward the securities of government a state is disabled from framing its system of taxation along lines of equity and justice. *Hepburn* v. *School Directors,* 23 Wall. 480, 485.

What is true of investments in class number 1 is true also of investments in class number 2. "For reasons of public policy and not as an unfriendly discrimination" (*Aberdeen Bank* v. *Chehalis County, supra*), corporations organized for laundering, for the processing and curing of meats, and for manufacturing within the state have been relieved by Pennsylvania from liability for a tax upon their capital. The motive dictating that exemption is the desire to induce capital to come or stay within the state when employed in forms of enterprise believed to be important for the good of the community. *Dupuy* v. *Johns, supra; Commonwealth* v. *Barnes Bros. Co.,* 5 Dauph. 75, 77; cf. *New York State* v. *Roberts,* 171 U. S. 658, 665, 666. In promotion of the same policy the shares of corporations thus relieved from liability for a tax are excluded from the reckoning when shareholders in trust companies are taxed upon the value of their holdings. The reckoning does not exclude the bonds or notes or other evidence of indebtedness of corporations of any kind, foreign or domestic. It does not exclude the shares of any corporation not engaged in the enumerated forms of business, except in so far as such other corporations have al-

ready paid a tax upon their capital or shares. It does not exclude the shares of manufacturing corporations except to the extent of the capital employed in Pennsylvania. The deduction is limited in range and beneficent in aim.

The situation, then, is this. Vast classes of securities—bonds and notes of every kind, as well as shares of stock in many and varied enterprises—are in the same position for the purpose of the tax in suit as government bonds and notes. The few investments that occupy a different position are not comparable in kind or in attractiveness to the obligations of the government and do not substantially compete with them. To hold that there was discrimination here in any forbidden sense is to hold that bonds and notes of the United States must be deducted from the value of the shares if there is a deduction of any form of investment, no matter how minute in amount or alien in quality. Assume, for illustration, an exemption of the shares of corporations engaged in the manufacture of books or in the sale of works of art, an exemption accorded in furtherance of a policy to foster art and letters. If the prevailing opinion stands, the policy in such a case must be abandoned or the federal bonds included. Assume again that laundering corporations only had been relieved by Pennsylvania from liability for a tax upon their capital. Laundering corporations, as we have seen, were actually relieved, but manufacturing corporations also. The prevailing opinion, if it stands, would bring us to a holding that laundering corporations could not be favored without hostility and peril to the treasury at Washington. This is to lose sight of the essence of discriminatory statutes and to stick in the bark of a hard and narrow verbalism.

From such incongruities and excesses the avenue of escape is clear. It is to be found in the acceptance of the test put forward in this opinion. The discrimination, as

has been said, must be so marked as to justify the inference that it was unfriendly in design or at the very least it must favor forms of investment that are in substantial competition with government securities. A helpful analogy is found in the taxation of national banks. By R. S. § 5219; 12 U. S. C. § 548, the several states may tax the shares of national banks, but "the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." There are many cases in this court expounding that enactment. *Hepburn* v. *School Directors, supra,* was a case where a statute of a state had given exemption from taxation to "all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate." The court assumed that the exempt investments might be ranked as moneyed capital. The tax upon the bank shares was none the less upheld. The exemption was partial only. "It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it." *Id.* at p. 485. There was no token of a hostile purpose. "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." *Ibid. Adams* v. *Nashville,* 95 U. S. 19, was a case where a municipal ordinance gave exemption from taxation to the municipal bonds. Again the ruling was that this exemption of particular property did not affect the validity of the tax upon the shares. "The plain intention of that statute [R. S. § 5219] was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power." *Id.* at p. 22. "It was not intended to cut off the power to exempt particular kinds of property if the legislature chose to do so." *Ibid. Mercantile Bank* v. *New York,* 121 U. S. 138, was a case where exemption had been given

to bonds of municipal corporations and also to deposits in savings banks. Again the protest of discrimination was unavailing to defeat the tax. After quoting from *Hepburn* v. *School Directors* and *Adams* v. *Nashville,* the court went on to say (p. 161): "The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national banks." The same note is sounded in *Aberdeen Bank* v. *Chehalis County, supra.* Even though the investments subjected to a lighter tax are to be classed as moneyed capital, this is unavailing without more to condemn the classification as unlawful. Unless the favored moneyed capital is in substantial competition with the business of national banks, the preference is innocent in aim and harmless in result. At least, the harm, if any, is too remote and dubious to vitiate the tax. *First National Bank* v. *Hartford,* 273 U. S. 548, 552; *Minnesota* v. *First National Bank,* 273 U. S. 561, 568; *Georgetown National Bank* v. *Anderson,* 269 U. S. 341, 348; *First National Bank* v. *Tax Commission,* 289 U. S. 60, 65, 66; cf. *Hibernia Savings Society* v. *San Francisco,* 200 U. S. 310, 314, 315. The conclusion is even clearer where the investment may not properly be classified as moneyed capital at all.*

Two cases, *National Life Insurance Co.* v. *United States,* 277 U. S. 508, and *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313, much relied upon by the appellant, are far beside the mark.

The first of these cases brought up a controversy as to a tax laid by Congress on the income of a life insurance company. The company was to be allowed (1) a deduc-

* For other and less direct analogies see: *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23, 28; *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245; *Rowley* v. *Chicago & N. W. Ry. Co.,* 293 U. S. 102, 111.

tion for tax exempt securities, and (2) an amount equal to 4% of its mean reserve fund, diminished, however, by the amount of the first allowance, the interest on government securities exempt under the federal law. The court held that the effect of the second allowance was to cancel the exemption conceded by the first.

The second of the two cases was one where in the view of a majority of the court a tax had been laid directly on the capital assets of the taxpayer and so on the government bonds included in the assets. It was not a case like this where the shares and not the capital were subjected to the burden.

I am unable for these reasons to discover an unlawful discrimination though the tax be assessed in accordance with the statute.

Assuming such a discrimination, I do not understand that any mandate is laid by this court upon the Supreme Court of Pennsylvania as to the choice between two methods of avoiding or correcting it.

The Acts of 1923, 1927 and 1929 prescribing the deductions, were amendatory statutes, separable, even though invalid, from the acts thereby amended. *Eberle* v. *Michigan,* 232 U. S. 700, 705; *Davis* v. *Wallace,* 257 U. S. 478, 484, 485; *Truax* v. *Corrigan,* 257 U. S. 312, 342.

If the state maintains the deductions prescribed by the amendments, it must remove the discrimination now held to be unlawful, even at the price of enlarging the deductions. *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 247. On the other hand, it may cancel the deductions altogether, annulling the amendatory acts in so far as they prescribe a new method of valuation and going back in that respect to the law previously in force. In that event the tax to be paid by the appellant will be increased instead of lessened. The choice between these curative measures must be made by the state court.

For reasons stated in *Bank of California* v. *Richardson,* 248 U. S. 476, the assessment is excessive to the extent that it includes shares of stock of the Philadelphia National Bank belonging to the Trust Company. These shares having been taxed to the Trust Company as owner could not properly be taxed again to a shareholder of the owner. *Bank of California* v. *Richardson, supra;* R. S. § 5219.

Other questions are in the case, but they are not decided in the prevailing opinion, and will not be considered here.

The judgment should be modified by directing the deduction from the assessment of the value of the appellant's shares in the Philadelphia National Bank, and as modified affirmed.

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

AMERICAN SURETY CO. *v.* WESTINGHOUSE ELECTRIC MANUFACTURING CO. ET AL.

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

No. 12. Argued October 17, 1935.—Decided November 11, 1935.

1. A bond given to the United States, pursuant to 40 U. S. C., § 270, for the faithful performance of a construction contract and for the making of prompt payment to all persons supplying the principal with labor and materials in the prosecution of the work, inures to the laborers and materialmen as obligees, together with the United States, though the claims of the Government have priority. P. 135.
2. Where a bond securing payment of the claims of materialmen was required by statute, and its full amount has been paid by the surety and applied in part satisfaction of such claims, the surety, against such claimants, has no equity to reimbursement from funds of its insolvent principal until such claims have been

settled in full; such an equity does not arise from the doctrine of subrogation, nor from an express contract of the principal, made before he became insolvent, to indemnify the surety out of those particular funds—in this case the "retained percentage" due the principal under a construction contract. P. 137.

75 F. (2d) 377, affirmed.

CERTIORARI, 295 U. S. 723, to review the affirmance of a decree of the District Court, in bankruptcy, directing that a fund belonging to the bankrupt, which had been retained by the United States as security from moneys due him under a construction contract, should be devoted to payment of claims of creditors who furnished materials for the performance of the contract, to the exclusion of the claim for reimbursement of the surety on the contractor's bond.

Mr. Hugh H. Obear, with whom *Messrs. Francis B. Carter* and *Charles A. Douglas* were on the brief, for petitioner.

Mr. Edward H. Cushman, with whom *Mr. William Fisher* was on the brief, for respondents.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A contract for drilling a well at the Naval Air Station at Pensacola, Florida, was made in November, 1930, between Melton J. Gray and the United States Government. It was drawn in the standard form. Payments were to be made in accordance with approved estimates during the progress of the work, but the contracting officer was required to retain 10% of the estimated amount "until final completion and acceptance of all work covered by the contract." The percentage might be reduced in stated contingencies. A bond was to be given for the protection of the Government and of persons supplying labor and materials. If thereafter a surety upon the

bond became unacceptable, the contractor was to furnish such additional security as might be required to protect the interests concerned.

The total contract price was $13,133.36. The bond which was executed by the contractor and by the petitioner as surety was in the penal sum of $3,940. The condition was that the principal, *i. e.*, the contractor, should perform the contract in all its terms, and in addition should "promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work." The additional obligation thus incurred is one exacted by statute. Act of August 13, 1894, c. 280, 28 Stat. 278; Act of February 24, 1905, c. 778, 33 Stat. 811; Act of March 3, 1911, c. 231, § 291, 36 Stat. 1167; 40 U. S. C. § 270. Laborers and materialmen, together with the Government, are obligees or beneficiaries of a bond so given (*Equitable Surety Co.* v. *United States*, 234 U. S. 448; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376; *Brogan* v. *National Surety Co.*, 246 U. S. 257), though the claims, if any, of the Government are to have priority of payment. 40 U. S. C. § 270.

The contractor finished the work required by the contract, but did not make payment to all persons supplying him with labor and materials. Demand was made upon the surety, which paid into court $3,940, the full amount of the penalty, for distribution among the respondents in proportion to their interests. The payment did not satisfy what was owing to them for labor and materials furnished for the well. Thereupon conflicting claims arose to the ten per cent retained by the Government in accordance with the contract. On the one hand, the surety laid claim to this reserved percentage ($2,724.23) by right of subrogation, and also and with greater emphasis by force of a covenant of indemnity received from the principal at the beginning of the work. On the other hand, the reserved percentage was claimed by the re-

spondents on the ground that the effect of the statute, the contract and the bond, when read together, was to make the equity of the surety subordinate to theirs. Out of this equity there grew, as they contended, a right or an interest which, even if not a lien in the strict and proper sense, brought kindred consequences along with it. At least a court of equity would not come to the aid of one whose equity was subordinate until claims superior in equity had been satisfied in full.

By this time Gray was a bankrupt, and a trustee in bankruptcy was in charge of his affairs. The Government turned over the fund to the trustee, who held it to abide the order of the court. No claim to any part of it was put forward by the general creditors or by the trustee in their behalf. The controversy was solely between the materialmen on the one side and the surety on the other. Indeed there is nothing to show that any other creditors than these existed. The District Court, confirming a report of a referee, gave priority to the materialmen and made a decree accordingly. The Court of Appeals for the Fifth Circuit affirmed, one judge dissenting. 75 F. (2d) 377. A writ of certiorari brings the case here.

The materialmen were creditors of the contractor, their standing as such being unchallenged in the record or in argument. The contractor was under a legal duty at the time of his insolvency to pay their claims in full. This obligation would have been his apart from any bond, the debtor-creditor relation subsisting independently. As to materialmen in that relation, the statute and the bond did not add to the extent of the contractor's obligation, though they made it definite and certain. What their effect would be when applied to materialmen not creditors of the contractor is a question not before us. The obligation of the surety, however, unlike that of the contractor, was created solely by the bond and is limited thereby and by the equities growing out of the suretyship relation.

In any suit upon the bond, at least against the surety the nominated penalty was to be the limit of recovery. Upon payment of that penalty it was to be "relieved," in the words of the statute, "from further liability." 40 U. S. C. § 270.

Liability to pay was ended, but equities growing out of the suretyship relation survived in undiminished force. Acquittance under the bond did not leave the surety at liberty to prove against the assets of the insolvent principal on equal terms with the materialmen, still less to go ahead of them. The settled principles of the law of suretyship forbid that competition. *Jenkins* v. *National Surety Co.*, 277 U. S. 258, 266. A surety who has undertaken to pay the creditors of the principal, though not beyond a stated limit, may not share in the assets of the principal by reason of such payment until the debts thus partially protected have been satisfied in full. This is the rule where the right to a dividend has its basis in the principle of equitable subrogation. "A surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied." *United States* v. *National Surety Co.*, 254 U. S. 73, 76.* If the holding were different, the surety would reduce the protection of the bond to the extent of its dividend in the assets of the debtor. *Jenkins* v. *National Surety Co., supra.* The rule is the same, and for like reasons, where the basis of the claim is the debtor's promise to indemnify, if the debtor is insolvent when the promise is enforced. *Jenkins* v. *National Surety Co., supra,* at pp. 266, 267. Cf. *Springfield National Bank* v. *American Surety Co.*, 7 F. (2d) 44. "Wherever equitable principles are called into play, as they preëminently are in determining the

* Cf. *Peoples* v. *Peoples Bros.*, 254 Fed. 489; *Maryland Casualty Co.* v. *Fouts*, 11 F. (2d) 71; *McGrath* v. *Carnegie Trust Co.*, 221 N. Y. 92, 95.

rights and liabilities of sureties and in the distribution of insolvents' estates, they likewise forbid the surety to secure by independent contract with the debtor indemnity at the expense of the creditor whose claim he has undertaken to secure." *Jenkins* v. *National Surety Co., supra,* at p. 267. This is surely so unless the contract of indemnity has the effect of a specific lien. In the absence of such a lien the reserved percentages in controversy became assets available to creditors, the respondents along with others, upon the completion of the work to the satisfaction of the Government. Insolvency supervening, the surety must be postponed in the distribution of the assets to the remedies of any claimants who are members of the class of creditors covered by the bond.

The petitioner draws a distinction between a general promise to indemnify, which would be implied if not expressed, and a promise whereby a specific fund, whether in being or to arise thereafter, is set apart or earmarked as collateral security. We are told in effect that the displacement of a lien is an exercise of power more drastic and far-reaching than the marshalling of assets where there has been no agreement for a lien. The distinction might be important if the contest were between the surety and creditors not covered by the bond or between the surety and later assignees of the security so promised. *Prairie State Bank* v. *United States,* 164 U. S. 227; *Henningsen* v. *United States Fidelity & Guaranty Co.,* 208 U. S. 404. Such is not the situation here, even though we assume in aid of the petitioner that the promise to indemnify, obscure in its terms, is to be read as amounting to a specific appropriation of the percentages reserved or of any other assets. The contest in this cause is between the surety on the one hand and on the other hand creditors of the class it has undertaken to protect. At such times the position

of the surety is not bettered though the promise is directed to particular collateral, at all events where the bond is one required by the law. What considerations may govern after payment of the penalty in full where the bond is altogether a voluntary security we do not need to inquire. Cases such as *Keller* v. *Ashford,* 133 U. S. 610, 622; *Hampton* v. *Phipps,* 108 U. S. 260, 263; and *Moses* v. *Murgatroyd,* 1 Johns. Ch. 119, 129, though they suggest an analogy, do not control, even in principle, for there the surety was in default upon his obligation to the creditor. Slight differences in the facts may cause the equities to vary, and thus vary the result. What concerns us here is the remedy available where the bond has been given under the mandate of a statute. Equity then forbids that the statutory security be whittled down indirectly by any promise of indemnity, general or specific. Debtor and surety may not effectually agree that materialmen and laborers shall have less of the general assets as the price of their right to recover on the bond. Through the bond and the statute a new relation has been established with a new set of equities, not subject to destruction at the pleasure of the principal. The integrity of that relation is in the keeping of the law.

We have no occasion to consider to what extent the creditors of the bankrupt not covered by the bond are affected by the equities of creditors so covered or by those of the petitioner with the result that their claims are to be held subordinate thereto. Cf. *Prairie State Bank* v. *United States, supra; Henningsen* v. *United States Fidelity & Guaranty Co., supra.* As we have already pointed out, the record does not show that there are any general creditors, and if any such exist, they are not complaining of the decree. Our decision must be kept within the bounds of the controversy before us.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

MR. JUSTICE ROBERTS, dissenting.

The opinion of Judge Sibley in the court below, 75 F. (2d) 380, seems to me conclusive upon the propositions that neither the common law, the contract with the Government, nor the bond furnished by the contractor, give materialmen or laborers any right of lien upon the fund or preference in distribution thereof. I also agree with his view that the indemnity contract between the contractor and the surety company (even if an assignment of a claim for retained percentages against the United States were valid, in view of R. S. § 3477), is too vague to amount to an assignment of the retained percentages; and that the surety is not entitled to subrogation either to the rights of the United States or of the materialmen and contractors. I think it clear that, in the circumstances, the amount paid by the United States into the fund in the hands of the trustee in bankruptcy is general assets of the estate and that the surety company, as respects its claim for the amount paid under its bond, and the furnishers of material and labor, are general creditors entitled to no preference or priority over each other. I think the judgment should, therefore, be reversed.

McCANDLESS, RECEIVER, *v.* FURLAUD ET AL.

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

No. 26. Argued October 21, 22, 1935.—Decided November 11, 1935.

1. Promoters of a corporation, who deal with it for their profit oppressively or in violation of statute, are chargeable as trustees. P. 156.
2. The extent to which approval of all the shareholders will relieve promoters of this liability depends upon the nature of the wrong and the interests affected. P. 157.

3. Promoters formed in Pennsylvania a corporation of low capitalization and bought all of its shares. Having full control, and acting with other agencies of their own, they greatly increased the capital stock, subscribed for part of it, and made two contracts with the corporation. By one of these the company was to buy land upon which the promoters had acquired options, and to pay for it partly in cash and partly in bonds, with a block of the new stock thrown in as a bonus. The bonds were to be part of a very large issue of bonds and notes, to be secured by mortgage of the land when the corporation got title. By the other contract, the corporation agreed to sell to the promoters the rest of the bonds and all of the notes at prices stated. They caused the bond and note issues to be offered to the public upon false representations grossly exaggerating the value of the land and calculated to mislead buyers to believe that the proceeds of the issues would all be used to buy the land for the company and to supply it with working capital. The agreements with the corporation were consummated, in effect, with moneys derived from subscriptions thus obtained for the bonds, the difficulty of taking up the options, vesting title in the corporation and making and recording its mortgage before cashing in the subscriptions being solved by one-day credits obtained from bankers, which were strictly limited and guarded to this one purpose, and which were promptly satisfied from part of the bond proceeds. The rest of the bonds, all of the notes, and the two blocks of new shares the promoters sold to the public. The result of the scheme was that the corporation owned, besides a comparatively small amount of working capital, only the land, worth less than the option price and saddled with liens securing the bonds and notes greatly exceeding its value; and much of its stock had been issued with nothing back of it; so that, at the inception of its career, the corporation was actually or virtually insolvent; whereas the promoters, by their sales of the securities as their own, had reaped large profits. Soon afterwards, the company was in the hands of a receiver.—*Held:*

(1) That the effect of these dealings with the corporation was, at the time of the conveyance, to put in jeopardy the interests of bondholders and noteholders by a diversion of the proceeds that would make their mortgage worthless; it was not within the power of the shareholders, who were also the promoters, to legalize this waste to the detriment of others. Pp. 158–160.

(2) The acts of the promoters also violated Art. 16, § 7, of the Pennsylvania Constitution and Purdon's Pennsylvania Statutes, Title 15, § 131, forbidding corporations to issue stocks or bonds except for money, labor or property actually received, and declaring all fictitious increases void. This prohibition may not be set aside by shareholders to the prejudice of creditors or other shareholders, present or prospective. P. 161.

(3) Assuming that the corporation itself, at the instance of new shareholders, could not disaffirm the fraud and seek equitable relief, its receiver is not so limited. He holds the assets to administer as a trust and may require the promoters to account for the moneys fraudulently diverted to the prejudice of creditors. P. 160.

(4) *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206, distinguished. P. 157.

(5) The liability of the promoters as trustees would exist even if their wrongful acts had not rendered the corporation literally insolvent at the beginning. P. 163.

(6) The promoters are liable to the receiver for the proceeds of the stock sales as well as the proceeds of the sales of bonds and notes. P. 164.

(7) In view of the initial fraud of the promoters and of evidence tending to prove that other parties to the suit to whom the promoters sold stock had guilty knowledge, the burden of proving *bona fide* purchase rested upon those parties as well as upon the promoters. P. 165.

(8) The promoters are liable personally for the wrongs committed through their corporate agencies. P. 165.

(9) The defendants may be credited with any legitimate expenses. P. 165.

(10) That defendants may be liable to purchasers of the securities in actions for deceit, is not a reason for denying to the receiver a recovery of the illicit profits. P. 166.

4. Cost, in and of itself, is evidence of value, especially where there is no market value. P. 158.

5. In a suit to hold promoters of a corporation as trustees of funds realized by them from securities of the corporation taken in exchange for land upon which they were secured by mortgage, there was evidence that the land was worth no more than its cost to the promoters and that the securities had been sold to the public upon fraudulent appraisals of the land and upon fraudulent representations that the proceeds would be used to purchase it for the corporation and for working capital; whereas two-fifths

of such proceeds went to the promoters. *Held* that, the burden being on the promoters to exculpate their conduct, the evidence, in the absence of contradiction or explanation, required the conclusion that the property and money acquired by the corporation was of much less value than the amount of the secured debts and that the corporation was insolvent from the beginning. P. 158.

75 F. (2d) 977, reversed.

CERTIORARI, 295 U. S. 726, to review a decree which reversed a decree of the District Court granting part of the relief sought by the receiver of an insolvent corporation in a suit to compel individuals, who had promoted it, and three of their corporate agencies, to account for profits made by selling it land and marketing its securities. The decree of the District Court is here affirmed with a modification. For an earlier phase, see 68 F. (2d) 925; 293 U. S. 67.

Mr. Ralph Royall for petitioner.

Presumptively the trial court's findings were correct. The defendant Furlaud as the promoter of the corporation stood in a fiduciary relation to it so as to be accountable for the whole proceeds of the securities of the corporation which were diverted and misappropriated. *Yeiser* v. *U. S. Board & Paper Co.,* 107 Fed. 340, 344; *New Sombrero Phosphate Co.* v. *Erlanger,* L. R. 5 Ch. Div. 73; 46 L. J. Ch. N. S. 425; 36 L. T. N. S. 222; 25 Week. Rep. 436 (1877); *Davis* v. *Las Ovas Co.,* 227 U. S. 80, 87; *Gluckstein* v. *Barnes* (1900), App. Cas. 230. *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206, and *Allenhurst Park Estates* v. *Smith,* 101 N. J. Eq. 581, distinguished. Citing: *Johnson* v. *Louisville Trust Co.,* 293 Fed. 857, 861; *Coleman* v. *Tepel,* 230 Fed. 63, 71.

The statements contained in the bond and note prospectuses were such as to impress a trust upon the proceeds of the issue of the bonds and notes for the benefit of the corporation. *Downey* v. *Finucane,* 205 N. Y. 251,

264. See also: *Gates* v. *Megargel,* 266 Fed. 811; *Ryan* v. *Ohmer,* 244 Fed. 31, 34; *Moran* v. *Standard Oil Co.,* 211 N. Y. 187, 196.

Where one delivers money to another with the intention that that other shall pay the money to a third person, a trust arises which may be enforced by that third person. *McKee* v. *Lamon,* 159 U. S. 317, 322; *Sayer* v. *Wynkoop,* 248 N. Y. 54, 59.

From a broader view of it, the relationship of the defendants to the whole subject was such as to bring about an implied trust. 2 Story Eq., 12th ed., § 1255.

Since the moneys which Furlaud's banking house received from the subscribers to the bonds and notes were held subject to a trust for the benefit of the corporation, it is difficult to see how anything which the promoters could contrive to have this insolvent corporation do could destroy its property rights as the beneficiary of this trust fund.

The accepted doctrine is that a receiver may disaffirm acts of the corporation or its officers which were in fraud of creditors even though there might be a good defense to the suit as against the corporation itself. *Casey* v. *Cavaroc,* 96 U. S. 467, 488; *Leach* v. *Grant,* 54 F. (2d) 731.

The rule has become firmly established that the receiver stands in the rights of the creditors and may undo all corporate transactions which were in fraud of the creditors' rights even though the corporation itself might not be able to do so. [Citing many cases.]

The corporation was powerless to render itself insolvent by surrendering to the defendants its right to hold them accountable to it for the proceeds which came into the hands of the defendants from the issuance of the securities of the corporation.

In the hands of the defendants all the securities were void under the Pennsylvania Constitution. The defendants at no time were in the position of stockholders, bondholders or noteholders of the corporation.

The defendant Furlaud is personally accountable for the fraudulent misappropriations. *Anderson* v. *Daley,* 38 App. Div. 505; appeal dismissed, 159 N. Y. 146; *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, 132; *Chandler* v. *Bacon,* 30 Fed. 538, 540.

The District Court properly held that the defendants as defaulting trustees were not entitled to be credited for services and disbursements in the course of defrauding the beneficiary. *Commonwealth Finance Corp.* v. *McHarg,* 282 Fed. 560; *Davis* v. *Las Ovas Co.,* 227 U. S. 80; *Dunlap* v. *Twin City Power Co.,* 226 Fed. 161.

Mr. Louis B. Eppstein, with whom *Messrs. Ira W. Hirshfield* and *Louis J. Altkrug* were on the brief, for respondents.

At the time of the sale of these properties by Kingston Corporation to Duquesne Gas Corporation, Furlaud & Company owned all of the stock of Duquesne Gas Corporation. As the result of the sale of this property by Kingston Corporation and the payment by Furlaud & Company of a sum of money, Furlaud & Company and its wholly owned subsidiary, Kingston Corporation, acquired every share of stock, every note and every bond ever issued by Duquesne Gas Corporation.

Old Dominion Copper Co. v. *Lewisohn,* 210 U. S. 206, 212, should have disposed of this case. *Gates* v. *Megargel,* 266 Fed. 811, distinguished.

Yeiser v. *U. S. Board & Paper Co.,* 107 Fed. 340, 344, and *New Sombrero Phosphate Co.* v. *Erlanger,* L. R. 5 Ch. Div. 73; 46 L. J. Ch. N. S. 425; 36 L. T. N. W. 222; 25 Week. Rep. 436 (1877), do not limit the doctrine of the *Lewisohn* case. Both were urged upon this Court in the *Lewisohn* case, and were disposed of on the ground that in those cases, at the very time when the promoters carried through their transactions, there were in existence innocent non-assenting stockholders to whom no disclosure of the true situation had been made. *Davis* v. *Las*

Ovas Co., 227 U. S. 80, was similar. Such cases are irrelevant where the corporation dealt only with its organizers. *Ball* v. *Breed*, 294 Fed. 227; cert. den. 264 U. S. 584. See *Blum* v. *Whitney*, 185 N. Y. 232, 244.

Even in Massachusetts, where the rule on this general subject is not in complete harmony with the federal rule, it is now well settled that a corporation cannot recover profits made by promoters in selling to it their own property, provided such promoters are or become the original subscribers of all of the shares of capital stock contemplated as a part of the scheme of promotion, as is admittedly true in this case. *Hays* v. *The Georgian*, 280 Mass. 10. See also: *Mile Wide Copper Co.* v. *Piper*, 29 Ariz. 129; *Allenhurst Park Estates* v. *Smith*, 101 N. J. Eq. 581; *Hoffman Motor Truck Co.* v. *Erickson*, 124 Minn. 279; *Higgins* v. *Lansingh*, 154 Ill. 301; *Tompkins* v. *Sperry, Jones & Co.*, 96 Md. 560; *Hamilton* v. *Hamilton Mammoth Mines*, 110 Ore. 546; *Turner* v. *Markham*, 155 Cal. 562; *Seymour* v. *Spring Forest Cemetery Assn.*, 144 N. Y. 333; *Wells* v. *Northern Trust Co.*, 195 Ill. 288.

In *McKee* v. *Lamon*, 159 U. S. 317, and *Sayer* v. *Wynkoop*, 248 N. Y. 54, money admittedly due to the plaintiff, was by his debtor turned over to a third party to be paid to that plaintiff.

In order that a trust in favor of a third person may come into existence, such third person must have or become entitled to an interest or a property right in the trust fund. No person delivered any property or money to Furlaud & Company with instructions to pay or deliver it to Duquesne Gas Corporation. What happened was that Furlaud & Company purchased certain securities from Duquesne Gas Corporation and paid that corporation for them. Furlaud & Company in turn sold some of the securities so purchased by it to third parties and the third parties paid it for them.

Just how did the receiver of Duquesne Gas Corporation acquire the right or power to bring suit to vindicate the personal rights of the individuals who became bondholders or noteholders of Duquesne Gas Corporation?

The complainant does not contend that he was appointed receiver of the personal rights of any individual; nor that any individual assigned his rights to him. Moreover, it does not even appear that any one had rights to be vindicated. The jurisdictional facts necessary to establish a cause of action on behalf of any of these bondholders or noteholders have neither been alleged nor proven. The court merely assumes that some one must have been misled.

Is it not elementary that in order to establish a cause of action for fraud, it is necessary to allege and prove not only (1) that certain representations were made, but (2) that they were false, and (3) that they were material? Is it not also essential to show (4) that the purchaser relied upon such representations and believed them to be true, and (5) acted upon them, and (6) that but for such reliance the persons aggrieved would not have entered into the engagement complained of?

We insist that insofar as the record in this case discloses the facts, no person is shown to have had any rights to be vindicated.

Is it not also true that even if a cause of action did accrue to some one, the person aggrieved had an election of remedies? Had he not the right to go before a court of equity to rescind the contract complained of if he so elected? Had he not the right to bring an action at law if he so elected? Does not each person so aggrieved have the separate right to make such election as in his own unrestricted judgment is in his own best interests? Is not such cause of action personal to each individual aggrieved? See *Foster* v. *Seymour,* 23 Fed. 65.

Under the facts of this case the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.

Directors of a corporation are trustees for the corporation and as such are trustees for its stockholders and creditors. Any act of theirs in violation of their obligation as trustees is, of course, actionable. We have shown that under the facts of this case no such relationship existed or could have existed as a matter of law. See *Ball* v. *Breed,* 294 Fed. 227; *Ball* v. *Chapman,* 1 F. (2d) 895; *South Penn Collieries Co.* v. *Sproul,* 52 F. (2d) 557; *Tompkins* v. *Sperry, Jones & Co.,* 96 Md. 560.

There is no allegation in the bill that charges that any wrong was practiced on any one. The contention of the petitioner that the corporation was powerless to render itself insolvent by a surrender to the defendants of its right to hold them accountable is not within the issues presented, and under the facts of this case it is unsound. *Wells* v. *Northern Trust Co.,* 195 Ill. 288; *Seymour* v. *Spring Forest Cemetery Assn.,* 144 N. Y. 333, 340.

The contention that all the securities were void under the law of Pennsylvania is not raised by the complaint and is in direct conflict with the theory upon which the case was tried.

As a matter of fact, none of the defendants in this case except Kingston Corporation ever acquired a single share of stock, a bond or a note from the Duquesne Gas Corporation, so as to them the question if otherwise sound could not be asserted. One of the leading cases following the *Lewisohn* case is *South Penn Collieries Co.* v. *Sproul,* 52 F. (2d) 537, involving a Pennsylvania corporation.

The bill was properly dismissed as to the Byron and Chaucer Corporations.

Furlaud is not personally liable in this case in any event. It nowhere appears that he personally received any of the funds paid to Furlaud & Co.

The bill shows that complainant had no title to any cause of action that could have been asserted by Duquesne Gas Corporation. *McCandless* v. *Furlaud,* 293 U. S. 67; *Mitchell* v. *Maurer,* 293 U. S. 237.

It affirmatively appears from the pleading in this case that the appointment of complainant as ancillary receiver was void.

Mr. Justice Cardozo delivered the opinion of the Court.

The suit is by a receiver of an insolvent corporation to compel its promoters and their confederates to restore illicit gains.

At the time of the challenged acts Maxime H. Furlaud was the president and principal shareholder of Furlaud & Company, Inc., a corporation now dissolved. For convenience the name Furlaud, unless qualified, will be used to designate the company. Carlos Reuter was an officer of the same corporation and a holder of a block of shares. He was named as a defendant, but was not served with process, and hence is out of the case, except in so far as his acts affect the liability of others. Kingston Corporation was a subsidiary of Furlaud and was owned and controlled by the same persons. Byron Corporation and Chaucer Corporation were closely related to Furlaud and Kingston, the wife of Maxime Furlaud being an important shareholder in Byron and the wife of Carlos Reuter an important shareholder in Chaucer.

Furlaud was known as an investment banking house, and was interested in the issue and sale of corporate securities. Particularly it was interested in a project for the formation of a company that would own and operate gas fields in Western Pennsylvania. Reuter, representing Furlaud, took options from the owners of nine separate tracts. These options, which at first were gratuitous, were acquired in the name of a subsidiary, Kingston.

Engineers were then employed to examine the fields and appraise their value. One of them, Davis, made report to his employer in February, 1930, that five of the tracts, which were afterwards acquired for about $1,300,000, had a value of about $1,700,000 at the time of the appraisal. The record permits the inference that the report was unsatisfactory to Reuter, who was hoping for a valuation that would make investment in the enterprise more attractive to the public. Accordingly the business of appraisal for the four remaining tracts was taken out of the hands of Davis and placed in charge of others. The new engineers were less conservative than their predecessor. They fixed the value of the four tracts at about $5,000,000, nearly five times the purchase price. Lands to be conveyed by Nuss for $660,000 figured in the appraisal as worth the price and a million over. A value of $850,000 was assigned to undeveloped acres which he agreed to convey for nothing. The purchase price for the nine tracts was $2,572,989; $7,000,000, or nearly that, was the appraisal for the whole. A witness for the complainant stated at the trial that the fair value of all the tracts was about $2,700,000, the cost and little more.

With the appraisals thus completed a company was organized in February, 1930, to take title to the gas fields covered by the options. This was the Duquesne Gas Corporation, now in the hands of the complainant as receiver. The options for the lands were still in the name of Kingston. Furlaud had made a payment ($45,510) to give them binding force, but title had not passed. The new company when organized had an authorized capital of 1,000 shares of no-par common stock. Furlaud subscribed for the whole issue, paying for the shares at the rate of 50 cents a share. The nominees and representatives of Furlaud were then the sole stockholders. They were also the sole directors. Provision was made after-

wards for an increase of the capital stock, but of this there will be more later.

With the options still oustanding Furlaud formed a syndicate of bankers to market the securities. The syndicate published an advertisement in a newspaper inviting subscriptions by the public to an issue of bonds and notes. There were to be $4,000,000 6% mortgage bonds (to be sold at 97½%), and $1,000,000 6½% mortgage notes (to be sold at 98%). Each circular contains the caption "purpose of issue." In the bond circular the statement is "These bonds are issued by the corporation in connection with the acquisition of properties, and to provide cash for developments, extensions and other corporate purposes." There is a like statement in the other circular as to the purpose of the notes. Investors were informed that the appraisals of the engineers covering the properties of the corporation, including working capital of $365,000, aggregate $7,038,000, the properties examined by Davis being appraised at $1,743,520, and those examined by his successors at $4,929,787. The circulars as first drafted lumped the two appraisals as if they had been the work of the two appraisers jointly. Davis objected, with the result that the appraisals became several.

In the meantime Duquesne was preparing the resolutions and agreements that would be necessary to satisfy the bankers. On March 5, 1930, the directors, still dominated by Furlaud, authorized the increase of the capital stock to 1,250,000 shares. On April 3, Furlaud subscribed for 139,000 shares at 50 cents a share. On April 7, Duquesne agreed with Kingston to take over the gas fields covered by the options as soon as Kingston got the title. The consideration was to be cash in the sum of $3,015,000 (which was $565,100 more than Kingston was expected to pay to the grantors); bonds of the par value of $1,300,-

000, part of the forthcoming issue; and 535,000 shares of no-par stock. On the same day there was an agreement between Duquesne and Furlaud whereby Furlaud agreed to take all the forthcoming mortgage notes ($1,000,000) at a price of 88%; and $2,700,000 mortgage bonds at a price of 90%. The whole issue of mortgage bonds was thus divided up between Furlaud and its subsidiary, Kingston, $2,700,000 to the one and $1,300,000 to the other. Furlaud and Kingston being one, the situation was the same in substance as if Furlaud had taken them all.

The public offering of the bonds was a spectacular success. It began on March 25. By the first week of April subscriptions of the par value of $2,350,000 were on hand, and other subscriptions were coming in from day to day. The responses made it clear that an avid and credulous public would absorb the entire issue. Furlaud could safely go ahead and exercise the options, for at the pace subscriptions were coming in the proceeds of the bonds would pay for all the gas lands and leave a handsome margin over. Even so, there was need of ingenuity to work out a plan that would synchronize the two transactions, the cashing of the subscriptions and the payment for the lands. The cash would not be paid on the subscriptions till the bonds with the deed of trust were ready for delivery, and delivery was impossible until Duquesne, the mortgagor, had title to the fields. A way had to be found for providing the money necessary to get possession of the deeds, which had been placed by the grantors in escrow with banks in Western Pennsylvania. A way had to be found also for making the proceeds of the subscriptions available as a fund that could be applied with a minimum of delay upon account of the purchase price. To those ends Maxime Furlaud made arrangements with the Central Hanover Bank & Trust Company of New York that for one day the Kingston Corporation should

have a credit with the trust company of $3,015,000, and the Furlaud Company for the same time a credit of $3,379,500. The day chosen for that purpose was April 9. The credits would be used to procure title to the lands and to supply the new corporation with a fund of working capital. The subscriptions would be used so far as possible to liquidate the credits. Precautions were taken to make certain that the credits would be applied to the expected uses and not otherwise. In the words of a witness, "the bank always had a string on the money."

The appointed day arrived. Kingston drew against the credit of $3,015,000 set up in its favor, and delivered certified checks to banks in New York with which to meet drafts drawn on those banks by the banks in Western Pennsylvania. The amount thus withdrawn was $2,449,900. On report by telephone and telegraph that the checks had been received the Pennsylvania banks released the deeds from escrow and caused them to be placed on record. Title being thereby vested in the mortgagor, the mortgage bonds were handed over to the trust company for transmission to the banking houses that had collected the subscriptions. A long queue of messengers, employed by these houses, was on hand throughout the day with checks from the subscribers for delivery against the bonds. Nearly $2,000,000 (if the defendants' figures are accepted, $1,886,330) was paid then and there upon account of the subscriptions with other payments close at hand. What was paid from these sources was turned over to Furlaud, who applied it at once toward the liquidation of the loan.

The loan had been fixed at the precise amount necessary to enable Furlaud to discharge its obligations to Duquesne. Of the credit for account of Furlaud, $2,430,000 was used to pay for $2,700,000 bonds at 90; $880,000 for $1,000,000 notes at 88; and $69,500 for 139,000 shares of stock at 50 cents a share ($3,379,500 in all). But Du-

quesne was no sooner in receipt of the money than it paid the greater part out again. Of the $3,379,500, $3,015,000 was paid back to the Trust Company to be credited to the account of Kingston. This canceled the Kingston loan, reimbursed the Trust Company for the $2,449,900 withdrawn earlier in the day to obtain title to the lands, and left $565,100 over. This balance was not kept by Kingston. It was transferred at once to Furlaud; the circuit was then complete.

Furlaud had been well assured, when it closed the title on April 9, that there would be no difficulty in disposing of every bond and note. The event justified its faith. Within a few weeks all the remaining bonds had been converted into cash. Also within a few weeks the notes had been sold in bulk for $861,097.69 to a firm of investment bankers. Even the worthless shares of stock were unloaded on the public. The shares that were to go to Kingston (535,000) and those that were to go to Furlaud (139,000) were taken in the name of Parisette, one of Furlaud's employees. Of the part belonging to Kingston, 85,000 shares were assigned to the Byron and the Chaucer companies, which sold them to the public through Bergen, a stock operator, for $850,000, $425,000 being paid to Byron and a like amount to Chaucer. What became of the other shares the record does not show.

Checks and credits have now been traced through their bewildering entanglements. None the less when the process of analysis is over, it is legitimate to forget the details, and fix our minds on the results. The situation can be simplified without obscuring its essential features. Indeed only in that way will the realities of what was done be manifest.

After all the circuits had been traveled from one company to another and back to the point of origin, what had been accomplished for Duquesne and Furlaud stood out in clear relief. Duquesne had the ownership of gas fields,

worth at cost about $2,500,000, though extravagantly appraised at many millions more. It had also $365,000 for working capital. True it had received $3,379,500, but it had paid out at once $3,015,000. The working capital was the difference ($364,500) together with $500 received for the first issue of its shares. These are the credit items that any balance sheet must show. The liabilities were the bonds and notes and the no-par shares of stock. The bonds and notes, when distributed to the public, became liens for $5,000,000, more than $2,000,000 in excess of the cost of all the assets with working capital included. The shares of stock, issued in vast quantities, had nothing of substance back of them. If cost and value were about the same, there was thus insolvency at the beginning as well as at the end, unless the proceeds of the securities were devoted to the uses of the debtor, as the circulars published in the newspaper in effect stated they would be. Nothing of the kind was done. The bonds and the notes, instead of being used by Furlaud and its allies for the benefit of Duquesne, were disposed of as their own and at a large profit to themselves. The record supports the inference that some of the shares of stock were used in the same way. The promoters and their confederates pocketed the spoils. Less than two years later the victimized company was in the hands of a receiver.

The District Judge held that the appraisal of the Duquesne assets was excessive and fraudulent. "There is little doubt," he said, "that the circulars which Furlaud & Company, Inc., issued in connection with the sale and distribution of the bonds and notes of Duquesne Gas Corporation grossly and fraudulently misrepresented the value of the property by which they were secured." He held also that by force of the statements in the circulars as to "the purpose of the issue," the proceeds of the subscriptions were chargeable with a trust for the benefit of Duquesne and the holders of its mortgage debt. He

gave judgment against Furlaud individually (the Furlaud Company was then dissolved) and also against Kingston for $1,554,779.73, with interest (a total of $1,834,640.08), which was the difference between the moneys realized by the promoters through the sale of bonds and notes ($4,492,768.73), and the amount paid to Duquesne and devoted to its proper uses ($2,937,989). He refused to give judgment against any of the defendants for the proceeds of the shares of stock. There were cross appeals to the Circuit Court of Appeals for the Second Circuit, Furlaud individually and Kingston appealing from the decree in so far as it held them accountable for the proceeds of the bonds and notes, and the receiver from so much of the decree as relieved all the defendants from liability growing out of the disposition of the shares. Upon the first hearing of the cause, the Court of Appeals declined to pass upon the merits and dismissed the bill on the ground that the appointment of the ancillary receiver was void for want of jurisdiction. 68 F. (2d) 925. This court reversed, and remanded the cause for a determination of the merits. 293 U. S. 67. Upon a second hearing in the Court of Appeals the defendants were again the victors. The court took the view that Furlaud and Kingston had acted with the knowledge and consent of Duquesne, the promoters and their agents being then the only shareholders, and that under the doctrine of *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206, the corporation, its incoming shareholders and the receiver were bound by that consent, whatever remedies might be available at the suit of a defrauded creditor. 75 F. (2d) 977. A second writ of certiorari brings the case to us again.

Promoters of a corporation stand in a fiduciary relation to it to this extent at least, that they will be chargeable as trustees if they deal with it unconscionably or oppressively or in violation of a statute, unless the liability for such misconduct has been effectually released. *Dicker-*

man v. *Northern Trust Co.*, 176 U. S. 181, 203, 204; *Brewster* v. *Hatch*, 122 N. Y. 349, 362; 25 N. E. 505; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, affirming 5 Ch. Div. 73; *Gluckstein* v. *Barnes*, [1900] A. C. 240; *Yeiser* v. *United States Board & Paper Co.*, 107 Fed. 340, 344. To what extent the approval of all the shareholders will relieve them of that burden is a question not susceptible of answer without considering the nature of the wrong and the interests affected. To some extent their position is akin to that of directors, though the limits of their duty are less definite and certain. Even for erring directors, however, there may at times be absolution if all the shareholders are satisfied. *Holmes* v. *Willard*, 125 N. Y. 75; 25 N. E. 1083. The interests affected by approval will shape the power to approve.

Old Dominion Copper Co. v. *Lewisohn* was a case where promoters made a sale to a corporation in return for shares of stock, the par value of the shares being greatly in excess of the cost to the sellers of the property conveyed. The existence of this profit was known to the shareholders, for the shares belonging to the promoters were all that had then been issued. There was no evidence that the effect of the transaction was to make the company insolvent or to work a fraud upon its creditors or to divert the assets to forbidden uses or to violate a statute. "At the time of the sale to the plaintiff . . . there was no wrong done to any one." 210 U. S. at p. 212. The grantors and their syndicate "were on both sides of the bargain, and they might issue to themselves as much stock in the corporation as they liked in exchange for their conveyance of their land." 210 U. S. at p. 212. Far from planning to defraud, "they believed in the enterprise" and "preferred to take stock at par rather than cash." 210 U. S. at p. 215. They had paid for the mines with their own money, and there were no creditors to be

affected by anything they did. In such circumstances the ruling was that incoming shareholders, subscribing for new shares, were in the plight of those ahead of them and could have no better case. *Davis* v. *Las Ovas Co.*, 227 U. S. 80, declined to extend the ruling to a case where the approval was by less than all the shareholders and without disclosure of the facts to others.

Old Dominion Copper Co. v. *Lewisohn* does not rule the case at hand. The effect of the promoters' conduct here was to saddle the company with liens beyond the value of its assets, mortgaged and unmortgaged. Through the diversion of the proceeds of the subscriptions to the use of Furlaud and confederates, the company became crippled and indeed insolvent at the outset of its business life. True, the findings of the District Court do not state in so many words that the company in its beginnings was insolvent as well as crippled. They do state, however, that the appraisals were grossly and fraudulently and wantonly excessive. Cost in and of itself, though far from conclusive, is still evidence of value (*Parmenter* v. *Fitzpatrick,* 135 N. Y. 190, 199; 31 N. E. 1032), especially where there is no market value in the strict or proper sense. *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U. S. 689, 697. In this case a witness for the complainant places a valuation upon the property in substantial correspondence with the cost. There is no opposing evidence in behalf of the defendants, and so the District Judge points out. In that state of the record, the promoters had the burden of answering and repelling the inculpatory evidence by proof that they had been true to their fiduciary duties and that their conduct had been fair and just. *Geddes* v. *Anaconda Copper Mining Co.,* 254 U. S. 590, 599; *Matter of Smith,* 95 N. Y. 516, 522; *Allen* v. *La Vaud,* 213 N. Y. 322, 326; 107 N. E. 570. The public had been invited to invest in the securities on the representation that the proceeds would be used

for the purchase of the lands and for cash capital necessary or useful for the business. In fact about three-fifths of the money was applied to the designated uses, the rest being kept for the use of the promoters. If this could be done without cutting down the value of the assets below the mortgage debt, the act would be so near to magic as to call for explanation from promoters not professing to be magicians. No word of explanation was offered at the trial or is now suggested in the briefs. In those conditions, only one legitimate inference was open to the trier of the facts, and this he must be taken to have drawn. The appraisals having been shown to be fraudulent, the one legitimate inference to be drawn from the defendants' silence was that the value of the lands was not greater than the cost, at least in any large amount. If that be so, the company was made insolvent at the outset when the proceeds of the subscriptions were devoted to the use of the promoters.

No consent of shareholders could make such conduct lawful when challenged by the receiver as the representative of creditors. If the shareholders and the directors had combined with the promoters to despoil the corporation and defeat the remedies of creditors by a gift of half the assets, the gift could have been annulled either by the creditors directly or in their behalf by a receiver. *Casey* v. *Cavaroc,* 96 U. S. 467, 489, 490; *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360, 371; *Hamor* v. *Taylor-Rice Engineering Co.,* 84 Fed. 392, 399; *American Can Co.* v. *Erie Preserving Co.,* 171 Fed. 540, 542; *Sweet* v. *Lang,* 14 F. (2d) 758, 760; *Gillet* v. *Moody,* 3 N. Y. 479; *Pittsburg Carbon Co.* v. *McMillin,* 119 N. Y. 46, 53; 23 N. E. 530. The distinction between such a situation and the present is one solely of degree. This is not a case where at the time of issuing the securities the shareholders and the promoters were the only ones concerned. Here at the moment of the conveyance the interests of bond-

holders and noteholders were put in jeopardy by a diversion of the proceeds that would make their mortgage worthless. The promoters could not receive for themselves or deliver to subscribers the bonds and notes of the company secured by deed of trust until title had been acquired to the lands covered by the deed. On the other hand, they could not pay the purchase price and acquire title to the lands without the proceeds of subscriptions, the contributions of the public. All this was known to the shareholders and known to the directors, for the promoters were the shareholders and the directors men of straw. In its effect upon subscribers the transaction was the same as if the proceeds of the bonds and notes had been paid into the treasury of the company and then paid out to the directors for the use of their confederates. It was not within the power of the shareholders to legalize this waste to the detriment of others. It would not have been within their power to bring that result to pass though shareholders and promoters had been different persons, acting at arm's length. Still more clearly it was not within their power when shareholders and promoters were in substance the same persons. Cf. *California-Calaveras Mining Co.* v. *Walls,* 170 Cal. 285, 299; 149 Pac. 595; *Pittsburg Mining Co.* v. *Spooner,* 74 Wis. 307; 42 N. W. 259. Consent in such conditions, so far as it gives approval to conduct in fraud of the rights of others, is a word and nothing more. It is not in concord with realities. There is no occasion to consider whether the corporation itself at the instance of new shareholders would be permitted to disaffirm the fraud and maintain a suit in equity for appropriate relief. We put that question by. Enough that the receiver has the requisite capacity. A court of equity has taken hold of the assets of this company, intangible assets as well as tangible, for administration as a trust in accordance with equitable principles. *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 380.

Included in those assets are moneys fraudulently diverted to the prejudice of creditors. Cf. *McClure* v. *Law,* 161 N. Y. 78; 55 N. E. 388; *Bosworth* v. *Allen,* 168 N. Y. 157, 166; 61 N. E. 163. There is power at the instance of the receiver to bring them back into the trust.

These considerations without more would separate *Old Dominion Copper Co.* v. *Lewisohn* from the case before us now. Other aspects of the present case accentuate the division. What was done by the promoters here was in the teeth of a prohibition of the Constitution of Pennsylvania, the state where the corporation was formed and where its business was to be done. The Constitution of Pennsylvania provides (Art. 16, § 7): ". . . no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." See also Act of April 17, 1876, P. L. 30, 32, § 4; Purdon's Penna. Stats., Title 15, § 131. The prohibition is not escaped through the receipt of some property or money if the amount or value is inadequate. *Big Spring Electric Co.* v. *Kitzmiller,* 268 Pa. 34, 38; 110 Atl. 783; *Commonwealth* v. *Reading Traction Co.,* 204 Pa. 151; 53 Atl. 755; *In re Wyoming Valley Ice Co.,* 153 Fed. 787, 793; affirmed *sub nom. Wiegand* v. *Albert Lewis Lumber & Mfg. Co.,* 158 Fed. 608, 610. True, the securities are valid in the hands of innocent purchasers, whatever the consideration (*Guarantee T. & T. Co.* v. *Dilworth Coal Co.,* 235 Pa. 594; 84 Atl. 516), but the liability of the directors or other fiduciaries who have put them into circulation is not thereby released. There are decisions in Pennsylvania that the Constitution is not self-executing. *Grange National Bank* v. *Collman,* 306 Pa. 200; 159 Atl. 26. That holding is irrelevant as to corporations such as this one, for there exists as to them an "implementing" statute (Purdon's Penna. Stats., *supra*), without restriction as to the form of remedy. Precedents exist for a

suit at the instance of incoming shareholders, though the corporation was solvent and there was no injury to creditors. *Spangler Brewing Co.* v. *McHenry,* 242 Pa. 522, at p. 530; 89 Atl. 665. Precedents exist in cases of insolvency for a suit by a trustee as the representative of creditors, and this though they became such after the securities were issued. *Bingaman* v. *Commonwealth Trust Co.,* 15 F. (2d) 119 (D. C. M. D. Pennsylvania), and cases there collected; cf. *Coleman* v. *Tepel,* 230 Fed. 63, 70 (C. C. A. 3), affirming 229 Fed. 300; *In re Wyoming Valley Ice Co., supra; Krebs* v. *Oberrender,* 274 Pa. 154; 118 Atl. 19; *Finletter* v. *Acetylene Light Co.,* 215 Pa. 86; 64 Atl. 429. Nowhere is it held that delinquent fiduciaries who have nullified the statute may keep the profits for themselves when creditors will be injured unless the profits are returned. At times and for certain purposes the consent of shareholders may give validity to acts that would otherwise be voidable, if the only interests affected are those of the shareholders consenting. It can never be operative to the prejudice of others where consent is in derogation of the public policy of the state or the prohibition of a statute. *Central Transportation Co.* v. *Pullman's Car Co.,* 139 U. S. 24, 59, 60; *Kent* v. *Quicksilver Mining Co.,* 78 N. Y. 159, 185, 186, 187; *Sheldon H. B. Co.* v. *Eickemeyer H. B. M. Co.,* 90 N. Y. 607, 613; *Mann* v. *Edinburgh Northern Tramways Co.* [House of Lords], 68 L. T. (N. S.) 96; *Society of Practical Knowledge* v. *Abbott,* 2 Beav. 559, 568. This case is plainly within the scope of that exception. There was here a statutory prohibition, rooted in public policy. *Gearhart* v. *Standard Steel Car Co.,* 223 Pa. 385, 389; 72 Atl. 699. The shareholders were not at liberty, at all events to the prejudice of creditors or other shareholders, present or prospective, to set that policy at naught. If the effect of what they did was to put illicit profits in the pockets of trustees,

their consent will not avail to block pursuit and reclamation.

We have assumed in all this that the corporation was insolvent at the beginning of its business life. The assumption is well founded for reasons already stated, yet we do not need to go so far. Even though the company was not literally insolvent, the result would be the same. There would be a wrong to bondholders and noteholders if assets were depleted to the very brink of insolvency after fraudulent misrepresentations to the effect that there was an ample margin of security. What was taken out of the company in such circumstances would be taken subject to a trust and would so continue until the security thus depleted had paid the debt in full. The defendants do not assert that it is adequate for that today. Confusion of thought is inevitable unless the position of the wrongdoers as trustees is steadily kept in mind. What is here is something more than a tort of fraudulent representations to be redressed by the recovery of damages at the suit of the defrauded creditors. What is here is a tort growing out of the fraudulent depletion of the assets by men chargeable as trustees if they have failed to act with honor. There are important differences, moreover, between an overissue of stock, which may leave the assets unimpaired, and a withdrawal of cash, which puts the enterprise in peril. Cf. *Arnold* v. *Searing,* 78 N. J. Eq. 146, 162; 78 Atl. 762; *id.,* 73 N. J. Eq. 262, 265, 266; 67 Atl. 831; *Eureka Mining Co.* v. *Lively,* 59 Wash. 550; 110 Pac. 425. The duty of reclaiming assets so diverted and holding the wrongdoers to their duty as trustees is one that rests on the receiver. It is not within the power of wrongdoers and shareholders by any compact between themselves to make the duty less.

In considering the effect of *Old Dominion Copper Co.* v. *Lewisohn,* we have spoken until now of the bonds and

notes only. It is necessary at this point to say something about the stock. Of the total issue, 535,000 shares went to Kingston as a bonus. The only pretense of value was a conveyance of the gas fields covered by the options, which were worth, as we have seen, no more than Kingston paid for them. In return for the conveyance of these lands Kingston received $3,015,000 in cash or more than the actual value of anything conveyed. It also received bonds of the par value of $1,300,000; and last of all the stock. Plainly the stock was a bonus and nothing else.

Furlaud and Kingston, having made themselves parties to a scheme whereby Duquesne was to be despoiled and its creditors were to be defrauded, became accountable, we think, for everything that came to them as a result of the conspiracy in excess of the consideration furnished on their side. They were not trustees as to the bonds and notes, and lawful owners of the shares, but trustees as to all, the transaction being a unit, infected with a common vice. Everything of profit arising out of the abused relation must now be yielded up. Even after this is done, reparation will be incomplete. Restitution of the profits will not make up, without more, for the inadequacy of the overvalued land to return to the lienors their principal and interest. In such circumstances the shares like the bonds and notes must contribute what they can. The certificates, were they on hand, might be turned into the treasury of the company for sale, if they still had any value. The shares having been sold to others and the certificates being no longer subject to the mandate of the court, the trust that attached to them has been transferred to the proceeds, which when paid to the receiver will be used like other assets in reduction of the debts.

We are not unmindful of the contention that the sale by Kingston was at the rate of 50 cents a share (which for 85,000 shares would amount to $42,500), and that the sale for $850,000 was made by two other corporations, the

Byron and the Chaucer. In view of the initial fraud the burden was on Kingston and Furlaud to show that Byron and Chaucer were purchasers in due course, and not agents and confederates wearing the cloak of purchasers. *King* v. *Doane,* 139 U. S. 166, 173; *Canajoharie National Bank* v. *Diefendorf,* 123 N. Y. 191, 204, 205; 25 N. E. 402; *Seymour* v. *McKinstry,* 106 N. Y. 230, 240; 12 N. E. 348. We think that Byron and Chaucer were subject to an equal burden. Many suspicious circumstances point to guilty knowledge and justify a holding that the burden has not been borne.

The respondents make the point that Maxime Furlaud is not subject to personal liability for wrongs committed by the Furlaud Company or Kingston. He was the head and front of the conspiracy. For anything done in fulfilment of the common purpose either by himself or by any of the corporations dominated by him, he and his confederates are liable *in solido. Mack* v. *Latta,* 178 N. Y. 525, 532; 71 N. E. 97; *Anderson* v. *Daley,* 38 App. Div. 505; 50 N. Y. S. 511; *id.,* 159 N. Y. 146; 53 N. E. 753; *Irving Trust Co.* v. *Deutsch,* 73 F. (2d) 121, 123; *Jackson* v. *Smith,* 254 U. S. 586, 589.

The objection is also made that testimony as to the value of the lands should have been excluded by the court as not within the pleadings. The complaint was based upon the theory that the promoters had been guilty of unconscionable conduct. Whether that was so could not be known without exploring the transaction to the depths and all the circumstances attending it. To this it may be added that the trial judge received the testimony provisionally and subject to a motion to strike when all the evidence was in. The motion was not made. Nor at any stage of the trial was there a motion to dismiss on the ground of a variance between the pleading and the proof.

Another objection is that the defendants should have been credited with expenses for commissions, attorneys'

fees, printing disbursements and the like, expenses incidental, it is claimed, to the acquisition of the lands. A fund of $300,000 was set aside for that purpose. The record makes it clear, however, that only a part of this fund was necessary for expenses of any kind and that only a small part of the expenses, if any, were of such a nature as to be permissible deductions for parties to a fraud. It is likely that some items would be allowable, if properly identified. *Loos* v. *Wilkinson,* 113 N. Y. 485, 499; 21 N. E. 392; *Frank* v. *Von Bayer,* 236 N. Y. 473, 477, 478; 141 N. E. 920; *Randolph* v. *Scruggs,* 190 U. S. 533, 539. The difficulty is that we are unable on this record to determine their amount. The judge might have required the defendants to separate the good from the bad while the case was still on trial. Instead of doing this he put the defendants off their guard by saying that matters of that sort would be reserved for an accounting. Unless the receiver and the defendants find it possible to agree as to the allowance for expenses, an accounting will be necessary to determine what part of the $300,000, the total amount reserved, is an appropriate deduction.

Other objections put forward in argument at the bar can be dismissed in a few words.

If and when the defendants shall restore to the receiver the moneys taken unto themselves, it will be time enough to consider problems as to the marshalling of assets between creditors who were such at the commission of the wrong and those of later date. No attempt is made to forecast the answer now. The principles that govern the distribution of assets conveyed in fraud of creditors, present or prospective, and after such conveyance reclaimed by a receiver, are adequate to work out justice, however great the complications.

We find it immaterial that the defendants or some of them may be liable to creditors in common law actions to recover damages for false representations as to the value of the assets. That is not the basis of the suit before us now. Moreover, the question is not here whether restitution of illicit profits as the outcome of this suit may be proved to mitigate the damages in actions by other plaintiffs, if any such there are. As we have striven to make clear, the receiver does not claim to have succeeded to the rights of bondholders or noteholders to recover damages for deceit. The wrong that is here redressed is the unlawful depletion of the assets whereby the company was made insolvent and the creditors were defrauded of their lawful rights and remedies.

The decree of the Circuit Court of Appeals reversing the decree of the District Court and dismissing the bill of complaint is reversed.

The decree of the District Court is modified by increasing the recovery against the defendants Maxime H. Furlaud and the Kingston Corporation in the sum of $850,000 with interest from June 6, 1930, when the shares of stock were sold, and by the award of judgment against the Byron Corporation in the sum of $425,000 with interest from June 6, 1930, and against the Chaucer Corporation for the same amount.

There will be a further modification by the allowance to the defendants Furlaud and the Kingston Corporation of so much of the sum of $300,000 as may be found on an accounting to have been disbursed for expenses that are chargeable in equity to the Duquesne Corporation, unless the amount of such allowance is fixed by agreement, approved by the court to which the receiver is accountable, in which event the judgment against those defendants shall be reduced accordingly.

The decree of the District Court as thus modified is affirmed.

Reversed.

MR. JUSTICE ROBERTS, dissenting.

I think that the decree of the Circuit Court of Appeals should be affirmed. I concur in the view that the promoters of Duquesne Gas Corporation took an unconscionable profit which they reaped at the expense of a credulous and avid purchasing public. This fact, however much it may invite animadversion, ought not to induce the courts to disregard settled principles in an effort to deprive the respondents of the fruits of their scheme.

An examination of the pleadings and the facts found leads me to the conclusion that the receiver of the corporation is without standing to recover from the promoters.

The bill recites in somewhat different sequence the facts which are set out in the opinion of the court. It does not state that the properties were not worth the amount in bonds, stocks, and cash which the Duquesne corporation paid for them. It fails to allege any fraudulent misrepresentation on the part of the respondents to purchasers of bonds or stock of the corporation. The allegation is made that Furlaud & Company, Inc. was, in the sale of the securities, a house of issue, meaning, of course, that it purchased the securities and resold them for its own account. Although the facts pleaded demonstrate that for some time after the organization of the Duquesne Corporation and the issuance of its bonds and stock Furlaud & Company, Inc., by itself and its subsidiaries, was the owner of every share of stock and every bond issued and outstanding, the bill asseverates, first, that the profit obtained on the sales of securities was a secret profit for which Furlaud and associates are accountable to the receiver and, secondly, that they stood in a fiduciary relation to Duquesne and "caused all the pro-

ceeds of the sale of the bonds and notes in excess of $2,937,989, plus legitimate expenses, to be diverted from the Duquesne Corporation for whose use and benefit the proceeds of the sale of said bonds and notes were intended and defendants Furlaud and Reuter fraudulently misappropriated said moneys to their own use." The last assertion is the nearest approach to an allegation of agency or trust for or on behalf of the corporation. The prayer is for an accounting by the defendants of the moneys received by them, apparently on the theory that such moneys were received as agents for the corporation. On its face the pleading is self-contradictory. If what the defendants took constituted promoters' profits the bill discloses that these were not secret profits taken to the disadvantage of innocent stockholders who had been brought into the corporation. Furlaud & Company and the other defendants were on both sides of the transaction and cannot be said to have deceived themselves as stockholders and bondholders and, upon familiar principles, those who took title to stock or bonds through them cannot assert rights higher than theirs. If, on the other hand, Furlaud & Company was a house of issue, dealing on its own account, it cannot have been an agent of Duquesne for the sale of bonds and stock.

The District Court denied a motion to make the pleading more specific and certain and the cause went to trial on the bill and answers. The proofs disclosed in detail the mechanics of the transaction whereby the promoters, at an expenditure of something in excess of $3,000,000, acquired $4,000,000 par value of first mortgage bonds, $1,000,000 of secured notes, and 675,000 shares of no-par common stock. Evidence was offered to prove that, at the date of the transfer, the property acquired was worth not to exceed $2,700,000. The defendants objected to this evidence on the ground that it was unsupported by any allegation in the bill. The court, nevertheless, received the proof and relied upon it for certain conclusions.

There was also evidence that in the bond circulars issued by the defendants as a house of issue, and by a syndicate of bankers formed by the defendants to sell the securities to the public, these statements were made: that the properties had been appraised at something over $7,000,000 and that the bonds and notes were issued by the corporation " in connection with the acquisition of properties and to provide cash for developments, extensions and other corporate purposes." The proofs conclusively show, and it is not disputed, that Furlaud & Company, upon its individual credit and that of its subsidiary, the Kingston Corporation, obtained the funds with which to make settlement for the bonds, notes, and stock with the Duquesne Corporation and reimbursed themselves for these loans out of moneys paid by brokers in the purchase of the securities.

It is quite true that Furlaud & Company, Inc. had, prior to receipt of the bonds, notes and stock, arranged for the sale of the bulk of the bonds to brokerage houses when, if, and as issued. This, however, is not an uncommon method of dealing and in itself is insignificant so far as the fairness or unfairness of the transaction goes.

In its final analysis the situation comes, as the District Court indicated, to this: that Furlaud & Company, Inc. advanced the purchase money for the gas properties, contributed $364,500 to Duquesne as working capital and in return received the securities. The court added that if without the circuity here resorted to Furlaud & Company, Inc. had thus bought the securities direct at an inordinately low price they could have done with them as they pleased. It held that they could not do with them as they pleased because of the method of settlement with the corporation to which they resorted. There is no specific finding by the District Court of fraud or misrepresentation on the part of Furlaud & Company, Inc., in the sale of the bonds. What is said is that the circulars misrepre-

sented the facts. There is no finding that any present bondholder relied on any misrepresentation. Although it is insisted that Duquesne was insolvent from the moment of the settlement with Furlaud & Company, Inc. there is no finding to that effect. The District Court held that the promoters stood in a fiduciary relation to the corporation. It made no finding that the purchasers of bonds and notes were induced to purchase by misrepresentation; made no finding of loss or damage to such purchasers; made no finding that the purchasers understood Furlaud & Company, Inc. were acting as agents for Duquesne in the sale of its securities; but reached the conclusion, without any evidence to support it, that those who purchased bonds and notes from the promoters understood that the money which they paid in the purchase of the securities was to go *in solido* into the treasury of Duquesne. A moment's reflection will show that this could not have been the case. The very circulars which were issued, and on which the bonds were sold, showed that they were not being sold for par and that commissions were being paid for their sale. It is quite evident from the circulars that these commissions were not being paid by Duquesne but by the brokers who were selling the bonds as principals.

Upon principle, and upon authority, the corporation had no cause of action in the circumstances against the promoters and the receiver's rights could rise no higher.

First. The District Court held, and the Circuit Court of Appeals concurred, that the promoters were not answerable in respect of the no par value common stock issued to them and thereafter sold by them. This Court reverses the holding and makes them liable to account for all they received for the stock. This is in the teeth of *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206. There, as here, stock was issued for property. The claim was that the property was worth vastly less than the par of

the stock issued for it. Additional shares were later subscribed for by the public. This Court, in a unanimous opinion, speaking by Mr. Justice Holmes, held that any wrong which had been done to the innocent subscribers could not be redressed in an action by the corporation. Here we have a much stronger case, for all the stock was subscribed for and taken by the promoters. There were no innocent subscribers. In such a situation the courts with practical unanimity hold that the corporation has no right of action.[1]

Second. On its face the transaction under investigation amounted to this and nothing more: The promoters paid themselves an exorbitant price in bonds, notes, stock, and cash for property which they turned over to the corporation they had promoted. The bonds and notes thus acquired they sold in the open market and as principals. If in such sale they misrepresented the value of the security they are liable to those whom they deceived. This is not denied. It was stated at the bar that numerous actions had been brought against them on this basis. Although purporting to be purchasers of securities and sellers of the same in turn for their own account, they are now converted into trustees for the corporation which corporation they were in essence at the time of the transaction and which corporation had, therefore, full and complete knowledge of every factor in the transaction. This again is in the teeth of *Old Dominion Copper Co.* v. *Lewisohn, supra.*

In support of its holding the court cites *Dickerman* v. *Northern Trust Co.,* 176 U. S. 181; *Brewster* v. *Hatch,* 122 N. Y. 349; 25 N. E. 505; *Erlanger* v. *New Sombrero Phosphate Co.,* 3 App. Cas. 1218; *Gluckstein* v. *Barnes* [1900] A. C. 240; and *Yeiser* v. *United States Board &*

[1] See the authorities collected in the annotation to *Hays* v. *The Georgian, Inc.* (280 Mass. 10; 181 N. E. 765) 85 A. L. R. 1263–1265.

Paper Co., 107 Fed. 340. An examination of the opinion in the *Old Dominion Copper Company* case will show that it was there said the relevant observations in the *Dickerman* case were *obiter* and could not control the case in hand; that the *New Sombrero Phosphate* case and the *Gluckstein* case were distinguishable, as was the *Yeiser* case, the latter on the ground that the transaction was carried through after innocent subscribers had paid for stock; and that *Blum* v. *Whitney,* 185 N. Y. 232; 77 N. E. 1159, (a later case than the New York case relied upon by the majority) was properly cited in support of this court's decision. The facts just stated clearly indicate that the decision now made in effect overrules the *Old Dominion* case. The so called fiduciary relation of promoters may be availed of by the corporation only in virtue of the equity of innocent stockholders defrauded by the promoters' scheme. So holds the *Old Dominion* case, and so hold many authorities which are in accord. It is said that the right of the corporation to pursue the promoters depends upon the circumstances under which the stockholders gave their consent to the transaction involved in the promoters' scheme. Nothing is disclosed in the opinion of the court to differentiate this case from the *Old Dominion* case save that, as asserted, but not found below, the transaction caused insolvency to the Duquesne Corporation and the suit is here brought by a receiver.

Third. It is of course true that a receiver represents creditors and stockholders; but the proposition is true only in the sense that what he recovers as assets of his corporation is dedicated first to the payment of creditors and afterwards to the liquidation of outstanding shares. It has never been doubted that his right of action for a fraud committed upon the corporation by a third person is no greater than and no different from that available to the corporation. It is a novel doctrine that, if individual creditors have at the date of the receivership their own

causes of action against third parties for fraud or misrepresentation, upon the appointment of a receiver these causes of action are assigned in law to the receiver. We know of no authority for such a proposition and none is cited in the opinion of the court. Courts which have considered the question have decided against the right of a receiver to maintain a suit such as this one.[2]

The opinion goes further, and holds not only that these individual causes of action may be grouped in the receiver, but that he as assignee is not subject to the rules as to allegation and proof by which the bondholder would be bound in an action for fraud, misrepresentation or deceit. This is to confuse separate causes of action fundamentally differing both in their substance and in their incidents. Any amount recovered by the receiver in this action will go into the corporate treasury and be distributed therefrom to the creditors of the corporation. It appears from the record that the bondholders have brought a foreclosure suit upon their mortgage. They will in that action first avail themselves of the security pledged under the mortgage. They will become general creditors as to any amount by which their security is deficient. The record does not inform us how many such general creditors,—sellers of merchandise, lenders on unsecured paper, or employees and the like,—there are. Certainly these have no equity and no vestige of claim against the promoters arising out of the promotion of the Duquesne Corporation. And yet a recovery here will inure to their benefit as well as to that of the bondholders. If, as is said, the receiver represents the bondholders, shall the obtaining of a decree in this action operate as *res judicata* in the other actions brought by bondholders and now pending? The opinion

[2] *Tompkins* v. *Sperry, Jones & Co.*, 96 Md. 560; 54 Atl. 254; *Bostwick* v. *Young*, 118 App. Div. 490, 496; 103 N. Y. S. 607, affirmed 194 N. Y. 516; 87 N. E. 1115; *Young* v. *Stevenson*, 180 Ill. 608; 54 N. E. 562.

does not answer the question. It seems clear that a suit by the receiver must be in the right of the corporation, and that the most he can claim is what the corporation could claim, namely, a derivative right of suit based upon fraud perpetrated upon innocent shareholders who were such at the time of the consummation of the scheme. Upon the facts pleaded and proved there can be no such derivative right in this case.

Fourth. We are told that the action may be maintained by the petitioner in virtue of the fact that the transaction was forbidden by a provision of the Constitution of Pennsylvania, and a statute passed to implement it, voiding all fictitious increases of capital stock or indebtedness of corporations and forbidding the issuance of stocks or bonds except for work and labor done or money or property actually received. The point was apparently not made or considered below. It cannot avail the petitioner.

The constitutional provision is not self-executing.[3] There is nothing in the law of Pennsylvania justifying a suit by a receiver in circumstances such as here disclosed to recover for the corporation alleged illicit profits; and the Supreme Court of the Commonwealth has clearly indicated that such a bill will not lie by the corporation to recover for promoters' profits or alleged fraud in issuing stock at an overvaluation for property where, as here, all the stockholders approved the transaction.[4]

As we have above pointed out, the receiver's rights can in no way differ from those of the corporation. This

[3] *Yetter* v. *Delaware Valley R. Co.*, 206 Pa. 485; 56 Atl. 57; *Grange National Bank* v. *Collman*, 306 Pa. 200; 159 Atl. 26.

[4] *Spangler Brewing Co.* v. *McHenry*, 242 Pa. 522, 529; 89 Atl. 665. See also *Wood* v. *Corry Water-Works Co.*, 44 Fed. 146 (*U. S. C. C. W. D. Pa.*). In contrast, see *McElhenny's Appeal*, 61 Pa. 188; *Densmore Oil Co.* v. *Densmore*, 64 Pa. 43; *Bailey* v. *Pittsburg & Connellsville Co.*, 69 Pa. 334, where there were innocent subscribers for shares, who were ignorant of the profits taken by the promoters.

Court ought not to create a trusteeship upon an assumption of a State policy which is not recognized by the courts of the State.

The decree of the Circuit Court of Appeals should be affirmed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER concur in this opinion.

PACIFIC STATES BOX & BASKET CO. *v.* WHITE ET AL.

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

No. 48. Argued October 25, 1935.—Decided November 18, 1935.

1. A State has power to prescribe the standards for the containers in which horticultural products are marketed. P. 181.
2. An administrative order pursuant to a statute of Oregon prescribed containers for raspberries and strawberries, of specified capacity and of a form commonly used in that State, and fixed the dimensions. *Held*, against the complaint of a manufacturer of containers of another type who made them in another State and sold them in Oregon:

   (1) That the regulation could not be considered arbitrary or capricious in that it prescribed the form and dimensions, since these bore reasonable relation to protection of buyers and to the preservation and shipment of the fruit. Pp. 181–182.

   (2) Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether the one adopted should have been made mandatory, involve questions of fact and policy, the determination of which rests in the legislative branch of the state government—a determination which may be made, if the constitution of the State permits, by a subordinate administrative body. P. 182.

   (3) The regulation is not in conflict with the Standard Baskets and Containers Acts of May 21, 1928, and August 31, 1916. P. 182.

   (4) The regulation did not operate to grant a monopoly to manufacturers of the type of containers prescribed; and, moreover, the grant of a monopoly, if otherwise an appropriate exercise of

the police power, is not void as denying equal protection of the law. P. 183.

(5) As the regulation does not affect the importation of other kinds of containers, but only their use after they have come into the State and been taken from the original packages, it is not an undue burden on interstate commerce. P. 184.

3. A bill attacking, under the Federal Constitution, a state regulation dealing with a subject clearly within the police power, cannot be sustained on allegations which are merely general conclusions of law or fact; the facts relied on to rebut the presumption of constitutionality must be specifically set forth; and a motion to dismiss, like a demurrer, admits only those which are well pleaded. P. 184.
4. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power; and where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. P. 185.
5. There is added reason for applying this presumption to a regulation adopted after notice and public hearing as required by statute. P. 186.
6. The validity of a general regulation made by an administrative body under a state statute is not dependent upon the making of special findings of fact, when not required by the statute. P. 186.
7. On an appeal from the District Court in a suit attacking a state regulation under the Federal Constitution, and based also on diversity of citizenship, *held* that there was no occasion to consider an objection under the constitution of the State which was not made or discussed below or included in the assignment of errors. P. 186.

9 F. Supp. 341, affirmed.

APPEAL from a decree dismissing the bill in a suit to set aside an order fixing standard containers for raspberries and strawberries. The jurisdiction of the District Court was based on constitutional grounds and also on diversity of citizenship.

Mr. Arthur A. Goldsmith, with whom *Mr. Byron C. Hanna* was on the brief, for appellant.

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Mr. Willis S. Moore, Assistant Attorney General of Oregon, with whom *Mr. I. H. Van Winkle,* Attorney General, was on the brief, for appellees.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit was brought in the federal court for Oregon, in May, 1934, to enjoin enforcement of an order of the Department of Agriculture of that State, dated May 3, 1933, entitled "Standard Containers for Fruits and Vegetables."[1] The plaintiff, Pacific States Box & Basket Company, is a California corporation which manufactures there fruit and vegetable containers. The defendants are the Director of Agriculture and the Chief of the Division of Plant Industry, of Oregon. The jurisdiction of the District Court was invoked both on the ground of diversity of citizenship and on the ground that the order, and the statutes purporting to authorize it, violate rights of the plaintiff guaranteed by the Federal Constitution. The case was heard upon plaintiff's motion for a preliminary injunction and defendants' motion to dismiss the bill on the ground that it does not state facts sufficient to entitle the plaintiff to relief. The court denied the injunction and dismissed the bill. 9 F. Supp. 341.

Oregon Code of 1930, §§ 18–2902 and 18–2903, as amended by Oregon Laws 1931, c. 136, and 1933, c. 225, authorize the Chief of the Division of Plant Industry, after investigation and public hearing and subject to the approval of the Director of Agriculture, to fix and promulgate "official standards for containers of horticultural products" "in order to promote, protect, further and develop the horticultural interests" of the State. After a standard

[1] The same provision concerning containers for strawberries is incorporated also in an order dated June 1, 1933; and the prayer for an injunction extends likewise to that order.

has been prescribed, these statutes make it unlawful for anyone to pack for sale or transport for sale, or sell, the article in a container unless it conforms to the standard. They make any violation of the order a misdemeanor, and charge the Director with the duty of enforcement.

The order challenged, so far as it prescribes containers for raspberries and strawberries, is:

"As provided for in sections 18–2902 and 18–2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, a public hearing was held in Portland, Oregon, on the date of April 15, 1933, to consider standard containers for fruits and vegetables. Containers for the following fruits and vegetables were considered and recommended:

Raspberries.

Crate—24-pint hallocks, . . . Size of hallock, 2 x 5¼ x 5¼ inches outside measurements, bottom set up ¾ inch, inside depth 1¼ inches.

Strawberries.

Crate—24-pint hallocks, . . . Size of hallocks, 2½ x 4⅜ x 4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches.

. . . the above-mentioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of time until January 1, 1934, in order to make use of such material."

A hallock is a type of rectangular till box with perpendicular sides and a raised bottom. It is usually made of rotary cut veneer, taken directly from spruce logs; but is sometimes made of paper or other material.

The plaintiff manufactures a type of container other than hallocks. Its type, which is also used for rasp-

berries and strawberries, is known as tin-top or metal rim. It differs from the hallock both in shape and construction. In shape, it is more like a cup; its sides slope outward; and it has not the raised bottom. This cup is made from two thin strips of wood crossing each other to form the bottom of the container and then bent upward to form the sides, reinforced with a narrow metal strip to insure protection of the cup and its contents, as well as to insure uniformity of cubic measure. The plaintiff has for years sold a part of its product of tin-top cups to dealers in Oregon, for ultimate use as containers for raspberries and strawberries to be packed there.

The bill alleges " that the effect " of the order is to prevent the sale by plaintiff for use in Oregon of " the metal top variety of containers or cups with the solid bottom "; " because dealers who formerly purchased such baskets from Plaintiff have been warned by officials . . . that they would not be allowed to sell strawberries or raspberries in any container " other than that prescribed; that it has no facilities for manufacturing hallocks; and that, because of the expense of installing the requisite machinery and the cost of transporting the appropriate supplies to its plant, it is impracticable for it to arrange to make hallocks.

The claim is that, since the order prescribed hallocks as the only permissible type of container, its necessary effect is to exclude containers of the plaintiff's manufacture from use in Oregon, and, therefore, the order violates its rights: (a) Under the due process clause of the Fourteenth Amendment, because the order is arbitrary, capricious, and not reasonably necessary for the accomplishment of any legitimate purpose of the police power; (b) Under the equal protection clause of the Amendment, because the order grants a monopoly to manufacturers of hallocks; (c) Under the commerce clause, because the order imposes undue burdens on interstate commerce. The defend-

ants insist that the order is an appropriate exercise of the police power of the State; does not create a monopoly; and does not burden interstate commerce. We think the defendants are right.

First. The power of a State to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See *Turner* v. *Maryland,* 107 U. S. 38, 51–54. Latterly, with the broadening of the field of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended.

Plaintiff does not question the reasonableness of the standard so far as it prescribes the capacity of the box or basket. Its challenge is directed solely to the fixing of the dimensions and the form of the container. But to fix both the dimensions and the form may be deemed necessary in order to assure observance of the prescribed capacity and to effect other purposes of the regulation. It may be that in Oregon, where hallocks have long been in general use,[1] buyers at retail are less likely to be deceived by dealers as to the condition and quantity of these berries if they are sold in containers of the prescribed form and dimensions. It is said that there are 34 other styles or shapes of berry basket in use somewhere in the United States. Obviously, a multitude of shapes and sizes of packages tends to confuse the buyer. Furthermore, the character of the container may be an important factor in preserving the condition of raspberries and strawberries, which are not only

[1] See "Containers used in Shipping Fruits and Vegetables," U. S. Department of Agriculture, Farmers' Bulletin No. 1579 (1934) pp. 7–9.

perishable but tender. A shallow container, like the hallock prescribed, may conceivably better preserve these fruits than the deeper cup which the plaintiff manufactures. A container with perpendicular sides, like the hallock, may conceivably preserve them better than a metal-rim cup with outward sloping sides. And, since the containers are to be packed and shipped in crates of 24, the berries may conceivably be better stowed where the fruit basket has the bottom set-up peculiar to the hallock, than if it had the flat bottom of the plaintiff's metal-rim cup. Considerations of this nature led the Colonies, the individual States, and Congress to prescribe for many articles not only the capacity, but the size and form of containers.[2]

Different types of commodities require different types of containers; and as to each commodity there may be reasonable difference of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the constitution of the State permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted.

Second. The standard prescribed by the order does not conflict with any established by Congress. The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685, has no relation to the matter here under con-

[2] See *Turner* v. *Maryland,* 107 U. S. 38, notes pp. 51–54.

sideration. That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel. The Standard Baskets and Containers Act of August 31, 1916, c. 426, 39 Stat. 673, which in § 2 deals with containers for small fruits and vegetables, prescribes merely the capacity of the containers. It fixes the cubic contents for dry half-pint, pint, and quart. It makes no reference to the dimensions or form of the container; and has left to the individual States the adoption of the standards in these respects if deemed necessary. Compare *Savage* v. *Jones,* 225 U. S. 501; *Merchants Exchange* v. *Missouri,* 248 U. S. 365, 368; *Mintz* v. *Baldwin,* 289 U. S. 346, 350, 351.

Third. The charge that the order is void because it grants a monopoly to manufacturers of hallocks is unfounded. The plaintiff, and all others, are free to engage in the business, which, so far as appears, is not protected by patent or trademark and does not rest upon trade secrets. The business is not closely controlled; nor is it peculiar to Oregon. In 1933, at least 25 concerns were engaged in the United States in manufacturing hallocks. Less than one-fourth of them were located in Oregon and Washington.[3] Plaintiff asserts that the order excludes it from the Oregon trade since its plant cannot be equipped to manufacture hallocks except at a prohibitive cost; and that the spruce logs, the veneer of which is customarily used in making hallocks, are not obtainable except in the Pacific Northwest. Obviously these allegations afford no support to the charge of monopoly; among other reasons, because the order does not prescribe the material from which hallocks may be made. They are

[3] See " Production and Carry-over of Fruit and Vegetable Containers for the Year 1933," U. S. Department of Agriculture, Bureau of Agricultural Economics, pp. 3, 7, 16, 19, 22; *ibid.* for 1934, pp. 2, 6. Compare U. S. Department of Agriculture, Farmers' Bulletin No. 1579, pp. 7–9.

in fact made, to some extent, from material other than spruce veneer. Moreover, the grant of a monopoly, if otherwise an appropriate exercise of the police power, is not void as denying equal protection of the law. Compare *Slaughter-House Cases,* 16 Wall. 36; *Nebbia* v. *New York,* 291 U. S. 502, 529.

Fourth. The order does not unduly burden interstate commerce. It is aimed, not at the importation or sale of other types of containers, but at their use in Oregon by packers of raspberries and strawberries, and the later transportation and sale of the packages. The prohibition of other types involved in prescribing the standard is non-discriminatory. It applies regardless of the origin of the containers. The plaintiff is a manufacturer of containers, not a packer or shipper of berries. It is not prohibited from shipping its tin-top containers into Oregon; nor from selling them there. The operation of the order is intrastate, beginning after the interstate movement of the containers has ceased, and after the original package has been broken. To sustain this contention of the plaintiff would be to hold that its containers, because of their origin, are entitled to immunity from the exercise of the state regulatory power. Compare *Packer Corporation* v. *Utah,* 285 U. S. 105, 111–112.

Fifth. Plaintiff contends that since the case was heard on motion to dismiss the bill, all allegations therein made must be accepted as true; and, among others, the charge that "there is no necessity for the particular orders relating to strawberries or raspberries" "based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described . . . does not of necessity promote, protect, further or develop the horticultural interests of the State"; and that its necessary effect is "to grant a monopoly to manufacturers of the so-called hal-

locks." The order here in question deals with a subject clearly within the scope of the police power. See *Turner* v. *Maryland,* 107 U. S. 38. When such legislative action " is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209. The burden is not sustained by making allegations which are merely the general conclusions of law or fact. See *Public Service Comm'n* v. *Great Northern Utilities Co.,* 289 U. S. 130, 136, 137. Facts relied upon to rebut the presumption of constitutionality must be specifically set forth. See *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440; *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163. A motion to dismiss, like a demurrer, admits only facts well pleaded. Compare *St. Louis, Kennett & Southeastern R. Co.* v. *United States,* 267 U. S. 346, 349.

Sixth. It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the

regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 and *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447. Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required. It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern. Compare *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n,* 260 U. S. 48, 58–59; *Mahler* v. *Eby,* 264 U. S. 32, 44; *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 193, 194.

Seventh. It is argued that under the constitution of Oregon, its legislature was without power to delegate the authority to prescribe standard containers, citing *Van Winkle* v. *Fred Meyer, Inc.,* 151 Ore. 455; 49 P. (2d) 1140. This objection (which involves solely a question of state law) was not made below, was not discussed by the lower court, and is not included in the assignment of errors filed in this Court. We have no occasion to consider it. See Rule 27 (4); *Blair* v. *Oesterlein Co.,* 275 U. S. 220, 225; *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92, 96–7.

Affirmed.

CHESAPEAKE & OHIO RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.*

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

No. 549. Argued November 13, 1935.—Decided November 25, 1935.

Order of the Interstate Commerce Commission fixing rates on coal is sustained by findings of the Commission adequately supported by evidence.

11 F. Supp. 588, affirmed.

Messrs. M. Carter Hall and *Robert E. Quirk,* with whom *Messrs. E. L. Beach* and *Harry S. Elkins* were on the brief, for the Chesapeake & Ohio Ry. Co. et al.

Mr. Nelson Thomas, with whom *Assistant Solicitor General Bell* and *Mr. Daniel W. Knowlton* were on the brief, for the United States and Interstate Commerce Commission.

Mr. David C. Walls argued the cause, *pro hac vice,* on behalf of the Commonwealth of Kentucky, and *Mr. Bailey P. Wootton,* Attorney General, and *Mr. C. R. Hillyer* filed a brief.

PER CURIAM.

This is a suit to restrain the enforcement of an order of the Interstate Commerce Commission, made February 7, 1935, relating to rates for the transportation of coal from mines in Kentucky and West Virginia, respectively, and requiring the establishment of rates, as described, in order to remove an undue prejudice found to result from

*Together with No. 550, *United States et al.* v. *Chesapeake & Ohio Ry. Co. et al.* Appeal from the District Court of the United States for the Southern District of West Virginia.

existing rates. 201 I. C. C. 165; 206 I. C. C. 445. Upon the hearing by the District Court, composed of three judges, the injunction was denied and the bill of complaint dismissed, but a restraining order was entered staying the enforcement of the Commission's order pending appeal to this Court. 11 F. Supp. 588. The Railway Company and intervening shippers appeal from so much of the decree as denied the injunction and dismissed the bill of complaint, and the United States, the Interstate Commerce Commission, and others, appeal from that part of the decree which stayed the enforcement of the Commission's order.

This Court, upon an examination of the record, agrees with the conclusion of the District Court that the order in question was sustained by findings of the Commission acting within its statutory authority and that these findings were adequately supported by evidence. The decree denying injunction and dismissing the bill of complaint is affirmed. *Texas & New Orleans R. Co.* v. *United States,* 295 U. S. 395.

This disposition of the case makes it unnecessary to pass upon that portion of the decree which stayed the enforcement of the Commission's order. See *Virginian Ry. Co.* v. *United States,* 272 U. S. 658.

Affirmed.

UNITED STATES *v.* HASTINGS.

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

No. 22. Argued November 12, 1935.—Decided December 9, 1935.

1. Upon appeal under the Criminal Appeals Act from an order quashing an indictment, this Court must accept the construction of the indictment placed upon it by the District Court. P. 192.
2. This Court cannot entertain an appeal by the Government, under the Criminal Appeals Act, from a judgment of the District Court

quashing an indictment, where the judgment was based not only upon the invalidity or construction of the statute upon which the indictment was founded but also upon another and independent ground. *United States* v. *Stevenson,* 215 U. S. 190, in part disapproved. Pp. 193–194.

3. A case may be reviewed under the Criminal Appeals Act even though one of the grounds certified for sustaining a demurrer is that the indictment fails to charge an offence, if it be apparent that this specification was but introductory to other grounds which clearly involve the construction and validity of the statute on which the indictment was founded. Pp. 194–195.

4. The United States Warehouse Act, as amended, provides for the licensing and regulation by the Secretary of Agriculture of warehouses in which any agricultural product is stored for interstate or foreign commerce, or, if located within any place under the exclusive jurisdiction of the United States, in which any agricultural product is stored; warehouse receipts are to be issued for all agricultural products stored for interstate or foreign commerce, or in any place subject to the exclusive jurisdiction of the United States, in warehouses so licensed; and, by § 10 (U. S. C. Supp. VII, Title 7, § 270) removal, contrary to the Act or regulations, of any agricultural products stored in a licensed warehouse and for which "licensed receipts" have been or are to be issued, is made a misdemeanor. *Held:*

(1) That, despite the broad language used in some of its parts, the Act, aside from its application to places within the exclusive jurisdiction of the United States, should be construed as limited in its operation to storage for interstate or foreign commerce. P. 198.

(2) The term "licensed receipts" in the penal section means the receipts for products stored for interstate or foreign commerce, when not stored in a place under the exclusive jurisdiction of the United States. P. 199.

(3) An indictment for unlawful removal need not allege ownership, value of goods, and intent to defraud as in a common-law indictment for larceny. Pp. 194, 199.

(4) It is, however, an essential ingredient of the offense that the goods removed have been stored for interstate or foreign commerce, or in a place subject to the exclusive jurisdiction of the United States, and that warehouse receipts have been or are to be issued for such storage; and this must be alleged in the indictment. P. 199.

5. No opinion is expressed respecting the power of Congress to punish removal of products stored in licensed warehouses, in places not within the exclusive jurisdiction of the United States. P. 200.

Affirmed.

APPEAL from a judgment of the District Court quashing an indictment upon a demurrer.

Assistant Attorney General Keenan, with whom *Solicitor General Reed* and *Mr. Amos W. W. Woodcock* were on the brief, for the United States.

Mr. James M. Beck, with whom *Messrs. Ed C. Brewer, Charles A. Sisson,* and *Challen B. Ellis* were on the brief, for appellee.

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

Defendant was indicted in the District Court of the United States for violation of the United States Warehouse Act. 7 U. S. C. 270. The indictment contained three counts, each charging the "removal and stealing" of a numbered bale of cotton from a licensed warehouse contrary to the statute and regulations.[1] A demurrer was

[1] The charge in the first count (the other counts being similar) was that defendant (and another) "did knowingly, wilfully, and unlawfully and without any authority of law, remove and steal from and out of the warehouse of the Federal Compress and Warehouse Company, Clarksdale, Mississippi, being the warehouse of said Federal Compress and Warehouse Company known and designated as Plant No. 2, said warehouse being then and there a duly licensed warehouse under and pursuant to the provisions of the United States Warehouse Act, certain agricultural products then and there stored and on storage in said warehouse, to wit: a certain bale of cotton identified on the records of said warehouse as bale of cotton number 407784, for which said bale of cotton a licensed warehouse receipt had theretofore been issued by said Federal Compress and Warehouse Company, the removal and stealing of said cotton from said licensed warehouse being

sustained and the Government brings this appeal under the Criminal Appeals Act. 18 U. S. C. 682.

The penal provision of the statute, so far as pertinent here, is as follows:

"Every person who shall . . . remove from a licensed warehouse contrary to this chapter or the regulations promulgated thereunder, any agricultural products stored or to be stored in such warehouse, and for which licensed receipts have been or are to be issued, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than $10,000, or double the value of the products involved if such double value exceeds $10,000, or imprisoned not more than ten years, or both, in the discretion of the court, . . ."

The District Judge certified his grounds for sustaining the demurrer as follows:

"(1) That said indictment fails to charge any offense against the laws of the United States;

"(2) That the indictment fails to charge that the cotton alleged to have been removed and stolen was the property of any person;

"(3) That the indictment fails to allege the name of the owner of said cotton, and does not charge any intent to defraud the owner thereof;

"(4) That the indictment does not allege the value of the cotton alleged to have been removed and stolen, or that the cotton was of any value;

"(5) That section 270, title 7, of the United States Code, being the section under which the indictment is drawn, is unconstitutional, in that, Congress is without authority under the Constitution to make it an offense

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then and there contrary to and in violation of the said United States Warehouse Act and the regulations promulgated thereunder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

against the laws of the United States to remove agricultural products from a Federal licensed warehouse as alleged in the indictment."

1. *The jurisdiction of this Court.* If the first four grounds of the decision, as stated in the certificate of the District Judge, are to be taken as wholly independent of the questions of the construction and validity of the United States Warehouse Act, those grounds may not be challenged on this appeal. The statute conferring jurisdiction on appeal by the Government in criminal prosecutions confines that jurisdiction to cases where the decision of the District Court, on demurrer, motion to quash or in arrest of judgment, "is based upon the invalidity or construction of the statute upon which the indictment is founded," or where the District Court has sustained "a special plea in bar, when the defendant has not been put in jeopardy." 18 U. S. C. 682. The proposal to confer a broader jurisdiction was considered by the Congress and rejected.[2] Thus the construction of the indictment and its sufficiency merely as a pleading, as distinguished from the construction of the statute, are questions for the District Court. We must accept the construction of the indictment as that court gives it. And where that court has rested its decision upon the invalidity or construction of the statute which underlies the indictment, this Court will not go beyond those grounds and consider other objections to the indictment. *United States* v. *Keitel,* 211 U. S. 370, 397, 398; *United States* v. *Miller,* 223 U. S. 599, 602; *United States* v. *Carter,* 231 U. S. 492, 493; *United States* v. *Moist,* 231 U. S. 701, 702; *United States* v. *Colgate & Co.,* 250 U. S. 300, 301, 302; *United States* v. *Schrader's Son, Inc.,* 252 U. S. 85, 98; *United States* v. *Yuginovich,* 256 U. S. 450, 461.

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[2] H. R. Rep. 59th Cong., 1st sess., vol. 1, No. 2119; Sen. Rep. 59th Cong., 1st sess., vol. 2, No. 3922; H. R. Rep. 59th Cong., 2d sess., vol. 2, No. 8113.

A distinct question is presented where the District Court has not placed its decision solely upon the invalidity or construction of the statute, but has also sustained the demurrer or granted the motion to quash the indictment upon wholly independent grounds of insufficiency. In such a case the judgment of the District Court would remain in effect, and the defendant would go free of the indictment, whatever views we might express upon appeal as to the construction or validity of the statute. We could not reverse the judgment upon questions not before us. An indictment not merely attacked, but found to be invalid on grounds not open here, would be made the vehicle of an effort to obtain from this Court an expression of an abstract opinion, which might or might not fit a subsequent prosecution of the same defendant or others but would not determine the instant case. Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly.

An analogous situation is found in cases where the jurisdiction of this Court has been invoked on writs of error or appeals from judgments of state courts, and it appears that, notwithstanding the existence of a federal question, and its consideration and determination by the state court, the judgment rests upon a nonfederal ground adequate to support it and hence would not be affected by a decision by this Court of the federal question. In such cases, we refuse review. While the earlier practice was to affirm the judgment without considering the federal question, the later practice has been to dismiss the writ of error or appeal. *Murdock* v. *Memphis,* 20 Wall. 590, 634, 635; *Jenkins* v. *Loewenthal,* 110 U. S. 222; *Hale* v. *Akers,* 132 U. S. 554, 565; *Hammond* v. *Johnston,* 142 U. S. 73, 78; *Eustis* v. *Bolles,* 150 U. S. 361, 370; *Enterprise Irrigation District* v. *Farmers Canal Co.,* 243 U. S. 157, 164, 166; *Petrie* v. *Nampa Irrigation District,* 248

U. S. 154, 157; *Ex parte Steckler,* 292 U. S. 610; *Capital Endowment Co.* v. *Ohio, post,* p. 546.

It was in the light of the considerations governing the exercise of the judicial power that the Criminal Appeals Act was enacted and appeals by the Government were subjected to the prescribed limitations. *United States* v. *Evans,* 213 U. S. 297, 300. We think that the provision which limits the Government's appeal to those cases where the decision or judgment of the District Court is "*based*" upon the invalidity or construction of the statute, should be taken to refer to cases where that determination, and not a wholly independent ground, is the foundation of the judgment. If the judgment is independently based, and in that respect is not open to correction or reversal, we are of the opinion that this Court should not entertain the Government's appeal. To the extent that the opinion in the case of *United States* v. *Stevenson,* 215 U. S. 190, 195, states a contrary view, it is disapproved.

Are the first four grounds stated by the District Judge independent of the construction of the statute? The first ground may fairly be regarded as not a distinct ground, or a finding of the insufficiency of the indictment as a mere matter of pleading, but as intended to be an introduction to the specifications which follow and to be read in their light. Treating the first ground in this sense, and as merely preliminary, we turn to the specifications in the second, third and fourth grounds, which clearly involve the construction of the Act. That is, they go upon the view that the ingredients of the statutory offense are similar to those of common law larceny and that to establish the offense it must be alleged and proved that the cotton in question was the property of a person named, was removed with intent to defraud the owner, and had value. It is the contention of the Government that this is an unwarranted construction and that the

words of the statute, which do not contain such requirements, are fully descriptive of the statutory offense.

In his fifth ground, the District Judge expressly deals with the constitutionality of the provision, holding that Congress is without authority "to make it an offense against the laws of the United States to remove agricultural products from a federal licensed warehouse as alleged in the indictment." The concluding words challenge attention to the absence from the indictment of an allegation that the cotton was stored for interstate or foreign commerce. The statement of the District Judge may be taken to be a construction of the indictment as charging simply the removal of the cotton from a federal licensed warehouse which had issued a receipt, without alleging that the cotton was stored for interstate or foreign commerce, and that the receipt was issued accordingly. We are not at liberty to construe the indictment otherwise. While in this view, the present appeal does not bring up the questions broadly discussed at the bar as to products stored for interstate or foreign commerce—questions which must await a different and appropriate record—the appeal does present a narrower but still important question as to the scope of the penal provision. That is, whether Congress sought to exert and, if so, could validly exert, such a measure of control over warehouses operating under federal licenses, as to penalize the removal of products deposited in such warehouses, and receipted for, regardless of the purpose, or the nature of the commerce, for which the deposit was made.

We have jurisdiction to determine these questions of construction and validity.

2. *The construction of the statute.* To construe the penal provision, we turn to its context, to the statutory definition of the terms it employs, and to the purpose thus disclosed.

The Act[3] defines the term "warehouse" as "every building, structure, or other protected enclosure in which any agricultural product is or may be stored for interstate or foreign commerce, or, if located within any place under the exclusive jurisdiction of the United States, in which any agricultural product is or may be stored." 7 U. S. C. § 242. The Secretary of Agriculture is authorized to make investigations and classifications, to issue licenses and to prescribe the duties of licensed warehousemen, who must give bond for the faithful performance of their obligations. *Id.*, §§ 243–247. The Secretary is also authorized to issue licenses to competent persons to inspect, sample, classify and weigh agricultural products stored or to be stored in licensed warehouses, and to give certificates accordingly. *Id.*, § 252. Those conducting licensed warehouses are required to receive for storage, within their capacity, agricultural products of the kind customarily stored by them if such products are tendered "in a suitable condition for warehousing" and "in the usual manner" according to the ordinary course of business, "without making any discrimination between persons desiring to avail themselves of warehouse facilities." *Id.*, § 254. Persons who deposit agricultural products for storage in licensed warehouses are to be deemed to have made the deposit subject to the statute and the regulations it authorizes. *Id.*, § 255. It is then provided that "Any fungible agricultural product stored for interstate or foreign commerce, or in any place under the exclusive jurisdiction of the United States" in a licensed warehouse must be inspected and graded by a person licensed for that purpose. *Id.* § 256.

The following provision for the issue of warehouse receipts is of special importance:

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[3] Act of August 11, 1916, c. 313, Part C, 39 Stat. 486, amended by Acts of February 23, 1923, c. 106, 42 Stat. 1282, and March 2, 1931, c. 366, 46 Stat. 1463; 7 U. S. C., §§ 241–273.

"For all agricultural products stored for interstate or foreign commerce, or in any place under the exclusive jurisdiction of the United States, in a warehouse licensed under this chapter original receipts shall be issued by the warehouseman conducting the same, but no receipts shall be issued except for agricultural products actually stored in the warehouse at the time of the issuance thereof." *Id.*, § 259.

The next section prescribes the contents of receipts which may be taken to refer to the receipts required by the provision above quoted. *Id.*, § 260.

In the original Act of 1916 it was provided that nothing therein should "be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen, weighers, graders, or classifiers," but the Secretary of Agriculture was authorized "to coöperate" with state officials and "through such coöperation to secure the enforcement" of the provisions of the Act. Act of August 11, 1916, Part C, § 29, 39 Stat. 490. This section was amended in 1931, so as to provide for coöperation with state officials in the "discretion" of the Secretary, and with the addition that "the power, jurisdiction, and authority" conferred upon the Secretary should be "exclusive with respect to all persons securing a license," so long as the license remains in effect. Act of March 2, 1931, 46 Stat. 1465; 7 U. S. C. § 269.

Then follows the provision prescribing penalties for the forging, altering, counterfeiting, etc. of licenses, the issue of false or fraudulent receipts, and the conversion or the unauthorized removal from a licensed warehouse of agricultural products for which "licensed receipts" have been or are to be issued. *Id.*, § 270.

The instant case relates to cotton, and the Government emphasizes the salient facts as to the customary move-

ment and marketing of cotton. But the Act is not limited to cotton. Originally, the Act defined "agricultural products" as embracing "cotton, wool, grains, tobacco and flaxseed." [4] By regulations under the Act as amended, it has been extended to a variety of products.[5] The Act is not limited to one section of the country, or to particular market conditions, but applies generally to warehouses for these varied commodities. The Government points to the permissive character of the statute which, it is said, should have "great weight in determining whether Congress has encroached upon the powers of the States." And Congress could not fail to have in mind that there were warehouses in many States, operating under state laws and serving local demands in intrastate transactions; receiving for storage and issuing receipts for agricultural products in connection with enterprises and trade that are entirely local.

It would need stronger evidence than this Act affords to justify the conclusion that Congress intended that warehousemen, in taking advantage of the federal statute and in issuing warehouse receipts as required by its terms, should submit to federal control the deposit of products and the issue of warehouse receipts in the course of their local business where the products were not stored for interstate or foreign commerce. Despite the broad language of certain sections of the Act, we think that (aside from places within the exclusive jurisdiction of the United States) the limitation to storage for interstate or foreign commerce is dominant. We have observed how specific is this limitation in the provision requiring the issue of warehouse receipts. To repeat, the requirement

[4] Act of August 11, 1916, c. 313, Part C, 39 Stat. 486.

[5] Act of February 23, 1923, c. 106, 42 Stat. 1282; "Once Again the United States Warehouse Act," U. S. Department of Agriculture (1925), p. 3.

is that receipts shall be issued "for all agricultural products stored for interstate or foreign commerce, or in any place under the exclusive jurisdiction of the United States," in a warehouse licensed under the Act. § 259. The amendment of 1931, with respect to conflict with the operation of state laws, does not militate against this limitation, for while the amendment asserts the exclusive authority of the Secretary of Agriculture, it has relation to the authority conferred by the Act, and the definition in the original Act of the warehouses which may be licensed and the provision of § 259 as to the products for which warehouse receipts are to be issued, were left unchanged by the amendment.

The penal section under which the indictment is laid defines the offense as not simply the unauthorized removal of agricultural products from a "licensed warehouse," but the removal of products "for which licensed receipts have been or are to be issued." § 270. We think that the term "licensed receipts" refers to those prescribed by the statute as above stated.

We agree with the Government that the penal section is fully descriptive of the statutory offense and does not require that a charge of violation should contain allegations such as would be appropriate in the case of common law larceny. But the statute does require that in order to make out a violation through the unauthorized removal of agricultural products, it is not enough that the removal should be from a licensed warehouse, or that a receipt has been given by the warehouseman, but the removal must also be of products for which "licensed receipts" have been or are to be issued. That is, it is an essential ingredient of the offense that the products have been stored for interstate or foreign commerce, or in a place subject to the exclusive jurisdiction of the United States, and that warehouse receipts have been or are to be issued for such storage.

3. As we conclude that the Congress has not attempted to punish the removal of products not stored for interstate or foreign commerce (when the place of storage is not within the exclusive jurisdiction of the United States), we need not consider the constitutional objections to such an effort. And as we do not have before us the case of a removal of products stored for interstate or foreign commerce, and for which receipts have been given accordingly, we express no opinion as to the extent of the power of the Congress in that relation.

Because of the absence from the charge of an essential element of the offense as defined in the statute, the District Court did not err in sustaining the demurrer.

Affirmed.

GENERAL UTILITIES & OPERATING CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 41. Argued November 15, 1935.—Decided December 9, 1935.

1. When a corporation, owning shares in another company which have increased in value since it bought them, declares a dividend payable in such shares, out of the surplus arising from such increase, and pays it accordingly by distributing such shares in specie among its stockholders, no taxable gain results to the corporation. This is not a sale to stockholders; nor a use of assets to discharge indebtedness. Pp. 202, 206.
2. In reviewing a decision of the Board of Tax Appeals, the Circuit Court of Appeals may not sustain an assessment over the Board's decision upon a ground which was not presented to the Board nor in the petition for review; the taxpayer is entitled to know with fair certainty the basis of the claim against him. P. 206.
3. The Circuit Court of Appeals committed error in this case, not only in deciding a question not properly raised, but also in making an inference of fact in conflict with the stipulation of the par-

ties and the findings of the Board of Tax Appeals and without support in the record. P. 206.

4. Upon reversal of a judgment of the Circuit Court of Appeals overruling a decision of the Board of Tax Appeals, the cause will not be remanded to the Board for further findings, if it be apparent that nothing could properly be found to sustain the Commissioner's contention. P. 207.

74 F. (2d) 972, reversed.

CERTIORARI, 295 U. S. 730, to review a judgment which reversed a decision of the Board of Tax Appeals overruling an income tax assessment.

Mr. Hugh C. Bickford, with whom *Mr. R. Kemp Slaughter* was on the brief, for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Lucius A. Buck* were on the brief, for respondent.

By leave of Court, *Messrs. Laurence Arnold Tanzer* and *John W. Townsend* and *Messrs. Russell D. Morrill, Walter S. Orr,* and *Francis L. Casey* filed briefs as *amici curiae,* supporting the contentions of petitioner.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

January 1st, 1927, petitioner—General Utilities, a Delaware corporation—acquired 20,000 shares (one-half of total outstanding) common stock Islands Edison Company, for which it paid $2,000. Gillet & Company owned the remainder.

During January, 1928, Whetstone, President of Southern Cities Utilities Company, contemplated acquisition by his company of all Islands Edison common stock. He discussed the matter with Lucas, petitioner's president, also with Gillet & Company. The latter concern agreed

to sell its holdings upon terms acceptable to all. But Lucas pointed out that the shares which his company held could only be purchased after distribution of them among stockholders, since a sale by it would subject the realized profit to taxation, and when the proceeds passed to the stockholders there would be further exaction. Lucas had no power to sell, but he, Gillet and Whetstone were in accord concerning the terms and conditions under which purchase of all the stock might become possible— "it being understood and agreed between them that petitioner would make distribution of the stock of the Islands Edison Company to its stockholders and that counsel would prepare a written agreement embodying the terms and conditions of the said sale, agreement to be submitted for approval to the stockholders of the Islands Edison Company after the distribution of said stock by the petitioner."

Petitioner's directors, March 22, 1928, considered the disposition of the Islands Edison shares. Officers reported they were worth $1,122,500, and recommended an appreciation on the books to that figure. Thereupon a resolution directed this change; also "that a dividend in the amount of $1,071,426.25 be and it is hereby declared on the Common Stock of this Company payable in Common Stock of The Islands Edison Company at a valuation of $56.12½ a share, out of the surplus of the Company arising from the appreciation in the value of the Common Stock of The Islands Edison Company held by this Company, viz, $1,120,500.00, the payment of the dividend to be made by the delivery to the stockholders of this Company, pro rata, of certificates for the Common Stock of The Islands Edison Company held by this Company at the rate of two shares of such stock for each share of Company Stock of this Corporation."

Accordingly, 19,090 shares were distributed amongst petitioner's thirty-three stockholders and proper transfers

to them were made upon the issuing corporation's books. It retained 910 shares.

After this transfer, all holders of Islands Edison stock, sold to Southern Cities Utilities Company at $56.12½ per share. Petitioner realized $46,346.30 net profit on 910 shares and this was duly returned for taxation. There was no report of gain upon the 19,090 shares distributed to stockholders.

The Commissioner of Internal Revenue declared a taxable gain upon distribution of the stock in payment of the dividend declared March 22nd, and made the questioned deficiency assessment. Seeking redetermination by the Board of Tax Appeals, petitioner alleged, " The Commissioner of Internal Revenue has erroneously held that the petitioner corporation made a profit of $1,069,517.25 by distributing to its own stockholders certain capital stock of another corporation which it had theretofore owned." And it asked a ruling that no taxable gain resulted from the appreciation upon its books and subsequent distribution of the shares. Answering, the Commissioner denied that his action was erroneous, but advanced no new basis of support. A stipulation concerning the facts followed; and upon this and the pleadings, the Board heard the cause.

It found " The respondent has determined a deficiency in income tax in the amount of $128,342.07 for the calendar year 1928. The only question presented in this proceeding for redetermination is whether petitioner realized taxable gain in declaring a dividend and paying it in the stock of another company at an agreed value per share, which value was in excess of the cost of the stock to petitioner." Also, " On March 26, 1928, the stockholders of the Islands Edison Company (one of which was petitioner, owning 910 shares) and the Southern Cities Utilities Company, entered into a written contract of sale of the Islands Edison Company stock. At no

time did petitioner agree with Whetstone or the Southern Cities Utilities Company, verbally or in writing, to make sale to him or to the Southern Cities Utilities Company of any of said stock except the aforesaid 910 shares of the Islands Edison Company."

The opinion recites—The Commissioner's "theory is that upon the declaration of the dividend on March 22, 1928, petitioner became indebted to its stockholders in the amount of $1,071,426.25, and that the discharge of that liability by the delivery of property costing less than the amount of the debt constituted income, citing *United States* v. *Kirby Lumber Co.*, 284 U. S. 1." "The intent of the directors of petitioner was to declare a dividend payable in Islands Edison stock; their intent was expressed in that way in the resolution formally adopted; and the dividend was paid in the way intended and declared. We so construe the transaction, and on authority of First Utah Savings Bank, *supra* [17 B. T. A. 804; aff'd, 60 App. D. C. 307; 53 F. (2d) 919], we hold that the declaration and payment of the dividend resulted in no taxable income."

The Commissioner asked the Circuit Court of Appeals, 4th Circuit, to review the Board's determination. He alleged, "The only question to be decided is whether the petitioner [taxpayer] realized taxable income in declaring a dividend and paying it in stock of another company at an agreed value per share, which value was in excess of the cost of the stock."

The court stated: "There are two grounds upon which the petitioner urges that the action of the Board of Tax Appeals was wrong: First, that the dividend declared was in effect a cash dividend and that the respondent realized a taxable income by the distribution of the Islands Edison Company stock to its stockholders equal to the difference between the amount of the dividend declared and the cost of the stock; second, that the sale made of the

Islands Edison Company stock was in reality a sale by the respondent (with all the terms agreed upon before the declaration of the dividend), through its stockholders who were virtually acting as agents of the respondent, the real vendor."

Upon the first ground, it sustained the Board. Concerning the second, it held that, although not raised before the Board, the point should be ruled upon. "When we come to consider the sale of the stock of the Islands Edison Company, we cannot escape the conclusion that the transaction was deliberately planned and carried out for the sole purpose of escaping taxation. The purchaser was found by the officers of the respondent; the exact terms of the sale as finally consummated were agreed to by the same officers; the purchaser of the stock stated that the delivery of all the stock was essential and that the delivery of a part thereof would not suffice; the details were worked out for the express and admitted purpose of avoiding the payment of the tax and for the reason that the attorneys for the respondent had advised that, unless some such plan was adopted, the tax would have to be paid; and a written agreement was to be prepared by counsel for the respondent which was to be submitted to the stockholders——all this without the stockholders, or any of them, who were ostensibly making the sale, being informed, advised, or consulted. Such admitted facts plainly constituted a plan, not to use the harsher terms of scheme, artifice or conspiracy, to evade the payment of the tax. For the purposes of this decision, it is not necessary to consider whether such a course as is here shown constituted a fraud, it is sufficient if we conclude that the object was to evade the payment of a tax justly due the government.

"The sale of the stock in question was, in substance, made by the respondent company, through the stockholders as agents or conduits through whom the transfer of

the title was effected. The stockholders, even in their character as agents, had little or no option in the matter and in no sense exercised any independent judgment. They automatically ratified the agreement prepared and submitted to them."

A judgment of reversal followed.

Both tribunals below rightly decided that petitioner derived no taxable gain from the distribution among its stockholders of the Islands Edison shares as a dividend. This was no sale; assets were not used to discharge indebtedness.

The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board. The petition for review relied wholly upon the first point; and, in the circumstances, we think the court should have considered no other. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised.

Recently (April, 1935) this court pointed out: "The 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." "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 records." *Helvering* v. *Rankin,* 295 U. S. 123, 131, 132.

Here the court undertook to decide a question not properly raised. Also it made an inference of fact directly

in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever. To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause.

The judgment of the court below must be reversed. The action of the Board of Tax Appeals is approved.

Reversed.

FOX FILM CORP. *v.* MULLER.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 47. Argued November 15, 1935.—Decided December 9, 1935.

1. Where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the jurisdiction of this Court fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. P. 210.
2. Whether the provisions of a contract are non-severable, so that if one be held invalid the others must fall with it, is a question of general and not of federal law. P. 210.
3. A ruling by a state supreme court that a concededly invalid arbitration clause in a contract between a motion picture distributor and an exhibitor (the same clause that was held invalid as a violation of the Sherman Act in *Paramount Famous Corp.* v. *United States*, 282 U. S. 30) was inseparable from the other provisions and rendered the entire contract unenforceable, *held* a non-federal ground adequate to support the judgment, without regard to whether the court decided a federal question in determining the contract invalid also on another ground. P. 210.
4. *Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, distinguished. P. 210.

Writ of certiorari to 194 Minn. 654; 260 N. W. 320, dismissed.

CERTIORARI, 295 U. S. 730, to review a judgment affirming a judgment denying recovery in an action for damages for breach of contract. A writ of certiorari previously granted in this case, 293 U. S. 550, to review an earlier

judgment of the state court, 192 Minn. 212; 255 N. W. 845, was dismissed as improvidently granted, it appearing that no final judgment had been entered, 294 U. S. 696.

Mr. Charles E. Hughes, Jr., with whom *Messrs. James D. Shearer* and *Percy Heiliger* were on the brief, for petitioner.

Mr. Abram F. Myers, with whom *Mr. Samuel P. Halpern* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought in a Minnesota state court of first instance by the Film Corporation against Muller, to recover damages for an alleged breach of two contracts by which Muller was licensed to exhibit certain moving-picture films belonging to the corporation. Muller answered, setting up the invalidity of the contracts under the Sherman Anti-trust Act. It was and is agreed that these contracts are substantially the same as the one involved in *United States* v. *Paramount Famous Lasky Corp.,* 34 F. (2d) 984, aff'd 282 U. S. 30; that petitioner was one of the defendants in that action; and that the "arbitration clause," paragraph 18 of each of the contracts sued upon, is the same as that held in that case to be invalid. In view of the disposition which we are to make of this writ, it is not necessary to set forth the terms of the arbitration clause or the other provisions of the contract.

The court of first instance held that each contract sued upon violated the Sherman Anti-trust Act, and dismissed the action. In a supplemental opinion that court put its decision upon the grounds, first, that the arbitration plan is so connected with the remainder of the contract that the entire contract is tainted, and, second, that the con-

tract violates the Sherman Anti-trust law. The state supreme court affirmed. 192 Minn. 212; 255 N. W. 845. We granted certiorari, 293 U. S. 550; but, when the case was called for argument, it appeared that no final judgment had been entered and the writ was dismissed as improvidently granted. 294 U. S. 696. The case was then remanded to the state supreme court; and, the judgment having been made final, and again affirmed by the state supreme court on the authority of its previous opinion, 194 Minn. 654; 260 N. W. 320, we allowed the present writ. 295 U. S. 730.

In its opinion, the state supreme court, after a statement of the case, said (192 Minn. at p. 214):

"The question presented on this appeal is whether the arbitration clause is severable from the contract, leaving the remainder of the contract enforceable, or not severable, permeating and tainting the whole contract with illegality and making it void."

That court then proceeded to refer to and discuss a number of decisions of state and federal courts, some of which took the view that the arbitration clause was severable, and others that it was not severable, from the remainder of the contract. After reviewing the opinion and decree of the federal district court in the *Paramount* case, the lower court reached the conclusion that the holding of the federal court was that the entire contract was illegal; and upon that view and upon what it conceived to be the weight of authority, held the arbitration plan was inseparable from the other provisions of the contract. Whether this conclusion was right or wrong we need not determine. It is enough that it is, at least, not without fair support.

Respondent contends that the question of severability was alone decided and that no federal question was determined by the lower court. This contention petitioner challenges, and asserts that a federal question was involved and decided. We do not attempt to settle the dis-

pute; but, assuming for present purposes only that petitioner's view is the correct one, the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger* v. *Missouri*, 13 Wall. 257, 263, and has been reiterated in a long line of cases since that time. It is enough to cite, in addition to the *Klinger* case, the following: *Enterprise Irrigation District* v. *Canal Co.*, 243 U. S. 157, 163–165; *Petrie* v. *Nampa Irrigation District*, 248 U. S. 154, 157; *McCoy* v. *Shaw*, 277 U. S. 302; *Eustis* v. *Bolles*, 150 U. S. 361.

Whether the provisions of a contract are non-severable, so that if one be held invalid the others must fall with it, is clearly a question of general and not of federal law. The invalidity of the arbitration clause which the present contracts embody is conceded. It was held invalid by the federal district court in the *Paramount* case, and its judgment was affirmed here. The question, therefore, was foreclosed; and was not the subject of controversy in the state courts. In that situation, the primary question to be determined by the court below was whether the concededly invalid clause was separable from the other provisions of the contract. The ruling of the state supreme court that it was not, is sufficient to conclude the case without regard to the determination, if, in fact, any was made, in respect of the federal question. It follows that the non-federal ground is adequate to sustain the judgment.

The rule announced in *Enterprise Irrigation District* v. *Canal Co.*, *supra*, and other cases, to the effect that our jurisdiction attaches where the non-federal ground is so interwoven with the other as not to be an independent

matter, does not apply. The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The non-federal question in respect of the construction of the contracts, and the federal question in respect of their validity under the Anti-trust Act, were clearly independent of one another. See *Allen* v. *Southern Pacific R. Co.*, 173 U. S. 479, 489–492. The case, in effect, was disposed of before the federal question said to be involved was reached. *Chouteau* v. *Gibson*, 111 U. S. 200; *Chapman* v. *Goodnow*, 123 U. S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.

Writ dismissed for want of jurisdiction.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

BINGHAM ET AL. *v.* UNITED STATES.

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

No. 83. Argued November 22, 1935.—Decided December 9, 1935.

1. Acts of Congress are to be construed, if possible, so as to avoid grave doubts of their constitutionality. P. 218.
2. Section 402 (f) of the Revenue Act of 1918, which declares that amounts in excess of $40,000 receivable by all beneficiaries, other than the executor, as insurance under policies taken out by a decedent upon his own life, shall be included in his gross estate in determining the estate transfer tax, is not to be construed as applicable to a policy taken out and made payable, directly or by assignment, to such a beneficiary long before the Act was passed, where no power was reserved in the decedent to change the bene-

ficiary, pledge or assign the policy, revoke the assignment made, or surrender the policy without the beneficiary's consent; even though, by the terms of the policy or assignment, if such beneficiary had not survived the decedent, the proceeds would have gone to the decedent's estate. *Lewellyn* v. *Frick*, 268 U. S. 238. Pp. 217–219.

3. The title and possession of the beneficiary were irrevocably fixed by the terms of the policy or assignment; and no interest passed to the beneficiary as the result of the death of the insured. *Helvering* v. *St. Louis Union Trust Co.*, *ante*, p. 39; *Becker* v. *St. Louis Union Trust Co.*, *ante*, p. 48. P. 219.
4. Matters pertinent to an issue before the court and which were clearly presented to it, are to be taken as covered by the decision though not mentioned in the opinion. P. 218.

76 F. (2d) 573, reversed.

CERTIORARI* to review a judgment reversing a judgment, 7 F. Supp. 907, in an action to recover the amount of a federal estate tax alleged to have been illegally exacted.

Mr. George S. Fuller for petitioners.

Mr. David E. Hudson, with whom *Solicitor General Reed*, *Assistant Attorney General Wideman*, and *Messrs. Sewall Key* and *Arnold Raum* were on the brief, for the United States.

The issue is not foreclosed by *Lewellyn* v. *Frick*, 268 U. S. 238. Whether § 402 (f) operates retroactively must be considered separately in every case.

Lewellyn v. *Frick* does not prevent the inclusion of every policy taken out before the enactment of the 1918 Act. In certain cases the statute would not have a retroactive effect because of reserved powers in the insured or because of contingencies involved in a beneficiary's interests which became indefeasible only upon the insured's death after the passage of the statute. And in such cases

*See Table of Cases Reported in this volume.

where there would in fact be no retroactive operation of the statute we believe that the all-inclusive language of § 402 (f) is not subject to the exception read into it by the *Frick* decision. Cf. *Heiner* v. *Grandin,* 44 F. (2d) 141; 56 F. (2d) 1082; cert. den., 286 U. S. 561.

That the scope of the *Frick* decision is not as broad as the petitioners herein assert is further evidenced by this Court's combined treatment of *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, and *Chase National Bank* v. *United States,* 278 U. S. 327. In the latter the Court held that § 402 (f) of the 1921 Act (identical with the corresponding provisions of the 1918 Act) was applicable. Since the policies were taken out after the effective date of the Act, that decision, if it stood alone, might not have any significance with reference to the present issue. But the Court on that same day decided the *Reinecke* case holding, *inter alia,* that two trusts, created in 1903 and 1910 respectively, revocable by the settlor, were properly included in his gross estate under the 1921 Act. In reaching that result, the Court relied upon its decision in the *Chase National Bank* case.

The Court employed the *Chase National Bank* case to justify a holding that it was not retroactive taxation to include in a decedent's gross estate transfers made by him before the effective date of any federal estate tax statute, but which became complete only at his death. The inference is plain, that had the policies in the *Chase National Bank* case been taken out before the first federal estate tax statute (or before either the 1918 or 1921 Acts), it would not have been retroactive taxation to include them in the decedent's gross estate. See also *Liebes* v. *Commissioner,* 63 F. (2d) 870, 873.

Reference to the record in the *Frick* case will disclose, it is true, that three of the policies involved therein had been assigned by the insured reserving the right to revoke the assignments, a power comparable to the power to

change the beneficiary, and that in several other policies, the beneficiaries' interests were contingent. But the Government did not make any argument based on that power of revocation or the defeasibility of the beneficiaries' interests, nor did the Court consider or even allude to them in its opinion. Under those circumstances, the decision cannot be regarded as having passed on the effect of such elements. Cf. *Webster* v. *Fall,* 266 U. S. 507, 511; *United States* v. *Mitchell,* 271 U. S. 9, 14. Those circumstances, when considered along with the *Chase National Bank* case, *Reinecke* v. *Northern Trust Co.,* and the denial of certiorari in the *Grandin* case, would seem to indicate that the issue herein is not foreclosed by the *Frick* case.

Section 402 (f) does not operate retroactively as to the policies herein.

Transactions initiated before the effective date of a statute are frequently considered as completed only at the decedent's death occurring after the passage of the statute. A common type of such transactions is a transfer with reserved power to revoke, alter, or amend. It is only upon termination of the power that the transfers are regarded as complete. See *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Saltonstall* v. *Saltonstall,* 276 U. S. 260; *Porter* v. *Commissioner,* 288 U. S. 436; *Gwinn* v. *Commissioner,* 287 U. S. 224. Cf. *Burnet* v. *Guggenheim,* 288 U. S. 280.

But a transfer with reserved powers to revoke, etc., is not the only kind of transaction that may be incomplete until a later date. The creation of an estate by the entirety, for example, gives neither spouse any right of severance, revocation, etc. Yet the whole estate may be included in the gross estate of the spouse who created the tenancy, regardless of when it was created, because the surviving spouse's rights depended upon outliving the other, and became absolute for the first time at the other's

death. *Third Nat. Bank & Trust Co.* v. *White,* 287 U. S. 577, affirming *per curiam,* 58 F. (2d) 1085, affirming *per curiam,* 45 F. (2d) 911; *Robinson* v. *Commissioner,* 63 F. (2d) 652; cert. den., 289 U. S. 758; *Bushman* v. *United States,* 8 F. Supp. 694, cert. den., 295 U. S. 756. Cf. *Tyler* v. *United States,* 281 U. S. 497.

Entirely apart from the decedent's payment of premiums up to the time of his death, the rights of the wife depended on outliving her husband. His death was the indispensable event giving rise to, or at least enlarging, valuable property rights in the wife, not theretofore possessed or enjoyed. *Klein* v. *United States,* 283 U. S. 231, 234. See also *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509; *Sargent* v. *White,* 50 F. (2d) 410; *Hoblitzelle* v. *United States,* 3 F. Supp. 331; *Union Trust Co.* v. *United States,* 54 F. (2d) 152, cert. den., 286 U. S. 547; *Commissioner* v. *Schwarz,* 74 F. (2d) 712.

In the Connecticut policy there is an additional feature, namely, the right of cash surrender. Under that policy the insured had it within his power, for a period of thirty days from May 22, 1893, and a similar period at the end of each five years from that date, to wipe out all rights under that policy and to obtain for himself the cash value thereof. Until the moment of death, the beneficiary's interest depended not only upon her surviving the insured, but also upon his failure to live until the end of the five year period, or if he should reach the end of the five year period, upon his failure to exercise his power to cancel the policy and receive the cash surrender value thereof.

The petitioners may point out, however, that the insured died February 27, 1921, and that the last five year period before his death ended May 22, 1918. The possibility that the insured might live until May 22, 1923, and then exercise his right of cash surrender was indeed a substantial obstacle to her rights. That obstacle was in existence while the 1918 Act was in effect.

When the insured's power to call for cash surrender was last effective before his death, there was in existence a comprehensive estate tax law. The mere fact that the estate is being taxed under a later statute should be immaterial on the question of retroactivity. Cf. *Milliken* v. *United States,* 283 U. S. 15, 20 *et seq.* True, the earlier law had no specific provision regarding insurance. But it did present a comprehensive system of death taxes, and was sufficient to put one on notice that transactions testamentary in character, hitherto unprovided for, might be included in a later statute. It would, therefore, not be arbitrary and capricious to include such testamentary transactions in a later Act. Cf. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 379; *Cooper* v. *United States,* 280 U. S. 409.

So construed, § 402 (f) is constitutional.

Life insurance is inherently testamentary in character. The policies herein are particularly so because of the contingent character of the beneficiaries' interests, and it is therefore appropriate to include the proceeds in the insured's gross estate.

Mr. Justice Sutherland delivered the opinion of the Court.

This case involves the construction and constitutionality, as applied, of § 402 (f) of the Revenue Act of 1918, which provides that the value of the gross estate of the decedent shall be determined by including the value, at the time of his death, of all property "(f) to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

Petitioners are the executors of the will of King Upton, who died in 1921 while the Act of 1918 was in force. His wife survived him. Long prior to the passage of the Act, a number of life insurance policies were issued to the decedent, among them four issued by the Berkshire Life Insurance Company of Massachusetts, originally payable to his estate; and one issued in 1883 by the Connecticut Mutual Life Insurance Company of Connecticut, payable to the wife of the decedent with a condition that in case of the predecease of the wife the amount of the policy should be payable to his children, or, if there be no children or descendants of children then living, to the legal representatives of the insured. In 1904, decedent assigned the four Berkshire policies to his wife, " provided she survives me." The decedent had no power, none being reserved, to change the beneficiaries, to pledge or assign the policies after the assignment to his wife, or revoke that assignment, or surrender the policies without the consent of the beneficiaries. *Central Bank of Washington* v. *Hume,* 128 U. S. 195, 205; *Miles* v. *Connecticut Life Ins. Co.,* 147 U. S. 177, 181, 182, 183, compare dissent p. 188; *Commonwealth* v. *Whipple,* 181 Mass. 343; 63 N. E. 919; *Pingrey* v. *National Life Insurance Co.,* 144 Mass. 374, 382; 11 N. E. 562.

After having deducted the specific exemption of $40,000, the Commissioner of Internal Revenue included the proceeds of these five policies in the decedent's gross estate, for the purpose of the federal estate tax. An action was brought in a federal district court to recover the amount of the tax resulting from the inclusion of these proceeds. That court rejected the view of the commissioner and awarded judgment to the taxpayers upon the authority of *Lewellyn* v. *Frick,* 268 U. S. 238. 7 F. Supp. 907.

The court of appeals reversed, holding that the *Frick* case was distinguishable. 76 F. (2d) 573. We think the view taken by the district court is the correct one.

1. Eleven policies were involved in the *Frick* case, all antedating the passage of the act. Among them was one issued by the Berkshire company and another issued by the Connecticut Mutual. These policies in terms were identical with the corresponding policies in question here. The assignment of the Berkshire policy there was the same as the assignments here. This court applied the rule that acts of Congress are to be construed, if possible, so as to avoid grave doubts as to their constitutionality; and said that such doubts were avoided by construing the statute as referring only to transactions taking place after it was passed. In that connection we invoked the general principle "that the laws are not to be considered as applying to cases which arose before their passage" when to disregard it would be to impose an unexpected liability that, if known, might have been avoided by those concerned. The court below sought to distinguish the decision on the ground that this court did not refer to those specific provisions set forth in the policies and assignments which are pertinent here. The government makes the same point, and contends that since this court did not allude to these provisions in the opinion, the decision cannot be regarded as having passed on their effect. It is true that questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. *Webster* v. *Fall,* 266 U. S. 507, 511. That, however, is not the situation in the present case. In *Lewellyn* v. *Frick* the policies and assignments, in their entirety, were definitely before the court; and this necessarily included each of the provisions which they contained. Moreover, both in the appendix to the government's brief and in the main brief of the taxpayers, the attention of the court was distinctly called to all of the provisions which are now invoked. The latter brief summarized and described the provisions of the

four classes of policies which were involved—one class being policies, it was pointed out, made payable to the Frick estate " subsequently assigned by Mr. Frick to his wife or daughter if she survived him, without reserving power to revoke the assignments." This court, without stopping to recite the various specific provisions that were thus clearly brought to its attention, held that the proceeds of none of the policies were subject to the estate tax under § 402 (f). It fairly must be concluded that in reaching that result these provisions were considered, and that such of them as bore upon the problem, there as well as here presented, were found not to require a different determination. We think the points now urged by the government were decided in the *Frick* case, and find no reason to reconsider them.

2. The principles so recently announced by this court in *Helvering* v. *St. Louis Union Trust Co., ante,* p. 39, and *Becker* v. *St. Louis Union Trust Co., ante,* p. 48, are decisive of the case in favor of the taxpayers. Those principles establish that the title and possession of the beneficiary were fixed by the terms of the policies and assignments thereof, beyond the power of the insured to affect, many years before the act here in question was passed. No interest passed to the beneficiary as the result of the death of the insured. His death merely put an end to the possibility that the predecease of his wife would give a different direction to the payment of the policies.

Judgment reversed.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO concur on the first ground stated in this opinion.

The CHIEF JUSTICE concurs in this opinion, acquiescing in the second ground because of the recent decisions in the cases there mentioned.

INDUSTRIAL TRUST CO. ET AL., EXECUTORS, *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 213. Argued November 22, 1935.—Decided December 9, 1935.

1. Acts of Congress must be construed, if possible, so as to avoid grave doubts of their constitutionality. P. 221.
2. A life insurance policy taken out in 1892 by the insured and paid up in 1912, was payable to others if they survived him but otherwise to his estate. No power was reserved in him to change beneficiaries, borrow on the policy or surrender it. The others survived him when he died in 1930. *Held*: That § 302 (g), Revenue Act 1926, which is the same as § 402 (f), Revenue Act 1918, may not be construed as making the amount receivable by the beneficiaries a part of the gross estate; notwithstanding subdivision (h) of § 302 of the 1926 Act, which declares that subdivision (g) of that section, along with others, shall apply to "transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act." *Bingham* v. *United States, ante*, p. 211. Pp. 221–222.

80 Ct. Cls. 647; 9 F. Supp. 817, reversed.

CERTIORARI * to review a judgment dismissing a petition in a suit to recover an amount exacted as part of an estate tax.

Mr. Charles P. Taft for petitioners.

Mr. David E. Hudson, with whom *Solicitor General Reed*, *Assistant Attorney General Wideman*, and *Mr. Sewall Key* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioners, as executors of the estate of William M. Greene, who died in 1930, filed an estate-tax return and

* See Table of Cases Reported in this volume.

paid the amount of the federal estate tax disclosed thereby. A paid-up life-insurance policy of $42,000 was omitted from the return. The Commissioner of Internal Revenue declared a deficiency and included the amount of this policy in the gross estate. Petitioners filed a claim for refund, which was rejected by the commissioner. Thereupon, this proceeding was brought in the Court of Claims to recover the amount of the claim. That court held against the right to recover and dismissed the petition.

The policy, issued in 1892, promised to make payment to the wife of the decedent, as sole beneficiary if living; and if not living, to the surviving children of the decedent; and, in the event of none surviving, then to the executors, administrators, or assigns of the decedent. In 1912, the policy became a paid-up policy requiring no further payment of premiums. No power was reserved to change beneficiaries, borrow on the policy or surrender it. The wife of the decedent predeceased him; but he was survived by three children, to whom the proceeds of the policy were paid upon his death.

The case of *Lewellyn* v. *Frick*, 268 U. S. 238, arose under the Revenue Act of 1918. This case arises under the act of 1926, § 302 (g), which is the same as § 402 (f) of the former act. Subdivision (h) of the 1926 act, however, provides that subdivisions (b), (c), (d), (e), (f), and (g) shall apply to "transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act." Whether any of these terms apply to an amount receivable by a beneficiary, under a policy such as we have here, is fairly debatable. See *Wyeth* v. *Crooks*, 33 F. (2d) 1018, 1019. If any of them do apply, the provision is open to grave doubt as to its constitutionality, and the rule of the *Frick* case controls.

The foregoing facts bring the case clearly within our decision just announced in *Bingham* v. *United States*, *ante*, p. 211; and the judgment of the court below is accordingly

Reversed.

ALEXANDER ET AL., RECEIVERS, *v.* HILLMAN ET AL.*

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

Nos. 15 and 16. Argued October 17, 18, 1935.—Decided December 9, 1935.

In a suit in the District Court in which receivers were appointed to collect and distribute the assets of a corporation, claims were filed by individuals who as directors and officers had controlled and dominated the corporation's affairs, and by other companies, also controlled and used by them. In response to the claims, the receivers filed in the same court an ancillary bill, separately numbered but not praying process, in which they set up counterclaims for the value of assets of the corporation which they averred the individual claimants fraudulently and in violation of their duties as officers and directors had, through complicated transactions, converted to the use of themselves and the two corporate claimants. Upon being served by mail with copies of the ancillary bill and an order directing them to plead to it, the claimants appeared specially and moved to quash upon the ground that they were inhabitants of another State, within the purview of § 51, Jud. Code. *Held:*

1. The court had jurisdiction of the subject matter—the claims and counterclaims. P. 237.
2. The ancillary bill, while in form not inappropriate for the commencement of a suit, served as a pleading in the main suit, to put the claimants to proof of their claims and to assert the right of the receivers to affirmative relief. P. 239.

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* The respondents in this case were: J. H. Hillman, Jr., A. B. Sheets, Thomas Watson, Hillman Coal & Coke Co., and Hecla Coal and Coke Co.

3. Causes of action arising from the derelictions of officers and directors of corporations, such as those alleged, are cognizable in equity for the reason that the receivers have no adequate remedy at law and also because property was obtained fraudulently and therefore cannot in equity and good conscience be retained. P. 240.
4. Both the individual claimants and the corporate claimants, alleged to have been their tools, are to be dealt with just as if they were technically trustees for creditors and stockholders. P. 240.
5. Judicial Code, § 51, in the provision that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant . . ." is inapplicable, since the claimants were not summoned, but by presenting their claims waived the privilege conferred by that provision and subjected themselves to all the consequences that attach to an appearance. P. 240.
6. The provision of Equity Rule 30 with respect to counterclaims in answers does not cover counterclaims to claims filed against receivers; but the omission so to extend the rule gives rise to no implication that receivers may not assert and enforce, against those who appear and demand part of the *res*, counterclaims for portions of the receivership estate that they wrongfully took and still withhold. The right of the receivers to have affirmative relief in the receivership court is supported by the same, or at least similar and equally strong, reasons as those that constitute the foundation of the rule. P. 241.
7. As a general rule, equity, having jurisdiction of parties to a controversy, will decide all matters in dispute between them and decree complete relief. P. 242.
8. Nothing is more clearly a part of the main suit in this case than recovery of all that belongs to the *res;* the matters in controversy may be tried and determined more conveniently in the receivership court than elsewhere. Pp. 242, 243.

75 F. (2d) 451, reversed.

CERTIORARI, 295 U. S. 725, to review a decree modifying a decree of the District Court which dismissed for want of jurisdiction over the persons of the respondents an ancillary bill brought by receivers of a corporation setting up counterclaims against three individuals and two corporations who had presented claims.

Mr. David A. Reed, with whom *Messrs. Edwin W. Smith, Wm. M. Robinson, E. C. Higbee,* and *Arthur S. Dayton* were on the brief, for petitioners.

A District Court administering a receivership estate has authority to adjudicate all claims respecting the *res. White* v. *Ewing,* 159 U. S. 36; *Peck* v. *Elliott,* 79 Fed. 10; *Pope* v. *L. N. A. & C. Ry. Co.,* 173 U. S. 573.

Respondents, by appearing before the special master and proving their claims to participate in the receivership *res,* became actors in the cause and thereby submitted to the jurisdiction of the court. *Wabash Western Ry. Co.* v. *Brow,* 164 U. S. 271, 278; *Merchants Heat & Light Co.* v. *Clow & Sons,* 204 U. S. 286, 290; *Fisher* v. *Shropshire,* 147 U. S. 133, 145; *Commercial E. S. Co.* v. *Curtis,* 288 Fed. 657; *Rouse* v. *Letcher,* 156 U. S. 47; *Stewart* v. *Dunham,* 115 U. S. 61, 64; *Massachusetts Bonding & Ins. Co.* v. *Concrete Steel Bridge Co.,* 37 F. (2d) 695, 701; *Dailey Motor Co.* v. *Reaves,* 184 N. C. 260; *Fulton* v. *Ramsey,* 67 W. Va. 321; *Arnold & Ruffner* v. *Casner,* 22 W. Va. 444; *Bilmyer* v. *Sherman,* 23 W. Va. 656; *Wyatt* v. *Smith,* 25 W. Va. 813; *Bent* v. *Read,* 82 W. Va. 680; *Newman* v. *Moore,* 94 Ky. 147, 148.

"Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide the whole issues and award complete relief even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law." *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 217.

It is the spirit and intendment of Equity Rule 30 that when affirmative relief is sought in an equity proceeding, whether by bill or other appropriate pleading, the claimant submits himself to the jurisdiction of the court for the adjudication of equitable counterclaims, irrespective of the transactions out of which such counterclaims arose, to the end that the whole of the controversy may be de-

termined in a single proceeding. *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360, 364; *Buffalo Specialty Co.* v. *Van Cleef,* 217 Fed. 91, 93; *Young* v. *McNeal-Edwards Co.,* 283 U. S. 398; *Chicago & N. W. R. Co.* v. *Lindell,* 281 U. S. 14, 17; *Partridge* v. *Phoenix Mutual Life Ins. Co.,* 15 Wall. 573.

The counterclaims against respondents are cognizable in equity and their adjudication by a court in equity does not deprive respondents of any right to trial by jury. *Hornor* v. *Henning,* 93 U. S. 228, 231; *Jackson* v. *Ludeling,* 21 Wall. 616, 625; *Wardell* v. *Union Pacific R. Co.,* 103 U. S. 651; *Clews* v. *Jamieson,* 182 U. S. 461; *Jones* v. *Missouri-Edison Electric Co.,* 144 Fed. 765; *Wheeler* v. *Abilene Nat. Bank Bldg. Co.,* 159 Fed. 391; *Davis* v. *Pearce,* 30 F. (2d) 85; *Moon Motor Car Co.* v. *Moon,* 58 F. (2d) 90; *Wile* v. *Burns Bros.,* 2 F. Supp. 950; *Bosworth* v. *Allen,* 168 N. Y. 157.

Mr. Alexander J. Barron, with whom *Messrs. Edward W. Knight, George E. Alter,* and *Thomas B. Jackson* were on the brief, for respondents.

The fundamental issue in this case is not one of the general powers and jurisdiction of a federal court in a receivership in equity. The issue is one of venue in a civil suit brought by the receivers of such a court. The aim is to secure personal decrees for the payment of money against non-resident defendants who appear specially to raise the question of jurisdiction, asserting their right under § 51 of the Judicial Code to be sued in the district whereof they are inhabitants. *Barfield* v. *Zenith Tire & Rubber Co.,* 9 F. (2d) 204; *Schmitt* v. *Lamb,* 43 F. (2d) 770, 772.

Petitioners call the suit an ancillary one, but the issues and parties are not the same as the issues and parties in the primary cause. Respondents were not parties to that cause, and the claims asserted against them here are

new and independent claims. A contested claim is not a part of the receivership *res,* but the subject of a plenary action, which the court has no inherent power to adjudicate without first obtaining jurisdiction over the person. Hence the bill of complaint here is an original bill as against the respondents, requiring original process. *Merriam Co.* v. *Saalfield,* 241 U. S. 22; *Smith* v. *Woolfolk,* 115 U. S. 143, 148; *Bowen* v. *Christian,* 16 Fed. 729. Other authorities in point are: *Shainwald* v. *Davis,* 69 Fed. 701; *Gregory* v. *Pike,* 79 Fed. 520; *Manning* v. *Berdan,* 132 Fed. 382; *Rubber Co.* v. *Goodyear,* 9 Wall. 807; *Hart* v. *Wiltsee,* 19 F. (2d) 903; *Wood* v. *New York & N. E. R. Co.,* 61 Fed. 236; *Railroad Credit Corp.* v. *Fruit Growers Express Co.,* 71 F. (2d) 218, 219; Simkins Federal Practice, Rev. ed., 756.

The causes of action now alleged are not only the acts of fraud and mismanagement averred in the former bill, but are based on other actions not theretofore complained of. The suits were brought by different parties complainant against different parties defendant, and no party in either suit was made a party to the other.

The proving of claims before the special master does not make the claimant a party to the original cause. *International Banking Corp.* v. *Lynch,* 269 Fed. 242, 246; *Lucey Mfg. Corp.* v. *Morlan,* 14 F. (2d) 920; *Elkins* v. *First National Bank,* 43 F. (2d) 777; Clark, Receivers, Vol. 1, c. 18, §§ 532 (c), 533 (c); *Continental Trust Co.* v. *Toledo, St. L. & K. C. R. Co.,* 82 Fed. 642.

The question at bar is whether respondents being required, at the risk of forfeiting their rights, to comply with the invitation and order of court and present their claims in the receivership proceeding, by so doing became parties to the original cause and thereby gave the court jurisdiction over them to adjudicate the causes of action thereafter brought against them by the so-called ancillary bill. The cases cited are pertinent because they define in law

the status of one who files a claim with a receiver or special master in a federal equity receivership and hold that by so doing he does not become a party generally to the cause but merely a party *pro hac vice.*

The same rule holds in bankruptcy. *Fitch* v. *Richardson,* 147 Fed. 197; *Tate* v. *Brinser,* 226 Fed. 878.

Respondents by filing their proofs of claim in the receivership proceedings have not waived their personal privilege under § 51 of the Judicial Code. This Court has repeatedly held that the right of a defendant to be sued in his own district in any civil suit is absolute. *Munter* v. *Weil Corset Co.,* 271 U. S. 279; *Pacific Mutual Life Ins. Co.* v. *Tompkins,* 101 Fed. 539, cert. den., 179 U. S. 683.

Waiver must arise out of some act or thing done by him which evidences his clear intention to submit himself to the jurisdiction of the court wherein the suit is brought, such as a general appearance, a plea to the merits, or some other unequivocal act by which he consents to an adjudication by the court of the merits of the suit wherein he is named defendant. *Citizens S. & T. Co.* v. *Illinois Central R. Co.,* 205 U. S. 46; *Big Vein Coal Co.* v. *Read,* 229 U. S. 31; *Butterworth* v. *Hill,* 114 U. S. 128; *Camp* v. *Gress,* 250 U. S. 308; *Grable* v. *Killits,* 282 Fed. 185, 195; *Dahlgren* v. *Pierce,* 263 Fed. 841, 846; *Stonega C. & C. Co.* v. *Louisville & N. R. Co.,* 139 Fed. 271; *Pacific Mutual Life Ins. Co.* v. *Tompkins,* 101 Fed. 539.

Respondents presented their claims on "the invitation" of the court and for its "information" and guidance in the proper distribution of the proceeds of the assets in its custody, in compliance with an order which warned them that if they failed to present their claims before the master, they would be barred from thereafter asserting the same. The privilege exercised in this instance was not one asserted by claimants but one which the court itself had extended to them and which this Court, in most impressive language, has declared shall not be taken advantage

of for the purpose of oppressing or harassing the one to whom it is extended. *Stewart* v. *Ramsey,* 242 U. S. 128, 129 *et seq.; Parker* v. *Hotchkiss,* Fed. Cas. No. 10739; *Read* v. *Neff,* 207 Fed. 890, 891.

Unless a person, by filing a claim with a receiver, makes himself a party to the original cause, and enters a general appearance not only in that cause but in any and all other suits which the receivers may thereafter see fit to institute against him in that court, we submit that Equity Rule 30 has no application to the cases at bar. For in any other event the sole purpose of invoking the Rule would be to defeat the express provisions of § 51 of the Judicial Code and the rights asserted thereunder by the non-resident respondents. "Rule 30 is without force as against conflicting statutory provisions." *General Electric Co.* v. *Marvel Rare Metals Co.,* 287 U. S. 430, 434. *Washington Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U. S. 629, 635.

A reference to a master for the purpose of determining the application of the proceeds realized upon the winding up of a corporation is merely a part and only a part of the process of execution of the final decree in the original suit, and the filing of claims which must be filed to preserve the claimant's rights, whether his claims are legal or equitable, presents no analogy to the bringing of a suit in equity by the suitor in the forum of his choice.

Rule 30 must be read in connection with Rule 25 and succeeding rules. Rule 30 confines itself to prescribing the nature of the answer to the bill, the form of which is prescribed in Rule 25.

Rule 30 is confined to prescribing the form and contents of an answer and counterclaim filed to an original bill in equity where the bill and answer form part of one and the same suit.

The application of Rule 30 contended for by petitioners, rather than tending to simplification would result in con-

fusion. In the cases at bar, five separate and independent claims have been presented by respondents. The bill of complaint which petitioners would treat as an answer and counterclaim joins all the respondents as defendants. It presents four separate causes of action, none of which are common to all of the defendants named.

To hold that said proofs of claim are bills in equity and permit the bill of complaint to be treated as an answer and counterclaim thereto, would seem to be in direct violation of Equity Rule 26.

The prompt and orderly administration of an equity receivership is not impeded by the necessity of resorting to a court of competent jurisdiction for prosecuting claims of the receivers against others.

A decision of the question whether the alleged causes of action contained in the bill, or any of them, constitute grounds of actions at law or are cognizable in equity, is not necessary to the decision of the fundamental question involved, which is one of venue.

In the case of each of the corporate respondents, the cause of action, if an equitable one, must be sustained on other grounds than breach of trust by a fiduciary.

The claim against Hecla is exclusively one at law to recover money damages.

The claim against Hillman Company is nothing but an action at law to recover the difference between the amounts charged Tower Hill for expenses and a reasonable sum.

No decision of this Court has been found which specifically holds that equity jurisdiction attaches where the plaintiff has an adequate remedy at law in the form of money damages for alleged wrong committed by a fiduciary and the bill contains no other averments which show necessity for equitable relief.

On the other hand, this Court, in a long line of authorities, has held that under the Seventh Amendment

and § 267 of the Judicial Code, suits in equity are prohibited in any court of the United States where a plain, adequate and complete remedy may be had at law.

In cases of alleged fraud, a federal court will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when a like amount can be recovered at law in an action sounding in tort, or for money had and received. *Buzard* v. *Houston,* 119 U. S. 352.

Where the relief sought against the trustee is one for the payment of moneys generally, and the bill discloses no facts which require an accounting or any other recognized equitable relief, equitable jurisdiction has been denied. See: *Godfrey* v. *McConnell,* 151 Fed. 783; *Corsicana Nat. Bank* v. *Johnson,* 218 Fed. 822; *Adams* v. *Clark,* 22 F. (2d) 956; *Cockrill* v. *Cooper,* 86 Fed. 7; *Stephens* v. *Overstoltz,* 43 Fed. 771; *Kelley* v. *Dolan,* 233 Fed. 635; *Parkerson* v. *Borst,* 251 Fed. 242; *Adams* v. *Jones,* 11 F. (2d) 759; *Schoenthal* v. *Irving Trust Co.,* 287 U. S. 92; *Clews* v. *Jamieson,* 182 U. S. 461.

Mr. Justice Butler delivered the opinion of the Court.

The controversies here involved arise in a suit in equity brought November 3, 1924, in the federal court for the southern district of West Virginia by the Piedmont Coal Company, a Pennsylvania corporation, and three persons, inhabitants of Pennsylvania, against the Tower Hill Connellsville Coke Company of West Virginia, a corporation organized under the laws of that State. The plaintiffs own 4,000 common and 10,850 preferred shares of its stock. August 25, 1932, the court entered a decree that defendant's business be wound up and its properties converted into money and distributed to its creditors and shareholders, appointed petitioners receivers, and directed a special master to state an account and to report to the court all claims against defendant. Respondents have

presented claims. Petitioners oppose their demands and by counterclaims ask affirmative relief.

The questions, as put by them, are:

"(1) When a claimant appears before a master in a federal receivership proceeding and proves a claim to share in the distribution of the receivership *res,* does he submit himself to the jurisdiction of the receivership court for the adjudication of his liability to the *res,* when the counterclaim asserted against him by the receiver is of a nature cognizable in equity and its adjudication is essential to a final disposition of the receivership proceeding?

"(2) Is not the adjudication of the counterclaim against the claimant and the determination of the whole controversy within the purpose and intendment of Equity Rule 30?"

The Tower Hill Connellsville Coke Company, a Pennsylvania corporation, operated coal mines and coke plants.* The West Virginia Tower Hill, by issue of its stock to the stockholders of the Pennsylvania Tower Hill, acquired all the share capital of the latter and until January 8, 1930, was merely a holding company owning only that stock. In April, 1920, Thompson Connellsville Coke Company, a Pennsylvania corporation, purchased a majority, about 28,000 shares, of the common stock of the West Virginia Tower Hill. Respondent Hillman, an inhabitant of Pennsylvania, was president of and controlled the purchasing company. Respondents Sheets and Watson of that State were also its officers. Hillman became president and Sheets and Watson became officers of both Tower Hill companies. In June, 1920, the Eastern Coke

* The facts prior to the appointment of the special master are derived from the records of earlier litigation in this suit that were filed in this court with petitions for certiorari. 280 U. S. 607. 290 U. S. 675. We take judicial notice of them. *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 336, and cases cited.

Company was organized under Pennsylvania law; Hillman became its president and Sheets and Watson were given other offices. They caused the Pennsylvania Tower Hill to subscribe for 51% of the common shares, and later it acquired the rest. The three individual respondents were also directors of the Tower Hill companies, the Eastern Company and the two corporate respondents, the Hillman Coal & Coke Company and the Hecla Coal & Coke Company. Hillman, with the other two acting under his direction, dominated these five corporations. The corporations maintained joint general offices and joint sales, operating and engineering departments.

The preferred stock of the West Virginia Tower Hill was, in preference to the common, entitled to cumulative dividends at the annual rate of $6 per share and, upon distribution of assets, par plus unpaid dividends. In 1924 the company paid $9, leaving then accumulated $97.50 per share. No other dividend has been paid. The stockholders' bill alleged that, ever since Hillman took control, the Pennsylvania Tower Hill had sufficient resources to pay a dividend out of which the West Virginia Tower Hill could make a payment on account of its own preferred stock but that the directors of the former fraudulently refused to declare any dividend, and that it was intended to exhaust the resources of both companies without paying anything to stockholders of the latter. It prayed the appointment of receivers empowered to take the shares of Pennsylvania Tower Hill and vote them at meetings of the company's stockholders and to demand that it declare dividends, to procure appointment of ancillary receivers in Pennsylvania and, if found necessary, to bring suits there.

Defendant's answer denied the fraud charged. The court found plaintiffs entitled to relief and that the Pennsylvania Tower Hill had sufficient funds to pay $20 per share on defendant's preferred stock. It declared that,

if the companies failed within 30 days to take steps to do this, receivers would be appointed and given appropriate authority. Then, defendant moved to dismiss the suit for want of indispensable parties asserted to be: its common stockholders including the Thompson company, the Pennsylvania Tower Hill, and defendant's directors, all citizens of Pennsylvania. In support of the motion, defendant alleged that the directors were the actors in all the transactions of which the bill complained. Making any inhabitant of Pennsylvania a party would destroy diversity of citizenship and oust jurisdiction. *Salem Trust Co.* v. *Manufacturers' Finance Co.*, 264 U. S. 182, 189. The court refused to entertain the motion and, since no steps were taken to pay the dividend, appointed receivers and authorized them substantially as prayed.

Defendant appealed. The Circuit Court of Appeals, July 8, 1929, found that the holders of defendant's preferred stock had been subjected to treatment that amounted to fraud in law and that enough had been shown to require the appointment of receivers with power to bring in the courts in Pennsylvania all actions necessary to protect plaintiffs' rights. It held that for the appointment of receivers, with power so limited, the West Virginia Tower Hill was the only necessary party. 33 F. (2d) 703. This court having denied defendant's petition for certiorari (280 U. S. 607) the district court made its decree conform to the mandate of the Circuit Court of Appeals. The district court for western Pennsylvania appointed ancillary receivers with authority to sue the Pennsylvania Tower Hill, its officers and directors to obtain transfer by that company of property and money to the defendant. But, after the decision of the Circuit Court of Appeals and while its mandate was stayed pending decision by this court upon petition for certiorari, the individual respondents caused several transfers to be made: Pennsylvania Tower Hill traded coal lands for a

mine of Redstone Coal & Coke Company. Eastern Coke Company conveyed all its assets to Pennsylvania Tower Hill. And the latter transferred all its property to defendant.

Then plaintiffs by an amended and supplemental bill prayed that defendant be dissolved and that receivers be appointed to distribute its assets to creditors and stockholders. The relief was sought upon the ground that the purpose of the transfers had been to prevent inquiry into the management of the Tower Hill companies; great losses were endangering security for preferred stock liability, and the purposes for which the defendant was organized had failed. Almost immediately after knowledge of plaintiffs' purpose to file that bill, defendant paid $1,184,000 for 11,840 shares of the Emerald Coal & Coke Company. Plaintiffs then filed a second amended and supplemental bill. After answer and trial, the district court, in accordance with the plaintiffs' allegations and proofs, found: The purpose of the transfer of assets from Pennsylvania Tower Hill to defendant was to prevent the receivers from securing any relief. Defendant's assets had so decreased as to imperil its preferred shares and their value might disappear in the near future. And, August 25, 1932, it entered a decree substantially as prayed.

The Circuit Court of Appeals affirmed. 64 F. (2d) 817. It held:

None of the transactions occurring since its first decision has been to the advantage of the Tower Hill companies. The purchase of the Emerald stock was definitely harmful. Assets are hardly more than enough to pay preferred stockholders. To continue the business would allow those in control, who have shown utter disregard of rights of preferred stockholders, to speculate further at their risk alone. Transfer of assets by the Pennsylvania Tower Hill to defendant rendered futile and useless any-

thing the receivers might do in Pennsylvania and was made for that purpose. There was no lack of indispensable parties. This court denied certiorari. 290 U. S. 675.

Respondents' claims were verified and presented at a hearing before the master January 30, 1934. Hillman and Sheets claim the value of $105,000 in government bonds furnished by them to obtain supersedeas on defendant's appeal from the decree of August 25, 1932. Watson claims $33,750. This is for salary as defendant's secretary, and for services as counsel for defendant in the main suit and for the Pennsylvania Tower Hill in tax matters. The Hecla company claims as owner of preferred and common shares of defendant. The Hillman company claims $2,720.03, alleged to have been paid for account of defendant in adjustment of expenses of the companies having joint offices.

February 19, 1934, the receivers filed an ancillary bill. It asserts four counterclaims. The first is for large sums that under the guise of salaries the individual respondents took from the Tower Hill and Eastern companies. The amounts so withdrawn were wholly disproportionate to the value of services rendered. The second is for $1,184,000 that, for the advantage and benefit of Hillman personally, they caused defendant to pay for the shares of Emerald company. The third is for money that they, through and for the Hillman company, caused to be taken from the Tower Hill and Eastern companies under pretense of apportionment of joint expenses. The fourth is for $356,000, the value of land of the Pennsylvania Tower Hill that they, for the benefit of the Hecla company, caused to be transferred to the Redstone company in exchange for the coal mine, and claim is made for additional sums paid for taxes and improvements upon the latter. The facts alleged amount to charges that the disbursement of moneys and transfer of property complained of

were directed to be made by the individual respondents in bad faith and in violation of duties that as officers and directors they owed to the three companies and their stockholders and were misappropriations of the assets of these corporations.

The bill alleges that the claims presented by respondents cannot be adjudicated without consideration of the claims that the receivers assert against them and that the adjudication of both groups of claims in one proceeding is necessary for the effectual enforcement of the principal decree. It prays: that Hillman, Sheets and Watson be required to pay the amounts that they took under the guise of salaries and, upon return to them of the shares of the Emerald company, the amount they caused defendant to pay therefor; that they and the Hillman company pay the money taken on the pretended division of expenses; and that they and the Hecla company, upon return of the property received in exchange, pay the value of the coal lands handed over by Pennsylvania Tower Hill to the Redstone company, together with the net amounts expended by the Tower Hill companies upon the first mentioned property.

The court's order granting leave to file the ancillary bill directed that it be given a separate number and that it be ancillary to the main suit, required defendants to move to dismiss or to answer within a specified time, directed receivers to mail to respondents at Pittsburgh, and to deliver at the office in West Virginia of defendant's counsel in the main suit, a copy of the order and of the ancillary bill. This having been done, respondents appeared specially and moved to vacate the order and to quash the service on the ground that none of them was within the jurisdiction but that each was an inhabitant of Pennsylvania within the purview of § 51, Judicial Code, 28 U. S. C., § 112.

The court dismissed the bill for want of jurisdiction over the persons of respondents. By a memorandum filed with the order, the district judge indicated that he was of opinion that the respondents, by presenting their claims and appearing before the master, had become parties for all purposes but that, if he were to so hold, the suit would have to be tried before the question of jurisdiction could be finally decided, and that therefore he would grant the motion to dismiss so that the receivers might appeal and have the question settled in advance of trial. The Circuit Court of Appeals, one of the judges dissenting, held that the district court was without jurisdiction of respondents to adjudicate the counterclaims or to grant any affirmative relief. It did have jurisdiction to pass on any defense, legal or equitable, which might be asserted against respondents' claims, and to stay action thereon until the counterclaims could be elsewhere adjudicated "so that they could be set off against the claims, or the amounts payable thereunder, as might be proper." The district court should have retained the ancillary bill, "treating it as a petition to stay action on the claims . . . and as setting up defenses . . . where the matters alleged could be considered as purely matters of defense as distinguished from counterclaims." The court modified the decree and remanded the case for proceedings in accordance with the opinion. 75 F. (2d) 451. This court granted certiorari. 295 U. S. 725.

The subject matter of the main suit is the right of plaintiffs, being stockholders of defendant, to have its business wound up, and its assets collected and distributed among its creditors and stockholders. That the district court had jurisdiction to enter that decree has been finally adjudged. 64 F. (2d) 817. The receivers are the court's representatives and are entitled to have all the property belonging to defendant, and upon leave, may sue to re-

cover any part of the *res*. The controversies before us arise between respondents who come to share therein and the receivers who not only put in issue the validity of respondents' claims but allege that they have and refuse to account for a portion of the assets. Undoubtedly the court has jurisdiction of the subject matter, i. e., the claims and counterclaims. *White* v. *Ewing*, 159 U. S. 36. *Pope* v. *Louisville, N. A. & C. Ry. Co.*, 173 U. S. 573, 577, *Peck* v. *Elliott*, 79 Fed. 10.

We come to the question whether the court has jurisdiction of the persons of respondents in respect of the counterclaims.

They were not parties to the controversy resulting in the decree winding up defendant's affairs. The court has issued no process against them. The delivery of copies of the order and bill in accordance with the court's direction did not make them parties. But petitioners insist that by presenting their claims respondents submitted themselves to the jurisdiction of the court to grant affirmative relief on the causes of action alleged against them. Respondents contend that in the last analysis the issue is one of venue. They say: The ancillary bill is an original one commencing a suit to which they, being inhabitants of Pennsylvania, cannot be made parties by the service of process. The proving of claims before the special master did not make them parties to the original cause and they have not thereby waived the privilege conferred by § 51 of the Judicial Code.

Respondents appropriately presented their claims and became entitled to adjudication without petition for intervention, any formal pleading or commencement of suit. Unquestionably, they submitted themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers and of all objections that other claimants might interpose to the validity, amounts or priorities of

their claims. And they put themselves in position, should their interest warrant, to challenge the receivers' acts and the demands of others claiming as creditors. *Stewart* v. *Dunham,* 115 U. S. 61, 64. *Elkins* v. *First Nat. Bank,* 43 F. (2d) 777, 779. *Continental Trust Co.* v. *Toledo, St. L. & K. C. R. Co.,* 82 Fed. 642, 647. *Jones & Laughlins* v. *Sands,* 79 Fed. 913. *Gasquet* v. *Fidelity Trust & Safety Vault Co.,* 57 Fed. 80, 83. *Acme White Lead & Color Works* v. *Republic Motor Truck Co.,* 285 Fed. 88, 90. And see *Youtsey* v. *Hoffman,* 108 Fed. 693, 695.

The ancillary bill is not an original bill for the commencement of a suit. That it was not so intended is shown by the fact that process was not prayed or issued. While in form not inappropriate for commencement of suit, it was in fact formulated and filed to serve as a pleading in the main suit to put respondents to proof of their claims and to assert the right to affirmative relief. Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and promptly to enforce substantial rights of all the parties before them. See Story, Equity Jurisprudence, 14th ed., § 28.

All trusts, those implied as well as those expressly created, are within the jurisdiction of courts of equity. The doctrine of trusts is deemed to be " the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys." *Clews* v. *Jamieson,* 182 U. S. 461, 479. Pomeroy, Equity Jurisprudence, 4th ed., § 151. It is to be understood from the allegations of the ancillary bill that the individual respondents as officers and directors so dominated the corporate owners that they had and exerted full power over

all the corporate property and transactions. Causes of action arising from transgressions of officers and directors of corporations such as those on which the receivers rest their counterclaims are cognizable in equity for the reason that the receivers have no adequate remedy at law and also because respondents, as it is alleged, fraudulently obtained defendant's property and therefore cannot in equity and good conscience retain it. See Pomeroy, §§ 155, 157. *Cockrill* v. *Cooper,* 86 Fed. 7, 13, *et seq.* And, so far as concerns the matters in controversy here, the individual respondents are to be dealt with just as if they were technically trustees for creditors and stockholders. *Koehler* v. *Black River Falls Iron Co.,* 2 Black 715, 720–721. *Jackson* v. *Ludeling,* 21 Wall. 616, 624, 631. *Wardell* v. *Railroad Co.,* 103 U. S. 651, 658–659. *Briggs* v. *Spaulding,* 141 U. S. 132, 147. *Geddes* v. *Anaconda Mining Co.,* 254 U. S. 590, 599. The allegations of the ancillary bill make it appear that the corporate respondents were so under control of the individual respondents as to be merely their tools for carrying out the transactions culminating in the misappropriations charged. It results therefore that all the claims asserted against respondents may be dealt with in equity.

The rule contained in § 51, Judicial Code, 28 U. S. C., § 112, that is invoked by respondents here declares: ". . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant . . ." The section applies only where a suit is "brought . . . by any original process or proceeding . . ." No attempt was made to summon respondents into court. That provision does not affect the general jurisdiction of district courts but merely confers a personal privilege that may be waived. *General Investment Co.* v. *Lake Shore & M. S. Ry.,* 260 U. S. 261, 272. *Lee*

v. *Chesapeake & Ohio Ry.,* 260 U. S. 653, 655. By presenting their claims respondents subjected themselves to all the consequences that attach to an appearance, § 51 to the contrary notwithstanding. See *General Electric Co.* v. *Marvel Co.,* 287 U. S. 430, 435.

Petitioners invoke a provision of our Equity Rule 30: "The defendant by his answer shall set out . . . his defense to each claim asserted in the bill . . . The answer must state . . . any counterclaim arising out of the transaction which is the subject-matter of the suit, and may . . . set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him . . ." It may not be said that, by presenting their claims, respondents commenced a suit and so brought that provision into play. The rule does not purport to cover, and was not prescribed for, situations such as that here presented. *Chandler & Price Co.* v. *Brandtjen & Kluge, Inc., ante,* p. 53. But the omission so to extend the rule gives rise to no implication that receivers may not assert and enforce, against those who appear and demand part of the *res,* counterclaims for portions of the receivership estate that they wrongfully took and still withhold. The right of the receivers to have affirmative relief in the receivership court is supported by the same, or at least similar and equally strong, reasons as those that constitute the foundation of the rule. Cf. *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360, 365. *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593, 609.

Respondents' contention means that, while invoking the court's jurisdiction to establish their right to participate in the distribution, they may deny its power to require them to account for what they misappropriated. In behalf of creditors and stockholders, the receivers reasonably may insist that, before taking aught, respondents

may by the receivership court be required to make restitution. That requirement is in harmony with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. Pomeroy, §§ 181, 231. *United States* v. *Union Pacific Ry. Co.,* 160 U. S. 1, 52. *Camp* v. *Boyd,* 229 U. S. 530, 551–552. *McGowan* v. *Parish,* 237 U. S. 285, 296. *Greene* v. *Louisville & Interurban R. Co.,* 244 U. S. 499, 520. Cf. *Hartford Accident Co.* v. *Southern Pacific,* 273 U. S. 207, 217–218. Distribution may not be made without decision upon the counterclaims. Nothing is more clearly a part of the subject matter of the main suit than recovery of all that to the *res* belongs. *Gasquet* v. *Fidelity Trust & Safety Vault Co., supra,* 83–84. *Peck* v. *Elliott, supra. Hollander* v. *Heaslip,* 222 Fed. 808, 811.

The Circuit Court of Appeals rightly held that the district court has jurisdiction to pass on all defenses against respondents' claims, but erred in holding it to be without jurisdiction to grant affirmative relief. The decision permits the court to pass upon the receivers' rights of recoupment and set-off up to the amount of respondents' claims but, without regard to what they are entitled to have, prevents that court from giving them judgment against respondents. That limitation may be assumed to be in harmony with the rule governing recoupment and set-off that formerly was strictly applied. Cf. *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U. S. 252, 258. *Merchants Heat & L. Co.* v. *Clow & Sons,* 204 U. S. 286, 289–290. But, contrary to the rule that equity will decree complete relief, the prescribed restrictions prevent appropriate adaptation of equity to the circumstances of cases. It requires the receivers to split their causes of action. While permitted to seek enforcement of so much of their claims as are "purely defensive," they would be com-

pelled to go to another court to recover the rest. The splitting required extends even to separate items that go to make up a single cause of action; e. g., the items constituting the claim based upon respondents' apportionment of expenses. And if the receivership court has jurisdiction of respondents in respect of only so much of the receivers' counterclaims as are strictly defensive, then its determinations as to those parts would not be binding as to the rest. *Portland Wood Pipe Co.* v. *Slick Bros. Construction Co.*, 222 Fed. 528. The decision may be construed to direct the receivership court to stay all proceedings on respondents' claims until final judgment may be obtained in suits brought elsewhere upon the causes of action asserted by the receivers. That would introduce additional elements of uncertainty and would involve unnecessary delay, work and expense. As the individual respondents dominated the defendant and the other corporations used to effect the alleged misappropriations and also directed defendant's part in this litigation, it would seem that necessarily most of the issues in respect of the counterclaims will be quite similar to those litigated in the main suit. Unquestionably, all matters in the controversies between the parties may be tried and determined more conveniently and promptly in the receivership court than elsewhere.

It is clear that, under the circumstances disclosed, the restrictions laid by the Circuit Court of Appeals upon the receivership court are not consistent with that freedom as to procedure that necessarily belongs to courts of equity administering receiverships. See *Portland Wood Pipe Co.* v. *Slick Bros. Construction Co., supra.* Its decree will be reversed and the case remanded to the district court with directions to proceed in accordance with this opinion.

Reversed.

KLAMATH AND MOADOC TRIBES OF INDIANS ET AL. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 30. Argued November 12, 1935.—Decided December 9, 1935.

1. The Act of May 26, 1920, conferring jurisdiction on the Court of Claims to adjudicate all claims of the Klamath etc. Tribes of Indians against the United States, should not be construed as embracing a claim which they settled with the Government long before and of which they gave a valid release, even though the consideration for the release was grossly inadequate. Pp. 249–252.
2. The failure of the Indians, between the settlement in 1909, and this suit in 1925, to seek further payment, and their omission to mention the demand—a very large one—when seeking the passage of the jurisdictional Act, though they specified others, makes strongly against the contention that the Act was intended to cover this claim. P. 249.
3. An Act granting a special privilege is to be strictly construed and may not by implication be extended to cases not plainly within its terms. P. 250.
4. It is significant that earlier Acts, which were intended to waive settlements, employed terms quite different from those of the Act above mentioned. P. 251.
5. To bring their claim within the jurisdictional Act, the claimants were under the burden of proving in the Court of Claims that the release was invalid, and of showing in this Court that, as a matter of law, the facts found compel that conclusion. P. 252.
6. Congress has untrammeled power to fix as it deems appropriate and just under the circumstances, the compensation that shall be paid an Indian tribe for the taking of part of its reservation. P. 252.
7. An Act appropriating a sum to the credit of Indians declared that it was not to be effective until the Indians "through the usual channels" had executed a release of any claims against the United States for certain land of their reservation of which the Government had disposed. A release was given and accepted, which served to make the appropriation effective. *Held* that, in the absence of findings of fact requiring a conclusion to the contrary, it is to be presumed that all things necessary to make the release valid were done regularly as required by the Act. P. 253.

8. Duress in procuring the release will not be inferred from incomplete, doubtful or ambiguous findings. P. 253.
9. A release of a claim given by Indian Tribes in accordance with an Act of Congress appropriating the money received by them in settlement can not be avoided by the courts upon the ground that the amount paid was grossly inadequate. The obligation of the United States to make good their loss is a moral one calling for action by Congress. P. 254.

81 Ct. Cls. 79, affirmed.

CERTIORARI, 295 U. S. 729, to review a judgment rejecting a claim against the United States.

Mr. G. Carroll Todd, with whom *Messrs. Daniel B. Henderson, C. M. O'Neill,* and *T. Hardy Todd* were on the brief, for petitioners.

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

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought under an Act of May 26, 1920,[1] conferring jurisdiction of claims asserted by plaintiffs against the defendant. It provides: "That all claims of whatsoever nature" the plaintiffs may have against the United States "which have not heretofore been determined by the Court of Claims" may be submitted to that court for determination of the amount, if any, "due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to

[1] 41 Stat. 623.

hear and determine all legal and equitable claims, if any, of said Indians, against the United States, and to enter judgment thereon" (§ 1); that if any claim be submitted to said courts they shall settle the rights therein, both legal and equitable, "notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions . . ." § 2.

The claim in suit is for the value of plaintiffs' rights in respect of about 87,000 acres, which, less an admitted payment, is alleged to be $5,891,250. The answer is a general traverse. At the trial much evidence was taken and the contentions of the parties were fully presented. The court made findings of fact, stated its conclusions of law and dismissed the case.

The questions for decisions are:

Whether, assuming that before its passage plaintiffs gave defendant a valid release of the claim in suit, the Act empowers the court to adjudicate that claim.

Whether the facts found are sufficient to show that the release given is invalid.

The findings are sufficiently reflected by the following narration. In 1864 plaintiffs held by immemorial possession more than 20,000,000 acres located within what now constitutes Oregon and California. By an Act [2] of March 25 of that year the President was authorized to conclude with them a treaty for the purchase of the country they occupied. The treaty was made October 14 following.[3] A proviso sets apart a tract within the ceded country, to be held until otherwise directed by the President, as a residence for plaintiffs, with specified privileges. Rights

[2] 13 Stat. 37.

[3] Ratified July 2, 1866; proclaimed February 17, 1870. 16 Stat. 707.

of way for public roads were reserved.[4] Shortly before the treaty was made Congress granted Oregon, to aid in the construction of a road from the city of Eugene to the eastern boundary of the State, the odd-numbered sections for three in width on each side of the proposed road.[5] Oregon accepted the grant and assigned it to a road company which undertook to construct the road. Congress recognized the assignment.[6] Patents were issued to the State and to the road company for in all 420,240.67 acres, title to which was later acquired by a land company. Exclusive of right of way, 111,385 acres so acquired by that company were within the boundaries of the reservation and had been allotted in severalty to members of the tribe.

The Act of March 2, 1889,[7] directed suit by the United States to forfeit the grants for non-compliance with the specified conditions, saving, however, the rights of bona fide purchasers. The company's title was held valid. *United States* v. *California & Oregon Land Co.*, 148 U. S. 31. Then the United States brought another suit to recover the part of the lands within the reservation on the ground that by the terms of the grant they were expressly excepted. But, as that issue could have been raised in the first suit, it was held *res adjudicata*. *United States* v. *California & Oregon Land Co.*, 192 U. S. 355.

The Secretary of the Interior reported the result of the litigation and expressed the opinion that the Indians should have compensation. Congress by an Act of June 21, 1906,[8] authorized the Secretary to exchange unallotted lands in the reservation for the allotted lands earlier con-

[4] 16 Stat. 708.

[5] Act of July 2, 1864, 13 Stat. 355.

[6] Act of June 18, 1874, 18 Stat. 80.

[7] 25 Stat. 850.

[8] 34 Stat. 325, 368.

veyed. The Secretary made an agreement with the land company pursuant to which on August 22, 1906, it conveyed the 111,385 acres back to the United States and in return the latter conveyed 87,000 acres of unallotted lands to the company. That transfer was made without the knowledge or consent of plaintiffs and without giving them any compensation for the lands so taken from their reservation.

As found below, the value of plaintiffs' title was then $2,980,000.[9] An Act of April 30, 1908,[10] appropriated $108,750 to be deposited in the Treasury to the credit of the Indians and to be expended for their benefit. A proviso declares: "That this appropriation shall not be effective until said Indians, through the usual channels, shall execute a release of any claims and demands of every kind against the United States for the land involved."

The Indian population on the reservation was then 1,038, including 640 adults of whom 287 were men. The adult males alone were allowed to vote in Indian councils. The superintendent called a council to assemble at the general agency on December 5, 1908, for the purpose of considering compliance with the Act. The Indians were by the superintendent given timely notice in the usual way. The council, assembled in pursuance of the notice, was attended by 200 or more Indians. The superintendent presided and through an interpreter explained the terms of the measure and what would have to be done to get the appropriated money. There was some opposition, but the release was signed by 100 or more Indians present. The superintendent "neither did nor said anything to mislead the assembly." Forty or fifty miles from

[9] The court allowed counterclaims set up by defendant amounting to $1,978,431.24.

[10] 35 Stat. 70, 92.

the general agency there was a sub-agency at Yainax. The Indians in that section rarely attended councils at the general agency headquarters. The superintendent called another council at that place. In general the proceedings were the same as before; at that meeting others signed. In the end the release was signed by 150 adult males of the tribes on the reservation.

January 6, 1909, the Secretary received the release from the superintendent. In form it complied with the requirements of the Act and concluded: "Now, therefore, the undersigned, being a majority of the Indians of the Klamath Reservation in council assembled, do hereby relinquish any and all claims and demands of every kind and character which they now have or may hereafter have against the United States for the lands involved." The Secretary accepted it as sufficient compliance with the Act, and accordingly $108,750 was placed in the Treasury to the credit of the plaintiffs. Except by the petition in this suit, they have made no claim for additional compensation.

1. The jurisdictional Act is a special law passed for the benefit of plaintiffs upon consideration of their application for relief. Their memorial specified other claims but made no reference to the one before us. There is nothing in what they presented (see H. Rep. No. 672, 66th Cong., 2d Sess., p. 8), the reports of the committees or the Act itself to identify, or to indicate that they wanted to have determined, any claim for compensation for their right to the 87,000 acres conveyed by the United States to the land company. Their failure, between the settlement in 1909 and the suit in 1925, to seek further payment and their omission to mention this very large demand, when seeking congressional action in their favor, makes strongly against their contention that the jurisdictional Act was intended to cover this claim. Cf. *United States* v. *Creek Nation,* 295 U. S. 103, 108–109.

The meaning of the general language of § 1 that "all claims of whatsoever nature" which plaintiffs have against the United States "may be submitted" is limited by the clause "which have not heretofore been determined by the Court of Claims," and is further much narrowed by the definitions of the classes of claims meant to be included. And correspondingly restrained is the meaning of the phrase "all legal and equitable claims" in the clause conferring jurisdiction upon the court "to hear and determine." Thus the privilege of plaintiffs to submit and the power of the court to determine are made coextensive. The Act grants a special privilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms. *Schillinger* v. *United States,* 155 U. S. 163, 166. *Price* v. *United States and Osage Indians,* 174 U. S. 373, 375. *Blackfeather* v. *United States,* 190 U. S. 368, 376.

This claim is plainly not, within the meaning of § 1, for an amount due under treaty, agreement or law of Congress or for misappropriation of funds of the Indians. Plaintiffs maintain that it is covered by the clause: "for the failure of the United States to pay said Indians any money or other property due." There is here involved no question as to the adequacy of that language to cover any of the claims referred to in plaintiffs' application to the Congress; we are considering whether it extends to this claim assuming that prior to the enactment it had been effectively released. If the release stands, no money or property is due plaintiffs, for the settlement and release wiped out the claim. If the Act is sufficient to give jurisdiction of this claim, then it permits plaintiffs to bring into the Court of Claims for determination *de novo* all claims, whether released or not, that they ever had against the United States, excepting only those already there determined. It goes without saying that, if Congress in-

tended to grant so sweeping and unique a privilege, it would have made that purpose unmistakably plain. As shown in the opinion below, Acts intended to waive settlements employ terms quite different from the provisions under consideration.[11]

Plaintiffs turn for support to the provision of § 2 which prevents "payment . . . upon any claim" from being pleaded as an estoppel but permits it to be asserted as an offset. And they insist that, if this clause does not relate to payments made and accepted as being in full, it means nothing. But that contention is based on a misunderstanding of the language used. Payment upon a claim means payment on account or in part as distinguished from one made and accepted as payment in full. The quoted provision made no grant of jurisdiction; it was inserted merely to eliminate defenses. Neither it nor any other part of § 2 may be held to add claims to those

[11] For instances where Congress authorized submission to the Court of Claims of Indian claims theretofore settled or adjusted, see Act of February 7, 1925, 43 Stat. 812, as amended March 3, 1927, 44 Stat. 1358: "The said courts shall consider all such claims de novo . . . and without regard to any decision, finding, or settlement heretofore had in respect of any such claims"; construed in *Delaware Tribe* v. *United States*, 72 Ct. Cls. 483; *id.* 525; 74 Ct. Cls. 368. Act of March 3, 1881, 21 Stat. 504: Under a treaty of 1855, 11 Stat. 611, a determination had been made by the Senate and account was stated by the Secretary of the Interior. The Act authorized the court "to review the entire question of differences de novo" and declared that "the court shall not be estopped by any action had or award made by the Senate." Construed in *Choctaw Nation* v. *United States*, 19 Ct. Cls. 243; 119 U. S. 1, 29. Cf. statutes authorizing submission of claims not theretofore finally settled and released: Acts of February 11, 1920, 41 Stat. 404; June 3, 1920, 41 Stat. 738; March 19, 1924, 43 Stat. 27; May 20, 1924, 43 Stat. 133; May 24, 1924, 43 Stat. 139; June 4, 1924, 43 Stat. 366; June 7, 1924, 43 Stat. 537; June 7, 1924, 43 Stat. 644; February 7, 1925, 43 Stat. 812; March 3, 1925, 43 Stat. 1133; May 14, 1926, 44 Stat. 555; July 2, 1926, 44 Stat. 801; July 3, 1926, 44 Stat. 807; March 2, 1927, 44 Stat. 1263; March 3, 1927, 44 Stat. 1349.

covered by the language of § 1. As jurisdiction will not be extended beyond the terms of the Act by any implication or other resort to construction, no force can be given to plaintiffs' suggestion that intention to include claims already settled and released is shown by the clause in § 2 allowing defendant credit for money it expended for plaintiffs.

Plaintiffs say the committees recommended inclusion of a released claim and suggest that therefore the intention of Congress was to include the one in suit. Plaintiffs brought that claim forward; it arose under the Treaty of October 14, 1864, and involved questions concerning boundaries of the reservation meant to be defined by the treaty and boundaries as attempted to be established by surveys, and whether the release referred to extends to the area in respect of which the claim is asserted. The circumstances attending the enactment might be thought to have favorable bearing as to that claim. But as shown above plaintiffs' failure to disclose that it had and wanted to submit the claim in suit supports defendant's contention that the court below was without jurisdiction.

2. Have plaintiffs shown the release invalid?

The question is not whether under the circumstances disclosed the United States may set up the release as a defense. It is whether the special Act brings the claim within the court's jurisdiction. As this claim, if released, is not covered, it follows that in the court below the burden was on plaintiffs to prove the absence of valid release, and that here their burden is to show that, as a matter of law, the facts found compel the conclusion that the release given is not valid. It is to be remembered that the Act of April 30, 1908, was passed by Congress in the exertion of its untrammeled power in behalf of the United States to fix, as it deems appropriate and just under the circumstances, the amount of compensation to be paid the Indians for the rights of the plaintiffs lost by the tak-

ing of the 87,000 acres from their reservation. *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 306, 308. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565–566. *Choate* v. *Trapp,* 224 U. S. 665, 670–671. Cf. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 506, 509–510. *United States* v. *Creek Nation, supra,* 110. They gave, and through the Secretary of the Interior the United States accepted, the release as sufficient to comply with the Act. It served to make the appropriation effective and was treated as fulfillment of the conditions upon which the money was paid into the Treasury to be disbursed from time to time for plaintiffs' benefit. In the absence of findings of fact requiring conclusion to the contrary, it is to be presumed that all things necessary to make the appropriation effective and the release valid were done regularly and in accordance with the expressed will of Congress. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15.

The phrase "through the usual channels" is used in stating the condition without which payment would not have been made. There the expression is one of indefinite import. It does not necessarily mean the manner in which plaintiffs or other or all of the Indian tribes were then accustomed to make treaties or to negotiate other agreements with the United States. For aught that appears in the Act or findings of the court, "usual channels" may have been used to signify something less than the proceedings, if any there were, usually followed by plaintiffs or Indian tribes generally. If this ambiguous phrase be held to require adherence to custom, there is nothing in the findings to show what the custom was. They fail to show that anything required by the Act was omitted.

Plaintiffs contend that the release is invalid because obtained by duress. But duress will not be presumed; nor will it be inferred from incomplete, doubtful or ambiguous findings. There is nothing to suggest that, in

the making of the settlement, anything was done to overreach plaintiffs. On the contrary, the circumstances disclosed by the findings tend quite strongly to indicate that the negotiations were fairly conducted.

Plaintiffs say that the plain inadequacy of the payment, when taken in connection with the unequal positions of the parties, is enough without more to invalidate the release. The findings show that the amount paid plaintiffs was less than four per cent. of the value of the land. It was grossly inadequate. Where, in litigation between private parties, a release of claim is by the party who gave it challenged as invalid, inadequacy of consideration coupled with lack of business capacity and inferiority of position in respect of the transaction or in relation to that of the other party are elements having significance. *Wheeler* v. *Smith,* 9 How. 55, 82. *Thorn Wire Co.* v. *Washburn & Moen Co.,* 159 U. S. 423, 443. But the rules that govern in such cases have no application in suits by these Indian tribes against the United States. The relation between them is different from that existing between individuals whether dealing at arm's length, as trustees and beneficiaries, or otherwise. See *Choctaw Nation* v. *United States,* 119 U. S. 1, 28. *Lone Wolf* v. *Hitchcock, ubi supra. Choate* v. *Trapp, ubi supra.* Regard being had to the nature of duties, resembling those arising out of the relation of guardian and ward,[12] owed by the United States to Indian tribes, and in view of the undoubted power of Congress to determine the amount and to fix the terms of payment of compensation for the rights lost to plaintiffs, it is clear that, in the absence of specific authorization, they may not avoid the release given in accordance with the Act upon the

[12] *United States* v. *Kagama,* 118 U. S. 375, 383–384. *Choctaw Nation* v. *United States,* 119 U. S. 1, 27, 28. *Jones* v. *Meehan,* 175 U. S. 1, 10–11. *United States* v. *Payne,* 264 U. S. 446, 448.

ground that the payment was too small. That would enable them to question the laws of Congress in fields where, because of the relationship referred to, they are supreme.

The obligation of the United States to make good plaintiffs' loss is a moral one calling for action by Congress in accordance with what it shall determine to be right. Save to the extent that Congress may authorize, the Government's dealings with Indian tribes are not subject to judicial review.[13] Even if judicially cognizable, as would be a like contention in ordinary litigation between individuals, plaintiffs' insistence that inadequacy of consideration invalidates the release could not here be sustained. That is so because the findings fail to show that any person acting for the United States deceived or misled plaintiffs as to the value of the land or, indeed, had knowledge of any fact bearing upon its value that was not well known by plaintiffs when they made the settlement and gave the release. Mere inadequacy of consideration is not enough. *Eyre* v. *Potter,* 15 How. 42, 59. Pomeroy, Equity Jurisprudence, 14th ed., § 926. Williston on Contracts, § 115.

As the Act does not extend to this claim if released, and as the facts found fail to establish invalidity of the release admittedly given, the jurisdictional Act does not extend to the claim in suit and the Court of Claims rightly dismissed the case. If plaintiffs are to have additional compensation, it must be obtained through legislation dealing with the merits or authorizing effective judicial determination.

Affirmed.

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

[13] *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 567–568.

MILLER *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY.

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

No. 67. Argued November 20, 21, 1935.—Decided December 9, 1935.

A covenant in a lease provided that the landlord, upon reëntry, might relet and apply the resulting rents to rents due under the lease, and that the tenant should not be entitled to any surplus, but should remain liable for any deficiency, which, at the option of the landlord, should become payable on demand or as it accrued from month to month. *Held* no basis for a claim in bankruptcy against the tenant under § 63 of the Bankruptcy Act. *Irving Trust Co.* v. *A. W. Perry, Inc.*, 293 U. S. 307, distinguished. Pp. 258–259.

77 F. (2d) 1012, affirmed.

CERTIORARI, 295 U. S. 729, to review a judgment which affirmed an order of the District Court (10 F. Supp. 733) rejecting a claim in bankruptcy.

Mr. Robert D. Steefel, with whom *Mr. Sol M. Stroock* was on the brief, for petitioner.

Mr. Lester D. Melzer, with whom *Mr. Irving L. Ernst* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question is as to provability of a claim growing out of the termination of a lease by petitioner to the bankrupt and reëntry before lessee filed his petition in voluntary bankruptcy. There is involved a construction of §§ 1 (11), 17 and 63 (a) (b) of the Bankruptcy Act.* The

* Section 1 (11). " . . . 'debt' shall include any debt, demand, or claim provable in bankruptcy." 11 U. S. C., § 1 (11).

Section 17. "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . ." 11 U. S. C., § 35

District Court for the Southern District of New York held the claim not provable. 10 F. Supp. 733. The Circuit Court of Appeals affirmed, 77 F. (2d) 1012, following its decision in *Urban Properties Co.* v. *Irving Trust Co.*, 74 F. (2d) 654, in which we granted a writ of certiorari, 295 U. S. 725, dismissed on petitioner's motion, *post*, p. 658. The decision in the case now before us conflicts with that of the Circuit Court of Appeals for the Seventh Circuit in *Lloyd Investment Co.* v. *Schmidt*, 66 F. (2d) 371. To resolve the conflict we granted this writ. 295 U. S. 729.

The lease covered a store building in Newark, New Jersey, and was for a term of ten years commencing August 1, 1928. The lessee occupied the premises until April 27, 1932, when, by the above named court, an equity receiver was appointed for it. The receiver, having disaffirmed the lease, vacated the premises July 18, and the lessor took possession July 25; the lessee filed its petition in bankruptcy August 27. Later, the lessor relet the premises for the balance of the term but for rents less than those reserved in the lease to the bankrupt.

That lease provides that, if the premises shall become vacant or the term shall end prior to the expiration date because of any act of the tenant, the landlord may reenter, relet the premises and apply the rents received on

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Section 63. "*Debts which may be proved.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied; . . .

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." 11 U. S. C., § 103.

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the reletting to the payments of rents due under the lease, and that the tenant shall not be entitled to any surplus, but shall remain liable for any deficiency which, at the option of the landlord, shall become payable on demand or as it accrues from month to month.

The petitioner filed a claim consisting of two items. The first was for $600 filed as a priority claim covering rent for March and April, 1932, and the second was for $16,025 filed as a general claim for the difference between the rent reserved in the lease and the fair rental value of the premises for the balance of the term. The trustee objected to the claim and sought to have it reduced to $1,000 admittedly owing for past due rent at the time of filing the petition in bankruptcy. The first item having been allowed and paid as a claim entitled to priority, under New Jersey law, the referee reduced the second item to $400.

The covenant before us is like that considered in *Manhattan Properties* v. *Irving Trust Co.*, 291 U. S. 320. The difference between the cases is that here the reëntry occurred before, while in that case there was no reëntry until after, bankruptcy. The petitioner's statement of claim does not follow the covenant in his lease. It is made as if it rested on a covenant providing for damages equal to rents reserved less rental value for the rest of the term, such as that on which the landlord prevailed in *Irving Trust Co.* v. *Perry Co.*, 293 U. S. 307. But petitioner's claim must be adjudged on the basis of the covenant that in his interest was inserted in the lease. The only measure available to him is the difference between the rents reserved in the lease and what he might choose or happen to get on reletting. Under the clause in question, it was, at the time the petition in bankruptcy was filed, uncertain, a mere matter of speculation, whether any liability ever would arise under it. § 63 (a). *Riggin* v. *Magwire*, 15 Wall. 549. *Dunbar* v. *Dunbar*, 190 U. S. 340, 345. *In*

re Merrill & Baker, 186 Fed. 312; cf. *Maynard* v. *Elliott,* 283 U. S. 273, 278. The method here prescribed is not governed by any rule or principle written into or derivable from the lease or recognized in law as governing in such cases as this. Without transgressing the covenant, he may make, terminate and renew leases covering the premises without regard to rental value. He is free to fix or control the amount of lessee's liability, at least to the extent of the difference between free use and reasonable rental value of the premises. It is clear that the specified basis is not a valid one for the proving of claims under § 63.

Affirmed.

NEW JERSEY *v.* NEW YORK CITY.

PETITION FOR CONSTRUCTION OR MODIFICATION OF DECREE.

No. 10, original (October Term, 1934). Rule to Show Cause issued October 14, 1935.—Return to Rule presented November 18, 1935.—Decided December 9, 1935.

1. The defendant City is granted leave to file a petition for construction or modification of the former decree, 290 U. S. 237.
2. Dumping of sludge at sea, as described and explained in the petition, does not violate that decree.
3. Plaintiff's return does not put the petition in issue or show a violation.
4. Plaintiff's motion for appointment of a Special Master denied.
5. This decree is without prejudice to plaintiff's rights under the former decree.

Messrs. Paul Windels, Paxton Blair, and *P. Fearson Shortridge* were on the brief in support of the motion for leave to file the petition on behalf of defendant.

Mr. David T. Wilentz, Attorney General of New Jersey, and *Mr. Duane E. Minard* were on the Return to the Rule to Show Cause on behalf of plaintiff.

DECREE, announced by MR. JUSTICE BUTLER.

On December 4, 1933, this Court "ordered, adjudged and decreed:

"1. On and after July 1, 1934, the defendant, The City of New York, its employees and agents, and all persons assuming to act under its authority, be and they are hereby enjoined from dumping, or procuring or suffering to be dumped, any garbage or refuse, or other noxious, offensive or injurious matter, into the ocean, or waters of the United States, off the coast of New Jersey, and from otherwise defiling or polluting said waters and the shores or beaches thereof or procuring them to be defiled or polluted as aforesaid.

"2. If defendant shall fail to comply with paragraph 1 of this decree by July 1, 1934, it shall pay to plaintiff $5,000.00 a day until it does so comply; such payments however are to be without prejudice to any other relief to which complainant may be found entitled." 290 U. S. 237.

October 7, 1935, defendant applied for leave to file a petition for construction or modification of the decree. The purpose of the petition is to obtain a ruling that the dumping of sludge gathered by sedimentation and free of any matter capable of floating is not a violation of the decree. The petition states that the sludge consists of about 90 per cent. water and about 10 per cent. finely divided solids that settle to the bottom of the water, and in substance that no floating matter is included in the sludge; that defendant takes to sea about 4,000 tons of sludge per month and dumps it not less than ten miles from shore, and that the amounts dumped by defendant have ranged between one-twentieth and one-sixth of those dumped contemporaneously at the same place by the plaintiff or its political subdivisions.

The petition prays this Court to direct the State of New Jersey to show cause why (1) a ruling should not be made to the effect that the dumping of sludge, free

from any matter capable of floating, at places not less than 10 miles from any shore, is not a violation of the decree, or (2) in the alternative, why this Court should not modify the decree so as to permit defendant to dump non-floating sewage sludge as aforesaid.

The Court ordered that a rule issue requiring plaintiff to show cause why leave to file the petition should not be granted. November 15, 1935, plaintiff by its return consented to the filing of defendant's petition. And at the same time plaintiff filed its motion for the appointment of a special master with power to summon witnesses, to take testimony, "to make findings of fact and conclusions of law, respecting the allegations of the petition, and to submit the same to the Court with his recommendations, in respect to defendant's prayer therein."

Upon consideration of the premises, it is ordered, adjudged and decreed:

Defendant's motion for leave to file its petition is granted. The facts alleged therein do not constitute a violation of the decree of December 4, 1933. Plaintiff's return and motion are not sufficient to put in issue the allegations of defendant's petition or to show that defendant has failed to comply with the decree. Plaintiff's motion for the appointment of a special master is denied. This decree is without prejudice to any application that plaintiff may make under, in accordance with, or for the enforcement of, the decree of December 4, 1933.

CLYDE MALLORY LINES v. ALABAMA EX REL. STATE DOCKS COMMISSION.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 43. Argued November 15, 1935.—Decided December 9, 1935.

1. Article I, § 10, cl. 3, of the Constitution, providing that no State shall, without the consent of Congress, lay any duty of tonnage,

embraces taxes and duties which operate to impose a charge for the privilege of entering, trading in, or lying in a port. P. 264.

2. Invalidity under this clause depends upon the basis of the exaction, not upon measure by tonnage. P. 266.
3. This clause does not prevent a reasonable charge to defray the expense of policing service rendered by the State to insure safety and facility of movement of vessels using its harbors. P. 266.
4. State harbor regulation, and charges to defray the cost, though they may incidentally affect foreign or interstate commerce, are not forbidden by the commerce clause so long as they do not impede the free flow of commerce or conflict with any regulation of Congress. P. 267.

229 Ala. 624; 159 So. 53, affirmed.

APPEAL from a judgment affirming a recovery of harbor fees, in an action by the Docks Commission against the Steamship Company.

Mr. Roscoe H. Hupper, with whom *Messrs. Alexis T. Gresham* and *William J. Dean* were on the brief, for appellant.

Mr. S. Palmer Gaillard, Jr., for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on appeal under § 237 (a) of the Judicial Code, 28 U. S. C. 344 (a), from a judgment of the Supreme Court of Alabama, 229 Ala. 624; 159 So. 53, which affirmed a money judgment of the Circuit Court of Mobile County for the recovery of "harbor fees" from appellant.

Appellee, the State Docks Commission, is a state agency authorized to conduct "the operation of all harbors and seaports within the state" and to "adopt rules not inconsistent with the provisions of this Act for the purpose of regulating, controlling and conducting the said operation" and with power "to fix from time to time reasonable rates of charges for all services and for the use of all improvements and facilities provided under the authority

of this Act." No. 303, Alabama Acts of 1923, 330; No. 303, Ala. Acts of 1927, 1, 8, 12, 13.

By resolution of March 5, 1924, appellee adopted rules and regulations for the Port of Mobile, for the control, under the direction of a "chief wharfinger" or harbor master, of the movement, disposition and anchorage of vessels passing in and out of and using the port. By resolution of February 11, 1928, these rules were readopted and a new rule was added prohibiting the discharge of fuel oil into the harbor by vessels and manufacturing plants. The rules also established a schedule of "harbor fees," for mooring and shifting vessels in the harbor, and for all vessels of specified classes entering the harbor, including a fee of $7.50 for vessels "500 tons and over." Appellants operate vessels of more than 500 tons in the coastwise trade between New York and Mobile, and the present suit was brought by appellee to recover fees incurred by reason of the call of appellant's vessels at Mobile.

The authority of appellee, under the laws and constitution of the state, to adopt the harbor rules and schedule of fees is not questioned, and the reasonableness of the $7.50 fee is conceded. But appellant insists that its imposition is prohibited by Art. I, § 10, Clause 3 of the Constitution, which provides that "no state shall, without the consent of Congress, lay any duty of tonnage," and that it is a burden on interstate commerce forbidden by the commerce clause.

The Supreme Court of Alabama found that the contested fee was a charge made for the policing of the harbor under the rules adopted by the appellee to insure the safety of vessels and the dispatch of shipping within the port, by regulating the speed of vessels, their movement and anchorage, and by providing for their protection from danger of fire occasioned by the uncontrolled discharge of oil into the harbor.

The record amply supports this conclusion. Appellee's resolution adopting the harbor fees declared that they were "for the purpose of meeting the expense attendant upon the supervision of the port and the execution of the regulations and providing for the proper accommodation of vessels at this port." The rules are plainly devised to insure the safety of vessels and to facilitate their use of the harbor. They regulate, within the harbor, the disposition of the rigging of sailing ships, the speed and mooring of vessels, the selection and change of their anchorage, their loading and unloading, and the use of lighters, barges and rafts. They require the arrival of all vessels at the port to be reported to the chief wharfinger, and charge him with "responsibility for selecting and changing anchorages of and for the movements of vessels into and out of slips or berths, and with all other ship movements that effect a fair joint use of the facilities of the port." The evidence shows that ship movements within the port are carried on under his active supervision and control.

The $7.50 fee is conceded not to be a charge for the use of the state docks or for mooring and shifting vessels, for which specific charges are levied. It is the only fee attributable to the general service rendered by the Commission in securing the benefits and protection of the rules to shipping in the harbor. We accept the conclusion of the state court that it is charged for a policing service rendered by the state in the aid of the safe and efficient use of its port, and we address ourselves to the question whether such a fee is forbidden by the Constitution either because it is a "duty of tonnage" or an unwarranted burden on interstate commerce.

1. It seems clear that the prohibition against the imposition of any duty of tonnage was due to the desire of the Framers to supplement Art. I, § 10, Clause 2, denying to the states power to lay duties on imports or exports,

see *Steamship Co.* v. *Portwardens,* 6 Wall. 31, 35; *Packet Co.* v. *Keokuk,* 95 U. S. 80, 87, 88, by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state, and to their doubts whether the commerce clause would accomplish that purpose.[1] If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise. At the time of the adoption of the Constitution "tonnage" was a well understood commercial term signifying in America the internal cubic capacity of a vessel. See *Inman Steamship Co.* v. *Tinker,* 94 U. S. 238, 243. And duties of tonnage and duties on imports were known to commerce as levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state and were distinct from fees or charges by authority of a state for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage and the like. See *Cooley* v. *Board of Wardens,* 12 How. 299, 314; *Inman Steamship Co.* v. *Tinker, supra,* 243.

Hence the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the

[1] The adoption of the duty of tonnage clause followed a motion of Maryland delegates that "No state shall be restricted from laying duties of tonnage for the purpose of clearing harbors and erecting light houses." Despite the assertion that such works were peculiarly necessary in the Chesapeake, the convention proved hostile to state tonnage levies. There was uncertainty whether the commerce clause would forbid such duties: Gouverneur Morris said that it would not, Madison thought that it should, Sherman argued for a concurrent power over commerce with power in the United States to control state regulations. Whereupon the clause was added in its present form. See Madison's Notes of the Convention (for Sept. 15, 1787).

privilege of entering, trading in, or lying in a port, *Steamship Co.* v. *Portwardens, supra; State Tonnage Tax Cases,* 12 Wall. 204; *Cannon* v. *New Orleans,* 20 Wall. 577; *Inman Steamship Co.* v. *Tinker, supra;* and see *Huse* v. *Glover,* 119 U. S. 543, 549, 550. But it does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage, *Cooley* v. *Board of Wardens, supra,* or wharfage, *Packet Co.* v. *Keokuk, supra; Packet Co.* v. *St. Louis,* 100 U. S. 423; *Packet Co.* v. *Catlettsburg,* 105 U. S. 559; *Transportation Co.* v. *Parkersburg,* 107 U. S. 691; *Ouachita River Packet Co.* v. *Aiken,* 121 U. S. 444; or charges for the use of locks on a navigable river, *Huse* v. *Glover, supra,* or fees for medical inspection, *Morgan's Steamship Co.* v. *Board of Health,* 118 U. S. 455.

Appellant places its reliance on those cases in which a tax, levied in the guise of wharfage or a charge for medical inspection, was condemned because imposed on all vessels entering a port, whether receiving the benefit of the service or not, see *Steamship Co.* v. *Portwardens, supra; Cannon* v. *New Orleans, supra; Peete* v. *Morgan,* 19 Wall. 581. It argues that the present fees must similarly be condemned because imposed on all vessels entering the port, and points out that appellant has neither asked nor received any police service such as that which the state court regarded as the basis for the charge.

But the policing of a harbor so as to insure the safety and facility of movement of vessels using it differs from wharfage or other services which benefit only the particular vessels using them. It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it. Upon this ground, among others, a

fee for half pilotage imposed upon vessels such as were not required to take a pilot was upheld in *Cooley* v. *Board of Wardens, supra,* 312, 313. We conclude that a reasonable charge for a service such as the present is neither within the historic meaning of the phrase " duty of tonnage " nor the purpose of the constitutional prohibition.

It is unnecessary to consider other types of port charges, as for dredging or other forms of harbor improvement, with respect to which different considerations may apply.

2. The present fee to defray the cost of a purely local regulation of harbor traffic is not an objectionable burden on commerce. State regulations of harbor traffic, although they incidentally affect commerce, interstate or foreign, are of local concern. So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress they are not forbidden. *Willson* v. *Black-Bird Creek Marsh Co.,* 2 Pet. 245; *Gibbons* v. *Ogden,* 9 Wheat. 1, 209; *Cooley* v. *Board of Wardens, supra,* 314; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Pound* v. *Turck,* 95 U. S. 459; *Escanaba Co.* v. *Chicago,* 107 U. S. 678; *Cardwell* v. *American Bridge Co.,* 113 U. S. 205; *Willamette Bridge Co.* v. *Hatch,* 125 U. S. 1; *Lake Shore & M. S. Ry. Co.* v. *Ohio,* 165 U. S. 365; *Cummings* v. *Chicago,* 188 U. S. 410; *Manigault* v. *Springs,* 199 U. S. 473; see *Brown* v. *Houston,* 114 U. S. 622, 631; *Minnesota Rate Cases,* 230 U. S. 352, 363, 407. And charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible. Such charges were considered and upheld in *Packet Co.* v. *Keokuk, supra; Morgan's Steamship Co.* v. *Board of Health, supra; Transportation Co.* v. *Parkersburg, supra,* 701, *et seq.; Ouachita Packet Co.* v. *Aiken, supra,* 448, *et seq.; Huse* v. *Glover, supra.* See *Sands* v. *Manistee River Improvement Co.,* 123 U. S. 288. A similar exercise of state power is the imposition of in-

spection or license fees incident to or in support of local regulations of interstate commerce. *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345; *McLean & Co.* v. *Denver & Rio Grande R. Co.,* 203 U. S. 38, 54; *Red "C" Oil Mfg. Co.* v. *Board of Agriculture,* 222 U. S. 380; *Savage* v. *Jones,* 225 U. S. 501; *Merchants Exchange* v. *Missouri,* 248 U. S. 365; *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158. Its most recent manifestation is the levy of a tax which represents a reasonable charge upon interstate automobile traffic passing over state highways, upheld in *Kane* v. *New Jersey,* 242 U. S. 160; *Clark* v. *Poor,* 274 U. S. 554; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Hendrick* v. *Maryland,* 235 U. S. 610.

Affirmed.

MILWAUKEE COUNTY *v.* M. E. WHITE CO.

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

No. 32. Argued November 12, 13, 1935.—Decided December 9, 1935.

1. A suit by or on behalf of a State upon a judgment for taxes is a suit of a civil nature within the meaning of § 24, Jud. Code, defining the jurisdiction of the District Courts. P. 270.
2. The obligation to pay taxes is not penal; it is a statutory liability, *quasi*-contractual in nature, enforcible, if there be no exclusive statutory remedy, in the civil courts by the common-law action of debt or *indebitatus assumpsit.* This was the rule established in the English courts before the Declaration of Independence. P. 271.
3. The objection that the courts in one State will not entertain a suit to recover taxes due to another or upon a judgment for such taxes goes not to the jurisdiction but to the merits, and raises a question which District Courts are competent to decide. P. 272.
4. Even if full faith and credit are not commanded, there is nothing in the Constitution and laws of the United States which requires a court of a State to deny relief upon a judgment recovered in another State because it is for taxes. P. 272.

5. Where suits to enforce the laws of one State are entertained in the courts of another on the principle of comity, the federal District Courts sitting in that State may and should entertain them, if to do so will not infringe federal law or policy. P. 272.
6. Assuming that the courts of one State, and federal courts therein, are not required by the Constitution, Art. IV, § 1, and the Act of Congress passed thereunder, to entertain suits to recover taxes levied under the statutes of another State, they cannot deny full faith and credit to judgments recovered in the other State for such taxes. P. 275.
7. The opinion in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, is disapproved insofar as it can be taken to suggest that full faith and credit are not required with respect to a judgment unless the original cause of action would have been entitled to like credit. P. 278.

IN ANSWER to a question certified by the court below, on an appeal from a judgment of the District Court dismissing an action in Illinois based on a judgment for taxes recovered by the plaintiff County in Wisconsin.

Mr. Herbert H. Naujoks, Assistant Attorney General of Wisconsin, and *Mr. Clark J. A. Hazelwood,* with whom *Mr. James E. Finnegan,* Attorney General, and *Mr. O. L. O'Boyle* were on the brief, for Milwaukee County.

Mr. Irving Herriott, with whom *Mr. W. Ward Smith* was on the brief, for M. E. White Co.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here under § 239 of the Judicial Code, 28 U. S. C. 346, on certificate of the Court of Appeals for the Seventh Circuit, which presents a question of law concerning which the instructions of this Court are desired for the proper decision of the case.

The relevant facts, as stated by the certificate, are that the appellant, Milwaukee County, a county and citizen of Wisconsin, brought suit in the District Court for Northern Illinois against M. E. White Company, appellee,

a corporation and citizen of Illinois, to recover on a judgment for $52,165.84, which appellant had duly recovered and entered against the appellee in the Circuit Court of Milwaukee County, Wisconsin, a court of general jurisdiction. The judgment is said to be for taxes duly assessed against appellee, under Wisconsin statutes, upon income received from its business transacted within the state under state license. The district court dismissed the cause on the ground that, as the suit was in substance brought to enforce the revenue laws of Wisconsin, it could not be maintained in the district court in Illinois.

The question certified is as follows:

"Should a United States District Court in and for the State of Illinois, having jurisdiction of the parties, entertain jurisdiction of an action therein brought, based upon a valid judgment for over $3,000 rendered by a court of competent jurisdiction in the State of Wisconsin against the same defendant, which judgment was predicated upon an income tax due from the defendant to the State of Wisconsin?"

Appellee insists that the question should be answered in the negative (1) because such a suit is not within the judicial power conferred upon district courts by the Constitution and laws of the United States, and (2) because a judgment for taxes constitutes an exception to the requirement of the Constitution and statutes of the United States that full faith and credit be given in each state to the public acts and judicial proceedings of every state.

1. By § 24 of the Judicial Code, 28 U. S. C., § 31, district courts are given original jurisdiction "of all suits of a civil nature at common law or in equity," where there is the requisite diversity of citizenship and the amount in controversy exceeds $3,000. In this grant of jurisdiction of causes arising under state as well as federal law the phrase "suits of a civil nature" is used in contradistinction to "crimes and offenses," as to which the juris-

diction of the district courts is restricted by § 24 (2) to offenses against the United States. Thus suits of a civil nature within the meaning of the section are those which do not involve criminal prosecution or punishment, and which are of a character traditionally cognizable by courts of common law or of equity. Such are suits upon a judgment, foreign or domestic, for a civil liability, of a court having jurisdiction of the cause and of the parties, which were maintainable at common law upon writ of debt, or of *indebitatus assumpsit.*[1]

Even if the judgment is deemed to be colored by the nature of the obligation whose validity it establishes and we are free to reëxamine it and, if we find it to be based on an obligation penal in character, to refuse to enforce it outside the state where rendered, see *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 292, *et seq.;* compare *Fauntleroy* v. *Lum,* 210 U. S. 230, still the obligation to pay taxes is not penal. It is a statutory liability, *quasi*-contractual in nature, enforcible, if there is no exclusive statutory remedy, in the civil courts by the common law action of debt or *indebitatus assumpsit. United States* v. *Chamberlin,* 219 U. S. 250; *Price* v. *United States,* 269 U. S. 492; *Dollar Savings Bank* v. *United States,* 19 Wall. 227; and see *Stockwell* v. *United States,* 13 Wall. 531, 542; *Meredith* v. *United States,* 13 Pet. 486, 493. This was the rule established in the English courts before the Declaration of Independence. *Attorney General* v. *Weeks,* Bunbury's Exch. Rep. 223; *Attorney General* v. *Jewers and Batty, id.,* 225; *Attorney General* v. *Hatton,*

[1] *Horsy* v. *Daniel,* 2 Lev. 161; 1 Marsh. 284; *Prince* v. *Nicholson,* 5 Taunt. 665; *Hall* v. *Odber,* 11 East. 118; *Lyman* v. *Brown,* 2 Curtis 559, 561; *Taylor* v. *Bryden,* 8 Johns. 173; *Russell* v. *Smyth,* 9 M. & W. 810; *Andrews* v. *Montgomery,* 19 Johns. 162; *Boston India Rubber Co.* v. *Hoit,* 14 Vt. 92; *Carter* v. *Crews,* 2 Port. (Ala.) 81; *Belford* v. *Woodward,* 158 Ill. 122; *Cole* v. *Driskell,* 1 Blackf. (Ind.) 16; see 1 Chitty on Pleading, 115; 2 Freeman on Judgments, § 1515.

id., 262; *Attorney General* v. —, 2 Ans. Rep. 558; See Comyn's Digest (Title "Dett," A, 9); 1 Chitty on Pleading, 123; cf. *Attorney General* v. *Sewell*, 4 M. & W. 77.

The objection that the courts in one state will not entertain a suit to recover taxes due to another or upon a judgment for such taxes, is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes not to the jurisdiction but to the merits, and raises a question which district courts are competent to decide. See *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28; *General Investment Co.* v. *New York Central R. Co.*, 271 U. S. 228, 230; *Becker Steel Co. v. Cummings, ante*, p. 74.

That defense is without merit if full faith and credit must be given the judgment. But even if full faith and credit is not commanded there is nothing in the Constitution and laws of the United States which requires a court of a state to deny relief upon a judgment because it is for taxes. A state court, in conformity to state policy, may, by comity, give a remedy which the full faith and credit clause does not compel. *Young* v. *Masci*, 289 U. S. 253; *Bond* v. *Hume*, 243 U. S. 15; cf. *Tennessee Coal, Iron & R. Co.* v. *George*, 233 U. S. 354; *Clark Plastering Co.* v. *Seaboard Surety Co.*, 259 N. Y. 424; 182 N. E. 71; *Herrick* v. *Minneapolis & St. Louis Ry. Co.*, 31 Minn. 11; 16 N. W. 413; *Healy* v. *Root*, 11 Pick. (Mass.) 389; *Schuler* v. *Schuler*, 209 Ill. 522; 71 N. E. 16. A suit to recover taxes due under the statutes of another state has been allowed without regard to the compulsion of the full faith and credit clause. *Holshouser* v. *Copper Co.*, 138 N. C. 248; 50 S. E. 650. The privilege may be extended by statute. See N. Y. Laws, 1932, c. 333. Where suits to enforce the laws of one state are entertained in the courts of another on the principle of comity, the federal district courts sitting in that state may entertain them and should if they do not infringe federal law

or policy. *Union Trust Co.* v. *Grossman,* 245 U. S. 412, 418; *Bond* v. *Hume, supra; Northern Pacific R. Co.* v. *Babcock,* 154 U. S. 190, 197, 198; *Dennick* v. *Railroad Co.,* 103 U. S. 11; see *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 161.

2. The faith and credit required to be given to judgments does not depend on the Constitution alone. Article IV, § 1, not only commands that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state" but it adds "Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." And Congress has exercised this power, by Act of May 26, 1790, c. 11, 28 U. S. C. 687, which provides the manner of proof of judgments of one state in the courts of another, and specifically directs that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Such exception as there may be to this all-inclusive command is one which is implied from the nature of our dual system of government, and recognizes that consistently with the full faith and credit clause there may be limits to the extent to which the policy of one state, in many respects sovereign, may be subordinated to the policy of another. That there are exceptions has often been pointed out, *Broderick* v. *Rosner,* 294 U. S. 629, 642; *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532, 546; *Bradford Electric Light Co.* v. *Clapper, supra,* 160; *Huntington* v. *Attrill,* 146 U. S. 657, 663; *Wisconsin* v. *Pelican Insurance Co.,* 127 U. S. 265, 293; and in some instances decided. See *Haddock* v. *Haddock,* 201 U. S. 562; *Maynard* v. *Hill,* 125 U. S. 190; *Hood* v. *McGehee,* 237 U. S. 611; *Olmsted* v. *Olmsted,* 216 U. S. 386; *Fall* v. *Eastin,* 215 U. S. 1. Without attempting to

say what their limits may be, we assume for present purposes that the command of the Constitution and of the statute is not all-embracing and direct our inquiry to the question whether a state to which a judgment for taxes is taken may have a policy against its enforcement meriting recognition as a permissible limitation upon the full faith and credit clause. Of that question this Court is the final arbiter. See *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra,* 547; *Bradford Electric Light Co.* v. *Clapper, supra,* 157–162.

It is said that in answering it the court should examine the record which supports the judgment and refuse to give credit to the judgment, if the cause of action upon which it is founded is one which it would not enforce, and appellee urges that a suit for taxes imposed by state statute will not be entertained outside the taxing state. It has often been said,[2] and in a few cases held,[3] that statutes imposing taxes are not entitled to full faith and credit. Other obligations to pay money arising under the statutes of one state must be given recognition in courts of another. *Converse* v. *Hamilton,* 224 U. S. 243; *Broderick* v. *Rosner, supra; Bradford Electric Light Co.* v. *Clapper, supra.* But it is insisted that to this rule taxing statutes constitute an exception, analogous to that relat-

[2] *Henry* v. *Sargeant,* 13 N. H. 321; *Gulledge Bros. Lumber Co.* v. *Wenatchee Land Co.,* 122 Minn. 266; 142 N. W. 305; *Colorado* v. *Harbeck,* 232 N. Y. 71; 133 N. E. 357; *James & Co.* v. *Second Russian Insurance Co.,* 239 N. Y. 248, 257; 146 N. E. 369; *Matter of Martin,* 255 N. Y. 359, 362; 174 N. E. 753; *Beadall* v. *Moore,* 199 App. Div. 531; 191 N. Y. S. 826; cf. *Municipal Council of Sydney* v. *Bull* [1909], 1 K. B. 7; *Queen of Holland* v. *Drukker* [1928], Ch. 877; *Attorney General of Canada* v. *Schulze & Co.,* 9 Sc. L. T. Rep. 4.

[3] *Moore* v. *Mitchell,* 30 F. (2d) 600 (C. C. A. 2d); affirmed on another ground, 281 U. S. 18; *Matter of Bliss,* 121 Misc. 773; 202 N. Y. S. 185; *Matter of Martin,* 136 Misc. 51; 240 N. Y. S. 393; *Maryland* v. *Turner,* 75 Misc. 9; 132 N. Y. S. 173. *Contra, Holshouser* v. *Copper Co.,* 138 N. C. 248; 50 S. E. 650.

ing to penal laws, because the courts of one state should not be called upon to scrutinize the relations of a foreign state with its own citizens, such as are involved in its revenue laws, and thus commit the state of the forum to positions which might be seriously embarrassing to itself or its neighbors. See *Moore* v. *Mitchell,* 30 F. (2d) 600, 602, 604; Beale, Conflict of Laws, § 610.1.

Whether one state must enforce the revenue laws of another remains an open question in this Court. See *Moore* v. *Mitchell,* 281 U. S. 18, 24. But we do not stop to inquire whether the considerations which have been thought to preclude the enforcement of the penal laws of one state in the courts of another are applicable to taxing statutes; or whether the mere possibility of embarrassment in their enforcement should stay the hand of the court of another state in cases where in fact such embarrassment will not occur. For present purposes we will assume that the courts of one state are not required to entertain a suit to recover taxes levied under the statutes of another and confine our inquiry to the single question whether they must nevertheless give full faith and credit to judgments for such taxes.

A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction, *Pennoyer* v. *Neff,* 95 U. S. 714; *D'Arcy* v. *Ketchum,* 11 How. 165; *Tilt* v. *Kelsey,* 207 U. S. 43; or that it has ceased to be obligatory because of payment or other discharge; *Anderson* v. *Clark,* 70 Ga. 362; *Haggerty* v. *Amory,* 7 Allen (Mass.) 458; *First Nat. Bank* v.

Hahn, 197 Mo. App. 593; 198 S. W. 489; *Revere Copper Co.* v. *Dimock,* 90 N. Y. 33; or that it is a cause of action for which the state of the forum has not provided a court, *Anglo-American Provision Co.* v. *Davis Provision Co., (No. 1),* 191 U. S. 373; compare *Kenney* v. *Supreme Lodge,* 252 U. S. 411, unless it is compelled to do so by the privileges and immunities clause; compare *Douglas* v. *N. Y., N. H. & H. R. Co.,* 279 U. S. 377; *McKnett* v. *St. Louis & S. F. Ry Co.,* 292 U. S. 230, and *Broderick* v. *Rosner, supra;* or possibly because procured by fraud, compare *Christmas* v. *Russell,* 5 Wall. 290; *Maxwell* v. *Stewart,* 22 Wall. 77; *Hanley* v. *Donoghue,* 116 U. S. 1; *Simmons* v. *Saul,* 138 U. S. 439, with *Webster* v. *Reid,* 11 How. 437; *McNitt* v. *Turner,* 16 Wall. 352; *Cole* v. *Cunningham,* 133 U. S. 107, 112.

Trial of these issues, even though the judgment be for taxes incurred under the laws of another state, requires no scrutiny of its revenue laws or of relations established by those laws with its citizens, and calls for no pronouncement upon the policy of a sister state. It involves no more embarrassment than the interstate rendition of fugitives from justice, the constitutional command for which is no more specific than that requiring full faith and credit. Foreign judgments are not liens and are not entitled to execution in the state to which they are brought. See *McElmoyle* v. *Cohen,* 13 Pet. 312; *Cole* v. *Cunningham, supra,* 112; cf. *Gasquet* v. *Fenner,* 247 U. S. 16; *Sistare* v. *Sistare,* 218 U. S. 1, 26. They can no more demand priority over domestic claims for taxes than a judgment upon a simple contract debt, which is equally a binding obligation of the judgment debtor where rendered, and to which full faith and credit must be accorded.

We can perceive no greater possibility of embarrassment in litigating the validity of a judgment for taxes and enforcing it than any other for the payment of money. The very purpose of the full faith and credit

clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed against the policy of the constitutional provision and the interest of the state whose judgment is challenged. In the circumstances here disclosed no state can be said to have a legitimate policy against payment of its neighbor's taxes, the obligation of which has been judicially established by courts to whose judgments in practically every other instance it must give full faith and credit. Compare *Fauntleroy* v. *Lum, supra.*

In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded; that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it. Full faith and credit is required to be given to the judgment of another state although the original suit on which it was based arose in the state of the forum and was barred there by the Statute of Limitations when the judgment was rendered; *Christmas* v. *Russell,* 5 Wall. 290; *Roche* v. *McDonald,* 275 U. S. 449; and where the original suit was upon a gambling contract invalid by the law of the forum where it was made; *Fauntleroy* v. *Lum, supra.* It was required where the judgment was for wrongful death, although it was thought that the statute giving the recovery was not entitled to full faith and credit. *Kenney*

v. *Supreme Lodge, supra;* compare *Converse* v. *Hamilton, supra; Broderick* v. *Rosner, supra;* see also *American Express Co.* v. *Mullins,* 212 U. S. 311.

Appellee especially relies upon the statement in the opinion of this Court in *Wisconsin* v. *Pelican Insurance Co., supra,* that (292, 293):

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

In that case it was held that this Court was without original jurisdiction of a suit brought by Wisconsin to recover upon a judgment obtained in its own courts for a penalty imposed by its statutes for the failure of an insurance company to file an annual report. So far as the opinion can be taken to suggest that full faith and credit is not required with respect to a judgment unless the original cause of action would have been entitled to like credit, it is inconsistent with decisions of this Court already noted and was discredited in *Fauntleroy* v. *Lum, supra,* 36, 37, and *Kenney* v. *Supreme Lodge, supra,* 414.

The precise question now presented appears to have been decided in only a single case, *New York* v. *Coe Manufacturing Co.,* 112 N. J. L. 536; 172 Atl. 198. In holding in that case that a New York judgment for taxes was entitled to full faith and credit, the New Jersey Court of Errors and Appeals pointed out that questions of the construction and application of the New York tax laws were not the subject of litigation in New Jersey, since

they had been conclusively determined by the New York judgment, which established liability for the tax.[4]

We conclude that a judgment is not to be denied full faith and credit in state and federal courts merely because it is for taxes.

We intimate no opinion whether a suit upon a judgment for an obligation created by a penal law, in the international sense, see *Huntington* v. *Attrill, supra,* 677, is within the jurisdiction of the federal district courts, or whether full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed. See *Wisconsin* v. *Pelican Insurance Co., supra.*

The findings of the Wisconsin court, upon which the judgment in the present case was predicated, are appended as an exhibit to the certificate. They indicate that the judgment included interest and a "penalty" of

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[4] The Restatement of Conflict of Laws of the American Law Institute, 1934, declares:

§ 610. "No action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests."

This is stated by Comment (c) to refer to claims for taxes. It also declares:

§ 443. "A valid foreign judgment for the payment of money which has been obtained in favor of a state, a state agency, or a private person, on a cause of action created by the law of the foreign state as a method of furthering its own governmental interests will not be enforced."

Comment (b) states that the enforcement of such a judgment is not required by the full faith and credit clause. But illustration 4 states that a state judgment against a foreign corporation for a stipulated fee for the privilege of doing business within the state is entitled to full faith and credit.

These conclusions should be compared with *New York* v. *Coe Manufacturing Co., supra.* See Beale, Conflict of Laws, §§ 443.1, 610.2.

2% for delinquency in payment, but the record does not disclose that the nominal penalty arose under a penal law or is of such a nature as to preclude suit to recover it outside the state of Wisconsin. See *Huntington* v. *Attrill*, 146 U. S. 657, 667, *et seq.* The certificate and question are framed on the assumption that it is not. The judgment is stated to be for taxes.

The question is answered "yes."

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER think that the question should be answered "no."

DEL VECCHIO ET AL. *v.* BOWERS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 37. Argued November 13, 14, 1935.—Decided December 9, 1935.

1. A decision of the United States Court of Appeals for the District of Columbia construing the Longshoremen's and Harbor Workers' Compensation Act—the Act being national in scope and not confined in its operation to the District of Columbia, where it applies as a workmen's compensation law—may present a question of general importance which this Court will review on certiorari. P. 285.
2. Section 3 (b) of the Longshoremen's and Harbor Workers' Compensation Act provides that "No compensation shall be payable if the injury was occasioned solely . . . by the willful intention of the employee to injure or kill himself . . ." Section 20 provides that in any proceeding to enforce a claim for compensation under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary— . . . (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself . . ." In a proceeding upon a claim for compensation based on the death of an employee from a self-inflicted injury, the evidence was equally consistent with accident and suicide. The deputy commissioner made a finding of suicide and denied an award. *Held*:

(1) The requirement that evidence to overcome the presumption created by § 20 (d) must be substantial adds nothing to the general principle that a finding must be supported by evidence. P. 286.

(2) The presumption does not have the force of evidence in the claimant's favor, and vanishes from the case upon introduction by the employer of evidence sufficient to justify a finding of suicide. P. 286.

(3) Where the evidence in the case permits an inference either way on the question of suicide, the decision of the deputy commissioner as to the weight of it is conclusive and not subject to judicial review. P. 287.

(4) The deputy commissioner's finding of suicide in this case was supported by evidence and his order refusing an award should not have been set aside. P. 287.

64 App. D. C. 226; 76 F. (2d) 996, reversed.

CERTIORARI, 295 U. S. 728, to review a judgment of the United States Court of Appeals for the District of Columbia, which reversed a judgment of the Supreme Court of the District sustaining an order of a deputy commissioner refusing an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Mr. James E. McCabe for petitioners.

Mr. John H. Burnett, with whom *Mr. Chapin B. Bauman* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case involves the application of §§ 3 (b) and 20 (d) of the Longshoremen's and Harbor Workers' Compensation Act,[1] to the respondent's claim of compensation for the death of her husband, Jeff Bowers, who died

[1] March 4, 1927, c. 509, 44 Stat. 1424, 1426, 1436; U. S. C., Tit. 33, §§ 903 (b), 920 (d).

from a bullet wound inflicted while he was on duty in Del Vecchio's store in the District of Columbia.[2]

Evidence adduced at the hearing before a Deputy Compensation Commissioner tended to establish the following facts. On the morning of September 10, 1931, Bowers discovered a broken fastening on a door leading into an alley in the rear of the premises and engaged a carpenter to make repairs. The latter, while so occupied, hearing a sound like the bursting of an electric light bulb, followed by groans, entered the store and found Bowers lying on the floor. Death ensued without recovery of consciousness. An automatic pistol, owned by the decedent, which he kept in a drawer under a counter, was found in the partly closed drawer. There was blood in the drawer and on the counter near it. The bullet had entered the chest about three and one-half inches to the left of the median line and one inch above the nipple, emerged from the back of the body approximately in line with the point of entrance, and lodged in a paint can on a shelf behind the drawer about five feet above the floor. The ejected shell lay some twelve feet to the left of the drawer where it would naturally fall if the decedent had stood in front of the drawer, between the counter and the shelf, and held the pistol in his right hand pointing at his chest. Ballistic tests traced shell and bullet to the pistol. There were no identifiable fingerprints upon the weapon, but an indistinct print of the side of a finger was discernible. The front of Bowers' shirt bore grains of unburned powder which, with the condition of the material about the hole in the garment, indicated that the muzzle of the weapon had been held within two or three inches of the body. No rags or other material were discovered such as would suggest that Bowers was

[2] The statute is made a workmen's compensation law for the District of Columbia by the Act of May 17, 1928, c. 612, 45 Stat. 600.

cleaning the pistol. The victim of such a wound could have taken the few steps from the place where the gun was found to that where his body lay.

The parties agree the injury was self-inflicted, but are in controversy as to whether it was accidental or intentional. According to the respondent's evidence, Bowers was in good health, of a happy disposition, and in good financial condition; his accounts were in order; on the evening before his death he had written to his mother a cheerful letter in which he stated he would soon write her again; and the same evening he had promised a friend to bring him from the store some goods which the friend desired to purchase. The petitioners adduced evidence that Bowers had suffered from an infection of the ear and undergone a mastoid operation; about ten days before his death he visited a specialist to whom he complained of pain in the ear and headaches which seemed to be increasing. He was advised another mastoid operation might be necessary and was sent to a hospital for an X-ray examination. He submitted to the examination, which disclosed the presence of pus in the middle ear, but did not thereafter return to the physician whom he had consulted.

The Deputy Commissioner denied an award of compensation, holding claimant had failed to establish that Bowers' duties required the use of a weapon and there was therefore no showing that his injury arose out of his employment. Upon a bill filed [3] the Supreme Court of the District set aside the order, holding the keeping of the pistol in the store, although unknown to the employer, was in furtherance of the latter's interest, the find-

[3] As provided by § 21 (b); U. S. C., Tit. 33, § 921 (b): "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order . . ."

ing to the contrary was wholly unsupported, and the evidence tended to prove the death was due to accident. The Court of Appeals concurred in the view that an award should not have been refused on the ground that the injury did not arise out of the employment; but as the case was tried on the theory of suicide, and the Deputy Commissioner had made no finding upon this issue, remanded the cause for further findings.[4]

The Deputy Commissioner reconsidered the case upon the record as originally made before him and, finding the death suicidal, again refused an award. The respondent then instituted the present proceeding to have this action set aside. The Supreme Court denied relief, but the Court of Appeals reversed,[5] declaring the finding of suicide not to be in accordance with law because, though the act withholds compensation where an employee willfully kills himself,[6] § 20 (d) creates a presumption, in the absence of substantial evidence to the contrary, that the injury was not willfully inflicted.[7] The court found the evidence as consistent with accident as with suicide, and said that in such circumstances the presumption required a finding in favor of the claimant; adding that whatever measure of proof may generally suffice to support other findings of a deputy commissioner, a finding of suicide, in the absence of substantial evidence, is not in accord-

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[4] *Del Vecchio* v. *Bowers,* 62 App. D. C. 327; 67 F. (2d) 751.

[5] *Bowers* v. *Hoage,* 64 App. D. C. 226; 76 F. (2d) 996.

[6] Section 3 (b); U. S. C., Tit. 33, § 903 (b): "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

[7] Section 20 (d); U. S. C., Tit. 33, § 920 (d): "In any proceedings for the enforcement of a claim for compensation . . . it shall be presumed, in the absence of substantial evidence to the contrary—(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

ance with law. Substantial evidence, said the court, must be such as to induce conviction; and the evidence upon which the officer here acted did not reach that standard.

In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of § 20 (d).

We hold that the decision of the Deputy Commissioner should not have been annulled. The relevant substantive section of the act directs that no compensation shall be payable if the injury was occasioned by the willful intention of the employee to injure or kill himself; the adjective section creates a presumption that the injury was not so occasioned, in the absence of substantial evidence to the contrary. The question is whether, as the court below thought, the presumption has the quality of affirmative evidence. The answer must be that it has not.

When a trier of facts is to be persuaded of the truth of a disputed proposition, one or the other of the parties,—the proponent or the opponent,—has the burden of going forward with evidence. In the present instance, the fact that the wound was self-inflicted permits but one of two conclusions: either the decedent accidentally killed himself, or he committed suicide. Considerations of fairness and experience in human affairs induce fact-finding bodies, where there is a balance of probability, to

adopt a working assumption as the basis of a conclusion, unless and until the facts are developed by evidence.[8] The natural love of life, the comparative infrequency of suicide as contrasted with accident, and the likelihood that testimony as to the cause of death would be more readily available to the employer than to the claimant, justify a presumption, which the law indulges in such a case, that the death was accidental.[9] The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this *prima facies*. The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that a finding must be supported by evidence.[10] Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor.[11] Its only office is to control the result where there is an entire lack of competent evidence. If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposi-

[8] Thayer, A Preliminary Treatise on Evidence at the Common Law, pp. 314, 336; Wigmore on Evidence (2d ed.) Vol. 5, §§ 2487–2498, and Chapter 88.

[9] Jones, Commentaries on Evidence, (2d ed.), § 256; *Von Ette's Case,* 223 Mass. 56; 111 N. E. 696; *Manziano* v. *Public Service Gas Co.,* 92 N. J. L. 322; 105 Atl. 484; *Humphrey* v. *Industrial Commission,* 285 Ill. 372; 120 N. E. 816; *Westman's Case,* 118 Me. 133; 106 Atl. 532.

[10] *Crowell* v. *Benson,* 285 U. S. 22, 46, 49.

[11] Thayer, *ubi supra,* pp. 337, 339; Wigmore, *ubi supra,* Vol. 5, § 2487 (d).

tion, as was the case here, the issue must be resolved upon the whole body of proof pro and con; [12] and if it permits an inference either way upon the question of suicide, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court.[13]

For these reasons we are of opinion the Court of Appeals erred in holding that as the evidence on the issue of accident or suicide was, in its judgment, evenly balanced, the presumption must tip the scales in favor of accident. The only matter for decision was whether the affirmative finding of suicide was supported by evidence. It is clear that it was so supported and that the court should therefore not have set aside the Deputy Commissioner's order.

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

Reversed.

UNITED STATES v. CONSTANTINE.

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

No. 40. Argued November 14, 1935.—Decided December 9, 1935.

1. An otherwise valid federal excise tax on the business of selling liquor is not rendered invalid in the particular case by the fact that the business is being conducted in violation of the state law. P. 293.
2. A provision of the Revenue Act of 1926 imposes in addition to the $25 excise tax laid on retail liquor dealers by R. S., § 3244, as amended, a "special excise tax" of $1000 on such dealers when they carry on the business contrary to local state or municipal law, and provides fine and imprisonment for failure to pay. *Held:*

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[12] Thayer, *ubi supra,* p. 346.

[13] *Crowell* v. *Benson, supra,* 46; *Voehl* v. *Indemnity Insurance Co.,* 288 U. S. 162, 166.

(1) The provision, if regarded as part of the machinery for enforcing the Eighteenth Amendment, fell automatically with the repeal of that Amendment. P. 293.

(2) An exaction which in reality is a penalty cannot be converted into a tax by so naming it; its purpose and operation determine its character. P. 294.

(3) The additional exaction is not a tax, but a penalty for violation of state law. P. 294.

(4) The effect of the exaction in question is, under the guise of a taxing act, to usurp the police powers of the States. P. 296.

3. The United States may not impose penalties for infractions of the criminal laws of a State by her own citizens. P. 296.

4. The Court has no occasion in this case to consider whether the law in question is bad for want of the uniformity of operation required by Art. I, § 8 of the Constitution. P. 297.

75 F. (2d) 928, affirmed.

CERTIORARI, 295 U. S. 730, to review a judgment reversing a conviction and sentence under a criminal information.

Mr. Gordon Dean argued the cause, and *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. James E. Ruffin, Mahlon D. Kiefer,* and *W. Marvin Smith* filed a brief, for the United States.

Mr. William S. Pritchard, with whom *Messrs. Richard T. Rives* and *George D. Toole* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In November, 1934, an information was filed in the District Court for Northern Alabama charging that on October 8, 1934, at Birmingham, Alabama, the respondent conducted the business of a retail dealer in malt liquor, contrary to the laws of the State, without having paid the special excise tax of $1,000 imposed by § 701 of the

Revenue Act of 1926.[1] A demurrer and a motion to quash were overruled, a plea of not guilty was entered, and a jury trial was waived. Pursuant to a stipulation of facts, the court found that for the fiscal year July 1, 1934, to June 30, 1935, the respondent registered with the Collector of Internal Revenue as a retail liquor dealer and paid the tax of $25.00 imposed upon such dealers by R. S. 3244, as amended;[2] on the date named in the information the respondent had a restaurant in Birmingham, where he conducted the business of a retail dealer in malt liquors containing more than one-half of one per cent. alcohol, which business was contrary to the laws of

[1] "On an after July 1, 1926, there shall be levied, collected, and paid annually, in lieu of the tax imposed by section 701 of the Revenue Act of 1924, a special excise tax of $1,000, in the case of every person carrying on the business of a brewer, distiller, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills, as defined in section 3244 as amended and section 3247 of the Revised Statutes, in any State, Territory, or District of the United States contrary to the laws of such State, Territory, or District, or in any place therein in which carrying on such business is prohibited by local or municipal law. The payment of the tax imposed by this section shall not be held to exempt any person from any penalty or punishment provided for by the laws of any State, Territory, or District for carrying on such business in such State, Territory, or District, or in any manner to authorize the commencement or continuance of such business contrary to the laws of such State, Territory, or District, or in places prohibited by local or municipal law.

"Any person who carries on any business or occupation for which a special tax is imposed by this section, without having paid such special tax, shall, besides being liable for the payment of such special tax, be subject to a penalty of not more than $1,000 or to imprisonment for not more than one year, or both." Revenue Act of 1926, c. 27, 44 Stat. 9, 95.

[2] U. S. C. Tit. 26, § 1394. The act imposes special taxes as follows: Brewers $100; manufacturers of stills $50, and $20 for each still or worm; retail dealers in liquors, $25; wholesale liquor-dealers $100; retail dealers in malt liquors $20; wholesale dealers in malt liquors $50.

the state and of the city; and had not paid the $1,000 tax. Respondent's motion for judgment was denied, that of the United States was granted, and the respondent was sentenced. The Circuit Court of Appeals reversed the judgment [3] on the ground that the section became inoperative upon the repeal of the Eighteenth Amendment.

In its petition for certiorari the United States, though admitting the absence of a conflicting decision by the Circuit Court of Appeals of any other circuit, called attention to diverse decisions in the district courts,[4] to the many other cases pending in which action is awaiting authoritative settlement of the question presented herein, to the large amount of money involved, and to the number of persons whose liability will remain uncertain until the dispute is finally settled. The question thus assumes the importance required by Rule 38 and the writ issued accordingly.

In concluding that the law imposed a penalty in aid of the enforcement of the Eighteenth Amendment, and therefore fell with its repeal, the court relied upon the legislative history and administrative interpretation of § 701, and also thought such a construction necessary to avoid a serious question under Article I, § 8 of the Constitution as to the uniformity of operation of the Act throughout the United States. The Government insists that the section was not a part of the machinery for enforcing the prohibition amendment, but a revenue measure levying an excise conformably to the Constitution.

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[3] 75 F. (2d) 928.

[4] *Cleveland* v. *Davis,* 9 F. Supp. 337; *Green* v. *Page,* 9 F. Supp. 844; *Brabham* v. *Cooper,* 9 F. Supp. 904; *Liberis* v. *Nee,* 10 F. Supp. 366; *Senate Club* v. *Viley,* 12 F. Supp. 982; *United States* v. *Arthover* (D. C. N. D. Tex., unreported); *United States* v. *Columbia Fruit Products Co.,* 10 F. Supp. 873.

First: The Government attacks, and the respondent supports, the conclusion of the court below that the section was adopted pursuant to the Eighteenth Amendment. We think little aid is to be had from the legislative history. On the one hand it is said that the substance of the section was originally embodied in the Revenue Act of 1918, which became a law February 28, 1919; that while under consideration by Congress in the autumn of 1918 the bill contained the section in question; and that, when enacted, it was made effective as of January 1, 1919. As the Eighteenth Amendment was not proclaimed until January 9, 1919, effective January 9, 1920, the argument is that the Act of 1918 was independent revenue legislation and no section of it could have been intended to enforce fundamental law which was to become operative long after the passage of the act. From the fact that the provision for the additional tax of $1,000 was carried forward from the Act of 1918 through those of 1921 and 1924 into that of 1926,[5] the conclusion is drawn that the tax remained, as it was in the beginning, a means of raising revenue, and that its purpose was not altered by the existence of national prohibition when it was readopted as § 701 of the Revenue Act of 1926. Reference is also made to the fact that the section was specifically repealed by the Revenue Act of 1935,[6] and the deduction is drawn that Congress thought it had no relation to the prohibition amendment.

On the other hand, the respondent urges that the proclamation of the Amendment prior to the passage of the Act of 1918 made prohibition a certainty; that the tax of $1,000 laid upon violators of state liquor laws, in addition

[5] R. A. 1918, c. 18, §§ 1001 (12), 1005, 40 Stat. 1057, 1128, 1129; R. A. 1921, c. 136, §§ 1001, 1004, 42 Stat. 227, 296, 298; R. A. 1924, c. 234, §§ 701, 704, 43 Stat. 253, 327, 328.

[6] Act of August 30, 1935, c. 829, 49 Stat. 1014.

to the graded excises on various forms of the liquor business prescribed by R. S. 3244, and the retention of the $1,000 tax in the 1926 act, which discarded the many existing excises on other businesses, evince a purpose to prohibit rather than to tax liquor traffic violative of state laws.

For reasons presently to be stated we find it unnecessary to decide whether the policy exhibited by the act at its inception was independent of the Eighteenth Amendment or in subvention of it.

Second: The court below and the respondent regard the administrative construction as persuasive that the section is penal in character. After the adoption of the Revenue Act of 1926, the Treasury ruled that the so-called tax of $1,000 was a penalty.[7] Upon repeal of the Eighteenth Amendment the position was reversed; collectors were instructed to treat the item as a special tax; and the Department proceeded to prepare and distribute appropriate revenue stamps to be issued in token of its payment. We think the administrative practice has little bearing

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[7] T. D. 3911 (July 30, 1926). "Subject of internal revenue and prohibition taxes are (*sic*) divided into two classes:

1. Internal revenue taxes proper—that is taxes generally recognized as such.

2. Those while in the nature of internal revenue taxes are necessarily held to be penalties, ' and must be collected through the United States Courts.'

The following list is classed as taxes:

Retail dealers in malt liquors	$20.00
Wholesale dealers in malt liquors	50.00

The following list is classed as penalties:

' Under section 701 of the Revenue Act of 1926. A special tax of $1,000 on any person carrying on retail business of dealer in malt liquors contrary to laws of state or territory.'

. . . . . .

' Those designated as penalties. Such taxes will be carefully scheduled, summarized, and reported to the United States Attorney for any action he may bring.' "

upon the question of the nature of the exaction. During the life of the Amendment collection was lawful whether the demand was for a tax or a penalty; and the classification by the administrative officers was therefore immaterial. Congress then had power, in the enforcement of prohibition, to impose penalties for violations of national prohibitory laws.[8]

Third: The repeal of the Eighteenth Amendment renders it necessary to determine whether the exaction is in fact a tax or a penalty. If it was laid to raise revenue its validity is beyond question, notwithstanding the fact that the conduct of the business taxed was in violation of law. The United States has the power to levy excises upon occupations,[9] and to classify them for this purpose; and need look only to the fact of the exercise of the occupation or calling taxed, regardless of whether such exercise is permitted or prohibited by the laws of the United States [10] or by those of a State.[11] The burden of the tax may be imposed alike on the just and the unjust. It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise. The tax imposed by R. S. 3244 [12] affords an apposite illustration. That act imposes an excise, varying in amount, upon different forms of the liquor traffic. The respondent

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[8] Section 2 of the Eighteenth Amendment directed that the Congress and the several States should have concurrent power of enforcement by appropriate legislation. Compare *National Prohibition Cases,* 253 U. S. 350; *United States* v. *Lanza,* 260 U. S. 377; *Hebert* v. *Louisiana,* 272 U. S. 312.

[9] *License Tax Cases,* 5 Wall. 462.

[10] *United States* v. *Yuginovich,* 256 U. S. 450, 462; *United States* v. *Stafoff,* 260 U. S. 477, 480; *United States* v. *One Ford Coupe,* 272 U. S. 321, 327, 328.

[11] *License Tax Cases, supra.*

[12] *Supra,* Note 2.

paid the annual tax of $25 thereby required, despite the fact that he was violating local law in prosecuting his business. Undoubtedly this was a true tax for which he was liable. The question is whether the exaction of $1,000 in addition, by reason solely of his violation of state law, is a tax or a penalty? If, as the court below thought, § 701 was part of the enforcing machinery under the Amendment, it automatically fell at the moment of repeal.[13]

But even though the statute was not adopted to penalize violations of the Amendment, it ceased to be enforceable at the date of repeal, if, in fact, its purpose is to punish rather than to tax. The only color for the assertion of congressional power to ordain a penalty for violation of state liquor laws is the Eighteenth Amendment, which gave to the federal government power to enforce nation-wide prohibition.[14] That has been recalled; and the case must be decided in the light of constitutional principles which would have been applicable had the Amendment never been adopted. In the acts which have carried the provision, the item is variously denominated an occupation tax, an excise tax, and a special tax. If in reality a penalty it cannot be converted into a tax by so naming it,[15] and we must ascribe to it the character disclosed by its purpose and operation, regardless of name.[16] Disregarding the designation of the exaction, and viewing its substance and application, we hold that it is a penalty for the violation of state law, and as such beyond the limits of federal power.

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[13] *United States* v. *Chambers,* 291 U. S. 217.

[14] See Note 8, *supra.*

[15] *United States* v. *LaFranca,* 282 U. S. 568, 572.

[16] *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 625; *United States* v. *One Ford Coupe, supra,* 328; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 387.

Since 1878, the revised statutes have classified various forms of the liquor traffic for the payment of excises differing in amount according to the nature of the business.[17] When the section exacting $1,000 additional from all persons engaged in the traffic in violation of state law was made a part of the revenue laws the amount of the tax due by the respondent under R. S. 3244 was $25.00. The so-called excise of $1,000 is forty times as great. It is ten times as great as the annual tax under R. S. 3244 for wholesale liquor dealers and brewers, and fifty times as great as that imposed upon dealers in malt liquors. If the imposts under R. S. 3244 were fixed in amount in accordance with the importance of the business or supposed ability to pay, the exaction in question is highly exorbitant. This fact points in the direction of a penalty rather than a tax.

The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue.[18] Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct.[19]

We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of state law as such are too strong to be disregarded, remove all semblance of a revenue act, and stamp the sum it exacts as a penalty. In this view the statute is a clear invasion of the police power, inherent in the States, reserved from

[17] See Note 2, *supra.*

[18] Compare *Lipke* v. *Lederer,* 259 U. S. 557, 562.

[19] *Helwig* v. *United States,* 188 U. S. 605, 613.

the grant of powers to the federal government by the Constitution.

We think the suggestion has never been made—certainly never entertained by this Court—that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives. So far as the reservations of the Tenth Amendment were qualified by the adoption of the Eighteenth, the qualification has been abolished.

Reference was made in the argument to decisions of this Court holding that where the power to tax is conceded the motive for the exaction may not be questioned. These are without relevance to the present case. The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a state law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State.[20]

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[20] *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44; *Linder* v. *United States*, 268 U. S. 5, 17.

In view of what has been said we do not consider the contention that the law is bad for want of the uniformity of operation required by Article I, § 8, of the Constitution.

The judgment is

Affirmed.

MR. JUSTICE CARDOZO, dissenting.

I think the judgment should be reversed.

Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally and furtively is likely to yield larger profits than one transacted openly by law-abiding men. Not repression, but payment commensurate with the gains is thus the animating motive. The gains in all likelihood will seldom be exhausted by a tax of $1,000. Congress may also have believed that the furtive character of the business would increase the difficulty and expense of the process of tax collection. The Treasury should have reimbursement for this drain on its resources. Apart from either of these beliefs, Congress may have held the view that an excise should be so distributed as to work a minimum of hardship; that an illegal and furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge of criminals; and that in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.

Thus viewed, the statute was not adopted to supplement or sanction the police powers of the states or of their political subdivisions. It was adopted, for anything disclosed upon its face or otherwise, as an appropriate instrument of the fiscal policy of the nation. The business of trading in things contraband is not the same as the business of trading in legitimate articles of commerce. Clas-

sification by Congress according to the nature of the calling affected by a tax (*State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527) does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state. Power is not abused because the shock of its impact is equitably distributed. The practice of medicine by an unlicensed charlatan may be taxed on a different basis from its practice by a licensed physician, irrespective of the fact that the charlatan is guilty of a crime. The practice of law by a disbarred lawyer may be taxed on a different basis from the practice of the same profession by a lawyer in good standing. With as much if not greater reason a like distinction may be drawn between the licensed and the unlicensed traffic in intoxicating liquors. The underlying principle in all these cases is as clear as it is just. A business that is a nuisance (*People* v. *Vandewater,* 250 N. Y. 83; 164 N. E. 864), like any other business that is socially undesirable, may be taxed at a higher rate than one legitimate and useful. *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 100. By classifying in such a mode Congress is not punishing for a crime against another government. It is not punishing at all. It is laying an excise upon a business conducted in a particular way with notice to the taxpayer that if he embarks upon that business he will be subjected to a special burden. What he pays, if he chooses to go on, is a tax and not a penalty. *Nigro* v. *United States,* 276 U. S. 332, 353, 354. Cf. *Life & Casualty Insurance Co.* v. *McCray,* 291 U. S. 566, 574.

The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not

professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful. *Fletcher* v. *Peck,* 6 Cranch 87, 130; *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44. There is another wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion. *Ogden* v. *Saunders,* 12 Wheat. 213, 270. The warning sounded by this court in the *Sinking-Fund Cases,* 99 U. S. 700, 718, has lost none of its significance. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." I cannot rid myself of the conviction that in the imputation to the lawmakers of a purpose not professed, this salutary rule of caution is now forgotten or neglected after all the many protestations of its cogency and virtue.

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

UNITED STATES *v.* KESTERSON ET AL.

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

No. 46. Submitted November 14, 1935.—Decided December 9, 1935.

Decided upon the authority of *United States* v. *Constantine, ante,* p. 287.

76 F. (2d) 913, affirmed.

CERTIORARI* to review a judgment reversing convictions of respondents for carrying on a liquor business contrary to state law without having paid the tax imposed by § 701 of the Revenue Act of 1926.

Mr. Gordon Dean, with whom *Solicitor General Reed, Assistant Attorney General Keenan* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* were on the brief, submitted for the United States.

Mr. Frank Hickman submitted for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case, like the case next preceding, involves the validity of § 701 of the Revenue Act of 1926. The Circuit Court of Appeals reversed judgments of conviction under an indictment charging engaging in the business of a retail liquor dealer contrary to the laws of Oklahoma on August 17, 1934. 8 F. Supp. 680; 76 F. (2d) 913.

For the reasons given in the opinion in the other case the judgment is *Affirmed.*

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE CARDOZO dissent for the reasons stated in MR. JUSTICE CARDOZO's opinion in *United States* v. *Constantine, ante,* p. 287.

HULBURD *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 39. Argued November 14, 1935.—Decided December 9, 1935.

1. An assessment under Revenue Act, 1926, § 280, against the estate of a deceased transferee of property of a taxpayer cannot be converted by the Board of Tax Appeals upon review, or by the Cir-

*See Table of Cases Reported in this volume.

cuit Court of Appeals upon appeal from the Board's decision, into an assessment against the executor personally as legatee under the will; the liability of the legatee, if any, must first be determined by the Commissioner in a new inquiry and expressed in a new assessment. P. 305.

2. Assuming that executors, in petitioning for review of an assessment (Revenue Act 1926, § 280) against the estate, could by waiver or estoppel subject themselves to being held liable in the proceeding as legatees, no waiver or estoppel was in this case. P. 307.
3. Assuming that, under § 281 (b) of the Revenue Act of 1926, an executor, by failing to give notice of his discharge to the Commissioner of Internal Revenue, renders himself liable *qua* executor for an assessment under § 280 directed against the estate but made after his discharge, the Act in this respect is not to be construed as applicable to executors who were discharged from their fiduciary liability before the Act was approved. P. 308.
4. By the law of Illinois, in contrast with the rule at common law and in some of the States, an executor who has been discharged after a full and fair settlement of the estate, is *functus officio*. P. 311.
5. A decree of the Probate Court of Illinois, plainly intended to discharge an executor after a plenary accounting, is given much weight in this case as a construction of the Illinois statute governing the subject. P. 314.
6. An executor who, by reason of his discharge, is *functus officio* according to the local law, is no longer subject to be assessed in his representative capacity under Revenue Act, 1926, § 280. Pp. 308, 315.

76 F. (2d) 736, reversed; 27 B. T. A. 1123, affirmed.

CERTIORARI, 295 U. S. 730, to review a judgment of the Circuit Court of Appeals which reversed, on appeal, a decision of the Board of Tax Appeals overruling an assessment made against a decedent's estate as transferee of part of the assets of a corporation which was dissolved while liable for income and profits taxes. The assessment against the estate was made after the executors, one of whom is the petitioner in this case, had been discharged.

Mr. John E. Hughes, with whom *Mr. Henry A. Gardner* and *Alfred T. Carton* were on the brief, for petitioner.

Mr. N. A. Townsend, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Maurice J. Mahoney* were on the brief, for respondent.

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy is one as to the liability of the executor and legatee of a shareholder in a dissolved corporation for a deficiency of income and profits taxes assessed against the company.

In September, 1919, the Van Sicklen Company, an Illinois corporation, sold all its assets to a Delaware corporation, the Van Sicklen Speedometer Company, and was thereupon dissolved. In consideration of the sale it received $250,000 in cash and 5,000 shares in the new company, which it distributed forthwith among its own shareholders. One of these shareholders was Charles H. Hulburd. His distributive portion on the dissolution of the company was $8,000 in cash and 160 shares of no-par stock. He died on January 14, 1924, leaving a will by which his son, De Forest Hulburd, and Hugh McBirney Johnston were appointed executors. The son, who is the petitioner in this court, was also a legatee and devisee. The coëxecutor, Johnston, is dead.

In December, 1919, the Van Sicklen Company filed a corporation income and profits tax return for the fiscal year ending September 30, 1919. The return, however, was inadequate. Accordingly, on November 17, 1924, the Commissioner of Internal Revenue made an additional assessment in the sum of $227,872.06, with penalties in the sum of $113,936.03. Unable to collect this deficiency from the company after the distribution of its assets, he turned to the shareholders. On October 27, 1926, he mailed a letter to the "Estate of Charles H.

Hulburd, c/o De Forest Hulburd, 86 East Randolph Street, Chicago, Illinois." In this he gave notice of a proposed assessment "against the estate" by reason of its liability as transferee of the assets of the Illinois corporation. The amount of that liability was stated to be $24,000, but was afterwards reduced to $8,000, the cash received by the testator. In announcing this assessment, the Commissioner acted in reliance on § 280 of the Revenue Act of 1926 (26 U. S. C. App. § 1069), which permits an assessment against the transferee of a taxpayer upon the taxpayer's default. Before the passage of that act shareholders who had received the assets of a dissolved corporation might be compelled to discharge unpaid corporate taxes, but only by bill in equity or action at law. *Phillips* v. *Commissioner,* 283 U. S. 589, 592, 593. A summary procedure was added by the statute. *Phillips* v. *Commissioner, supra.* Upon the default of the taxpayer, the Commissioner is to apportion the deficiency among the transferees of the property and to give notice accordingly. Revenue Act of 1926, § 274. If the transferee is dissatisfied, he may petition the Board of Tax Appeals to redetermine the existence of liability and its proper distribution.

On October 27, 1926, when notice of the proposed assessment was sent to the petitioner, the estate of Charles H. Hulburd had been settled, the assets distributed and the executors discharged.[1] The discharged executors sub-

[1] The decree of the Probate Court of Cook County, Illinois, the place of administration, was made on February 26, 1925, and, the text being important, is quoted in full:

"In the Matter of the Estate of Charles H. Hulburd, Deceased.

"This day came Hugh McBirney Johnston and DeForest Hulburd, executors of the last will and testament of Charles H. Hulburd, deceased, and presented to the court and filed herein their final account

mitted to the Board of Tax Appeals a petition for review disclaiming liability. They stated in effect that they were the persons who had been appointed executors by the will of Charles H. Hulburd, but that their responsibilities as such were ended. Enumerating their objections to the assessment they alleged that the action of the Commissioner was erroneous for the reason that the estate had been "wholly distributed and settled and your petitioners duly discharged as executors thereof." Thus, as early as December, 1926 (when the petition for review was filed) and before the period of limitation under the statute had run against a new assessment against legatees or devisees (Revenue Act of 1926, § 280 (b) (2)), the Commissioner was put upon notice that the deficiency had been assessed against persons no longer liable and was given the opportunity to impose it upon others. Instead of doing this he stood his ground and prayed for an order that his determination be confirmed.

The Board of Tax Appeals held that "at the time the notice was mailed there was no liability of the estate or of the petitioners as executors." It put aside the consideration of a possible "liability of any of the beneficiaries

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with the estate of said decedent, showing that said estate has been fully administered.

"And it now appearing to the court that more than one year has elapsed since the granting of letters testamentary herein; that due notice has been given to all of the heirs at law, legatees and beneficiaries; that all assets of said estate have been collected; that no claims have been filed against said estate; that specific legacies have been paid; that the inheritance tax, federal estate tax, income tax, court costs and all other costs and expenses of administration herein have been paid, and that the balance of said estate has been distributed according to the last will and testament of said decedent, and guardian ad litem consenting to the approval of said final account.

"It is therefore ordered by the court that said final account be approved and recorded, that the estate be and it is declared settled and that the executors be and they are hereby discharged."

under the will or the distributees of the assets of the estate" on the ground that no such question was in the case. 27 B. T. A. 1123; cf. 21 B. T. A. 23. The decision of the Board was reviewed by the Circuit Court of Appeals for the Seventh Circuit. That court decided that the executors were liable *de bonis testatoris* because they had failed to give notice to the Commissioner that their fiduciary capacity had terminated. Revenue Act of 1926, § 281 (b). Besides this, the court held that De Forest Hulburd was liable individually to the extent of $4,000 because in the record there was evidence, not confirmed by any finding, that as legatee under the will he had received half of the $8,000 paid to his father on the dissolution of the company. The order of the Board was accordingly reversed, and the cause remanded for proceedings to conform to the opinion. 76 F. (2d) 736. The power was thus assumed to change a deficiency assessed against the executors of an estate into a deficiency to be assessed against a legatee who had shared in the estate. To determine the validity of that assumption and to settle other questions of statutory construction, a writ of certiorari was granted by this court.

First: The petitioner is not chargeable in this proceeding with liability as legatee under the will of a deceased shareholder in the taxpayer, a corporation now dissolved.

The Act of 1926 (c. 27, 44 Stat. 9, § 280; 26 U. S. C. App. § 1069), in supplementing by a summary procedure the cumbrous remedy of suit, laid the duty of assessment upon the Commissioner of Internal Revenue. "The liability, at law or in equity, of a transferee of property of a taxpayer" was to be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations" as in the case of any other tax deficiency. *Ibid.* § 280 (a) (1). Pursuant to this mandate the Commissioner did assess a liability and gave notice to the transferee accordingly. He assessed it to the estate rep-

resented by executors, and not to any one else. "As provided by Section 280 of the Revenue Act of 1926, there is proposed for assessment against the estate the sum of $24,000 constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois." The Board of Tax Appeals upon petition for review had power to redetermine the deficiency thus charged to the estate (Revenue Act of 1926, § 274), but not to charge it to another. Cf. 26 U. S. C. (1934 ed.) §§ 600, 601, 619; *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, 562, 564. If some one else was to be charged, there would be need of a new assessment, which the Commissioner might make at any time within a year after the enactment of the statute. Revenue Act of 1926, § 280 (b) (2). In making it he would consider any facts material and relevant for arriving at a just apportionment of benefits and burdens. The duty to inquire and determine was imposed by the statute upon him and not upon an agency of government established for the purpose of revising his decision. These restraints upon jurisdiction were duly heeded by the Board. It disclaimed the power or the purpose to pass upon the liability of legatees or devisees or to assess a tax against them. The same restraints upon jurisdiction were binding upon the Court of Appeals in reviewing the action of the Board, and binding with greater emphasis, for the court was without power to choose between conflicting inferences unless only one was possible, or to try the case *de novo. Helvering* v. *Rankin,* 295 U. S. 123. The adjudication of liability as to Hulburd individually was made in seeming forgetfulness of these jurisdictional restrictions. It was error to ignore them.

In so holding we are not unmindful of the argument for the respondent that the form of the petition to review the action of the Commissioner was effective in some way to enlarge the scope of the proceeding and to subject the

legatee to a new and different assessment. The argument will not stand. There is nothing in the petition submitted to the Board whereby power was extended beyond the statutory limits, if we assume provisionally that consent might be effective, at least in certain circumstances, to bring that result about. The petitioners, having been discharged as executors, were unwilling to describe themselves as if they were still acting in that capacity. What they did was to state the facts and ask the judgment of the Board thereon. Far from conceding that the assessment ran against either of them personally, they protested that in form and in purpose it was an assessment against the estate and hence was of no validity after the estate had been settled and the executors discharged. The meaning of their protest was not subject to misconstruction, nor in fact was it misconstrued, as the opinion of the Board shows, if the fact might otherwise be doubtful. When the protest had been made, the remedy available to the Commissioner was obvious and ample. He had time even then as we have already pointed out, to announce a new assessment, which would have brought up the question whether the liability once resting on the executors had devolved upon another. For reasons not disclosed he determined not to do so. In such circumstances the cases cited by the government, where a formal defect has been ignored in circumstances tending toward an inference of waiver or estoppel,[2] have no relation to the case at hand. We are not required at

[2] *Commissioner* v. *New York Trust Co.*, 54 F. (2d) 463; *Haag* v. *Commissioner*, 59 F. (2d) 516; *Burnet* v. *San Joaquin Fruit & Investment Co.*, 52 F. (2d) 123; *Warner Collieries Co.* v. *United States*, 63 F. (2d) 34; *American Equitable Assurance Co.* v. *Helvering*, 68 F. (2d) 46; *Continental Products Co.* v. *Commissioner*, 66 F. (2d) 434; *Buzard* v. *Helvering*, 64 App. D. C. 268; 77 F. (2d) 391; *Commissioner* v. *Nichols & Cox Lumber Co.*, 65 F. (2d) 1009; *Pittsburgh Terminal Coal Corp.* v. *Heiner*, 56 F. (2d) 1072.

this time to approve or disapprove them. In this case there was neither waiver nor estoppel, but a steady insistence that the deficiency had been assessed against the estate and no one else, and that the liability of the estate had ended. To hold that by consent, either tacit or express, the proceeding had been turned into one to review the validity of a different assessment, and one never in fact made, would be a perversion of the record.

Second: The estate having been settled and the executors discharged, the petitioner was *functus officio* under the law of Illinois, and was no longer subject to an assessment in his representative capacity.

The Court of Appeals in upholding the liability of the executors as such put its ruling upon the ground that they had failed to give notice to the Commissioner of the termination by decree or otherwise of their fiduciary capacity. The notice was thought to be requisite under § 281 (b) of the Revenue Act of 1926, which is quoted in the margin.[3] But the Revenue Act of 1926 became a law in February of that year (§ 286; 26 U. S. C. § 931), and the executors were discharged in February, 1925. If their liability as executors was ended at that time, the statute will not be read as attempting to revive it. *White* v. *United States,* 191 U. S. 545; *Winfree* v. *Northern Pacific Ry. Co.,* 227 U. S. 296; *Union Pacific R. Co.* v. *Laramie Stock Yards,* 231 U. S. 190, 199; *Shwab* v. *Doyle,* 258 U. S. 529; *Liberman's Committee* v. *Commissioner,* 54 F. (2d) 527.

[3] "Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 280, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated."

Section 281 (b) being found to be inapplicable, we have still to determine whether executors who have been discharged after a full settlement of the estate are subject by the law of Illinois to assessment or suit in their representative capacity.

By the common law of England an executor was deemed to carry forward the *persona* of the testator. Holmes, The Common Law, pp. 344, 345; Holdsworth's History of English Law, vol. 3, pp. 563, 573, 574, 583; Littleton's Tenures, § 337; Co. Litt. 209, a, b; *Mechanics' Savings Bank* v. *Waite,* 150 Mass. 234, 235; 22 N. E. 915; *Chipman* v. *Manufacturers' National Bank,* 156 Mass. 147, 149; 30 N. E. 610. Unless the appointment was qualified in respect of time, it continued during life. Williams, Executors, 12th ed., vol. 1, pp. 131, 147, 342. There was no such thing as a discharge upon a showing of *plene administravit.* There was no such thing as a resignation because of mere unwillingness to go on. *Rogers* v. *Frank,* 1 Younge and Jervis 409, 414; *In the Goods of Heslop,* 1 Robertson's Ecclesiastical Rep. 457, 458; *In the Goods of Veiga,* 3 Swabey & Tristram 13, 15. The power to act might be suspended or revoked through the appointment of a committee or a receiver if the executor was found to be physically or mentally incapable. *In the Goods of Binckes,* 1 Curteis 286; *In the Goods of Newton,* 3 Curteis 428; *In the Goods of Cooke,* [1895] P. D. 68; *In the Goods of Goldschmidt,* 78 L. T. (N. S.) 763; *In the Estate of Shaw,* [1905] P. D. 92. There might be like relief if he had become insolvent after probate or had disappeared or had misappropriated the assets or otherwise abused his trust. *In the Goods of Covell,* [1889] 15 P. D. 8; *Estate of Thomas,* [1912] P. D. 177; *Utterson* v. *Mair,* 2 Ves. Jr. 95, 97, 98; *In the Goods of Loveday,* [1900] P. D. 154, 156; *Oldfield* v. *Cobbett,* 4 L. J. (N. S.) (Chan.) 271, 272; *Richards* v. *Perkins,* 8 L. J. (N. S.) (Ex. Eq.) 57, 58.

Nothing short of clear necessity would cause him to be ousted. In the absence of peril to the estate, responsibility and power were not to be renounced when once they had been assumed. So the law of England continues even now.[4]

The common-law rule is preserved in some of our states today, but in many has been abandoned, at times as the result of statute, at times through the combined force of statute and decision. The diversity of doctrine is surprising, and so, often, is its obscurity. The commentators tell us, however, and, as the cases show, correctly, that the growing tendency in this country is away from the English rule.[5] Some states, though they make provision for an accounting, make none for a discharge, and hold the executor suable after the estate has been distributed, upon the chance that other property may be discovered later on. The judgment will be collectible out of assets *in futuro*, or *quando acciderint*, as was said in early days. Williams, *supra*, vol. 2, p. 1253; *Mary Shipley's Case*, 4 Coke, Part 8, p. 408; *Noell* v. *Nelson*, 2 Saund. 226. This in effect is the practice in New York (*Mahoney* v. *Bernhard*, 45 App. Div. 499, 501; 63 N. Y. S. 642; aff'd, 169 N. Y. 589; 62 N. E. 1097; *Willets* v. *Haines*, 96 App. Div. 5, 7; 88 N. Y. S. 1018; *Rosen* v. *Ward*, 96 App. Div. 262, 266; 89 N. Y. S. 148; *Pearse* v. *National Lead Co.*, 162 App. Div. 766, 769; 147 N. Y. S. 989; *Paff* v. *Kinney*, 1 Bradf. 1, 9), where a judicial settlement of accounts is conclusive as to the past, but is never ultimate in the sense that it relieves the fiduciary from liability for the future. See also *Hazlett* v. *Estate of*

[4] Cf. 14 Halsbury, Laws of England, 2d ed., pp. 171, 269, 287, 288, and cases cited.

[5] See Woerner, The American Law of Administration, 3d ed., vol. 3, §§ 571, 572, 573, where the cases are brought together.

Blakely, 70 Neb. 613, 617; 97 N. W. 808; *Weyer* v. *Watt,* 48 Ohio St. 545, 551; 28 N. E. 670. On the other hand, there are states where by express provision of the statutes the executor is to be discharged upon a showing of full administration, and others where the requirement of a discharge has been read into the statutes by a process of construction.[6]

The courts of Illinois, as we interpret their opinions, maintain a middle ground, which is neither that of the common law on the one side nor its opposite on the other. This is not to say that there is any case in that state so like in its essential features to the one for decision here as to make the Illinois position certain. On the contrary,

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[6] Minnesota: *Security Trust Co.* v. *Black River National Bank,* 187 U. S. 211, 234, reviewing the state decisions; *State ex rel. Matteson* v. *Probate Court,* 84 Minn. 289, 293; 87 N. W. 783 (Since 1903 the right to a discharge has been reinforced by statute. Acts of 1903, c. 195; 1 Mason's Stats., 1927, § 8886.); Missouri: *Grayson* v. *Weddle,* 63 Mo. 523, 539, 540; *State ex rel. Stotts* v. *Kenrick,* 159 Mo. 631; 60 S. W. 1063; *In re Estate of Rooney,* 163 Mo. App. 389, 394; 143 S. W. 888; cf. Kentucky: *U. S. Fidelity & Guaranty Co.* v. *Martin,* 143 Ky. 241, 242, 243; 136 S. W. 200; West Virginia: *Downey* v. *Kearney,* 81 W. Va. 422, 426; 94 S. E. 509. See also, Alabama: *Modawell* v. *Holmes,* 40 Ala. 391, 404; *Hicky* v. *Stallworth,* 143 Ala. 535, 540; 39 So. 267; Code, 1928, § 5962; California: *Willis* v. *Farley,* 24 Cal. 490, 502; *In re Clary,* 112 Cal. 292, 294; 44 Pac. 569; Probate Code, 1933, § 1066; Georgia: *Carter* v. *Anderson,* 4 Ga. 516; *Groce* v. *Field,* 13 Ga. 24, 30; Code, 1933, § 113–2302; Iowa: *Diehl* v. *Miller,* 56 Iowa 313; 9 N. W. 240; Code, 1931, § 12052; Kansas: *Musick* v. *Beebe,* 17 Kan. 47, 53, 54; *Proctor* v. *Dicklow,* 57 Kan. 119, 125; Rev. Stats., 1923, § 22–931; Montana: *State ex rel. Petters & Co.* v. *District Court,* 76 Mont. 143, 148; 245 Pac. 529; Rev. Code, 1921, §§ 10311, 10331; Pennsylvania: *Vandever's Appeal,* 42 Pa. 74; *Estate of John Wiseman,* 12 Phila. 11; 20 Purdon's Stats., § 911; South Carolina: *Seabury* v. *Green,* 294 U. S. 165, 169; *Quick* v. *Campbell,* 44 S. C. 386, 392; 22 S. E. 479; *McNair* v. *Howle,* 123 S. C. 252, 266; 116 S. E. 279; Code, 1932, § 9024.

support will be found for the strict rule of the common law if what has been said in some of the opinions is taken from its framework and considered without reference to what was actually decided. See, e. g., *Starr* v. *Willoughby,* 218 Ill. 485, 493; 75 N. E. 1029. The aspect becomes different, however, when attention is directed to the setting of the facts and to the provisions and implications of the applicable statutes. What emerges, it would seem, is this: A discharge upon an accounting will be vacated in a direct proceeding if it appears that there were assets, not inventoried by the executor nor included in his report, for which, when the decree was passed, he was properly accountable (*Fraser* v. *Fraser,* 149 Ill. App. 186, 187, 195, 196; cf. *Musick* v. *Beebe,* 17 Kan. 47, 53, 54): in the absence of such a showing, the discharge when decreed upon a finding of full administration will relieve the executor for the future of responsibility and power. Cf. *Reizer* v. *Mertz,* 223 Ill. 555, 562, 564; 79 N. E. 283; *Robinson* v. *Robinson,* 214 Ill. App. 262, 268, 269.[7]

[7] Leading cases in Illinois are brought together in this note for the purpose of distinguishing dictum from decision: *Blanchard* v. *Williamson,* 70 Ill. 647, 650, holds that a discharge of an administrator will be treated as a nullity if made while the estate is in course of administration; *Diversey* v. *Johnson,* 93 Ill. 547, 558, holds that a discharge is of no effect if obtained by the administrator with notice of an outstanding claim and in fraud of the rights of the adverse claimant (cf. *People* v. *Rardin,* 171 Ill. App. 226, 230); *Bayless* v. *People,* 56 Ill. App. 55, 58, holds that a surety is liable on an executor's bond where a balance available for creditors was wrongfully distributed; *Starr* v. *Willoughby,* 218 Ill. 485, 492; 75 N. E. 1029, holds that a power in trust, unrelated to the office of executor, will survive a decree which purports to discharge him; and *Maguire* v. *City of Macomb,* 293 Ill. 441, 453; 127 N. E. 682, is substantially to the same effect. No case has been found where an executor whose discharge had been decreed after a full and fair accounting has been held suable thereafter in his representative capacity.

Whatever doubt may survive a reading of the cases is dispelled or greatly attenuated when we pass to an examination of the statutes and the plan that they reveal.

First in order of importance is the statute regulating the settlement of accounts.[8] An executor is required to exhibit a report of his administration within thirty days after the expiration of one year from the date of his letters. That being done, he must exhibit a report thereafter, whenever required by the court, "until the duties of administration are fully completed." He may from time to time at his own volition file "a final report of his administration to a specified date," which, even if approved, will not terminate his office. He may also make a final report "at the conclusion of administration."[9] Such a report, if approved upon notice to all parties in interest, shall be binding upon them "in the absence of fraud, accident or mistake." A final report "at the conclusion of administration" assumes that there is a stage when administration is over. The executor is *functus officio* when discharged by the court after that stage has been attained.

Another statute of high significance is one that makes provision for an appraisal of the assets.[10] If the executor discovers after the making of an inventory and appraisal that the assets of the estate do not exceed the amount of the widow's allowance, after deducting necessary expenses, he is to report the facts to the court. Thereupon the court, if it finds the report to be true, shall order the assets to be delivered to the widow, "and discharge the executor

[8] Laws of 1872, p. 77, at pp. 105, 106, § 112; amended by Laws of 1919, p. 1, at p. 3; Laws of 1931, p. 6; Laws of 1933, p. 3, at p. 6; now Revised Statutes, 1935, c. 3, § 114.

[9] See Laws of 1931, p. 6.

[10] Laws of 1872, p. 77, at p. 92, § 59; Laws of 1919, p. 1, at p. 2; now Revised Statutes, 1935, c. 3, § 60.

or administrator from further duty." Plainly such a discharge is equivalent to a termination of the office. There is not only exoneration for the past, but absolution for the future.[11]

The decree of the Probate Court discharging this executor must be read against the background of this statutory scheme. It is too precise in its terms to be dismissed as amounting to nothing more than a confirmation of the report as submitted for approval. If words can express an intention to declare administration ended, the expression is not lacking here. We may not put all this aside as surplusage. If there was no power in the Illinois court to give relief so comprehensive, the defect should be very clear before a federal court will undertake to wrest the words of the decree from their natural and ordinary meaning or hold them to be futile. Especially is that so in view of the growing tendency of probate courts throughout the land to break the shackles of the ancient rule. Weighty considerations of expediency and justice explain this tendency and support it. In the thought of many judges, an executor discharged after a full and fair accounting is no longer to be vexed by the annoyance and expense of defending fruitless suits with assets no longer available for reimbursement or indemnity. If suitors or tax-gatherers wish to go against the estate or against those who have shared in it, they must either vacate the decree upon a showing of assets unaccounted for, or procure upon a showing of necessity the appointment of an administrator, or pass over the estate and its representatives and pursue the legatees to the extent of benefits received. There was no attempt to tread those paths, though the last at all events was open.

[11] Still another inroad upon the common-law rule is made by a statute allowing an executor to resign whenever it appears to the court that a resignation is proper. Laws of 1872, p. 77, at p. 88, § 40; now Revised Statutes, 1935, c. 3, § 41.

The controversy in this aspect is one of local law, which, once it is ascertained, must be accepted as controlling. *Security Trust Co.* v. *Black River National Bank, supra; Forrest* v. *Jack,* 294 U. S. 158; *Seabury* v. *Green,* 294 U. S. 165. The decree discharging the executors amounts to a construction of the Illinois statute by a court of the state, and a court of special competence and experience in disposing of such questions. There being no satisfactory showing that the decision overpasses the bounds of jurisdiction, we yield to its authority.

The decree of the Circuit Court of Appeals is reversed and the order of the Board of Tax Appeals affirmed.

Reversed.

HOPKINS FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* CLEARY ET AL.*

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 55. Argued November 18, 19, 1935.—Decided December 9, 1935.

1. The Federal Home Owners' Loan Act of 1933, § 5 (i), as amended, must be construed as providing that any state building and loan association which has become a member of a Federal Home Loan Bank by subscribing to its shares, may convert itself into a Federal Savings and Loan Association upon the vote of a bare majority of its members and without the consent of the State that created it. P. 332.

   This construction is corroborated by a comparison of the Act in its present form with its form before amendment, and with other analogous legislation. P. 333.
2. Courts cannot ignore the plain meaning of a statute in order to avoid a decision upon its validity. P. 334.
3. The Home Owners' Loan Act, to the extent that it permits the conversion of state associations into federal ones in contravention

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* Together with No. 56, *Reliance Building & Loan Assn.* v. *Cleary et al.;* and No. 57, *Northern Building & Loan Assn.* v. *Cleary et al.* Certiorari to the Supreme Court of Wisconsin.

of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the States. United States Constitution, Amendment X. *Casey* v. *Galli,* 94 U. S. 673, explained and distinguished. P. 335.

4. Building and Loan Associations, in Wisconsin and other States, are not merely business corporations; they are quasi-public instruments, created and fostered by the State, for the common good. P. 336.
5. The destruction of such associations, established by a State, is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends. P. 338.
6. The State of Wisconsin, in vindication of her public policy, and also as *parens patriae* acting on behalf of non-consenting shareholders and creditors, has a standing as litigant to prevent the conversion of a local building and loan association into a federal corporation, contrary to her statutes and without her consent. *Massachusetts* v. *Mellon,* 262 U. S. 447, distinguished. P. 339.

217 Wis. 179; 257 N. W. 684, affirmed.

CERTIORARI, 295 U. S. 721, to review judgments of the Supreme Court of Wisconsin in three actions. In No. 55 the suit originated in that court and was brought by the State Banking Commission against a local building and loan association, for the purpose of annulling proceedings whereby the association sought to convert itself into a federal corporation, and compelling the directors and officers to continue the business in accordance with Wisconsin law or else to wind it up. The state court granted the decree. The other two cases were suits by two other such associations against the Commission to restrain it from interfering with similar conversions of their status. Decrees in their favor were reversed by by the court below.

Messrs. Emery J. Woodall and *Horace Russell,* with whom *Messrs. John H. Schlintz, B. F. Saltzstein, Wallace Reiss,* and *J. Aldrich Hall* were on the brief, for petitioners.

Section 5 (i) of the Home Owners' Loan Act of 1933 is an absolute grant of right and power to any member of a Federal Home Loan Bank to convert itself into a Federal Savings and Loan Association.

Congress refused or failed to require that conversion shall not contravene state laws.

Similar federal conversion statutes have been so interpreted by this Court. *Casey* v. *Galli,* 94 U. S. 673, 678.

Congress had power to use the public moneys, and to provide for the borrowing of money, to be loaned in a systematic and general plan to promote thrift and home financing. Having this power, it could adopt appropriate means, and create instrumentalities.

The power of Congress to create federal savings and loan associations is implicit in and resultant from several of the express powers of Congress, i. e., the power to tax; the power to borrow; the power to make all laws necessary and proper in executing the powers.

The General Welfare Clause is a limitation upon the taxing power rather than an independent power. It prescribes that appropriation of moneys obtained from taxation shall be for objects which concern the common defense and general welfare. Hamilton, Report on Manufactures, December 5, 1791, 3 Works (John C. Hamilton) 192; Hamilton, Opinion on Bank of the United States, February 23, 1791, 4 *id.* 104; Jefferson, Opinion on Bank of the United States, February 15, 1791, 5 Writings (Ford), 284; President Monroe, Message on the Subject of Internal Improvements, in connection with his veto of the Cumberland Road Bill, May 4, 1822. See Willoughby, Const., 2d ed., §§ 61, 62; Story, Const., 5th ed., §§ 979 *et seq;* also §§ 906–991. See *Gibbons* v. *Ogden,* 9 Wheat. 1, 199; *United States* v. *Gettysburg Electric Ry. Co.,* 160 U. S. 668, 681; *United States* v. *Realty Co.,* 163 U. S. 427, 440. Story, § 991, contains an enumeration of instances of appropriations which have not been limited to enumerated

powers of Congress. Cooley, Taxation, 4th ed., §§ 106, 107, 109. *United States* v. *Weirton Steel Co.*, 10 F. Supp. 55, 87.

The borrowing power is subject to no express limitations. Implicitly funds so obtained must be appropriated for a public use. Selection of the objects is a political question to be determined by Congress. *Juilliard* v. *Greenman*, 110 U. S. 421. As to public use, see *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 161 *et seq.*; *Clark* v. *Nash*, 198 U. S. 361; *Houck* v. *Little River Drainage District*, 239 U. S. 254.

The power to make all laws necessary and proper in executing other powers includes the power to create a corporation as a means of accomplishing the object of an appropriation by Congress for the general welfare. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *The Bank*, 9 Wheat. 738; *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180.

Instead of an outright appropriation of public moneys to promote thrift and home financing, Congress chose to create corporate instrumentalities and to appropriate funds to be used as revolving capital funds of federal home loan banks and federal savings and loan associations. The purpose thus subserved, through the provisions of the Act, was a public purpose and for the general welfare. 1 Hamilton Works, pp. 236, 237; 3 *id.* 250; 4 *id.* 111; *Osborn* v. *The Bank*, 9 Wheat. 738; *McCulloch* v. *Maryland*, 4 Wheat. 316.

Congress has power to create any fiscal agencies which it deems necessary and proper to the operations of the Federal Government, and its decision is not open to judicial review. It may create by conversion of state institutions, as in this instance, moneyed institutions to serve as fiscal agents of the Government and to provide a market for United States bonds. *McCulloch* v. *Maryland, supra; Farmers & Merchants Nat. Bank* v. *Dearing*,

91 U. S. 29, 33, 34; *Osborn* v. *The Bank,* 9 Wheat. 738; *Legal Tender Cases,* 12 Wall. 457; *Mercantile Bank* v. *New York,* 121 U. S. 138; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275; *Easton* v. *Iowa,* 188 U. S. 220; *First National Bank* v. *Trust Co.,* 244 U. S. 416; *Smith* v. *Kansas City Title & Trust Co., supra;* Hamilton, Opinion on the Bank, *supra;* Story, Const. 5th ed., §§ 1259–1271; Willoughby, Const., 2d ed., § 80.

The twelve Federal Home Loan Banks are banking instrumentalities facilitating the fiscal operations of the Government. They are designed to promote home financing and to relieve the other financial institutions in the national fiscal system from the demands of long term home financing credits.

Federal savings and loan associations are fiscal agencies through which the Government supplies financial aid, through loans on a general plan. They are bound to perform all reasonable duties imposed upon them as such agents. They aid in the exercise of the borrowing power by the provisions for investment and dealing in United States bonds.

Federal savings and loan associations are banking instrumentalities to provide home mortgage credit. Cf. *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180, 210, 211.

There was no delegation of legislative authority by Congress in authorizing the Federal Home Loan Bank Board to make rules and regulations providing for the organization, incorporation, examination, operation, conversion, reorganization, consolidation, merger or liquidation of federal savings and loan associations.

The conversion of a member of a federal home loan bank into a federal savings and loan association does not deprive either the State which incorporated such institution or any of the stockholders of property or contract rights without due process of law. *Norman* v. *Baltimore*

& Ohio R. Co., 294 U. S. 240, 307; *New York* v. *United States,* 257 U. S. 591, 600, 601; *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435.

It would seem that the question was definitely settled by *Casey* v. *Galli,* 94 U. S. 673. In that case the bank, under a similar statute (§ 4 of the Act of June 3, 1864, 13 Stat. 99, 112) converted itself into a national bank. Its action was held valid. The conversion statute was held constitutional. Such conversion was not a deprivation of property without due process of law nor an impairment of contract rights.

Mr. Joseph P. Brazy, with whom *Mr. J. E. Finnegan,* Attorney General of Wisconsin, and *Mr. Benjamin Poss* were on the brief, for respondents.

The court below properly held that the Act merely consents to conversion of state associations when permitted by the State.

Possessing the sovereign power to create these corporations, the State may endow them with such powers as it deems appropriate. It may impose such conditions upon the right to incorporate as it sees fit; and by accepting a charter from the State, the corporation accepts the conditions. *Home Insurance Co.* v. *New York,* 134 U. S. 594, 600.

It is submitted that the State has the sole right to grant powers to its corporate instrumentalities or withhold powers from them. A corporation obtains all of its powers from the same source that it does its existence, i. e., the State. If the State wishes to create corporations which have no power to convert, or to engage in interstate commerce, or to hold real estate, or to do one hundred other things which the State desires shall not be done, the State may enforce its wishes by withholding these powers in the grant of the privilege of incorporation. This has always been the set-

tled law of Wisconsin. *Janesville Bridge Co.* v. *Stoughton,* 1 Pinney's Wis. Rep. 667, 672; *Kappers* v. *Cast Stone Construction Co.,* 184 N. W. 627; *Fleischer* v. *Pelton Steel Co.,* 183 Wis. 451; *Northwestern National Ins. Co.* v. *Freedy,* 201 Wis. 51. The same rule has been expressed by this Court. *Head and Amory* v. *Providence Insurance Co.,* 2 Cranch 127; *Thomas* v. *West Jersey R. Co.,* 101 U. S. 71.

The powers conferred on a corporation by its charter and the laws of the State creating it cannot be enlarged by Congress. Our dual system of Government does not permit Congress to amend or repeal the statutes of a State except on those subjects where the Federal Government has exclusive jurisdiction if it chooses to exercise it, e. g. bankruptcy. Cf. *Federal Land Bank* v. *Crookston Trust Co.,* 180 Minn. 319.

In Wisconsin the charter of a corporation is a legislative act and must be given the same respect as any other state statute. *Casper* v. *Kalt-Zimmers Mfg. Co.,* 159 Wis. 517.

Petitioners will concede that the conversion which they are attempting to effect means the cessation of business by the building and loan association as a state corporation. If effected it means that the State is ousted of all jurisdiction over the association. The Federal Government becomes the sovereign of these corporations with full power to control and alter them as it sees fit. The State has been deprived of an instrumentality which it has created and controlled for its own benefit in the exercise of its governmental functions.

The charter issued by the State and accepted by the instrumentality is a contract that cannot be discharged by the consent of only one of the parties thereto.

The respondent commission was created not only to see that the governmental function was properly discharged by these associations, but also to protect the

rights of its stockholders. The proposed conversions, it is submitted, violate the rights of those stockholders who do not desire their association to convert.

It would seem that the vested rights of members of state building and loan associations or their creditors should be protected under the Fifth Amendment from destruction or impairment by the Federal Congress.

It is hard to justify the language in *Casey* v. *Galli*, 94 U. S. 673, even as applied to banks.

It is submitted that the doctrine which authorizes the Federal Government to take over state banks without state consent, stretches the Federal Constitution to the breaking point. The right to create its own banking instrumentalities does not include the right to take away the banking instrumentalities of the sovereign States, unless perhaps such taking over be necessary for the very preservation of the Federal Government. Such necessity does not exist.

An acceptance of the doctrines urged by petitioners that the Federal Government has the power to transmute any state corporation which directly or indirectly may aid the Federal Government by purchasing government bonds or promoting the "general welfare," would mean complete ruination of the several States.

The creation of a national corporation must be "necessary or proper for the carrying into execution . . . the powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." What power, express or implied, of the Federal Government supports its creation of these savings and loan associations? What lawful power is the Federal Government attempting to carry out when it organizes these associations?

The power given to Congress to lay and collect taxes does not justify the sponsoring and regulation of federal

savings and loan associations, unless this power be construed as a grant to Congress of the unlimited power to enact general welfare legislation wholly dissociated from the power to tax. If this construction were adopted, our Federal Government would be changed from a government of limited delegated and enumerated powers to one of unlimited powers, and the States would be deprived of a substantial portion of the power reserved to them upon the adoption of the Constitution.

The taxing power of Congress is not applicable. The prime purpose of these associations is to raise money among their members to aid them in acquiring or building homes. It is not contemplated that they should serve as distributing agents for federal funds. The Federal Government aids them in the beginning by purchasing stock, which must be re-purchased by the associations. In substance, the Federal Government makes a loan to the local association to permit it to start in business. After that, it is contemplated that it shall continue in business exclusively on the moneys raised among its own members; but the Federal Government continues to regulate and control it.

The scope and meaning of the general welfare clause have been the subject of much discussion and controversy. For an exhaustive and able analysis, see opinions of Newton D. Baker and James M. Beck, November 22, 1934 and January 11, 1935, cited in *Duke Power Co.* v. *Greenwood County,* 10 F. Supp. 854, 869.

Nor can the power to borrow money sustain the creation of these local institutions. It is not the Federal Government's purpose to borrow money from them. On the contrary, it proposes to lend money to them in order that they may begin the business for which they are organized, i. e., to lend money for home purposes. The savings and loan scheme of operation prevents these institutions from

becoming a source from which the Government can borrow money. They cannot receive deposits, § 5 (b), Home Owners' Loan Act, 1933. The building up of cash reserves is contrary to their scheme of operation. It is intended that all of the moneys received by them shall be promptly loaned out on long term loans to serve the purpose for which they were created.

They are given the power to invest in government securities, not for the purpose of aiding the Government, but for the purpose of aiding the institutions in safely carrying on their functions.

We submit that Congress cannot assume the power to create corporations by the simple expedient of authorizing them to invest in government bonds.

The power in Congress to make all laws "necessary and proper," Art. I, § 8, cl. 18, obviously is not a grant of any new and independent power.

The cases which hold that Congress has the power to incorporate banks do not sustain the petitioners. The *ratio decidendi* of these bank cases completely negatives the contention that Congress has the power to create corporate instrumentalities for the purpose of aiding private citizens in acquiring homes.

The argument that Congress has the power directly to use public moneys for the purpose of aiding agriculture, and therefore may create corporate instrumentalities to the same end, was ably put in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180. The Court, however, did not, and could not, place its decision upon that ground. The stimulation of home ownership is no more a function of the Federal Government than the stimulation of agricultural development. The jurisdiction of both subject matters is vested exclusively in the several States.

If Congress has the power to incorporate by the simple expedient of reciting the formula contained in § 5 (k), in

spite of the obvious purpose of the corporations appearing on the face of the law which created them, then there is no limit to the congressional power. It can organize and exercise exclusive jurisdiction over every conceivable type of corporation. It can strip the States of one of their principal sources of revenue. It can virtually exhaust the reserved powers vested in the States.

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government." *Linder* v. *United States,* 268 U. S. 5, 17.

Assuming that Congress has the power to create and regulate building and loan associations, such power has been improperly delegated to the Federal Home Loan Bank Board.

By leave of Court, *Solicitor General Reed* and *Assistant Solicitor General Bell* filed a brief on behalf of the United States, as *amicus curiae,* in support of the contentions of petitioners.

Section 5 (i) of the Home Owners' Loan Act of 1933, as its language and its legislative history plainly show, should be construed as authorizing a member of a federal home loan bank to convert itself into a federal savings and loan association without the consent of the State under whose laws it is organized. In other statutes Congress has used explicit language when it intended that conversion into a federal corporation should take place in compliance with state law, and the absence of such language in § 5 (i) shows that Congress did not intend to require such compliance or the consent of the State. The decision of this Court in *Casey* v. *Galli,* 94 U. S. 673, construing a similar provision in the National Bank Act of 1864, establishes that this construction is correct.

Section 5 (i) is a lawful exercise of the fiscal powers of Congress. In the exercise of those powers Congress can

provide for a national credit and currency system and it can strengthen and preserve federal fiscal institutions established for that purpose. *McCulloch* v. *Maryland,* 4 Wheat 316; *Osborn* v. *The Bank,* 9 Wheat. 738; *Farmers & Mechanics Nat. Bank* v. *Dearing,* 91 U. S. 29; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180. The federal home loan banks and the federal savings and loan associations were created by Congress to strengthen the national currency and credit system and to protect established federal fiscal institutions. Furthermore, Congress has power to create appropriate corporate agencies to aid in the execution of its fiscal powers, and federal savings and loan associations are such agencies. They are authorized to act as fiscal agencies of the Government, and are closely related to the federal home loan banks, which also act as such agencies and as depositaries of public money. Moreover the functions of the federal savings and loan associations are similar to those of the Federal Land Banks, whose constitutionality was established by the decision of this Court in *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180.

The creation of federal savings and loan associations is a lawful exercise of the power of Congress to levy taxes and spend the proceeds to promote the general welfare of the United States, and the power to spend funds for that purpose carries with it the power to organize appropriate corporate agencies to aid in its execution.

Section 5 of the Home Owners' Loan Act of 1933 does not improperly delegate legislative power to the Federal Home Loan Bank Board merely because it does not prescribe a detailed plan of operation for federal savings and loan associations.

The conversion of petitioners into federal savings and loan associations does not violate the constitutional rights of Wisconsin. No creditors or stockholders of petitioners

are parties to these proceedings or object to the conversion of petitioners, and Wisconsin has no standing to enforce the rights of creditors and stockholders. The rights claimed by respondents for Wisconsin are political and not proprietary in character. The Fifth Amendment, on which respondents apparently rely, does not protect purely political rights, nor will the federal courts otherwise protect such rights, unless their invasion will destroy or impair a proprietary interest of the State. Finally, the political rights of Wisconsin are not violated by the conversion of petitioners. The constitutional authority of Congress to create federal savings and loan associations without the consent of the State carries with it the power to convert a Wisconsin corporation into a federal savings and loan association without the consent of the State, because the power to convert is co-extensive with the power to create. *Casey* v. *Galli,* 94 U. S. 673.

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy in each of these causes is one as to the meaning and validity of an Act of Congress whereby building and loan associations organized under the laws of a state may be converted into Federal Savings & Loan Associations upon the vote of a majority of the shareholders present at a meeting legally convened.

In Number 55, an original suit was brought in the Supreme Court of Wisconsin by the respondents, constituting the Banking Commission of that state, against the Hopkins Federal Savings & Loan Association, formerly the Hopkins Street Building & Loan Association, its officers and directors. The complaint prayed for a decree annulling the proceedings whereby the state association had attempted to convert itself into a federal one, and compelling the directors and officers to continue the busi-

ness in accordance with Wisconsin law or else to wind it up. The state court granted the decree upon grounds to be considered later. 217 Wis. 179; 257 N. W. 684.

In Numbers 56 and 57, suits were brought by Wisconsin corporations, the Reliance Building and Loan Association (plaintiff in Number 56) and the Northern Building and Loan Association (plaintiff in Number 57) to restrain the Banking Commission and the supervisor of building and loan associations from interfering with the plaintiffs in the attempt to convert themselves into federal corporations. Decrees of the trial court in favor of the plaintiffs were reversed by the Supreme Court of Wisconsin with directions to enter judgment in favor of the Commission. 217 Wis. 179; 257 N. W. 684.

Building and loan associations organized in Wisconsin are subject to strict supervision by the administrative agencies of the state both in the course of doing business and in that of liquidation. They are quasi-public corporations, chartered to encourage thrift and promote the ownership of homes, with powers and immunities peculiarly their own. See Wisconsin Statutes, 1933, Chap. 215, §§ 215.01 *et seq*; cf. *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 40; *United States* v. *Cambridge Loan & Building Co.,* 278 U. S. 55, 57.[1] They may loan their moneys to members only. Wisconsin Statutes, 1933, § 215.07 (1). They must submit many of their proposed investments for the approval of the Commissioner of

[1] Cf. *Bibb County Loan Assn.* v. *Richards,* 21 Ga. 592, 595, 596; *First National Bank* v. *County of Dawson,* 66 Mont. 321, 335; 213 Pac. 1097; *Washington Investment Assn.* v. *Stanley,* 38 Oregon 319, 330, 331; 63 Pac. 489; *Union Savings & Investment Co.* v. *Salt Lake County,* 44 Utah 397, 404, 405; 140 Pac. 221; *Becket* v. *Uniontown Building & Loan Assn.,* 88 Pa. 211, 216; *Miller* v. *Prudential Banking & Trust Co.,* 63 W. Va. 107, 110; 59 S. E. 977; *Mutual Building & Savings Assn.* v. *Wilkinson,* 8 F. (2d) 183; 13 F. (2d) 997, 998.

Banking. § 215.07 (6) (7) (8). They must conform to precise restrictions as to the quality of mortgages accepted as security for loans. § 215.15;[2] cf. § 215.01 (10) (11). At the close of every year they must submit to the Commissioner a report of their condition (§ 215.31); and at all times they shall be subject to his control and supervision. § 215.31. If their business has been conducted in a manner contrary to law, or if their financial condition appears to be unsound, the Commissioner may take charge of the business and liquidate the assets. § 215.33. In recognition of their quasi-public functions they are given an exemption from income taxes payable by corporations generally. § 71.05 (d). Cf. *United States* v. *Cambridge Loan & Bldg. Co., supra.* The statute contains provisions governing the consolidation of such associations and their voluntary dissolution. Corporations formed thereunder may consolidate with other building and loan associations located in the same county, but only with the consent of the Commissioner of Banking and that of two-thirds of the outstanding shares as well as the consent of a majority of the directors. § 215.335. A vote of approval by two-thirds of the outstanding shares is necessary also for voluntary dissolution. § 215.36 (1). With the consent of the Commissioner an association formed under the act may become a member of a Federal Home Loan Bank, or a borrower therefrom. § 215.07 (7) (8). Membership in such a bank grows out of a subscription to its shares, and has no effect upon the corporate life of the subscribing member. On the other hand, there is nothing in the statutes of Wisconsin whereby building and loan associations chartered in that state may be transmuted into associations chartered by the federal government.

[2] These restrictions should be compared with those imposed by the Home Owners Loan Act upon federal associations organized for kindred purposes. 48 Stat. 128, 132; 12 U. S. C. § 1464 (c).

The petitioners insist that without the consent of Wisconsin the transmutation from a state into a federal association has become possible now by virtue of an Act of Congress. The Act relied upon for that purpose is § 5 of the Home Owners' Loan Act of 1933 (48 Stat. 128, 132), as amended in April, 1934 (48 Stat. 643, 645, 646), and again in May, 1935 (49 Stat. 297), 12 U. S. C. § 1464. By subdivision (a) of that section the Federal Home Loan Board is empowered to issue charters for the creation of Federal Savings and Loan Associations "in which people may invest their funds and in order to provide for the financing of homes." By subdivision (e), "no charter shall be granted except to persons of good character and responsibility," nor unless in the judgment of the Board the institution is likely to be successful and is necessary for the well being of the community to be served. By other subdivisions (b, c, d, f, g, h, j and k) the powers and duties of the associations are defined. Subdivision (i), the one that concerns us specially, permits state associations to be converted into federal ones. As amended in April, 1934, its provisions are as follows:

"(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act." [3]

[3] The following is the text of this subdivision before the date of the amendment:

"Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of its stockholders as provided by the law under which it oper-

The exchange of a state for a federal charter may be made under this section by any member of a Federal Home Loan Bank. To ascertain the limits of that membership we turn to the "Federal Home Loan Bank Act" of 1932 as amended from time to time. 47 Stat. 725; 48 Stat. 128, 643, 1246; 12 U. S. C. c. 11; cf. 49 Stat. 297. We learn from that act that the term "member" means any institution which has subscribed for the stock of a Federal Home Loan Bank, § 2 (4), and that "any building and loan association, savings and loan association, coöperative bank, homestead association, insurance company or savings bank," shall be eligible to become a member of a Federal Home Loan Bank, or a nonmember borrower from such a bank, upon compliance with conditions not important at this time. §§ 4 and 5.

Each of the three building and loan associations, the petitioners before us, was a member in good standing of the Federal Home Loan Bank of Chicago, Illinois. After application in proper form each received from the Board permission to convert itself into a federal association under § 5 (i) of the Federal Home Loan Act. Each convened a meeting of its shareholders to consider such action and approve or disapprove it. At the meeting of the Hopkins Street Building and Loan Association, held on May 31, 1934, 5,973 shares were represented in person or by proxy. A resolution authorizing the change was unanimously adopted. Shares outstanding and not represented numbered 976. This association (under the name of Hopkins Federal Savings & Loan Association) has received a charter from the Board, under which it will act unless restrained. At the meeting of Reliance Building

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ates; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

& Loan Association, held August 20, 1934, 7,286 shares were voted in favor of the change and 66 against it; shares outstanding and not represented numbered 3,533. At the meeting of Northern Building and Loan Association, held August 14, 1934, 23,291 shares were voted in favor of the change and 11 against it; shares outstanding and not represented numbered 12,006.

The State of Wisconsin, acting through its Banking Commission, came forward at this point to check the process of conversion. It took the position (1) that § 5 (i) of the Home Owners' Loan Act was subject to an implied condition whereby no conversion was to be permitted in contravention of local laws; and (2) that if this reading of the section were to be rejected as erroneous, the statute to that extent was void under the Tenth Amendment as an unconstitutional trespass upon the powers of the states. Other provisions of the Constitution, believed not to be material, were invoked at the same time.

The Supreme Court of Wisconsin placed its decision upon the first of these positions to the exclusion of the other. It read the federal statute as subject to the implied condition contended for by the state officials. It did this to avoid embarrassing and doubtful questions of constitutional power, which it described without deciding. To determine the meaning and, if need be, the validity of an important federal statute, writs of certiorari were granted by this court.[4] 295 U. S. 721.

First: Congress did not mean that the conversion from state associations into federal ones should be conditioned upon the consent of the state or compliance with its laws.

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[4] At the same time we dismissed the appeals that had been taken from the judgments, the remedy of appeal being held to be inappropriate for the reason that the validity of the statute was untouched by the decision brought here for review. § 237 (a), Judicial Code; 43 Stat. 936, 937.

Under § 5 (i) as enacted in 1933, the argument could have been made with force that the laws of the state must be obeyed in the process of conversion. The provision then was, as we have already pointed out, that the association was to act "upon a vote of its stockholders as provided by the law under which it operates." But Congress would not leave it so. By an amendment of the statute, approved April 27, 1934, there was substituted a provision that conversion would be effective "upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action." Thus Congress erected a standard of its own, which was to be uniform in all the states irrespective of the local laws. A bare majority of the shares voted at a meeting was to be enough to give authority for fundamental changes of policy and power, no matter how many other shares were unrepresented at the meeting. We are unable to accede to the suggestion of the court below that the percentage was meant to be a minimum which the local laws might raise, though they were powerless to reduce it. Nothing in the wording of the statute gives support to that construction. On the contrary, comparison of the act as amended with the act as first adopted impels to the conclusion that Congress had in mind to take possession of the field to the exclusion of other occupants. Thereafter the procedure for conversion and the power to convert were to be governed by a uniform rule, irrespective of repugnant limitations prevailing in the states.

Whatever doubt might exist as to the correctness of this view disappears when other and cognate statutes are subjected to our scrutiny.

The National Banking Act of 1864 (13 Stat. 99, 112, 113) gave permission to the banks incorporated in the states to become national associations upon the consent of the owners of two thirds of the capital stock, the consent to be evidenced by an appropriate certificate. This

court in *Casey* v. *Galli,* 94 U. S. 673, decided in 1876, refused to read into the act a condition that the state as well as the stockholders must consent to the conversion, though no question of constitutional power was necessary to the decision, as will be shown later on. The statute as thus interpreted remained substantially unchanged until 1913, when the percentage was reduced from two thirds to a majority, with the addition of a proviso "that said conversion shall not be in contravention of the state law." R. S. § 5154; 38 Stat. 258; 12 U. S. C. § 35. Cf. 12 U. S. C. § 342; *Ex parte Worcester National Bank,* 279 U. S. 347.[5]

Again, in the Act of March 4, 1923, whereby agricultural or livestock financing corporations organized in the states were permitted to convert themselves into National Agricultural Credit Corporations, the permission was coupled with a similar proviso. 42 Stat. 1454, 1469; 12 U. S. C. § 1281.

Congress had no difficulty in finding fit and simple phrases for the expression of its will when power was to be conditioned upon the approval of the states. Cf. *Westfall* v. *United States,* 274 U. S. 256, 259. The form chosen by its draftsman for the statute here involved takes on a new significance when read in the revealing light of the forms that were rejected.

We think the light is so strong as to flood whatever places in the statute might otherwise be dark. Courts have striven mightily at times to canalize construction along the path of safety. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379. When a statute is reasonably susceptible of two interpretations, they have preferred the meaning that preserves to the meaning that destroys.

[5] Complementary statutes permitting the conversion are common in the states. See, e. g., Mich. Comp. Laws, 1929, § 11957; N. Y. Banking Law (McKinney's Consol. Laws) § 137; Purdon's Penna. Stats. Title 7, c. 14; Wis. Stats. 1933, § 221.21.

United States v. *Delaware & Hudson Co.*, 213 U. S. 366, 407; *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205; cf. *Illinois Central R. Co.* v. *Public Utilities Comm'n*, 245 U. S. 493, 510; *Savage* v. *Jones*, 225 U. S. 501, 533. "But avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *Moore Ice Cream Co.* v. *Rose, supra.* "Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power." *Ibid.* The problem must be faced and answered.

Second: The Home Owners' Loan Act, to the extent that it permits the conversion of state associations into federal ones in contravention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the states. United States Constitution, Amendment X.

If § 5 (i) may be upheld when state laws are inconsistent, any savings bank or insurance company as well as any building and loan association, may be converted into a savings and loan association with a charter from the central government, provided only that 51 per cent of the shares represented at a meeting vote approval of the change. Indeed, as counsel for the petitioners insisted at our bar, the power of transformation, if it is adequate in such conditions, is not confined to building and loan associations or savings banks or insurance companies or to members of the Home Loan Bank, except by the adventitious features of this particular enactment. It extends in that view to moneyed corporations generally and even to other corporations, if Congress chooses to convert them into creatures of the federal government. Compulsion, by hypothesis, being lawful, the percentage of assenting shares voted in a given instance or exacted by a given statute assumes the aspect of an accident. Fifty-one per cent is the minimum required here. Another act may reduce the minimum to ten per cent or

even one, or dispense with approval altogether. If non-assenting shareholders or creditors were parties to these suits the question would be urgent whether property interests may be so transformed consistently with the restraints of the Fifth Amendment. The Wisconsin courts hold that the protest of a single shareholder will check "a fundamental and radical change" in the powers and purposes of the corporation, though the change be brought about by voluntary amendment. See opinion of the court below; also *Martin Orchard Co.* v. *Fruit Growers Canning Co.*, 203 Wis. 97; 233 N. W. 603; *Huber* v. *Martin*, 127 Wis. 412; 105 N. W. 1031. Shareholders and creditors being absent, we have instead the question whether consistently with the Tenth Amendment the change may be made under license of the central government against the protest of the state.

For the purposes of these cases we find it needless to consider whether Congress has the power to create building and loan associations and thereupon to invest them with corporate capacity. As to that we do not indicate an opinion either one way or the other. The critical question here is something very different. The critical question is whether along with such a power there goes the power also to put an end to corporations created by the states and turn them into different corporations created by the nation.

A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 668–672. Cf. the statutes and decisions collected by Brandeis, J. in *Liggett Co.* v. *Lee*, 288 U. S. 517, 548, *et seq.* This is true of building and loan associations in Wisconsin and in other states. They have been given corporate capacity in the belief

that their creation will advance the common weal. The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi-public instruments. *Louisville Gas & Electric Co.* v. *Coleman, supra.* They may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it. See opinion of the court below, and cf. *Thomas* v. *Railroad Co.,* 101 U. S. 71; *Central Transportation Co.* v. *Pullman's Car Co.,* 139 U. S. 24. How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred.

Wisconsin, planning these agencies in furtherance of the common good and purposing to preserve them that the good may not be lost, is now informed by the Congress, speaking through a statute, that the purpose and the plan shall be thwarted and destroyed. By the law of the state, associations such as these may be dissolved in ways and for causes carefully defined, in which event the assets shall be converted into money and applied, so far as adequate, to the payment of the creditors. By the challenged Act of Congress, the same associations are dissolved in other ways and for other causes, and from being creatures of the state become creatures of the nation. In this there is an invasion of the sovereignty or quasi-sovereignty of Wisconsin and an impairment of its public policy, which the state is privileged to redress as a suitor in the courts so long as the Tenth Amendment preserves a field of autonomy against federal encroachment.

We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount. *Minnesota Rate Cases,* 230 U. S. 352, 399, 400; *Savage* v. *Jones,* 225 U. S. 501, 533; *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456, 485; *Mintz* v. *Baldwin,* 289 U. S. 346, 350. That is not the situation here. No one would say with reference to the business conducted by these petitioners that Congress could prohibit the formation or continuance of such associations by the states, whatever may be its power to charter them itself. So also we are not concerned with the rule to be applied where the business of an association under charter from a state is conducted in such a way as to be a menace or obstruction to the legitimate activities of its federal competitors. Cf. *Northern Securities Co.* v. *United States,* 193 U. S. 197, 344, 345, 346; *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342, 351; *New York* v. *United States,* 257 U. S. 591, 600, 601. For anything here shown, the two classes of associations, federal and state, may continue to dwell together in harmony and order. A concession of this possibility is indeed implicit in the statute, for conversion is not mandatory, but dependent upon the choice of a majority of the voters. The power of Congress in the premises, if there is any, being not exclusive, but at most concurrent, and the untrammeled coexistence of federal and state associations being a conceded possibility, we are constrained to the holding that there has been an illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states. Cf. *Linder* v. *United States,* 268 U. S. 5, 17; *United States* v. *Dewitt,* 9 Wall. 41, 45. The destruction of associations established by a state is not an

exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends.[6]

Given the encroachment, the standing of the state to seek redress as suitor is not to be gainsaid, unless protest without action is the only method of resistance. Analogy combines with reason in telling us that this is not the law. By writs of *quo warranto* as well as through other remedial devices the state has been accustomed to keep its juristic creatures within the limits of the charters that define the purpose of their being. *People* v. *Ballard,* 134 N. Y. 269; 32 N. E. 54; *Attorney General* v. *Utica Insurance Co.,* 2 Johns. Ch. 371. The practice is so inveterate that it may be ranked as rudimentary. Indeed, there are many situations where no one other than the state will be held to be aggrieved, with the result that capacity to sue is either there or nowhere. *Kerfoot* v. *Farmers' & Merchants' Bank,* 218 U. S. 281, 286, 287; *National Bank* v. *Matthews,* 98 U. S. 621, 629. As against the protest of the state, asserting its public policy or the prohibition of a statute, no assent by shareholders, however general or explicit, will be permitted to prevail. *McCandless* v. *Furlaud, ante,* p. 161. It is of no moment in such conditions that the interest of the state in repelling the encroachment is other than pecuniary. *Missouri* v. *Holland,* 252 U. S. 416, 431. At least there is "a matter of grave public concern in which the state as the representative of the public has an interest apart from

[6] The court has upheld the validity of a statute whereby national banks are given the same power as state banks to act as executors or administrators, to the end that the two classes of banks may compete on equal terms. *First National Bank* v. *Union Trust Co.,* 244 U. S. 416. This is far from a holding that the function of acting as executors and administrators may be withdrawn from the state banks and lodged by the Congress in the national banks alone.

that of the individuals affected." *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 591, 592. Cf. *North Dakota* v. *Minnesota,* 263 U. S. 365, 374; *New York* v. *New Jersey,* 256 U. S. 296, 301, 302; *Heckman* v. *United States,* 224 U. S. 413, 439, 440; *Kansas* v. *Colorado,* 185 U. S. 125, 141, 142; s. c. 206 U. S. 46, 99; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237; *In re Debs,* 158 U. S. 564, 584, 586; *United States* v. *Bell Telephone Co.,* 128 U. S. 315, 357, 367. In its capacity of quasi-sovereign, the state repulses an assault upon the quasi-public institutions that are the product and embodiment of its statutes and its policy. Finding them about to deviate from the law of their creation, it is met by the excuse that everything done or purposed is permitted by an Act of Congress. The excuse is inadequate unless the power to give absolution for overstepping such restrictions has been surrendered by the state to the Government at Washington.

The standing of Wisconsin to resist a trespass on its powers is confirmed if we view the subject from another angle of approach. In the creation of corporations of this quasi-public order and in keeping them thereafter within the limits of their charters, the state is *parens patriae,* acting in a spirit of benevolence for the welfare of its citizens. Shareholders and creditors have assumed a relation to the business in the belief that the assets will be protected by all the power of the government against use for other ends than those stated in the charter. Aside from the direct interest of the state in the preservation of agencies established for the common good, there is thus the duty of the *parens patriae* to keep faith with those who have put their trust in the parental power. True, most of the shareholders in the cases now before us assented to the change. Even so, an important minority were not represented at the meetings, and their approval is not

shown. Creditors other than shareholders have not been heard from at all. To these non-vocal classes the *parens* owes a duty which it is free to vindicate by suit.[7] *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355, 356; *Kansas* v. *Colorado, supra; Georgia* v. *Tennessee Copper Co., supra; New York* v. *New Jersey, supra; Pennsylvania* v. *West Virginia, supra.*

The ruling in *Massachusetts* v. *Mellon,* 262 U. S. 447, is nothing to the contrary, though it is made a cornerstone of the argument in favor of the statute. There the state of Massachusetts attempted to enjoin the enforcement of an Act of Congress appropriating money to be used in coöperation with the states to reduce maternal and infant mortality. The ruling was that it was no part of the duty or power of a state to enforce the rights of its citizens in respect of their relations to the Federal Government. Cf. *Florida* v. *Mellon,* 273 U. S. 12. Here, on the contrary, the state becomes a suitor to protect the interests of its citizens against the unlawful acts of corporations created by the state itself.

Much reliance is placed in behalf of the petitioners upon the decision of this court in *Casey* v. *Galli, supra.* The Bank of New Orleans, a Louisiana corporation, became a national banking association by vote of its stockholders. The state did not oppose the conversion, though it was not shown to have consented. The reorganized

[7] The fact is not ignored, but is thought to be unimportant, that the vote in favor of conversion at two of the three meetings, being more than two thirds of the outstanding shares of stock, would have been sufficient to authorize a voluntary dissolution at a meeting duly called to consider such action. The same shareholders who voted to go on with the business under a charter from the Federal Government might have opposed dissolution as inexpedient or wasteful. Moreover, liquidation would then have followed under the supervision of the state.

corporation did business for more than two years, when it failed and a receiver was appointed by the Comptroller of the Currency. In an action by the receiver against a shareholder to enforce the individual liability under the provisions of the federal statute, the defendant filed three pleas in abatement, to which the plaintiff demurred. The pleas were as follows: (1) *Nul tiel corporation;* (2) that there was not then, nor when the plaintiff became receiver of the New Orleans Banking Association, any such corporation in existence, because the Bank of New Orleans had no power under its charter, nor authority otherwise from the State of Louisiana, to change its organization to that of a national banking association under the laws of the United States; and (3) that there had been a failure to comply with the statutory conditions as to the method of conversion if conversion was permissible. The first plea was abandoned, and the third is without bearing upon the causes now before us. The court sustained the demurrer to the second plea upon two independent grounds, which will be stated inversely to the order in which they appear in the opinion. Thus stated they are these: (a) The defendant was estopped from contesting the validity of the change after standing by for over two years without making his objection known; and (b) apart from any estoppel, "no authority from the State was necessary to enable the bank so to change its organization." p. 678. "The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally." *Ibid.*

No question of constitutional power was in the case, for nowhere in the record did the defendant invoke the Tenth Amendment or the Fifth or any other provision of the Federal Constitution. The substance of the plea was this, that the change from one form of association to

another was to be condemned as *ultra vires*. The meaning of the statute was thus the pivot of the controversy. The argument in the briefs was directed in the main to the formal correctness of the pleadings, the validity of the act being taken for granted. The assumption was one that could hardly be avoided when the controversy was viewed in the setting of the facts. Louisiana, like the defendant shareholder, had apparently acquiesced in the attempt of the central government to take over the state banks. The time had gone by to vindicate her majesty. What she might have done if she had been vigilant is a question not before us. Distinctions may conceivably exist between the power of the Congress in respect of banks of issue and deposit and its power in respect of associations to encourage industry and thrift. Whether that be so or not, all that was said in *Casey* v. *Galli* as to the condition of consent was unnecessary to the decision if it was meant to do more than define the meaning of the statute. We cannot accept it as determining the constitutional rights and privileges of a party not then before the court, least of all when it appears that constitutional rights and privileges were not invoked or argued.

Confining ourselves now to the precise and narrow question presented upon the records here before us, we hold that the conversion of petitioners from state into federal associations is of no effect when voted against the protest of Wisconsin. Beyond that we do not go. No question is here as to the scope of the war power or of the power of eminent domain or of the power to regulate transactions affecting interstate or foreign commerce. The effect of these, if they have any, upon the powers reserved by the Constitution to the states or to the people will be considered when the need arises.

The judgments are

Affirmed.

MORRISSEY ET AL., TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 17. Argued October 18, 1935.—Decided December 16, 1935.

1. Under Revenue Acts declaring that the term "corporation" shall include "associations," the Treasury Department was authorized to define the latter term by regulation and thereafter to clarify or enlarge the definition in order to meet administrative exigencies and conform with judicial decision. Pp. 349, 354.
2. Enactment of the Revenue Act of 1924, providing, as in previous Acts, that the term corporation shall include associations, did not fix the definition of the term "association" then in the regulations so that the Department could not further adapt it to the administration of the Act. P. 355.
3. The view expressed by this Court in *Hecht* v. *Malley*, 265 U. S. 144, that the degree of control by the beneficiaries was not a decisive test of whether a trust is an "association" and therefore subject to the special excise imposed on corporations (defined as including "associations") by the Revenue Act of 1918, is applicable also to general income taxes laid by the Revenue Acts upon corporations and thus upon associations. P. 355.
4. Regulations of the Treasury Department adopting this view, under the Revenue Act of 1924, *held* not in excess of its authority. P. 355.
5. Revision of the Treasury Regulations defining the term "associations" in the Revenue Act of 1924, was in effect approved by Congress in subsequent Revenue Acts through the reënactment, without substantial change, of the provision so construed by the Department. P. 355.
6. Congress has power to tax as a corporation an unincorporated association in the form of a trust which transacts its business as if it were incorporated. P. 356.
7. Whether a trust may be classed and taxed as an "association," under the Revenue Acts of 1924 and 1926, which define the term corporations as including "associations," joint stock companies and insurance companies, is not dependent on its having a statutory organization or statutory privileges, or upon its use of corporate forms of procedure. Its trustees may perform the

functions performed in corporations by officers and directors, and provisions of the trust instrument may take the place of by-laws. P. 357.

8. To constitute a trust an "association" within the meaning of these Acts, it is not essential that the beneficiaries should have such control as is commonly exercised by stockholders or that they should hold meetings to elect representatives. P. 358.
9. While the faculty of transferring the interests of members without affecting the continuity of the enterprise may be deemed to be characteristic, the test of such an "association" is not to be found in the formal evidence of interests or in a particular method of transfer. P. 358.
10. A trust designed, not for the purpose of holding and conserving particular property with incidental powers in the trustees, as in the traditional type of trusts, but as a medium for the conduct of a joint business enterprise and a sharing of the gains, is to be classed as an "association" within the meaning of the Revenue Acts, *supra,* when the following attributes, analagous to those of corporate organizations, are present: (1) title to property embarked in the enterprise held by trustees, as a continuing body, during the existence of trust; (2) centralized management by trustees, as representatives of beneficial owners, whether selected by or with the advice of beneficiaries or designated in the trust instrument with power to select successors; (3) continuity uninterrupted by deaths among beneficial owners; (4) means for transfer of beneficial interests and introducing new participants without affecting continuity; (5) limitation of personal liability of participants to property embarked in the undertaking. P. 359.
11. A trust was created to develop a tract of land through construction and operation of golf courses, club houses, etc., and for the conduct of incidental businesses, with broad powers for the purchase, operation and sale of properties; the management and control were vested in the trustees; and the interests of the beneficiaries were represented by transferable common and preferred shares. *Held:*

    (1) That the trust constituted an "association." P. 360.

    (2) That sale of part of the property before the beginning of the tax years in question and conveyance of the remainder to a corporation in exchange for its shares, did not alter its character, since it remained an organization for profit with profits still coming in, and the powers of the trustees continued. P. 360.

    (3) The character of the trust is revealed by the terms of the trust instrument. P. 361.

12. Section 704 (a), Revenue Act, 1928, providing that a taxpayer filing a return as a trust for a taxable year prior to 1925 shall be taxable as a trust, and not as a corporation, if under regulations or departmental rulings in force at time of filing the return it was considered to be so taxable,—*held* inapplicable to a return for the year 1924 filed after the adoption of Treasury Regulations No. 65, Art. 1504, amending prior regulations so as to provide that operating trusts in which the trustees were not restricted to the mere collection of funds and their payment to beneficiaries, but were associated together in much the same manner as directors in a corporation, for the purpose of carrying on a business enterprise, should be deemed to be associations, regardless of the control exercised by the beneficiaries. P. 361.

74 F. (2d) 803, affirmed.

CERTIORARI, 295 U. S. 725, to review the affirmance of a decision of the Board of Tax Appeals which sustained income taxes laid upon a trust as an association.

Mr. Theodore B. Benson, with whom *Mr. Charles Francis Cocke* was on the brief, for petitioners.

Mr. James W. Morris, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Miss Helen R. Carloss* were on the brief, for respondent.

By leave of Court, *Mr. Claude A. Hope* filed a brief as *amicus curiae* on the question of what constitutes an "association" within the meaning of the Revenue Acts. *Mr. John Ross Delafield* was with him on the brief.

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

Petitioners, the trustees of an express trust, contest income taxes for the years 1924 to 1926, inclusive, upon the ground that the trust has been illegally treated as an "association." The Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals, which sustained the ruling of the Commissioner of Internal Revenue. 74

F. (2d) 803. We granted certiorari because of a conflict of decisions as to the distinction between an "association" and a "pure trust," the decisions being described in one of the cases as "seemingly in a hopeless state of confusion." *Coleman-Gilbert Associates* v. *Commissioner*, 76 F. (2d) 191, 193.[1]

The facts were stipulated. In the year 1921 petitioners made a declaration of trust of real estate in Los Angeles. They were to be designated in "their collective capacity" as "Western Avenue Golf Club." The trustees were authorized to add to their number and to choose their successors; to purchase, encumber, sell, lease and operate the "described or other lands"; to construct and operate golf courses, club houses, etc.; to receive the rents, profits and income; to make loans and investments; to make regulations; and generally to manage the trust estate as if the trustees were its absolute owners. The trustees were declared to be without power to bind the beneficiaries personally by "any act, neglect or default," and the beneficiaries and all persons dealing with the trustees were required to look for payment or indemnity to the trust property. The beneficial interests were to be evidenced solely by transferable certificates for shares which were divided into 2,000 preferred shares of the par value of $100 each, and 2,000 common shares of no par value, and the rights of the respective shareholders in the surplus, profits, and capital assets were defined. "Share ledgers" showing the names and addresses of shareholders were to be kept.

The trustees might convene the shareholders in meeting for the purpose of making reports or considering recommendations, but the votes of the shareholders were to be advisory only. The death of a trustee or of a beneficiary was not to end the trust, which was to continue

[1] *Post*, p. 369, Nos. 78–79. See, also, *post*, pp. 362, 365, No. 108, *Swanson* v. *Commissioner*, and No. 238, *Helvering* v. *Combs*.

for twenty-five years unless sooner terminated by the trustees.

During the years 1921 and 1922, the trustees sold beneficial interests and paid commissions on the sales. About 42 acres (of the 155 acres described by the declaration of trust) were plotted into lots which were sold during the years 1921 to 1923, most of the sales being on the installment basis. On the remaining property a golf course and club house were constructed, and in 1923 this property with the improvements was conveyed to Western Avenue Golf Club, Inc., a California corporation, in exchange for its stock. Under a lease from the corporation petitioners continued the operation of the golf course until January 12, 1924. After that date petitioners' activities were confined to collections of installments of principal and interest on contracts of purchase, the receipt of interest on bank balances and of fees on assignments by holders of purchase contracts, the execution of conveyances to purchasers, the receipt of dividends from the incorporated club, and the distribution of moneys to the holders of beneficial interests. On December 31, 1923, the total number of outstanding beneficial interests was 3016, held by 920 persons; by December 31, 1926, the number of interests had been gradually decreased to 2172, held by 275 persons. The holdings by the trustees ranged approximately from 16 to 29 per cent.

Petitioners contend that they are trustees "of property held in trust," within § 219 of the Revenue Acts of 1924 and 1926,[2] and are taxable accordingly and not as an "association." They urge that, to constitute an association, the applicable test requires "a quasi-corporate organization in which the beneficiaries, whether or not certificate holders, have some voice in the management and some control over the trustees and have an opportunity

[2] 43 Stat. 275; 44 Stat. 32.

to exercise such control through the right to vote at meetings"; and that, in any event, the activities in which petitioners were engaged, during the tax years under consideration, did not constitute "a carrying on of business" within the rule applied by this Court.

The Government insists that the distinction between associations and the trusts taxed under § 219 is between "business trusts on the one side" and other trusts "which are engaged merely in collecting the income and conserving the property against the day when it is to be distributed to the beneficiaries"; that Congress intended that all "business trusts" should be taxed as associations.

1. The Revenue Acts of 1924 and 1926 provided:

"The term 'corporation' includes associations, joint-stock companies, and insurance companies." 1924, § 2 (a) (2); 1926, § 2 (a) (2).[3]

A similar definition is found in the earlier Revenue Acts of 1917, § 200, 1918, § 1, and 1921, § 2 (2),[4] and also in the later Acts of 1928, § 701 (a) (2), 1932, § 1111 (a) (2), and 1934, § 801 (a) (2).[5]

The Corporation Tax Act of 1909,[6] which imposed an excise tax upon the privilege of doing business in a corporate capacity, embraced associations having a capital stock represented by shares and "organized under the laws of the United States or of any State or Territory." *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 144; *Eliot* v. *Freeman*, 220 U. S. 178, 186. The Income Tax Act of 1913,[7] taxed the net income of "every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how cre-

[3] 43 Stat. 253; 44 Stat. 9.

[4] 40 Stat. 302; 40 Stat. 1058; 42 Stat. 227.

[5] 45 Stat. 878; 47 Stat. 289; 48 Stat. 771.

[6] 36 Stat. 112.

[7] 38 Stat. 172.

ated or organized, not including partnerships." The case of *Crocker* v. *Malley,* 249 U. S. 223, arose under the latter Act. The Court found that the declaration of trust in that case, relating to mill property was on its face "an ordinary real estate trust of the kind familiar in Massachusetts," and that the function of the trustees was "not to manage the mills but simply to collect the rents and income of such property as may be in their hands, with a large discretion in the application of it, but with a recognition that the receipt holders are entitled to it subject to the exercise of the powers confided to the trustees." The Court thought that, if it were assumed that the words "no matter how created or organized" applied to "association," still it would be "a wide departure from normal usage" to call the beneficiaries a joint-stock association when they were not partners and had "no joint action or interest and no control over the fund." Nor could the trustees "by themselves" be treated as a joint-stock association within the meaning of the Act "unless all trustees with discretionary powers are such." *Id.,* pp. 232-234.

The decision in *Crocker* v. *Malley* was rendered in March, 1919, and the Treasury Department thereupon assumed that the degree of control exercised by the beneficiaries over the management of the trust was determinative of the question whether the trust constituted an "association." See statement of the rulings of the Bureau by the Board of Tax Appeals in Woodrow Lee Trust *v.* Commissioner, 17 B. T. A., pp. 111, 112. It was in that view, that the Regulations under the Revenue Acts of 1918 and 1921, in distinguishing an "association" from a "trust," provided as follows:

"If, however, the *cestuis que trust* have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust

is an association within the meaning of the statute." Regulations Nos. 45, 62, Art. 1504.

This ruling continued until our decision in May, 1924, in *Hecht* v. *Malley,* 265 U. S. 144, and furnished the test which the Board of Tax Appeals applied in its determinations for earlier years.[8] Accordingly, the Board in the case now before us, holding that under the trust instrument the shareholders "had no control over the trustees or the management of the business," determined that the trust was taxable as such and not as an association, for the years 1921, 1922 and 1923.

The case of *Hecht* v. *Malley* related to the excise taxes imposed upon "associations" by the Revenue Acts of 1916, § 407, and 1918, § 1000 (a).[9] The provision of the Act of 1916 retained the qualifying words of the Corporation Tax Act of 1909—"organized under the laws of the United States, or any State or Territory"—and the Court followed the construction placed upon those words in *Eliot* v. *Freeman, supra.* But the Act of 1918 omitted this qualification, and the excise tax as laid upon corporations applied to "associations" under the general definition. The Court thus found the terms of the Act of 1918 to be in significant contrast to the provisions of the Acts of 1909 and 1916. The omission of the qualification showed the intention of Congress "to extend the tax from one imposed solely upon organizations exercising statutory privileges, as theretofore, to include also organizations exercising the privilege of doing business as associations at the common law." 265 U. S. p. 155. Shorn of the restriction, the word "association" appeared to be used in its

[8] E. A. Landreth Co., 15 B. T. A. 655; Van Cleave Trust, 18 B. T. A. 486; Commercial Trust Co., 18 B. T. A. 1248; Rollin S. Sturgeon et al., Trustees, 25 B. T. A. 368; Twin Bell Oil Syndicate, 26 B. T. A. 165.

[9] 39 Stat. 789; 40 Stat. 1126.

ordinary meaning, and we referred to several definitions found in standard dictionaries, as, *e. g.*, "a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise"; "a body of persons organized for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation"; "an organized but unchartered body analogous to but distinguished from a corporation." *Id.*, p. 157. We expressed the view that the word "association," as used in the excise tax provision of the Revenue Act of 1918, clearly included "Massachusetts trusts," of the sort there involved, "having quasi-corporate organizations under which they are engaged in carrying on business enterprises." We were careful to say that it was then unnecessary to determine "what other form of 'associations,' if any," the Act embraced. *Id.*

In the *Hecht* case, the trustees of the Hecht and Haymarket trusts relied strongly upon the decision in *Crocker* v. *Malley* as conclusively determining that those trusts could not be held to be associations, unless the trust agreements vested "the shareholders with such control over the trustees as to constitute them more than strict trusts within the Massachusetts rule." Reviewing the reasoning of that decision, we pointed out that it was not authority for the broad proposition advanced. We concluded that, when the nature of the trusts was considered, as the petitioners were "not merely trustees for collecting funds and paying them over," but were "associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises," the trusts were to be deemed associations within the meaning of the Act of 1918. This was true "independently of the large measure of control exercised by the beneficiaries." And we rejected the view that Congress intended that organizations of that character "should be exempt from

the excise tax on the privilege of carrying on their business merely because such a slight measure of control may be vested in the beneficiaries that they might be deemed strict trusts within the rule established by the Massachusetts courts."

Following this decision, the Treasury Department amended its regulation so as to provide that the distinction between an association and a trust should no longer depend upon beneficiary control. The new provision read:

"Operating trusts, whether or not of the Massachusetts type, in which the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together in much the same manner as directors in a corporation for the purpose of carrying on some business enterprise, are to be deemed associations within the meaning of the Act, regardless of the control exercised by the beneficiaries." Regulations No. 65, Art. 1504, issued in October, 1924, under the Revenue Act of that year.

This provision was amended in August, 1925, so as to read as follows:

"If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute." T. D. 3748, IV-2 Cumulative Bulletin 7.

The text of the regulations relating to associations, so far as pertinent here, promulgated under the Act of 1924, is set forth in the margin. Regulations No. 65, Arts. 1502,

1504, as amended.[10] These regulations were continued substantially unchanged under the Revenue Acts of 1926 and 1928. No. 69, Arts. 1502, 1504; No. 74, Arts. 1312, 1314. The corresponding regulations under the Act of 1932 were somewhat modified, No. 77, Art. 1314; and these were considerably expanded by the regulations issued under the Act of 1934, No. 86, Art. 801–2, 801–3.

2. As the statute merely provided that the term "corporation" should include "associations," without further definition, the Treasury Department was authorized to supply rules for the enforcement of the Act within the

[10] "Art. 1502. *Association.*—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to state laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. . . ."

"Art. 1504. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, and the beneficiaries have no control over the trust although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by section 219 and by articles 341–347. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute."

permissible bounds of administrative construction. Nor can this authority be deemed to be so restricted that the regulations, once issued, could not later be clarified or enlarged so as to meet administrative exigencies or conform to judicial decision. Compare *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 303–307. We find no ground for the contention that by the enactment of the Revenue Act of 1924 the Department was limited to its previous regulations as to associations. And, while the case of *Hecht* v. *Malley* was concerned with the special excise tax provision of the Revenue Act of 1918, the ruling of the Court that the degree of the control by beneficiaries was not a decisive test in that relation could by similar reasoning be applied to the general income taxes laid by the revenue acts upon corporations and thus upon associations. These general income taxes covered both those taxes which in their nature were excise taxes on business, and as such could have been laid prior to the Sixteenth Amendment, and those taxes on other income which were permitted by that Amendment. *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 107, 114. We think that the Department did not exceed its powers in rewriting its regulation, in the light of the decision in *Hecht* v. *Malley*, so as to provide with respect to the income taxes, in general, to be paid by associations, that the extent or lack of control by the beneficiaries of a trust should not in itself determine whether there was an association within the meaning of the statute. That the revised regulation had congressional approval is persuasively evidenced by the fact that the regulation, as amended in 1925, was continued without substantial alteration until 1933, and meanwhile Congress reënacted without change the general provision as to associations in the Revenue Acts of 1926, 1928, and 1932. See *Brewster* v. *Gage*, 280 U. S. 327, 337; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492;

Murphy Oil Co. v. *Burnet, supra; Helvering* v. *Bliss,* 293 U. S. 144, 151.

The question is not one of the power of Congress to impose this tax upon petitioners but is simply one of statutory construction,—whether Congress has imposed it. See *Burk-Waggoner Oil Assn.* v. *Hopkins,* 269 U. S. 110, 114. The difficulty with the regulations as an exposition was that they themselves required explication; that they left many questions open with respect both to their application to particular enterprises and to their validity as applied. The so-called " control test " had led to much litigation, and the change in the regulations after the decision in *Hecht* v. *Malley* caused increased uncertainty. That situation is put in a strong light by the action of Congress, in order to afford relief to taxpayers, in enacting § 704 of the Revenue Act of 1928 as a " retroactive " provision applicable, as stated, to trust returns which had been filed for a taxable year prior to 1925 under previous regulations and rulings, and also by giving an option to a trustee, in specified circumstances, in relation to the Revenue Act of 1926 and prior Acts.[11] While it is impossible in the nature of things to translate the statutory concept of " association " into a particularity of detail that would fix the status of every sort of enterprise or organization which ingenuity may create, the recurring disputes emphasize the need of a further examination of the congressional intent.

3. "Association " implies associates. It implies the entering into a joint enterprise, and, as the applicable regulation imports, an enterprise for the transaction of business. This is not the characteristic of an ordinary trust—whether created by will, deed, or declaration—by which particular property is conveyed to a trustee or is to be held by the settlor, on specified trusts, for the benefit of

[11] 45 Stat. 880.

named or described persons. Such beneficiaries do not ordinarily, and as mere *cestuis que trustent,* plan a common effort or enter into a combination for the conduct of a business enterprise. Undoubtedly the terms of an association may make the taking or acquiring of shares or interests sufficient to constitute participation, and may leave the management, or even control of the enterprise, to designated persons. But the nature and purpose of the coöperative undertaking will differentiate it from an ordinary trust. In what are called " business trusts " the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties; or for dealings in securities or other personal property; or for the production, or manufacture, and sale of commodities; or for commerce, or other sorts of business; where those who become beneficially interested, either by joining in the plan at the outset, or by later participation according to the terms of the arrangement, seek to share the advantages of a union of their interests in the common enterprise.

The Government contends that such an organized community of effort for the doing of business presents the essential features of an association. Petitioners stress the significance of, and the limitations said to be implied in, the provision classifying associations with corporations.

4. The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity. The resemblance points to features distinguishing associations from partnerships as well as from ordinary trusts. As we have seen, the classification cannot be said to require organization under a statute, or with statutory priv-

ileges. The term embraces associations as they may exist at common law. *Hecht* v. *Malley, supra.* We have already referred to the definitions, quoted in that case, showing the ordinary meaning of the term as applicable to a body of persons united without a charter "but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." These definitions, while helpful, are not to be pressed so far as to make mere formal procedure a controlling test. The provision itself negatives such a construction. Thus unincorporated joint-stock companies have generally been regarded as bearing the closest resemblance to corporations. But, in the revenue acts, associations are mentioned separately and are not to be treated as limited to "joint-stock companies," although belonging to the same group. While the use of corporate forms may furnish persuasive evidence of the existence of an association, the absence of particular forms, or of the usual terminology of corporations, cannot be regarded as decisive. Thus an association may not have "directors" or "officers," but the "trustees" may function "in much the same manner as the directors in a corporation" for the purpose of carrying on the enterprise. The regulatory provisions of the trust instrument may take the place of "by-laws." And as there may be, under the reasoning in the *Hecht* case, an absence of control by beneficiaries such as is commonly exercised by stockholders in a business corporation, it cannot be considered to be essential to the existence of an association that those beneficially interested should hold meetings or elect their representatives. Again, while the faculty of transferring the interests of members without affecting the continuity of the enterprise may be deemed to be characteristic, the test of an association is not to be found in the mere formal evidence of interests or in a particular method of transfer.

What, then, are the salient features of a trust—when created and maintained as a medium for the carrying on of a business enterprise and sharing its gains—which may be regarded as making it analogous to a corporate organization? A corporation, as an entity, holds the title to the property embarked in the corporate undertaking. Trustees, as a continuing body with provision for succession, may afford a corresponding advantage during the existence of the trust. Corporate organization furnishes the opportunity for a centralized management through representatives of the members of the corporation. The designation of trustees, who are charged with the conduct of an enterprise,—who act " in much the same manner as directors "—may provide a similar scheme, with corresponding effectiveness. Whether the trustees are named in the trust instrument with power to select successors, so as to constitute a self-perpetuating body, or are selected by, or with the advice of, those beneficially interested in the undertaking, centralization of management analogous to that of corporate activities may be achieved. An enterprise carried on by means of a trust may be secure from termination or interruption by the death of owners of beneficial interests and in this respect their interests are distinguished from those of partners and are akin to the interests of members of a corporation. And the trust type of organization facilitates, as does corporate organization, the transfer of beneficial interests without affecting the continuity of the enterprise, and also the introduction of large numbers of participants. The trust method also permits the limitation of the personal liability of participants to the property embarked in the undertaking.

It is no answer to say that these advantages flow from the very nature of trusts. For the question has arisen because of the use and adaptation of the trust mechanism.

The suggestion ignores the postulate that we are considering those trusts which have the distinctive feature of being created to enable the participants to carry on a business and divide the gains which accrue from their common undertaking,—trusts that thus satisfy the primary conception of association and have the attributes to which we have referred, distinguishing them from partnerships. In such a case, we think that these attributes make the trust sufficiently analogous to corporate organization to justify the conclusion that Congress intended that the income of the enterprise should be taxed in the same manner as that of corporations.

5. Applying these principles to the instant case, we are of the opinion that the trust constituted an association. The trust was created for the development of a tract of land through the construction and operation of golf courses, club houses, etc. and the conduct of incidental businesses, with broad powers for the purchase, operation and sale of properties. Provision was made for the issue of shares of beneficial interests, with described rights and priorities. There were to be preferred shares of the value of $100 each and common shares of no par value. Thus those who took beneficial interests became shareholders in the common undertaking to be conducted for their profit according to the terms of the arrangement. They were not the less associated in that undertaking because the arrangement vested the management and control in the trustees. And the contemplated development of the tract of land held at the outset, even if other properties were not acquired, involved what was essentially a business enterprise. The arrangement provided for centralized control, continuity, and limited liability, and the analogy to corporate organization was carried still further by the provision for the issue of transferable certificates.

Under the trust, a considerable portion of the property was surveyed and subdivided into lots, which were sold

and, to facilitate the sales, the subdivided property was improved by the construction of streets, sidewalks and curbs. The fact that these sales were made before the beginning of the tax years here in question, and that the remaining property was conveyed to a corporation in exchange for its stock, did not alter the character of the organization. Its character was determined by the terms of the trust instrument. It was not a liquidating trust; it was still an organization for profit, and the profits were still coming in. The powers conferred on the trustees continued and could be exercised for such activities as the instrument authorized.

6. Petitioners contend that the trust was not taxable as an association, by reason of the retroactive provisions of § 704 (a) of the Revenue Act of 1928.[12] The contention is plainly unavailing and does not require an extended discussion. Section 704 (a) of the Act of 1928 provides, in substance, that where a taxpayer filed a return as a trust for a taxable year prior to 1925, the taxpayer shall be taxable as a trust, and not as a corporation, if the taxpayer was considered to be so taxable either (1) under the regulations in force at the time the return was made, or (2) under a departmental ruling then applicable and in force. Prior to the time for filing petitioners' return for the year 1924 the regulations had been amended, following the decision in *Hecht* v. *Malley, supra,* so as to provide that operating trusts in which the trustees were not restricted to the mere collection of funds and their payment to beneficiaries, but were associated together in much the same manner as directors in a corporation for the purpose of carrying on a business enterprise, should be deemed to be associations, regardless of the control exercised by the beneficiaries. Treasury Regulations No. 65, Art. 1504, October, 1924. It does not appear that there

[12] 45 Stat. 880.

were regulations or rulings in force, at the time of the return for the taxable year 1924, under which the trust in this instance would be taxable as a trust and not as an association.

The judgment is

Affirmed.

SWANSON ET AL., TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 108. Argued November 21, 22, 1935.—Decided December 16, 1935.

1. A trust formed by the owners of an apartment house under an agreement conveying title to trustees and providing complete power in them to manage, control, sell, etc.; with shares of beneficiaries represented by transferable "receipts," to be registered; with limited liability and succession and continuity during the trust period,—*held* taxable as an "association," under the Revenue Act of 1926. *Morrissey* v. *Commissioner, ante,* p. 344. P. 363.
2. The limited number of actual beneficiaries and the fact that the operations did not extend beyond the real property first acquired did not alter the nature and purpose of the common undertaking. P. 365.

76 F. (2d) 651, affirmed.

CERTIORARI * to review the affirmance of a decision of the Board of Tax Appeals which sustained a tax assessed on the income of a trust as an association.

Mr. Arnold R. Baar for petitioners.

Assistant Attorney General Morris, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Miss Helen R. Carloss* were on the brief, for respondent.

* See Table of Cases Reported in this volume.

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

The question presented is whether the income of the "Lake View Land Association" for the years 1925 and 1926 was subject to tax as the income of a trust under § 219 of the Revenue Act of 1926,[1] or as the income of an "association" by virtue of § 2 (a) (2) of that Act.[2] The Circuit Court of Appeals held the taxpayer to be an "association" and affirmed the decision of the Board of Tax Appeals to that effect. 76 F. (2d) 651. This Court granted a writ of certiorari. See *Morrissey* v. *Commissioner, ante,* p. 344.

The material facts as found by the Board of Tax Appeals are as follows: Joseph E. Swanson and Ralph C. Otis, in 1914, acquired a piece of vacant land in the city of Chicago with the view of improving it by the erection of an apartment house, the title being taken by Swanson. An apartment house was built. Subsequently, in 1915, at the suggestion of their attorney, they entered into a trust agreement for the purpose of carrying the title to the property. The trust was designated as the "Lake View Land Association." The first trustees were Ralph C. Otis, Joseph E. Swanson, and Allen G. Mills. Petitioners set forth the following summary of the trust agreement,—taken from the opinion of the Circuit Court of Appeals:

"Under the trust agreement, the trustees were given the complete management and control of the property, to exchange, reconstruct, remodel, sell, or improve at their discretion or to borrow money secured by the property. They were authorized to rent suitable quarters for the transaction of the business of the trust and employ such

[1] 44 Stat. 32.

[2] 44 Stat. 9.

assistants as they required. The agreement provided for the issuance of 'receipts' to evidence the interests of the beneficiaries, representing 1,000 shares at the par value of $100 each. It was provided that the receipts were evidences of the ownership of personal property and not real estate. They might be transferred by assignment. Originally, one-half of the shares were issued to Otis and one-half to Swanson, who later transferred their interests to their wives, who owned the shares during 1925 and 1926. The agreement provided that the trust could sue and be sued;[3] that neither the trustees nor the beneficiaries should be personally liable, and that all persons dealing with the trustees must look only to the property of the trust; that it should be terminated at the expiration of twenty years after the death of the last survivor of certain named persons or by the trustees in their discretion at any time before the expiration of the twenty years by selling all the property held by them as such and distributing the net proceeds of such sale. The trust had succession and was not terminated by the death of a trustee or beneficiary."

The Court of Appeals also stated that "The trustees of the Lake View Land Association never assembled in formal meetings, never adopted resolutions or took formal action with reference to the affairs of the property, kept no minute book, had no by-laws. They elected no officers and no so-called board of directors."

The compensation of the trustees was to be fixed by themselves but was not to exceed 2½ percent of the gross income of the trust. After making provision for the payment of outstanding claims, the net income was to be divided among the beneficiaries according to their interests, and on the request of any beneficiary the trustees

[3] Petitioners submit that this provision of the agreement should, under the law of Illinois, be taken to imply that the trustees could sue and be sued as individuals, and not "the trust as an entity."

were to render annual accounts. The trust agreement also made provision for a written registry of beneficiaries, who could transfer their interests in a described manner, after having first offered them to the other beneficiaries.

The renting of apartments, the details of management and the distribution of net income, were committed to a firm (of which Joseph E. Swanson was a member) engaged in the business of buying and selling real estate and managing properties. That firm acted under the direction of Ralph C. Otis and Joseph E. Swanson and the "entire affairs of the Lake View Land Association" were at all times in their hands.

Applying the governing principles, as set forth in our opinion in *Morrissey* v. *Commissioner, supra,* we agree with the Court of Appeals that the trust constituted an association and was taxable as such. The limited number of actual beneficiaries did not alter the nature and purpose of the common undertaking. Nor did the fact that the operations of the association did not extend beyond the real property first acquired change the quality of that undertaking.

The judgment is

Affirmed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* COMBS ET AL., TRUSTEES.

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

No. 238. Argued November 22, 1935.—Decided December 16, 1935.

A common enterprise, under a trust instrument, for acquisition of an oil lease, drilling and operation of an oil well, sale of the products, sale of the well, and distribution of income among the beneficiaries, *held* taxable on income as an "association" under the Revenue Act of 1926, upon the authority of *Morrissey* v. *Commissioner, ante,* p. 344. P. 368.

76 F. (2d) 682, reversed.

CERTIORARI * to review a judgment affirming a decision of the Board of Tax Appeals which overruled an assessment of income taxes laid on a trust as an "association."

Assistant Attorney General Morris, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Miss Helen R. Carloss* were on the brief, for petitioner.

Mr. Dana Latham, with whom *Mr. Melvin D. Wilson* was on the brief, for respondents.

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

The trustees of E. E. Combs Well No. 2 contested the ruling of the Commissioner of Internal Revenue that the taxpayer was taxable as an association, and not as a trust, on its income for the years 1925 and 1926. The Board of Tax Appeals sustained their contention and the Circuit Court of Appeals affirmed the order of the Board. 76 F. (2d) 682. A writ of certiorari was issued in view of the conflict of decisions to which we have referred in *Morrissey* v. *Commissioner, ante,* p. 344.

The trust was created "to finance and drill a well for production and sale of oil and other hydro-carbon substances under Oil and Gas Lease dated July 24, 1924." By the agreement, the Hub Oil Company, a California corporation and owner of the oil and gas lease, assigned to E. E. Combs and Edward Everett as Trustees all its rights under the lease, subject to a reservation of 6.5 percent of all oil, gas, and other hydro-carbon substances which might be produced and of a royalty interest in favor of one Smithson of 2 percent. The agreement described as beneficiaries "All persons who may own or acquire portions of the whole beneficial interest" as defined. The

* See Table of Cases Reported in this volume.

assignor agreed to supply to the trustees certain equipment, and one Bailes had already agreed to furnish other equipment and materials and to superintend the operation of drilling the well in consideration of 12 percent of the production. The trust was to pay all labor claims and for materials not otherwise provided.

The "whole beneficial interest" in the trust was defined as .71333 percent of gross production, and the beneficiaries were to be paid their pro rata shares, after deduction for the payment of lawful trust obligations, as follows: (a) 25 percent of gross production to the beneficiaries who provided money for the trust purposes, (b) .44333 percent to E. E. Combs, and (c) 2 percent to Edward Everett. Certificates of beneficial interest were to be issued in approved legal form and were to be held in escrow until a producing well was brought in. Thirteen persons were named as beneficiaries, with the amounts contributed and the percentages owned by each, these amounts aggregating $25,000 and the percentage of ownership amounting to 25 percent. The "certificate of beneficial interest" recited that the party named was the holder of a beneficial interest under the trust agreement in the amount stated and that the same was transferable only upon the books of the trustees, upon endorsement and surrender of the certificate. The trustees were authorized to hold all property and property rights, the legal title to which might vest in them under the trust, to use the moneys deposited by beneficiaries to pay for labor, casing and other materials incident to drilling and production, to manage and protect the trust property, to pay "trust debts," to sell all products of the well, to borrow money upon the credit of the trust, and to sell any "unsold beneficial interests" as they might deem best for trust purposes. The trustees were not to be individually liable except for willful misconduct. E. E. Combs was to act as production manager at a stated salary after the

well was in production. All proceeds "of sale of well products" were to be paid into a designated bank to be distributed as agreed.

The provisions of the agreement were carried out. The thirteen described beneficiaries contributed the amount above stated. A well was drilled in 1925 and produced oil through the remainder of that year and for a portion of the year 1926. In the latter year the Trustees sold the lease. In both years they currently distributed to the beneficiaries the net proceeds from the sale of oil and from the sale of the lease and, after the latter sale and distribution of the moneys received, the trust was terminated.

The beneficiaries did not hold a meeting and the trust had no office or place of business, no seal, by-laws or official name, and the operations of the trustees were confined to the one lease they acquired.

In considering whether an association was created, the fact that the beneficiaries did not exercise control is not determinative. *Hecht* v. *Malley,* 265 U. S. 144; *Morrissey* v. *Commissioner, supra.* The parties joined in a common enterprise for the transaction of business, and the beneficiaries who contributed money for that purpose became associated in the enterprise according to the terms of the arrangement. The essential features of the enterprise were not affected by the fact that the parties confined their operations to one oil well. See *Swanson* v. *Commissioner, ante,* p. 362. Parties may form an association for a small business as well as for a large one. Here, through the medium of a trust the parties secured centralized management of their enterprise, and its continuity during the trust term without termination or interruption by death or changes in the ownership of interests, and with limited liability and transferable beneficial interests evidenced by certificates. Entering into a joint undertaking they avoided the characteristic re-

sponsibilities of partners and secured advantages analogous to those which pertain to corporate organization. The fact that meetings were not held or that particular forms of corporate procedure were absent is not controlling. *Morrissey* v. *Commissioner, supra.*

We think that the taxpayer was taxable as an association. The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* COLEMAN-GILBERT ASSOCIATES.

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

Nos. 78 and 79. Argued November 21, 1935.—Decided December 16, 1935.

1. A common enterprise, under a trust agreement, for the owning, operating, leasing, and selling of particular property conveyed to the trustees by its co-owners, and of such other, similar property as it might acquire, and for distribution of net income among the trust beneficiaries, *held* taxable on income as an "association" under the Revenue Acts of 1926 and 1928. *Morrissey* v. *Commissioner, ante,* p. 344. P. 372.
2. The parties are not at liberty to disclaim the purpose of the trust organization as revealed by the trust instrument. P. 373.

76 F. (2d) 191, reversed.

CERTIORARI * to review a judgment reversing a decision of the Board of Tax Appeals, 30 B. T. A. 1463, which sustained assessments of income taxes laid on a trust as an "association."

Assistant Attorney General Morris, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Miss Helen R. Carloss* were on the brief, for petitioner.

* See Table of Cases Reported in this volume.

Mr. Ralph E. Tibbetts, with whom *Mr. Henry Herrick Bond* was on the brief, for respondent.

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

The Commissioner of Internal Revenue determined deficiencies in income taxes for the years 1927 to 1929 upon the ground that respondent was taxable as an association. The decision of the Board of Tax Appeals, sustaining this ruling, was reversed by the Circuit Court of Appeals. 76 F. (2d) 191. In view of the conflict of decisions as to the test to be applied, we granted certiorari. See *Morrissey* v. *Commissioner, ante,* p. 344.

From the facts, as found by the Board of Tax Appeals, it appears that respondent was formed by an indenture of trust in November, 1926. The creators of the trust were Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine. They were co-owners of real property consisting of about twenty apartment houses in the city of Boston and vicinity.

The property had originally been owned by Harry Coleman, Bernard Gilbert and Harris Levine in equal shares, but subsequently Coleman and Levine transferred to their wives one-half of their interests. These five persons had for some time been associated in the business of owning and operating apartment houses. By the trust instrument, which recited a contemporaneous conveyance of the property to themselves, they declared that the real estate so conveyed, and any real estate thereafter acquired under the trust, should be held by them in trust for the purposes described, with the designation "Coleman-Gilbert Associates." The trust was to continue for fifteen years unless sooner terminated by sale and distribution of the trust estate. The trustees were to hold the property in order to improve and dispose of it for the benefit of the persons named as "*cestuis que trustent* and beneficiaries, and

their respective representatives and assigns, devisees, or legatees" in the shares provided in the instrument. Except as stated, the beneficiaries were to have no interest in the trust property, and "especially" they were to have "no right to call for any partition thereof." The interests of the beneficiaries were to be personal property, and the death of any one or of all the beneficiaries was not to determine the trust nor entitle the legal representatives of the decedent to an accounting by the trustees.

The trustees were to have the "full power and discretion" of absolute owners, with authority to invest and reinvest the trust property, including its income, in mortgages or in obligations secured upon real estate, and "in the purchase and improvement of real estate situated in the cities or towns of the Commonwealth of Massachusetts." The trustees were authorized to sell at public or private sale any part or all of the trust property upon such terms as they might see fit, "to improve, to lease for a term beyond the possible termination" of the trust, or for any less term, "to hire for improvement or otherwise, to let, to exchange, to release, to partition," to borrow money, and to execute all necessary contracts. Funds in the possession of the trustees, being "the proceeds of sales or otherwise," or net income, which was "not required in their judgment for development or improvement of the trust property," were to be divided and paid over annually, or oftener, if convenient, equally among the said beneficiaries and their respective representatives and assigns in the proportions stated. The trustees were to have no power to bind the beneficiaries personally, and the trustees were to be responsible only for willful default and breach of trust. There was also provision for the resignation of trustees, and in case of death or resignation of a trustee, the surviving trustees were to appoint successors, and if they failed to do so, the beneficiaries were to have the right of appointment.

The Board of Tax Appeals found that the trust owned and operated some twenty apartment houses, the gross annual rents of which amounted to about $420,000. There were approximately 1500 tenants. The gross cost of the properties was about $3,000,000. Employees' payrolls amounted to about $25,000, and the operating expenses to about $300,000, annually. The trustees drew no salary. Two of the male trustees devoted their entire time to the management and a third trustee was also actively engaged. An office force of three persons, besides the three operating trustees, was required to keep the necessary financial records of the trust. There were no "building managers" or superintendents. The trustees supervised the maintenance of the trust properties, looking after their operating condition, collecting rents, ordering repairs, purchasing supplies, arranging loans and supervising office details, securing new tenants, and generally operating the trust properties. The female trustees were entirely inactive.

The Board of Tax Appeals summed up its findings by saying: "These trustees, although they did not exercise all of the powers given to them in the trust instrument, were engaged, nevertheless, in carrying on a business for profit in much the same manner as the directors of a corporation are associated together for the purpose of carrying on a business enterprise."

We think that the Board was right in its conclusion that the trust constituted an association within the meaning of the revenue acts. The governing principles have been discussed in *Morrissey* v. *Commissioner, supra,* and need not be restated. The small number of persons in the trust now before us does not present a difference in the legal aspect of their enterprise from the standpoint of the statutory classification. A few persons, as well as many, may form an association to conduct a business for their common profit. Nor is the absence of provision for

control by the beneficiaries, as such, determinative. The fact that the enterprise was confined to dealings in real property, its management and improvement, does not prevent its being classified as an association. See *Swanson* v. *Commissioner, ante,* p. 362. The Circuit Court of Appeals, while not questioning the sufficiency of the evidence to warrant the Board of Tax Appeals in finding that the trustees were conducting a business enterprise for the purpose of ensuring an income for the beneficiaries, and that the trustees may have exercised powers in some respects as great as those of the directors of a corporation, found a distinction in the procedure that had been followed. There had been no meetings, no records, and the acts of the trustees were not determined by a majority vote. The trustees had conducted the business in the same manner as it had been conducted before the trust was formed. We think that the court unduly emphasized the mere differences of formal procedure. If such differences were to be made the test in determining whether or not an enterprise for the transaction of business constitutes an association, the subject would be enveloped in a cloud of uncertainty, and enterprises of the same essential character would be placed in different categories simply by reason of formal variations in mere procedural details. The significant resemblance to the action of directors does not lie in the formalities of meetings or records but in the fact that, by virtue of the agreement for the conduct of the business of a joint enterprise, the parties have secured the centralized management of their undertaking through designated representatives.

We agree with the Circuit Court of Appeals that weight should be given to the purpose for which the trust was organized, but that purpose is found in the agreement of the parties. Not only were they actually engaged, as the Board of Tax Appeals determined, in carrying on an extensive business for profit, but the terms of the trust

instrument authorized a wide range of activities in the purchase, improvement and sale of properties in the cities and towns of the State. The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted. Undoubtedly they wished to avoid partition of the property of which they had been co-owners, but their purpose as declared in their agreement was much broader than that. They formed a combination to conduct the business of holding, improving and selling real estate, with provision for management through representatives, with continuity which was not to be disturbed by death or changes in ownership of beneficial interests, and with limited liability. They had been co-owners but they preferred to become "associates," and also not to become partners. *Morrissey* v. *Commissioner, supra.*

The decrees of the Circuit Court of Appeals are reversed and the orders of the Board of Tax Appeals are affirmed.

Reversed.

JOHN A. NELSON CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 61. Argued November 19, 20, 1935.—Decided December 16, 1935.

1. A corporation transferred substantially all of its property to another corporation in return for cash and the entire issue of preferred stock of the transferee, the stock being without voting rights except in case of default in payment of dividends; the transferor used part of the cash received to retire its own preferred stock, and distributed to its stockholders the remainder of the cash and the preferred stock of the transferee; the transferor corporation did

not dissolve, but retained its franchise and continued liable for certain obligations. *Held*, there was a "reorganization" under § 203 (h)(1)(A) of the Revenue Act of 1926 and no taxable gain upon the transaction was recognizable under the Act. P. 376.

2. Under § 203 (h)(1)(A) of the Act it is not essential to a reorganization that the transferor acquire a controlling interest in the transferee; nor that the transferor be entitled to participate in the management of the transferee; nor that the transferor be dissolved. P. 377.
3. Paragraph (h)(1)(B) of § 203, under which control of the transferee corporation by the transferor or its stockholders is essential to a reorganization, was not intended to modify the provisions of paragraph (h)(1)(A). P. 377.
4. The owner of preferred stock, though without voting rights, has a substantial interest in the affairs of the issuing corporation. P. 377.

75 F. (2d) 696, reversed.

CERTIORARI * to review a judgment affirming a decision of the Board of Tax Appeals (24 B. T. A. 1031; 28 B. T. A. 529) sustaining a determination of a deficiency in income tax.

Mr. J. S. Seidman for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Reed*, *Assistant Attorney General Wideman*, and *Messrs. James W. Morris* and *Sewall Key* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The petitioner contests a deficiency income assessment made on account of alleged gains during 1926. It claims that the transaction out of which the assessment arose was reorganization within the statute. Section 203, Revenue Act, 1926, c. 27, 44 Stat. 9, 11, is relied upon. The

* See Table of Cases Reported in this volume.

pertinent parts are in the margin of the opinion in *Helvering* v. *Minnesota Tea Co., post,* p. 378.

In 1926, under an agreement with petitioner, the Elliott-Fisher Corporation organized a new corporation with 12,500 shares non-voting preferred stock and 30,000 shares of common stock. It purchased the latter for $2,000,000 cash. This new corporation then acquired substantially all of petitioner's property, except $100,000, in return for $2,000,000 cash and the entire issue of preferred stock. Part of this cash was used to retire petitioner's own preferred shares, and the remainder and the preferred stock of the new company went to its stockholders. It retained its franchise and $100,000, and continued to be liable for certain obligations. The preferred stock so distributed, except in case of default, had no voice in the control of the issuing corporation.

The Commissioner, Board of Tax Appeals and the court all concluded there was no reorganization. This, we think, was error.

The court below thought the facts showed "that the transaction essentially constituted a sale of the greater part of petitioner's assets for cash and the preferred stock in the new corporation, leaving the Elliott-Fisher Company in entire control of the new corporation by virtue of its ownership of the common stock."

"The controlling facts leading to this conclusion are that petitioner continued its corporate existence and its franchise and retained a portion of its assets; that it acquired no controlling interest in the corporation to which it delivered the greater portion of its assets; that there was no continuity of interest from the old corporation to the new; that the control of the property conveyed passed to a stranger, in the management of which petitioner retained no voice.

"It follows that the transaction was not part of a strict merger or consolidation or part of something that partakes of the nature of a merger or consolidation and has a real semblance to a merger or consolidation involving a continuance of essentially the same interests through a new modified corporate structure. Mere acquisition by one corporation of a majority of the stock or all the assets of another corporation does not of itself constitute a reorganization, where such acquisition takes the form of a purchase and sale and does not result in or bear some material resemblance to a merger or consolidation."

True, the mere acquisition of the assets of one corporation by another does not amount to reorganization within the statutory definition. *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462, so affirmed. But where, as here, the seller acquires a definite and substantial interest in the affairs of the purchasing corporation, a wholly different situation arises. The owner of preferred stock is not without substantial interest in the affairs of the issuing corporation, although denied voting rights. The statute does not require participation in the management of the purchaser; nor does it demand that the conveying corporation be dissolved. A controlling interest in the transferee corporation is not made a requisite by § 203 (h) (1) (A). This must not be confused with par. (h) (2).

Finally, as has been pointed out in the *Minnesota Tea* case, *supra,* par. (h) (1) (B) was not intended to modify the provisions of par. (h) (1) (A). It describes a class. Whether some overlapping is possible is not presently important.

The judgment below must be

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MINNESOTA TEA CO.*

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

No. 174. Argued November 19, 1935.—Decided December 16, 1935.

1. A corporation transferred to another all of its assets in exchange for a large sum in cash and 18,000 shares of common stock of the transferee corporation; it retained the stock and distributed the cash to its own stockholders, who assumed certain of its debts. *Held:*

   (1) The transaction was a "reorganization" under § 112 (i) (1) (A) of the Revenue Act of 1928, which embraces within the meaning of the term reorganization "a merger or consolidation (including the acquisition by one corporation of . . . substantially all of the properties of another corporation)," and no taxable gain was recognizable under the Act. P. 382.

   (2) That the relationship of the taxpayer to the assets transferred was substantially changed does not prevent the transaction from constituting a reorganization under the Act. P. 386.

   (3) That a large amount in cash was received by the transferor was permissible so long as it received also an interest in the affairs of the transferee which represented a material part of the value of the transferred assets. P. 386.
2. Clause (B) of § 112 (i)(1) of the Revenue Act of 1928, under which it is essential to the "reorganization" there defined that immediately after the transfer the transferor or its stockholders be in control of the transferee corporation, does not narrow the scope of clause (A). P. 384.
3. Dissolution of the transferor corporation is not essential to a reorganization under the Act. P. 386.
4. The construction here given the Act is supported by Treasury Regulations long enforced. P. 384.
5. To constitute a reorganization under clause (A) of the section, it is essential that the interest acquired by the transferor in

*Together with No. 175, *Helvering, Commissioner of Internal Revenue,* v. *E. C. Peterson,* and No. 176, *Helvering, Commissioner of Internal Revenue,* v. *L. T. Peterson,* both on writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit.

the affairs of the transferee corporation be definite and material; it must represent a substantial part of the value of the thing transferred. P. 385.

76 F. (2d) 797; *id.* 806, affirmed.

CERTIORARI* to review judgments reversing a decision of the Board of Tax Appeals, 28 B. T. A. 591, in three cases involving income taxes.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Sewall Key* were on the brief, for petitioner.

Messrs. Homer Hendricks and *James G. Nye,* with whom *Messrs. Oscar Mitchell, C. J. McGuire,* and *Robert N. Miller* were on the brief, for respondents.

By leave of Court, *Mr. James S. Y. Ivins* filed a brief as *amicus curiae* supporting the proposition that the word "securities" as used in the reorganization sections of the Revenue Acts was intended to include corporation bonds.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

No. 174.

Respondent, a Minnesota corporation with three stockholders, assailed a deficiency assessment for 1928 income tax, and prevailed below. The Commissioner seeks reversal. He claims the transaction out of which the assessment arose was not a reorganization within § 112, par. (i) (1) (A), Revenue Act, 1928, c. 852, 45 Stat. 791: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes

* See Table of Cases Reported in this volume.

of stock of another corporation, or substantially all the properties of another corporation)." The Circuit Court of Appeals held otherwise and remanded the cause for determination by the Board whether the whole of the cash received by the Minnesota Tea Company was in fact distributed as required by the act. We granted certiorari because of alleged conflicting opinions.

The petition also stated that, as the taxpayer made an earlier conveyance of certain assets, the later one, here in question, of what remained to the Grand Union Company did not result in acquisition by one corporation of substantially all property of another. This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it.

Statutory provisions presently helpful are in the margin.*

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* *Revenue Act, 1918, c. 18, 40 Stat. 1060:*

"Sec. 202. (b) When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any; but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, and the new stock or securities received shall be treated as taking the place of the stock, securities, or property exchanged."

Revenue Act, 1921, c. 136, 42 Stat. 230:

"Sec. 202. (c) For the purposes of this title, on an exchange of property, real, personal or mixed, for any other such property, no gain or loss shall be recognized unless the property received in exchange has a readily realizable market value; but even if the property received in exchange has a readily realizable market value, no gain or loss shall be recognized—

. . . . . .

"(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorgani-

July 14, 1928, respondent caused Peterson Investment Company to be organized and transferred to the latter real estate, investments and miscellaneous assets in exchange for the transferee's entire capital stock. The shares thus obtained were immediately distributed among the three stockholders. August 23, 1928 it transferred all remaining assets to Grand Union Company in exchange for voting trust certificates, representing 18,000 shares of the transferee's common stock, and $426,842.52 cash. It retained the certificates; but immediately distributed the money among the stockholders, who agreed to pay $106,471.73 of its outstanding debts. Although of opinion that there had been reorganization, the Commissioner treated as taxable gain the amount of the assumed debts upon the view that this amount of the cash received

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zation. The word 'reorganization,' as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation, . . ."

Revenue Act, 1924, c. 234, 43 Stat. 256:

"Sec. 203. (a) Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 202, shall be recognized, except as hereinafter provided in this section.

. . . . . .

"(b) (2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the rerganization.

"(3) No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

"(4) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange

by the company was really appropriated to the payment of its debts.

The matter went before the Board of Tax Appeals upon the question whether the Commissioner ruled rightly in respect of this taxable gain. Both parties proceeded upon the view that there had been reorganization. Of its own motion, the Board questioned and denied the existence of one. It then ruled that the corporation had realized taxable gain amounting to the difference between cost of the property transferred and the cash received plus the value of the 18,000 shares—$712,195.90.

The Circuit Court of Appeals found there was reorganization within the statute and reversed the Board. It

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such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

. . . . .

"(e) If an exchange would be within the provisions of paragraph (3) of subdivision (b) if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

. . . . .

"(h) As used in this section and sections 201 and 204—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation,

concluded that the words "the acquisition by one corporation of . . . substantially all the property of another corporation" plainly include the transaction under consideration. Also that Clause (B), § 112 (i) (1), first introduced by Revenue Act of 1924, and continued in later statutes, did not narrow the scope of Clause (A). Further, that reorganization was not dependent upon dissolution by the conveying corporation. And finally, that its conclusions find support in Treasury regulations long in force.

These conclusions we think are correct.

The Commissioner maintains that the statute presents two definitions of reorganization by transfer of assets.

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or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

Revenue Act, 1926, c. 27, 44 Stat. 12:

Section 203 (a), (b)(2), (b)(3), (b)(4), (e), (e)(1), (e)(2), (h), (h)(1) and (h)(2) repeat the words of § 203 (a), (b)(2), (b)(3), (b)(4), (e), (e)(1), (e)(2), (h), (h)(1) and (h)(2) of the Act of 1924.

Revenue Act, 1928, c. 852, 45 Stat. 816:

Section 112 (a), (b)(3), (b)(4), (b)(5), (d), (d)(1), (d)(2), (i), (i)(1) and (i)(2) repeat the words of § 203 (a), (b)(2), (b)(3), (b)(4), (e), (e)(1), (e)(2), (h), (h)(1) and (h)(2) of the Act of 1924.

Revenue Act, 1932, c. 209, 47 Stat. 196:

Section 112 (a), (b)(3), (b)(4), (b)(5), (d), (d)(1), (d)(2), (i), (i)(1) and (i)(2) repeat the words of § 203 (a), (b)(2), (b)(3), (b)(4), (e), (e)(1), (e)(2), (h), (h)(1) and (h)(2) of the Act of 1924.

One, Clause (B), requires that the transferror obtain control of the transferee. The other, Clause (A), is part of the definition of merger or consolidation, and must be narrowly interpreted so as to necessitate something nearly akin to technical merger or consolidation. These clauses have separate legislative histories and were intended to be mutually exclusive. Consequently, he says, Clause (A) must be restricted to prevent overlapping and negation of the condition in Clause (B). Also, the transaction here involved substantially changed the relation of the taxpayer to its assets; a large amount of cash passed between the parties; there are many attributes of a sale; what was done did not sufficiently resemble merger or consolidation as commonly understood.

With painstaking care, the opinion of the court below gives the history of Clauses (A) and (B), § 112 (i) (1). We need not repeat the story. Clause (A) first appeared in the Act of 1921; (B) was added by the 1924 Act. We find nothing in the history or words employed which indicates an intention to modify the evident meaning of (A) by what appears in (B). Both can have effect, and if one does somewhat overlap the other the taxpayer should not be denied, for that reason, what one paragraph clearly grants him. Treasury regulations long enforced support the taxpayer's position, as the opinion below plainly points out.

Pinellas Ice Co. v. *Commissioner,* 287 U. S. 462, 470, considered the language of § 203 (h) (1) (A), Act of 1926, which became § 112 (i) (1) (A), Act of 1928, and held that a sale for money or short-term notes was not within its intendment. We approved the conclusion of the Commissioner, Board of Tax Appeals and Court of Appeals that the transaction there involved was in reality a sale for the equivalent of money—not an exchange for securities. But we disapproved the following assumption

and observations of the court: "That in adopting paragraph (h) Congress intended to use the words 'merger' and 'consolidation' in their ordinary and accepted meanings. Giving the matter in parenthesis the most liberal construction, it is only when there is an acquisition of substantially all the property of another corporation in connection with a merger or consolidation that a reorganization takes place. Clause (B) of the paragraph removes any doubt as to the intention of Congress on this point." And we said: "The words within the parenthesis may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation. But the mere purchase for money of the assets of one Company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes." And we now add that this interest must be definite and material; it must represent a substantial part of the value of the thing transferred. This much is necessary in order that the result accomplished may genuinely partake of the nature of merger or consolidation.

Gregory v. *Helvering,* 293 U. S. 465, revealed a sham—a mere device intended to obscure the character of the transaction. We, of course, disregarded the mask and dealt with realities. The present record discloses no such situation; nothing suggests other than a bona fide business move.

The transaction here was no sale, but partook of the nature of a reorganization in that the seller acquired a definite and substantial interest in the purchaser.

True it is that the relationship of the taxpayer to the assets conveyed was substantially changed, but this is not inhibited by the statute. Also, a large part of the consideration was cash. This, we think, is permissible so long as the taxpayer received an interest in the affairs of the transferee which represented a material part of the value of the transferred assets.

Finally, it is said the transferror was not dissolved and therefore the transaction does not adequately resemble consolidation. But dissolution is not prescribed and we are unable to see that such action is essential to the end in view.

The challenged judgment is

Affirmed.

Nos. 175 and 176.

The respondents in these cases are two of the three stockholders of Minnesota Tea Company. The writs were granted upon the Commissioner's petition, which states the question involved is whether the transaction between Minnesota Tea Company and Grand Union Company, described above—No. 174—resulted in a reorganization within the Revenue Act of 1928. The petition also declared—"The amount of the tax due from the respondents, . . . depends solely upon whether the transfer of the properties of the Minnesota Tea Company to the Grand Union Company was a reorganization within the meaning of the Revenue Act."

We think the court below rightly decided there was a reorganization. It reversed the Board of Tax Appeals and remanded the cause for further proceedings, and its judgment must be

Affirmed.

Counsel for Parties.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WATTS.*

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

No. 184. Argued November 20, 1935.—Decided December 16, 1935.

1. Where stockholders owning all of the shares of corporation A exchanged them for stock in corporation B and mortgage bonds of corporation A guaranteed by Corporation B, there was a "reorganization" under § 203 (h) (1) (A) of the Revenue Act of 1924, and by the effect of § 203 (b) (2) no taxable gain resulted; notwithstanding the A corporation continued in business. *Helvering* v. *Minnesota Tea Co., ante,* p. 378. P. 388.
2. The transaction is within the description of reorganization set forth by Article 1574 of Treasury Regulations 65, applicable to the Revenue Act of 1924; and that this regulation is a proper interpretation of the Act is confirmed by the reënactment without change by Congress of the paragraph to which it refers. P. 389.
3. The bonds were "securities" within the meaning of § 203 (b) (2) of the Act. P. 389.

75 F. (2d) 981, affirmed.

CERTIORARI † to review a judgment reversing a decision of the Board of Tax Appeals, 28 B. T. A. 1056, which sustained a deficiency assessment of income taxes.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Sewall Key* were on the brief, for petitioner.

Mr. Samuel Seabury, with whom *Messrs. John F. McCabe, James P. Quigley,* and *Robert J. Heberle* were on the brief, for respondents.

* Together with No. 185, *Helvering, Commissioner of Internal Revenue,* v. *Sicard,* and No. 186, *Helvering, Commissioner of Internal Revenue,* v. *Sloane,* both on writs of certiorari to the Circuit Court of Appeals for the Second Circuit.

† See Table of Cases Reported in this volume.

By leave of Court, *Mr. Edward H. Green* filed a brief as *amicus curiae,* supporting the contentions of respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These causes involved deficiency assessments for income tax against the three respondents for the year 1924.

They were the sole stockholders of United States Ferro Alloys Corporation—herein Ferro Alloys—and the causes, alike in all essential particulars, were dealt with below in one opinion.

The respondents maintain that they exchanged all stock of Ferro Alloys for shares of Vanadium Corporation of America and bonds of Ferro Alloys guaranteed by Vanadium; that these two corporations were parties to a reorganization, and that under § 203 (b) (2), Revenue Act, 1924, no taxable gain resulted. The Commissioner insists that the transaction was a sale of all the stock of the Ferro Alloys and therefore taxable gain resulted. The applicable statutory provision is § 203, Revenue Act, 1924, the pertinent parts of which are in the margin of the opinion in *Helvering* v. *Minnesota Tea Co., ante,* p. 378.

In December, 1924, respondents owned all the stock of Ferro Alloys Corporation. They exchanged this with the Vanadium Corporation for stock of the latter valued at $30 per share and for $1,161,184.50 mortgage bonds of Ferro Alloys guaranteed by Vanadium. Ferro Alloys continued to conduct business until its dissolution in 1928. Article 1574 of Treasury Regulations 65 provided that under the Act of 1924 no gain or loss shall be recognized to the shareholders from the exchange of stock made in connection with the reorganization, if two or more corporations reorganize, for example, by either the sale of the stock of B to A, or the acquisition by A of a majority of the total number of shares of all other classes of stock of B.

The transaction here involved is within the description of reorganization recognized by the Treasury Regulation above quoted. And if the regulation can be taken as properly interpreting the statute, the challenged judgment must be affirmed.

The court below recites the history of the Treasury Regulation above quoted and concludes that, in view of the reënactment of the paragraph to which it refers without change, Congress intended to approve the regulation as written.

The Commissioner here maintains that the definition of reorganization found in § 203 (h) (1) (A), Revenue Act, 1924, should be limited to transactions which partake of the nature of mergers or consolidations and that here the Vanadium merely made an investment in Ferro Alloys stock and obtained only the rights of a stockholder therein. It is also urged that an exchange of stocks for bonds results in a substantial change of position and that such bonds are "other property" within the meaning of the statute and as such subject to tax. Much of the argument presented is the same as the one considered in the *Minnesota Tea Company* case, and it need not be again followed in detail. The bonds, we think, were securities within the definition and cannot be regarded as cash, as were the short term notes referred to in *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462.

The judgment of the court below must be

Affirmed.

G. & K. MANUFACTURING CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 187. Argued November 20, 1935.—Decided December 16, 1935.

1. A transfer by one corporation to another of substantially all of its assets for cash and common stock of the transferee corporation

amounts to a reorganization under § 112 (i)(1)(A) of the Revenue Act of 1928; even though the transferor corporation and its subsidiaries continued in business. P. 391.

2. The Board of Tax Appeals having omitted to make a finding as to whether the transfer was of substantially all of the assets of the transferor corporation, the cause is remanded for determination by the Board of this essential fact. P. 391.

76 F. (2d) 454, reversed.

CERTIORARI * to review a judgment affirming a decision of the Board of Tax Appeals, which sustained a determination of a deficiency in income tax. Compare with the three cases preceding.

Mr. Llewellyn A. Luce for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Sewall Key* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The petitioner contests the validity of a deficiency assessment for 1929 income taxes. It maintains that the transaction out of which the alleged gains arose amounted to a reorganization within the intendment of § 112 (i) (1) (A), Revenue Act, 1928.†

The court below was of opinion that the transaction involved amounted to a sale of the assets and business of the taxpayer. In November, 1929, petitioner transferred what the Board of Tax Appeals seems to have assumed was substantially all of its assets to the Kraft-Phenix Cheese Corporation and received therefor $200,000 in cash and 17,250 shares common stock of the purchaser, then worth possibly thirty dollars per share. After the trans-

* See Table of Cases Reported in this volume.

† Margin of opinion in *Helvering* v. *Minnesota Tea Co., ante,* p. 378.

fer, the taxpayer remained in existence and continued to do business. It also retained assets of undisclosed value, namely, shares of certain subsidiary corporations and some other property. If the claim of the taxpayer that the transfer included substantially all its property is correct, then we think what was done amounted to a reorganization within the statute. The facts in respect of this were not found by the Board of Tax Appeals, and the cause must be returned there in order that the omission may be supplied. The mere fact that the taxpayer and its subsidiaries continued actively in business would not defeat the claim of reorganization. The ownership of the stock in the Kraft-Phenix Cheese Corporation gave the taxpayer a substantial and continuing interest in the affairs of that corporation.

The judgment of the court below is reversed. The cause will be remanded to the Circuit Court of Appeals with direction to that Court to remand the case to the Board of Tax Appeals for determination of the value of the retained assets and such further proceedings as may be necessary.

Reversed.

BUS & TRANSPORT SECURITIES CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 490. Argued November 20, 1935.—Decided December 16, 1935.

A corporation transferred shares of stock which it owned to another corporation in exchange for shares of stock which the latter owned, neither party to the exchange acquiring any definite immediate interest in the other. *Held,* not a reorganization within § 112 of the Revenue Act of 1928. P. 393.

79 F. (2d) 509, affirmed.

CERTIORARI * to review a judgment affirming a decision of the Board of Tax Appeals which sustained an order determining a deficiency in income tax.

Mr. Albert E. James for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioner—Bus and Transport Securities Corporation—challenges a deficiency income tax assessment for 1929, and says that the transaction from which the alleged taxable gain arose was reorganization within § 112, Rev. Act, 1928. Paragraphs (b) (4), (i) (1) and (i) (2) are specially relied upon.†

Jacobus owned practically all shares of two corporations, herein designated "A" and " B," which operated bus lines. The Public Service Corporation of New Jersey—the projector—desired to control these lines; and to that end engineered the following plan.

Public Service Coördinated Transport Company, affiliated with the projector, caused the organization of C. Easman Jacobus, Inc., took all the stock and paid therefor by transfering 2500 of the projector's shares.

Jacobus caused petitioner to be organized and acquired all its stock in exchange for all shares of "A" and " B " corporations. Thereafter petitioner transferred to Public Service Coördinated Transport Company these "A" and " B " shares and took all shares of C. Easman Jacobus, Inc.

Thus, petitioner, through Jacobus, Inc., came to control 2500 of the projector's shares. And Public Service

* See Table of Cases Reported in this volume.

† Margin of opinion in *Helvering* v. *Minnesota Tea Co., ante,* p. 378.

Coördinated Transport Company became owner of all shares of "A" and "B" corporations. Through these manipulations, the projector obtained indirect control of corporations "A" and "B" and the lines which they operate.

The Commissioner, the Board of Tax Appeals, and the Circuit Court of Appeals all rightly concluded that petitioner was not party to a reorganization within the statute. Certain corporate shares owned by it were exchanged for shares which another corporation owned. Neither party to the exchange acquired any definite immediate interest in the other. Nothing here, we think, even remotely resembles either merger or reorganization as commonly understood. *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462.

The challenged judgment must be

Affirmed.

HILL *v.* MARTIN, STATE TAX COMMISSIONER, ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 193. Argued November 11, 12, 1935.—Decided December 16, 1935.

1. Under the law of New Jersey the review by the Supreme Court of the State of a decree of the Prerogative Court affirming a tax assessment, is a judicial proceeding as distinguished from an administrative one. P. 400.
2. Upon appeal from a tax assessment, the Prerogative Court of New Jersey acquires jurisdiction not only to determine the tax due, but to take proceedings for its collection; and the docketing of its decree affirming a tax, gives it the effect of a judgment creating a lien and enforcible by execution. P. 401.

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* Together with No. 194, *Dorrance et al.* v. *Martin, State Tax Commissioner, et al.* Appeal from the District Court of the United States for the District of New Jersey.

3. The prohibition of § 265 of the Judicial Code against the granting by any federal court of an injunction to stay proceedings in any court of a State, embraces all steps that may be taken in a state court to collect a judgment, including not only execution but ancillary proceedings in the court which rendered the judgment or some other; and it governs privies to the case in the state court as well as the parties. P. 403.

12 F. Supp. 746, affirmed.

APPEAL from a decree of the District Court, of three judges, denying a temporary injunction for want of jurisdiction in a suit to prevent collection of an inheritance tax in New Jersey.

Mr. William A. Schnader for appellants.

Mr. Duane E. Minard, with whom *Mr. David T. Wilentz,* Attorney General of New Jersey, and *Mr. George S. Hobart,* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These suits were brought, on April 1, 1935, under § 266 of the Judicial Code, to enjoin the collection of an inheritance tax in the sum of $12,247,333.52, assessed by New Jersey upon the estate of John T. Dorrance, which was valued at more than $115,000,000. The bills charge that its transfer inheritance tax act, as construed and applied, violates the full faith and credit clause of the Federal Constitution and the due process clause of the Fourteenth Amendment. The defendants are the State Tax Commissioner and other New Jersey officials.[1] In No. 193, the plaintiff is a daughter of the decedent and a beneficiary under his will. In No. 194, his executors are the plaintiffs. A temporary restraining order issued. An appli-

[1] These are the State Supervisor of the Inheritance Tax Bureau, the Comptroller of the State, the State Treasurer, and the Attorney General.

cation was made for an interlocutory injunction; answers were filed; and the case was heard before three judges upon an elaborate record. But the injunction was denied for want of jurisdiction upon the allegations of the bill, because of the prohibition contained in § 265 of the Judicial Code.[2] The cases are here on appeal.

The material allegations are substantially the same in the two suits: Dorrance died on September 21, 1930, at his residence in Cinnaminson, Burlington County, New Jersey, leaving a will in which he named his wife, two brothers, and the Camden Trust Company executors. On October 2, 1930, his will was, upon petition of the executors, admitted to probate in the Orphan's Court of that county; letters testamentary issued; and the executors have administered the estate ever since under the jurisdiction of that court. Their petition for probate, like the will, had recited that Dorrance's domicil was in New Jersey. On April 6, 1931, they filed with the Inheritance Tax Bureau of New Jersey their return as a basis for the assessment of the inheritance tax. The estate consisted almost wholly of bonds, stocks, and other evidence of title to intangible personal property; and these were then, and still are, located in New Jersey. On October 17, 1931, the Tax Commissioner, finding, upon evidence presented by the executors, that Dorrance was at the time of his death domiciled in New Jersey, assessed the amount stated as the tax on direct transfers payable under the New Jersey Transfer Inheritance Tax Act of April 20, 1909, ch. 228, as amended.

On December 12, 1931, the assessment so made was, upon request of the executors, opened for the purpose of

[2] Section 265 provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." See *Smith* v. *Apple*, 264 U. S. 274.

enabling them to submit additional information concerning the decedent's domicil; and, introducing in evidence the judgment of the Supreme Court of Pennsylvania hereafter referred to, first rendered September 26, 1932, they claimed that Dorrance was, or must be deemed to have been, domiciled in Pennsylvania, in view of that judgment and other evidence. On October 10, 1932, the New Jersey Tax Commissioner again assessed upon the estate the tax of $12,247,333.52. The executors appealed to the Prerogative Court, which, by final decree entered May 11, 1934, affirmed the assessment, subject to a modification not here material. *In re Dorrance,* 115 N. J. Eq. 268; 170 Atl. 601; 116 N. J. Eq. 204; 172 Atl. 503. The executors procured, by writ of certiorari, a review of the assessment by the New Jersey Supreme Court. On February 8, 1935, that court affirmed the decree of the Prerogative Court and dismissed the writ of certiorari with costs. *Dorrance* v. *Thayer-Martin,* 13 N. J. Misc. Rep. 168; 176 Atl. 902. On February 13, 1935, the executors notified the defendant Martin that they intended to take an appeal to the New Jersey Court of Errors and Appeals. They have not done so; but under the state practice an appeal may be taken at any time prior to February 11, 1936.[3]

Dorrance had a residence also in Pennsylvania. That State claimed that he was domiciled there at the time of his death; and promptly commenced proceedings to subject his estate, including the intangible property, to the Pennsylvania inheritance tax. In March, 1933, it recovered in its Supreme Court a final judgment against the executors, which, adjudging that Dorrance's domicil was at the time of his death in Pennsylvania, imposed an inheritance tax upon the intangible property, as well as upon the real estate and tangible personal property situ-

[3] 2 Comp. Stats. of N. J. of 1910, p. 2208, § 2; 2 Cum. Supp. of 1924, p. 2818, § 163–301.

ated there. *Dorrance's Estate,* 309 Pa. 151; 163 Atl. 303. No question under the Federal Constitution was presented. Certiorari was denied by this Court, 287 U. S. 660; 288 U. S. 617. In satisfaction of the judgment, the executors paid to Pennsylvania $14,394,698.88, and $104,278.03 as interest thereon; and they also gave a bond in the sum of $4,000,000 to pay additional amounts, if upon final determination of the federal estate tax they should appear to be due.

In the suits at bar, the plaintiffs insist that the Pennsylvania judgment was *in rem* and bound New Jersey and the defendants although they were not parties to that litigation; that the New Jersey courts and administrative authorities, in refusing to give effect to the Pennsylvania judgment holding that Dorrance was domiciled in the latter State, violated the full faith and credit clause of the Federal Constitution; and that if they construed the New Jersey Transfer Inheritance Tax Act as applying to intangible property the situs of which was outside New Jersey, they violated the due process and equal protection clauses of the Fourteenth Amendment. The plaintiffs contend further that if the Pennsylvania judgment is not *in rem,* the federal court is now free to ascertain the facts as to domicil and reach its conclusion independently of the prior decisions of the courts of the two States; and that the evidence introduced below establishes that Dorrance's domicil was in Pennsylvania.

The plaintiffs claim that the District Court erred in holding that § 265 of the Judicial Code prevents the federal court from granting the injunctions prayed for, since at the time of the institution of these suits in the federal court the proceedings in New Jersey had not passed into the judicial stage; and since, in any case, an independent judicial proceeding was necessary to collect the tax. The defendants concede that § 265 would not bar federal courts from staying collection of the tax if the state pro-

ceedings had not passed from the administrative into the judicial stage. See *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24; 293 U. S. 112. But they assert that the proceedings in the Supreme Court of New Jersey reviewing by certiorari the final decree of the Prerogative Court (itself a judicial tribunal) were proceedings judicial in their nature; and that the stay sought is of proceedings pending in a court of New Jersey. The defendants contend also that the judgment of the New Jersey Supreme Court to which the executors were parties is *res judicata* as to the domicil of the deceased and as to the liability of the estate for the taxes assessed by New Jersey; and they set up other reasons why the relief prayed should be denied. We have no occasion to consider any of these defenses, since we agree with the District Court that it was without jurisdiction to grant the injunction.

First. To determine whether a judicial proceeding was pending when these suits were brought, we turn to the law of New Jersey. The proceedings, administrative and judicial, governing the assessment and the collection of its inheritance tax are, in substance, these: The assessment is made by the State Tax Commissioner, his duty being to "assess and fix the cash value of such estate and levy the tax to which the same is liable." He performs this duty after receiving the report of an appraiser appointed by him. The appraiser makes the appraisal and essential findings after notice to the interested parties and hearing evidence and argument.[4] Any person dissatisfied with the appraisal or the assessment may appeal therefrom to the "Ordinary," that is, the Prerogative Court. *Bugbee* v. *Van Cleve,* 99 N. J. Eq. 825, 834; 134 Atl. 646. Upon that court is conferred jurisdiction "to hear and determine all questions in relation to any tax levied under the

[4] N. J. Laws of 1931, c. 303, § 18, pp. 763, 764; c. 336, p. 823.

provisions of" the Act.[5] The decree of the Prerogative Court is reviewable on writ of certiorari by the New Jersey Supreme Court; [6] and its judgment is reviewable by the Court of Errors and Appeals.[7]

As to the collection of the tax, § 21 of the Transfer Inheritance Tax Act provides that "if it shall appear to the State Tax Commissioner that any tax . . . has not been paid according to law," he shall report such fact to the register of the Prerogative Court, who must issue a citation citing the interested parties to "show cause why such tax should not be paid." [8] The Attorney General, if he has probable cause to believe that a tax is due and unpaid, and is so notified by the Commissioner, shall prosecute the proceeding before the Prerogative Court.[9] The service of the citation, and subsequent proceedings thereon, shall conform to the practice prevailing in the Prerogative Court, including the power to commit for contempt.[10] Such proceedings would be the same in character whether the review of the original assessment had ended with the appeal to the Prerogative Court, or had been followed by certiorari to the Supreme Court; and whether or not an appeal was taken from the judgment of the Supreme Court to the Court of Errors and Appeals. Upon the making by the Prerogative Court of any decree, a copy thereof filed by the Commissioner with the clerk of the Supreme Court has the same effect as a judgment at law, and execution may issue thereon.[11]

[5] N. J. Laws of 1909, § 20, p. 335.

[6] See *In re Roebling's Estate*, 91 N. J. Eq. 72, 75.

[7] See *Central R. Co.* v. *State Tax Department*, 112 N. J. Law 5; 169 Atl. 489.

[8] N. J. Laws of 1931, § 21, pp. 764, 765.

[9] *Id.*, § 22, p. 765.

[10] N. J. Laws of 1900, c. 148, p. 347; see note 14.

[11] N. J. Laws of 1902, c. 158, § 44, pp. 524, 525; N. J. Laws of 1931, § 21.

Thenceforward, collection is pursued as prescribed for civil judgments in "an Act respecting executions." 2 Comp. Stats. of N. J. of 1910, p. 2243. Paragraph Fifth of § 1 of the Inheritance Tax Act provides that under certain conditions executors (and others) "shall be personally liable for any and all such taxes until the same shall have been paid as hereinafter directed, for which an action of debt shall lie in the name of the State of New Jersey."

Second. The Supreme Court's review of the administrative act of assessing was judicial action. It is a court created by the constitution; and its jurisdiction to review, on certiorari, proceedings of inferior tribunals is an inheritance from the Court of Kings Bench. The Supreme Court has broad powers. It may, as recited in the New Jersey Certiorari Act of 1903, as amended, "determine disputed questions of fact, as well as of law"; and when inquiring into the facts, is not limited to the evidence introduced before the tribunal whose proceeding is under review. It may act "by depositions taken on notice, or in such other manner as is according to the practice of the court"; and it "may reverse or affirm, in whole or in part, such tax or assessment."[12] Power to review the facts is conferred in New Jersey not only upon the Supreme Court but also upon its highest appellate tribunal—the Court of Errors and Appeals. Power, upon enquiry into the facts, to take evidence additional to that introduced before the tribunal whose action is under review is a power not uncommonly possessed by appellate

[12] See *State* v. *Justices of Middlesex,* 1 N. J. Law 244, 248; *Royal Mfg. Co.* v. *Rahway,* 75 N. J. Law 416; 67 Atl. 940; *Dubelbeiss* v. *West Hoboken,* 82 N. J. Law 683, 686; 82 Atl. 897; *Trenton & Mercer County Traction Corp.* v. *Mercer County Board of Taxation,* 92 N. J. Law 398; 105 Atl. 222; *Gibbs* v. *State Board of Taxes,* 101 N. J. Law 371; 129 Atl. 189; *Kearney* v. *State Board of Taxes,* 103 N. J. Law 26, 27; 135 Atl. 61.

courts in proceedings strictly judicial. The power to "reverse or affirm, in whole or in part" does not imply that the court may exercise administrative discretion. Such power is a common incident of the judicial review of taxation. As the administrative proceeding of assessing the tax had ended when the Supreme Court granted its writ of certiorari, we have no occasion, in this connection, to enquire whether it had not already ended when the appeal to the Prerogative Court was allowed.

Third. The plaintiffs contend that even if the action of the Supreme Court was judicial, the federal court had jurisdiction of this controversy because the judgment of the New Jersey courts was limited to a review of the assessment; that in order to collect the tax—to translate the assessment into an enforceable judgment—the state officials must institute a new and independent action, namely either an action for debt in the name of the State or a statutory proceeding against the persons interested in the estate; and that since no such action or proceeding had been taken at the time when these suits were filed, there is here no application to "stay proceedings in any court of" New Jersey. That is, the plaintiffs contend that the determination of the amount and validity of the tax is to be treated as an isolated and distinct proceeding, not as a step in the process of determining and collecting the tax imposed.

It is true that if the executors fail to pay the tax adjudged to be due, New Jersey must take further proceedings to compel the executors to discharge their obligation. This is so even if the executors do not avail themselves of their existing right to appeal to the Court of Errors and Appeals, or if upon such appeal that court affirms the judgment of the Supreme Court. But it is not true that such further proceeding would be, in legal contemplation, independent action. Upon dismissal of the certiorari, the

cause was remanded to the Prerogative Court. By the appeal of the executors, it had acquired jurisdiction not only to determine the tax due, but to take appropriate proceedings for its collection. Its jurisdiction continues until its decree is satisfied.

The further proceedings required to compel satisfaction of the decree establishing liability for the tax do not differ in essence from those required to satisfy any judgment for a debt recovered at law or any decree in chancery for the payment of money. The procedure of the Prerogative Court subsequent to a decree follows that of the equity courts, which had, ordinarily, no power to enforce their decrees except by citation for contempt.[13] Chapter 148 of the laws of 1900, which provides, as a means of collection, that the Prerogative Court shall issue a citation if it appears that a tax found to be due has not been paid, is declaratory of the existing procedure.[14] Section 21 of the Transfer Inheritance Tax Act provides that the lien created by docketing a decree " shall have the same effect

[13] See 2 Daniell, Chancery Pleading & Practice (6th Am. ed., 1894) 1042 *et seq.*

[14] N. J. Laws of 1900, § 7, p. 347: " If any person shall neglect or refuse to obey any citation, or to perform any sentence or decree of the ordinary or judge of the prerogative court, it shall be lawful for such ordinary and such court to cause such person or persons, by process directed to any sheriff of any county of this state, to be taken and imprisoned until he shall obey the said citation, or perform the said sentence or decree; and every sheriff is hereby directed to cause all such process, to him at any time directed, to be duly executed, and to confine the person against whom such process shall be issued, as in execution, until he shall be delivered by due course of law; and if any sheriff shall neglect his duty therein, he shall be answerable to the party aggrieved in such manner as he would be answerable upon process of the like nature issuing out of the supreme court." Imprisonment and realization upon the tax lien are means provided for enforcing also other New Jersey taxes. See Laws of 1918, § 606, p. 874; *McLean* v. *Delaware, Lackawanna & Western Coal Co.*, 13 N. J. Misc. Rep. 83, 84; 176 Atl. 557; see note 10.

as a lien by judgment, and execution shall issue thereon according to the rules and practice appertaining to other judgments." [15]

Fourth. The prohibition of § 265 is against a stay of "proceedings in any court of a State." That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.[16] It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res judicata.* It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment,[17] but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective.[18] The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other. And it governs a privy to the state court proceeding—like Elinor Dorrance Hill—as well as the parties of record. Thus, the prohibition applies whatever the nature of the proceeding, unless the case presents facts which bring it within one of the recognized exceptions to § 265.[19] It is not suggested that there is a basis here for any such exception.

The conclusion reached by the lower court is consistent with *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S.

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[15] See note 11.

[16] Compare *Hyattsville Building Assn.* v. *Bouic,* 44 App. D. C. 408, 413; *United States* v. *Collins,* 25 Fed. Cas. 14,834, pp. 539, 544; Charles Warren, "Federal and State Court Interference," 43 Harv. L. Rev. 345, 366–78.

[17] *Ruggles* v. *Simonton,* 20 Fed. Cas. 12,120, p. 1325; *Leathe* v. *Thomas,* 97 Fed. 136; *Ke-Sun Oil Co.* v. *Hamilton,* 61 F. (2d) 215.

[18] *Mutual Reserve Fund Life Assn.* v. *Phelps,* 190 U. S. 147, 159; *American Assn.* v. *Hurst,* 59 Fed. 1, 5; *American Shipbuilding Co.* v. *Whitney,* 190 Fed. 109.

[19] Compare *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 182–184; *Essanay Film Co.* v. *Kane,* 258 U. S. 358, 361; *Riehle* v. *Margolies,* 279 U. S. 218, 223.

24; and with all the other decisions of this Court distinguishing administrative from judicial proceedings to which the plaintiffs have called our attention; with the cases which hold that this Court lacks jurisdiction where the review sought is legislative or administrative in character; with those which hold that the lower court lacked jurisdiction because the plaintiff had not exhausted his administrative remedies; and with those which hold that the assessment of taxes is not an order within the meaning of § 266 of the Judicial Code.[20]

Affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of these cases.

COLGATE *v.* HARVEY, STATE TAX COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF VERMONT.

No. 8. Argued October 14, 15, 1935.—Decided December 16, 1935.

1. A state tax upon income is not to be deemed an interference with interstate commerce merely because the income is derived from a source in another State. P. 419.
2. A state tax is not invalid as an interference with interstate commerce when its effect upon such commerce is merely collateral and incidental. *Id.*
3. A Vermont law laying a general income tax of 4% upon the dividends received by residents from corporations, exempts dividends from corporation business done in the State, measuring the exemption by the ratio of the net income of the corporation earned within the State to its entire net income. Corporations, on the other hand, are subjected to an annual franchise or privilege tax of 2% of the net income attributable to their local business, in addition to taxes upon their local tangible property. *Held:*

[20] See, e. g., *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210; *Keller* v. *Potomac Electric Co.,* 261 U. S. 428; *Ex parte Williams,* 277 U. S. 267, 271–2.

(1) That the exemption does not produce unconstitutional discrimination against recipients of dividends earned outside of the State. P. 419.

(2) The evident intent and general operation of the legislation are to adjust with a reasonable degree of equality the tax burdens it imposes on shareholders, the exemption of locally earned dividends being the practical equivalent of the burden which the shareholders receiving them must bear indirectly because of the local taxes laid on their corporations. P. 420.

4. Conceding the power of a State to impose double or multiple taxation, the avoidance of that result cannot be condemned as an arbitrary basis for apportioning tax burdens. P. 420.
5. In testing whether the taxes imposed by a State on its residents discriminate unduly, in violation of the equality clause of the Fourteenth Amendment, the tax burdens imposed upon them by other States are irrelevant. P. 420.
6. Absolute equality in taxation is not required by the Fourteenth Amendment; the boundary between permissible and forbidden inequalities depends upon the material circumstances in each case. P. 422.
7. A Vermont law taxing income from interest-bearing securities exempts interest received on account of money loaned within the State at a rate of interest not exceeding 5% per annum, evidenced by promissory notes, mortgages on real estate, or bonds for deeds. Residents whose income is from like loans made outside of the State are not allowed the exemption. *Held:*

(1) That on the face of the statute the discrimination is purely arbitrary, being based entirely upon a fortuitous circumstance—the place where the loan is made—which has no substantial or fair relation to the object of the Act, namely, the raising of revenue. Pp. 422, 424.

(2) Assuming that the classification would be valid under the equality clause of the Fourteenth Amendment if the exemption were made to depend not only upon the making of the loan within the State but also upon the investment of the money loaned in property having its situs within the State, the Court is not at liberty to read such additional condition into the statute. P. 424.

(3) The proposition that money loaned within the State will generally be invested there, is a pure speculation, without warrant in the record or in the judicial knowledge of the Court. P. 425.

8. A statutory discrimination, which on its face is arbitrary, cannot be upheld by simply surmising that it subserves some unnamed public interest. P. 425.
9. Classification for the purposes of taxation, to comply with the equal protection clause, must be founded upon pertinent and real differences, as distinguished from the irrelevant and artificial. The test is whether the taxing statute arbitrarily and without genuine reason imposes a burden upon one group of taxpayers from which it exempts another, both of them occupying substantially the same relation toward the subject-matter of the legislation. P. 423.
10. Even if beneficial to the State, a discrimination whereby its citizens who lend money outside of the State are taxed on the income, while those who make like loans in the State are not taxed, violates the privileges and immunities clause of the Fourteenth Amendment. Pp. 426, 433.
11. As citizens of the United States our people are members of a single great community consisting of all the States united, and not of distinct communities consisting of the States severally. No citizen of the United States is an alien of any State of the Union; and the very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States. P. 426.
12. A citizen of the United States is *ipso facto* and at the same time a citizen of the State in which he resides. While the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship "paramount and dominant" instead of "derivative and dependent" upon state citizenship. P. 427.
13. Whatever latitude of state power might exist under Art. IV, § 2 of the Constitution, providing that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," a State cannot, in view of the privileges and immunities clause of the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the State which undertakes to do so. P. 428.
14. The same Act of a state legislature may contravene more than one provision of the Constitution, e. g., it may infringe the right of a citizen under the commerce clause and also his privileges and immunities as a citizen of the United States. Cf. *Crandall* v. *Nevada*, 6 Wall. 35. P. 430.
15. The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money

in any State other than that in which the citizen resides is a privilege attributable to his national citizenship. A state law prohibiting the exercise of any of these rights in another State would, therefore, be invalid under the Fourteenth Amendment; a discriminating tax upon such activities is necessarily void even if the taxing State will thereby help its domestic business. P. 430.

16. As the Fourth Article of the Constitution requires each State to accord equality of treatment to the citizens of other States in respect of the privileges and immunities of state citizenship, so the privileges and immunities clause of the Fourteenth Amendment safeguards citizens of the United States against any legislation of their own States having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other States. P. 431.
17. The right of a citizen of the United States resident in one State to contract in another may be a liberty safeguarded by the due process clause and at the same time, none the less, a privilege protected by the privileges and immunities clause of the Fourteenth Amendment. In such case he may invoke either or both. P. 433.
18. A state law which allows a personal exemption from the taxable income derived from interest-bearing securities but withholds it if the taxpayer receive also income of another kind, and, in that event, gives to him a larger personal exemption in the computation of his tax upon the latter kind of income, is consistent with equal protection of the laws, notwithstanding the fact that, in a particular tax year, the taxpayer because of allowable deductions from gross income, paid no tax upon the latter kind of income and had no occasion to resort to the larger exemption applicable to it. P. 434.
19. The question of equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers. P. 436.

107 Vt. 28; 175 Atl. 352, reversed.

APPEAL from a judgment which affirmed a judgment rendered by a county court in favor of Harvey, Tax Commissioner, in a proceeding under the Income and Franchise Tax Law of Vermont for the revision of an income tax assessment.

Mr. Edward J. Dimock, with whom *Mr. George L. Hunt* was on the brief, for appellant.

The Act in effect taxes interest and dividends earned outside of Vermont and exempts interest and dividends earned within Vermont, and is therefore unconstitutional under the Fourteenth Amendment.

The Act deprives citizens of the United States of the constitutional right to invest in non-Vermont loans and stocks on at least as favorable terms as they are permitted to invest in Vermont loans and stocks.

Capricious classifications for purposes of taxation deny the equal protection of the laws. *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32. Even a conclusion that a classification is not capricious is not necessarily enough to save it under the equal protection clause. *Hanover Insurance Co.* v. *Harding,* 272 U. S. 492.

Though a classification be not so oppressive as to be unconstitutional under the equal protection clause, it may yet be unconstitutional if it discriminates against a privilege of a citizen of the United States.

The concept of privileges of citizens of the United States is one which has developed since the foundation of the Republic. It is even said that prior to the adoption of the Fourteenth Amendment there were no citizens of the United States. *Sharon* v. *Hill,* 26 Fed. 337, 343. Before the Civil War had more closely welded the Union into a single nation, statesmen were much more deeply concerned with preventing States from abridging the due privileges of citizens of other States than with preventing them from abridging the due privileges of citizens of their own who later came to constitute members of the class of citizens of the United States.

Under Art. IV, § 2 of the Constitution, citizens of other States were able to come into Vermont and invest their funds upon equal terms with the citizens of Vermont with-

out interference by its legislature. *Chalker v. Birmingham & N. W. Ry. Co.*, 249 U. S. 522.

Upon the adoption of the Fourteenth Amendment, citizens of Vermont became *ipso facto* citizens of the United States as well, and they thereby became entitled to go into other States and invest their funds without being subjected by the legislature of Vermont to any greater burdens than it placed upon their investment of money within its borders.

There can be no doubt that the right to employ funds in any State of the Union on equal terms with citizens of that State and unhampered by restrictions imposed by the State of which the investor is a citizen is one of the essential rights of citizenship in the United States. If we have no such right, the citizenship in the United States created by the Fourteenth Amendment was a citizenship subject to the sovereignty of the States over their citizens. That cannot be. If there is a paramount sovereign of the citizen, it is the United States.

State lines are used by the Act as the basis of a classification hostile to investment in enterprises in sister States. What the State has done in effect is to announce that income over which Vermont has territorial jurisdiction shall be tax free and income over which Vermont has no territorial jurisdiction, but only a jurisdiction through the residence of the owner, shall be taxed. This is not the usual case of a classification invalid because capricious and without logical basis. Its basis is extremely logical but wholly vicious and repugnant to the Fourteenth Amendment and to the whole theory of our Union of States. Of all the classifications that might have been chosen for the purpose of taxation, the most clearly unconstitutional is that which exempts intrastate income and taxes extra-state income.

The Act, by discriminating against investment by Vermont residents in non-Vermont stocks and loans, in ef-

fect creates an embargo upon the export of capital. It is therefore unconstitutional under the commerce clause of the Constitution.

The taxes involved cannot stand if the discriminatory exemptions are stricken from the statute as unconstitutional.

The Act, by arbitrarily refusing to the appellant the $800 exemption given to other persons whose situation differed from his only in that they had no income from business, denies appellant the equal protection of the laws. It is therefore unconstitutional under the Fourteenth Amendment.

Messrs. Guy M. Page and *Seymour P. Edgerton,* with whom *Mr. Lawrence C. Jones,* Attorney General of Vermont, was on the brief, for appellee.

The challenged exemptions are directed to the avoidance of double or multiple taxation by Vermont of the same economic interest, viz: (a) shares of stock in corporations to the extent to which the issuing corporation is taxed in Vermont, and (b) certain credits, the consideration for which became a part of the general wealth of the State and thereby subject to its tax laws.

The general power of States to classify for purposes of taxation is not open to question. It applies equally to classification of incomes for taxation. In such taxation, "possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary or capricious do not fall within constitutional prohibitions." *Lawrence* v. *State Tax Comm'n,* 286 U. S. 284. "It is not necessary . . . that the basis of the classification must be deducible from the nature of the things classified. . . . It is enough, for instance, if the classification is reasonably founded in the 'purposes and policy of taxation.'" *Watson* v. *State Comptroller,* 254 U. S. 122, 125; *Stebbins* v. *Riley,* 268 U. S. 137, 143.

A basis of classification is reasonable and valid which operates to avoid double taxation by a single State of the same economic interest. *Lawrence* v. *State Tax Comm'n, supra; Klein* v. *Board of Supervisors,* 282 U. S. 19, 23; *Kidd* v. *Alabama,* 188 U. S. 730, 732; *Darnell* v. *Indiana,* 266 U. S. 390; *Watson* v. *State Comptroller, supra; Clement National Bank* v. *Vermont,* 231 U. S. 120; *Concordia Fire Ins. Co.* v. *Illinois,* 292 U. S. 535.

The rule has a wide variety of application. *Concordia Fire Ins. Co.* v. *Illinois, supra; Pacific Express Co.* v. *Seibert,* 142 U. S. 339; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *Travelers' Insurance Co.* v. *Connecticut,* 185 U. S. 364; *Clement National Bank* v. *Vermont, supra; General American Tank Car Corp.* v. *Day,* 270 U. S. 367; *Watson* v. *State Comptroller, supra.*

The right to exempt persons or property from one tax because the same economic interest has been otherwise taxed has been repeatedly applied in cases with respect to the taxation of corporations or the stockholders. *Kidd* v. *Alabama, supra; Darnell* v. *Indiana, supra; Klein* v. *Board of Supervisors, supra.*

It is the necessary conclusion from these cases that a State may so classify the objects of taxation within its jurisdiction as to avoid taxing the same value more than once and in so doing may disregard the taxation imposed by other States. Distinguishing: *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494.

In the case at bar there is no classification of taxpayers under the income tax law. The sole classification is of income. That classification is admittedly "extremely logical," and operates equally with respect to all taxpayers who are recipients of income in any of the specified classes. The Fourteenth Amendment guarantees equal protection to taxpayers similarly situated, but it "does not compel the adoption of an iron rule of equal taxation,

nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties. . . ." *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527, 537.

The privileges and immunities protected under the Fourteenth Amendment are those that arise from the Constitution and laws of the United States, rather than those which spring from other sources. *Slaughter-House Cases,* 16 Wall. 36; *Twining* v. *New Jersey,* 211 U. S. 78; *Duncan* v. *Missouri,* 152 U. S. 377; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530. Nothing in the Constitution or laws of the United States requires the equal taxation of all property, although the Constitution does require the equal protection of all citizens similarly situated. *Chalker* v. *Birmingham & N. W. Ry. Co.,* 249 U. S. 522, distinguished.

Nothing in the Federal Constitution requires that a State shall twice tax the property which a citizen has left at home, subject to the taxing laws, because property which he has invested in other States is to be once taxed at home. *Darnell* v. *Indiana,* 226 U. S. 390, and *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, distinguished.

An examination of the history and effect of the exemption of the income from money loaned within the State at not over 5% per annum discloses that the encouragement intended was the removal of the barrier of double taxation of the same intrinsic wealth, a barrier adequate to effectively discourage investment of Vermont funds within the State.

The obvious effect of the change in taxation thus enacted was to tax the property and exempt the credit, provided the creditor yielded 1% of the legal rate of interest; and if the creditor exacted the legal rate of interest, to tax the creditor and permit the debtor to deduct one-half of the taxable debt (with limitations) which amounted to substantially 1%. In other words, the legislature recog-

nized that the sale on credit of property within the State to become a part of the property of the debtor in fact created no new wealth and so a single tax was exacted, within limitations. The incidence of the tax was substantially equally divided between the debtor and the creditor. The system thus achieved is analogous to systems for the taxation of credits in force in many jurisdictions and uniformly sustained by the courts.

The statute is within the "general usage" of the States, which, in the frequently quoted statement in *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237, was said not to be forbidden by the Fourteenth Amendment.

It cannot be said that a legislative purpose to encourage the investment of Vermont money for the assistance of the agricultural and industrial interests of the State is an unlawful and prohibited purpose. Without the exemption, a debt-burdened class of residents would be subjected to tax laws oppressive in proportion to the taxpayers' indebtedness. Cf. *Aero Mayflower Transit Co.* v. *Public Service Comm'n,* 295 U. S. 285; *Stephenson* v. *Binford,* 287 U. S. 251; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114; *Barbier* v. *Connolly,* 113 U. S. 27; *Pacific Express Co.* v. *Seibert,* 142 U. S. 339; *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322.

The legislative purpose to encourage, approved in the foregoing cases, had no necessary relation to other States. See *New York* v. *Roberts,* 171 U. S. 658; *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71, 75; *Board of Education* v. *Illinois,* 203 U. S. 553.

The controlling test is to be found in the operation and effect of the law as applied and enforced by the State. *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362, 363; *Texas* v. *Brown,* 258 U. S. 466, 479; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 482; *Wagner* v. *Covington,* 251 U. S. 95, 102; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284, 288.

The record is devoid of any evidence which indicates that any of the capital of appellant, or any capital of any other resident of Vermont, has been driven from other States into Vermont, or unreasonably retained within Vermont, by reason of the provisions of the challenged tax law; nor is there any evidence from which a tendency in that direction can be deduced.

An exemption of shares of stock, complete or partial, under the Vermont income tax law arises out of the imposition of a franchise tax upon the corporation. The imposition of a franchise tax is conditioned and proportioned upon business within the State. The locus of a corporate business is by fair inference the locus of its principal property. *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, 139; *Kidd* v. *Alabama,* 188 U. S. 730, 732.

All the tangible property of corporations within the State is taxed at the local rate. Pub. Laws, Vt., §§ 571, 588. Both the report of the State Tax Commissioner to the Legislature and the United States census show that this rate is about 3%. It follows that in general the exemption of stock in corporations is conditioned upon the payment by the corporation of a property tax substantially proportioned to the extent of the exemption.

Entirely apart from any franchise tax, the payment of the property tax would justify the exemption of the stock from a similar property tax. *Kidd* v. *Alabama, supra; Darnell* v. *Indiana, supra; Klein* v. *Board of Supervisors, supra; Lawrence* v. *State Tax Comm'n, supra.*

But by the Vermont tax laws the income tax is substituted for the property tax upon shares of stock. The income tax is therefore in effect a tax upon the shares. See *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 581; *Weston* v. *Charleston,* 2 Pet. 449; *Railroad Co.* v.

Jackson, 7 Wall. 262; *Opinion of the Justices,* 220 Mass. 613; *Wright* v. *Georgia R. Co.,* 216 U. S. 420.

It follows that wholly irrespective of the franchise tax, the income from shares of corporations doing business in Vermont may fairly be exempted from taxation, in proportion to business within the State, as the statute in effect provides.

But the statute imposes an additional condition that the corporation shall pay in addition to its property tax a franchise tax at the rate of 2% upon its entire net income attributable to business within the State. It is obvious that in the ordinary case the net income of the corporation will exceed the distribution of dividends; that, therefore, the 2% tax will be applied to a wider base than the 4% tax. The excess of burden upon a stockholder who pays a 4% dividend tax can never exceed 50% of his tax paid, and will generally be less. Entirely apart from the property tax, the franchise tax presents a disproportion to the taxation of shares not materially different from that sustained by this Court in *Klein* v. *Board of Supervisors,* 282 U. S. 19.

As to the personal exemption, a taxpayer with a subsistence exemption from one class of income is not subjected to unjust discrimination because he is not permitted to take an exemption from another class, any more than a taxpayer would be entitled to an exemption of two homesteads because he occupied alternately two places of residence. If the taxpayer had other than Class B income, his need was less than that of the taxpayer who had no income in addition to Class B income, and generally, he would have availed himself of an exemption from his Class A income. In any aspect there is a substantial difference between income from intangibles and income from business and rents. All taxpayers are classified by the same criteria, having a real relation to the purpose and object of the exemption.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The Vermont Income and Franchise Tax Act of 1931, Public Laws of Vermont, 1933, § 872 *et seq.* (the pertinent provisions of which are copied in the margin [1]), imposes

[1] "Chapter 39.

"Sec. 873. *Rate; Exemptions; Amount.*—A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually, with respect to:

"I. His net income as herein defined, after deducting the exemptions provided in this chapter, at the rate of two per cent; and

"II. To the income received by him on account of the ownership or use of or interest in any stock, bond, note, agreement or other interest bearing security at the rate of four per cent; but the words 'income received by him on account of the ownership or use of or interest in any stock, bond, note, agreement or other interest bearing security' shall not include the following items which shall be exempt from taxation under this chapter:

"(a) Interest received on account of money loaned within this state, at a rate of interest not exceeding five per cent per annum evidenced by a promissory note, mortgage on real estate or a bond for a deed, including credits representing the purchase price, or any part thereof, of real estate within this state, sold or transferred, evidenced by a promissory note, mortgage or bond for a deed bearing a rate of interest not exceeding five per cent per annum;

. . . . . .

"(e) Dividends on stocks of those corporations which are subject to taxation under chapter 40, but if a corporate franchise tax is not measured by the entire net income of such corporation, then a portion of the dividends paid by such corporation shall be taxable under this chapter, and such taxable portion shall be that proportion of the dividend as the income earned by the corporation from business done without the state of Vermont bears to the entire income of the corporation;

"(f) In case the income taxed in this section is derived wholly from ownership of or interest in any stock, bond, note or other interest bearing security, there shall be deducted from such income the following exemptions:

individual income taxes as follows: First, with respect to net income derived from salaries, wages, etc., denominated by the court below class A income, at the rate of 2%; second, with respect to income received on account of the ownership or use of or interest in any interest bearing security, denominated class B income, at the rate of 4%, excluding, however, from such income (a) interest re-

"1. In case of a single individual a personal exemption of four hundred dollars;

"2. In the case of the head of a family, or a married individual living with husband or wife, a personal exemption of eight hundred dollars; but if either a husband or wife shall receive any income other than that derived from the ownership of or interest in any stock, bond, note or other interest bearing security, then such personal exemption shall not be allowed. A husband and wife, living together, shall receive but one personal exemption of eight hundred dollars against their aggregate net income; and in case they make separate returns, the personal exemption of eight hundred dollars may be taken by either or divided between them. . . .

"Chapter 40.

"Sec. 887. *Rate.*—For the privilege of exercising its franchise in this state in a corporate or organized capacity, every domestic corporation, and for the privilege of doing business in this state every foreign corporation, liable to tax under this chapter shall annually pay to this state a franchise tax to be measured by its net income to be computed in the manner hereinafter provided at the rate of two per cent upon the basis of its net income as herein computed, for the next preceding fiscal or calendar year.

"Sec. 888. *Basis on business within the state.*—If the entire business of the corporation be transacted within the state, the tax imposed shall be based upon the entire net income of such corporation for such fiscal or calendar year. If the entire business of the corporation be not transacted within the state and its gross income derived from business done both within and without the state, the determination of its net income shall be based upon the business done within the state and for the purpose of computing such net income the commissioner shall adopt such recommendations and regulations for the allocation of net income as will fairly and justly reflect the net income of that portion of the business done within the state."

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ceived on account of *money loaned within the state* at a rate of interest not exceeding 5% per annum, evidenced by a promissory note, mortgage, or bond for a deed bearing a like rate of interest; (b) dividends on stocks of corporations subject to taxation under §§ 887, 888 of the statute. If the income taxed is derived wholly from interest-bearing securities, there is allowed in the case of a single individual, a personal exemption of $400, and, in the case of a head of a family or of a married individual living with husband or wife, a personal exemption of $800. If, however, either husband or wife shall receive any income other than that derived from such securities, then the personal exemption is not allowed. A distinct and larger personal exemption is allowed in the case of net income derived from salaries, wages, etc. (§ 880)—namely, $1,000 in the case of a single individual, and $2,000 in the case of a head of a family or a married individual living with husband or wife.

Appellant is a resident of Vermont, married and living with his wife. During the taxable year in question, he received both class A and class B income; but his class A income, although large, was absorbed by allowable deductions, so that there was no net income from that source, and consequently nothing subject to taxation. His class B income amounted to a larger sum, part of which consisted of interest on notes, mortgages, etc., representing money loaned outside the State of Vermont at not exceeding 5% per annum, and another part from taxable dividends received from corporations other than Vermont corporations. Upon these two sums a tax was assessed against him at the rate of 4%. Under the statute he was allowed no personal exemption whatever.

The validity of the statute under the federal Constitution was properly challenged. The grounds of attack, so far as necessary to be stated, are as follows: (1) The act imposes a tax upon dividends earned outside the State of

Vermont, while exempting from the tax dividends earned within the state, thereby denying petitioner the equal protection of the laws in violation of the Fourteenth Amendment; (2) the act, in violation of the same clause, discriminates in favor of money loaned within the state as against money loaned outside the state; (3) the act arbitrarily denies appellant the $800 exemption while giving it to other persons whose situation differed from his only in that they had no income from business, and thereby denies appellant the equal protection of the laws guaranteed by the Fourteenth Amendment; and in each of these three particulars the act abridges the privileges and immunities of appellant as a citizen of the United States in contravention of the same amendment.[2]

The court below denied the contentions of appellant and sustained the validity of the act in every particular. 107 Vt. 28; 175 Atl. 352.

First. Does the imposition of a tax upon dividends earned outside the state, from which tax dividends earned within the state are exempt, constitute, under the Fourteenth Amendment, an allowable classification? The basis of the classification rests in the consideration that by §§ 887 and 888 a tax of 2%, measured by net income, is imposed upon every corporation for the privilege of exer-

[2] The further point is made that the discrimination in respect of dividends and interest upon loans is a regulation of interstate commerce and therefore void under the commerce clause of the federal Constitution. But we mention this latter claim only to reject it as without merit, since clearly a tax upon income is not an interference with interstate commerce simply because the income is derived from a source within another state; and, moreover, if there be any tendency to interfere with such commerce it is purely collateral and incidental. *Nathan* v. *Louisiana*, 8 How. 73, 82; *Williams* v. *Fears*, 179 U. S. 270, 276; *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616; *Anderson* v. *United States*, 171 U. S. 604, 616; *Engel* v. *O'Malley*, 219 U. S. 128, 138; *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604.

cising its franchise in the state and of doing business therein. If the entire business of the corporation be transacted within the state, the amount of the tax is fixed with regard to the entire net income. If the entire business be not so transacted, the net income is calculated with respect to that part of the business done within the state, to be allocated so as fairly and justly to reflect such net income. Dividends upon shares of corporations which are subjected to this tax are exempted from the income tax. In addition to the 2% franchise tax, all tangible corporate property lying within the state is subjected to a property tax. The evident aim of the classification, therefore, is to produce equality and not inequality; and, obviously, that aim will become effective in fact, to a greater or less extent, in the administration of the legislation.

The theory upon which the tax is laid upon dividends realized from out-of-state business while leaving dividends realized from domestic business untaxed, is that the 2% franchise tax, especially with the property tax added, has the effect of indirectly imposing a tax burden upon the latter measurably equivalent to that imposed directly upon the former. Thus, the tendency of the plan is to avoid taxing twice what is, in effect, the same thing. And conceding the power of the state to impose double or even multiple taxation, legislation which is calculated to avoid that undesirable result certainly cannot be condemned as arbitrary. Thus far, the question is settled in favor of the validity of the tax by prior decisions of this court. *Kidd* v. *Alabama,* 188 U. S. 730; *Darnell* v. *Indiana,* 226 U. S. 390, 398; *Traveller's Insurance Co.* v. *Connecticut,* 185 U. S. 364; *Watson* v. *State Comptroller,* 254 U. S. 122, 124–125; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 284. True, it well may be assumed that similar franchise and property taxes are imposed upon the outside corporations by other states; but the assumption is immaterial

to the issue here involved. It is enough that such taxes are not imposed by the State of Vermont. It was so decided in *Kidd* v. *Alabama, supra,* where Mr. Justice Holmes, speaking for the court, said (p. 732):

"The State of Alabama is not bound to make its laws harmonize in principle with those of other States. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all." And see *Bacon* v. *Board of Tax Comm'rs,* 126 Mich. 22, 25–26; 85 N. W. 307.

Appellant urges that the franchise tax measured by the corporation's income is at the rate of 2%, while the tax on dividends is at the rate of 4%; and concludes that this results in putting a burden on dividends directly taxed twice as great as that imposed indirectly by the franchise tax. But it is obvious that, since the 4% tax is imposed only upon such part of the corporate net income as passes to the shareholders in the form of dividends, and the 2% tax is measured by the entire net income of the corporation, this conclusion is erroneous. Corporations do not, at least as a general rule, pay out their entire net income in dividends. Something is reserved for future contingencies; and it may well result that a tax of 2% measured by the entire net income of the corporation will roughly approximate the amount imposed by a 4% tax on that part of the net income paid out as dividends. There is nothing in the equality clause of the Constitution which requires that the two sums shall be mathematically equivalent. *Concordia Fire Ins. Co.* v. *Illinois,* 292 U. S. 535, 547. In *Klein* v. *Board of Supervisors,* 282 U. S. 19, this court sustained an act exempting corporate shares from taxation where 75% of the total property of the corporation was taxable in the state and the taxes thereon were paid. It was said that this was plainly a reasonable effort to do justice to all in view of the way other assessments were made.

It is impossible to say from the record before us that there is a greater disproportion here than was presented in the *Klein* case, or to conclude that the disproportion is so great as to stamp the classification as wholly arbitrary or capricious. Moreover, as a general thing, a corporation subject to the 2% franchise tax will pay also a tax upon property located within the state, with the effect of still further narrowing, if not altogether extinguishing, the difference.

This court has frequently said that absolute equality in taxation cannot be obtained and is not required under the Fourteenth Amendment. This, of course, is not to say that, because some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed. The boundary between what is permissible and what is forbidden by the constitutional requirement has never been precisely fixed and is incapable of exact delimitation. In the great variety of cases which have arisen, decisions may seem to be difficult of reconcilement; but investigation will generally cause apparent conflicts to disappear when due weight is given to material circumstances which distinguish the cases. If the evident intent and general operation of the tax legislation are to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied. We think the provision now under consideration meets this test. *Cf. State Railroad Tax Cases,* 92 U. S. 575, 612; *Tappan* v. *Merchants' National Bank,* 19 Wall. 490, 504; *Merchants' Bank* v. *Pennsylvania,* 167 U. S. 461, 464.

Second. It is settled beyond the admissibility of further inquiry that the equal protection clause of the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415. And "the power of the state to classify for purposes of taxation is

of wide range and flexibility . . ." *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37. But the classification " must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia, supra; Air-Way Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240. The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation? "*Mere* difference is not enough . . ." *Louisville Gas Co.* v. *Coleman, supra; Frost* v. *Corporation Commission,* 278 U. S. 515, 522.

The question depends here upon whether the income taxed and the income exempted from taxation reasonably can be assigned to different classes. As the Supreme Court of Vermont itself has pointed out, in all such cases it must appear not only that a classification has been made, but that it is one based on some reasonable ground. *State* v. *Hoyt,* 71 Vt. 59, 64–66; 42 Atl. 973. The decision in that case held invalid a state statute the effect of which was to impose a tax upon sales of goods manufactured in the state, while leaving sales of goods manufactured in other states free from taxation. It was held that the classification could not be based on any difference in the goods, because there was none; nor on the fact that they were made in different states, for that bore no just and proper relation to the classification, but was purely arbitrary; nor on the difference of residence of the manufacturers, for the same reason. And clearly the view of the court was that

a like discrimination against the products of another state would have been open to the same objections.

Let us apply these principles to the statute creating the exemption now in question. Upon the face of the statute the classification is based upon a difference having no substantial or fair relation to the object of the act—which, so far as this question is concerned, simply is to secure revenue. The statute itself suggests no other public purpose which will be served by the exemption. The language creating the exemption is "(a) Interest received on account of money loaned within this state, at a rate of interest not exceeding five per cent per annum . . ." The naked and complete test afforded by the statute is that the money shall be loaned within the state. What is to be done with the money, whether it is to be invested in the state or elsewhere—indeed, whether it is to be devoted to any useful purpose—are matters having nothing to do with the imposition of the tax or the exemption therefrom. If the statute had provided that interest on account of money so loaned when invested in property having a situs within the state shall be free from the tax, a different question as to classification might be presented. In that event the actual wealth of the state would be increased, and in addition, and as a consequence, opportunity to obtain additional revenue through taxation would result. But this exempting provision, we repeat, contains neither this qualification nor any other. Its terms are positive and all-inclusive and will be fully satisfied whenever it appears that money has been loaned within the state. The Supreme Court of Vermont has not read into the statute a qualification that loans shall be deemed to be made within the state only if their proceeds be invested in the state. Obviously this court cannot so read the provision, for that would be to amend and not to construe it. We are unable to find in the provision any public purpose which can be subserved by

making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan.

It is suggested, however, that, aside from anything in the statute, money loaned within the state generally will be invested therein. But there is nothing in the record to indicate that this will result; and for aught this court can know judicially, there is no warrant for saying either that it will or will not result. All we can say is that money so loaned *may be* invested in Vermont, or *may be* invested in some other state—for example, in property having a situs in New York—or may not be invested at all. If there be circumstances which will justify the exemption of any income derived from money loaned within the state while taxing the income from that loaned outside, it is for the state legislature to point them out and limit the exemption accordingly. To import any such circumstances into the present situation is to indulge in pure speculation. Compare *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 81.

To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only upon surmise, with nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose or to anything else beyond the mere fact that the favored loans are effected within the state. In principle, the classification is quite as arbitrary as that dealt with by this court in *Louisville Gas Co.* v. *Coleman, supra,* pp. 38–39. If the exemption had been made to depend upon the *time* when the loan was made, instead of upon the *locality* where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted, although a minute inspection of the field of

possibilities might persuade an anxious mind, bent on sustaining the tax at all events, to the view that in some far-fetched way a loan made on Monday would further some public purpose, other than that of revenue, which a loan made on another day of the week would not.

It is said that an exemption which may have for its aim the advancement of local interests can hardly be condemned under a Constitution which for a century has known a protective tariff. Considering the suggestion categorically, a pertinent answer to it is that while the general government may, for the benefit of national interests, exact impost duties which discriminate against foreign interests, one state, even for the advancement of its own interests, is not permitted to exact taxes discriminating against goods brought from a sister state. See, for example, *Welton* v. *Missouri,* 91 U. S. 275; cf. *Burnet* v. *Brooks,* 288 U. S. 378, 401, *et seq.*

But, assuming that the State of Vermont is benefited by the exemption, the complete answer is that appellant is a citizen of the United States; and, quite apart from the equal protection of the laws clause, the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment. "For all the great purposes for which the Federal government was formed," this court has said, "we are one people, with one common country." *Crandall* v. *Nevada,* 6 Wall. 35, 48–49. As citizens of the United States we are members of a single great community consisting of all the states united and not of distinct communities consisting of the states severally. No citizen of the United States is an alien in any state of the Union; and the very status of national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the

United States. This fact is obvious and vital and no elaboration is required to establish it.

Section 2 of Article IV of the Constitution contains the provision, " The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Fourteenth Amendment, § 1, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . ."

Thus, the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And while the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship " paramount and dominant " instead of " derivative and dependent " upon state citizenship.[3] " In reviewing the subject," Chief Justice White said in the *Selective Draft Law Cases,* 245 U. S. 366, 377, 388–389, " we have hitherto considered it as it has been argued, from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that [the Fourteenth] Amendment for the purpose of pointing out, as has been frequently done in the past, how completely it broadened the national scope of the Government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate

[3] In *United States* v. *Hall,* Case No. 15,282, 26 Fed. Cas. 79, 81, Judge Woods said: " By the original constitution citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. . . . and citizenship in a state is a result of citizenship in the United States."

and derivative, and therefore, operating as it does upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit were otherwise not so clearly made manifest."

The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so. This is pointed out by Mr. Justice Bradley in the *Slaughter House Case,* 1 Woods 21, 28:

"The 'privileges and immunities' secured by the original constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against the citizens of other states.

"But the fourteenth amendment prohibits any state from abridging the privileges or immunities of citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired."

The same distinction is made by this court in *Bradwell* v. *State,* 16 Wall. 130, 138, where, speaking of the privileges and immunities provision of the Fourth Article, it was said:

"The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation." [4]

[4] This does not mean that a state has unlimited power by law to abridge the privileges of its own citizens. It only means that in such case we must look elsewhere than to the language of the privileges and immunities clause of the Fourth Article of the Constitution for the constitutional infirmity of the statute, if it have any.

But the court added that with respect to the Fourteenth Amendment " there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the Fourteenth Amendment to prohibit a State from abridging them, . . . We agree . . . that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge." The governments of the United States and of each of the several states are distinct from one another. The rights of a citizen under one may be quite different from those which he has under the other. To each he owes an allegiance; and, in turn, he is entitled to the protection of each in respect of such rights as fall within its jurisdiction. *United States* v. *Cruikshank,* 92 U. S. 542, 549.

Under the Fourteenth Amendment, therefore, the simple inquiry is whether the privilege claimed is one which arises in virtue of national citizenship. If the privilege be of that character, no state can abridge it. No attempt has been made by the courts comprehensively to define or enumerate the privileges and immunities which the Fourteenth Amendment thus protects.[5] Among those privileges, however, undoubtedly is the right to pass freely from one State to another. *Crandall* v. *Nevada, supra; Williams* v. *Fears,* 179 U. S. 270, 274. And that privilege, obviously, is as immune from abridgement by the state from which the citizen departs as it is from abridgement by the state which he seeks to enter. This results from the essential character of national citizenship. Cf. *In re Kemmler,* 136 U. S. 436, 448; *Duncan* v. *Missouri,* 152 U. S. 377, 382; *In re Quarles and Butler,*

[5] For examples, however, see *Corfield* v. *Coryell,* 4 Wash. C. C. 371, 380, 381; *Slaughter-House Cases,* 16 Wall. 36, 79–80; *Twining* v. *New Jersey,* 211 U. S. 78, 97; *Ward* v. *Maryland,* 12 Wall. 418, 430; *Blake* v. *McClung,* 172 U. S. 239, 248, 252; *United States* v. *Wheeler,* 254 U. S. 281; *Paul* v. *Virginia,* 8 Wall. 168, 180.

158 U. S. 532, 536; *United States* v. *Cruikshank, supra,* at p. 552.

In the *Crandall* case, while the court at least gravely doubted whether a capitation tax imposed by the State of Nevada upon persons leaving the state by railroad or stagecoach violated the commerce clause (p. 43), it was distinctly held that the tax did affect the rights of citizens under the federal government so as to invalidate the act imposing the tax. The doubt as to the first point has been resolved in later cases against the power of the state (*Helson and Randolph* v. *Kentucky,* 279 U. S. 245, 251); but the ruling on the second point has never been doubted and was definitely approved in the *Slaughter-House Cases,* 16 Wall. 36, 79, and the right described in the *Crandall* case placed among the partially enumerated privileges and immunities "which owe their existence to the Federal government, its National character, its Constitution, or its laws." The opinions in both cases were delivered by the same eminent justice; and it is not without significance that while the first opinion was delivered before the adoption of the Fourteenth Amendment, the second one was delivered afterwards and with direct reference to the privileges and immunities clause of that amendment. The fact that we have since decided, and should now hold, that the Nevada act was in violation of the commerce clause, in no way detracts from the view that it also violated the privileges and immunities clause; but simply demonstrates that the same act of state legislation may contravene more than one provision of the federal Constitution.

The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any state other than that in which the citizen resides is a privilege equally attributable to his national citizenship. A state law prohibiting the exercise of any of these rights in another state would,

therefore, be invalid under the Fourteenth Amendment. The imposition by one state of a discriminating tax upon a citizen resident in another state for trading in the territory of the former has been held invalid. *Ward* v. *Maryland,* 12 Wall. 418, 430. And, of course, conversely, a tax of that description is likewise void if imposed by one state upon a resident citizen of the United States for trading or doing business in the territory of another state. And such a tax is not justified because the taxing state will thereby help its domestic business.

The purpose of the pertinent clause in the Fourth Article was to require each state to accord equality of treatment to the citizens of other states in respect of the privileges and immunities of state citizenship. It has always been so interpreted. One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left by that article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states. A provision which thus extended and completed the shield of national protection between the citizen and hostile and discriminating state legislation cannot be lightly dismissed as a mere duplication, or of subordinate or no value, or as an almost-forgotten clause of the Constitution.

Reference has been made to numerous cases in which this court has rejected or ignored specific claims under the privileges and immunities clause; but since none of them relates to state legislation even remotely resembling the Vermont law here challenged, their collection and citation is without useful result, unless, as it seems to be thought, these numerous unsuccessful efforts to give the clause applications which fall outside its meaning show or tend to show that the clause itself has become a dead

letter. Such a conclusion is, of course, inadmissible; for as we have already said, referring to the *Bradwell* case, there *are* privileges and immunities which belong to a citizen of the United States *as such;* otherwise it would be nonsense to prohibit a state from abridging them. Some of these privileges and immunities we have already pointed out; others are enumerated in the cases cited under note 5.

To these illustrations we may add another, which here is peculiarly pertinent. The business of insurance has grown to vast proportions. Insurance companies issuing policies are found in every state; and the activities of the larger companies overflow state lines and extend into every part of the country. But insurance is not commerce; and the right of a citizen to take out a policy in one state, insuring property in another where he resides, cannot be protected under the commerce clause. National protection, when appropriate, must be found in the Fourteenth Amendment. It well cannot be doubted that a citizen of the United States, residing and having property in Vermont, exercises a privilege of national citizenship when he negotiates and takes out in another state a policy insuring that property, or takes out in another state a policy insuring his life. There may be very cogent reasons, resting in the strength of the company, terms of the policy, and otherwise, making it desirable that he should do so. And it well cannot be doubted that legislation of one state denying the privilege or taxing the transaction when it occurs in another state, while leaving the transaction wholly free from taxation when it takes place in the former state, would abridge that privilege of citizenship. It would be no answer to say that thereby the former state was building up her local insurance companies and adding to the wealth of the state. Nor is it any answer to say that the citizen may resort to other clauses of the Fourteenth Amendment which will afford

protection. The right of a citizen of the United States resident in one state to contract in another may be a liberty safeguarded by the due process of law clause, and at the same time, none the less, a privilege protected by the privileges and immunities clause of the Fourteenth Amendment. In such case he may invoke either or both. This seems to be recognized in *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589–592, where the court evidently thought that under circumstances not unlike those just suggested the words "liberty" and "privilege" were interchangeable terms.

It follows from what has been said that when a citizen of the United States residing in Vermont goes into New Hampshire, he does not enter foreign territory, but passes from one field into another field of the same national domain. When he trades, buys or sells, contracts or negotiates across the state line, when he loans money, or takes out insurance in New Hampshire—whether in doing so he remains in Vermont or not—he exercises rights of national citizenship which the law of neither state can abridge without coming into conflict with the supreme authority of the federal Constitution.

The statute, as here applied, says that if a citizen resident in Vermont loan his money at 5% or less in another state, he must pay a tax upon the income; but if he loan money in Vermont at the same rate, no tax whatever shall be imposed. The power to tax income here asserted by Vermont is, in the final analysis, the power to tax so heavily as to preclude loans outside the state altogether. It reasonably is not open to doubt that the discriminatory tax here imposed abridges the privilege of a citizen of the United States to loan his money and make contracts with respect thereto in any part of the United States.

The tax on dividends, already discussed and upheld, rests in a different situation. Although dividends from outside investments are taxed, and those from state in-

vestments in terms are exempt, they are, as already appears, in substance and effect treated alike—the one by a tax falling directly upon the income of the individual stockholders, and the other falling indirectly but no less definitely upon that income, in the form of a tax which is first imposed upon the corporation as a franchise tax measured by income, but the burden of which ultimately is borne by the stockholders. The effect is the same as though the tax were imposed generally upon corporate dividends without exception or discrimination. *Travellers' Insurance Co.* v. *Connecticut,* 185 U. S. 364, 369 *et seq.* The same would be true of the tax on income from loans, if it had been imposed in respect of all loans wherever made or if there had been some form of equalizing tax which would have compensated for the burden cast upon loans made in other states. But such is not the case. Income from loans made outside the state is taxed directly, while income from loans made within the state is not taxed directly or in any indirect way so as to equalize the burden. *Woodruff* v. *Parham,* 8 Wall. 123, 140, dealt with a sales tax imposed upon all sales, whether made by a citizen of the state where the tax was imposed or a citizen of another state; and whether the goods sold were the product of the state enacting the law or of some other state. This court upheld the tax upon the ground that it did not discriminate against the products of other states or affect the privileges or immunities of their citizens; but the court clearly stated that if it had done so it would be an infringement of the provisions of the Constitution relating to those subjects. The principle of that case is applicable here and has the effect of sustaining the tax in respect of dividends and condemning the tax in respect of loans. Compare *Travis* v. *Yale & Towne Mfg. Co., supra.*

Third. The statute, so far as it applies to appellant, provides that if the income taxed be derived wholly from ownership of or interest in interest-bearing securities, there shall be allowed an exemption of $800. If the in-

come be derived from other enumerated sources, an exemption is allowed of $2,000 against the "aggregate net income."

It is manifest that if the legislation had provided that where the taxpayer shall have income from both of these general sources he shall not be entitled to both exemptions, the provision would have been open to no constitutional objection. Such legislation might properly permit him, in that contingency, to select which of the exemptions he will take; or, on the other hand, might properly specify which of the two exemptions shall be accorded him. In effect, though not in terms, it is the latter alternative which the statute adopts. In terms, the statute provides that if the taxpayer receive any income other than that derived from interest-bearing securities, the personal exemption applicable to the latter class of income shall not be allowed. But the right to the $2,000 exemption allowed in respect of class A income remains unaffected. The taxpayer who receives both classes of income, while thus compelled to forego the smaller exemption, is accorded the larger one; and it is impossible reasonably to find in this situation anything arbitrary or capricious. It is true that during the taxable year in question appellant had no net income because his gross income derived from salaries, etc., amounting to about $70,000, was entirely absorbed by allowable deductions; but this was an incident of the particular year in question and might never happen again. He failed to obtain the advantage of the exemption not because of any hostile statutory intent or hostile enforcement of the tax, but because of the collateral circumstance, peculiar, perhaps, to him alone and to the taxable year in question, that his entire gross income was absorbed by deductions, allowed by the statute as a matter of grace as is the exemption itself, so that nothing remained from which the amount of the exemption or any part of it could be subtracted.

The question of equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers. "And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell* v. *Bugbee,* 250 U. S. 525, 543. "The operation of a general rule will seldom be the same for every one. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 102. Cf. *Packard* v. *Banton,* 264 U. S. 140, 145; *Gant* v. *Oklahoma City,* 289 U. S. 98, 102; *Storaasli* v. *Minnesota,* 283 U. S. 57, 62.

The general classification—namely, that the right to a partial exemption from a tax upon one class of income will depend upon whether the taxpayer is in receipt of income of another class with respect to which a different exemption applies—does not seem to us to be open to the objection that it is arbitrary or capricious, simply because, like any other general rule of taxation, its administration may involve incidental instances of inequality.

We conclude that the taxing act is valid in respect of the first and third points which we have discussed, but invalid in respect of the second.

Reversed and remanded for further proceedings not inconsistent with the foregoing opinion.

MR. JUSTICE STONE, dissenting.

I think that the exemption, from the tax, of net income from money loaned within the state at not more than 5%, like the exemption of income from dividends of

corporations earned within the state, does not deny equal protection or infringe any privilege or immunity of citizens of the United States, and that the judgment should be affirmed in its entirety. Unless the constitutional validity of the exemptions is to turn upon the ground that we approve laws enacted to avoid taxing the same economic interest twice, but disapprove those to encourage residents to invest their funds at home, it would seem that the considerations which have led to upholding the one exemption would not admit of condemning the other. See *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 127.

1. It is not denied that the effect of both exemptions is to place a burden on income derived from sources or investments made without the state which they do not place on income derived from like sources or investments made within it. But that affords no ground for saying that either is invalid. The equal protection clause does not forbid inequalities in state taxation. A state may select the objects to be taxed and selection, which is but the converse of exemption, involves the imposition of a tax burden on some which is not placed on others. As this Court has repeatedly held, inequalities resulting from the singling out of one particular class for taxation or exemption, regardless of the reason for the choice, or even if there is no discernible reason, are not to be pronounced invalid where there is no clear indication that the purpose or effect is a hostile or oppressive discrimination against particular persons or classes. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Board of Education* v. *Illinois,* 203 U. S. 553; *Beers* v. *Glynn,* 211 U. S. 477; *Southwestern Oil Co.* v. *Texas, supra; Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276; *Concordia Fire Insurance Co.* v. *Illinois,* 292 U. S. 535.

The end sought by the classification is of significance in passing upon the constitutionality of the tax only insofar as it serves to show that the discrimination is not invidious. If it appears or may fairly be assumed that it is for the purpose of promoting a permissible public aim, it cannot be condemned because one class must pay a tax which another does not. Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one, *American Sugar Refining Co.* v. *Louisiana, supra; Heisler* v. *Thomas Colliery Co., supra; Aero Mayflower Transit Co.* v. *Georgia Commission,* 295 U. S. 285, or to restrict or suppress the other, *Magnano Co.* v. *Hamilton,* 292 U. S. 40; *Fox* v. *Standard Oil Co.,* 294 U. S. 87; *Quong Wing* v. *Kirkendall, supra; Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304; *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48. But it is not necessary to go so far to support the present exemption. There is no serious contention that its purpose or effect is to suppress the lending of money without the state or to injure appellant or his fellow residents of Vermont who may prefer to invest their funds elsewhere. Nor can it be said that the exemption was not granted in furtherance of a permissible state policy, which was the legislative objective rather than an invidious discrimination against appellant and others similarly situated.

It seems to be conceded that if the statute had placed upon the tax gatherers the burden of ascertaining whether money loaned within the state is invested in property there, and had limited the exemption to money so loaned and invested, the tax would be sustained because of the benefit which would result from the increase of wealth in the state and the enlarged opportunity to obtain additional revenue. The attack is thus narrowed to the single objection that there are exempted loans, some of which, although made within the state, are or may be withdrawn and used elsewhere. It is assumed that money thus loaned

and withdrawn can be of no possible benefit to the state, and it is declared that since such transactions may occur the Court cannot determine whether the exemption will have any beneficent effect and that it is therefore invalid.

But there are benefits other than the increase of its taxable wealth which a state is at liberty to stimulate by its taxing policy, and exemptions have been sustained on the broader ground that they foster some form of domestic industry. *New York* v. *Roberts,* 171 U. S. 658; *Magnano Co.* v. *Hamilton, supra; Fox* v. *Standard Oil Co., supra; Aero Mayflower Transit Co.* v. *Georgia Commission, supra.* If Vermont chooses to encourage, by tax exemption, loans at favorable rates of interest within the state, because it believes that local interests will be benefited, it can hardly be said for that reason to be contravening a constitution that has known a protective tariff for more than one hundred years. See *Alaska Fish Co.* v. *Smith, supra,* 48; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 347. It is true that a state may not lay taxes on imports or burden interstate commerce, *Welton* v. *Missouri,* 91 U. S. 275, but it is too late for this Court to declare that a state may not favor domestic interests by granting exemptions in the exercise of its taxing power.

It is not for us to say that the Vermont legislature was unmindful of these broader advantages, or to declare that the presence within the state of investment funds offered at 5% or less to borrowers there, including those who are carrying on the business and industry of the state, is not beneficial; or that if any loans made within the state are used elsewhere they are or ever would be more than negligible in amount; or if they were that they could not have a favorable effect on interest rates within the state, which is a matter of state concern. When the Vermont legislature adopted the present exemption, it had before it the reports of two committees specially appointed to inves-

tigate the tax system of the state, which clearly indicate their judgment, based on a study of conditions in the state, that the existing system was driving investment capital from the state or into secured and non-commercial loans, and that a tax exemption embracing both secured and commercial loans would tend to increase the supply of investment capital for both and to reduce interest rates in the state.[1] This Court has no basis for saying that those committees were wrong and no authority to say it. The state supreme court has stated in the present case that the legislature did have in mind these broader advantages, for it rested its decision on the ground that the exemption was made "in the interest of thrift and state development" and "for the assistance of the agricultural and industrial interests of the state."

If in the face of so much which is persuasive of the legitimate purpose and effect of this legislation, we are to declare that we cannot say whether the benefits intended either will or will not result, it does not follow that the Vermont legislature is similarly uninformed. We must assume that it is not, unless we are to discard the salutary principle of decision, that, out of a decent respect to an independent branch of the government, legislative acts must be taken to be based on facts which support their constitutional validity unless the contrary reasonably ap-

[1] The committee appointed in 1900 by the Governor of Vermont to investigate double taxation and to recommend measures for its relief found that the existing taxing system was driving capital from the state or into tax exempt savings banks, and suggested an exemption of loans secured by property returned for taxation in the state. Double Taxation in Vermont; Report of Special Committee Appointed to Report a Measure for its Relief to the Legislature of 1900, pp. 4, 15. In 1908 a similar committee recognized the same evils but did not favor the exemption of secured loans alone, because it would increase interest rates on unsecured loans and cause a dearth of commercial credits. Vermont—Commission on Taxation—Report 1908, pp. 43 ff.

pears. This Court, it is true, has held discriminations invalid where, upon the facts disclosed by the record or within the range of judicial notice, it has felt able to say that there could be no state of facts which could rationally support them. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Heiner* v. *Donnan,* 285 U. S. 312; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32; *Liggett Co.* v. *Lee,* 288 U. S. 517. But in no case has it rendered such a judgment where it has declared that it is unable to say that consequences which would justify the discrimination will not result. *Erb* v. *Morasch,* 177 U. S. 584, 586; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 158; *Stebbins* v. *Riley,* 268 U. S. 137, 143; *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407, 413, 414; *Fort Smith Light & Traction Co.* v. *Paving District No. 16,* 274 U. S. 387, 391, 392; *Clarke* v. *Deckebach,* 274 U. S. 392; *Silver* v. *Silver,* 280 U. S. 117, 123; *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 257, 258; *Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537–541; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 158; *Boston & Maine R. R.* v. *Armburg,* 285 U. S. 234, 240; *Lawrence* v. *State Tax Comm'n, supra,* 283; *Concordia Fire Insurance Co.* v. *Illinois, supra,* 547, 548; *Metropolitan Casualty Insurance Co.* v. *Brownell,* 292 U. S. 620; *Fox* v. *Standard Oil Co., supra.* Unless, as we profess not to do, *Standard Oil Co.* v. *City of Marysville,* 279 U. S. 582, we are to sit as a super-legislature, or as triers of the facts on which a legislature is to say what shall and what shall not be taxed, we are not free to say that the exemption will not induce residents to offer to lend their funds within the state and at lower interest rates than they otherwise would, or that opportunities thus afforded will not be availed of by borrowers requiring funds for carrying on the commerce and industry of the state.

Even if we are to assume, in the absence of any actual knowledge, that money loaned in the state at favorable

rates would not benefit it if used elsewhere, and further that in fact some money is so loaned and used, there is no discernible reason why those circumstances should be deemed to invalidate the tax and none is stated by the Court. It is irrelevant that the state, which has selected domestic loans for exemption in furtherance of a state policy, has not excluded from the exemption every transaction which conceivably might not advance its purpose. Whether the legislative object is completely achieved is of no concern to this Court, once it appears that the exemption is made for a permissible end and bears some reasonable relation to that end. Purpose or motive of the selection of the objects of taxation and exemption is material only so far as it is needful to ascertain whether the discrimination is invidious. If the choice is not condemned for that reason, it has never been held that an exemption must fail because it may benefit some who do not advance the legislative purpose. A classification for a permissible end is not to be condemned because it operates to prohibit transactions in themselves harmless, or fails to reach others which are harmful. *Powell* v. *Pennsylvania,* 127 U. S. 678; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Jacob Ruppert, Inc.* v. *Caffey,* 251 U. S. 264; *Miller* v. *Wilson,* 236 U. S. 373; *Hawley* v. *Walker,* 232 U. S. 718.

All taxes must of necessity be levied by general rules capable of practical administration. In drawing the line between the taxed and the untaxed the equal protection clause does not command the impossible or the impractical. Unless the line which the state draws is so wide of the mark as palpably to have no reasonable relation to the legitimate end, it is not for the judicial power to reject it and say that another must be substituted. *Citizens' Telephone Co.* v. *Fuller, supra,* 329; *Miller* v. *Wilson,* 236 U. S. 373, 384; *Clark* v. *Titusville,* 184 U. S. 329, 331; *Metropolis Theatre Co.* v. *Chicago,* 228 U. S.

61, 69, 70; see also *Salomon* v. *Tax Commission,* 278 U. S. 484; *McCray* v. *United States,* 195 U. S. 27; *Quong Wing* v. *Kirkendall, supra; Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237.

As the purpose of the exemption appears to be to encourage the lending of money within Vermont by its residents, at low rates of interest, and as it appears reasonably calculated to have that effect, and as we cannot say that such loans will not be of benefit to the state by tending to establish the interest rate at 5% or less, and by stimulating loans to borrowers for the purpose of carrying on business and industry within the state, the conclusion seems inescapable that the equal protection clause does not forbid it.

2. Feeble indeed is an attack on a statute as denying equal protection which can gain any support from the almost forgotten privileges and immunities clause of the Fourteenth Amendment. The notion that that clause could have application to any but the privileges and immunities peculiar to citizenship of the United States, as distinguished from those of citizens of states, has long since been rejected. *Slaughter-House Cases,* 16 Wall. 36. It created no new privileges and immunities of United States citizenship, *Bartemeyer* v. *Iowa,* 18 Wall. 129, 133, and, as they are derived exclusively from the Constitution and laws enacted under it, the states were powerless to abridge them before the adoption of the Fourteenth Amendment as well as after. See *Crandall* v. *Nevada,* 6 Wall. 35.

Before the Amendment the privilege of passing from state to state for the purpose of approaching the seat of the national government, of transacting business with it, and of gaining access to its courts, its public offices and its ports, was declared in *Crandall* v. *Nevada, supra,* 44, to be a right of national citizenship which could be exercised independently of the will of the state. Upon this

ground was placed the decision in that case that a state capitation tax on passengers transported out of the state by railroad or stage coach infringed the Constitution. No one could doubt that if the decision had been made at any time after *Railroad Co.* v. *Maryland,* 21 Wall. 456, 472 (1874), and until the present moment, it would have been rested on the commerce clause. This Court has many times pointed out that movements of persons across state boundaries are a part of interstate commerce, subject to the regulation and entitled to the protection of the national government under the commerce clause. *Caminetti* v. *United States,* 242 U. S. 470; *Hoke* v. *United States,* 227 U. S. 308; *Mayor of Vidalia* v. *McNeely,* 274 U. S. 676; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; cf. *Passenger Cases,* 7 How. 283. And it has specifically pointed out that *Crandall* v. *Nevada, supra,* is overruled so far as it referred the protection of such commerce to the privileges and immunities clause rather than to the commerce clause. *Helson and Randolph* v. *Kentucky,* 279 U. S. 245, 251.

The privileges and immunities clause has consistently been construed as protecting only interests, growing out of the relationship between the citizen and the national government, created by the Constitution and federal laws. *In re Kemmler,* 136 U. S. 436, 448; *McPherson* v. *Blacker,* 146 U. S. 1, 38; *Giozza* v. *Tiernan,* 148 U. S. 657, 661; *Duncan* v. *Missouri,* 152 U. S. 377, 382. Appeals to this Court to extend the clause beyond these limitations have uniformly been rejected, and even those basic privileges and immunities secured against federal infringement by the first eight amendments have been held not to be protected from state action by the privileges and immunities clause. *Walker* v. *Sauvinet,* 92 U. S. 90; *Presser* v. *Illinois,* 116 U. S. 252; *O'Neil* v. *Vermont,* 144 U. S. 323; *Maxwell* v. *Dow,* 176 U. S. 581; *Twining* v. *New Jersey,* 211 U. S. 78; cf. *Hurtado* v. *California,* 110 U. S. 516; *West* v. *Lou-*

isiana, 194 U. S. 258. The protection and control of intercourse between the states, not carried on in pursuance of the relationship between the citizen and the national government, has been left to the interstate commerce clause, to the due process and equal protection clauses of the Fourteenth Amendment, and to Art. IV, § 2, guaranteeing to the citizens of each state the privileges and immunities of citizens in the several states. See *Williams* v. *Fears,* 179 U. S. 270. In no case since the adoption of the Fourteenth Amendment has the privileges and immunities clause been held to afford any protection to movements of persons across state lines or other form of interstate transaction.

The reason for this reluctance to enlarge the scope of the clause has been well understood since the decision of the *Slaughter-House Cases, supra.* If its restraint upon state action were extended more than is needful to protect relationships between the citizen and the national government, and it did more than duplicate the protection of liberty and property secured to persons and citizens by the other provisions of the Constitution, it would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the *Slaughter-House Cases, supra,* with the decision against the enlargement. Since the adoption of the Fourteenth Amendment at least forty-four cases [2] have been

[2] *Slaughter-House Cases,* 16 Wall. 36; *Bradwell* v. *State,* 16 Wall. 130; *Bartemeyer* v. *Iowa,* 18 Wall. 129; *Minor* v. *Happersett,* 21 Wall. 162; *Walker* v. *Sauvinet,* 92 U. S. 90; *Kirtland* v. *Hotchkiss,* 100 U. S. 491; *Presser* v. *Illinois,* 116 U. S. 252; *Mahon* v. *Justice,* 127 U. S. 700; *In re Kemmler,* 136 U. S. 436; *Crowley* v. *Christensen,* 137 U. S. 86; *McElvaine* v. *Brush,* 142 U. S. 155; *McPherson* v. *Blacker,* 146 U. S. 1; *Giozza* v. *Tiernan,* 148 U. S. 657; *Duncan* v. *Missouri,* 152 U. S. 377; *Miller* v. *Texas,* 153 U. S. 535; *In re Lockwood,* 154 U. S. 116; *Iowa Central Ry.* v. *Iowa,* 160 U. S. 389; *Plessy*

brought to this Court in which state statutes have been assailed as infringements of the privileges and immunities clause. Until today none has held that state legislation infringed that clause.

If its sweep were now to be broadened to include protection of every transaction across state lines, regardless of its connection with any relationship between the citizen and the national government, a step would be taken, the gravity of which might well give us concern. But it is necessary to go much further before the present tax can be condemned. If protection of the freedom of the citizen to pass from state to state were the object of our solicitude, that privilege is adequately protected by the commerce clause, even though the purpose of his going be to effect insurance or transact any other kind of business which is in itself not commerce. But protection of the citizen's freedom of movement, whether by the privileges and immunities clause or by the commerce clause, will afford appellant no relief from the present tax. The record does not show that he was ever outside the State of Vermont and for aught that appears he acquired his extra-state investments, which are in the form of negoti-

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v. *Ferguson*, 163 U. S. 537; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557; *Cumming* v. *Board of Education*, 175 U. S. 528; *Maxwell* v. *Dow*, 176 U. S. 581; *Williams* v. *Fears*, 179 U. S. 270; *Orr* v. *Gilman*, 183 U. S. 278; *Cox* v. *Texas*, 202 U. S. 446; *Board of Education* v. *Illinois*, 203 U. S. 553; *Ballard* v. *Hunter*, 204 U. S. 241; *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359; *Halter* v. *Nebraska*, 205 U. S. 34; *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 73; *Twining* v. *New Jersey*, 211 U. S. 78; *Western Union* v. *Commercial Milling Co.*, 218 U. S. 406; *Missouri Pacific Ry. Co.* v. *Castle*, 224 U. S. 541; *Graham* v. *West Virginia*, 224 U. S. 616; *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112; *Rosenthal* v. *New York*, 226 U. S. 260; *Waugh* v. *Board of Trustees*, 237 U. S. 589; *Porter* v. *Wilson*, 239 U. S. 170; *Crane* v. *Campbell*, 245 U. S. 304; *Armour & Co.* v. *Virginia*, 246 U. S. 1; *Omaechevarria* v. *Idaho*, 246 U. S. 343; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Ownbey* v. *Morgan*, 256 U. S. 94; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530; *Hamilton* v. *Regents*, 293 U. S. 245.

able corporate securities, by gift or purchase in Vermont. Nor does it appear that the physical securities or payments of income of which appellant has had the benefit have crossed state lines. He can be saved from the tax only by the extension of the immunity to his income merely because the property from which it has been derived, or the corporation paying it, is located in another state.

Such is the contention now made: that the privilege of acquiring, owning and receiving income from investments without the state is a privilege of federal citizenship. And the suggestion is that the privilege is infringed by taxing this income just as the commerce clause is infringed by state taxation burdening the privilege of carrying on commerce across state lines. In any case the privileges and immunities clause is said to be infringed by taxing this income at a different rate than income from investments made within the state.

The novel application thus given to the clause, and the arguments used to support it, leave one in doubt whether it is thought to preclude all differences of taxation of the two classes of income, or only to forbid such inequality as is in some sense arbitrary and unreasonable. If the former, the clause becomes an inexhaustible source of immunities, incalculable in their benefit to taxpayers and in their harm to local government, by imposing on the states the heavy burden of an exact equality of taxation wherever transactions across state lines may be involved. If the latter, it would seem to add nothing to the guarantee of the equal protection clause, which extends to all "persons," including citizens of the United States. In that case discourse upon the privileges and immunities clause would appear to be a gratuitous labor of supererogation.

If the privilege of making investments without the state is one protected by the privileges and immunities clause

and a tax upon the income derived from them is analogous to a tax upon the privilege of carrying on interstate commerce, we must not only accept the view that the privilege is infringed by the present tax, but it would follow that any taxation of the income is forbidden. The answer is, of course, that a state tax on net income derived from interstate commerce has never been regarded as a burden on commerce or as an infringement of the commerce clause. See *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37; cf. *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Wagner* v. *Covington,* 251 U. S. 95. Far less could it be thought that a tax on property, or income from it, is an interference with commerce because the property had at some time been or might some time become the subject of such commerce. Cf. *Heisler* v. *Thomas Colliery Co., supra.* In applying the privileges and immunities clause, as now interpreted, no ground is suggested, or well could be, for regarding a tax on income from investments without the state as infringing the privilege of carrying on interstate transactions, any more than a tax on net income derived from interstate commerce or from property which had at some time moved in interstate commerce infringes the commerce clause.

The contention that a state tax indirectly affecting transactions carried on across state lines, not forbidden by the commerce clause or by Art. IV, § 2, can be condemned under the privileges and immunities clause, was definitely rejected by this Court in *Williams* v. *Fears, supra.* There a state occupation tax upon those engaged in hiring laborers for employment outside the state was held not to infringe the privileges and immunities clause or the equal protection clause.

So far as the objection is addressed to bare inequality of taxation affecting interstate transactions, if valid, it must be accepted as compelling equality of taxation by

the state of the citizen's residence and as well by the state into which the transaction extends. More than this, since the exercise of the privilege involves both states, it would seem to be infringed not only by an unequal tax imposed by either, but by any tax imposed at the normal rate by both.

Starting with the dubious assumption that the protection of every movement of the citizen interstate, an acknowledged subject of the commerce clause, is independently a subject of the privileges and immunities clause, the protection afforded by the latter is expanded until it affords a refuge to the citizen from taxation which has no necessary relation to his movements interstate and is in fact not shown to impose any restraint upon them. A tax immunity created avowedly for the protection of the citizen's privilege of movement from state to state is thus pressed far beyond the requirements of the interest put forward to justify it, and to a point which has never been thought needful or even desirable for the protection of the commerce of the nation. It is a transition effected only by ignoring the decision of this Court in *Williams* v. *Fears, supra.*

If mere difference in taxation is made the test of infringement, the iron rule of equality of taxation which the equal protection and due process clauses have failed to impose, see *Bell's Gap R. Co.* v. *Pennsylvania, supra,* 237, is the first fruit of this expansion of the protection of the privileges and immunities clause. To gain the benefits of its shelter the citizen has only to acquire, by a transaction wholly intrastate, an investment outside his state. I can find in the language and history of the privileges and immunities clause no warrant for such a restriction upon local government and policy. Citizens of the United States are given no privilege not to pay taxes. It would seem that a subordination of state taxing power to the

interests of the individual, of such debatable wisdom, could be justified only by a pointed command of the Constitution of plain import.

If we turn from the reasoning by which this application of the privileges and immunities clause to state taxation is supported to the decision now actually made, it seems that the clause is thought to prohibit only those inequalities in taxation which are considered to be arbitrary and unreasonable. The exemption of dividends derived from corporate business carried on within the state, and the taxation of similar dividends from without the state, is held not to be an infringement of the clause. Exemption of income from investments in property within the state and taxation of like income from without the state is thought to be valid. But the privileges and immunities clause, it is declared, forbids any difference in the taxation of income from investment made within the state and income from investment made without, a conclusion which can only be attributed to the belief that this discrimination, as distinguished from the others, is arbitrary and unreasonable.

We are thus returned to the point of beginning, to a discussion of the question whether the exemption in the present tax is so unreasonable, so without support of a permissible state policy, as to infringe constitutional limitations. If the exemption does not merit condemnation as a denial of the equal protection which the Fourteenth Amendment extends to every person, nothing can be added to the vehemence or effectiveness of the denunciation by invoking the command of the privileges and immunities clause.

The judgment should be affirmed.

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

UNITED STATES *v.* HALSEY, STUART & CO., INC. ET AL.

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

No. 109. Argued December 11, 1935.—Decided December 23, 1935.

1. A motion to quash, challenging the sufficiency of an indictment in the light of a bill of particulars, *held* not a special plea in bar, within the meaning of the Criminal Appeals Act. P. 452.
2. A judgment sustaining such a motion is not reviewable under the Act, when it does not appear that it was based upon the invalidity or construction of the statute upon which the indictment was founded. *Id.*

Appeal dismissed.

APPEAL from an order quashing an indictment charging fraudulent use of the mails. See 4 F. Supp. 662.

Mr. Walter Brower, with whom *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. Lee A. Jackson* and *W. Marvin Smith* were on the brief, for the United States.

Mr. John W. Davis, with whom *Mr. Theodore W. Brazeau* was on the brief, for appellees.

PER CURIAM.

Defendants were indicted in the United States District Court for the Eastern District of Wisconsin for violations of § 215 of the Criminal Code, relating to fraudulent use of the mails. 18 U. S. C. 338. Under order of the court the Government filed a bill of particulars. 4 F. Supp. 662. Defendants then moved to quash the indictment. The motion was based upon the indictment, the bill of particulars, and an affidavit of defendants' counsel. The affidavit was an argumentative review of the bill of

particulars for the purpose of showing that in view of its statements the Government would be "unable to make a case." The court granted the motion to quash, and the Government brought this appeal under the Criminal Appeals Act. 18 U. S. C. 682. Defendants' motion to dismiss the appeal was postponed to the hearing on the merits.

The District Judge rendered no opinion, but certified that his "decision and order quashing the indictment herein were not based in any respect upon the invalidity or construction of section 215 of the Criminal Code upon which the indictment in said cause is founded."

We find no basis for the contention that defendants' motion to quash was in substance a "special plea in bar" within the meaning of the Criminal Appeals Act. See *United States* v. *Storrs,* 272 U. S. 652, 654; *United States* v. *Murdock,* 284 U. S. 141, 147. The motion and the affidavit in its support challenged the sufficiency of the indictment in the light of the bill of particulars. As it does not appear that the decision of the District Judge was based upon the construction or invalidity of the statute upon which the indictment is founded, and as it may well be that the decision was based upon the construction of the indictment and its insufficiency as a pleading, this Court is without jurisdiction of the appeal. *United States* v. *Carter,* 231 U. S. 492, 493, 494; *United States* v. *Moist,* 231 U. S. 701, 702; *United States* v. *Colgate & Co.,* 250 U. S. 300, 301, 302; *United States* v. *Hastings, ante,* p. 188.

Dismissed.

CORPORATION COMMISSION OF OKLAHOMA ET AL. *v.* CARY, TRUSTEE.

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

No. 124. Argued December 13, 1935.—Decided December 23, 1935.

1. The Act of May 14, 1934, restricting the jurisdiction of the District Court over suits to restrain the enforcement of orders of state

administrative boards or commissions affecting unconstitutionally the rates chargeable by public utilities, is by its terms inapplicable where the existence of an effective judicial remedy in the state courts is uncertain. P. 457.

2. In granting a temporary injunction restraining enforcement of gas rates prescribed by a commission in Oklahoma which were alleged to be confiscatory, the District Court rightfully concluded that, in view of the conflicting decisions of the Supreme Court of the State, the right to a judicial review of the order in the state courts was seriously uncertain. P. 458.
3. Upon appeal from such an interlocutory decree, review by this Court is confined to the questions whether the District Court had jurisdiction and whether it abused its discretion. *Id.*
4. Adjudication of these questions cannot be influenced by a decision of the state court made after the District Court had acquired jurisdiction and entered the interlocutory decree. *Id.*

9 F. Supp. 709, affirmed.

APPEAL from an interlocutory decree of the three judge District Court restraining the enforcement of an administrative order prescribing gas rates.

Mr. Holmes Baldridge for appellants.

A plain, speedy and efficient remedy at law in the state courts is available. The Supreme Court of Oklahoma reviews judicially such orders as are here involved, and therefore the Act of May 14, 1934, depriving the lower federal courts of jurisdiction is applicable.

A plain, speedy and efficient remedy in equity is available. The State District Courts of Oklahoma have equity power judicially to review orders of the Corporation Commission.

An adequate equitable remedy is available, and therefore due process of law requirements are met, even though review by the State Supreme Court be legislative rather than judicial in character.

The phrase "in equity" is sufficiently broad to include legislative review. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428; *Porter* v. *Investors Syndicate,* 286 U. S. 461.

Legislative review by the State Supreme Court does not prevent judicial review by the Supreme Court of the United States of the legislative order of the Supreme Court. *Washington ex rel. Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510; *Sterling Refining Co.* v. *Walker,* 165 Okla. 45; *Oklahoma Cotton Ginners' Assn.* v. *State,* 51 P. (2d) 327.

This Court has, by necessary implication, held that it has power to review judicially an order of the Supreme Court of Oklahoma, acting legislatively in a public utility rate proceeding. *Oklahoma Natural Gas Co.* v. *State,* 258 U. S. 234.

A broad interpretation of congressional language will always be made in order to effectuate the congressional purpose. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290; *Louisville & N. Ry. Co.* v. *Finn,* 235 U. S. 601; *Cumberland Tel. & Tel. Co.* v. *Louisiana Pub. Serv. Comm'n,* 260 U. S. 212; *Georgia Continental Tel. Co.* v. *Georgia Pub. Serv. Comm'n,* 8 F. Supp. 434.

Messrs. Streeter B. Flynn and *Robert M. Rainey* for appellee.

This question whether the State Supreme Court acted in a judicial or legislative capacity in affirming the gas rate order involved herein was not then doubtful. Theretofore the State Supreme Court had repeatedly and consistently held that it acted legislatively in reviewing such orders; and when occasion required it had substituted rates for those established by the Commission.

The Supreme Court of the State actually established rates pursuant to the legislative power vested in it under § 23, Art. IX of the state constitution.

This Court, the United States Circuit Court of Appeals for the Tenth Circuit, and the District Courts of the United States in Oklahoma, have consistently recognized the question as settled. *Oklahoma Natural Gas Co.* v.

Russell, 261 U. S. 290; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 388; *Oklahoma Gas & Electric Co.* v. *Wilson & Co.,* 54 F. (2d) 596, 598; *Frost* v. *Corporation Comm'n,* 26 F. (2d) 508, 516, reversed on other grounds, 278 U. S. 515; *Oklahoma Gas & Electric Co. v. Corporation Comm'n,* 1 F. Supp. 966, 967; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 6 F. Supp. 893, 894, reversed on other grounds, 292 U. S. 386.

In view of many cases there can be no question but that the Supreme Court of the State, in affirming the order complained of herein, acted legislatively.

In *Oklahoma Cotton Ginners Assn.* v. *State,* 51 P. (2d) 327, the Supreme Court of the State held that its review of orders similar to the one involved herein was judicial. It recognized, however, in the opinion, that it had been reviewing similar orders legislatively in the past, but said that its right to exercise such legislative jurisdiction either had not been challenged, or was due to the fact that the parties had stipulated it might exercise such jurisdiction.

It will be observed that appellants in their briefs are unable to refer to any case wherein the Supreme Court of Oklahoma has even intimated that the law was unsettled in regard to the nature of its review of gas rate orders, except the recent case of *Oklahoma Cotton Ginners Assn.* v. *State, supra.*

Under § 22, Art. IX, of the state constitution, the supreme court was expressly prohibited from permitting a party to introduce evidence. When a state constitution expressly forbids a court, under any circumstances, to permit the introduction of evidence, we submit a review cannot be judicial. While the Supreme Court of Oklahoma may say that its review is judicial, "we must not be misled by name but look to the substance and intent of the proceeding." *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266.

In the event a reduction in rates is ordered and the utility prosecutes an appeal to the State Supreme Court, asserting in that court that the reduced rates deprive it of its property without due process of law, contrary to the Fourteenth Amendment, it cannot under any circumstances introduce in that court evidence in support of such claim. This fact we suggest prevents the appeal from being judicial. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Crowell* v. *Benson,* 285 U. S. 22, 26; *Denver Stock Yard Co.* v. *United States,* 57 F. (2d) 735, 739; *American Comm. Co.* v. *United States,* 11 F. Supp. 965, 969. Cf. *Oklahoma Gas & Electric Co.* v. *Corporation Comm'n,* 1 F. Supp. 966.

Appellants again urge, as they did in the lower court, that if the Supreme Court of the State affirms a rate order of the Commission, it acts judicially, while if it reverses the order its action is legislative. The cases of *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226, 227, 229, 230, and *McAlester Gas & Coke Co.* v. *Corporation Comm'n,* 101 Okla. 268, 270, effectively answer the argument.

When this suit was filed, the decree entered, and this appeal taken, no remedy existed at law or in equity in the courts of the State.

Appellee's right to assert his constitutional objections to the Commission's order accrued when his petition for rehearing was denied by the State Supreme Court in June, 1934. This right still existed when the decree herein was entered in February, 1935, and "whatever may be the prospective effect" of the decision in *Oklahoma Cotton Ginners Assn.* v. *State,* 174 Okla. 243; 51 P. (2d) 327, "it cannot be given a retroactive effect in respect of the judgment of the Federal District Court so as to 'make that erroneous which was not so when the judgment of that court was given,'" (*Concordia Ins. Co.* v. *School District,* 282 U. S. 545, 553–554) or to take away the

right, which he had when this suit was filed, to present his federal question to the United States Court.

PER CURIAM.

This suit was brought in the United States District Court for the Western District of Oklahoma to restrain the enforcement of an order of the Corporation Commission of that State reducing gas rates. Plaintiff, trustee of the properties of the Consolidated Gas Service Company, alleged that the order was confiscatory and violated the due process clause of the Fourteenth Amendment of the Constitution of the United States. Application for an interlocutory injunction was brought before the District Court composed of three judges. 28 U. S. C. 380. Defendants, the Corporation Commission and its members, moved to dismiss the complaint upon the ground that the court was without jurisdiction, by reason of the terms of the Act of Congress of May 14, 1934 (48 Stat. 775) which provide that no District Court shall have jurisdiction to restrain the enforcement of an order of an administrative board or commission of a State--

"where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Plaintiff contended that the constitution and laws of Oklahoma did not afford an opportunity for judicial review in the courts of the State of orders affecting rates for the transportation and sale of gas. The District Court considered the provision of the Constitution of Oklahoma creating the Corporation Commission and providing for review of its orders (Const. Okla., Art. IX, §§ 20, 23, 35),

the state legislation with respect to appeals from orders affecting gas rates (Laws of 1913, chap. 93, § 5), and the pertinent decisions of the Supreme Court of the State. The District Court found that it had been repeatedly held by the state court that the reviewing power conferred upon it by the provision of the state constitution was legislative in character (compare *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 291); and upon the question whether any opportunity was afforded in the courts of the State for a judicial review of an order of the Commission, the District Court found serious uncertainty because of "diametrically opposed decisions" of the state court. And as it did not appear that "a plain, speedy, and efficient remedy" could be had "at law or in equity in the courts of such State," the District Court took jurisdiction and granted an injunction pending a hearing upon the merits. 9 F. Supp. 709.

We find no error in that action. An examination of the decisions of the Supreme Court of Oklahoma confirms the conclusion reached by the court below as to the uncertainty with which it was confronted and the consequent lack of the effective judicial remedy in the state courts which was contemplated by the Act of May 14, 1934. The question presented on this appeal from the interlocutory order is whether the District Court had jurisdiction, and, if so, whether it abused its discretion in issuing the injunction. *Alabama* v. *United States,* 279 U. S. 229, 231; *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 338; *United Fuel Gas Co.* v. *Public Service Comm'n,* 278 U. S. 322, 326, 327; *Baldwin* v. *G. A. F. Seelig, Inc.,* 293 U. S. 522. Appellants' counsel invoke the decision of the Supreme Court of Oklahoma in *Oklahoma Cotton Ginners' Assn.* v. *State,* 174 Okla. 243, but it is unnecessary to analyze that decision or to attempt to determine its import in relation to subsequent litigation, as the decision was rendered after this suit was brought and the interlocutory injunction had been

granted. The jurisdiction of the District Court had already attached and there is no ground for concluding that the granting of the injunction was an improvident exercise of judicial discretion.

The decree is

Affirmed.

RADIO CORPORATION OF AMERICA *v.* RAYTHEON MANUFACTURING CO.

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

No. 127. Argued December 11, 1935.—Decided December 23, 1935.

In an action at law for damages, the issue whether a release relied on by the defendant and attacked by the plaintiff is void at law, cannot be transferred on motion of the defendant and over the plaintiff's objection for decision as an equitable issue. P. 462.
76 F. (2d) 943, affirmed.

CERTIORARI* to review the reversal of a decree sustaining a release set up as a defense in an action for triple damages under the Sherman Act.

Messrs. John W. Davis and *Richard Wait* argued the cause and *Mr. Davis,* with *Messrs. John L. Hall, Manton Davis,* and *Claude R. Branch,* filed a brief, for petitioner.

Mr. Edward F. McClennen for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question is whether in the circumstances here exhibited the validity of a release pleaded by a defendant as a bar to a cause of action at law is triable in equity.

Plaintiff, respondent in this court, is a Massachusetts corporation, once known as Raytheon Manufacturing Company, now known as Raytheon, Inc. It sues for the

* See Table of Cases Reported in this volume.

benefit of Raytheon Manufacturing Company, a Delaware corporation, which by agreement is to receive the fruits of a recovery. The cause of action is under the anti-trust laws for treble the damages suffered by the plaintiff through a combination and monopoly in restraint of trade and commerce. 15 U. S. C., §§ 1, 2, 14, 15. The defendant, petitioner in this court, pleads as one of its defenses that after the cause of action had arisen the plaintiff without duress and for a valuable consideration signed and delivered to the defendant a general release under seal.

At this point there is need to recur to the allegations of the complaint. From them it appears that the defendant's monopoly became complete by the early part of 1928. The plaintiff's business had then been destroyed to its damage in excess of $3,000,000. " Wholly because of this destruction and of the illegal duress " imposed by the monopoly, the plaintiff and the Delaware corporation were compelled to seek and accept a license from the defendant and to execute a release. The complaint does not state whether the document was sealed. " The illegal duress aforesaid by the defendant rendered said release void, and the plaintiff has never executed a valid release of said claim." Moreover, there was an agreement upon "the execution of the void release " that its effect in stated contingencies was to be subject to exceptions. The release was not to be pleaded as a bar if there was " pecuniary recognition " by the defendant of the rights of other claimants. Such " pecuniary recognition " there has been to the extent of $1,600,000, with the result that plaintiff may recover within that limit, even if not beyond. All this appears from the complaint with many amplifying statements unimportant here and now.

The issues being thus defined, the defendant moved upon the pleadings to transfer the case to equity for a preliminary hearing upon the validity of the release.

This motion was granted against the plaintiff's opposition. Thereafter plaintiff moved to vacate or supersede the transfer, disclaiming "any right or remedy in this case, because of duress, to be relieved from such operation as said release would have at law had there been no duress." * This motion was denied. Thereafter plaintiff moved for a final decree dismissing it from equity, and reiterated its disclaimer of any right or remedy not belonging to it at law. This motion also was denied. At the same time a decree was entered at the instance of the defendant adjudging that the release as set forth in the defendant's answer was "valid and binding," and sending the case back to law for further proceedings. From the decree and the supporting orders there was an appeal by the plaintiff to the Circuit Court of Appeals for the First Circuit, where the decree and orders were reversed. 76 F. (2d) 943. The opinion covers a wide range. It considers the distinction between fraud in the "factum" and fraud in the "inducement" as affecting the power of a court of law to nullify a release not otherwise illegal, and the distinction for the same purpose between sealed and unsealed instruments. It suggests, without deciding, that the presence or absence of a seal, whatever significance may have attached thereto of old, has now ceased to be important. In the end it holds,

* For greater certainty we add the next succeeding paragraph:

"Following this disclaimer, the issue, as to duress, for trial is whether the purported release which was obtained by the defendant from the plaintiff was originally obtained in fact by the duress of a power obtained by the defendant by unlawfully restraining interstate trade and substantially lessening competition therein by contract, combination or conspiracy or otherwise or by monopolizing or attempting to monopolize interstate trade in violation of Code of Laws of the United States, Title 15, chapter 1, sections 1, 2 and 14, or any of them, and if so whether a court of law, not equity, of the United States will adjudge originally valid a release so obtained, notwithstanding such duress."

however, that the release signed by the plaintiff was so connected with the unlawful combination and monopoly as to be inoperative at law, irrespective of the possibility of avoiding it in equity. A writ of certiorari issued to resolve a claim of conflict with decisions of this court.

The answer with its plea in bar will be searched in vain for the suggestion of an equitable defense. A release under seal is a good defense at law, unless its effect is overcome by new matter in avoidance. This will happen, for illustration, when it is so much a part of an illegal transaction as to be void in its inception. If it is subject to that taint, a court of law is competent to put it out of the way. We assume that a like competence exists in other circumstances. True there are times when a release, unassailable at law, is voidable in equity, and in equity only. If the plaintiff were demanding relief upon that basis, the equitable issue would have to be disposed of at the beginning. *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 363; *Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 242; *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, 383; *Adamos* v. *New York Life Insurance Co.*, 293 U. S. 386. With the parties so arrayed, the situation would be the same as if a bill in equity had been filed to set aside the release, the suitor thus removing a bar to a recovery. *Enelow* v. *New York Life Insurance Co., supra*, p. 382. But the plaintiff disclaims any title to relief upon that basis. It insists that the release is void at law on one or other of two grounds, either because not sealed by the maker, or because tainted with the same illegality as the illegal combination. It concedes here, as it did in the District Court, that if unable to prevail at law, it is unable to prevail anywhere. Before the days of equitable defenses no one would have insisted that a suitor who refused to file a bill in chancery could be sent there against his will. The only penalty for refusing to go would be the loss of any remedy peculiar to a court of equity. There is no other penalty now

after the reforms of the Judicial Code. The defendant, setting up a legal defense, the bar of a release, would have us force upon the plaintiff an equitable replication which the plaintiff disavows. Accepting the disavowal, a court of equity must decline at this stage to adjudicate the validity of the release or its effect upon the parties, leaving that issue along with others to adjudication at law.

In thus delimiting the issues we delimit at the same time the scope of our decision. We do not attempt to say whether the release will collapse upon the showing of an illegal combination or will retain an independent life. That is matter for the trial at law, where the bond between monopoly and surrender can be shown with certainty and fulness. Till then it will be best to put aside as premature not a little that is said in the opinion of the court below. Enough for present purposes that there are issues triable at law, and none triable in equity. We leave our ruling there.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

UNITED STATES *v.* BANK OF NEW YORK & TRUST CO.*

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

No. 195. Argued December 18, 1935.—Decided January 6, 1936.

1. The court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of other courts. P. 477.

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* Together with No. 196, *United States* v. *President and Directors of the Manhattan Co.*, and No. 197, *United States* v. *Louis H. Pink.* Both cases were on writs of certiorari to the Circuit Court of Appeals for the Second Circuit. In No. 197, Mr. Louis H. Pink, Superintendent of Insurance of New York, was substituted by an order of the court below for his predecessor in office, Mr. George S. Van Schaick, the original defendant in that case.

2. This principle governs the state and federal courts and is so applied by this Court as to insure harmony and coöperation between them. P. 477.
3. The principle is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property. P. 477.
4. The jurisdiction granted to the District Court over suits by the United States, Jud. Code, § 24 (1); 28 U. S. C. 41, is not exclusive; and the propriety of its exercise in a given case is determined by the particular circumstances. P. 479.
5. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them. P. 479.
6. In intervening to present a claim in proceedings in a state court, the United States is a voluntary actor—not a defendant. P. 480.
7. Separate funds which had been deposited with the Superintendent of Insurance of the State of New York by three Russian insurance companies to qualify them for local business were liquidated and administered by him, under direction of the state court, for the satisfaction of local claims and of other claims that had been filed with him. In two of the cases, this administration was over, but the surpluses had, by order of court, been deposited with local trust companies and proceedings were going on in the state court to determine the rights of other creditors and shareholders. In the other case, the statutory administration by the Superintendent was still in progress. In this posture, the United States brought three suits in the federal court against the three depositaries, respectively, in which it demanded accountings for and delivery of the funds in their hands. Its bills alleged that the companies had been dissolved and their assets confiscated by the Russian Government, and that that Government in connection with its recognition by this one in 1933, had assigned the property in controversy to the United States. *Held:*

(1) That the statutory proceeding was essentially *in rem*, the Superintendent being virtually a receiver. P. 475.

(2) In the other two cases, the proceedings in the state court were *quasi in rem*, control of the funds being essential to the exercise of the court's jurisdiction to protect the rights of claimants. The funds being already in the hands of depositaries appointed by the court and subject to its direction, appointment of receivers was unnecessary. P. 476.

(3) The suits of the Government were not merely *in personam* to establish a right to share in property; their object was to take the property from the depositaries and from the control of the state court, and to vest it in the United States to the exclusion of all those whose claims were being adjudicated in the state proceedings. P. 478.

(4) Whatever the effect of the recognition of the Russian Government, it did not terminate the state proceedings. The state court still had control of the property, and questions as to the rights of the parties who were before it, or of those who might come before it, were legal questions which that court had jurisdiction to decide. P. 478.

(5) The fact that the complainant in the federal court is the United States does not justify a departure from the rule which would otherwise be applicable. The United States is free to invoke the jurisdiction of the state court for the determination of its claims, and the decision by the state court of any federal question which may be presented upon such an invocation, may be reviewed by this Court, and thus all the questions which the Government seeks to raise in these suits may be appropriately and finally decided. Jud. Code, § 237; 28 U. S. C. 344. P. 479.

(6) The claimants in the state proceedings are entitled to be heard and are indispensable parties to any proceeding for the disposition of the property involved; convenient and orderly administration of justice requires that the jurisdiction of the state court should be respected. P. 480.

77 F. (2d) 866, 880, 881, affirmed.

CERTIORARI * to review decrees which affirmed in three cases decrees of the District Court, 10 F. Supp. 269, dismissing bills brought by the United States for an accounting and delivery of funds in the custody of the respondents.

* See Table of Cases Reported in this volume.

Mr. David E. Hudson, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Paul A. Sweeney, M. Leo Looney, Jr.,* and *Alanson W. Willcox* were on the brief, for the United States.

The Soviet decrees dissolving these Russian insurance corporations, appropriating their assets, and terminating the rights of creditors and stockholders therein, transferred to the Soviet Government the New York assets of the corporations, except such as were required to respond to the claims of creditors within the statutory trust created by § 27 of the New York Insurance Law.

The dissolution of a corporation and the transfer of its property are governed by the law of the State of incorporation.

Recognition operates retroactively and admits the validity of the decrees of the Soviet Government from the date of the inception of that Government.

The decrees are not opposed to the public policy of the United States.

The funds were transferred to the United States by the Litvinoff assignment.

The federal court has original jurisdiction of these suits. Jud. Code, § 24 (1). The general doctrine of priority of jurisdiction is superseded by the specific provision of the Judicial Code in cases such as these, wherein the actions are brought by the United States. *United States* v. *Inaba,* 291 Fed. 416; *United States* v. *McIntosh,* 57 F. (2d) 573; *United States* v. *Babcock,* 6 F. (2d) 160; *United States* v. *Lee,* 106 U. S. 196, 222.

Should the decision below be affirmed, it would compel the United States, as the only means of asserting its right to this particular property, to enter its appearance in the pending actions in the state court. So to limit the rights of the United States is in practical effect to subject the United States to suits without its consent.

Furthermore, if the doctrine of the decision below should prevail, it is conceivable that in an action pending in a state court involving a *res,* the United States, should it seek to assert its right to such *res,* would, for procedural reasons, be compelled to appear as a party defendant. It is beyond the competence of any officer of the Government to bring in the United States as a party defendant in an action in a state court. *Case* v. *Terrell,* 11 Wall. 199; *Stanley* v. *Schwalby,* 162 U. S. 255. In such a situation, the United States would be powerless to maintain its rights.

The rule of priority of jurisdiction is not applicable because (1) the suits instituted by the United States in the District Court are *in personam.* Should the decision of the federal court be favorable to the claim of the United States, it may be that the United States would be required to prove the claim in the state court proceedings. But it does not follow that the federal court has no jurisdiction to adjudicate the rights of the United States. *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U. S. 33; *Riehle* v. *Margolies,* 279 U. S. 218; *Allen* v. *United States,* 285 Fed. 678, 683; *Chase Nat. Bank* v. *Sayles,* 11 F. (2d) 948; *Brown* v. *Duffin,* 13 F. (2d) 708.

Furthermore, the proceedings in the state court are also *in personam.*

Even assuming, contrary to *Farrell* v. *Stoddard,* 1 F. (2d) 802, 803, that the state court acquired custody and control of the property by virtue of the original liquidation proceedings, nevertheless, that court's authority in the liquidation ended when the superintendent had paid the domestic creditors and policyholders.

Any jurisdiction in the state court over the *res* was lost when the state court relinquished the funds and ordered them deposited in the Bank of New York & Trust Company and the Manhattan Company, as agents and depositaries of the insurance companies, under in-

structions to pay out only upon the order of "a court of competent jurisdiction." Had the state court intended to retain jurisdiction of the funds, it would have provided that further payments could be made only "upon the further order of this court."

It is also to be noted that the deposit of the funds in the Bank of New York & Trust Co., and the Manhattan Company, subject to court order as noted above, was an alternative to relinquishing the funds to the surviving directors themselves. *Matter of People (Northern Insurance Co.)*, 255 N. Y. 433, 435. Had the latter course been adopted, it certainly could not be said that thereafter the state court still maintained its custody and control of the *res.*

The state courts lacked jurisdiction to entertain suits involving the disposition of the funds because at the time when such suits were instituted the funds were the property of a sovereign which had not consented to be sued.

Whenever it appears in any litigation that the party defendant, or a necessary party in interest, is a foreign State or a foreign Sovereign, the courts should immediately refuse to assume or retain jurisdiction of the controversy. This is true whether the foreign Nation has been recognized or not by the country before whose courts the litigation is pending. *Wulfsohn* v. *Russian Socialist Federated Soviet Republic,* 234 N. Y. 372, writ of error dismissed, 266 U. S. 580. The foreign Sovereign is not required to come into our courts and plead immunity. *Nankivel* v. *Omsk All Russian Government,* 237 N. Y. 150.

It is apparent that at the time when the state suits were instituted (which had for their purpose the disposition of the surplus assets of the dissolved Russian insurance companies) the funds in question were the property of the Soviet Government, which was asserting its own-

ership, and that the New York courts were apprised of that fact.

Furthermore, it definitely appears that all of the Russian insurance companies were nationalized and ceased to exist as Russian corporations, by virtue of decrees of the Soviet Government, prior to any proceedings now pending in the New York courts. Thus, in one case there was no corporate plaintiff; in the second there was not any corporate assignor; and in the third there was no corporation which could claim the surplus assets in the hands of the Superintendent of Insurance. It therefore results that any proceedings purported to have been instituted by any of these nationalized Russian corporations could not have given the court any jurisdiction, *in rem* or otherwise, over the funds herein concerned.

Messrs. Frederick B. Campbell and *Samson Selig* argued the cause, and *Mr. Campbell,* with *Messrs. Paul C. Whipp* and *Lounsbury D. Bates,* filed a brief, for the Bank of New York & Trust Co., respondent in No. 195.

Mr. Hartwell Cabell, with whom *Mr. Milton B. Ignatius* was on the brief, for Assecuranz Union von 1865, intervener-respondent in No. 195.

Mr. Robert J. Sykes, with whom *Mr. E. W. McMahon* was on the brief, for the President and Directors of the Manhattan Co., respondent in No. 196.

Mr. John M. Downes, with whom *Mr. Alfred L. Green* was on the brief, for Pink, Superintendent of Insurance of New York, respondent in No. 197.

By leave of Court, briefs of *amici curiae* were filed as follows: By *Mr. Borris M. Komar* in behalf of Samuel E. Morro et al.; by *Messrs. Joseph M. Proskauer, Philip A. Carroll, Otey McClellan,* and *J. Alvin Van Bergh,* in

behalf of The National City Bank of New York; by *Messrs. Samson Selig* and *Mr. William F. Roche;* and by *Mr. John W. Davis* in behalf of the Guaranty Trust Company of New York. These briefs all supported the contentions of respondents.

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

The United States, claiming to be the owner of certain funds which originally had belonged to Russian insurance companies, brought these suits for accounting and delivery. The companies had made deposits with the Superintendent of Insurance of the State of New York in order to obtain authority to transact business within the State. The complaints alleged that in 1917, or 1918, the companies had been dissolved, and their properties had been "confiscated and appropriated," by decrees of the Russian State. The claim of the United States is based upon an assignment made by the Russian Government, on November 16, 1933, in connection with the recognition of that Government. Defendants hold the funds in question under orders and judgments of the state court in New York, providing for liquidation and distribution.

In each case, defendants moved to dismiss the complaint for insufficiency and, in opposition to complainant's motion for an interlocutory injunction restraining distribution, set up the proceedings of the state court. The District Court denied the motions for injunction and dismissed the complaints upon the grounds (1) that the Russian decrees, by reason of their confiscatory character, were ineffective to vest in the Russian Government the title to these funds situated in New York, and (2) that these funds were not covered by the assignment to the United States, 10 F. Supp. 269. The Circuit Court of Appeals held that the jurisdiction of the state court should be respected, and in that view affirmed the decrees of the Dis-

trict Court. 77 F. (2d) 866, 880, 881. Because of the nature and importance of the questions presented, we granted writs of certiorari, October 14, 1935.

The special facts of the three cases are these:

(1) The case against the Bank of New York and Trust Company (No. 195) relates to the deposit made by the Moscow Fire Insurance Company. By order of the Supreme Court of the State of New York, in 1925, the Superintendent of Insurance was appointed liquidator of the United States branch of the company pursuant to § 63 of the state insurance law and creditors were enjoined from pursuing their legal remedies against the assets so sequestered. The Superintendent of Insurance took possession of the assets and proceeded in the course of liquidation to satisfy the claims of domestic creditors and policyholders. There remained a substantial surplus.

Similar results followed the Superintendent's liquidation of the branches of other Russian companies, and the disposition of the surplus assets was brought before the Court of Appeals of New York. Creditors and policyholders with claims arising out of foreign business insisted that the time had come when their claims should be enforcible. The insurance companies insisted that they were still "juristic persons," that they were represented by boards of directors competent to act, and were entitled to possession subject to the remedies of creditors. The court declined to sustain the position of the Superintendent that the surplus should be left in his hands indefinitely,—until the recognition of a Russian government. As the Superintendent had fulfilled the statutory trust, the court considered it to be no part of his duty to ascertain the validity of the claims that would be paid out of the surplus "unless inequity would be done if the claimants were remitted to a remedy at law." Exceptions were recognized where attachments or executions had been levied before the date of liquidation and also where

proofs of claim had been filed and diligently pressed while the Superintendent was still in charge and the injunction was still in force. As the creditors so proving were acting in response to an invitation—published in accordance with the order of liquidation—to submit claims of every kind without reference to the place of origin, and were meanwhile stayed, the court thought that there would be manifest inequity if at that late day they were remitted to their legal remedies and compelled to prove anew. A court of equity having assumed control over a fund might continue to grant relief if justice so required. But the court took the view that after the liquidator had made provision for the payment of claims already filed, the surplus then remaining "should be paid to the corporations, represented by directors, a quorum of the board." *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, 420–424; 175 N. E. 114, 117.

The Moscow Fire Insurance Company, however, had been left with but one director; and although he might be treated as a "conservator" of the property of his company when there were assets within the State "that might otherwise be lost," the Court of Appeals was of the opinion that a measure of discretion should be exercised by a court of equity "before surrendering possession." Exercising that discretion the court directed that the delivery of the assets in the case of that company should be conditioned upon the execution of a bond to the People of the State in a sum equal to the value of the assets delivered, with a condition that the director should faithfully apply the assets to the use of the corporation, its creditors and shareholders. In the event of inability or failure to give the bond, the court directed that delivery should be made to a trust company "as agent or depositary" upon the stipulation of the insurance company and its "conservator" that the fund would "not be withdrawn except upon the order of a court of competent jurisdiction." *Matter of*

People (*Moscow Fire Insurance Co.*), 255 N. Y. 433, 435; 175 N. E. 120, 121. On the remittitur of the Court of Appeals, judgment was entered in the Supreme Court of the State on August 11, 1931, and provided, in the stated alternative, that the Superintendent should deliver the surplus assets to the Bank of New York and Trust Company. The Moscow Company and Paul Lucke, "its sole surviving director and conservator," took advantage of this alternative and gave the required stipulation, whereupon the Trust Company received the surplus assets, of about $1,000,000, on April 18, 1933.

Immediately—on April 19, 1933—the Moscow Company and Lucke brough suit in the Supreme Court of the State to determine the disposition of these assets, including the determination of the claims of creditors. A second suit was brought in June, 1933, by a shareholder of the Moscow Company. In October, 1933, the first of these suits was referred to a referee to hear and determine, and later the two suits were consolidated. Trial was had before the referee and proofs of claims of various creditors and shareholders of the Moscow Company were submitted. On August 13, 1934, when the referee was about to file his report, the United States Attorney presented to the referee a proof of claim of the United States to the entire fund,—based upon the assignment of November 16, 1933, by the Russian Government. Apparently the claim was not pressed and an understanding was reached that the referee would withhold his report until August 21, 1934, and that the United States would meanwhile determine in what manner it would assert its claim, whether by intervention in a proceeding in the state court or by suit in the federal court. The referee made no mention of the claim in his report, which was filed on August 22, 1934. Judgment was at once entered upon the report directing payment of the claims of creditors as allowed by the referee and, after making reservation for future claims

and expenses, ordering the distribution of the residue in liquidating dividends to the shareholders of the Moscow Company. There was also provision that any shareholder, or any party to the action, or successor in interest, might apply at the foot of the judgment for further directions. On the same day the United States brought the present suit.

(2) The case against the President and Directors of the Manhattan Company (No. 196) relates to the Northern Insurance Company of Moscow. Under an order of the state court, in 1926, the Superintendent of Insurance took possession of the assets of the United States branch of the company. The statutory liquidation was completed. But as the company was left with but two directors, provision was made in April, 1931—under the decision of the Court of Appeals of New York—for the delivery of the surplus assets to a trust company, in case the required bond was not given. *Matter of People (Northern Insurance Co.)*, 255 N. Y. 433, 435; 175 N. E. 120. In the following year an assignment for the benefit of creditors was made on behalf of the Northern Insurance Company to the Bank of Manhattan Trust Company, the predecessor in interest of the defendant in the present suit. Pursuant to a decision of the Court of Appeals on reargument (*Matter of People (Northern Insurance Co.)*, 262 N. Y. 453; 188 N. E. 17) judgment was entered, on June 6, 1933, in the Supreme Court of the State directing the Superintendent of Insurance to deliver the surplus assets to the Bank of Manhattan Trust Company "as agent or depositary" to be held subject to the order of a court of competent jurisdiction. The delivery was made, the amount being upwards of $245,000. On November 13, 1933, the state court directed the President and Directors of the Manhattan Company, as successor in interest, to transfer the fund to itself "as assignee for the benefit of creditors of the Northern Insur-

ance Company of Moscow." In July, 1934, the state court appointed a referee to take and state the account of the assignee, and to take proof and report as to the claims of creditors and those entitled to share in the disposition of the fund. That proceeding was in progress when the present suit by the United States was begun on August 25, 1934.

(3) The third case (No. 197) relates to the assets of the United States branch of the First Russian Insurance Company, which the state court, in 1925, placed in the hands of the Superintendent of Insurance as liquidator. This case differs from the others in that the Superintendent is still in possession. After the payment of domestic creditors, the surplus assets were retained by the Superintendent under the order of the state court for the purpose of satisfying valid claims founded upon foreign business, where proofs of claim had been filed with him during the statutory liquidation. *Matter of People* (*First Russian Insurance Co.*), 255 N. Y. 415, 423; 175 N. E. 114. It appears that some of these foreign claims had been allowed by the liquidator and payments on account had been made under orders of the state court, and that other claims which the liquidator had disallowed were being heard before a referee appointed by the state court, when the United States brought the present suit on November 14, 1934. The Government states that the fund then held by the Superintendent amounted to over $1,000,000.

First. When the state court directed the Superintendent of Insurance to take possession of the assets of the United States branches, and to conserve those assets until its further order, the court took jurisdiction of the *res.* While the superintendent was a statutory liquidator, he took possesion under the direction of the court and the fund was at all times subject to the court's control. The proceeding was essentially one *in rem* and the Superintendent was protected by a sweeping injunction in the

unimpeded liquidation of the sequestered property. *Matter of People* (*Russian Reinsurance Co.*) *supra,* p. 420. Under § 63 of the state statute (Insurance Law; Cons. Laws, c. 28), the liquidator had rights and duties such as had previously "been exercised by and imposed upon ancillary receivers of foreign corporations." *Id.,* p. 424.

When the statutory trust was satisfied by the payment of domestic creditors and policyholders, it did not follow that the remaining assets were automatically released and the state court was *ipso facto* shorn of its jurisdiction. The court still had control of the property and necessarily had the pertinent equitable jurisdiction to decide what should be done with it. In such a case, the court might direct that the surplus assets should be remitted to a domiciliary receiver—if there were one—on appropriate conditions. *Matter of People* (*Norske Lloyd Insurance Co.*), 242 N. Y. 148; 151 N. E. 159. Or the court might direct further liquidation, in order to provide for the payment of other claims, if that course appealed to the sense of equity in the particular circumstances. *Matter of People* (*Russian Reinsurance Co.*), *supra,* p. 423. The latter action was taken and the Superintendent of Insurance was continued in possession of the assets subject to the control of the court. He was virtually its receiver for the purposes specified. In No. 197, the Superintendent still holds possession by virtue of that authorization and the *res* thus remains under the court's jurisdiction.

In the other two cases (Nos. 195 and 196) the Superintendent completed the additional liquidation and turned over the remaining assets to the designated depositaries. To safeguard all rights in the funds, they were not to be withdrawn from the depositaries except upon a court order. We need not pause to inquire as to the effect of that limitation, for, if jurisdiction was relinquished, it was soon resumed. On the very next day, in the case of the

Moscow Fire Insurance Company, suit was brought in its name, and by the sole surviving director and conservator, against the depositary and those alleged to be creditors and shareholders of the insurance company, to determine the disposition of the fund. Claims of creditors and shareholders were in course of adjudication in that proceeding when the present suit was brought. At that time, also, in the case of the Northern Insurance Company, the depositary—which had received an assignment for the benefit of creditors—was accounting in the state court for the fund in its hands and the claims of creditors and of those entitled to share in the fund were being heard.

In both these cases the proceedings in the state court were *quasi in rem.* Control of the funds was essential to the exercise of the court's jurisdiction to protect the rights of claimants. It was not necessary for the court to appoint receivers, as the funds were already in the hands of depositaries appointed by the court and subject to its direction. The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property. *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co.,* 177 U. S. 51, 61. If the two suits are *in rem* or *quasi in rem,* so that the court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 195. This principle is applied in the discharge of the long recognized duty of this court to give effect to such

"methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may coöperate as harmonious members of a judicial system coextensive with the United States." *Taylor* v. *Carryl,* 20 How. 583, 595. See also, *Peck* v. *Jenness,* 7 How. 612, 625; *Buck* v. *Colbath,* 3 Wall. 334, 341; *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38, 54; *Palmer* v. *Texas,* 212 U. S. 118, 129; *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 89; *Harkin* v. *Brundage,* 276 U. S. 36, 43.

The Government urges that the present suits for an accounting are not suits *in rem* but *in personam;* and that to allow the federal court to pass upon the right asserted would not necessarily interfere with the jurisdiction or control by the state court over the *res.* See *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 230. But these suits are not to enforce a personal liability but to obtain possession of the respective funds. The suits are not merely to establish a debt or a right to share in property, and thus to obtain an adjudication which might be had without disturbing the control of the state court. Compare *Waterman* v. *Canal-Louisiana Bank Co.,* 215 U. S. 33, 44–46; *Riehle* v. *Margolies,* 279 U. S. 218, 223, 224. Complainant demands that the depositaries account and pay over to the complainant, as "the sole and exclusive owner," the entire funds in their hands. Thus the object of the suits is to take the property from the depositaries and from the control of the state court, and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings.

The Government also insists that the courts of the State had lost jurisdiction of the funds, prior to the time when the present suits were begun, by reason of the fact that the funds were the property of the Russian Government which our Government had recognized. But, what-

ever the effect of recognition, it is manifest that it did not terminate the state proceedings. The state court still had control of the property and questions as to the rights of the parties who were before it, or of those who might come before it, were legal questions which the court had jurisdiction to decide.

Second. The fact that the complainant in these suits is the United States does not justify a departure from the rule which would otherwise be applicable. The Government invokes § 24 (1) of the Judicial Code (28 U. S. C. 41) which confers jurisdiction upon the District Court to entertain all suits of a civil nature brought by the United States. The Government insists that the United States is entitled to have its claim determined in its own courts. But the grant of jurisdiction to the District Court in suits brought by the United States does not purport to confer exclusive jurisdiction. It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive. See *Gittings* v. *Crawford,* Taney's Dec. 1; *Ames* v. *Kansas,* 111 U. S. 449, 464; *Plaquemines Fruit Co.* v. *Henderson,* 170 U. S. 511, 517, 518; *Merryweather* v. *United States,* 12 F. (2d) 407, 409, 410. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them. *Robb* v. *Connolly,* 111 U. S. 624, 637. In this instance it cannot be doubted that the United States is free to invoke the jurisdiction of the state court for the determination of its claim, and the decision of the state court of any federal question which may be presented upon such an invocation, may be reviewed by this Court and thus all the questions which the Government seeks to raise in these suits may be appropriately and finally decided. Jud. Code, § 237, 28 U. S. C. 344.

The statutory grant of jurisdiction to the District Court leaves open the question of the propriety of its exercise in particular circumstances. Even where the District Court has acquired jurisdiction prior to state proceedings, the character and adequacy of the latter proceedings in relation to the administration of assets within the State, and the status of those assets, may require in the proper exercise of the discretion of the federal court that jurisdiction should be relinquished in favor of the state administration. *Pennsylvania* v. *Williams,* 294 U. S. 176, 185; *Gordon* v. *Ominsky,* 294 U. S. 186, 188; *Penn General Casualty Co.* v. *Pennsylvania, supra,* p. 197. In the instant cases, not only had the state court first acquired jurisdiction, but there are numerous persons whose claims in relation to these funds are in course of adjudication. Whether or not their claims are valid against the claim of ownership by the United States, they are entitled to be heard and they are indispensable parties to any proceeding for the disposition of the property involved. They have not been made parties to the present suits, and this fact in itself would be a sufficient reason for the District Court to refuse to proceed in their absence. Only the stakeholders are defendants. The adverse claimants are parties to the respective proceedings in the state court and from every point of view the principles governing the convenient and orderly administration of justice require that the jurisdiction of the state court should be respected.

There is no merit in the suggestion that the United States, in presenting its claim in the state proceedings, would be compelled to take the position of a defendant,—being sued without its consent. In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant. We cannot see that there would be impairment of any rights the United States may

possess, or any sacrifice of its proper dignity as a sovereign, if it prosecuted its claim in the appropriate forum where the funds are held.

As we are dealing simply with the question of the exercise of jurisdiction by the District Court, we intimate no opinion upon the merits.

The decrees are

Affirmed.

UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 169. Argued December 17, 1935.—Decided January 6, 1936.

A trust created by a father for his three children, providing *inter alia* that each of them should receive one-third of the net income and upon termination of the trust one-third of the principal of the trust estate, was amended, as permitted by the indenture, to declare that the estate should be divided into three separate and equal shares, to which might be assigned undivided interests in the whole or any part of it; that such shares should be designated by the respective names of the three beneficiaries, and that each of the beneficiaries should have the same rights, interest and power in and over his share and the income thereof as was given to them, respectively, by the original trust instrument over one-third of the trust estate. The object of the amendment was to divide the trust into three separate trusts in order to reduce liability for income taxes. The cash and property of the trust were accordingly transferred on the books of the trustee, in equal shares, to three new accounts, one for each of the beneficiaries; income, disbursements, and new principal were entered in this same way; and the accounts of the single trust were closed. *Held:*

1. That the single trust had been converted into three in accordance with the intention of the parties. P. 486.

2. It was not necessary that the cash and securities should be physically divided. P. 487.

3. Any vested property right, including an undivided interest, may constitute the corpus of a trust; a single fund may be held on several trusts. P. 487.

75 F. (2d) 973, reversed.

CERTIORARI* to review a judgment reversing an order of the Board of Tax Appeals which set aside an additional tax imposed on a trustee by the Commissioner of Internal Revenue.

Mr. Clay Judson for petitioner.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* were on the brief, for respondent.

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

Petitioner is trustee under a trust created by John P. Wilson, in 1913, for the benefit of his three children. Under a reserved power, the trust was four times amended. The sole question is whether the amendments created three separate trusts. The question arises in relation to the taxation of income. If there is but a single trust, as the Commissioner of Internal Revenue ruled, an additional tax would be payable. If there are three trusts, as the Board of Tax Appeals determined, there would be no additional tax. The Circuit Court of Appeals held that there was only one trust. 75 F. (2d) 973. Certiorari was granted because of the conflicting decision of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *McIlvaine,* 78 F. (2d) 787.

By the original deed, one-third of the net income of the securities held in trust was to be paid to each of the three children while living, and upon the death of any one, to those who were to succeed to his or her interest in accord-

* See Table of Cases Reported in this volume.

ance with the provisions of the deed. During the first fifteen years of the trust the income could be accumulated by the trustee, with the written consent of the primary beneficiaries, and added to the principal. The trust was terminable at any time in whole or in part by the three children (or survivors) subject to the approval of the grantor, if living, and in any event was to terminate on the death of all the children. Upon termination, one-third of the principal was to be distributed to each of the three children if living, and the share of a deceased child was to go according to the provisions of his or her will or, in the absence of such disposition, to the surviving issue of the decedent or, in default of such issue, to the surviving issue of the grantor *per stirpes*. Provision was made for the alteration of the trust "in any respect and to any extent at any time" by the three children, or survivors, subject to the approval of the grantor if living. Thereafter the "rights and powers of all parties concerned" were to be the same as though the trust deed had originally been executed in the altered form.

In 1918, the three children, with the approval of the grantor, modified the trust so as to provide:

"The trust estate now held under said trust deed shall be divided into three separate and equal parts or shares (to which may be assigned undivided interests in the whole or any part of the said trust estate), which parts or shares shall severally be designated by our respective names, and each of us and our respective legal representatives shall have the same rights, interest and power in and over one of said three equal parts or shares and the income thereof which is given to us respectively by said indenture over one-third of said trust estate and the income thereof, except as may be otherwise specifically provided herein."

It was further provided that the whole of the net income received from each share during the remainder of 1918,

and one-half of the net income received thereafter and during the life of the grantor, should be accumulated and added to the principal of such share, with privilege of withdrawal by the beneficiary, with the grantor's consent, of the amount so accumulated. All the provisions of the original trust deed, except as they were "expressly or necessarily" modified by the new instrument, were to continue in force.

In 1919, the three children, with the grantor's approval, executed another modifying instrument which provided that one-half of the net income "of each of the three trust estates" should be paid over, as received, to the beneficiaries entitled thereto, and that the other one-half should be paid to them when the payment was requested by any two of the original beneficiaries; the net income not so paid over was to "be added to the principal of the trust fund from which it is derived." Provision was also made for the disposition of the net income in case of the death of any of the original beneficiaries and for the distribution of the "several trust estates" upon termination.

In 1920, the three children, with the approval of the grantor, modified the amendment of 1919 with respect to the disposition of income by providing that the trustee should pay out "as much of the net income from each of said separate trusts" to the beneficiaries as should be requested by a majority in interest of the beneficiaries, with the added requirement that "equal payments must be made out of the net income from each of said separate trusts, to the end that said several separate trusts may be maintained on a basis of equality in amount so far as practicable." There was a further provision that so much of the net income, "received in any year from each separate trust estate," which was not paid out should form part "of the principal of the separate trust estate" from which it was derived, and the trustee was required to

devote to charitable purposes so much of the net income "of said trusts" as should be requested by the three children (or survivors), such payments to be made "in equal amounts from each of said separate trusts."

There was a further amendment in 1928 enlarging the powers conferred upon the trustee by the original deed with respect to the borrowing of money, the borrowed sums to be dealt with "as part of the principal of the three trusts hereunder, in equal shares."

The purpose of the first amendment and the subsequent course of dealings are thus described in the findings of the Board of Tax Appeals, which are adequately supported by the evidence:

"The purpose of the amendment of September 21, 1918, was to create three separate and distinct trusts, one for each of the beneficiaries of the single trust then in existence, in order to reduce liability for income taxes on the income of the trust.

"Prior to the first amendment the trustee kept one cash account for the trust under the heading 'Trust under deed of John P. Wilson, for John P. Wilson, Jr., and others' to which was credited all income of the trust. On September 27, 1918, three accounts were opened up by the trustee, one in the name of 'Trust under Deed of John P. Wilson for John P. Wilson, Jr.'; one under the name of 'Trust under Deed of John P. Wilson, for Anna W. Dickinson'; and the other under the name of 'Trust under Deed of John P. Wilson, for Martha Wilson.' The single account was then closed by transferring equal amounts of its balance to each of the new accounts. Thereafter cash received and disbursed on account of the trust property was entered in these accounts, one-third in each.

"At the same time the property account kept by the trustee for the stock of the single trust was closed out by transferring the items thereof equally to accounts opened up under the names of the three beneficiaries. There was

no actual division of the property held under the trust indenture. The new accounts as set up showed that one-third of each asset of the old trust represented the corpus of three new trusts, one for each of the three children of the grantor. Acquisitions of additional principal by purchase were divided equally among the three trusts.

"The stock certificates acquired by the trustee before and after September 21, 1918, were carried in the name of the petitioner as trustee under the deed of trust of John P. Wilson or in the name of a nominee of the trustee. The cash belonging to the trusts in question here and all other trusts being administered by the trustee was kept in one general account with another bank.

"During the taxable years the trustee rendered separate reports each month to the beneficiaries on the basis of a separate trust for each. For each of the years 1924 to 1929, inclusive, it filed fiduciary and income tax returns on the basis of a separate and distinct trust for each child. In his audit of the returns the respondent determined that the income held in trust under the indenture of March 12, 1913, as amended, was taxable on the basis of a single trust and a single return for each year."

The Board of Tax Appeals concluded that "three separate and distinct trusts" were created.

No question is raised as to the validity of the several amendments. The only question is as to their construction and effect. The parties, if they pleased, had power to convert the single trust into three trusts and the evidence and findings leave no doubt as to their intention to do so. The question is whether they accomplished their purpose. *United States* v. *Phellis,* 257 U. S. 156, 172. If the various securities had been divided physically, if new certificates of stock had been obtained for the several beneficiaries, and such certificates and specific bonds and cash had been set aside for each, there would be no room for argument that three separate trusts were not created. But it was

not necessary to have such a physical division in order to carry out the clear intention of the parties. An undivided interest in property may constitute the corpus of a trust. The original trust deed provided that its provisions and limitations should be construed according to the laws of Illinois. But the elementary principle is applied in Illinois, as elsewhere, that "every kind of vested right which the law recognizes as valuable may be transferred in trust." *Burke* v. *Burke,* 259 Ill. 262, 268; 102 N. E. 293, 295. "It [a trust] may be created in any property, real or personal, legal or equitable, which is in existence, and which in the eye of a court of equity, is of value." *Gurnett* v. *Mutual Life Insurance Co.,* 356 Ill. 612, 617; 191 N. E. 250, 252. Perry on Trusts, 7th ed., §§ 67, 68. Nor are the amending instruments open to the objection that the subject of the trusts was not adequately defined. Compare *Snyder* v. *Snyder,* 280 Ill. 467, 469, 470; 117 N. E. 465; *Marble* v. *Marble's Estate,* 304 Ill. 229, 236; 136 N. E. 589. Where there is an intention to create separate trusts, the fact that "the trusts" are "kept in one fund" does not necessarily defeat the intention and require the conclusion that there is but a single trust. *Matter of Colegrove,* 221 N. Y. 455, 459; 117 N. E. 813. "In many cases," said the Court of Appeals of New York in *Vanderpoel* v. *Loew,* 112 N. Y. 167, 180; 19 N. E. 481, 484, where "income and principal were given in equal shares, although out of one fund kept *in solido* for convenience of investment, a severance of the trust into its component parts has been adjudged. . . . The shares and interests are several, although the fund remains undivided." See, also, *Rollestone* v. *National Bank of Commerce,* 299 Mo. 57, 71; 252 S. W. 394.

In the instant case, immediately following the first amendment, the trustee opened separate accounts for the three trusts and the single account previously kept was closed. Income received and amounts disbursed were di-

vided and entered in the separate accounts. The property account of the single trust was closed and the items were transferred equally to separate accounts in the names of the beneficiaries, showing one-third of the assets of the old trust as representing the corpus of each of the three trusts. New principal was divided equally in the same way. If, at the outset, there had been three trust deeds, each creating a trust for the benefit of a distinct beneficiary in an undivided one-third of the property involved, no question would have arisen. We think the same result was achieved by the use of the power of amendment. We find no ground for concluding that the purpose of the parties to create the three trusts was not carried out.

The decision of the Circuit Court of Appeals is reversed and the order of the Board of Tax Appeals is affirmed.

Reversed.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* McILVAINE ET AL., TRUSTEES.

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

No. 566. Argued December 17, 1935.—Decided January 6, 1936.

Decided upon the authority of *United States Trust Co.* v. *Commissioner, ante,* p. 481.
78 F. (2d) 787, affirmed.

CERTIORARI * to review a judgment affirming a decision of the Board of Tax Appeals, 27 B. T. A. 304, which overruled an additional tax assessment on a trustee.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. Clay Judson for respondents.

* See Table of Cases Reported in this volume.

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

The question presented in this case is similar to that involved in *United States Trust Co.* v. *Commissioner,* decided this day, *ante,* p. 481. By amendments under a reserved power, the terms of an original trust created by John P. Wilson, in 1913, were altered with the intention of creating three separate trusts. The Board of Tax Appeals, upon findings supported by evidence, concluded that this purpose was accomplished and hence that there was no deficiency. 29 B. T. A. 304. The Circuit Court of Appeals affirmed the order of the Board. 78 F. (2d) 787. We granted certiorari because of the conflict with the decision of the Circuit Court of Appeals for the Second Circuit, in the case of the *United States Trust Company, supra,* 75 F. (2d) 973, and, for the reasons stated in our opinion in that case, the decree of the Circuit Court of Appeals is

Affirmed.

LEGG *v.* ST. JOHN, TRUSTEE.

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

No. 54. Argued November 18, 1935.—Decided January 6, 1936.

1. The right of a bankrupt to receive future disability payments under a contract with an insurance company having no cash surrender value, is not insurance within the meaning of § 70 (a) of the Bankruptcy Act, and, if not exempted by the state law, passes to his trustee in bankruptcy. P. 493.

   Provision for the payment of disability benefits in connection with life insurance was not introduced in the United States until about twenty years after the passage of the Bankruptcy Act.

2. The fact that the disability benefits were provided for in a supplementary contract issued on the same day as, and physically

attached to, a policy of insurance on the obligee's life, did not make them life insurance. P. 494.

3. The right to receive such disability benefits in the future, having accrued before bankruptcy, is not after-acquired property but is in essence an annuity purchased and paid for, which like other property of the bankrupt, passes to the trustee unless exempted by the law of the bankrupt's domicile. P. 495.
4. Such disability benefits are not exempted by the statutes of Tennessee. P. 496.

76 F. (2d) 841, affirmed.

CERTIORARI, 295 U. S. 728, to review the affirmance of an order confirming a report of a referee in bankruptcy.

Messrs. Wm. Marshall Bullitt and *Henry Roberts* for petitioner.

Mr. Robert Burrow and *Mr. Clayton Scyphers, pro hac vice,* for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The question for decision is whether the bankrupt or his trustee is the person entitled to future monthly disability benefits payable under a contract entered into before the adjudication.

On March 8, 1934, Legg, a resident of Tennessee, was, on his petition, adjudged a bankrupt. He then held a policy in the Metropolitan Life Insurance Company by which it agreed, in consideration of an annual premium of $425.83, to pay upon his death either $24,000 in 240 monthly installments or the single sum of $17,452, as commuted value. By a supplementary contract issued the same day and attached to the policy, the company, for an annual premium of $49.39, agreed, among other things, to pay a monthly benefit of $174.52, upon due proof that the insured had become totally and permanently disabled before the age of 60. By this provision, if Legg was "pre-

vented thereby from engaging in any occupation and performing any work for compensation or profit," the company undertook to:

"1. Waive the payment of each premium falling due under said Policy and this Supplementary Contract, and,

"2. Pay to the insured, or a person designated by him for the purpose, or if such disability is due to, or is accompanied by, mental incapacity, to the beneficiary of record under said Policy, a monthly income of $10 for each $1,000 of insurance, or of commuted value of instalments, if any, under said Policy."

Legg had become totally and permanently disabled several years before the adjudication. The company had treated its obligation as matured; had waived the payment of premiums on both the policy and the supplementary contract; and, until the adjudication, had paid to him monthly the disability benefits. The bankrupt asked to have the life insurance policy and also the future disability benefits payable under the supplementary contract exempted from the operation of the assignment to the trustee. The latter set aside as exempt the life insurance policy and its cash surrender value, but reported that the obligation of the company to make the benefit payments was an asset of the estate. The bankrupt excepted to the report in so far as it denied these to him. The referee ruled that the right to receive them vested in the bankrupt at the time of the adjudication; and that this right given by the supplementary contract is not insurance within the meaning of the laws granting exemptions. He accordingly overruled the exception of the bankrupt. But he directed that of the $174.52 payable monthly, the bankrupt should receive $40 as income exempt under the Tennessee law; and the trustee the balance, namely $134.52. The trustee acquiesced in the decision; the bankrupt sought review. The District Court confirmed the referee's order; and its judgment was affirmed

by the Circuit Court of Appeals. 76 F. (2d) 841. This Court granted certiorari, conflict in decisions being alleged. 295 U. S. 728.

The bankrupt contends that the "Supplementary Contract" covering disability is not a separate and distinct contract, but an integral part of the life insurance policy; that the obligation to pay disability benefits is insurance within the meaning of § 70 (a) of the Bankruptcy Act; that it did not pass to the trustee, since that feature has no cash surrender value; and that if it be held that the contract for disability benefits has a cash surrender value, its amount should be ascertained and the bankrupt be given the opportunity, by paying such value to the trustee, to hold the obligation free from the claims of creditors. The bankrupt contends further that any future disability payments are in the nature of future earnings or after-acquired property and, hence, do not pass to the trustee. Finally, he insists that the obligation of the company to pay disability benefits is property exempt under the law of Tennessee. All of these contentions are, in our opinion, unsound.

The applicable statutes are these:

The Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, 548, provides, in § 6, that it shall not affect the allowance of exemptions to the bankrupt prescribed by the laws of the State of his domicile; and in § 70 (a) that: "when any bankrupt shall have any insurance policy which has a surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets. . . ."

The Tennessee Code (1932) provides:

"8456. *Insurance on husband's life, effected by himself, goes to wife and children.*—Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the statutes of distribution, without being in any manner subject to the debts of the husband.

"8458. *Life insurance or annuity for or assigned to wife or children, or dependent relatives is exempt from claims of creditors.*—The net amount payable under any policy of life insurance or under any annuity contract upon the life of any person made for the benefit of, or assigned to, the wife and/or children, or dependent relatives of such person, shall be exempt from all claims of the creditors of such person arising out of or based upon any obligation created after the effective date of this Code, whether or not the right to change the named beneficiary is reserved by or permitted to such person."

First. As Legg had become totally and permanently disabled before the adjudication, the company's obligation to make benefit payments monthly thereafter was property of the bankrupt which passed to the trustee, unless specially exempted by the law of Tennessee, or by § 70 (a) of the Bankruptcy Act. It was not exempted by § 70 (a), because the obligation to pay disability benefits is not "insurance" within the meaning of that section. The term "insurance" as there used referred only to legal reserve life insurance, the kind of insurance to which a cash surrender value was a common incident. For such value specific detailed provision is commonly made in life policies. Compare *Burlingham* v. *Crouse,* 228 U. S. 459; *Cohen* v. *Samuels,* 245 U. S. 50.[1] The effect of the pro-

[1] The Legg policy contained a table of cash surrender values. This related to the separate obligation to pay the face of the policy on death. It had no relation to the company's obligation under the "Supplementary Contract" for disability benefits.

vision in § 70 (a) is to assign to the trustee the cash surrender value of the life insurance policy. *Everett* v. *Judson,* 228 U. S. 474. No provision is made in the "Supplementary Contract" for a cash surrender value of the obligations thereby assumed; and none is provided by law or custom. Provision for the payment of disability benefits in connection with such life insurance was not introduced in the United States until about twenty years after the passage of the Bankruptcy Act.[2]

Second. The fact that the disability benefits are provided for in a "Supplementary Contract" issued on the same day as the policy and physically attached thereto does not make them life insurance. The life policy and the contract were executed as distinct instruments. The "Supplementary Contract" was to operate for some purposes as if a part of the life policy.[3] But for all other pur-

[2] Compare *In re Kern,* 8 F. Supp. 246. As early as 1910, some companies had inserted in their policies a provision that if the insured became "totally and permanently" disabled, payment of premiums would be waived so long as such disability continued. See *New York Life Insurance Co.* v. *Edwards,* 271 U. S. 109, 117, 118. A little later, some companies introduced the provision that in case of total and permanent disability the face of the policy would be paid in annual instalments beginning after the accrual of disability—the amounts so paid to correspondingly reduce the final amount of the policy payable at death, so that the entire liability under the policy could be extinguished even without death. Policies issued under the War Risk Insurance Act, October 6, 1917, c. 105, 40 Stat. 398, provide in addition to payments of (say) $10,000 on death, monthly benefit payments up to $57.50, the aggregate to be deducted from the face of the policy. It was not until about 1920 that provision was made for the payment, in consideration of an additional premium, of monthly disability benefits in addition to the full face of the policy at death. See Hunter and Phillips, "Disability Benefits in Life Insurance Policies," Actuarial Study No. 5 (2nd ed.) Part 1, ch. I (1932); Arthur Hunter, Papers on Disability Benefits, Eighth International Congress of Actuaries (1927), p. 83.

[3] It concludes: "The Supplementary Contract shall be deemed to be a part of the above numbered Policy and the provisions of said

poses it is a separate obligation. The hazards covered by the two instruments are obviously different. The beneficiaries differ also. The payment under the life policy was to be made to the wife; [4] the disability benefits are to be paid to Legg himself. A separate and different premium was exacted for the obligations assumed in each instrument. It was provided that forfeiture of the life policy would terminate all rights arising from disability; but the supplementary contract could be terminated by Legg without affecting otherwise his life policy.

Third. The obligation of the company to pay disability benefits in the future is not after-acquired property. It is property which was acquired by Legg long before the adjudication, and fully paid for by the premiums paid before the adjudication. Nor are the benefits payable after the adjudication in any sense future earnings. They are not the fruit of anything to be done by Legg after the adjudication. The right to receive disability benefits in the future does not differ from any other right acquired before adjudication to receive money thereafter. It is in essence an annuity purchased and paid for prior to the adjudication. Like other property, it passed to the trustee, unless exempted by the law of the bankrupt's

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Policy concerning declarations and representations by the insured, restrictions, payment of premiums, change of beneficiary, and assignment, are hereby referred to and by such reference made a part hereof. No other provision of said Policy shall be held or deemed to be a part hereof, except (a) The provision of the said Policy as to incontestability shall apply hereto, but shall not preclude the Company from requiring as a condition to recovery hereunder, due proof of such total and permanent disability as entitles him to the benefits hereof. (b) The provision of said Policy as to reinstatement shall apply hereto, except that this Supplementary Contract shall not be reinstated unless said Policy is in force and no premium is in default thereon, or unless said Policy is reinstated at the time of reinstatement of this Supplementary Contract."

[4] Later, Legg changed the beneficiary to his children, reserving the right to change the beneficiary thereafter.

domicile.[5] The principle declared in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, is not applicable here.

Fourth. No statute of Tennessee exempts disability benefits. Its law is, in some respects, more liberal to the debtor than § 70 (a) of the Bankruptcy Act. Section 8456 provides that "any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children," free from claims of the husband's creditors. This has been held to mean that the cash surrender value, as well as the policy, is exempt.[6] But there obviously was no intention to exempt this contract right which is not life insurance, or "the money thence arising," since § 8456 is, in substance, a re-enactment of the statute passed in 1846. Section 8458, enacted in 1925, and slightly modified since, is not applicable here. It deals only with life insurance and annuity contracts "made for the benefit of, or assigned to, the wife and/or children, or dependent relatives." Even if a contract for future disability benefits be deemed an annuity within the meaning of that section, it does not apply, because this contract to pay disability benefits was not made for, and has not been assigned to, Legg's wife, his children, or any dependent. The highest court of Tennessee has not had occasion to decide whether future disability benefits are exempt from claims of creditors; but the intermediate appellate court has held that the statute exempting life insurance does not apply to disability benefits payable

[5] See *In re Wright*, 157 Fed. 544; *In re Burtis*, 188 Fed. 527; *In re Matschke*, 193 Fed. 284; *In re Evans*, 253 Fed. 276. Compare *In re Baudouine*, 96 Fed. 536; *Mutual Life Ins. Co.* v. *Smith*, 184 Fed. 1, 5; *In re Balsier*, 215 Fed. 134.

[6] See *Dawson* v. *National Life Ins. Co.*, 156 Tenn. 306; 300 S. W. 567; *In re Stansell*, 8 F. (2d) 363; Grade, Exemption of Life Insurance Policies Under Tennessee Statutes, etc., 11 Tenn. Law Rev. 34. Compare *Lunsford* v. *Nashville S. & L. Corp.*, 162 Tenn. 179; 35 S. W. (2d) 395.

under a so-called health-insurance policy. *Cravens* v. *Robbins,* 8 Tenn. App. 435, 437.

Affirmed.

POSADAS, COLLECTOR OF INTERNAL REVENUE, *v.* NATIONAL CITY BANK.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 114. Argued December 11, 12, 1935.—Decided January 6, 1936.

1. Capital and deposit taxes levied by the Philippine Government, in addition to the taxes permitted by R. S., § 5219, upon branches of a national bank lawfully established in the Philippine Islands under § 25 of the Federal Reserve Act, as amended, are invalid. P. 499.
2. The Philippine Islands are a "dependency of the United States," within the meaning of § 25 of the Federal Reserve Act, originally and as amended by the Act of September 7, 1916. Pp. 500, 502.
3. Section 26 of the Organic Act of August 29, 1916, which provides: "That the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States," is to be taken distributively, i. e., as conferring power on the local legislature to deal only with local laws, and not to alter, amend, or repeal any Act of Congress. P. 501.
4. The declaration of §§ 6 and 31 of the Philippine Organic Act of August 29, 1916, continuing in force laws applicable to the Philippines which were not amended or repealed by that Act or in conflict with any of its provisions, applies to § 25 of the Federal Reserve Act of 1916. P. 501.
5. The Act of September 7, 1916, which amended § 25 of the Federal Reserve Act "to read as follows," repeating the words of the original section and adding a provision authorizing national banks to invest in the stock of certain other banks, did not repeal and immediately reënact the old provisions but left them continuously in force and speaking from the time of their first enactment. P. 502.
6. Section 5 of the Philippine Organic Act of August 29, 1916, which declares that the statutory laws of the United States "hereafter

enacted" shall not apply to the Islands except when they specifically so provide or it is so provided in that Act, does not apply to those provisions of § 25 of the Federal Reserve Act of 1913 which were copied into and retained by the Act of September 7, 1916. Pp. 501, 505.

7. Where there are two Acts on the same subject, effect should be given to both, if possible. P. 503.
8. Repeals by implication are not favored and will not be adjudged unless the legislative intention to repeal is clear. P. 503.
9. The mere fact that a later statute covers the whole subject of an earlier one and embraces new provisions does not demonstrate an intention completely to substitute the new for the old. A repeal will be implied only so far as the later enactment is in conflict with the earlier, or so far as it is plainly intended as a substitute for the earlier. *United States* v. *Tynen,* 11 Wall. 88. P. 503.

Affirmed.

CERTIORARI * to review a judgment ordering the Collector to refund to the Bank a sum of money which the Bank had paid to him, under protest, as taxes, and had sued to recover. The judgment of the Court of First Instance, directing recovery of only a part of the taxes, was reversed by the one here under review.

Mr. William Cattron Rigby for petitioner.

Mr. Carl A. Mead, with whom *Mr. Harry W. Forbes* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The National City Bank of New York is organized under the National-Banking Act, as amended from time to time since its enactment. In 1930 the bank, after complying with the requirements of § 25 of the Federal Reserve Act of December 23, 1913, c. 6, 38 Stat. 251, 273, as amended September 7, 1916, c. 461, 39 Stat. 752, 755,

* See Table of Cases Reported in this volume.

infra, established branches at Manila and Cebu in the Philippine Islands. A tax was levied by and paid to the Philippine Government on the net income of these branches for the first six months of the year 1931 (R. S. § 5219),[1] about which there is no controversy. The Philippine Government, however, in addition, levied capital and deposit taxes not permitted by § 5219, and, these having been paid by the bank under protest, this action was brought in the Court of First Instance of Manila to recover the amount. That court gave judgment in favor of the bank for only a part of the additional taxes; but the Philippine Supreme Court, upon appeal, reversed the judgment in so far as it was against the bank, and ordered a refund of the entire amount.

Section 25 of the Federal Reserve Act of 1913, *supra,* reproduced in the margin so far as it is pertinent here,[2]

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[1] Sec. 5219, Revised Statutes (12 U. S. C. [1934 ed.] § 548), provides that the legislature of each state may "(1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, . . ." provided certain specified conditions are complied with.

[2] "SEC. 25. Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board, upon such conditions and under such regulations as may be prescribed by the said board, for the purpose of securing authority to establish branches in foreign countries or dependencies of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agents of the United States. Such application shall specify, in addition to the name and capital of the banking association filing it, the place or places where the banking operations proposed are to be carried on, and the amount of capital set aside for the conduct of its foreign business. The Federal Reserve Board shall have power to approve or to reject such application if, in its judgment, the amount of capital proposed to be set aside for the conduct of foreign business is inadequate, or if for other reasons the granting of such application is deemed inexpedient."

authorizes the establishment of branches of national-banking associations "in foreign countries or dependencies of the United States." It cannot be doubted that, viewing this section without regard to later legislation, the branches here in question were lawfully established; for, as will appear at a later point in this opinion, the Philippine Islands are included by the words "dependencies of the United States." In that view of the matter, the additional taxes imposed by the Philippine Government are invalid under *Domenech* v. *National City Bank,* 294 U. S. 199, 204; *Talbott* v. *Silver Bow County,* 139 U. S. 438; and, were it not for the asserted effect of legislation subsequent to the passage of the Federal Reserve Act in 1913, which we shall examine in a moment, this case would be disposed of, without further detail, upon the authority of those cases. In the *Domenech* case we held that the national-banking laws extended to Puerto Rico; that a tax on a branch of a national bank is a tax on the bank; and that Puerto Rico, being a dependency of the United States, could not, except as permitted by R. S. § 5219, tax a national bank, since it is an agency of the United States. The *Talbott* case involved the power of a territory to impose a tax upon a national bank. This court held, in the first place, that the same power of taxation in respect of national banks exists in the territories as in the states; and, in the second place, that this power of taxation in the territories was limited by the provisions of § 5219 although in terms that section refers only to the states. 294 U. S. 204. We find nothing in the original Organic Act or in any of the early statutes relating to the Philippines referred to by petitioner which takes those islands out of the controlling rule of the *Domenech* case that " a dependency may not tax its sovereign "; and we come to the only remaining point which we deem it necessary to discuss.

Petitioner contends that subsequent legislation has the effect of repealing and abrogating § 25 of the 1913 act, permitting the establishment of national bank branches, in so far as the Philippine Islands are concerned. This later legislation consists of certain provisions in the Organic Act for the Philippine Islands of August 29, 1916, c. 416, 39 Stat. 545, and the act of September 7, 1916, *supra,* amending designated sections of the original Federal Reserve Act.

We examine these statutory provisions in their chronological order. By § 25 of the 1913 act, as we have seen, national banks were authorized to establish branches in the Philippine Islands. The Organic Act of 1916 provides:

"Sec. 5. That the statutory laws of the United States hereafter enacted shall not apply to the Philippine Islands, except when they specifically so provide, or it is so provided in this Act.

"Sec. 6. That the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States."

(Section 6 obviously is to be taken distributively—that is to say, as conferring power on the local legislature to deal only with local laws. It, of course, confers no power on the local legislature to alter, amend or repeal an act of Congress.)

"Sec. 31. That all laws or parts of laws applicable to the Philippines not in conflict with any of the provisions of this Act are hereby continued in force and effect."

By §§ 6 and 31 it is clear that § 25 of the Federal Reserve Act of 1913, not being in conflict with any provision of the Organic Act of 1916, was continued in full force and effect.

September 7, 1916, nine days after the passage of the new Organic Act, the act to amend the Federal Reserve Act, *supra,* was passed. It, first, is to be observed in respect of this amending act that it does not purport to enact a substitute for the Federal Reserve Act, or to repeal and re-enact any portion, but only to *amend* certain specified sections thereof. The old act contains thirty sections. The act of September 7, 1916, amends §§ 11, 13, subsection (e) of § 14, the second paragraph of § 16, §§ 24 and 25, and § 5202 of the Revised Statutes. The introductory words as to § 25 are—"That section twenty-five be, and is hereby, amended to read as follows." The original section is then copied, the only change or addition, so far as the question here is concerned, being the insertion of the words "or insular possessions" after the word "dependencies." No reason appears from anything called to our attention, and we are not ourselves aware of any reason, for the addition of these words, since the comprehensive term "dependencies" would seem to include all insular possessions which we then had. But in any event, the Philippine Islands constituted a dependency, for they were not possessions merely, but possessions held by right of cession from Spain and over which the United States undoubtedly had supreme power of legislation and government. See *United States* v. *The Nancy,* 3 Wash. C. C. 281, 286 *et seq.* Compare 34 Op. Atty. Gen. 287, 291. The only substantial change made in the old § 25 is the addition of a provision authorizing a national-banking association to invest in the stock of other banks and corporations chartered or incorporated under the laws of the United States or of any state engaged in international or foreign banking, or banking in dependencies or insular possessions of the United States; and it is fairly plain that this addition constituted the sole reason for amending the section.

The amending act just described contains no words of repeal; and if it effected a repeal of § 25 of the 1913 act, it did so by implication only. The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

The law on the subject as we have just stated it finds abundant support in the decisions of this court, as well as in those of lower federal and state courts. It will be enough to direct attention to a few of these decisions out of a very large number. In *United States* v. *Tynen,* 11 Wall. 88, 92, Mr. Justice Field, speaking for the court, after stating the general rule, said that if two acts "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." It was not meant by this statement to say, as a casual reading of it might suggest, that the mere fact that the latter act covers the whole subject and embraces new

provisions demonstrates an intention completely to substitute the latter act for the first. This is made apparent by the decision in *Henderson's Tobacco,* at the same term, 11 Wall. 652, 657, where, in an opinion delivered by Mr. Justice Strong, it is said, " But it must be observed that the doctrine [of the *Tynen* case] asserts no more than that the former statute is impliedly repealed, *so far* as the provisions of the subsequent statute are repugnant to it, or *so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." (Italics are in the original.) These two cases, with others, are briefly reviewed by this Court in *Red Rock* v. *Henry,* 106 U. S. 596, 601, by Mr. Justice Woods, and the court's conclusion stated as follows:

"The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest."

The implication of which the cases speak must be a necessary implication. *Wood* v. *United States,* 16 Pet. 342, 362–363. It is not sufficient, as was said by Mr. Justice Story in that case, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." The question whether a statute is repealed by a later one containing no repealing clause, on the ground of repugnancy or substitution, is a question of legislative intent to be ascertained by the application of the accepted rules for ascertaining that intention. *United States* v. *Claflin,* 97 U. S. 546, 551; *Eastern Extension Tel. Co.* v. *United States,* 231 U. S. 326, 332.

And, even in the face of a repealing clause, circumstances may justify the conclusion that a later act repeating provisions of an earlier one is a continuation, rather than an abrogation and reënactment, of the earlier act. *Bear Lake Irrigation Co.* v. *Garland,* 164 U. S. 1, 11–13.

Petitioner relies on *Murdock* v. *Memphis,* 20 Wall. 590, 617; but it is sufficient to say that the rule which we have quoted from *Red Rock* v. *Henry, supra,* was formulated with that case in mind, since it is specifically mentioned.

In some of the states, the principle has been embodied in statutes to the general effect that provisions of a prior statute, so far as they are reproduced in a later one, are to be construed as a continuation of such provisions and not as a new enactment. See *Barrows* v. *People's Gaslight & Coke Co.,* 75 Fed. 794, 795. But such statutes are only declaratory of the rule of the common law. *Dallmann* v. *Dallmann,* 159 Wis. 480, 485–486; 149 N. W. 137; *Julien* v. *Model B., L. & I. Assn.,* 116 Wis. 79, 89–90; 92 N. W. 561. See, also, *Ely and others* v. *Holton,* 15 N. Y. 595, 598, 599; *Moore* v. *Mausert,* 49 N. Y. 332, 335; *Longlois* v. *Longlois,* 48 Ind. 60, 63–64; *People* v. *N. Y., C. & St. L. R. Co.,* 316 Ill. 452, 457–458; 147 N. E. 494.

Applying the rule established by the foregoing and other authorities, we see nothing in the terms of the Federal Reserve amending act, in the provisions of the new Organic Act, or in the history of Philippine legislation, which justifies the conclusion that by the amendment of 1916 Congress intended to repeal the old § 25 of the Federal Reserve Act. The amendment is made in a well-approved form—a form which, indeed, many of the states compel by constitutional provision—namely, by repeating the language of the original section with the additions to which we have heretofore called attention. Unless the contrary plainly appear, the employment of such form of amendment is simply to serve the causes of con-

venience and certainty. That is to say, by carrying the full text forward, the task of searching out and bringing together the various fragments which go to make up the completed whole, after specific eliminations or additions by amendment, is rendered unnecessary; and possible doubt as to the precise terms of the law as amended is avoided. Or, as Chief Judge Denio said in *Ely and others* v. *Holton, supra*—

"In short, we attribute no effect to the plan of dovetailing the amendment into the original section, except the one above suggested, of preserving a harmonious text, so that when future editions shall be published the scattered members shall easily adjust themselves to each other."

It follows that such parts of the original § 25 as were copied into the amended section were not thereby repealed and immediately reënacted, but continued, uninterruptedly, to be the law after the amendment precisely as they were before. Section 5 of the Organic Act of 1916, *supra,* which in terms relates only to laws *thereafter* enacted, must be put aside as not applicable.

Judgment affirmed.

PUBLIC SERVICE COMMISSION OF PUERTO RICO *v.* HAVEMEYER ET AL.

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

No. 115. Argued December 12, 13, 1935.—Decided January 6, 1936.

1. By grant of the Executive Council of Puerto Rico a limited partnership was entitled (among other privileges) to dam the outlet of a lake and use the impounded water in the irrigation of its own land, subject to the condition, imposed to protect private lands, public roads and the public health from the injurious effects of overflows, that the lake should not be raised above a level prescribed. *Held* a grant of quasi-public nature, within the mean-

ing of provisions of the Organic Acts for Puerto Rico of 1900 and 1917. P. 514.

2. Every franchise is subject to be revoked by the proper public authority for breach of a condition, express or implied, upon which the grant depended. P. 515.
3. Revocation of a franchise for breach of condition may be by any procedure not repugnant to established principles of justice; and they are satisfied if the withdrawal of the privilege, declared by executive or legislative authority, may be followed by an appeal to a court of competent jurisdiction, in which the rights of the holder may be determined. P. 515.
4. Reservation in the Organic Acts of power in Congress to annul or modify grants of franchises in Puerto Rico does not imply a withholding of such power from the local authorities. P. 515.
5. Under the Organic Acts for Puerto Rico and Act No. 70, 1917, of the local legislature, the Public Service Commission was authorized to cancel the franchise, involved in this case, granted by the earlier Executive Council, both under the power to amend, alter and repeal, which was expressly reserved, and under the implied power to revoke for breach of condition. P. 516.
6. A reserved power to repeal a grant of special privileges may be exercised at the pleasure of the legislature or other authority in which it is vested; but the power to cancel for condition broken cannot be exerted without allowing the holder an opportunity to have the asserted default judicially determined. P. 517.
7. Upon review under Act No. 70, 1917, of Puerto Rico of an order of the Public Service Commission canceling a franchise for breach of condition, the Insular district and the supreme courts are confined to the questions whether the order was (1) reasonable, i. e., not capricious, arbitrary, or confiscatory; (2) in conformity with law; and (3), based upon incompetent evidence; and the court may decide the questions of law and affirm or reverse, or may remand the record to the commission for further action; but it cannot amend or modify the commission's order. *Held:*

   (1) These functions are strictly judicial. P. 516.

   (2) The Circuit Court of Appeals for the First Circuit has jurisdiction to review the decision of the Insular Supreme Court on the reasonableness of the commission's order. P. 517.
8. Objection, first made in the Circuit Court of Appeals, that appeals from an administrative order canceling a franchise owned by a limited partnership in Puerto Rico were not taken by the parties in interest, because the respondent in the administrative proceeding

was the partnership, described as composed of certain individuals, whereas the appeals were taken in the names of the individuals as members of the partnership,—*held* (1) too late, and also (2) without merit. P. 518.

9. An answer on the merits admits the actor's capacity to sue. P. 519.

10. The facts in this record support the conclusion of the Public Service Commission and the Insular courts that the holder of the franchise, by failing to keep clear the outlet of the lake, over which it had control, and thus allowing the waters to rise above the limits specified in the franchise, was responsible for a long-continued overflow resulting in damage to public and private property; and the order canceling the franchise is not shown to be capricious, arbitrary, or otherwise contrary to law. P. 520.

74 F. (2d) 637, reversed.

CERTIORARI * to review the reversal of a judgment of the Supreme Court of Puerto Rico sustaining an order of the Public Service Commission canceling a franchise.

Mr. William Cattron Rigby, with whom *Mr. Benjamin J. Horton,* Attorney General of Puerto Rico, and *Mr. Nathan R. Margold* were on the brief, for petitioner.

Mr. Ralph S. Rounds for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

March 19, 1901, the executive council of Puerto Rico granted to the Guanica Land Company, a New Jersey corporation, assignable franchises including the privilege to take water from Guanica Lake for the irrigation of the company's lands. Russell & Company, Sucesores, Sociedad en Comandita, a limited civil agricultural partnership composed of Havemeyer and the other respondents as partners, succeeded to that privilege. March 8, 1929, the public service commission of Puerto Rico made an order canceling it. The district court of San Juan and the supreme court successively sustained the order. Respond-

* See Table of Cases Reported in this volume.

ents' final appeal was to the Circuit Court of Appeals; it held the order unreasonable, reversed the judgment of the supreme court and remanded the case for further proceedings. 74 F. (2d) 637.

Notwithstanding absence of cross petition, we may consider respondents' insistence that the commission was without authority to make the order. *Langnes* v. *Green,* 282 U. S. 531, 536–538. The petition presents two questions: Whether the Circuit Court of Appeals, a constitutional court of the United States, has jurisdiction to review the commission's order; whether the six individual respondents here are parties in interest entitled to appeal. There is another question adequately raised by the petition though not specified formally as are the others or presented in accordance with the best practice. It is whether the Circuit Court of Appeals erred in holding the order to be unreasonable and in reversing upon that ground the judgment of the supreme court.

The Organic Act of 1900, c. 191, 31 Stat. 77, authorized the creation of an executive council, § 18, and provided: "That all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same." § 32. The Joint Resolution of May 1, 1900, § 3, 31 Stat. 716, required that all such grants "shall provide that the same shall be subject to amendment, alteration, or repeal."

The franchise, in addition to conferring the privilege of using the water of Guanica Lake for irrigation of their lands, authorized the grantees to construct a wharf in, and to build and operate a railroad along, the harbor of Guanica bay into which flow the waters of the lake. The irrigation privilege is the only one here involved; its substance follows: The grant was for 99 years and extended

to the land company, its successors and assigns. They were authorized to construct and operate a dam across the outlet for the purpose of regulating the flow of the water from the lake. They were given the right to take up to 20,000,000 gallons a day from the outlet or elsewhere, by gravity, through channels or by pumps, and to construct and operate works therefor. The franchise declared that nothing therein should be construed to permit grantees to raise or maintain the height of the lake above its customary level during the rainy season in years of average and usual rainfall, and they were declared liable for all damage sustained by abutting owners by reason of unduly raising the waters. They were authorized to acquire by eminent domain private lands needed for their works, and were required to have plans for the same approved by the commissioner of the interior before commencing work. They were required to pay $300 per year for the irrigation privilege, and in case of default the commissioner might stop the flow of the water. It was provided " that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal."

The Second Organic Act, approved March 2, 1917, c. 145, 39 Stat. 951, declares the authority of the legislature shall extend "to all matters of a legislative character not locally inapplicable," § 37, but expressly reserves to Congress the power to annul acts of the legislature. § 34. The Act also creates a public service commission and declares that all grants of franchises, rights, and privileges of a public or quasi-public nature shall be made by it but not to be effective until approved by the governor and to be subject to the power of Congress "to annul or modify the same." § 38. It requires such grants to provide that they shall be subject to amendment, alteration or repeal. § 39. Section 38 was by § 6, Act of March 4, 1927, amended to empower and direct the commission to discharge such additional duties and functions as might be conferred upon it by the legislature. 44 Stat. 1420.

The Laws of Puerto Rico, 1917, Act No. 70, requires that all grants of franchises shall be subject to amendment, alteration or repeal by the commission (§ 54), and declares that it shall have power to alter, amend, modify or repeal any franchise that may have been granted by the executive council and shall exercise all the rights and powers reserved to the executive council by any such franchise or privilege or by any law. § 60.

Act No. 70 also regulates the commission's procedure and the appeals from its orders. The testimony before the commission must be taken down. § 68. Any party to the proceedings thereby affected may appeal from its orders to the district court of San Juan. Petitions for appeals include assignments of errors. § 78. The commission is brought in as party defendant; upon the filing of its answer, the case is at issue. The commission is required to certify to the court its proceedings including the testimony, findings, opinions and orders. §§ 79–82. No evidence may be taken on appeal. § 86. The court is required to determine whether the order appealed from is reasonable and in accordance with law. § 83. If found to be so, the court must dismiss the appeal and affirm the order. If found unreasonable or based upon incompetent evidence or otherwise not in conformity with law, the court must reverse the order or remand to the commission. § 85. A party aggrieved by the final judgment of the district court may appeal to the supreme court in the same manner and form as in other cases. § 90. Appeal from the judgment of that court is to the Circuit Court of Appeals for the First Circuit. Judicial Code, § 128 (a) (Fourth). 28 U. S. C., § 225 (a) (Fourth). The attorney general is required, upon request of the commission, to proceed by mandamus, injunction or quo warranto to enforce the commission's orders. § 94.

February 24, 1928, the municipality of Lajas complained to the commission and to the commissioner of the

interior that the works of the holders of the irrigation privilege were causing irreparable damage by raising waters of the lake above the levels specified in the franchise and thereby flooding privately owned lands and public roads. The commissioner investigated and to the governor reported: Apparently the situation was created by violation of the provisions of the franchise. The holders failed to submit plans as required. The customary levels of the lake mentioned in the franchise have not been determined. The company has borne none of the damages. There was sufficient cause to request the commission to consider repealing the franchise. The governor referred the report to the commission. It called on the parties interested to show cause why it should not totally cancel the franchise.

The South Porto Rico Sugar Company, interested in other privileges, and Russell & Company, holder of the irrigation privilege, appeared specially and objected to the jurisdiction of the commission. Before answering the rule to show cause, they brought a suit in the United States Court for Puerto Rico to enjoin the commission from asserting any jurisdiction over them in respect of the franchise. The court dismissed the bill on the grounds that the suit was premature and that the commission had jurisdiction. The Circuit Court of Appeals affirmed. *South Porto Rico Sugar Co.* v. *Munoz,* 28 F. (2d) 820.

Russell & Company, by its answer to the order to show cause, admits that the water of the lake has been higher than the usual level and has flooded some lands, asserts that it was not raised by the fault of any owners of the franchise, alleges that the holders have spent large sums for works for the taking of water and that cancelation would cause it great loss, maintains that the commission has no jurisdiction over it and says that, although the partnership had no obligation so to do, it has (since the order to show cause) at its own expense taken steps to

lower the waters of the lake to, and also to guarantee that in the future they will not go beyond, customary levels.

Shortly after this answer was interposed, the commission, upon consideration of conditions then existing in and near the flooded area, found partial drainage to be immediately feasible and, by an interlocutory order, called on the holders of the irrigation privilege to prepare a draft of works to lower the level of the lake in order to relieve the overflowed district. The record before us discloses no response or action by the holders.

There was a hearing upon the issues raised by the order to show cause and the answers filed by interested parties. Russell & Company appeared and was heard; much evidence was received. The commission canceled the franchise but only in respect of the irrigation privilege. The report made by the president of the commission shows: The holders of the irrigation privilege controlled the lands through which the water had been accustomed to flow from the lake to the bay. They allowed to accumulate in the outlet soil and debris, for a distance of 100 yards or more, which held back the waters and caused overflow on an opposite side of the lake. From about the middle of 1926 until late in 1928 the waters so raised continued to flood thousands of acres including entire farms and seven or eight kilometers of public roads in the Lajas Valley and so caused damage to private owners and to the community in general.

The district court deemed itself required to decide only whether the order was reasonable and in accordance with law. There was no claim that it rested on incompetent evidence. Upon the record of proceedings, including the evidence introduced before the commission, it held: Under the franchise the holders of the irrigation privilege assumed control of the flow from the lake through the outlet to the bay and had power to raise or lower the level of the waters. They failed to comply with the duty—

voluntarily contracted by them in accepting the franchise—to submit plans of their works to the commissioner for approval. From July, 1926, appellants caused or permitted an excess of water to be held in the lake raising it to heights above the customary levels in years of average rainfall and thereby flooded thousands of acres and caused injury to land owners and to the community in general. The order is reasonable and agreeable to law. The court gave judgment dismissing the appeal and affirming the order.

Respondents took the case upon the same record to the supreme court. It construed the franchise not only to prohibit grantees from causing the water to be raised above the indicated levels but also to require them to prevent its exceeding such levels and to that end imposed upon them the duty to keep the outlet open. It held that, "inasmuch as appellant has failed to comply with the conditions of the franchise," the commission's order was reasonable and in accordance with law and affirmed the judgment of the district court.

On the appeal to the Circuit Court of Appeals, the evidence was omitted from the record. That court, assuming that it was sufficient to support a finding that the holders of the irrigation privilege knowingly permitted obstruction in the outlet to raise the level of the lake, concluded that the order canceling the privilege was "an arbitrary and unreasonable act" and reversed the judgment.

1. First to be considered is respondents' insistence that the commission was not authorized to cancel the irrigation privilege.

That contention has been overruled by both insular courts and the Circuit Court of Appeals on the authority of *South Porto Rico Sugar Co.* v. *Munoz, supra.* While, as to the privilege in question, the original grantee or subsequent holders are not public utilities, the franchise is one of a quasi-public nature. The holders' right to take

the waters depended upon a grant from the public. Civil Code of Puerto Rico, §§ 341, 343, 344. They were endowed with power of eminent domain to acquire *in invitum* lands of others to enable them conveniently to irrigate their lands and effectively to discharge the duties imposed upon them by the franchise. The terms of the grant were a matter of general concern inasmuch as the use of lands, condition of roads and health of people in the vicinity were liable to be adversely affected if the holders of the privilege should permit the waters to overflow contiguous areas.

Implied in every grant of franchise is the condition that it may be lost by misuse. Every such special privilege is subject to termination for breach of condition, whether express or implied, upon which the grant depends. It may be canceled or withdrawn by any procedure that is not repugnant to the established principles of justice. The initial step need not be a suit for mandamus, *quo warranto,* injunction or the like. Essential requirements are satisfied if the withdrawal of the privilege, declared by legislative or executive authority, may be followed by appeal to a court of competent jurisdiction in which the rights of the holders may be determined. *N. Y. Electric Lines* v. *Empire City Subway,* 235 U. S. 179, 194. *Cosmopolitan Club* v. *Virginia,* 208 U. S. 378, 383. *New Orleans Waterworks Co.* v. *Louisiana,* 185 U. S. 336, 346. *Eagle Insurance Co.* v. *Ohio,* 153 U. S. 446, 454. *Chicago Life Ins. Co.* v. *Needles,* 113 U. S. 574, 580. *Terrett* v. *Taylor,* 9 Cranch 43, 51.

The assertion by Congress of power to "annul and modify" franchises granted by the commission and to annul laws enacted by the insular legislature gives rise to no implication that the reserved power was intended to be withheld from insular authorities. Inference to the contrary is a more reasonable one and in harmony with the reasons which underlie the reservation. Local authorities

may ascertain facts and decide questions upon which depends appropriate exertion of the power much more conveniently than may the Congress.

Under the Organic Acts and insular laws the power of the commission to make the order in question is clear. And that is so whether the cancelation was accomplished by exertion of the power to amend, alter and repeal expressly reserved or was effected under the implied rule that such franchises are terminable for breach of condition. Congress has not directly empowered the commission or any other insular authority to exert the reserved power. But it has adequately empowered the insular legislature and created a public service commission in which it vested the functions in respect of franchises that theretofore had been discharged by the executive council. The insular legislature by enactment, obviously not locally inapplicable, empowered the commission to alter, amend, modify or repeal any franchise granted by the executive council. § 60, Act No. 70 of 1917. That authorization unquestionably extends to the cancelation of the irrigation privilege.

2. Petitioner maintains that the judicial power of the United States does not extend to the review of reasonableness of the commission's order and that therefore the Circuit Court of Appeals was without jurisdiction of the appeal. It assumes that the making of the order was merely the exertion of the power to repeal that is expressly reserved in the grant. It says that here involved is a question of the kind of reasonableness of a purely executive decision to exercise a contractual right of the government, and that it is a wholly different kind of question of reasonableness from that involved in the exercise of a power to cancel a franchise where may arise a judicial question whether executive action is confiscatory. And on that basis the commission insists that the repeal in-

volved nothing but the exercise of executive discretion and is therefore not subject to review of the courts.

The reserved power to repeal a grant of special privileges implies that it may be exerted at the pleasure of the legislature or other authority in which the power to repeal is vested. *Tomlinson* v. *Jessup,* 15 Wall. 454, 459. *Miller* v. *State,* 15 Wall. 478, 498. *Railroad Co.* v. *Georgia,* 98 U. S. 359, 365. *Sinking-Fund Cases,* 99 U. S. 700, 720. *Greenwood* v. *Freight Co.,* 105 U. S. 13, 17. *Calder* v. *Michigan,* 218 U. S. 591, 599. Cf. *Grand Trunk Western Ry.* v. *South Bend,* 227 U. S. 544. That power is plainly distinguishable from the power to cancel for violation of the terms of the grant. In the absence of constitutional, legislative or contractual restriction, the exertion of the first mentioned power requires nothing more than an appropriate declaration of the repeal. *Hamilton Gas Light Co.* v. *Hamilton City,* 146 U. S. 258, 270–271. But, without consent of the holder, valid cancelation for condition broken cannot be accomplished without giving to the holder an opportunity to have the asserted default judicially determined. *N. Y. Electric Lines* v. *Empire City Subway, supra,* p. 195. *Farnsworth* v. *Minnesota & Pacific R. Co.,* 92 U. S. 49, 66. *Atlantic & Pacific R. Co.* v. *Mingus,* 165 U. S. 413, 430–434. *New York Indians* v. *United States,* 170 U. S. 1, 24.

We need not consider whether the expressly reserved power of repeal is trammeled by Act No. 70 or other law governing the commission or the appeals from its orders, for there is above disclosed enough of the proceedings and determinations of the commission and of the lower courts to show that the order in question was not the exertion of the expressly reserved power to repeal but was the assertion of the implied right to cancel for failure of holders to perform their undertakings. On the appeal the district court was not authorized to substitute for those

of the commission its own views as to what action would be just or ought to be taken, or to perform any legislative, executive or administrative function. Its only jurisdiction was to decide upon the record certified to it by the commission whether the order was (1) reasonable, (2) in conformity with the law, (3) based upon incompetent evidence. "Reasonable" as here employed means not "capricious," "arbitrary" or "confiscatory." Whether the order of cancelation was reasonable in the sense that it did not transgress permissible limits is a question of law. It is not suggested that the other questions presented on the appeal were not within the jurisdiction of the court. The permissible scope of the determinations and judgment of the court is significant. It may only decide the questions of law raised by the appeal and affirm or reverse the order or remand the record to the commission for further action. It is without authority to amend or modify an order of the commission. The jurisdiction and duties of the supreme court and Circuit Court of Appeals are similar in all respects to those of the district court. Neither has any power or function other than what is strictly judicial. It is clear that the Circuit Court of Appeals had jurisdiction of the appeal taken to it. *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 200. *Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266. Cf. *Keller* v. *Potomac Elec. Power Co.,* 261 U. S. 428, 444. *Porter* v. *Investors Syndicate,* 286 U. S. 461, 468. *Radio Comm'n* v. *General Electric Co.,* 281 U. S. 464, 469.

3. The second question specified in the petition for the writ is whether the six individuals named as partners, constituting Russell & Company, are parties in interest entitled to appeal from the order. The question as put requires clarification by reference to the facts on which it is based. Havemeyer and the other persons named constitute a limited partnership, Russell & Company. Its answer to the order to show cause is in this form:

"Now comes Russell & Company, Sucrs., S. en C., a civil agricultural partnership organized in accordance with the laws of Puerto Rico, composed of Horace Havemeyer, Frank A. Dillingham, Frank M. Welty, Edwin L. Arnold and H. B. Orde, as partners . . ."

The petition for appeal to the district court begins:

"Now come Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, members of the civil agricultural partnership of Puerto Rico, Russell & Co., Sucrs., S. en C., and hereby appeal . . ."

With immaterial variations in the use of words, the designation of appellants last given was followed in the petitions for appeals to the supreme court and the Circuit Court of Appeals. And so in substance were the appealing parties referred to in the opinions, judgments and generally throughout the litigation. Petitioner's point comes to this. The partnership, Russell & Company, composed of the persons named as partners, claiming to be the owner of the irrigation privilege answered the order to show cause; but the appeal from the order of cancelation was taken by these persons as partners constituting the partnership. The commission first raised the point in the Circuit Court of Appeals. If worthy of notice, it should have been made when the appeal was taken to the district court. The appeal is in the nature of a suit to have the order adjudged invalid. The petition for appeal is the complaint. The commission answered on the merits. Thereby it admitted respondents' capacity to initiate the proceeding. *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church,* 137 U. S. 568, 572. *Society for the Propagation* v. *Town of Pawlet,* 4 Pet. 480, 501. *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386, 450. Havemeyer and the other partners here maintain that, by the proceedings above described, the partnership itself, a juridical entity (*Puerto Rico* v. *Russell & Co.,* 288 U. S. 476, 482)

in legal effect did take all the appeals and was before the Circuit Court of Appeals. It results that the commission's suggestion that the partnership will not be bound by the judgment is without merit. The Circuit Court of Appeals rightly held that the partnership appealed and was before it and that the commission's objection came too late.

4. The facts disclosed by the record support the conclusion of the commission and insular courts that the holder of the irrigation privilege is responsible for the overflow and resulting damages to private and public property. Reasonably construed, the franchise must be held to have given to the grantees control of the outlet and to have bound them to keep it sufficiently clear, for the passage of waters from the lake to the bay, to prevent raising them above the designated levels. The findings of fact included in the report of the commission and decisions of the insular courts, based as we must assume on adequate evidence, indicate that Russell & Company allowed the outlet to become and remain filled up and that the obstruction caused the waters to overflow and keep submerged the large contiguous area that is above referred to. Having regard to the quasi-public nature of the privilege, the extended period of the holder's default, the character of the resulting damages and the commission's authority to terminate for breach of condition on which the grant was made, the order of cancelation is clearly not shown to be capricious, arbitrary or otherwise contrary to law. Russell & Company have failed to establish any ground upon which it may be set aside. *Kern River Co.* v. *United States,* 257 U. S. 147, 155. *Farnsworth* v. *Minnesota & Pacific R. Co., supra,* 68. *Union Land & Stock Co.* v. *United States,* 257 Fed. 635, 637.

Reversed.

OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION ET AL. *v.* BARNSDALL REFINERIES, INC. ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 116. Argued December 12, 1935.—Decided January 6, 1936.

1. The Act of March 3, 1921, authorizing the State of Oklahoma to levy a tax upon the gross production of oil from lands in Osage County, as applied to oil produced by lessees of lands of the Osage tribe of Indians in that county, is construed, in the light of its history, as authorizing a tax measured by the gross value of oil produced and to be distributed in part to the county, and not as authorizing a tax at a flat rate per barrel, the proceeds of which are paid into the state treasury and used to defray the expenses of administering the state Oil and Gas Proration Law. P. 523.
2. An Act of Congress which waives the immunity from state taxation of instrumentalities of the Federal Government, such as leases of Indian oil lands, is strictly construed. P. 526.

171 Okla. 145; 41 P. (2d) 918, affirmed.

CERTIORARI * to review a decree enjoining the collection of a tax measured on the oil produced by the plaintiffs as lessees of Indian lands.

Messrs. C. D. Cund and *Earl Foster,* with whom *Messrs. C. W. King, H. L. McCracken, E. L. Richardson,* and *Edwin Dabney* were on the brief, for petitioners.

Mr. L. G. Owen, with whom *Messrs. Edward H. Chandler, James B. Diggs, R. W. Garrett,* and *Wm. H. Zwick* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

This case presents the single question whether an Oklahoma tax of ⅛ of a cent per barrel on oil produced in

* See Table of Cases Reported in this volume.

the state, c. 132, Oklahoma Session Laws, 1933, when applied to oil produced by lessees of lands of the Osage Tribe of Indians in Osage County, Oklahoma, is within the congressional enactment consenting to a state tax upon the production of such oil. The challenged tax is paid into the State Treasury and used to defray the expenses of administering the State Oil and Gas Proration Law. The Oklahoma Supreme Court held that the tax is not within the congressional consent and accordingly enjoined its collection as imposing an unconstitutional burden on the Indian leases, which are deemed to be instrumentalities of the federal government. 171 Okla. 145; 41 P. (2d) 918. We granted certiorari to review the judgment of the state court, the case being of public importance because involving relations of the state to the national government.

The Oklahoma legislature, by Act of February 14, 1916, c. 40, Okla. Session Laws, 102, imposed a production tax of 3% of the gross value of all oil produced within the state. The Act provides that the tax shall be in lieu of all other taxes upon oil in place in the ground, oil leases, or equipment used for oil production, and that one-third of the tax collected in each county shall be returned to it for the construction of permanent roads and bridges and "for and in aid of" the common schools. The levy is denominated by the taxing act a "gross production tax," a label which this Court and the Supreme Court of Oklahoma have accepted as appropriate. *Gillespie* v. *Oklahoma,* 257 U. S. 501, 504; *Barnsdall Refineries, Inc.* v. *Oklahoma Tax Comm'n,* 171 Okla. 145, 147.

In *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503, and *Large Oil Co.* v. *Howard,* 248 U. S. 549, this tax was held invalid so far as applied to the production of oil by lessees of lands of the Osage Tribe of Indians, which were located in Osage County, as a tax burden upon instrumentalities of the United States. See *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Gillespie* v. *Okla-*

homa, supra; compare *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393.

These decisions were followed by the Act of Congress of March 3, 1921, 41 Stat. 1250, § 5 [1] of which authorized the State of Oklahoma to levy a tax upon the gross production of oil in Osage County, with the proviso that ". . . all taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, . . ." Other sections of the act permitted the extension, by an additional twenty-five years, of the period, expiring in 1931, for which mineral leases of the lands of the Osage Indians might be granted by the Secretary of the Interior acting in their behalf.

Congress, in enacting the legislation, was advised of the Oklahoma 3% gross production tax, of the decisions of this Court holding lessees of Indian oil lands, which

[1] " Sec. 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma: *Provided,* That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: *Provided further,* That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

were located in Osage County, immune from the tax, and that removal of the immunity would benefit the Osage Indians through the return of one-third of the tax to the county. See Hearings before Committee on Indian Affairs, S. 4039 (particularly letters of the Secretary of the Interior and of the Indian Commissioner to the Chairman of the Committee), Part 1, pp. 7, 8; Part 2, pp. 108, 109; Report Senate Committee on Indian Affairs, No. 704, 66th Cong., 3rd Sess. As originally introduced the bill authorized the levy of a gross production tax upon oil produced in Osage County "not to exceed 3 per centum of the value of the same," and directed that it should be "distributed as now provided by the laws of Oklahoma." With the evident purpose of removing the 3% limit but not of otherwise altering the character of the permitted tax, the 3% limitation was stricken from the bill before enactment.

Congress, in removing the tax immunity, thus had in contemplation the particular tax then on the statute books of Oklahoma, then and ever since described as a gross production tax, the benefits of which would inure to Indians in Osage County by the distribution of a part of the tax to that county. The section bears its own evidence of the intention that the waiver of tax immunity of the production of oil from Indian lands was to be limited to a tax having these characteristics. The tax is described as a gross production tax. It is to be "paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, . . ." The reference must be taken to be to the laws then in effect, unless we are to indulge the improbable assumption that the state was to be left free to dispense with the requirement that the tax permitted was to be in lieu of all other taxes. This conclusion seems inescapable, despite the amendment of the bill as introduced by dropping the word "now" from the

direction that the tax is to be "distributed as now provided by the laws of Oklahoma," since in the section as amended the phrase is used to qualify the "lieu" provision of the statute as well as the payment and distribution provisions. The section removing the immunity thus described the gross production tax then on the statute books, which was by the taxing act declared to be in lieu of all other taxes upon the oil leases, with which Congress was particularly concerned. Moreover, the Secretary is directed to pay from Indian funds "the per centum" levied as a gross production tax "to be distributed as provided by the laws of Oklahoma" and to pay to the county for road and bridge construction "an additional sum" equal to one per cent of the oil royalties received upon the Osage Indian leases, the latter sum evidently being in addition to the amounts to be received by the county upon distribution of the gross production tax.

We think that the cumulative effect of the words of the section, obscure until read in the light of its history and of the situation to which it applied, is persuasive that the permitted tax is, as was the then existing tax, one to be measured by the gross value of the oil produced, and to be distributed in part to the counties and thus to be of benefit to the Indian owners of lands in Osage County.

In these particulars the tax of ⅛ of a cent per barrel of oil produced does not conform to the congressional consent. The taxing act does not, as required by the permissive Act, levy a per centum gross production tax in terms of value, and, more important, it provides that the entire tax levied for the period from the effective date of the Act of 1933 to June 30, 1935, is to be used to pay the expenses of state officials authorized by the state "proration law" to apportion and control oil and gas production in such manner as to prevent waste by producers drawing from a common source or pool. No part of the proceeds of the tax is required to be paid to the counties,

and the benefits of proration depending upon the existence of a common source drawn upon by different producers, would not necessarily extend to any particular county.

The Supreme Court of Oklahoma emphasized the fact that the ⅛ of a cent per barrel tax, denominated by the statute an "excise," is an excise tax distinguishable from a property tax in lieu of which the gross production tax is levied, and different from the gross production tax in its temporary character and the method of its computation and distribution, and so concluded that it is not a tax contemplated by the congressional consent. Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign, we think the conclusion of the state court was right.

Affirmed.

CHAPMAN *v.* HOAGE, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA COMPENSATION DISTRICT, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 151. Argued December 13, 16, 1935.—Decided January 6, 1936.

1. The question whether an employer and his insurance carrier, in the District of Columbia, were released from their obligation to an injured employee under the Longshoremen's and Harbor Workers' Compensation Act through the voluntary discontinuance by the employee of his action against a third person, alleged to have caused the injury, when no compromise with the third person took place but the discontinuance occurred after the statute of limitations had run against the claim sued upon, and the employer and insurance carrier were thereby deprived of an opportunity to pursue the third person as subrogees,—*held* a question to be determined by the general principles of suretyship. P. 528.

2. The rule that any modification of the principal obligation releases the surety is abated in the case of a compensated surety or indemnitor. He is discharged only so far as his right is shown to be in fact prejudiced by action of the indemnitee. P. 531.
3. An insurance company which, under the above-mentioned compensation act, receives premiums from an employer for insuring the performance of his duty to compensate his employees for injuries, and which is entitled to be subrogated to any claim that an injured employee may have against a third person, is not released from its obligation to pay the prescribed compensation because the employee, after bringing suit on such a claim, dismissed it when the statute of limitations had run upon it, if the claim had been demonstrated to be groundless, so that the insurer was not prejudiced by the loss of its right of subrogation. Pp. 529, 532.
4. An indemnitor is given the right of subrogation not to enable him to avoid his undertaking but in order that it may not be enlarged beyond that of indemnity. P. 531.

64 App. D. C. 349; 78 F. (2d) 233, reversed.

CERTIORARI * to review the affirmance of a decree dismissing a petition for a mandatory injunction requiring the respondent, as Deputy Commissioner, etc., to make an award of compensation to the petitioner.

Mr. Harlan Wood, with whom *Mr. James P. Donovan* was on the brief, for petitioner.

Mr. G. Bowdoin Craighill, with whom *Mr. Frank H. Myers* was on the brief, for Indemnity Insurance Company of North America, respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on certiorari to resolve a question arising under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, made applicable to the District of Columbia by the Act of April 17, 1928, 45 Stat. 600.

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* See Table of Cases Reported in this volume.

Petitioner sought, in the Supreme Court of the District of Columbia, a mandatory injunction directing respondent, a Deputy Commissioner of the District of Columbia Compensation District, to award him compensation. In the proceedings in that court it appeared that petitioner had been injured in a collision with a street car, in the course of his employment as helper on a delivery truck of his employer, for whom the respondent, The Indemnity Insurance Company of North America, intervenor in the suit, is the insurance carrier: that petitioner, electing to sue the street car company, had recovered judgment in the District Supreme Court, which the District Court of Appeals had reversed and remanded for further proceedings, *Washington Ry. & Electric Co.* v. *Chapman,* 62 App. D. C. 140; 65 F. (2d) 486: that petitioner had then discontinued his suit and pressed his application for compensation before the Deputy Commissioner who denied it on the ground that petitioner had failed to pursue to final judgment his remedy against the third party. The present suit was dismissed by the District Supreme Court on motion of the Insurance Company. The Court of Appeals affirmed, 64 App. D. C. 349; 78 F. (2d) 233, holding that, as the petitioner had elected to pursue his remedy against the third party, and as the statute of limitations had run while the suit was pending, his failure to proceed to final judgment operated to discharge the employer and the insurance carrier.

While by § 33 (a) of the Compensation Act the employee may elect to pursue his remedy against a third person, election does not deprive him of his right to compensation. See *American Lumbermen's Mutual Casualty Co.* v. *Lowe,* 70 F. (2d) 616. By § 33 (f) the employer or the insurance carrier who, by §§ 32 (a), 35 and 36 is substituted for the employer, remains liable for any amount by which the recovery against the third person falls short of the prescribed compensation. Section 33 (a) only pro-

vides for release of the employer's liability for compensation when the claim against the third party is compromised without the employer's consent. In other respects his rights and liabilities, so far as he is in the position of a surety or indemnitor, are governed, as the court below held, by the general principles of suretyship.

Upon election of the employee to take compensation the employer is entitled to be subrogated to the rights of the employee against the third person. The insurer, who, as an indemnitor of the employer, and by the Act, stands in the place of the employer, is similarly entitled to subrogation. As with other indemnitors, his obligation may be discharged by release or other relinquishment of the principal liability which deprives him of his right of subrogation. *Aetna Life Insurance Co.* v. *Moses,* 287 U. S. 530; *Doleman* v. *Levine,* 295 U. S. 221, 225; *Travelers' Insurance Co.* v. *Great Lakes Engineering Works Co.,* 184 Fed. 426. Hence the only question for decision is whether the abandonment by plaintiff of his suit against the third party, after the running of the statute of limitations had precluded the possibility of bringing another suit, and in the circumstances disclosed by the record, is to be deemed so prejudicial to the insurer's right of subrogation as to operate as a discharge of its liability.

Whether, in any case, an indemnitor is discharged by the mere failure of his obligee to sue the principal debtor until suit is barred by the statute of limitations, remains an open question in this Court. See *Nelson* v. *First Nat. Bank,* 69 Fed. 798; *Gill* v. *Waterhouse,* 245 Fed. 75, answering it in the negative; contra: *Hayward* v. *Sencenbaugh,* 141 Ill. App. 395; *Auchampaugh* v. *Schmidt,* 70 Iowa 642; 27 N. W. 805; *Mulvane* v. *Sedgley,* 63 Kan. 105; 64 Pac. 1038; *Johnson* v. *Success Brick Machinery Co.,* 104 Miss. 217; 61 So. 178; and see *Cheesman* v. *Cheesman,* 236 N. Y. 47, 51; 139 N. E. 775. It is unnecessary to decide it now. We assume for present purposes

that petitioner's election to sue the third party followed by his discontinuance of the suit when the claim was barred by the statute is sufficient to discharge respondent from its obligation as an insurer, if prejudicial to its right of subrogation. We confine our investigation to the questions whether the fact of prejudice to this right is open to inquiry and, if so, whether the right is shown in the present circumstances to be so unsubstantial that respondent has not in fact been prejudiced by its loss.

It is generally true that the obligation of a voluntary surety is so far regarded as *strictissimi juris* as to be released upon a showing, without more, that the principal obligation has been modified or surrendered without the consent of the surety. *Sprigg* v. *Bank of Mt. Pleasant,* 14 Pet. 201; *Wood* v. *Steele,* 6 Wall. 80; *Porto Rico* v. *Title Guaranty & Surety Co.,* 227 U. S. 382; *Edwards* v. *Goode,* 228 Fed. 664; *United States Fidelity & Casualty Co.* v. *Pensacola,* 263 Fed. 344. But the strictness of this rule is relaxed in those jurisdictions where the failure of the creditor to prosecute his claim against the principal debtor after demand by the surety may be availed of as a defense by the latter. In that case the surety is discharged only to the extent of the loss which results. *Pain* v. *Packard,* 13 Johns. (N. Y.) 174; *Huffman* v. *Hulbert,* 13 Wend. (N. Y.) 377; *Herrick* v. *Borst,* 4 Hill (N. Y.) 650; *Hunt* v. *Purdy,* 82 N. Y. 486; see *Snow* v. *Horgan,* 18 R. I. 289, 291; 27 Atl. 338; cf. *Pickens* v. *Yarboroughs' Administrator,* 26 Ala. 417; *Wurster* v. *Albrecht,* 237 Ill. App. 284; *Bingham* v. *Mears,* 4 N. D. 437; 61 N. W. 808; *Thompson* v. *Watson,* 10 Yerg. (Tenn.) 362; but cf. *Shehan* v. *Hampton,* 8 Ala. 942; *Shenandoah Nat. Bank* v. *Ayres,* 87 Iowa 526; 54 N. W. 367; *Sullivan* v. *Dwyer,* 42 S. W. 355 (Tex. Civ. App.).

This follows from the fact that the surety's contract, not being one of guaranty, does not entitle him to have the creditor first assert his claim against the principal debtor.

Failure by the creditor to perform any obligation to prosecute the claim arising out of his conduct subsequent to the contract, like his failure to realize upon subsequently acquired security, is a defense only so far as it is prejudicial to the surety. See *State Bank* v. *Edwards,* 20 Ala. 512; *Curan* v. *Colbert,* 3 Ga. 239; *Brown* v. *Executors of Riggins,* 3 Ga. 405; *Robeson* v. *Roberts,* 20 Ind. 155; *Mt. Sterling Improvement Co.* v. *Cockrell,* 70 S. W. 842; 24 Ky. Law Rep. 1151; *Springer* v. *Toothaker,* 43 Me. 381; *Humphrey* v. *Hitt,* 6 Grat. (Va.) 509; *Hyde* v. *Rogers,* 59 Wis. 154; 17 N. W. 127. The analogy to the present case, where the employee was not bound to proceed against the third person but elected to do so, is apparent.

Moreover, respondent is a compensated surety, whose premiums the employer is required to pay by § 32. The rule that any modification of the principal obligation releases the surety is also abated in the case of a compensated surety or indemnitor, who is discharged only so far as his right is shown to be in fact prejudiced by action of the indemnitee. One who engages in the business of insurance for compensation may properly be held more rigidly to his obligation to indemnify the insured than one whose suretyship is an undertaking uncompensated and casual. *Atlantic Trust & Deposit Co.* v. *Laurinburg,* 163 Fed. 690; *Gunsul* v. *American Surety Co.,* 308 Ill. 312; 139 N. E. 620; *United States Fidelity & Guaranty Co.* v. *Poetker,* 180 Ind. 255; 102 N. E. 372; *State ex rel. Elberta Peach & Land Co.* v. *Chicago Bonding & Surety Co.,* 279 Mo. 535; 215 S. W. 20; *Royal Indemnity Co.* v. *Northern Ohio Granite & Stone Co.,* 100 Ohio St. 373; 126 N. E. 405; *Duke* v. *National Surety* Co., 130 Wash. 276; 227 Pac. 2; cf. *Guaranty Co.* v. *Pressed Brick Co.,* 191 U. S. 416. The insurer is given a right of subrogation not to enable him to avoid his undertaking to indemnify but that it may not be enlarged beyond that of indemnity. *Standard Marine Insurance Co.* v. *Scottish*

Metropolitan Assurance Co., Ltd., 283 U. S. 284, 288. He is not prejudiced by failure to prosecute a claim after it has been demonstrated to be groundless.

Application of these principles to an insurance contract under a compensation act such as the present does not require that an employee who has elected to proceed against a third person do more than prosecute his claim in a manner and to an extent which will avoid prejudice to the insurer's right of subrogation. The facts disclosed show that respondent has not been prejudiced. The judgment upon the first trial was set aside by the Court of Appeals because uncontradicted evidence established petitioner's contributory negligence so clearly that the trial judge should have directed a verdict for the defendant. The appellate court was nevertheless required by the rule of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, to remand the case for further proceedings. Meanwhile, petitioner's main witness, the driver of the truck, had died. Petitioner, who was without funds, asked leave of the trial court to proceed with the second trial *in forma pauperis*, with the evident purpose of preserving, by this course, his rights against the insurer. His application was denied, presumably because it was thought a second trial would be fruitless. These circumstances are enough to establish, at least *prima facie*, that failure to proceed with a second trial did not prejudice the insurer. Respondent, insisting that it was discharged by the mere failure of petitioner to proceed further, regardless of prejudice, has offered no evidence that it did.

Reversed.

DECISIONS PER CURIAM, FROM OCTOBER 7, 1935, TO AND INCLUDING JANUARY 6, 1936.*

No. 81. WILLIS *v.* TENNESSEE. Appeal from the Supreme Court of Tennessee. Jurisdictional statement submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Burke* v. *Oregon,* 279 U. S. 811; *McKane* v. *Durston,* 153 U. S. 684, 687–688; *Andrews* v. *Swartz,* 156 U. S. 272, 275. *Mr. W. C. Cherry* for appellant. *Mr. W. F. Barry, Jr.,* for appellee.

No. 89. YORK HEATING & VENTILATING CORP. *v.* MALOOLY ET AL. Appeal from the Supreme Court of Michigan. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a properly presented federal question. (1) *Harding* v. *Illinois,* 196 U. S. 78, 88; *Chesapeake & Ohio Ry. Co.* v. *McDonald,* 214 U. S. 191, 195. (2) *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248; *Maxwell* v. *Newbold,* 18 How. 511, 516; *Hoyt* v. *Shelden,* 1 Black 518, 521–522. *Messrs. Charles J. Staples* and *O. L. Smith* for appellant. *Mr. David H. Crowley* for appellees. Reported below: 270 Mich. 240; 258 N. W. 622.

No. 91. BELL TELEPHONE CO. *v.* VAN DYKE, SECRETARY OF THE DEPARTMENT OF HIGHWAYS. Appeal from the Supreme Court of Pennsylvania. Jurisdictional

*For decisions on applications for certiorari, see *post,* pp. 553, 572; for rehearing, *post,* p. 660.

statement submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The appeal herein is dismissed for the reason that the decision of the state court sought here to be reviewed was based upon a non-federal ground adequate to support it. *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 162, 165; *Utley* v. *St. Petersburg,* 292 U. S. 106, 111; *Mobile, J. & K. C. R. Co.* v. *Mississippi,* 210 U. S. 187, 204; *Lowry* v. *Silver City G. & S. Mining Co.,* 179 U. S. 196, 198. *Mr. Arthur H. Hull* for appellant. No appearance for appellee. Reported below: 317 Pa. 387; 177 Atl. 36.

No. 117. WASHINGTON *v.* HOLLAND. Appeal from the Supreme Court of Appeals of Virginia. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *Louisville & Nashville R. Co.* v. *Schmidt,* 177 U. S. 230, 236; *Holmes* v. *Conway,* 241 U. S. 624, 631–632. *Mr. Alexander T. Gordon* for appellant. *Mr. W. C. Bibb* for appellee.

No. 145. POSTAL TELEGRAPH-CABLE CO. ET AL. *v.* WHITE. Appeal from the Supreme Court of Arkansas. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a properly presented federal question. *Lynch* v. *New York,* 293 U. S. 52, 54; *Herndon* v. *Georgia,* 295 U. S. 441, 443; *Atlantic Coast Line R. Co.* v. *Mims,* 242 U. S. 532, 535; *Hartford Life Ins. Co.* v. *Johnson,* 249 U. S. 490, 493. *Messrs. Howard*

L. Kern and *S. Lasker Ehrman* for appellants. *Mr. S. S. Hargraves* for appellee. Reported below: 190 Ark. 365; 80 S. W. (2d) 633.

No. 154. CONNECTICUT GENERAL LIFE INSURANCE CO. *v.* JOHNSON, TREASURER. Appeal from the Supreme Court of California. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a properly presented federal question. *Home for Incurables* v. *City of New York,* 187 U. S. 155, 158; *Henkel* v. *Cincinnati,* 177 U. S. 170; *Seaboard Air Line Ry.* v. *Duvall,* 225 U. S. 477, 481; *Fullerton* v. *Texas,* 196 U. S. 192, 193–194. *Mr. Raymond Benjamin* for appellant. *Mr. U. S. Webb* for appellee. Reported below: 3 Cal. (2d) 83; 43 P. (2d) 278.

No. 163. JOHNSON *v.* WASHINGTON. Appeal from the Supreme Court of Washington. Jurisdictional statement submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *St. Louis & San Francisco R. Co.* v. *Shepherd,* 240 U. S. 240, 241. *Messrs. Walter Schaffner* and *Stiles W. Burr* for appellant. No appearance for appellee. Reported below: 180 Wash. 401; 40 P. (2d) 159.

No. 164. MCBRIDE *v.* WASHINGTON. Appeal from the Supreme Court of Washington. Jurisdictional statement submitted September 10, 1935. Decided October 14,

1935. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *St. Louis & San Francisco R. Co.* v. *Shepherd,* 240 U. S. 240, 241. *Messrs. Walter Schaffner* and *Stiles W. Burr* for appellant. No appearance for appellee. Reported below: 180 Wash. 401.

No. 166. D. A. SCHULTE, INC. *v.* GRAVES, PRESIDENT OF THE STATE TAX COMMISSION, ET AL. Appeal from the Supreme Court of New York. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 43; *Liggett Co.* v. *Lee,* 288 U. S. 517, 538; *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 537. *Mr. Walter H. Liebman, Jr.,* for appellant. *Mr. Henry Epstein* for appellees. Reported below: 266 N. Y. 592, 195 N. E. 215; 266 N. Y. 665, 195 N. E. 372.

No. 180. MISSISSIPPI CENTRAL R. CO. ET AL. *v.* ROBERTS ET AL. Appeal from the Supreme Court of Mississippi. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a properly presented substantial federal question. (1) *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *St. Louis & San Francisco R. Co.* v. *Shepherd,* 240 U. S. 240, 241. (2) *New York* v. *Kleinert,* 268 U. S. 646, 649–651; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 633; *Dewey* v. *Des Moines,*

173 U. S. 193, 197. The motion of the appellees to allow damages is granted, and it is ordered that damages of one hundred dollars, payable to appellees, be taxed against appellants. *Slaker* v. *O'Connor,* 278 U. S. 188; *Roe* v. *Kansas,* 278 U. S. 191. *Messrs. Thomas Brady, Jr.,* and *Thomas C. Hannah* for appellants. *Mr. Lee D. Hall* for appellees. Reported below: 173 Miss. 487; 160 So. 604.

No. 181. MISSISSIPPI CENTRAL R. CO. ET AL. *v.* AULTMAN ET AL. Appeal from the Supreme Court of Mississippi. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a properly presented substantial federal question. (1) *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *St. Louis & San Francisco R. Co.* v. *Shepherd,* 240 U. S. 240, 241. (2) *New York* v. *Kleinert,* 268 U. S. 646, 649–651; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 633; *Dewey* v. *Des Moines,* 173 U. S. 193, 197. The motion of the appellees to allow damages is granted, and it is ordered that damages of one hundred dollars, payable to appellees, be taxed against appellants. *Slaker* v. *O'Connor,* 278 U. S. 188; *Roe* v. *Kansas,* 278 U. S. 191. *Messrs. Thomas Brady, Jr.,* and *Thomas C. Hannah* for appellants. *Mr. Lee D. Hall* for appellees. Reported below: 173 Miss. 622; 160 So. 737.

No. 190. GELKOM REALTY CORP. *v.* YOUNG WOMEN'S HEBREW ASSN. ET AL. Appeal from the Supreme Court of New York. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is

granted, and the appeal is dismissed for the want of a properly presented federal question. *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *St. Louis & San Francisco R. Co.* v. *Shepherd,* 240 U. S. 240, 241; *Herndon* v. *Georgia,* 295 U. S. 441. *Mr. Gustavus A. Rogers* for appellant. *Messrs. Harold H. Levin* and *Paxton Blair* for appellees. Reported below: 266 N. Y. 270, 194 N. E. 751; 266 N. Y. 672, 195 N. E. 376.

No. 283. BALTIMORE NATIONAL BANK *v.* STATE TAX COMMISSION. Appeal from the Court of Appeals of Maryland. Jurisdictional statement submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937); *Citizens National Bank* v. *Durr,* 257 U. S. 99, 106; *Jett Bros. Distilling Co.* v. *Carrollton,* 252 U. S. 1, 6; *Indian Territory Illuminating Co.* v. *Board of Equalization,* 287 U. S. 573. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), the petition is granted. *Mr. Edwin F. A. Morgan* for appellant. *Messrs. Herbert R. O'Conor* and *Wm. L. Henderson* for appellee. Reported below: 169 Md. 65; 180 Atl. 260.

No. 285. EVANS TERRY CO. *v.* MISSISSIPPI EX REL. RICE, ATTORNEY GENERAL, ET AL. Appeal from the Supreme Court of Mississippi. Motion to affirm submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellees to affirm is granted, and the decree is affirmed. *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285, 290 *et seq.; Hicklin* v. *Coney,* 290 U. S. 169, 173, 177; *Continental Baking Co.* v. *Woodring,* 286

U. S. 352, 369–371; *Carley & Hamilton, Inc.* v. *Snook*, 281 U. S. 66, 72–73. *Messrs. John B. Brunini* and *Thomas C. Hannah* for appellant. *Messrs. Greek L. Rice* and *W. W. Pierce* for appellees. Reported below: 173 Miss. 526; 159 So. 658.

No. 362. SHORT *v.* BOARD OF THE SCHOOL DISTRICT OF UPPER MORELAND TOWNSHIP ET AL. Appeal from the Superior Court of Pennsylvania. Jurisdictional statement submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Alward* v. *Johnson*, 282 U. S. 509, 514; *Tirrell* v. *Johnston*, 293 U. S. 533; *Willcuts* v. *Bunn*, 282 U. S. 216, 225–226; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128. *Mr. Wm. A. Schnader* for appellant. No appearance for appellees. Reported below: 117 Pa. Super. Ct. 227; 177 Atl. 480.

No. 363. LEVY *v.* IRVING TRUST CO., TRUSTEE. Appeal from the Supreme Court of New York. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted, and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). The petition for writ of certiorari is denied. *Mr. Jonas J. Shapiro* for appellant. *Mr. John Neville Boyle* for appellee. Reported below: 267 N. Y. 102; 195 N. E. 811.

No. 374. UNITED STATES NATUROPATHIC ASSN., LTD. ET AL. *v.* CHIROPRACTIC LEAGUE OF CALIFORNIA ET AL. Appeal from the District Court of the United States for the Southern District of California. Motion to dismiss submitted

September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of jurisdiction. Section 238, Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 938); § 266 Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 938); *Stratton* v. *St. Louis S. W. Ry.,* 282 U. S. 10, 15–16. *Mr. George P. Sakis* for appellants. *Mr. U. S. Webb* for appellees.

No. 381. Board of Liquidation, City Debt of New Orleans, et al. *v.* Board of Commissioners of the Port of New Orleans et al. Appeal from the Supreme Court of Louisiana. Motion to dismiss submitted September 10, 1935. Decided October 14, 1935. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question which the appellants are entitled to raise. (1) *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 439; *Von Hoffman* v. *Quincy,* 4 Wall. 535, 553–554; *South Carolina* v. *Gaillard,* 101 U. S. 433, 437–438; *Hill* v. *Merchants' Ins. Co.,* 134 U. S. 515, 527; *Sturges* v. *Crowninshield,* 4 Wheat. 122, 200. (2) *Columbus & Greenville Ry.* v. *Miller,* 283 U. S. 96, 99–100; *Hooker* v. *Burr,* 194 U. S. 415, 418–419; *Williams* v. *Eggleston,* 170 U. S. 304, 309. *Messrs. Francis P. Burns, Bertrand I. Cahn, James C. Henriques,* and *Henry B. Curtis* for appellants. *Messrs. Huey P. Long* and *James Wilkinson* for appellees. Reported below: 183 La. 139; 162 So. 826.

No. 458. Peerless Stages, Inc. *v.* Railroad Commission of California et al. Appeal from the Supreme Court of California. Motion to dismiss submitted September 20, 1935. Decided October 14, 1935. *Per Curiam:*

The motion of the appellees to dismiss the appeal herein is granted, and the appeal is dismissed for the want of a substantial federal question. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447; *Puget Sound Co.* v. *Seattle,* 291 U. S. 619, 625–626; *Public Service Comm'n* v. *Utilities Co.,* 289 U. S. 130, 134. *Mr. Chauncey F. Tramutolo* for appellant. *Messrs. Herman Phleger, Ira H. Rowell, Maurice E. Harrison,* and *James S. Moore, Jr.,* for appellees.

No. —, original. Ex parte Van Dyke. October 14, 1935. The motion for leave to file a petition for writ of habeas corpus is denied, without prejudice to appropriate application to the proper Court of the State of Michigan. *Mooney* v. *Holohan,* 294 U. S. 103. *Mr. Otto Van Dyke, pro se.*

No. —, original. Ex parte Lee. October 14, 1935. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Calvin L. Lee, pro se.*

No. —, original. Ex parte Davis. October 14, 1935. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Joseph Davis, pro se.*

No. —, original. Ex parte Mooney. October 14, 1935. Motion for leave to file petition for writ of habeas corpus denied. *Messrs. Frank P. Walsh, John F. Finerty,* and *George T. Davis* for petitioner.

No. —, original. Ex parte Steve. October 14, 1935. The motion for leave to file a petition for writ of habeas corpus is denied, without prejudice to appropriate applica-

tion to the proper District Court of the United States or Judge. *Mr. Gorham O. Steve, pro se.*

No. —, original. Ex parte Morgan. October 14, 1935. The motion for leave to file petition for writ of mandamus is denied. *Mr. Harlen O. Morgan, pro se.*

No. 10, original (October Term, 1934). New Jersey *v.* New York City. October 14, 1935. The City of New York having filed a motion for leave to file a petition praying this Court to direct the State of New Jersey to show cause why (1) a ruling should not be made to the effect that the dumping of sludge, free from any matter capable of floating, at places not less than 10 miles from any shore is not a violation of the injunction order of this Court dated December 4, 1933, or (2) in the alternative why this Court should not modify its order of December 4, 1933, so as to permit the City of New York to dump nonfloating sewage sludge as aforesaid.

It is ordered that a rule issue, returnable on or before November 18, next, requiring the State of New Jersey to show cause why leave to file the petition should not be granted. *Messrs. Paul Windels, Paxton Blair,* and *F. Pearson Shortridge* for the City of New York, in support of the motion.

No. 11, original. Washington *v.* Oregon. October 14, 1935. The report of the Special Master herein is received and ordered to be filed.

No. 13, original. Nebraska *v.* Wyoming. October 14, 1935. The motion for leave to file replication herein is granted. The motion for the appointment of a Special

Master is granted. An order is entered appointing Michael J. Doherty, Esq., of St. Paul, Minnesota, Special Master in this cause; defining his authority and duties; providing for his compensation and expenses; and authorizing the Chief Justice to designate another if this appointment be not accepted or if the place should become vacant during a recess of the court. *Mr. Wm. H. Wright,* Attorney General of Nebraska, and *Mr. Paul F. Good* for plaintiff, in support of the motions.

No. 102. GENERAL OUTDOOR ADVERTISING CO., INC., ET AL. *v.* CALLAHAN ET AL.; and

No. 103. SAME *v.* HOAR ET AL. October 14, 1935. The motion to dismiss the appeal as to R. C. Maxwell Co., one of the appellants in No. 102, is granted. Reported below: 289 Mass. 149; 193 N. E. 799.

No. 482. BINGHAM LAND CO. *v.* CENTRAL MAINE POWER CO. Appeal from the Supreme Judicial Court of Maine. Jurisdictional statement submitted October 11, 1935. Decided October 21, 1935. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), the petition is denied. *Messrs. Carter B. Keene* and *Herbert E. Locke* for appellant. *Mr. Edward F. Merrill* for appellee. Reported below: 133 Me. 519; 180 Atl. 363.

No. 488. OSTRANDER, ADMINISTRATOR, ET AL. *v.* PREECE, ADMINISTRATOR, ET AL. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted October 11, 1935. Decided October 21, 1935. *Per Curiam:* The ap-

peal herein is dismissed for the want of a substantial federal question. *Maxwell* v. *Bugbee,* 250 U. S. 525, 540, 541–542; *Campbell* v. *California,* 200 U. S. 87, 95; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 288; *Mager* v. *Grima,* 8 How. 490, 493; *Frederickson* v. *Louisiana,* 23 How. 445, 447; *United States* v. *Perkins,* 163 U. S. 625, 627; *United States* v. *Fox,* 94 U. S. 315, 320–321. *Mr. Robert Newbegin* for appellants. No appearance for appellees. Reported below: 129 Oh. St. 625; 196 N. E. 670.

No. —, original. GEORGIA *v.* MORGENTHAU, SECRETARY OF THE TREASURY, ET AL. October 21, 1935. A rule is ordered to issue returnable on Monday, November 11, next, requiring the defendants to show cause why leave to file the Bill of Complaint should not be granted.

No. 485. SECESH DREDGING, MINING & MILLING CO., INC. *v.* CARREY ET AL. Appeal from the Supreme Court of Idaho. Jurisdictional statement submitted October 19, 1935. Decided October 28, 1935. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), the petition is denied. *Messrs. Samuel Herrick* and *S. S. Bassett* for appellant. *Mr. James F. Ailshie, Jr.,* for appellees. Reported below: 55 Idaho 136; 39 P. (2d) 772.

No. 27. VILLA ET AL. *v.* VAN SCHAICK, SUPERINTENDENT OF INSURANCE. Appeal from the Supreme Court of New York. Argued October 22, 1935. Decided October 25, 1935. *Per Curiam:* The appeal herein is dismissed

for the want of a properly presented federal question. *Lynch* v. *New York*, 293 U. S. 52. *Mr. Hartwell Cabell*, with whom *Mr. Asa B. Kellogg* was on the brief, for appellants. *Messrs. Louis H. Pink, Walter B. Herendeen*, and *Benjamin Potoker* were on the brief for appellee. *Mr. John J. Bennett, Jr.*, Attorney General of New York, *Mr. Henry Epstein*, Solicitor General, and *Mr. Joseph A. McLaughlin*, Assistant Attorney General, were on the brief for the Industrial Commissioner of New York, intervener, in support of the position of appellee. Reported below: 266 N. Y. 589.

No. —, original. ARKANSAS *v.* TENNESSEE. October 28, 1935. The motion for leave to file the bill of complaint herein is granted and process is ordered to issue returnable on Monday, January 6, 1936. *Mr. Carl E. Bailey*, Attorney General of Arkansas, for plaintiff, in support of the motion.

No. 492. SMITH *v.* JOHNSON, ADMINISTRATOR OF THE N. R. A., ET AL. Appeal from the District Court of the United States for the Southern District of New York. Jurisdictional statement submitted November 2, 1935. Decided November 11, 1935. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 238, Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938). *Mr. Walter N. Smith, pro se.* No appearance for appellees.

No. 509. PURCELL *v.* NEW YORK CENTRAL R. Co. Appeal from the Supreme Court of New York. Jurisdictional statement submitted November 2, 1935. Decided November 11, 1935. *Per Curiam:* The motion for leave to file statement as to jurisdiction is granted. The appeal herein is dismissed for the want of a properly presented

federal question. *Home for Incurables* v. *City of New York*, 187 U. S. 155, 158; *Henkel* v. *Cincinnati*, 177 U. S. 170; *Seaboard Air Line Ry.* v. *Duvall*, 225 U. S. 477, 481; *Fullerton* v. *Texas*, 196 U. S. 192, 193–194; *Connecticut General Life Ins. Co.* v. *Johnson*, *ante*, p. 535. The petition for a writ of certiorari is denied. *Messrs. T. J. Johnston* and *Irving I. Goldsmith* for appellant. *Mr. Charles E. Nichols* for appellee. Reported below: 268 N. Y. 164; 197 N. E. 182.

No. 530. Capital Endowment Co. *v.* Ohio ex rel. Bowen, Supervisor of Bond Investment Companies. Appeal from the Supreme Court of Ohio. Motion to dismiss submitted November 2, 1935. Decided November 11, 1935. *Per Curiam:* The motion to dismiss the appeal herein is granted, and the appeal is dismissed for the reason that the judgment sought here to be reviewed is based upon a non-federal ground adequate to support it. *Enterprise Irrigation Dist.* v. *Canal Co.*, 243 U. S. 157, 163–164; *McCoy* v. *Shaw*, 277 U. S. 302, 303; *Browne* v. *Union Pacific R. Co.*, 267 U. S. 255, 258–259. *Messrs. George W. Ritter* and *Richard Inglis* for appellant. *Mr. John W. Bricker* for appellee Reported below: 129 Oh. St. 654; 196 N. E. 643.

No. 531. George Allison & Co., Inc. et al. *v.* United States et al. Appeal from the District Court of the United States for the Southern District of New York. Jurisdictional statement submitted November 2, 1935. Decided November 11, 1935. *Per Curiam:* The decree is affirmed. *Standard Oil Co.* v. *United States*, 283 U. S. 235, 241; *Brady* v. *United States*, 283 U. S. 804. *Mr. John A. Kelly* for appellants. *Messrs. Daniel W. Knowlton* and *Nelson Thomas* for the United States et al. Reported below: 12 F. Supp. 862.

No. —, original. TEXAS *v.* NEW MEXICO. November 11, 1935. The motion for leave to file the Bill of Complaint herein is granted and process is ordered to issue returnable on Monday, January 13, 1936. *Mr. William McCraw,* Attorney General of Texas, *Mr. H. Grady Chandler,* Assistant Attorney General, and *Messrs. Richard F. Burges* and *Edwin Mechem* for plaintiff, in support of the motion.

No. —, original. EX PARTE NORTHERN INSURANCE CO. OF NEW YORK. November 11, 1935. The motion for leave to file petition for writ of mandamus herein is denied. *Ex parte United States,* 287 U. S. 241, 248, 249. *Mr. J. L. Kohl* for petitioner.

No. 2. BAYSIDE FISH FLOUR CO. *v.* GENTRY ET AL. November 11, 1935. Pursuant to the stipulation of counsel the judgment entered in this case on October 14, 1935, *post,* p. 660, is vacated and set aside and the case is restored to the docket, to be submitted without oral argument upon briefs to be filed by the appellant on or before December 2 next and by appellees on or before December 16 next. [For later order and opinion, see 297 U. S.] *Mr. Roy Daily* for appellant. *Messrs. U. S. Webb* and *Ralph O. Marron* for appellees. Reported below: 8 F. Supp. 67.

No. —, original. GEORGIA *v.* MORGENTHAU ET AL. November 11, 1935. Return to the rule to show cause presented. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris, Sewall Key, J. Louis Monarch,* and *Arnold Raum* were on the return to the rule to show cause.

No. 35. WALL ET AL. *v.* MCNEE. Appeal from the District Court of the United States for the Southern District of Florida. Argued November 13, 1935. Decided November 18, 1935. *Per Curiam:* As appellants, de-

fendants below, are not state officers within the meaning of § 266 of the Judicial Code (*Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 92; *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; *Ex parte Everglades Drainage District,* 293 U. S. 521; *Everglades Drainage Dist.* v. *Florida Ranch & Dairy Corp.,* 74 F. (2d) 914, 915, 916; *Rorick* v. *Everglades Drainage,* 27 F. (2d) 377, 380, 381), the decree herein is reversed and the cause remanded to the District Court for further proceedings to be taken independently of § 266 of the Judicial Code, *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 18, 19. *Mr. H. E. Carter,* Assistant Attorney General of Florida, with whom *Mr. Cary D. Landis,* Attorney General, and *Mr. J. V. Keen,* Assistant Attorney General, were on the brief, for appellants. *Mr. D. C. Hull,* with whom *Messrs. Erskine W. Landis* and *Francis P. Whitehair* were on the brief, for appellee. See 4 F. Supp. 496.

No. —, original. Ex parte Tinkoff. November 18, 1935. The motion for leave to file petition for writ of mandamus is denied. *Mr. Paysoff Tinkoff, pro se.*

No. —, original. Georgia *v.* Morgenthau et al. November 18, 1935. The motion for leave to file the bill of complaint is granted and process is ordered to issue returnable on Monday, January 20, 1936. *Mr. M. J. Yeomans,* Attorney General of Georgia, *Mr. B. D. Murphy,* Assistant Attorney General, and *Mr. Barry Wright* for plaintiff, in support of the motion.

No. 13, original. Nebraska *v.* Wyoming. November 18, 1935. The motion of Platte Valley Public Power & Irrigation District for leave to intervene is denied. *Messrs. Arthur F. Mullen* and *George F. Shea* in support of the motion.

No. 577. RICKERT RICE MILLS, INC. *v.* FONTENOT, COLLECTOR OF INTERNAL REVENUE;

No. 578. DORE *v.* SAME;

No. 579. UNITED RICE MILLING PRODUCTS CO., INC. *v.* SAME;

No. 580. BATON ROUGE RICE MILL, INC. *v.* SAME;

No. 581. SIMON *v.* SAME;

No. 585. LEVY RICE MILLING CO., INC. *v.* SAME;

No. 586. FARMERS RICE MILLING CO., INC. *v.* SAME; and

No. 587. NOBLE-TROTTER RICE MILLING CO. *v.* SAME. November 18, 1935. The Government's motion for additional time to file answers to the motions for temporary injunctions and responses to the petitions for certiorari is granted, and the Government's time to file such answers and responses is extended to Thursday, November 21, at noon, with the understanding that no action will be taken by the Government by means of jeopardy assessment or otherwise to change the existing situation until the motions for injunctions have been passed upon by the Court. Petitioners may have until Friday, November 22, at noon, to file such replies to the answers and responses of the Government as they may be advised.

No. 10, original (October Term, 1934). NEW JERSEY *v.* NEW YORK CITY. November 18, 1935. Return to rule to show cause presented. *Mr. David T. Wilentz,* Attorney General of New Jersey, and *Mr. Duane E. Minard* for plaintiff, on the return to the rule to show cause.

No. 58. VIA *v.* STATE COMMISSION ON CONSERVATION & DEVELOPMENT. Appeal from the District Court of the United States for the Western District of Virginia. Argued November 19, 1935. Decided November 25, 1935.

Per Curiam: The decree is affirmed on the ground that appellant has an adequate remedy at law. *Insurance Co.* v. *Bailey,* 13 Wall. 616, 623; *Grand Chute* v. *Winegar,* 15 Wall. 373, 375, 376; *Gaines* v. *Nicholson,* 9 How. 356, 364–365; *Wehrman* v. *Conkling,* 155 U. S. 314, 326. *Mr. William J. Hughes, Jr.,* with whom *Mr. William E. Leahy* was on the brief, for appellant. *Mr. Abram P. Staples,* Attorney General of Virginia, was on the brief for appellee. Reported below: 9 F. Supp. 556.

No. —, original. Ex parte Scalese. November 25, 1935. The motion for leave to file petition for writ of mandamus is denied. *Mr. Francis Scalese, pro se.*

No. —, original. Ex parte Rubin. November 25, 1935. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Lloyd Rubin, pro se.*

No. —. Budlong *v.* Budlong. Application for allowance of an appeal from the District Court of the United States for the District of Arizona. November 25, 1935. The application for allowance of appeal, having been considered by the whole Court, is denied. *Jesse Margaret Wilson Budlong, pro se,* in support of the application.

No. 202. Stone et al., Trustees, *v.* White, Former Collector. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. November 25, 1935. Upon consideration of the motion of petitioners, and the time for presenting a petition for rehearing of the application for writ of certiorari herein having been extended to the end of the present term.

It is ordered that the entry of judgment herein by the District Court of the United States for the District of Massachusetts be, and it hereby is, stayed until the expiration of the present term of this Court, or until further order of the Court. *Mr. Thomas Allen* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Joseph M. Jones* for respondent. Reported below: 78 F. (2d) 136.

No. 545. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* STOKES. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. December 9, 1935. *Per Curiam:* The petition for writ of certiorari in this case is granted. Decree reversed. *Douglas* v. *Willcuts, ante,* p. 1; and *Helvering* v. *Schweitzer* and *Helvering* v. *Blumenthal,* the two cases next following. *Solicitor General Reed* for petitioner. *Mr. Charles H. Knight* for respondent. Reported below: 79 F. (2d) 256.

Nos. 69 and 70. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SCHWEITZER. On writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit. Argued November 21, 1935. Decided December 9, 1935. *Per Curiam:* Decrees reversed. *Douglas* v. *Willcuts, ante,* p. 1. *Assistant Attorney General Wideman,* with whom *Solicitor General Reed* and *Mr. Sewall Key* were on the brief, for petitioner. *Mr. Hugh W. McCulloch* for respondent. By leave of Court, *Mr. Russell L. Bradford* filed a brief as *amicus curiae* supporting the position of respondent. With him on the brief were *Messrs. George H. Craven* and *Arthur O. Lampland.* Reported below: 75 F. (2d) 702.

No. 82. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BLUMENTHAL. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Argued November 21, 1935. Decided December 9, 1935. *Per Curiam:* Decree reversed. *Douglas* v. *Willcuts, ante,* p. 1, and *Helvering* v. *Schweitzer, supra. Assistant Attorney General Wideman,* with whom *Solicitor General Reed* and *Mr. Sewall Key* were on the brief, for petitioner. *Mr. Eugene Blumenthal* for respondent. Reported below: 76 F. (2d) 507.

No. —, original. ARIZONA *v.* CALIFORNIA ET AL. December 9, 1935. A rule is ordered to issue requiring the defendants to show cause on or before January 13, next, why leave to file the Bill of Complaint herein should not be granted. Complainant shall have three weeks from the date of service of the returns to the rule within which to reply thereto if so advised.

No. —, original. EX PARTE PIERGIOVANNI. December 16, 1935. Motion for leave to file petition for writ of habeas corpus denied. *Mr. Mauro Piergiovanni, pro se.*

No. —, original. EX PARTE POLLITT. December 16, 1935. Motions for leave to file petition for writ of mandamus and for leave to institute suit against the State of Virginia denied. *Mr. Basil H. Pollitt, pro se.*

No. —. IN RE DEPPE. December 16, 1935. The motion of William P. Deppe of October 25, 1935, is denied. *Mr. William P. Deppe, pro se.*

No. 149. TEXAS & PACIFIC RY. CO. *v.* TEXAS ET AL. Appeal from the Supreme Court of Texas. Argued Decem-

ber 17, 18, 1935. Decided December 23, 1935. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Zucht* v. *King,* 260 U. S. 174, 176; *Sugarman* v. *United States,* 249 U. S. 182, 184; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. T. D. Gresham,* with whom *Messrs. M. E. Clinton* and *Herbert Fitzpatrick* were on the brief, for appellant. *Mr. H. Grady Chandler,* Assistant Attorney General of Texas, and *Mr. William McCraw,* Attorney General, with whom *Mr. Scott Gaines,* Assistant Attorney General, was on the brief, for appellees. Reported below: 124 Tex. 482; 78 S. W. (2d) 580.

No. 13, original. NEBRASKA *v.* WYOMING. December 23, 1935. The motion for leave to file amended and supplemental answer is granted. It is ordered that the State of Colorado be made a party defendant to this suit and that process issue against the State of Colorado in accordance with the prayer of the amended and supplemental answer of the State of Wyoming, returnable on Monday, March 2 next. *Mr. Ray E. Lee,* Attorney General of Wyoming, and *Messrs. Robert R. Rose* and *William C. Snow* for defendant, in support of the motion.

No. —. BURT *v.* GENERAL ELECTRIC CO. January 6, 1936. The application of John C. Burt, dated December 28, 1935, is denied. *Mr. John C. Burt, pro se,* in support of the application.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 7, 1935, TO AND INCLUDING JANUARY 6, 1936.

No. 283. BALTIMORE NATIONAL BANK *v.* STATE TAX COMMISSION OF MARYLAND. See *ante,* p. 538.

No. 151. CHAPMAN *v.* HOAGE, DEPUTY COMMISSIONER, ET AL. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. The motion for leave to proceed *in forma pauperis* is also granted. *Messrs. Harlan Wood* and *James P. Donovan* for petitioner. *Messrs. G. Bowdoin Craighill* and *Frank H. Myers* for respondents. Reported below: 64 App. D. C. 349; 78 F. (2d) 233.

No. 192. TYSON *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit is granted. The motion for leave to proceed *in forma pauperis* is also granted. *Mr. J. Melville Broughton* for petitioner. *Solicitor General Reed* and *Messrs. Will G. Beardslee, Wilbur C. Pickett, Randolph C. Shaw,* and *W. Marvin Smith* for the United States. Reported below: 76 F. (2d) 533.

No. 199. DISMUKE *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is granted. The motion for leave to proceed *in forma pauperis* is also granted. *Mr. John J. McCreary* for petitioner. *Solicitor General Reed* and *Messrs. James W. Morris, Alexander Holtzoff, Paul A. Sweeney,* and *M. Leo Looney, Jr.,* for the United States. Reported below: 76 F. (2d) 715; 77 *id.* 1017.

No. 33. UNITED STATES *v.* CALIFORNIA. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for the United States. *Messrs. U. S. Webb* and *Ralph O. Marron* for respondent. Reported below: 75 F. (2d) 41.

No. 61. JOHN A. NELSON CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. J. S. Seidman* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *A. F. Prescott* for respondent. Reported below: 75 F. (2d) 696.

Nos. 69 and 70. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* SCHWEITZER. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Hugh W. McCulloch* for respondent. Reported below: 75 F. (2d) 702.

No. 75. UNITED STATES *v.* SAFETY CAR HEATING & LIGHTING CO.; and

No. 76. ROGERS, COLLECTOR OF INTERNAL REVENUE, *v.* SAME. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Reed* for petitioners. *Messrs. Thomas G. Haight, Robert H. Montgomery,* and *Henry T. Stetson* for respondent. Reported below: 76 F. (2d) 133.

Nos. 78 and 79. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* COLEMAN-GILBERT ASSOCIATES. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Henry Herrick Bond* and *Ralph E. Tibbetts* for respondent. Reported below: 76 F. (2d) 191.

No. 114. POSADAS, COLLECTOR OF INTERNAL REVENUE, *v.* NATIONAL CITY BANK OF NEW YORK. October 14, 1935. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. William Cattron Rigby* for petitioner. *Messrs. Harry W. Forbes* and *Carl A. Mead* for respondent.

No. 115. PUBLIC SERVICE COMMISSION OF PUERTO RICO *v.* HAVEMEYER ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. William Cattron Rigby, Benjamin J. Horton,* and *Nathan R. Margold* for petitioner. *Mr. Ralph S. Rounds* for respondents. Reported below: 74 F. (2d) 637.

No. 116. OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION ET AL. *v.* BARNSDALL REFINERIES, INC. ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Messrs. C. D. Cund, C. W. King, E. L. Richardson, Edwin Dabney,* and *Earl Foster* for petitioners. *Messrs. Edward H. Chandler, James B. Diggs, R. W. Garrett, Wm. H. Zwick,* and *L. G. Owen* for respondents. Reported below: 171 Okla. 145; 41 P. (2d) 918.

No. 125. PALMER CLAY PRODUCTS CO. *v.* BROWN, TRUSTEE. October 14, 1935. Petition for writ of certiorari to the Municipal Court of Boston, County of Suffolk, Massachusetts, granted. *Messrs. Frank H. Pardee, F. Paul Welsch,* and *Edward F. Smith* for petitioner. *Messrs. Harrison J. Barrett* and *Matthew Brown* for respondent. Reported below: 290 Mass. —; 195 N. E. 122.

No. 127. RADIO CORPORATION OF AMERICA *v.* RAYTHEON MANUFACTURING CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. John W. Davis, Manton Davis, John L. Hall, Claude R. Branch,* and *Frederick A. Ballard* for petitioner. *Mr. Edward F. McClennen* for respondent. Reported below: 76 F. (2d) 943.

No. 157. ST. LOUIS CAN CO. *v.* GENERAL AMERICAN LIFE INSURANCE CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. T. M. Pierce* and *Samuel H. Liberman* for petitioner. *Messrs. Fred L. Williams, Earl F. Nelson, Fred L. English,* and *Everett Paul Griffin* for respondents. Reported below: 77 F. (2d) 598.

No. 169. UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Clay Judson* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John MacC. Hudson* for respondent. Reported below: 75 F. (2d) 973.

No. 173. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SALVAGE; and

No. 280. SALVAGE *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Reed, Assist-*

ant Attorney General Wideman, Mr. James W. Morris, and *Miss Helen R. Carloss* for Helvering. *Messrs. John G. Jackson* and *William H. White, Jr.,* for Salvage. Reported below: 76 F. (2d) 112.

No. 178. GREAT NORTHERN RY. CO. *v.* WEEKS, STATE TAX COMMISSIONER, ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. F. G. Dorety* and *C. J. Murphy* for petitioner. *Mr. P. O. Sathre* for respondents. Reported below: 77 F. (2d) 405.

No. 195. UNITED STATES *v.* BANK OF NEW YORK & TRUST CO.;

No. 196. SAME *v.* PRESIDENT AND DIRECTORS OF THE MANHATTAN CO.; and

No. 197. SAME *v.* PINK. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Reed* for the United States. *Messrs. Paul C. Whipp, Samson Selig, Frederick B. Campbell, L. D. Bates, Hartwell Cabell,* and *Milton B. Ignatius* for respondent in No. 195. *Messrs. Leroy B. Iserman* and *Robert J. Sykes* for respondent in No. 196. *Messrs. Alfred L. Green, John M. Downes,* and *Clarence C. Fowler* for respondent in No. 197. Reported below: 77 F. (2d) 866, 881, 880.

No. 218. CAHN, EXECUTOR, *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims granted. *Messrs. John W. Townsend* and *Claude E. Koss* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W.*

Morris for the United States. Reported below: 81 Ct. Cls. 308; 10 F. Supp. 577.

No. 226. MANHATTAN GENERAL EQUIPMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 227. COLLIER SERVICE CORP. *v.* SAME. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Laurence Graves, Samuel H. Kaufman, Emil Weitzner,* and *Brode B. Davis* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Arnold Raum* for respondent. Reported below: 76 F. (2d) 892.

No. 265. UNITED STATES *v.* ATKINSON. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Reed* for the United States. *Messrs. Warren E. Miller, Thornton Hardie,* and *A. H. Culwell* for respondent. Reported below: 76 F. (2d) 564.

No. 272. UNITED STATES *v.* RIZZO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Reed* for the United States. *Messrs. Louis Halle, Milton P. Kroopp,* and *Samuel I. Kessler* for respondent. Reported below: 73 F. (2d) 1010.

No. 301. BROWN ET AL. *v.* MISSISSIPPI. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Mississippi granted. *Messrs. J. Morgan Stevens* and

Earl Brewer for petitioners. *Messrs. Greek L. Rice, William Henry Maynard,* and *William Dow Conn, Jr.,* for respondent. Reported below: 173 Miss. 542; 161 So. 465.

No. 335. NOBLE ET AL. *v.* OKLAHOMA CITY; and

No. 336. HIGGINS ET AL. *v.* SAME. October 14, 1935. Petition for writs of certiorari to the Supreme Court of Oklahoma granted. *Messrs. Charles H. Garnett, Warren E. Libby, Henry L. Goddard, Fred E. Suits* and *Fred Ptak* for petitioners. *Messrs. Harlan T. Deupree* and *W. H. Brown* for respondent. Reported below: 172 Okla. 182; 44 P. (2d) 135.

No. 351. TERMINAL WAREHOUSE CO. *v.* PENNSYLVANIA R. CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. T. R. White, Walter W. Ahrens, John J. Hickey,* and *Wm. A. Schnader* for petitioner. *Messrs. John Hampton Barnes, Frederic D. McKenney, M. Hampton Todd, Robert T. McCracken,* and *George G. Chandler* for respondents. Reported below: 78 F. (2d) 591.

No. 356. WINE RAILWAY APPLIANCE CO. *v.* ENTERPRISE RAILWAY EQUIPMENT CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Gilbert P. Ritter* for petitioner. *Mr. George I. Haight* for respondent. Reported below: 77 F. (2d) 159.

No. 360. PENNSYLVANIA R. CO. *v.* ILLINOIS BRICK CO. October 14, 1935. Petition for writ of certiorari to the Appellate Court of Illinois, First District, granted.

Messrs. Frederic D. McKenney, Henry Wolfe Biklé, Frank J. Loesch, and *Edward M. Burke* for petitioner. *Mr. Abraham R. Miller* for respondent. Reported below: 278 Ill. App. 623.

No. 377. WHITFIELD *v.* OHIO. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Ohio granted. *Messrs. Wm. Logan Martin* and *Thomas E. Knight, Jr.,* for petitioner. *Messrs. John W. Bricker, William S. Evatt, Harry B. Hawes, Raymond A. Walsh,* and *Bon Geaslin* for respondent. Reported below: 129 Oh. St. 543, 196 N. E. 164; 49 Oh. App. 530, 197 N. E. 605.

No. 379. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SAN JOAQUIN FRUIT & INVESTMENT CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Geo. W. Naus, J. Robert Sherrod,* and *Joseph D. Peeler* for respondent. Reported below: 77 F. (2d) 723.

No. 399. SOUTHERN RY. CO. *v.* LUNSFORD, ADMINISTRATRIX. October 14, 1935. Petition for writ of certiorari to the Court of Appeals of Georgia granted. *Messrs. Sidney S. Alderman, S. R. Prince, G. E. Maddox,* and *H. O'B. Cooper* for petitioner. *Mr. Reuben R. Arnold* for respondent. Reported below: 50 Ga. App. 829; 179 S. E. 571.

No. 401. UNITED STATES *v.* BUTLER ET AL., RECEIVERS. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* for the United States. *Messrs.*

Edward R. Hale and *Bennett Sanderson* for respondents. Reported below: 78 F. (2d) 1.

Nos. 403 and 404. ASHWANDER ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Forney Johnston* for petitioners. *Solicitor General Reed* and *Messrs. James Lawrence Fly, John Lord O'Brian, Noel T. Dowling,* and *Paul A. Freund* for respondents. Reported below: 78 F. (2d) 578.

No. 46. UNITED STATES *v.* KESTERSON ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Reed* for the United States. *Mr. Frank Hickman* for respondents. Reported below: 76 F. (2d) 913.

No. 174. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MINNESOTA TEA CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Oscar Mitchell, James G. Nye, Homer Hendricks, Robert N. Miller,* and *C. J. McGuire* for respondent. Reported below: 76 F. (2d) 797.

Nos. 175 and 176. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PETERSON. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Oscar Mitchell, James G. Nye, Homer Hendricks, Robert N. Miller,* and *C. J. McGuire* for respondent. Reported below: 76 F. (2d) 806.

No. 184. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* WATTS;

No. 185. SAME *v.* SICARD; and

No. 186. SAME *v.* SLOANE. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Samuel Seabury* and *John F. McCabe* for respondents. Reported below: 75 F. (2d) 981.

No. 187. G. & K. MANUFACTURING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted limited to the question of the application of the statutory provisions as to reorganization. *Mr. Llewellyn A. Luce* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 76 F. (2d) 454.

No. 82. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BLUMENTHAL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Walter H. Liebman, Jr.,* for respondent. Reported below: 76 F. (2d) 507.

No. 108. SWANSON ET AL, TRUSTEES, *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Arnold R. Baar* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *A. F. Prescott* for respondent. Reported below: 76 F. (2d) 651.

No. 238. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* COMBS ET AL., TRUSTEES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Dana Latham* and *Melvin D. Wilson* for respondents. Reported below: 76 F. (2d) 682.

No. 83. BINGHAM ET AL. *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. George S. Fuller* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. David E. Hudson, James W. Morris,* and *Arnold Raum* for the United States. Reported below: 76 F. (2d) 573.

No. 213. INDUSTRIAL TRUST CO., ET AL., EXECUTORS, *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims granted. *Mr. Charles P. Taft* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 647; 9 F. Supp. 817.

No. 262. BECKER, COLLECTOR OF INTERNAL REVENUE, *v.* ST. LOUIS UNION TRUST CO. ET AL., EXECUTORS. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Thomas S. McPheeters* for respondents. Reported below: 76 F. (2d) 851.

No. 110. UNITED STATES *v.* FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES. October 14, 1935. Petition

for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* for the United States. *Mr. George S. Fuller* for respondents. Reported below: 76 F. (2d) 200.

No. 111. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* LEE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Hugh W. McCulloch* for respondent. Reported below: 76 F. (2d) 203.

No. 137. OGLE *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. J. B. Faegre* for petitioner. *Solicitor General Reed* for respondent. Reported below: 77 F. (2d) 338.

No. 232. BRONX BRASS FOUNDRY, INC., *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Maxwell H. Goldstein* for petitioner. *Mr. Edward F. Unger* for respondent. Reported below: 76 F. (2d) 935.

Nos. 375 and 376. MEYER ET AL. *v.* KENMORE GRANVILLE HOTEL CO. ET AL. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Meyer Abrams* and *Max Shulman* for petitioners. *Messrs. I. E. Ferguson* and *Arthur M. Cox* for respondents. Reported below: 77 F. (2d) 1004; 78 *id.* 1018.

No. 270. PRUDENCE CO., INC. *v.* FIDELITY & DEPOSIT CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted, limited to the question of the measure of damages. *Mr. Alfred T. Davison* for petitioner. *Messrs. John W. Davis* and *Joseph F. Murray* for respondents. Reported below: 77 F. (2d) 834.

No. 273. COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE, ET AL. *v.* ATWOOD, RECEIVER. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted, limited to the question of jurisdiction and its appropriate exercise. *Mr. W. Denning Stewart* for petitioners. *Mr. John G. Frazer* for respondent. Reported below: 78 F. (2d) 92.

No. 348. CITY OF LINCOLN ET AL. *v.* RICKETTS, TRUSTEE IN BANKRUPTCY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted, limited to the question of the application of § 64b of the Bankruptcy Act. *Mr. Karl W. Kindleberger* for petitioners. *Mr. Allen W. Field* for respondent. Reported below: 77 F. (2d) 425.

No. 439. RAND *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. J. B. Faegre* for petitioner. *Solicitor General Reed* for respondent. Reported below: 79 F. (2d) 24.

No. 494. DIBBLEE *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Clark R. Fletcher* for petitioner. *Solicitor General Reed* for respondent. Reported below: 75 F. (2d) 617.

No. 428. TUTTLE ET AL. *v.* HARRIS ET AL. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. George T. Buckingham* for petitioners. *Mr. William J. Grace* for respondents. Reported below: 78 F. (2d) 409.

No. 443. UNITED STATES *v.* CERTAIN LANDS IN THE CITY OF LOUISVILLE ET AL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Reed* for the United States. *Mr. Charles G. Middleton* for respondents. Reported below: 78 F. (2d) 684.

No. 490. BUS & TRANSPORT SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Albert E. James* for petitioner. *Solicitor General Reed* for respondent. Reported below: 79 F. (2d) 509.

No. 566. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MCILVAINE ET AL., TRUSTEES. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Clay Judson* for respondents. Reported below: 78 F. (2d) 787.

No. 4. VAN DER WEYDE *v.* OCEAN TRANSPORT CO., LTD. ET AL. November 18, 1935. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Ninth Circuit granted, limited to the question of the application to this controversy of the Treaty of Commerce and Navigation of July 4, 1827, between the United States and the Kingdom of Sweden and Norway (8 Stat. 346). The motion of respondent, Ocean Transport Co., Ltd., to print additional parts of the record is denied. *Mr. John P. Hannon* for petitioner. *Messrs. Lane Summers, F. T. Merritt,* and *W. H. Hayden* for respondents. Reported below: 73 F. (2d) 922.

No. 525. GREAT WESTERN POWER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Thomas R. Dempsey* and *A. Calder Mackay* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *A. F. Prescott* for respondent. Reported below: 79 F. (2d) 94.

No. 546. UNITED STATES SHIPPING BOARD MERCHANT FLEET CORP. ET AL. *v.* RHODES; and

No. 547. O'CONNOR, COMPTROLLER OF THE CURRENCY, ET AL. *v.* SAME. November 25, 1935. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia granted, limited to the question of the right of respondent, to bring this suit without prior demand upon, and refusal by, the Comptroller of the Currency or the receiver, or both. *Solicitor General Reed* and *Messrs. George P. Barse, Swagar Sherley, Frederick DeC. Faust,* and *Charles F. Wilson* for petitioners. *Messrs. Charles A. Douglas, Hugh H. Obear,* and *R. L. Merrick* for respondent. Reported below: 65 App. D. C. 21; 79 F. (2d) 146.

No. 577. RICKERT RICE MILLS, INC. *v.* FONTENOT, COLLECTOR OF INTERNAL REVENUE;

No. 578. DORE *v.* SAME;

No. 579. UNITED RICE MILLING PRODUCTS CO., INC. *v.* SAME;

No. 580. BATON ROUGE RICE MILL, INC. *v.* SAME;

No. 581. SIMON *v.* SAME;

No. 585. LEVY RICE MILLING CO., INC. *v.* SAME;

No. 586. FARMERS RICE MILLING CO., INC. *v.* SAME; and

No. 587. NOBLE-TROTTER RICE MILLING CO., INC. *v.* SAME. November 25, 1935. The petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit are granted. The motions for injunction restraining the collection of the assailed tax, pending the hearing and determination of the causes in this Court, are granted, upon condition that the amount of the assailed taxes, as they accrue from month to month, shall be paid over to a depositary to be appointed by the Court, the order for injunction to be settled by the Chief Justice upon two days' notice.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO dissent from the action of the Court in granting the injunction. *Messrs. Homer L. Bruce* and *John P. Bullington* for petitioners in Nos. 577 to 581, inclusive. *Messrs. Ralph J. Schwarz* and *M. B. Redmann* for petitioner in No. 585. *Mr. C. A. McCoy* for petitioners in Nos. 586 and 587. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Andrew D. Sharpe, M. H. Eustace,* and *Edward H. Horton* for respondent. Reported below: 79 F. (2d) 700.

No. 533. DUPARQUET HUOT & MONEUSE CO. ET AL. *v.* EVANS ET AL. November 25, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit granted. *Messrs. Mark M. Horblit* and *Harold Harper* for petitioners. *Mr. Daniel A. Shirk* for respondents. Reported below: 78 F. (2d) 678.

No. 545. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* STOKES. See *ante,* p. 551.

No. 388. TRIPLETT ET AL. *v.* LOWELL. On petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. December 9, 1935. It is ordered that the petition for rehearing in this case be, and it hereby is, granted. The order heretofore entered on October 14, 1935, [*post,* p. 621] denying the petition for writ of certiorari in this case is vacated, and it is ordered that the petition for writ of certiorari be, and the same hereby is, granted. *Mr. Samuel E. Darby, Jr.,* for petitioners. *Messrs. C. V. Edwards* and *John B. Brady* for respondent. Reported below: 77 F. (2d) 556.

No. 539. CALLAGHAN ET AL. *v.* RECONSTRUCTION FINANCE CORP.; and

No. 540. STITT *v.* SAME. December 9, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Percival E. Jackson* for petitioner in No. 539. *Mr. Theodore Stitt, pro se. Solicitor General Reed* for respondent. Reported below: 79 F. (2d) 187.

No. 552. MCCANDLESS ET AL. *v.* UNITED STATES. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Urban Earl Wild* for petitioners. *Solicitor General*

Reed, Assistant Attorney General Blair and *Mr. Aubrey Lawrence* for the United States. Reported below: 74 F. (2d) 596.

No. 583. CHANDLER, RECEIVER, *v.* PEKETZ. December 23, 1935. Petition for writ of certiorari to the Supreme Court of Colorado granted. *Messrs. Harry S. Silverstein* and *Harold F. Collins* for petitioner. No appearance for respondent. Reported below: 97 Colo. 268; 49 P. (2d) 425.

No. 602. NEW YORK LIFE INSURANCE CO. *v.* VIGLAS. December 23, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Louis H. Cooke, Frederick H. Nash,* and *Claude R. Branch* for petitioner. *Mr. Harris J. Booras* for respondent. Reported below: 78 F. (2d) 829.

No. 636. CARTER *v.* CARTER COAL CO. ET AL.; and No. 651. HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL. *v.* CARTER ET AL. December 23, 1935. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Frederick H. Wood, William D. Whitney,* and *Richard H. Wilmer* for Carter. *Mr. Karl J. Hardy* for Carter Coal Co. *Solicitor General Reed* for the Commissioner.

No. 649. R. C. TWAY COAL CO. ET AL. *v.* GLENN. December 23, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Charles I. Dawson* for petitioners. *Solicitor General Reed* and *Assistant Attorney General Dickinson* for respondent.

No. 650. R. C. Tway Coal Co. et al. *v.* Clark. December 23, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Charles I. Dawson* for petitioners. *Solicitor General Reed* and *Assistant Attorney General Dickinson* for respondent.

No. 599. Leahy *v.* State Treasurer et al. January 6, 1935. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Mr. C. S. Macdonald* for petitioner. *Messrs. C. D. Cund* and *C. W. King* for respondents. Reported below: 173 Okla. 614; 49 P. (2d) 570.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 7, 1935, TO AND INCLUDING JANUARY 6, 1936.

No. 363. Levy *v.* Irving Trust Co., Trustee in Bankruptcy. See *ante*, p. 539.

No. 128. Linderholm *v.* Kansas. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Kansas and motion for leave to proceed further *in forma pauperis* denied. *Mr. Justus B. Linderholm, pro se.* No appearance for respondent.

No. 153. Love *v.* Nordbye, Judge. October 14, 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. H. R. Love, pro se.* No appearance for respondent.

No. 200. PARKS *v.* UNITED STATES. October 14, 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. W. O. Cooper, Jr.*, for petitioner. No appearance for the United States. Reported below: 76 F. (2d) 709.

No. 203. DAMBROSIO *v.* ADERHOLD, WARDEN. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. Carl Dambrosio, pro se.* No appearance for respondent.

No. 225. BOLIN *v.* MARSHALL, DEPUTY COMMISSIONER, ET AL. October 14, 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. *Mary Bolin, pro se. Mr. John F. Reilly* for respondents. Reported below: 76 F. (2d) 668.

No. 231. WACHOVIA BANK & TRUST CO., ADMINISTRATOR, ET AL. *v.* UNITED STATES. October 14, 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. Hiram P. Whitacre* for petitioners. *Solicitor General Reed*, and *Messrs. Will G. Beardslee, W. Marvin Smith, Fendall Marbury*, and *Young M. Smith* for the United States. Reported below: 77 F. (2d) 91.

No. 239. ROWE *v.* NICHOLSON, SUPERINTENDENT. October 14, 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. Otis W. Rowe, pro se.* No appearance for respondent. Reported below: 78 F. (2d) 468.

No. 257. SPEAKS *v.* HOAGE, DEPUTY COMMISSIONER, ET AL. October 14, 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. I. Irwin Bolotin* for petitioner. No appearance for respondents. Reported below: 64 App. D. C. 324; 78 F. (2d) 208.

No. 279. TARRER *v.* UNITED STATES. October 14, 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. *Messrs. Charles Beach Edwards* and *Allen W. Post* for petitioner. No appearance for the United States. Reported below: 77 F. (2d) 423.

No. 297. STEINBERG *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. Joseph Heller* for petitioner. No appearance for the United States. Reported below: 79 F. (2d) 1017.

No. 309. MOORE *v.* LOWE, SHERIFF. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia and motion for leave to proceed further *in forma pauperis* denied. *Mr. John C. Palmer,*

Jr., for petitioner. No appearance for respondent. Reported below: 116 W. Va. 165; 180 S. E. 1.

No. 317. SPRUILL *v.* BALLARD ET AL. October 14, 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. *Georgia M. Spruill, pro se.* No appearance for respondents. Reported below: 64 App. D. C. 60; 74 F. (2d) 464.

No. 319. SMALL *v.* NEW YORK. October 14, 1935. Petition for writ of certiorari to the Supreme Court of New York and motion for leave to proceed further *in forma pauperis* denied. *Mr. George Small, pro se.* No appearance for respondent. Reported below: 243 App. Div. 852; 278 N. Y. S. 1017.

No. 357. DE LA YSLA *v.* UNITED STATES. October 14, 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. Roque Espiritu De La Ysla, pro se.* No appearance for the United States. Reported below: 77 F. (2d) 988.

No. 435. EX PARTE ILSE. October 14, 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. Henry A. Ilse, pro se.*

No. 456. RIDGEWAY *v.* WOODWARD, TRUSTEE, ET AL. October 14, 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. *Miss Etta L. Taggart* for petitioner. No appearance for respondents. Reported below: 64 App. D. C. 399; 78 F. (2d) 878.

No. 38. Omaha Baum Iron Store, Inc. *v.* United States. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. The motion to remand to the Court of Claims for further findings is also denied. *Mr. Thaddeus G. Benton* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for the United States. Reported below: 80 Ct. Cls. 67; 8 F. Supp. 703.

No. 147. International Agricultural Corp. et al. *v.* Amtorg Trading Corp. October 14, 1935. Petition for writ of certiorari to the United States Court of Customs and Patent Appeals denied for want of jurisdiction. Act of June 17, 1930, c. 497, § 337 (c), 46 Stat. 590, 703–704; U. S. Code, Title 19, § 1337 (c). *Messrs. L. Randolph Mason* and *Henry D. Williams* for petitioners. *Messrs. J. Harry Covington, John Marshall,* and *Alan C. Maxwell* for respondent. Reported below: 22 C. C. P. A. (Cust.) 558; 75 F. (2d) 826.

No. 42. Chippewa Indians of Minnesota *v.* United States et al. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Webster Ballinger* for petitioner. *Solicitor General Reed, Assistant Attorney General Blair,* and *Mr. George T. Stormont* for the United States et al. Reported below: 80 Ct. Cls. 410.

No. 44. FLORIDA ASPHALT PAVEMENT MANUFACTURING CO. ET AL. *v.* FEDERAL RESERVE BANK OF ATLANTA. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Herbert S. Phillips* for petitioners. No appearance for respondent. Reported below: 76 F. (2d) 326.

No. 87. DAVIS *v.* FEDERAL RESERVE BANK OF ATLANTA. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Burton G. Henson* for petitioner. No appearance for respondent. Reported below: 76 F. (2d) 326.

No. 45. KANSAS OR KAW TRIBE OF INDIANS *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Edward T. Miller* for petitioner. *Solicitor General Reed, Assistant Attorney General Blair,* and *Mr. George T. Stormont* for the United States. Reported below: 80 Ct. Cls. 264.

No. 50. MUNOZ ET AL. *v.* PORTO RICO RAILWAY, LIGHT & POWER CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby, Benjamin J. Horton,* and *Nathan R. Margold* for petitioners. *Mr. Henri Brown* for respondent. Reported below: 74 F. (2d) 816.

No. 51. COLLIER ET AL. *v.* KING, SHERIFF. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. W. D. Bell* for petitioners.

Mr. Cary D. Landis for respondent. Reported below: 116 Fla. 703; 156 So. 703.

No. 52. SKIPPER *v.* SCHUMACHER, SHERIFF. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. W. D. Bell* for petitioner. *Mr. Cary D. Landis* for respondent. Reported below: 118 Fla. 867; 160 So. 357.

No. 53. METROPOLITAN LIFE INSURANCE CO. *v.* RUBIN'S DEPARTMENT STORE, INC. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Clarence W. Diver, Philip A. Populorum,* and *Morris I. Conner* for petitioner. *Mr. Thomas D. Nash* for respondent. Reported below: 75 F. (2d) 731.

No. 59. JOHNSTONE, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Thomas R. Dempsey* and *A. Calder Mackay* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 76 F. (2d) 55.

No. 60. NEW YORK, CHICAGO & ST. LOUIS R. CO. *v.* SINGLETON ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Mr. Russell P. Harker* for petitioner. *Messrs. Philip Lutz, Jr.,* and *Urban C. Stover* for respondents. Reported below: 207 Ind. 449; 190 N. E. 761.

No. 211. GEORGETOWN WATER, GAS & ELECTRIC CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Laurence Graves* and *Ike Lanier* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. David E. Hudson, James W. Morris,* and *Lucius A. Buck* for respondent.

No. 63. MICHAEL ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. S. Wallace Dempsey* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 75 F. (2d) 966.

No. 64. OREGON SHORT LINE R. CO. *v.* ROY. October 14, 1935. Petition for writ of certiorari to the Fifth Judicial District Court in and for Bannock County, Idaho, denied. *Mr. George H. Smith* for petitioner. *Mr. Roy L. Black* for respondent. Reported below: 55 Idaho 404; 42 P. (2d) 476.

No. 65. ENGEBRETSON, TRUSTEE, *v.* MARCELL ET AL., TRUSTEES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William M. Giller* for petitioner. *Messrs. W. H. Herdman* and *U. S. G. Cherry* for respondents. Reported below: 74 F. (2d) 93.

No. 66. BINZEL *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to

the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Mark Eisner* and *Ferdinand Tannenbaum* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 75 F. (2d) 989.

No. 68. ASSOCIATED INDEMNITY CORP. *v.* WILSON. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. R. Boone* for petitioner. No appearance for respondent. Reported below: 74 F. (2d) 896.

No. 71. LIGGETT & MYERS TOBACCO CO., INC. *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Richard S. Holmes* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *J. P. Jackson* for the United States. Reported below: 77 F. (2d) 65.

No. 72. MICCA *v.* WISCONSIN NATIONAL LIFE INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John E. Cassidy* for petitioner. *Mr. R. A. Hollister* for respondent. Reported below: 75 F. (2d) 710.

No. 73. JOHN T. RIDDELL, INC. *v.* ATHLETIC SHOE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Wm. R. Rummler* for petitioner. *Messrs. Cyril A. Soans* and *Frank H. Marks* for respondent. Reported below: 75 F. (2d) 93.

No. 74. AULL *v.* LIDEPA CORPORATION ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Frederick W. Schmitz* for petitioner. No appearance for respondents. Reported below: 118 Fla. 408; 159 So. 808.

No. 77. TEXAS & PACIFIC RY. CO. *v.* TEXAS ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. T. D. Gresham* and *M. E. Clinton* for petitioner. *Messrs. William McCraw* and *Scott Gaines* for respondents. Reported below: 124 Tex. 482; 78 S. W. (2d) 580.

No. 80. HOLLIDGE *v.* COLONIAL TRUST CO. October 14, 1935. Petition for writ of certiorari to the Superior Court in and for the County of Norfolk, Massachusetts, denied. *Mr. Brenton K. Fisk* for petitioner. *Mr. Lawrence E. Green* for respondent. Reported below: 290 Mass. —; 194 N. E. 711.

Nos. 85 and 86. CAMPBELL *v.* ALLEGHANY CORPORATION. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Llewellyn A. Luce* for petitioner. *Messrs. George Weems Williams* and *W. T. Kinder* for respondent. Reported below: 75 F. (2d) 947.

No. 88. LAMBORN ET AL. *v.* AMERICAN SHIP & COMMERCE NAVIGATION CORP. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Alfred C. B. McNevin* and *Farnham P. Griffiths* for petitioners. *Messrs.*

Cletus Keating, Charles R. Hickox, and *James H. Herbert* for respondents. Reported below: 76 F. (2d) 363.

No. 90. Ottenheimer Bros., Inc. et al. *v.* Libuwitz. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John Elliott Byrne* for petitioners. *Mr. Edwin S. Clarkson* for respondent. Reported below: 74 F. (2d) 858.

No. 92. Eckstein *v.* United States. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Albert L. Hopkins, Harry B. Sutter, Anderson A. Owen,* and *Samuel H. Horn* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 725; 10 F. Supp. 231.

No. 93. Provident Life & Accident Insurance Co. *v.* Dance. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. B. Sizer* for petitioner. *Mr. Howard B. Warren* for respondent. Reported below: 76 F. (2d) 384.

No. 94. Oliver *v.* Iowa State Traveling Men's Assn. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Jesse A. Miller* and *E. C. Street* for petitioner. *Messrs. J. M. Parsons* and *Earl C. Mills* for respondent. Reported below: 76 F. (2d) 963.

No. 95. BUNKER HILL COUNTRY CLUB *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frederick L. Pearce* for petitioner. *Solicitor General Biggs, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 375; 10 F. Supp. 159.

No. 96. GOLDBERG-RUDKOWSKY *v.* EQUITABLE LIFE ASSURANCE SOCIETY. October 14, 1935. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Borris M. Komar* for petitioner. *Messrs. John W. Davis* and *Wm. C. Cannon* for respondent. Reported below: 266 N. Y. 451; 195 N. E. 149.

No. 140. KLOCHKOV *v.* PETROGRADSKI MEJDUNARODNI COMMERCHESKI BANK. October 14, 1935. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Borris M. Komar* for petitioner. *Messrs. Frederick B. Campbell* and *Lounsbury D. Bates* for respondent. Reported below: 266 N. Y. 596; 195 N. E. 216.

No. 98. MOORE, EXECUTRIX, *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Preston B. Kavanagh* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 80 Ct. Cls. 842; 10 F. Supp. 143.

No. 99. CITIES SERVICE CO. *v.* ARMSBY ET AL. October 14, 1935. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Ninth Circuit denied. *Messrs. Benjamin F. Bledsoe* and *Elvon Musick* for petitioner. No appearance for respondent. Reported below: 74 F. (2d) 907.

No. 100. PFLUEGER ET AL. *v.* SHERMAN ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John Francis Neylan* and *Bartley C. Crum* for petitioners. *Messrs. Alfred Sutro, W. H. Lawrence, Eugene M. Prince,* and *W. L. Stanley* for respondents. Reported below: 75 F. (2d) 84.

No. 101. PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY ET AL. *v.* PRUDENCE-BONDS CORP. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. J. M. Richardson Lyeth, John Ross Delafield, Jackson A. Dykman, Thurlow M. Gordon, Timothy N. Pfeiffer, John W. Davis,* and *Emery H. Sykes* for petitioners. *Messrs. Archibald Palmer* and *Wm. P. Maloney* for respondents. Reported below: 77 F. (2d) 328.

No. 105. ZACHRITZ *v.* ST. LOUIS SAN FRANCISCO RY. CO. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. W. S. Hogsett* for petitioner. *Messrs. Joseph W. Jamison, Henry S. Conrad,* and *L. E. Durham* for respondent. Reported below: 336 Mo. 801; 81 S. W. (2d) 608.

No. 106. LUCKY TIGER COMBINATION GOLD MINING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit

Court of Appeals for the Eighth Circuit denied. *Mr. George E. H. Goodner* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. David E. Hudson* and *James W. Morris* for respondent. Reported below: 76 F. (2d) 234.

No. 107. MARSHALL *v.* SOUTH CAROLINA TAX COMMISSION ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. Lionel K. Legge* for petitioner. *Messrs. John M. Daniel* and *J. Fraser Lyon* for respondents. Reported below: 178 S. C. 57; 182 S. E. 96.

No. 112. MACRAE ET AL., EXECUTORS, ET AL. *v.* GUY, TRUSTEE, ET AL. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. George E. Sullivan* and *Albert W. Fox* for petitioners. *Messrs. Frederic B. Warder, Stanton C. Peelle,* and *Dale D. Drain* for respondents. Reported below: 64 App. D. C. 314; 78 F. (2d) 198.

No. 113. LILY-TULIP CUP CORP. ET AL. *v.* AMERICAN LACE PAPER CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. S. Mortimer Ward* for petitioners. *Mr. Drury W. Cooper* for respondent. Reported below: 76 F. (2d) 130.

No. 118. BUIE *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. William R. Watkins* and *J. Forrest McCutcheon* for petitioner.

Solicitor General Reed and *Messrs. Amos W. W. Woodcock* and *W. Marvin Smith* for the United States. Reported below: 76 F. (2d) 848.

No. 119. DYER *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. H. B. McCawley* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. David E. Hudson, James W. Morris,* and *Lucius A. Buck* for respondent. Reported below: 74 F. (2d) 685.

No. 120. TROUP *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. H. B. McCawley* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 75 F. (2d) 1010.

No. 141. SCHOENBERG *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. James W. Beller* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 77 F. (2d) 446.

No. 313. SLAYTON *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Lee M. Friedman* and *Edward Clif-*

ford for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 76 F. (2d) 497.

No. 121. KEITHLEY *v.* GROSS ET AL. October 14, 1935. Petition for writ of certiorari to the Appellate Department of the Superior Court in and for the County of Los Angeles, California, denied. *Mr. Edward E. Gann* for petitioner. No appearance for respondents.

No. 122. J. J. & M. TAXMAN REFINING CO., INC. *v.* WICHITA FALLS. October 14, 1935. Petition for writ of certiorari to the Court of Civil Appeals, 2d Supreme Judicial District, of Texas, denied. *Mr. Harry C. Weeks* for petitioner. *Messrs. James T. Montgomery* and *Thomas R. Boone* for respondent. Reported below: 74 S. W. (2d) 524.

No. 123. FEIFFER *v.* MANN ET AL. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Robert E. Lynch* for petitioner. *Messrs. Walter C. Clephane, J. Wilmer Latimer,* and *Gilbert L. Hall* for respondents. Reported below: 64 App. D. C. 230; 76 F. (2d) 1000.

No. 126. MOUNT VERNON TRUST CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. F. Morse Hubbard* and *Barham R. Gary* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. David*

E. Hudson and *Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 75 F. (2d) 938.

No. 129. DICK *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. A. Scott Thompson* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *J. P. Jackson* for respondent. Reported below: 76 F. (2d) 265.

No. 130. PENNSYLVANIA INDEMNITY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Henry S. Drinker, Jr.,* and *Frederick E. S. Morrison* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for respondent. Reported below: 77 F. (2d) 92.

No. 131. NEW YORK EX REL. FEDERAL MOTOR TRUCK CO., INC. *v.* LYNCH ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Howard A. Sperry* for petitioner. *Messrs. Henry Epstein* and *Wendell P. Brown* for respondents. Reported below: 264 N. Y. 679; 191 N. E. 623.

No. 132. E. R. FAIN *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 133. MRS. E. R. FAIN *v.* SAME;

No. 134. CHAS. P. MCGAHA *v.* SAME;

No. 135. MRS. CHAS. P. MCGAHA *v.* SAME; and

No. 136. L. D. FAIN *v.* SAME. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. King* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 76 F. (2d) 1008.

No. 138. DEVEREAUX *v.* BELSEY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph G. M. Browne* for petitioner. No appearance for respondent. Reported below: 76 F. (2d) 522.

No. 139. BRADBURY *v.* AYCOCK, RECEIVER. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Warren K. Snyder* for petitioner. No appearance for respondent. Reported below: 77 F. (2d) 14.

No. 142. DORSEY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Eugene P. Locke* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 76 F. (2d) 339.

No. 143. JONES ET AL. *v.* GERMANTOWN TRUST CO., ADMINISTRATOR. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Charlotte F. Jones* for petitioners. *Mr. Wm. Clarke Mason* for respondent.

No. 144. WOOD & SELICK, INC. *v.* CANISTER CO.; and No. 209. CANISTER CO. *v.* WOOD & SELICK, INC. October 14, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter L. McDermott* for Wood & Selick, Inc. *Messrs. Frederic L. Ballard* and *John V. Lovitt* for Canister Co. Reported below: 73 F. (2d) 312; 74 F. (2d) 1009.

No. 146. HOLMAN ET AL. *v.* GULF REFINING CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Conard E. Cooper, J. O. Modisette,* and *Thaddeus G. Benton* for petitioners. *Messrs. H. L. Stone, S. L. Herold,* and *John E. Green, Jr.,* for respondents. Reported below: 76 F. (2d) 94.

No. 148. AMERICAN CASUALTY CO. *v.* CLAVERIE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles G. Lee, Jr.,* for petitioner. No appearance for respondent. Reported below: 76 F. (2d) 570.

No. 150. MACHO, ADMINISTRATOR, *v.* BROWN ET AL., EXECUTORS. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Messrs. Wm. J. Hughes, Jr., Edward J. Callahan,* and *H. Stanley Hanson* for petitioner. *Messrs. Preston B. Kavanagh, Karl D. Loos,* and *Preston C. King, Jr.,* for respondents. Reported below: 194 Minn. 127; 260 N. W. 320.

No. 152. REALTY ACCEPTANCE CORP. *v.* MONTGOMERY. October 14, 1935. Petition for writ of certiorari to the

Circuit Court of Appeals for the Third Circuit denied. *Mr. R. Randolph Hicks* for petitioner. *Messrs. Robert H. Richards* and *Thomas J. Crawford* for respondent. Reported below: 77 F. (2d) 762.

No. 155. GUARANTY TRUST CO., EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Davis* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman, Messrs. David E. Hudson* and *James W. Morris,* and *Miss Helen R. Carloss* for respondent. Reported below: 76 F. (2d) 1010.

No. 156. MILWAUKEE *v.* AMERICAN STEAMSHIP CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Max Raskin* for petitioner. *Mr. Newton D. Baker* for respondents. Reported below: 76 F. (2d) 343.

No. 158. BRAME *v.* KEYSTONE CREDIT CORP. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. M. J. Fulton* for petitioner. *Messrs. Hartwell Cabell* and *John S. Eggleston* for respondents. Reported below: 76 F. (2d) 328.

No. 159. NEVIUS *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ewing Everett* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for respondent. Reported below: 76 F. (2d) 109.

No. 160. HARPER *v.* MORAN, RECEIVER. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Ward B. McCarthy, Wm. E. Richardson, Milton D. Campbell, W. W. Millan, Ralph P. Barnard,* and *E. Hilton Jackson* for petitioner. No appearance for respondent. Reported below: 64 App. D. C. 210; 76 F. (2d) 980.

No. 258. HAMILTON, RECEIVER, *v.* OFFUTT ET AL., TRUSTEES. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Charles E. Wainwright, Brice Clagett,* and *George P. Barse* for petitioner. *Messrs. Charles V. Imlay* and *Ross H. Snyder* for respondents. Reported below: 64 App. D. C. 385; 78 F. (2d) 735.

Nos. 161 and 162. THOMPSON ET AL. *v.* PARK SAVINGS BANK, INC., ET AL. October 14, 1935. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. E. Hilton Jackson, Wm. E. Richardson, Ward B. McCarthy, J. Bruce Kremer, George B. Springston,* and *Herbert M. Bingham* for petitioners. *Messrs. Joseph T. Sherier* and *Otis Beall Kent* for respondents. Reported below: 64 App. D. C. 308; 77 F. (2d) 955.

No. 165. BALTIMORE & OHIO R. Co. *v.* WOLF, ADMINISTRATRIX. October 14, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. George E. Hamilton* and *John J. Hamilton* for petitioner. *Messrs. Eugene Van Voorhis* and *John Van Voorhis* for respondent. Reported below: 267 N. Y. 583; 196 N. E. 591.

No. 167. MALLERY *v.* MANAGERS SECURITIES CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Hal H. Smith* for petitioner. *Mr. Hugh M. Morris* for respondent. Reported below: 77 F. (2d) 186.

No. 170. WHEELING *v.* JOHN F. CASEY CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Wright Hugus, Howard D. Matthews,* and *Carl O. Schmidt* for petitioner. *Mr. T. S. Riley* for respondent. Reported below: 74 F. (2d) 794.

No. 171. DAKOTA CORPORATION *v.* SLOPE COUNTY ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George E. Wallace* for petitioner. No appearance for respondents. Reported below: 75 F. (2d) 584.

No. 172. DAKOTA CORPORATION *v.* SLOPE COUNTY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George E. Wallace* for petitioner. No appearance for respondent. Reported below: 75 F. (2d) 587.

No. 177. LONG, RECEIVER, *v.* FIRST METHODIST EPISCOPAL CHURCH. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George M. Stevens, John F. Anderson,* and *George P. Barse* for petitioner. No appearance for respondent. Reported below: 76 F. (2d) 344.

No. 179. MAYERS *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jay Leo Rothschild* for petitioner. *Mr. Hartwell Cabell* for respondent. Reported below: 77 F. (2d) 1007.

No. 182. TELLING ET AL. *v.* BELLOWS CLAUDE NEON CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. R. B. Newcomb* and *Herman J. Nord* for petitioners. *Messrs. William Bohleber* and *Francis H. Fassett* for respondents. Reported below: 77 F. (2d) 584.

No. 183. TAYLOR *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Fred A. Woodis* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 76 F. (2d) 904.

No. 188. MATALONE ET AL. *v.* PEORIA LIFE INSURANCE CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Tom D. McKeown* for petitioners. *Messrs. Montgomery S. Winning, J. B. Wolfenbarger,* and *George W. Hunt* for respondents. Reported below: 75 F. (2d) 777.

No. 382. UNION GUARANTEE & MORTGAGE CO. *v.* VAN SCHAICK, SUPERINTENDENT OF INSURANCE. October 14, 1935. Petition for writ of certiorari to the Circuit Court

of Appeals for the Second Circuit denied. *Mr. Raymond M. White* for petitioner. *Mr. Alfred C. Bennett* for respondent. Reported below: 75 F. (2d) 984.

No. 189. HARDEE, RECEIVER, ET AL. *v.* AMERICAN SECURITY & TRUST CO. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. John F. Anderson, Huston Thompson, Herbert S. Ward, George P. Barse,* and *F. G. Awalt* for petitioners. *Messrs. Frederic D. McKenney, John S. Flannery,* and *G. Bowdoin Craighill* for respondent. Reported below: 64 App. D. C. 259; 77 F. (2d) 382.

No. 191. LOWENDAHL *v.* HESSEY, TRUSTEE IN BANKRUPTCY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Neil P. Cullom* for petitioner. *Mr. Sylvan Hayes Lauchheimer* for respondent. Reported below: 76 F. (2d) 645.

No. 198. BALTIMORE MAIL STEAMSHIP CO. *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Stuart S. Janney* and *Charles Markell* for petitioner. *Solicitor General Reed, Assistant Attorney General Sweeney,* and *Messrs. M. Leo Looney, Jr., Paul A. Sweeney,* and *W. Marvin Smith* for the United States. Reported below: 76 F. (2d) 582.

No. 201. DETROIT *v.* WYANDOTTE TRANSPORTATION CO. October 14, 1935. Petition for writ of certiorari to

the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Adolph R. Jobson, Raymond J. Kelly,* and *John Atkinson* for petitioner. *Mr. Thomas H. Garry* for respondent. Reported below: 76 F. (2d) 674.

No. 202. STONE ET AL., TRUSTEES, *v.* WHITE, FORMER COLLECTOR OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Thomas Allen* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Joseph M. Jones* for respondent. Reported below: 78 F. (2d) 136.

No. 204. CROCKER ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. S. Milton Simpson* and *George E. Cleary* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 64 App. D. C. 204; 76 F. (2d) 974.

No. 219. FABER, EXECUTOR, *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. George H. Emerson* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 81 Ct. Cls. 142; 10 F. Supp. 602.

No. 205. SIMMS ET AL. *v.* ELYRIA SAVINGS & TRUST CO. October 14, 1935. Petition for writ of certiorari

to the Supreme Court of Ohio denied. *Mr. Miles E. Evans* for petitioners. *Mr. Frank H. Myers* for respondent. Reported below: 129 Oh. St. 318; 195 N. E. 485.

No. 206. SIMMS ET AL. *v.* SAVINGS DEPOT & TRUST CO. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Miles E. Evans* for petitioners. *Mr. Herman J. Nord* for respondent. Reported below: 129 Oh. St. 318; 195 N. E. 485.

No. 207. INDUSTRIAL BOARD OF NEW YORK *v.* DELAWARE, LACKAWANNA & WESTERN R. CO. October 14, 1935. Petition for writ of certiorari to the Appellate Division, Third Judicial Department, of the Supreme Court of New York denied. *Messrs. Joseph A. McLaughlin* and *Henry Epstein* for petitioner. *Mr. Louis L. Babcock* for respondent. Reported below: 266 N. Y. 553; 195 N. E. 196.

No. 208. STANDARD OIL CO. *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. John W. Davis* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 81 Ct. Cls. 174; 10 F. Supp. 550.

No. 210. MOORE ET AL. *v.* TUMWATER PAPER MILLS CO. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Washington denied. *Messrs. O. C. Moore* and *H. C. Brodie* for petitioners. *Messrs. Bruce C. Shorts* and *John S. Coke* for respondent. Reported below: 181 Wash. 45; 42 P. (2d) 29.

No. 212. AMCHANITZKY *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Nathan Amchanitzky, pro se. Solicitor General Reed, Assistant Attorney General Sweeney,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 81 Ct. Cls. 409.

No. 214. THAL ET AL. *v.* CREDIT ALLIANCE CORP. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. William C. Sullivan* for petitioners. No appearance for respondent. Reported below: 64 App. D. C. 328; 78 F. (2d) 212.

No. 215. EX PARTE GENERAL PUBLIC UTILITIES CORP. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry W. Killeen* for petitioner. Reported below: 76 F. (2d) 1003.

No. 216. SPRINGFIELD FIRE & MARINE INSURANCE CO. *v.* MARTIN. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. S. Phillips* for petitioner. *Mr. Curtis L. Sparkman* for respondent. Reported below: 77 F. (2d) 492.

No. 217. MASSACHUSETTS PROTECTIVE ASSN., INC. *v.* PICARD, ADMINISTRATRIX. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Frederick H. Nash, Richard B. Montgomery,* and *Claude R. Branch* for petitioner. *Messrs. Elias Goldstein, H. C. Walker, Jr.,* and *Leon*

O'Quin for respondent. Reported below: 76 F. (2d) 684; 77 F. (2d) 1006.

No. 221. JACKSON SECURITIES & INVESTMENT CO. *v.* SNEAD, COLLECTOR OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Douglas Arant* and *Harry Friedman* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 77 F. (2d) 19.

Nos. 222 and 223. AMERICAN STEAM CONVEYOR CORP. *v.* UNITED STATES. October 14, 1935. Petition for writs of certiorari to the Court of Claims denied. *Mr. J. Nelson Anderson* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 81 Ct. Cls. 151; 10 F. Supp. 571.

No. 224. GRAVEL PRODUCTS CORP. *v.* BUFFALO GRAVEL CORP. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Karl Fenning* for petitioner. *Mr. John S. Powers* for respondent. Reported below: 76 F. (2d) 756.

No. 228. RANDOLPH ET AL., TRUSTEES, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Richard S. Doyle, Stanley S. Waite, Abraham Lowenhaupt,* and *Francis M. Curlee* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs.*

James W. Morris and *John MacC. Hudson* for respondent. Reported below: 76 F. (2d) 472.

No. 281. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* RANDOLPH ET AL., TRUSTEES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Solicitor General Reed* for petitioner. *Messrs. Abraham Lowenhaupt, Stanley S. Waite, F. M. Curlee,* and *Richard S. Doyle* for respondents. Reported below: 76 F. (2d) 472.

No. 229. UNITED STATES *v.* INDIAN MOTOCYCLE CO. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States. *Mr. J. S. Y. Ivins* for respondent. Reported below: 80 Ct. Cls. 594; 9 F. Supp. 608.

No. 230. NEWMAN ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Ralph J. Schwarz* and *Morris B. Redmann* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *J. P. Jackson* for respondent. Reported below: 76 F. (2d) 449.

No. 233. UNITED STATES EX REL. MANNISTO *v.* REIMER, COMMISSIONER OF IMMIGRATION. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph R. Brodsky* for petitioner. *Solicitor General Reed* and *Messrs. Bart*

W. Butler and *W. Marvin Smith* for respondent. Reported below: 77 F. (2d) 1021.

No. 234. MANSFIELD ET AL. *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ira W. Burns* for petitioners. *Solicitor General Reed* and *Messrs. Amos W. W. Woodcock* and *W. Marvin Smith* for the United States. Reported below: 76 F. (2d) 224.

No. 235. GEORGIA RAILWAY & ELECTRIC CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. L. A. Gravelle, Walter T. Colquitt,* and *Adrian C. Humphreys* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *J. P. Jackson* for respondent. Reported below: 77 F. (2d) 897.

No. 236. MORGAN *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Frank S. Bright* and *H. Stanley Hinrichs* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 76 F. (2d) 390.

No. 237. PHILADELPHIA NATIONAL BANK *v.* RAFF, ADMINISTRATOR. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Homer C. Corry* and *Charles E.*

Morgan, III, for petitioner. *Mr. J. S. Y. Ivins* for respondent. Reported below: 76 F. (2d) 843.

No. 240. HUTTON ET AL. *v.* TORGERSON. October 14, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. D. Roger Englar* and *George S. Bringle* for petitioners. *Mr. Arthur L. Ross* for respondent. Reported below: 267 N. Y. 535; 196 N. E. 566.

No. 241. WRIGHT ET AL. *v.* AYER & LORD BARGE CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. W. Chapman Rivercomb* for petitioners. *Mr. Charles C. Grassham* for respondents. Reported below: 76 F. (2d) 871.

No. 242. UNITED STATES ON BEHALF OF VARIOUS TRUSTEES AND RECEIVERS OF THE BANKRUPTCY COURT *v.* SQUIRE, SUPERINTENDENT OF BANKS OF OHIO, ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Marc J. Grossman* for petitioners. No appearance for respondents. Reported below: 75 F. (2d) 295.

No. 243. PUERTO RICO *v.* VELAZQUEZ. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby, Benjamin J. Horton,* and *Nathan R. Margold* for petitioner. *Mr. Luis F. Velazquez, pro se.* Reported below: 77 F. (2d) 431.

No. 244. SENTINEL LIFE INSURANCE CO. *v.* BLACKMER. October 14, 1935. Petition for writ of certiorari

to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. William H. Allen* and *S. Harrison White* for petitioner. *Mr. Frank N. Bancroft* for respondent. Reported below: 77 F. (2d) 347.

No. 245. NAVIGAZIONE GENERALE ITALIANA *v.* ELTING, COLLECTOR OF CUSTOMS. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Delbert M. Tibbetts* and *Gaspare M. Cusumano* for petitioner. *Solicitor General Reed, Assistant Attorney General Sweeney,* and *Messrs. Paul A. Sweeney* and *W. Marvin Smith* for respondent. Reported below: 77 F. (2d) 270.

No. 246. DAVIS, ADMINISTRATRIX, *v.* LOUISVILLE & NASHVILLE R. Co. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Albert Williams* and *Edwin F. Hunt* for petitioner. *Mr. Ed. T. Seay* for respondent. Reported below: 75 F. (2d) 849.

No. 247. BAUSCH & LOMB OPTICAL CO. ET AL. *v.* WAHLGREN ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Silas H. Strawn* and *John D. Black* for petitioners. *Messrs. Charles Hudson* and *Benjamin F. J. Odell* for respondents. Reported below: 77 F. (2d) 121.

No. 248. BANCKER *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit

denied. *Mr. Hal Lindsay* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 76 F. (2d) 1.

No. 249. LINDSAY, RECEIVER, *v.* ELLIOTT ET AL., RECEIVERS. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Edward D. Hays* for petitioner. *Mr. Edward W. Mullins* for respondents. Reported below: 77 F. (2d) 95.

No. 250. HIRSIG ET AL. *v.* TRAVELERS INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Frank F. L'Engle* for petitioners. *Mr. Francis M. Holt* for respondent. Reported below: 76 F. (2d) 701.

No. 251. BREA CANON OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George H. Koster* and *L. A. Luce* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John G. Remey* for respondent. Reported below: 77 F. (2d) 67.

No. 253. MONTANA, WYOMING & SOUTHERN R. CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Henry J. Richardson* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. David E. Hudson, James W. Morris* and *S. Dee*

Hanson for respondent. Reported below: 77 F. (2d) 1007.

No. 254. WALSH CONSTRUCTION CO. *v.* UNITED STATES GUARANTEE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Edmond M. Cook* and *Reuel B. Cook* for petitioner. *Mr. Jesse A. Miller* for respondent. Reported below: 76 F. (2d) 240.

No. 255. CURTIS, TRUSTEE, ET AL. *v.* HUMPHREY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Watkins* for petitioners. *Mr. J. A. Tyson* for respondent. Reported below: 78 F. (2d) 73.

No. 256. SOMMER & MACA GLASS MACHINERY CORP. ET AL. *v.* JOHNSON ET AL. October 14, 1935. Petition for writ of certiorari to the Appellate Court, First District of Illinois, denied. *Mr. Marshall Solberg* for petitioners. No appearance for respondents. Reported below: 278 Ill. App. 620.

No. 259. BLUE ROSE OIL CO. *v.* ILLINOIS EX REL. KERNER, ATTORNEY GENERAL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Justus Chancellor* for petitioner. *Mr. G. F. Mulligan, Jr.,* for respondent. Reported below: 360 Ill. 397; 196 N. E. 456.

No. 260. CALLISON *v.* PICKENS ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court

of Appeals for the Tenth Circuit denied. *Messrs. Preston C. West* and *A. A. Davidson* for petitioner. *Mr. David R. Milsten* for respondents. Reported below: 77 F. (2d) 62.

No. 261. DURELL *v.* PEARSON, RECEIVER. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. H. Peters, Jr.*, for petitioner. *Mr. J. A. Fowler* for respondent. Reported below: 77 F. (2d) 465.

No. 263. MUTZENBECHER ET AL. *v.* BALLARD. October 14, 1935. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Nathan Ottinger* for petitioners. *Mr. Emory R. Buckner* for respondent. Reported below: 266 N. Y. 574; 195 N. E. 206.

No. 264. STANDARD WHOLESALE PHOSPHATE & ACID WORKS, INC. *v.* GENERAL CHEMICAL CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Clair W. Fairbank* and *William R. Perkins* for petitioner. *Mr. W. Brown Morton* for respondent. Reported below: 77 F. (2d) 230.

No. 266. PUERTO RICO *v.* WHITE STAR BUS LINE, INC. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby, Benjamin J. Horton,* and *Nathan R. Margold* for petitioner. *Mr. Ismael Soldevila* for respondent. Reported below: 75 F. (2d) 889.

No. 267. STALLFORTH *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for

writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Moultrie Hitt* and *G. Kirby Munson* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *F. E. Youngman* for respondent. Reported below: 64 App. D. C. 290; 77 F. (2d) 548.

No. 269. GUSTASON *v.* CALIFORNIA TRUST CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. David G. Gustason, pro se. Mr. Thomas S. Tobin* for respondents. Reported below: 73 F. (2d) 765.

No. 271. EVANS *v.* MISSOURI STATE LIFE INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Anne M. Evans* and *Dorothy Frooks* for petitioner. No appearance for respondent. Reported below: 336 Mo. 1122; 82 S. W. (2d) 579.

No. 274. MORTGAGE LOAN CO. ET AL. *v.* LIVINGSTON, TRUSTEE IN BANKRUPTCY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Paul Bakewell, Jr.,* for petitioners. No appearance for respondent. Reported below: 78 F. (2d) 517.

No. 275. MCMULLEN *v.* PENNSYLVANIA R. CO. October 14, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Frank Gibbons* for petitioner. *Messrs. Frederic D. McKenney, J. Spalding Flannery, G. Bowdoin Craighill,* and *Harold J. Adams* for respondent. Reported below: 267 N. Y. 580; 196 N. E. 589.

No. 276. BURTON *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frank P. Walsh* for petitioner. *Solicitor General Biggs* and *Messrs. Bart W. Butler* and *W. Marvin Smith* for the United States. Reported below: 77 F. (2d) 356.

No. 277. GUTENKUNST *v.* WISCONSIN. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. Ralph A. Cusick* for petitioner. No appearance for respondent. Reported below: 218 Wis. 96; 259 N. W. 610.

No. 278. INTERSTATE TRUST & BANKING CO. ET AL. *v.* JONES COUNTY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Bert Flanders, Jr.,* and *Walter F. Marcus* for petitioners. *Mr. John D. Miller* for respondent. Reported below: 77 F. (2d) 806.

No. 282. HOUSE *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William H. Boyd* and *James A. Fowler* for petitioner. *Solicitor General Reed* and *Messrs. Guy K. Bard* and *William H. Ramsey* for the United States. Reported below: 78 F. (2d) 296.

No. 284. NAVIGAZIONE GENERALE ITALIANA *v.* ELTING, COLLECTOR OF CUSTOMS. October 14, 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 Reed, Assistant Attorney General Sweeney,* and *Messrs. M. Leo Looney, Jr., Paul A. Sweeney,* and *W. Marvin Smith* for respondent. Reported below: 77 F. (2d) 770.

No. 286. CHADICK *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. B. D. Tarlton* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Earl C. Crouter* for the United States. Reported below: 77 F. (2d) 961.

Nos. 291, 292, 293, 294, and 295. BALKWILL *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. W. W. Spalding* and *W. H. Annat* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 77 F. (2d) 569.

No. 296. HOAGE, DEPUTY COMMISSIONER, ET AL. *v.* HARTFORD ACCIDENT & INDEMNITY CO. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Solicitor General Reed* and *Mr. E. S. Brashears* for petitioners. *Mr. Cornelius H. Dorety* for respondent. Reported below: 64 App. D. C. 258; 77 F. (2d) 381.

No. 298. NIAGARA FALLS POWER CO. *v.* WATER POWER AND CONTROL COMMISSION OF NEW YORK. October 14,

1935. Petition for writ of certiorari to the Appellate Division, Third Judicial Department, Supreme Court of New York, denied. *Messrs. Randall J. LeBoeuf, Jr.,* and *Horace R. Lamb* for petitioner. *Mr. Henry Epstein* for respondent. Reported below: 267 N. Y. 265; 196 N. E. 51.

No. 299. WILLIAMS POCAHONTAS COAL CO. *v.* BERWIND LAND CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John L. Steinbugler* and *Henry S. Miller* for petitioner. *Mr. LeRoy Allebach* for respondent. Reported below: 76 F. (2d) 319.

No. 300. NEW ENGLAND NEWSPAPER PUBLISHING CO. *v.* BONNER. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis P. Garland* for petitioner. *Messrs. Richard W. Hale* and *John W. Guider* for respondent. Reported below: 77 F. (2d) 915.

No. 304. MOSES COHEN *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 305. ROSENBAUM *v.* SAME;

No. 306. NATHAN COHEN *v.* SAME; and

No. 307. GODFRIED *v.* SAME. October 14, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. Kennedy McCook* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Arnold Raum* for respondent. Reported below: 77 F. (2d) 184.

No. 308. KERR, TRUSTEE IN BANKRUPTCY, *v.* SOUTHWESTERN LUMBER CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John H. Crooker* for petitioner. *Messrs. Charles H. Woods* and *Jonathan C. Gibson* for respondent. Reported below: 78 F. (2d) 348.

No. 310. OKLAHOMA STATE BANK OF ENID *v.* FIDELITY & DEPOSIT CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. P. C. Simons, L. E. McKnight,* and *R. W. Simons* for petitioner. *Mr. Horace G. McKeever* for respondent. Reported below: 77 F. (2d) 734.

No. 311. L. J. HOUZE CONVEX GLASS CO. *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Court of Claims denied. *Messrs. James J. Lenihan* and *William S. John* for petitioner. *Solicitor General Reed, Assistant Attorney General MacLean,* and *Messrs. Paul A. Sweeney* and *M. Leo Looney, Jr.,* for the United States. Reported below: 81 Ct. Cls. 661.

No. 314. MITCHELL *v.* CITIZENS STATE BANK OF CHICAGO ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Abraham Teitelbaum* and *Esther Melnick* for petitioner. *Messrs. James Todd* and *Wm. H. Beckman* for respondents. Reported below: 77 F. (2d) 168.

No. 331. SORENSEN *v.* COLLINS, TRUSTEE. October 14, 1935. Petition for writ of certiorari to the Circuit Court

of Appeals for the Seventh Circuit denied. *Mr. Tom D. McKeown* for petitioner. *Mr. Daniel M. Healy* for respondent. Reported below. 77 F. (2d) 166.

No. 315. WITT ET AL. *v.* BERMAN, TRUSTEE IN BANKRUPTCY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel C. Duberstein* for petitioners. *Mr. David Haar* for respondent. Reported below: 77 F. (2d) 909.

No. 318. WARD M. CANADAY, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George W. Ritter* and *Bernhard Knollenberg* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John MacC. Hudson* for respondent. Reported below: 76 F. (2d) 278.

No. 320. WALKER *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John C. Theus* for petitioner. *Solicitor General Reed* and *Messrs. Will G. Beardslee, Wilbur C. Pickett,* and *W. Marvin Smith* for the United States. Reported below: 77 F. (2d) 415.

No. 321. PUTNAM ET AL. *v.* ICKES, SECRETARY OF THE INTERIOR, ET AL.;

No. 322. LASSIG ET AL. *v.* SAME;

No. 323. DUNN ET AL. *v.* SAME;

No. 324. ABBOT ET AL. *v.* SAME;

No. 325. HILL ET AL. *v.* SAME;

No. 326. THOMPSON ET AL. *v.* SAME;

No. 327. HULL ET AL. *v.* SAME; and

No. 328. FORDHAM ET AL. *v.* SAME. October 14, 1935. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Raymond M. Hudson* for petitioners. *Solicitor General Reed, Assistant Attorney General Blair,* and *Mr. Edward T. Burke* for respondents. Reported below: 64 App. D. C. 339; 78 F. (2d) 223.

No. 329. O'TOOLE *v.* NEW JERSEY. October 14, 1935. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Arthur O'Toole, pro se. Mr. Frank G. Schlosser* for respondent. Reported below: 115 N. J. Law 205; 178 Atl. 780.

No. 330. FREEPORT TEXAS CO. *v.* BOWERS, EXECUTOR. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Paul Armitage* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Paul R. Russell* for respondent. Reported below: 77 F. (2d) 288.

No. 332. HAYS, TRUSTEE IN BANKRUPTCY, ET AL. *v.* HARRIS ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Kenneth W. Coulter, Boone T. Coulter,* and *Edward H. Coulter* for petitioners. *Mr. J. R. Wilson* for respondents. Reported below: 78 F. (2d) 66.

No. 333. WOODBURY ET AL. *v.* COMMERCE TRUST CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. E. R. Johnston, I. N. Watson, Henry N. Ess, Armwell L. Cooper,* and *Rees Turpin* for petitioners. *Messrs. Samuel A. Mitchell* and *H. M. Langworthy* for respondents. Reported below: 77 F. (2d) 478.

No. 334. DANTE, EXECUTOR, *v.* TAIT, COLLECTOR OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. James C. Rogers* and *Harold N. Marsh* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *F. E. Youngman* for respondent. Reported below: 78 F. (2d) 303.

No. 337. BOSTER *v.* FIRST NATIONAL BANK, DETROIT, ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Howell Van Auken* for petitioner. *Mr. Robert S. Marx* for respondents.

No. 338. SMITH ET AL. *v.* RUSSELL, FORMER COLLECTOR OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. A. L. Barber* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Morton K. Rothschild* for respondent. Reported below: 76 F. (2d) 91.

No. 339. B. KUPPENHEIMER & Co., INC., *v.* MORNIN, RECEIVER, ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Julius Moses* and *Walter Bachrach* for petitioner. *Messrs. John T. Sullivan* and *Denis M. Kelleher* for respondents. Reported below: 78 F. (2d) 261.

No. 340. BORGIA *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Otto Christensen* for petitioner. *Solicitor General Reed* and *Mr. W. Marvin Smith* for the United States. Reported below: 78 F. (2d) 550.

No. 342. NELLIS *v.* MARYLAND CASUALTY CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. T. T. Ansberry* for petitioner. *Mr. Herman A. Krueger* for respondent. Reported below: 75 F. (2d) 23.

No. 343. UNION AGRICULTURAL & INDUSTRIAL COLLEGE OF ARKANSAS, INC. ET AL. *v.* ARKANSAS BAPTIST COLLEGE, INC. ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. George A. McConnell* and *Graham R. Hall* for petitioners. *Mr. John A. Hibber* for respondents. Reported below: 190 Ark. 817; 81 S. W. (2d) 16.

No. 344. BROWN *v.* GAREY ET AL., EXECUTORS. October 14, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. John Fletcher*

Caskey for petitioner. *Messrs. Emil Weitzner, Eugene L. Garey,* and *Earl J. Garey* for respondents. Reported below: 267 N. Y. 167; 196 N. E. 12.

No. 345. IRBY *v.* ARKANSAS EX REL. ATTORNEY GENERAL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. Wm. F. Kirsch* for petitioner. *Mr. G. B. Oliver, Jr.,* for respondent. Reported below: 190 Ark. 786; 81 S. W. (2d) 419.

No. 347. OSSEN ET AL. *v.* MUTUAL TRUST LIFE INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas Gold Frost* for petitioners. *Mr. John J. Cunneen* for respondent. Reported below: 77 F. (2d) 317.

No. 352. NORGE CORPORATION *v.* LONG ISLAND R. CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ernie Adamson* for petitioner. *Messrs. Henry Wolf Biklé* and *Frederic D. McKenney* for respondent. Reported below: 77 F. (2d) 312.

No. 353. ARNOLD CONSTABLE CORP. *v.* COMMERCIAL OPERATING CORP. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William Dean Embree* for petitioner. *Messrs. Arthur B. Hyman, Joseph C. Slaughter,* and *Whitney North Seymour* for respondent. Reported below: 77 F. (2d) 285.

No. 354. KELLEY, ANCILLARY ADMINISTRATOR, *v.* BRIGHT, EXECUTOR. October 14, 1935. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Messrs. William Cattron Rigby* and *Noah A. Stancliffe* for petitioner. No appearance for respondent. Reported below: 168 Md. 107; 176 Atl. 874.

No. 355. E. GRIFFITHS HUGHES, INC., *v.* FEDERAL TRADE COMMISSION. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert Edward Maves* for petitioner. *Solicitor General Reed, Assistant Attorney General Dickinson,* and *Messrs. Charles H. Weston, Carl McFarland,* and *W. T. Kelley* for respondent. Reported below: 77 F. (2d) 886.

No. 358. CONTINENTAL ILLINOIS NATIONAL BANK & TRUST CO. *v.* COLUMBIAN NATIONAL LIFE INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William Beye, Harry I. Allen,* and *Leonard F. Martin* for petitioner. *Messrs. Wm. P. Sidley* and *Frederick H. Nash* for respondent. Reported below: 76 F. (2d) 733.

No. 359. CHICAGO GRAVEL CO. *v.* COLUMBIAN NATIONAL LIFE INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William Beye, Harry I. Allen,* and *Leonard F. Martin* for petitioner. *Messrs. Wm. P. Sidley* and *Frederick H. Nash* for respondent. Reported below: 76 F. (2d) 733.

No. 361. SEIFER FURNITURE CO. *v.* SURPRISE, TRUSTEE IN BANKRUPTCY. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward Rothbart* for petitioner. No appearance for respondent. Reported below: 78 F. (2d) 196.

No. 364. WAGGAMAN *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Daniel Thew Wright* and *Meredith M. Daubin* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 64 App. D. C. 371; 78 F. (2d) 721.

No. 365. BROWN *v.* GESELLSCHAFT FUR DRAHTLOSE TELEGRAPHIE, M. B. H. October 14, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Stanton C. Peelle, Paul E. Lesh,* and *Dale D. Drain* for petitioner. *Messrs. G. Thomas Dunlop, George Whitefield Betts, Jr.,* and *Frank J. Hogan* for respondent. Reported below: 64 App. D. C. 357; 78 F. (2d) 410.

No. 366. INTERNATIONAL VISIBLE SYSTEMS CORP. *v.* REMINGTON RAND, INC. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter F. Murray* for petitioner. *Mr. Harrison M. Brooks* for respondent. Reported below: 78 F. (2d) 606.

No. 369. WICHITA FALLS & SOUTHERN R. CO. ET AL. *v.* HOLBROOK. October 14, 1935. Petition for writ of cer-

tiorari to the Supreme Court of Texas denied. *Mr. John B. King* for petitioners. *Mr. Raymond E. Beck* for respondent. Reported below: 125 Tex. 184; 78 S. W. (2d) 938.

No. 370. POTTORFF, RECEIVER, *v.* STAFFORD. October 14, 1935. Petition for writ of certiorari to the Court of Civil Appeals of Texas, Eighth Supreme Judicial District, denied. *Messrs. Thornton Hardie, George P. Barse,* and *Ben R. Howell* for petitioner. *Mr. Robert Ewing Thomason* for respondent. Reported below: 81 S. W. (2d) 539.

No. 371. AMERICAN-HAWAIIAN STEAMSHIP CO. *v.* WEISTHOFF ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles R. Hickox* and *Vernon S. Jones* for petitioner. *Mr. David Haar* for respondents. Reported below: 79 F. (2d) 124.

No. 372. GORDON, SECRETARY OF BANKING OF PENNSYLVANIA, *v.* HELLER. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Paul C. Wagner* and *Charles J. Margiotti* for petitioner. *Mr. Frank B. DeVine* for respondent. Reported below: 271 Mich. 240; 260 N. W. 156.

No. 373. UNION GUARDIAN TRUST CO., RECEIVER, ET AL. *v.* GUARDIAN NATIONAL BANK OF COMMERCE OF DETROIT ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Rowland W. Fixel* and *Arthur E. Fixel* for petitioners. *Messrs. Frank E. Wood* and *Harry*

Kaspir for respondents. Reported below: 78 F. (2d) 529.

No. 378. COGGIN, TRUSTEE IN BANKRUPTCY, *v.* HARTFORD ACCIDENT & INDEMNITY CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles Lee Coggin* for petitioner. *Mr. Robert Ruark* for respondent. Reported below: 78 F. (2d) 471.

No. 380. MORTON *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lewis H. Barnes* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Morton K. Rothschild* for respondent. Reported below: 77 F. (2d) 1008.

No. 383. MISSOURI PACIFIC R. CO. *v.* BARTLETT. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. William L. Curtis* and *Thomas B. Pryor* for petitioner. *Messrs. Joseph M. Hill* and *Henry L. Fitzhugh* for respondent. Reported below: 79 F. (2d) 275.

No. 384. BEERS *v.* COMMISSIONER OF INTERNAL REVENUE. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Bernhard Knollenberg* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Joseph M. Jones* for respondent. Reported below: 78 F. (2d) 447.

No. 387. WARNER-QUINLAN CO. *v.* SWAN-FINCH OIL CORP. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Thomas G. Haight, Chauncey I. Clark,* and *William J. Dean* for petitioner. *Mr. Arthur Vanderbilt* for respondents. Reported below: 78 F. (2d) 870.

No. 388. TRIPLETT ET AL. *v.* LOWELL ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Samuel E. Darby, Jr.,* for petitioners. *Messrs. C. V. Edwards* and *John B. Brady* for respondents. Reported below: 77 F. (2d) 556. See *ante,* p. 570.

No. 389. ATLANTIC COAST LINE R. CO. *v.* MCDONALD, ADMINISTRATRIX. October 14, 1935. Petition for writ of certiorari to the Court of Appeals of Georgia denied. *Messrs. W. E. Kay* and *Lee W. Branch* for petitioner. *Mr. Clifford E. Hay* for respondent. Reported below: 50 Ga. App. 856; 179 S. E. 185.

No. 390. HALL *v.* UNIVERSAL OIL PRODUCTS CO. ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Donald W. Johnson, Charles V. Garnett,* and *Minitree Jones Fulton* for petitioner. *Messrs. Alexander F. Richmann* and *R. R. Brewster* for respondents. Reported below: 76 F. (2d) 258.

No. 391. DENNIS *v.* NEW YORK CENTRAL R. CO. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. John F. Carlisle*

for petitioner. *Mr. Robert Newbegin* for respondent. Reported below: 129 Oh. St. 544; 196 N. E. 164.

No. 393. NORTH WESTERN REFRIGERATOR LINE CO. *v.* ERVIN ET AL., RECEIVERS. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harry Eugene Kelly* and *Albert S. Bozeman* for petitioner. *Messrs. Carl Fox* and *Rufus Creekmore* for respondents. Reported below: 78 F. (2d) 186.

No. 394. CLIFTON MANUFACTURING CO. *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. William A. Sutherland* and *Joseph B. Brennan* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Carlton Fox* for the United States. Reported below: 76 F. (2d) 577.

No. 395. ALLEN ET AL. *v.* BETHEA ET AL. October 14, 1935. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. Henry E. Davis* for petitioners. No appearance for respondents. Reported below: 177 S. C. 534; 181 S. E. 721.

No. 397. LAKE'S LAUNDRY, INC. *v.* BRAUN ET AL. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioner. *Messrs. Duane R. Dills, Harold C. Mendelson,* and *Abraham S. Rudnick* for respondents. Reported below: 79 F. (2d) 326.

No. 398. HESSELBERG ET AL. *v.* AETNA LIFE INSURANCE CO. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. P. H. Cullen* and *Clem F. Storckman* for petitioners. No appearance for respondent. Reported below: 75 F. (2d) 490.

No. 400. MAGNOLIA PETROLEUM CO. ET AL. *v.* WALKER, COMMISSIONER OF THE GENERAL LAND OFFICE. October 14, 1935. Petition for writ of certiorari to the Supreme Court of Texas denied. *Messrs. George E. Elliott* and *Walace Hawkins* for petitioners. *Mr. Scott Gaines* for respondent. Reported below: 125 Tex. 430; 83 S. W. (2d) 929.

No. 406. JENELLO *v.* UNITED STATES. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. David A. Reed* and *J. Julius Levy* for petitioner. *Solicitor General Reed* and *Messrs. Thomas W. Lanigan* and *W. Marvin Smith* for the United States. Reported below: 78 F. (2d) 1020.

No. 408. DODSON ET AL. *v.* FEDERAL TRADE COMMISSION. October 14, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Joseph E. Davies, Raymond N. Beebe,* and *Adrien F. Busick* for petitioners. *Solicitor General Reed* and *Messrs. A. H. Feller, Carl McFarland,* and *W. T. Kelley* for respondent.

No. 421. RUBEN CONDENSER CO. ET AL. *v.* AEROVOX CORPORATION. October 14, 1935. Petition for writ of

certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lawrence Bristol* for petitioners. *Messrs. Oscar W. Jeffery* and *Morris Hirsch* for respondent. Reported below: 77 F. (2d) 266.

No. 482. BINGHAM LAND CO. *v.* CENTRAL MAINE POWER CO. See *ante*, p. 543.

No. 392. CLARKE ET AL. *v.* HOT SPRINGS ELECTRIC LIGHT & POWER CO. ET AL. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. C. Dickerman Williams* for petitioners. *Mr. E. E. Enterline* for respondents. Reported below: 76 F. (2d) 918.

No. 402. JENNY WREN CO. *v.* SYKES ET AL. October 21, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Paul M. Segal* for petitioner. *Solicitor General Reed* and *Messrs. M. S. Huberman, A. H. Feller,* and *Hampson Gary* for respondents. Reported below: 64 App. D. C. 379; 78 F. (2d) 729.

No. 405. UNITED STATES EX REL. CHRISTMAS ET AL. *v.* ASBURY PARK ET AL. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Arthur T. Vanderbilt* and *David M. Wood* for petitioners. *Messrs. William A. Stevens* and *E. J. Dimock* for respondents. Reported below: 78 F. (2d) 1003.

No. 407. RIVERSIDE & DAN RIVER COTTON MILLS, INC. *v.* UNITED STATES. October 21, 1935. Petition for

writ of certiorari to the Court of Claims denied. *Messrs. Ellsworth C. Alvord* and *Donald Horne* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for the United States. Reported below: 81 Ct. Cls. 610; 11 F. Supp. 134.

No. 409. PECK ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Sterling Halstead* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 77 F. (2d) 857.

No. 410. SHINN, TRUSTEE IN BANKRUPTCY, *v.* MILBORNE, DEPUTY COLLECTOR OF INTERNAL REVENUE. October 21, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Wm. E. Richardson* and *Ward B. McCarthy* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Joseph M. Jones* for respondent. Reported below: 64 App. D. C. 390; 78 F. (2d) 740.

No. 411. HENRY, STATE TREASURER, *v.* WADHAMS OIL CO. October 21, 1935. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. Herbert H. Naujoks* for petitioner. *Mr. Irving A. Fish* for respondent. Reported below: 218 Wis. 506; 261 N. W. 20.

No. 412. MUTUAL LIFE INSURANCE CO. *v.* MARKOWITZ ET AL. October 21, 1935. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frederick L. Allen* and *F. Eldred Boland* for petitioner. *Mr. Arthur Rosenblum* for respondents. Reported below: 78 F. (2d) 396.

No. 413. NEW YORK LIFE INSURANCE CO. v. KAUFMAN. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Edwin A. Meserve* and *Louis H. Cooke* for petitioner. *Mr. Arthur Rosenblum* for respondent. Reported below: 78 F. (2d) 398.

No. 414. AUSTIN *v.* THOMAS, RECEIVER. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William S. McDowell* for petitioner. *Mr. Robert S. Marx* for respondent. Reported below: 78 F. (2d) 602.

No. 415. SCHICK *v.* GOLDSTEIN. October 21, 1935. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Oscar A. Lewis* for petitioner. *Mr. M. M. Edelstein* for respondent. Reported below: 243 App. Div. 814; 278 N. Y. S. 208.

No. 416. MISSOURI EX REL. WOODS *v.* SEVIER. October 21, 1935. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. George A. Edwards* for petitioner. *Mr. Walter Sloat* for respondent.

NOS. 417 and 418. ROOT REFINING CO. *v.* UNIVERSAL OIL PRODUCTS CO. October 21, 1935. Petition for writs

of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Arthur C. Denison* and *J. Bernhard Theiss* for petitioner. *Messrs. Hugh M. Morris, Thomas G. Haight,* and *William F. Hall* for respondent. Reported below: 78 F. (2d) 991.

No. 419. ALLRED, GOVERNOR, ET AL. *v.* STANOLIND OIL & GAS CO. ET AL. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Mark McMahon* for petitioners. No appearance for respondents. Reported below: 77 F. (2d) 802.

No. 422. CHUNG YIM *v.* UNITED STATES. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles A. Lich* for petitioner. *Solicitor General Reed* and *Mr. W. Marvin Smith* for the United States. Reported below: 78 F. (2d) 43.

No. 423. EXPORT LEAF TOBACCO CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 424. SMITH PAPER CO. *v.* SAME; and

No. 425. T. C. WILLIAMS CO. *v.* SAME. October 21, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John H. Jackson* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John G. Remey* for respondent. Reported below: 78 F. (2d) 163.

No. 426. JACKSONVILLE TERMINAL CO. *v.* BLACKSHEAR, ADMINISTRATRIX. October 21, 1935. Petition for writ of certiorari to the Supreme Court of Florida denied. *Messrs.*

John O. Jackson and *Julian Hartridge* for petitioner. *Mr. George C. Bedell* for respondent. Reported below: 120 Fla. 159; 162 So. 509.

No. 429. EDWARDS ET AL. *v.* RECTOR ET AL. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Ransom H. Gillett* for petitioners. *Mr. Chase Mellen* for respondents. Reported below: 77 F. (2d) 884.

No. 430. WISHNICK-TUMPEER, INC., *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 21, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Joseph R. Little* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *S. Dee Hanson* for respondent. Reported below: 64 App. D. C. 295; 77 F. (2d) 774.

No. 431. EVENING STAR NEWSPAPER CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Edward H. Hart* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 78 F. (2d) 604.

No. 432. BEDELL *v.* UNITED STATES;

No. 433. L. E. CHAPMAN *v.* SAME; and

No. 434. H. E. CHAPMAN *v.* SAME. October 21, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Eugene*

D. O'Sullivan and *Louis H. Salinger* for petitioners. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 78 F. (2d) 358.

No. 436. CENTRAL VERMONT RAILWAY, INC., *v.* KIERCE, ADMINISTRATRIX; and

No. 437. SAME *v.* PEARSON, ADMINISTRATOR. October 21, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace H. Powers* for petitioner. *Mr. Ernest W. Gibson* for respondent in No. 436. *Mr. Sol Gelb* for respondent in No. 437. Reported below: 79 F. (2d) 198.

No. 438. QUIGLEY *v.* UNITED STATES. October 21, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Eugene D. O'Sullivan* and *Charles J. Southard* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Mr. David V. Cahill* for the United States. Reported below: 77 F. (2d) 673.

No. 485. SECESH DREDGING, MINING & MILLING CO., INC., *v.* CARREY ET AL. See *ante,* p. 544.

No. 466. CAHILL *v.* MAYFLOWER BUS LINES, INC. ET AL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied for the reason that application for the writ of certiorari was not made within the time provided by law. Section 8 (a) Act of February 13, 1925 (43 Stat. 936, 940), U. S. Code, Title 28, § 350. *Warshauer* v. *Lloyd Sabaudo S. A.,* 293 U. S. 610; *Medhurst* v. *The South*

American, 264 U. S. 587. *Mr. Humphrey J. Lynch* for petitioner. *Mr. Edward R. Brumley* for respondents. Reported below: 77 F. (2d) 838.

No. 440. SOUTHERN PACIFIC CO. *v.* HACKLEY, ADMINISTRATRIX. October 28, 1935. Petition for writ of certiorari to the District Court of Appeal, 3d Appellate District, of California, denied. *Messrs. Robert T. Devlin, W. H. Devlin, A. I. Diepenbrock*, and *Horace B. Wulff* for petitioner. *Mr. Herman A. Bachrack* for respondent. Reported below: 6 Cal. App. (2d) 611; 45 P. (2d) 447.

No. 441. DOWNEY, ADMINISTRATRIX, *v.* THOMSON, TRUSTEE. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Horace E. Gunn* for petitioner. *Mr. William M. Acton* for respondent. Reported below: 78 F. (2d) 487.

No. 444. TRAFFORD OIL & GAS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John C. Sherriff* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman*, and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 78 F. (2d) 814.

No. 445. GEIGER, ADMINISTRATRIX, *v.* MERLE ET AL. October 28, 1935. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Russell Whitman* for petitioner. *Messrs. Charles S. Cutting, Charles LeRoy Brown, William P. Sidley*, and *Kenneth F. Burgess* for respondents. Reported below: 360 Ill. 497; 196 N. E. 497

No. 449. WHEELER *v.* CLARK, U. S. MARSHAL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lin William Price* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Mr. W. Marvin Smith* for respondent. Reported below: 77 F. (2d) 216.

No. 450. SOUTHERN PACIFIC CO. ET AL. *v.* MCKINLEY, ADMINISTRATOR. October 28, 1935. Petition for writ of certiorari to the Court of Civil Appeals, 8th Supreme Judicial District, of Texas, denied. *Messrs. James R. Bell* and *Del W. Harrington* for petitioners. *Mr. Sydney Smith* for respondent. Reported below: 80 S. W. (2d) 1009.

No. 451. SOUTHERN PACIFIC CO. ET AL. *v.* CLAYTON, ADMINISTRATOR. October 28, 1935. Petition for writ of certiorari to the Court of Civil Appeals, 8th Supreme Judicial District, of Texas, denied. *Messrs. James R. Bell* and *Del W. Harrington* for petitioners. *Mr. Robert Ewing Thomason* for respondent. Reported below: 81 S. W. (2d) 788.

No. 452. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SPEYER. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Reed* for petitioner. *Mr. Henry W. Taft* for respondent. Reported below: 77 F. (2d) 824.

No. 453. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ULLMANN. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the

Second Circuit denied. *Solicitor General Reed* for petitioner. *Mr. Frank L. Weil* for respondent. Reported below: 77 F. (2d) 827.

No. 454. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HONNALD. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Reed* for petitioner. *Messrs. Ellsworth C. Alvord, Floyd F. Toomey,* and *Paul Armitage* for respondent. Reported below: 77 F. (2d) 995.

No. 457. SHAMROCK OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. King* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 77 F. (2d) 553.

No. 459. DRAKE ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles C. LeForgee, Edwin W. Sims,* and *Franklin J. Stransky* for petitioners. *Messrs. George Gillette, Thomas M. Hoyne,* and *Edward W. Everett* for respondents. Reported below: 77 F. (2d) 255.

No. 460. DRAKE ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles C. LeForgee, Edwin W. Sims,* and *Franklin J. Stransky* for petitioners. *Messrs. George Gillette, Thomas M. Hoyne,* and *Edward W.*

Everett for respondents. Reported below: 77 F. (2d) 255.

No. 461. WEST *v.* MILLER ET AL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Alvin E. Stein* for petitioner. *Messrs. Harry P. Weber* and *Henry F. Tenney* for respondents. Reported below: 78 F. (2d) 479.

No. 463. BELL-DOWLEN MILLS *v.* DRAPER. October 28, 1935. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. Albert Lee Dorsey* for petitioner. No appearance for respondent. Reported below: 169 Tenn. 112; 83 S. W. (2d) 247.

No. 464. BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS ET AL. *v.* NORTH AMERICAN FRUIT & STEAMSHIP CORP. ET AL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. James Wilkinson* for petitioners. No appearance for respondents. Reported below: 77 F. (2d) 695.

No. 465. PUBLIC WAREHOUSES OF MATANZAS, INC. ET AL. *v.* FIDELITY & DEPOSIT CO. October 28, 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 petitioners. *Mr. Louis O. Bergh* for respondent. Reported below: 77 F. (2d) 831.

No. 467. KECK INVESTMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 28, 1935. Petition for writ

of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Thomas R. Dempsey* and *A. Calder Mackay* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *F. E. Youngman* for respondent. Reported below: 77 F. (2d) 244.

No. 470. CONSUMERS NATURAL GAS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Douglas M. Moffat* and *Wm. D. Whitney* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 78 F. (2d) 161.

No. 471. GEORGE *v.* COMMISSIONER OF INTERNAL REVENUE. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles B. McInnis* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent.

No. 472. JOHNSTON, RECEIVER, *v.* GOLL ET AL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. John F. Anderson, F. G. Awalt,* and *George P. Barse* for petitioner. *Mr. E. C. Michener* for respondents.

No. 473. BAKER, ANCILLARY RECEIVER, *v.* W. J. KENNEDY DAIRY CO. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth

Circuit denied. *Mr. Isadore Levin* for petitioner. *Messrs. James R. Breakey, Frank C. Cook,* and *John P. O'Hara* for respondent. Reported below: 77 F. (2d) 574.

No. 475. MUTUAL LIFE INSURANCE CO. *v.* GREGORY ET AL. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Wm. Marshall Bullitt, Frederick L. Allen,* and *A. F. House* for petitioner. *Mr. Ross Mathis* for respondents. Reported below: 78 F. (2d) 522.

No. 483. SHAWKEE MANUFACTURING CO. ET AL. *v.* HARTFORD-EMPIRE CO. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William B. Jaspert, Hugh M. Morris,* and *Lawrence C. Kingsland* for petitioners. *Messrs. Thomas G. Haight, William J. Belknap,* and *Clarence P. Byrnes* for respondent. Reported below: 73 F. (2d) 1013.

No. 484. UNITED STATES RADIATOR CORP. *v.* HENDERSON. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. James H. Pershing* for petitioner. No appearance for respondent. Reported below: 68 F. (2d) 87, 733.

No. 487. WOLFE *v.* TRAVELERS INSURANCE CO. October 28, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. W. Price* for petitioner. *Mr. C. M. Horn* for respondent. Reported below: 78 F. (2d) 78.

No. 509. PURCELL *v.* NEW YORK CENTRAL R. Co. See *ante*, p. 545.

No. 563. CARTER *v.* CARTER COAL CO. ET AL. November 11, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. The motion for temporary restraining order and for temporary injunction is also denied. *Mr. William D. Whitney* for petitioner. *Solicitor General Reed, Assistant Attorney General Dickinson,* and *Messrs. Wendell Berge, A. H. Feller,* and *Karl J. Hardy* for respondents.

No. 562. MATTES *v.* UNITED STATES. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit and motion for leave to proceed further herein *in forma pauperis* denied. *Mr. John Duggan, Jr.,* for petitioner. No appearance for the United States. Reported below: 79 F. (2d) 127.

No. 448. NATIONAL BOX CO. *v.* UNITED STATES. November 11, 1935. Petition for writ of certiorari to the Court of Claims denied. *Mr. Delbert M. Tibbetts* for petitioner. *Solicitor General Reed, Assistant Attorney General MacLean,* and *Messrs. Paul A. Sweeney* and *W. Marvin Smith* for the United States. Reported below: 81 Ct. Cls. 164.

No. 455. UNITED STATES *v.* FORD MOTOR CO. November 11, 1935. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States. *Mr. Charles B. McInnis* for respondent. Reported below: 81 Ct. Cls. 30; 9 F. Supp. 590.

No. 462. O'Brien *v.* United States. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Raymond K. Dykema* and *John W. Davis* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. Guy K. Bard* and *Arthur Breuer* for the United States.

No. 468. Lee, Comptroller, *v.* Kenan et al. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Cary D. Landis, H. E. Carter,* and *J. V. Keen* for petitioner. No appearance for respondents. Reported below: 78 F. (2d) 425.

No. 469. Lowry *v.* McCarl, Comptroller General, et al. November 11, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Fred B. Rhodes* for petitioner. *Solicitor General Reed, Assistant Attorney General MacLean,* and *Mr. Paul A. Sweeney* for respondents. Reported below: 79 F. (2d) 144.

No. 476. Windt et al. *v.* Lindy et al. November 11, 1935. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mr. C. E. Pigford* for petitioners. *Mr. Jerome J. Rothschild* for respondents. Reported below: 169 Tenn. 210; 84 S. W. (2d) 99.

No. 478. Riggs *v.* Commissioner of Internal Revenue;

No. 479. Lamborn *v.* Same;

No. 480. Logan *v.* Same;

No. 481. LINDGREN *v.* SAME. November 11, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. H. B. McCawley* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 78 F. (2d) 1004.

No. 486. PEYSER *v.* MCLEAN. November 11, 1935. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *Messrs. William C. Sullivan* and *Simon E. Sobeloff* for petitioner. *Mr. Edgar Allen Poe* for respondent. Reported below: 169 Md. 1; 179 Atl. 58.

No. 491. WELLS FARGO BANK & UNION TRUST CO., EXECUTOR, *v.* MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Archibald J. Treat* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *John G. Remey* for respondent. Reported below: 78 F. (2d) 934.

No. 474. CURRERI *v.* VICE, U. S. MARSHAL. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Hugh L. Smith* and *James F. Brennan* for petitioner. *Messrs. Alfred Sutro* and *Eugene M. Prince* for respondent. Reported below: 77 F. (2d) 130.

No. 493. JULIUS LEVINE & CO. ET AL. *v.* AUTOMATIC PAPER MACHINE CO. ET AL. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals

for the Third Circuit denied. *Mr. Charles W. Hills* for petitioners. *Mr. George E. Middleton* for respondents. Reported below: 78 F. (2d) 504.

No. 495. GREENSBORO GAS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Douglas M. Moffat* and *Wm. D. Whitney* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. James W. Morris* for respondent. Reported below: 79 F. (2d) 701.

No. 496. INTERMOUNTAIN BUILDING & LOAN ASSN. ET AL. *v.* GALLEGOS ET AL. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James R. Moore* for petitioners. *Mr. Thomas A. Flynn* for respondents. Reported below: 78 F. (2d) 972.

No. 500. BERNHEIMER *v.* FIRST NATIONAL BANK OF BEVERLY HILLS ET AL. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Irving M. Walker* for petitioner. *Mr. Rollin L. McNitt* for respondents. Reported below: 78 F. (2d) 139.

No. 501. ALADDIN MANUFACTURING CO. *v.* MANTLE LAMP CO. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Alvin E. Stein* for petitioner. *Mr. George I. Haight* for respondent. Reported below: 78 F. (2d) 426.

No. 502. SIMON *v.* CITY CAB CO., INC. November 11, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. George D. Horning, Jr.,* and *Louis Ottenberg* for petitioner. *Messrs. Alvin L. Newmyer* and *David G. Bress* for respondent. Reported below: 64 App. D. C. 364; 78 F. (2d) 506.

No. 504. NATIONAL LEAD CO. ET AL. *v.* ST. LOUIS. November 11, 1935. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Gustave A. Stamm* for petitioners. *Messrs. Charles M. Hay* and *Francis J. Sullivan* for respondent. 337 Mo. 238.

No. 506. REINHARD, TRUSTEE, *v.* BOWERS, BANKRUPT, ET AL. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Julius M. Rapoport* for petitioner. *Mr. Edwin K. Kline* for respondents. Reported below: 78 F. (2d) 776.

No. 508. IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, ET AL. *v.* LOS ANGELES ET AL. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. R. Memhard* for petitioners. *Messrs. David M. Wood, John H. Hoffman, W. Morton Carden, Rudolph L. Von Bermuth, Harry G. Gray,* and *Walter Gordon Merritt* for respondents. Reported below: 79 F. (2d) 98.

No. 512. MOORE ET AL. *v.* BACKUS ET AL. November 11, 1935. Petition for writ of certiorari to the Circuit

Court of Appeals for the Seventh Circuit denied. *Messrs. Walter H. Jacobs, Harold A. Smith, Albert H. Veeder, Frederic Burnham, Frank D. Mayer, Henry Veeder, Carl Meyer, David F. Rosenthal,* and *Irving B. Goldsmith* for petitioners. *Mr. Morris Townley* for respondents. Reported below: 78 F. (2d) 571.

No. 514. WASHBURN CROSBY CO. *v.* NEE. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles B. Rugg, Frank J. Morley,* and *Dewitt C. Chastain* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *J. Louis Monarch* for respondent.

No. 518. BOWERS, EXECUTOR, *v.* UNTERMYER. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Reed* for petitioner. *Mr. Abraham Shamos* for respondent. Reported below: 79 F. (2d) 9.

No. 519. HELVERING, COMMISSIONER OF INTERNAL REVENUE *v.* CHISHOLM. November 11, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Reed* for petitioner. *Mr. Joseph H. Morey* for respondent. Reported below: 79 F. (2d) 14.

No. 534. JOYCE *v.* HUMBIRD ET AL.; and

Nos. 535 and 536. WILLIAM T. JOYCE CO. *v.* SAME. November 11, 1935. Petition for writs of certiorari to the

Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Franklin J. Stransky* and *John S. Burchmore* for petitioners. *Mr. Thomas L. Marshall* for respondents. Reported below: 78 F. (2d) 386.

No. 489. A–1 GARAGE *v.* LANGE INVESTMENT CO. November 18, 1935. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Mr. James L. Minnis* for petitioner. *Mr. F. Eldred Boland* for respondent. Reported below: 6 Cal. App. (2d) 593; 44 P. (2d) 681.

No. 503. HUDSPETH *v.* ARKANSAS. November 18, 1935. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Mr. Edward H. Coulter* for petitioner. No appearance for respondent. Reported below: 188 Ark. 323; 67 S. W. (2d) 191.

No. 505. RICHARDS *v.* LORLEBERG. November 18, 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. No appearance for respondent. Reported below: 79 F. (2d) 413.

No. 507. MOBILE & OHIO R. CO. *v.* ROGERS, ADMINISTRATOR. November 18, 1935. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Carl Fox* and *Rufus Creekmore* for petitioner. *Mr. Walter L. Hensley* for respondent. Reported below: 337 Mo. 140; 85 S. W. (2d) 581.

No. 521. HEARD ET AL. *v.* HOUSTON GULF GAS CO. ET AL. November 18, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Samuel B. Dabney* for petitioners. *Mr. W. A. Vinson* for respondents. Reported below: 78 F. (2d) 189.

No. 522. FOSTER *v.* CHICKASHA. November 18, 1935. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Frank M. Bailey* for petitioner. *Mr. Alger Melton* for respondent. Reported below: 173 Okla. 217; 48 P. (2d) 289.

No. 532. KITRELL *v.* UNITED STATES. November 25, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. The application for bail is also denied. *Messrs. Charles Rosenbaum* and *Harry S. Silverstein* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Earl C. Crouter* for the United States. Reported below: 79 F. (2d) 259.

No. 560. UNITED STATES *v.* WOOD ET AL. November 25, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of this application. *Solicitor General Reed* for the United States. *Mr. Robert T. McCracken* for respondents. Reported below: 79 F. (2d) 286.

No. 446. CHOCTAW NATION *v.* UNITED STATES. November 25, 1935. Petition for writ of certiorari to the

Court of Claims denied. *Messrs. W. F. Semple, R. M. Rainey,* and *Streeter B. Flynn* for petitioner. *Solicitor General Reed, Assistant Attorney General Blair,* and *Messrs. George T. Stormont* and *Charles H. Small* for the United States. Reported below: 81 Ct. Cls. 1.

No. 447. CHOCTAW AND CHICKASAW NATIONS *v.* UNITED STATES. November 25, 1935. Petition for writ of certiorari to the Court of Claims denied. *Messrs. W. F. Semple, R. M. Rainey,* and *Streeter B. Flynn* for petitioners. *Solicitor General Reed, Assistant Attorney General Blair,* and *Messrs. George T. Stormont* and *Charles H. Small* for the United States. Reported below: 81 Ct. Cls. 63.

No. 515. KOUTEI SUGAYA *v.* HAFF, DISTRICT DIRECTOR OF IMMIGRATION. November 25, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Roger O'Donnell* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. W. Marvin Smith* and *Bart W. Butler* for respondent. Reported below: 78 F. (2d) 989.

No. 516. PENNSYLVANIA INDEMNITY CO. *v.* MACLAUGHLIN, ADMINISTRATRIX. November 25, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Edward H. Horton* for respondent. Reported below: 78 F. (2d) 957.

No. 526. BLUMEN ET AL. *v.* HAFF, DISTRICT DIRECTOR OF IMMIGRATION. November 25, 1935. Petition for writ

of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Roger O'Donnell* and *Stephen M. White* for petitioners. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Messrs. Bart W. Butler* and *W. Marvin Smith* for respondent. Reported below: 78 F. (2d) 833.

No. 527. IN RE GROSS. November 25, 1935. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. George J. Gross, pro se.* Reported below: 318 Pa. 143; 177 Atl. 767.

No. 537. HILLERICH & BRADSBY CO. *v.* HANNA MANUFACTURING CO. November 25, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Edward S. Rogers* and *Max Michael* for petitioner. *Messrs. Howard S. Smith, Gilbert P. Ritter,* and *William L. Erwin* for respondent. Reported below: 78 F. (2d) 763.

No. 542. ASIATIC PETROLEUM CO., LTD., *v.* COMMISSIONER OF INTERNAL REVENUE. November 25, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William D. Whitney* and *Joseph C. White* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. James W. Morris* and *Lucius A. Buck* for respondent. Reported below: 79 F. (2d) 234.

No. 554. LEITHAUSER *v.* HARTFORD FIRE INSURANCE CO. November 25, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. T. T. Ansberry* for petitioner. *Mr. Harold*

W. Fraser for respondent. Reported below: 78 F. (2d) 320.

No. 498. ALLEN C. WEISSMAN CO., INC. ET AL. *v.* DENISON ET AL.; and

No. 499. SAME *v.* LEHIGH BERNSTEIN MANUFACTURING CORP. November 25, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Grover C. Ladner* for petitioners. *Mr. Arthur E. Sutherland* for respondents. Reported below: 77 F. (2d) 1022.

No. 523. EGBERT, SUPERINTENDENT OF BANKS, *v.* CALLAGHAN ET AL., TRUSTEES; and

No. 524. GARLICK ET AL. *v.* PRUDENCE CO., INC. ET AL. November 25, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Gerald Donovan* for petitioner in No. 523. *Mr. Samuel C. Duberstein* for petitioners in No. 524. *Messrs. William W. Miller, Samuel H. Kaufman, Emil Weitzner, Emanuel Celler,* and *Archibald Palmer* for respondents. Reported below: 79 F. (2d) 77.

No. 593. JONES *v.* JEFFERSON STANDARD LIFE INSURANCE CO. December 9, 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. R. Douglas Feagin* for petitioner. No appearance for respondent. Reported below: 79 F. (2d) 640.

No. 606. RICHARDSON *v.* CHICAGO, ROCK ISLAND & GULF RY. CO. December 9, 1935. Petition for writ of certiorari to the Supreme Court of Texas and motion for

leave to proceed further *in forma pauperis* denied. *Mr. A. J. Richardson, pro se.* No appearance for respondent. Reported below: 124 Tex. 648.

No. 543. HAMILTON GAS CO. *v.* HARPER ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit; and

No. 569. HAMILTON GAS CO. *v.* WATTERS ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. December 9, 1935. Petitions for writs of certiorari denied. MR. JUSTICE ROBERTS took no part in the consideration or decision of these applications. *Mr. Nathan A. Smyth* for petitioner. *Messrs. Philip P. Steptoe, Thomas Raeburn White,* and *Charles C. Norris, Jr.,* for respondents. Reported below: 79 F. (2d) 97.

No. 528. NOXON CHEMICAL PRODUCTS CO., INC., *v.* COMMISSIONER OF INTERNAL REVENUE. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George H. Rosenstein* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for respondent. Reported below: 78 F. (2d) 871.

No. 541. RAINIER NATIONAL PARK CO. *v.* HENNEFORD ET AL. December 9, 1935. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. Edgar N. Eisenhower* for petitioner. *Mr. E. P. Donnelly* for respondents. Reported below: 182 Wash. 159; 45 P. (2d) 617.

No. 548. SOUTHERN PACIFIC CO. *v.* WALTON, ADMINISTRATRIX. December 9, 1935. Petition for writ of cer-

tiorari to the District Court of Appeal, 1st Appellate District, Division One, of California, denied. *Mr. Arthur B. Dunne* for petitioner. *Mr. Herman A. Bachrack* for respondent. Reported below: 8 Cal. App. (2d) 290; 48 P. (2d) 108.

No. 556. UPDIKE ET AL. *v.* MANUFACTURERS TRUST CO. December 9, 1935. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. William S. Siemon* for petitioners. *Mr. Basil Robillard* for respondent. Reported below: 243 App. Div. 15; 275 N. Y. S. 716.

No. 557. JOSEPH T. RYERSON & SON, INC. *v.* BULLARD MACHINE TOOL CO. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George I. Haight* for petitioner. *Mr. Merrell E. Clark* for respondent. Reported below: 79 F. (2d) 192.

No. 570. V. VIVAUDOU, INC. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 571. ALFRED H. SMITH CO. *v.* SAME. December 9, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Benjamin V. Becker* and *Randolph E. Paul* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for respondent. Reported below: 78 F. (2d) 192.

No. 574. ELECTRIC AUTO-LITE CO. *v.* P. & D. MANUFACTURING CO., INC. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sec-

ond Circuit denied. *Messrs. Drury W. Cooper* and *Edmund B. Whitcomb* for petitioner. *Messrs. Theodore S. Kenyon* and *John L. Lotsch* for respondent. Reported below: 78 F. (2d) 700.

No. 582. HAUPTMANN *v.* NEW JERSEY. December 9, 1935. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Egbert Rosecrans* for petitioner. *Mr. Joseph Lanigan* for respondent. Reported below: 115 N. J. Law 412; 180 Atl. 809.

Nos. 510 and 511. BOWERS, EXECUTOR, *v.* FARMERS' LOAN & TRUST CO., TRUSTEE. December 9, 1935. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Reed* for petitioner. *Messrs. John W. Davis, Carl Taylor, Mansfield Ferry,* and *Philip M. Payne* for respondent. Reported below: 68 F. (2d) 916.

No. 553. ENDELMAN *v.* RECONSTRUCTION FINANCE CORP. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James M. Beck* for petitioner. *Solicitor General Reed* for respondent. Reported below: 79 F. (2d) 179.

No. 558. UNITED STATES EX REL. PHELPS *v.* MAIATICO CONSTRUCTION CO., INC. December 9, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Foster Wood* for petitioner. No appearance for respondent. Reported below: 79 F. (2d) 418.

No. 561. McCarthy *v.* United States. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David P. Siegel* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Mr. W. Marvin Smith* for the United States. Reported below: 79 F. (2d) 321.

No. 564. Helvering, Commissioner of Internal Revenue, *v.* Stoner. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor General Reed* for petitioner. No apearance for respondent. Reported below: 79 F. (2d) 75.

No. 565. Donahue *v.* Rockwell et al. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel Hoffman* for petitioner. *Messrs. Hiram C. Todd* and *Wm. Dewey Loucks* for respondents. Reported below: 79 F. (2d) 81.

No. 567. Armand Co., Inc. *v.* Federal Trade Commission. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Ward Beer* for petitioner. *Solicitor General Reed, Assistant Attorney General Dickinson,* and *Messrs. Wendell Berge, M. S. Huberman,* and *W. T. Kelley* for respondent. Reported below: 78 F. (2d) 707.

No. 572. Counselman, Executrix, *v.* Pritzer. December 9, 1935. Petition for writ of certiorari to the United States Court of Appeals for the District of Colum-

bia denied. *Mr. James F. Reilly* for petitioner. *Mr. Aubrey St. C. Wardwell* for respondent. Reported below: 79 F. (2d) 707.

No. 576. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES ET AL. December 9, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. Solicitor General *Reed* for petitioner. *Mr. Maurice Bower Saul* for respondents. Reported below: 79 F. (2d) 295.

No. 568. MENIHAN *v.* COMMISSIONER OF INTERNAL REVENUE. December 16, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George H. Harris* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Mr. Sewall Key* for respondent. Reported below: 79 F. (2d) 304.

No. 575. FIRST NATIONAL BANK OF CHICAGO, TRUSTEE, *v.* FIRST NATIONAL BANK OF WHEATON ET AL. December 16, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Delbert A. Clithero* for petitioner. *Messrs. Robert F. Carey* and *Emmett J. McCarthy* for respondents. Reported below: 78 F. (2d) 502.

No. 584. NATIONAL CITY BANK OF NEW YORK ET AL. *v.* IRVING TRUST CO., TRUSTEE. December 16, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harry W. Forbes* and *Carl A. Mead* for petitioners. *Mr. Edwin A. Falk* for respondent. Reported below: 78 F. (2d) 665.

No. 588. CHEMICAL BANK & TRUST CO., TRUSTEE, *v.* PRUDENCE-BONDS CORP. December 16, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thurlow M. Gordon* for petitioner. *Mr. Ross W. Lynn* for respondent. Reported below: 79 F. (2d) 205.

No. 589. HASKELL *v.* COMMISSIONER OF INTERNAL REVENUE. December 16, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. T. Hardy Todd* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman, Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 78 F. (2d) 869.

No. 591. DELAWARE *v.* IRVING TRUST CO., TRUSTEE. December 16, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Ralph G. Albrecht, Amos J. Peaslee,* and *Martin A. Meyer, Jr.,* for petitioner. *Mr. Godfrey Goldmark* for respondent. Reported below: 79 F. (2d) 203.

No. 477. UNITED STATES *v.* GLIDDEN CO. ET AL. December 16, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General Reed* and *Messrs. George W. Whiteside* and *James M. Hoffa* for the United States. *Mr. Roger Hinds* for respondents. Reported below: 78 F. (2d) 639.

No. 626. PUGLIESE *v.* UHL, DISTRICT DIRECTOR OF IMMIGRATION. December 23, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. Sam Pugliese, pro se.* No appearance for respondent.

Nos. 594 and 595. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* NEW YORK CENTRAL R. Co.; and

No. 596. NEW YORK CENTRAL R. Co. *v.* COMMISSIONER OF INTERNAL REVENUE. December 23, 1935. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Reed* for the Commissioner. *Messrs. Clive C. Handy* and *Jacob Aronson* for the New York Central R. Co. Reported below: 79 F. (2d) 247.

No. 611. LEATHEM SMITH-PUTNAM NAVIGATION Co. *v.* OSBY ET AL. December 23, 1935. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles E. Kremer* for petitioner. *Mr. Lawrence Duncan Lloyd* for respondents. Reported below: 79 F. (2d) 280.

No. 648. GILLIS *v.* NEW YORK CITY. January 6, 1936. Petition for writ of certiorari to the Supreme Court of New York and motion for leave to proceed further *in forma pauperis* denied. *Mr. Silas B. Axtell* for petitioner. No appearance for respondent. Reported below: 244 App. Div. 781, 280 N. Y. S. 793; 245 App. Div. 715, 281 N. Y. S. 978.

No. 623. FRAZIE *v.* ORLEANS DREDGING Co. January 6, 1936. Petition for writ of certiorari to the Supreme Court of Mississippi denied for the want of a final judgment. *Messrs. S. B. Laub, Wm. H. Watkins,* and *Joseph E. Brown* for petitioner. *Messrs. Gerard Brandon* and

Gerard H. Brandon for respondent. Reported below: 173 Miss. 882; 161 So. 699.

No. 513. LIPMAN *v.* GOEBEL ET AL. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry N. Pritzker* for petitioner. No appearance for respondents. Reported below: 78 F. (2d) 872.

No. 592. SHREVE ET AL. *v.* UNITED STATES. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leslie C. Hardy* for petitioners. *Solicitor General Reed* and *Assistant Attorney General Keenan* for the United States. Reported below: 77 F. (2d) 2.

No. 598. TWIN FALLS LAND & WATER CO. *v.* TWIN FALLS CANAL CO. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. W. G. Bissell* and *Branch Bird* for petitioner. No appearance for respondent. Reported below: 79 F. (2d) 431.

No. 600. LINCOLN MORTGAGE & TITLE GUARANTY CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Merritt Lane* and *Samuel Kaufman* for petitioners. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 79 F. (2d) 585.

No. 601. BRAND *v.* UNITED STATES. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Meyer Kraushaar* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Mr. W. Marvin Smith* for the United States. Reported below: 79 F. (2d) 605.

No. 603. KLINE, RECEIVER, *v.* GENERAL MOTORS ACCEPTANCE CORP. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Eimon L. Wienir* for petitioner. *Mr. Seth W. Richardson* for respondent. Reported below: 78 F. (2d) 618.

No. 607. GENERAL MOTORS CORP. *v.* PREFERRED ELECTRIC & WIRE CORP. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Drury W. Cooper* for petitioner. *Mr. Theodore S. Kenyon* for respondent. Reported below: 79 F. (2d) 621.

No. 614. OUACHITA NATIONAL BANK *v.* HAMBURG BANK ET AL. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. G. Hudson, Jr.,* for petitioner. *Mr. J. A. Tellier* for respondents. Reported below: 78 F. (2d) 100.

No. 615. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. Co. *v.* GOLDHAMMER. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. R. W. Root, A. C. Erdall,* and *C. S. Jefferson* for petitioner. *Mr. Walter H. Newton* for respondent. Reported below: 79 F. (2d) 272.

No. 622. HARLAN, TRUSTEE, *v.* ARCHER. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Ogle Marbury* for petitioner. *Mr. Horace S. Whitman* for respondent. Reported below: 79 F. (2d) 673.

No. 604. SARTOR ET AL. *v.* ARKANSAS NATURAL GAS CO. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. P. Bullis* for petitioners. No appearance for respondent. Reported below: 78 F. (2d) 924.

No. 605. HALL *v.* CALIFORNIA. January 6, 1936. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Marshall B. Woodworth* for petitioner. *Mr. U. S. Webb* for respondent. Reported below: 220 Cal. 166; 30 P. (2d) 23.

No. 608. ANDERSON ET AL. *v.* ST. LOUIS COKE & IRON CORP. ET AL. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Ford W. Thompson* for petitioners. *Mr. Daniel O. Hastings* for respondents. Reported below: 79 F. (2d) 336.

No. 609. COOK *v.* CUTLER ET AL. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles A. Hart, Fletcher Rockwood, Omar C. Spencer,* and *Charles E. McCulloch* for petitioner. No appearance for respondents. Reported below: 78 F. (2d) 863.

No. 612. MANUS MULLER & CO., INC., *v.* COMMISSIONER OF INTERNAL REVENUE. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wilbur H. Friedman* and *Joseph M. Proskauer* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key* and *John MacC. Hudson* for respondent. Reported below: 79 F. (2d) 19.

No. 616. PLANERT *v.* COSMOPOLITAN BOND & MORTGAGE CO. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Meyer Abrams* and *Max Shulman* for petitioner. No appearance for respondent. Reported below: 79 F. (2d) 547.

No. 617. ALLEN *v.* CLOISTERS BUILDING CORP. ET AL. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Meyer Abrams* and *Max Shulman* for petitioner. *Mr. Walter E. Beebe* for respondents. Reported below: 79 F. (2d) 694.

No. 618. PUBLIC SERVICE COMMISSION ET AL. *v.* MISSOURI EX REL. CITIES SERVICE GAS CO. January 6, 1936. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Ben Ely* for petitioners. *Mr. R. E. Cullison* for respondent. Reported below: 337 Mo. 809; 85 S. W. (2d) 890.

No. 619. SIGNAL GASOLINE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. January 6, 1936. Petition for writ

of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Melvin D. Wilson, Robert N. Miller,* and *Donald V. Hunter* for petitioner. *Solicitor General Reed, Assistant Attorney General Wideman,* and *Messrs. Sewall Key, John MacC. Hudson, John G. Remey,* and *Charles E. Wyzanski, Jr.,* for respondent. Reported below: 77 F. (2d) 728.

No. 620. MULLONEY *v.* UNITED STATES. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Romney Spring* for petitioner. *Solicitor General Reed, Assistant Attorney General Keenan,* and *Mr. W. Marvin Smith* for the United States. Reported below: 79 F. (2d) 566.

No. 631. RAILWAY ENGINEERING EQUIPMENT CO. ET AL. *v.* OREGON SHORT LINE R. CO. January 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Wallace R. Lane, Hervey S. Knight,* and *Ralph M. Snyder* for petitioners. *Mr. L. B. Mann* for respondent. Reported below: 79 F. (2d) 469.

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No. 19. URBAN PROPERTIES CO. *v.* IRVING TRUST CO., TRUSTEE IN BANKRUPTCY. On writ of certiorari to the Circuit Court of Appeals for the Second Circuit. October 7, 1935. Dismissed on motion of *Mr. Arthur F. Gotthold* for petitioner. *Mr. Wm. D. Whitney* for respondent. Reported below: 74 F. (2d) 654.

No. 385. KANSAS UTILITIES CO. *v.* BURLINGTON ET AL. On petition for writ of certiorari to the Supreme Court

of Kansas. October 7, 1935. Dismissed on motion of *Mr. Robert Stone* for petitioner. *Mr. John G. Egan* for respondents. Reported below: 141 Kan. 926; 44 P. (2d) 223.

No. 18. NATURAL GAS COMPANY OF WEST VIRGINIA *v.* PUBLIC SERVICE COMMISSION ET AL. On appeal from the Supreme Court of Appeals of West Virginia. October 14, 1935. *Per Curiam:* Pursuant to the joint motion of counsel it is ordered that the injunction granted herein on April 1, 1935, be, and it hereby is, dissolved; that the bond filed pursuant to the order of this Court of April 1, 1935, be, and it hereby is, discharged; and that the appeal herein be, and it hereby is, dismissed. *Messrs. David E. Mitchell, Donald O. Blagg, Frederick H. Wood, Harold A. Ritz,* and *H. D. Rummel* for appellant. *Mr. Homer A. Holt,* Attorney General of West Virginia, for appellees. Reported below: 115 W. Va. 149; 175 S. E. 339.

No. 5. PAYNE *v.* UNITED STATES. On writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. October 14, 1935. Dismissed per stipulation of counsel. *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. 220. C. F. SMITH CO. ET AL. *v.* ATWOOD, SECRETARY OF STATE, ET AL. Appeal from the Supreme Court of Michigan. October 14, 1935. Dismissed with costs, per stipulation of counsel. *Messrs. Robert S. Marx* and *Abraham J. Levin* for appellants. *Mr. Harry S. Toy,* Attorney General of Michigan, and *Mr. James W. Williams,* Assistant Attorney General, for appellees. Reported below: 270 Mich. 659; 259 N. W. 352.

No. 2. BAYSIDE FISH FLOUR CO. *v.* GENTRY ET AL. Appeal from the District Court of the United States for the Northern District of California. October 14, 1935. Affirmed with costs pursuant to Rule 21 on motion of *Mr. Ralph O. Marron* for the appellees. [Restored to docket, *ante,* p. 547.] Reported below: 8 F. Supp. 67.

No. 341. MCNABB ET AL. *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California. October 28, 1935. Dismissed on motion of *Messrs. Ernest Clewe* and *William L. Southwell* for petitioners. Reported below: 3 Cal. (2d) 441; 45 P. (2d) 334.

No. 84. MCKNIGHT *v.* MASSACHUSETTS. Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts. November 25, 1935. Dismissed on motion of *Mr. John H. Blanchard* for petitioner. *Mr. Henry P. Fielding* for respondent. Reported below: 289 Mass. 530; 195 N. E. 499.

No. 157. ST. LOUIS CAN CO. *v.* GENERAL AMERICAN LIFE INSURANCE CO. ET AL. On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. December 9, 1935. Writ of certiorari dismissed per stipulation of counsel. *Messrs. T. M. Pierce* and *Samuel H. Liberman* for petitioner. *Messrs. Fred L. Williams, Earl F. Nelson, Fred L. English,* and *Everett Paul Griffin* for respondents. Reported below: 77 F. (2d) 598.

PETITIONS FOR REHEARING GRANTED, FROM OCTOBER 7, 1935, TO AND INCLUDING JANUARY 6, 1936.

No. 388. TRIPLETT ET AL. *v.* LOWELL. December 9, 1935. See ante, p. 570.

PETITIONS FOR REHEARING DENIED, FROM OCTOBER 7, 1935, TO AND INCLUDING JANUARY 6, 1936.*

No. 142 (October Term, 1934). STEWART v. KEYES ET AL. October 14, 1935. 295 U. S. 403.

No. 552 (October Term, 1934). YOUNGSTOWN SHEET & TUBE CO. ET AL. *v.* UNITED STATES ET AL. October 14, 1935. 295 U. S. 476.

No. 601 (October Term, 1934). PETERS PATENT CORP. *v.* BATES & KLINKE, INC. October 14, 1935. 295 U. S. 392.

No. 648 (October Term, 1934). WEST ET AL. *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF BALTIMORE. October 14, 1935. 295 U. S. 662.

No. 665 (October Term, 1934). HERNDON *v.* GEORGIA. October 14, 1935. 295 U. S. 441.

No. 704 (October Term, 1934). ALLISON *v.* TEXAS. October 14, 1935. 295 U. S. 717.

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No. 887 (October Term, 1934). UNITED STATES EX REL. TETONIS *v.* PERKINS, SECRETARY OF LABOR, ET AL. October 14, 1935. 295 U. S. 761.

No. 979 (October Term, 1934). DEKTOR *v.* OVERBROOK NATIONAL BANK. October 14, 1935. 295 U. S. 755.

No. 1002 (October Term, 1934). WHEELER *v.* UNITED STATES. October 14, 1935. 295 U. S. 765.

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No. 406. JENELLO *v.* UNITED STATES. October 28, 1935.

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No. 118. BUIE *v.* UNITED STATES. November 11, 1935.

No. 128. LINDERHOLM *v.* KANSAS. November 11, 1935.

No. 131. NEW YORK EX REL. FEDERAL MOTOR TRUCK Co. *v.* LYNCH ET AL. November 11, 1935.

No. 152. REALTY ACCEPTANCE CORP. *v.* MONTGOMERY. November 11, 1935.

No. 183. TAYLOR *v.* COMMISSIONER OF INTERNAL REVENUE. November 11, 1935.

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No. 359. CHICAGO GRAVEL CO. *v.* COLUMBIAN NATIONAL LIFE INSURANCE CO. November 11, 1935.

No. 365. BROWN *v.* GESELLSCHAFT FUR DRAHTLOSE TELEGRAPHIE, M. B. H. November 11, 1935.

No. 378. GOGGIN, TRUSTEE, *v.* HARTFORD ACCIDENT & INDEMNITY CO. November 11, 1935.

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No. 426. JACKSONVILLE TERMINAL CO. *v.* BLACKSHEAR, ADMINISTRATRIX. November 11, 1935.

No. 458. PEERLESS STAGES, INC. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. November 11, 1935.

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No. 285. EVANS TERRY CO. *v.* MISSISSIPPI EX REL. RICE, ATTORNEY GENERAL, ET AL. November 18, 1935.

No. 362. SHORT *v.* SCHOOL BOARD, UPPER MORELAND TOWNSHIP, PENNSYLVANIA, ET AL. November 18, 1935.

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No. 381. BOARD OF LIQUIDATION, CITY DEBT OF NEW ORLEANS, ET AL. *v.* BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS ET AL. November 25, 1935.

No. 449. WHEELER *v.* CLARK, U. S. MARSHAL. November 25, 1935.

Nos. 459 and 460. DRAKE ET AL. v. METROPOLITAN LIFE INSURANCE CO. ET AL. November 25, 1935.

No. 10. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CITY BANK FARMERS TRUST CO., TRUSTEE. December 9, 1935. *Ante*, p. 85.

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No. 514. WASHBURN CROSBY CO. *v.* NEE. December 9, 1935.

No. 531. GEORGE ALLISON & CO., INC. ET AL. *v.* UNITED STATES ET AL. December 9, 1935.

No. 542. ASIATIC PETROLEUM CO., LTD. *v.* COMMISSIONER OF INTERNAL REVENUE. December 23, 1935.

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Nos. 69 and 70. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* SCHWEITZER. January 6, 1936.

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No. 574. ELECTRIC AUTO-LITE CO. *v.* P. & D. MANUFACTURING CO., INC. January 6, 1936.

No. 593. JONES *v.* JEFFERSON STANDARD LIFE INSURANCE CO. January 6, 1936.

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OCTOBER TERM, 1926.

No. 169. EBERT *v.* MILLER, ALIEN PROPERTY CUSTODIAN, ET AL. Appeal from the Court of Appeals for the District of Columbia. September 7, 1926. Dismissed per stipulation of counsel. Reported below: 55 App. D. C. 220; 4 F. (2d) 296.

No. 424. HOFFMAN *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. June 29, 1926. Dismissed per stipulation of counsel. Reported below: 13 F. (2d) 278.

No. 444. MORRIS ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. June 18, 1926. Dismissed per stipulation of counsel. Reported below: 12 F. (2d) 727.

OCTOBER TERM, 1927. (See also, 275 U. S. 578.)

No. 124. UNITED STATES *v.* MILLER ET AL., TRUSTEES. Certiorari to the Court of Claims. July 7, 1927. Dismissed per stipulation of counsel. Reported below: 62 Ct. Cls. 404.

OCTOBER TERM, 1928.

No. 26. MUST HATCH INCUBATOR CO., INC., *v.* PATTERSON, GOVERNOR, ET AL. Appeal from the District Court of the United States for the District of Oregon. August 9, 1928. Dismissed per stipulation of counsel. Reported below: 27 F. (2d) 447.

No. 179. WILLIAMS ET AL. *v.* GUITAR. Appeal from the District Court of the United States for the District of New Mexico. June 6, 1928. Docketed and dismissed.

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* Lists of dispositions of this class were included in the Reports for the 1925 Term, and preceding Terms. In future Reports they will be found under the more general heading Cases Disposed of Without Consideration by the Court.

No. 186. JACKSON LUMBER CO. ET AL. *v.* WALTON COUNTY. Appeal from the Supreme Court of Florida. July 14, 1928. Dismissed per stipulation of counsel. Reported below: 95 Fla. 632; 116 So. 771.

Nos. 422 and 423. GILCHRIST ET AL. *v.* INTERBOROUGH RAPID TRANSIT CO. ET AL. Appeal from the District Court of the United States for the Southern District of New York. September 7, 1928. Docketed and dismissed. Reported below: 26 F. (2d) 912.

OCTOBER TERM, 1929.

No. 149. MAMMOTH MINING CO. *v.* CHIEF CONSOLIDATED MINING CO. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. July 13, 1929. Dismissed per stipulation of counsel. Reported below: 29 F. (2d) 703.

OCTOBER TERM, 1930.

No. 75. CALIFORNIA WATER SERVICE CO. ET AL. *v.* RAILROAD COMMISSION OF CALIFORNIA ET AL. Appeal from the Supreme Court of California. September 9, 1930. Dismissed per stipulation of counsel.

No. 89. O'CONNELL *v.* UNITED STATES. Certiorari to the Circuit Court of Appeals for the Second Circuit. June 12, 1930. Dismissed per stipulation of counsel. Reported below: 40 F. (2d) 201.

No. 126. FRANC-STROHMENGER-COWAN, INC., *v.* PAYETTE NECKWEAR CO. Certiorari to the Circuit Court of Appeals for the Sixth Circuit. September 11, 1930. Dismissed per stipulation of counsel. Reported below: 39 F. (2d) 899.

No. 322. SCHUEDTER *v.* ILLINOIS. Petition for writ of error to the Supreme Court of Illinois. July 24, 1930. Docketed and dismissed. Reported below: 336 Ill. 244.

No. 324. U. S. Mortgage & Trust Co. et al., Trustees, *v.* Chicago & Alton R. Co. et al. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. August 21, 1930. Dismissed per stipulation of counsel. Reported below: 40 F. (2d) 386.

No. 360. Szarowicz *v.* Szarowicz. Appeal from the Supreme Court of Illinois. August 18, 1930. Docketed and dismissed. Reported below: 338 Ill. 481.

October Term, 1931.

No. 46. Mutual Lumber Co. *v.* Poe, Collector of Internal Revenue. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. June 2, 1931. Dismissed per stipulation of counsel. Reported below: 44 F. (2d) 922.

No. 91. Cizura *v.* Day, Commissioner of Immigration. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. July 9, 1931. Dismissed per stipulation of counsel. Reported below: 46 F. (2d) 1022.

No. 146. Ingraham et al. *v.* Central Leather Co. et al. Appeal from the Court of Errors and Appeals of New Jersey. July 29, 1931. Dismissed per stipulation of counsel.

October Term, 1932.

No. 2. Green Star Steamship Co., Ltd., *v.* Armour & Co. et al. Certiorari to the Circuit Court of Appeals for the Second Circuit. July 13, 1932. Dismissed per stipulation of counsel. Reported below: 47 F. (2d) 874.

No. 17. Solez *v.* Zurich General Accident & Liability Insurance Co., Ltd. Certiorari to the Circuit Court of Appeals for the Second Circuit. August 4, 1932. Dismissed per stipulation of counsel. Reported below: 54 F. (2d) 523.

No. 49. DOANE-COMMERCIAL TOWING CO. *v.* MEXICAN PETROLEUM CORP. Certiorari to the Circuit Court of Appeals for the First Circuit. September 26, 1932. Dismissed per stipulation of counsel. Reported below: 55 F. (2d) 32.

No. 92. LAFAYETTE NATIONAL BANK *v.* MORRISON, TRUSTEE. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. August 17, 1932. Dismissed per stipulation of counsel. Reported below: 60 F. (2d) 41.

OCTOBER TERM, 1933.

No. 135. WITWER, ADMINISTRATRIX, *v.* HAROLD LLOYD CORP. ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. September 1, 1933. Dismissed per stipulation of counsel. Reported below: 65 F. (2d) 1.

No. 211. COLVIN ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. August 21, 1933. Dismissed per stipulation of counsel. Reported below: 67 F. (2d) 988.

OCTOBER TERM, 1935.

No. 62. ERVIN ET AL., RECEIVERS, *v.* INDUSTRIAL COMMISSION OF ILLINOIS. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois. July 8, 1935. Dismissed per stipulation of counsel.

No. 367. UNITED STATES *v.* KINNEBREW MOTOR CO. ET AL. Appeal from the District Court of the United States for the Western District of Oklahoma. August 15, 1935. Dismissed per stipulation of counsel. Reported below: 8 F. Supp. 535.

No. 368. UNITED STATES *v.* LEADBETTER MOTOR CO. ET AL. Appeal from the District Court of the United States for the Western District of Oklahoma. August 15, 1935. Dismissed per stipulation of counsel.

ORDER.

Rule 70½ of the rules of practice in equity heretofore promulgated by this Court (226 U. S., Appendix; 281 U. S. 773) is amended to read as follows:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and, in granting or refusing interlocutory injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action.

"Such findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

NOVEMBER 25, 1935

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