T
98919940 0

PROPERTY OF THE
UNITED STATES
GOVERNMENT

UNITED STATES REPORTS

VOLUME 298

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1935

FROM MARCH 31 TO AND INCLUDING JUNE 1, 1936
(END OF THE TERM)

ERNEST KNAEBEL
REPORTER

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1936

For sale by the Superintendent of Documents, Washington, D. C. - Price $2.00 (Buckram)

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.

---

[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.

TABLE OF CASES REPORTED

Page.

Abraham Lincoln Life Ins. Co., Hopwood *v*..... 687
Acker *v.* United States..... 426, 692
A. C. Spark Plug Co. *v.* Motor Improvements, Inc.. 671
Adamowicz *v.* United States..... 664
Aeolian-Skinner Organ Co., Shepard Service *v*..... 681
Ajax Pipe Line Co., Smith *v*..... 641
Alabama, Vincent *v*..... 682
Alemite Corp., Rogers *v*..... 415
Allen *v.* Cloisters Building Corp..... 660, 692
Allen *v.* Georgian Hotel Corp..... 673
American Diamond Lines *v.* Peterson..... 684
American National Bank, Tennessee Pub. Co. *v*.... 651
American Veterinary Assn., Boone *v*..... 659
Anelich, The Arizona *v*..... 110, 692
Anglo-Continentale Treuhand, Henwood *v*..... 655
Anraku *v.* General Electric Co..... 678
Arizona *v.* California..... 558
Arizona, The, *v.* Anelich..... 110, 692
Aron *v.* Pennsylvania R. Co..... 658
Ashton *v.* Cameron County District..... 513, 648
Associated Press, KVOS, Inc. *v*..... 650
Atchison, T. & S. F. Ry. Co., Tipton *v*..... 141
Atlantic Coast Line *v.* Bethel..... 682
Atlantic Coast Line *v.* Commissioner..... 656, 691
Atlantic Lumber Co. *v.* Commissioner..... 553
Atlantic Mutual Ins. Co., United States *v*..... 483
Attorney General, N. C. *ex rel.*, Gorson *v*..... 662
Bachman *v.* Davis..... 681
Baldwin *v.* National Savings & Trust Co..... 670
Baltimore Mail S. S. Co., Madsen *v*..... 675

Page.
Baltimore & Ohio R. Co. *v.* United States..... 349
Bassick Manufacturing Co. *v.* R. M. Hollingshead Co..... 415
Baxter, McGee *v*..... 680
Beadle *v.* Spencer..... 124
Beale *v.* Snead..... 685
Beard *v.* United States..... 655
Beasley, Cate *v*..... 651
Belt *v.* Zerbst..... 667
Berman *v.* McDonnell..... 660
Bethel, Atlantic Coast Line *v*..... 682
Bingaman, Morf *v*..... 407, 639
Bingaman, Piper *v*..... 643
Bingaman, U. S. Fidelity & Guaranty Co. *v*..... 407
Black Gull, The, *v.* Peterson..... 684
Blume *v.* United States..... 691
Board of Equalization, British-American Oil Co. *v*.. 652
Boone *v.* American Veterinary Assn..... 659
Booth Fisheries Corp., Lindh *v*..... 670
Bourdieu *v.* Pacific Western Oil Co..... 647
Bowers, Gans Steamship Line *v*..... 676
Braniff Investment Co., Norton *v*..... 663
Brimmer *v.* Union Oil Co..... 668
British-American Oil Co. *v.* Board of Equalization. 652
Brooklyn Trust Co. *v.* Commissioner..... 659
Brown *v.* South Carolina..... 639
Bruckner-Mitchell, Inc., Sun Indemnity Co. *v*..... 677
Brukenfeld *v.* New York Railways Corp..... 687
Buck, Hillsborough County *v*..... 679
Burns Trading Co., Welborn *v*..... 672
Byllesby (H. M.) & Co. *v.* Welch..... 686
Cabanero *v.* Torres..... 661
California, Arizona *v*..... 558
Californian, The, J. V. Lane & Co. *v*..... 690
California Packing Corp., Sun-Maid Raisin Growers *v*..... 668
California State Bar, Kustoff *v*..... 661

Page.
Callaghan *v.* Central Hanover Bank & Trust Co.... 685
Callaghan *v.* City Bank Farmers Trust Co..... 685
Callaghan *v.* Marine Midland Trust Co..... 685
Callaghan *v.* President of the Manhattan Co..... 685
Camden Fire Insurance Co. *v.* Martin..... 672
Camden Safe Deposit & Trust Co. *v.* Martin..... 678
Cameron, International Alliance of Theatrical Employees *v*..... 659
Cameron County Water District, Ashton *v*..... 513, 648
Capital Co., Fox *v*..... 649, 672
Carden *v.* North Carolina..... 682
Carlin (P. J.) Construction Co. *v.* Heaney..... 637
Carnahan *v.* Missouri-Kansas-Texas Ry..... 664
Carolina, C. & O. Ry. *v.* Commissioner..... 656, 692
Carter *v.* Carter Coal Co..... 238
Carter, Helvering *v*..... 238
Carter Coal Co., Carter *v*..... 238
Cate *v.* Beasley..... 651
Central Hanover Bank & Trust Co., Callaghan *v*.... 685
Central States Life Ins. Co. *v.* Koplar Co..... 687
Cerro de Pasco Copper Corp. *v.* United States..... 686
Chalaire, Franklin *v*..... 678
Chandler *v.* Peketz..... 691
Chase National Bank, Leonardi *v*..... 677
Chesapeake & Ohio Ry. *v.* Rich..... 684
Chicago, B. & Q. R. Co., United States *v*..... 689
Chicago Great Western R. Co. *v.* Rambo..... 99, 692
Chisholm *v.* Gilmer..... 648
Cinema Patents Co. *v.* Columbia Pictures Corp..... 663
Citizens Passenger Ry. Co. *v.* Public Service Comm'n..... 673
City Bank Farmers Trust Co., Callaghan *v*..... 685
City National Bank *v.* Flood..... 666
Clark, R. C. Tway Coal Co. *v*..... 238
Cloisters Building Corp., Allen *v*..... 660, 692
C. M. Kemp Mfg. Co. *v.* Hoeltke..... 673
Coe; Keller, Heumann & Thompson Co. *v*..... 656

Page.
Collins *v.* Streitz 640
Colorado, Wyoming *v.* 573
Columbia Pictures Corp., Cinema Patents Co. *v.* ... 663
Commissioner, Atlantic Coast Line *v.* 656, 691
Commissioner, Brooklyn Trust Co. *v.* 659
Commissioner, Carolina, C. & O. Ry. *v.* 656, 692
Commissioner, Dohme *v.* 680
Commissioner, Evans Products Co. *v.* 675
Commissioner, Farren *v.* 653
Commissioner, Houbigant, Inc. *v.* 669
Commissioner, London Shoe Co. *v.* 663
Commissioner, McCarthy Co. *v.* 655
Commissioner, McCrary *v.* 653
Commissioner, Peak *v.* 666
Commissioner, Robinson *v.* 663
Commissioner, Rudolph Wurlitzer Co. *v.* 676
Commissioner, Silk Center Building, Inc. *v.* 683
Commissioner, Starr *v.* 680
Commissioner, True *v.* 680
Commissioner, Van Vleck *v.* 656
Commissioner, Washington *v.* 689
Commissioner, Whitney Realty Co. *v.* 668
Commissioner, Wurlitzer Grand Piano Co. *v.* 676
Commissioner of Corporations, Atlantic Lumber Co. *v.* 553
Committee on Grievances, Duke *v.* 662
Compagnie Generale Transatlantique *v.* Elting 217
Connecticut Fire Ins. Co. *v.* Oakley Bldg. & L. Co. . 687
Corrick, United States *v.* 435, 692
Cossack *v.* United States 654, 678, 691
Courier Publishing Co. *v.* Police Jury 675
Cowan Investment Corp., Wimberly *v.* 654
Crady, Provident Life & Accident Ins. Co. *v.* 681
Craig *v.* United States 637, 690
Crenshaw, Harper *v.* 685
Crook *v.* Wallace 683
Crown Willamette Paper Co. *v.* McLaughlin 674

Page.
Culhane, Mechanics Universal Joint Co. *v*..... 648
Cutten, Wallace *v*..... 229
Daffern, Zurich General Accident & L. Ins. Co. *v*... 667
Dallas *v*. Gardner..... 668
Davis, Bachman *v*..... 681
Davis *v*. Ruzicka..... 671
De Benque *v*. United States..... 681
De Parcq, Liggett & Myers Tobacco Co. *v*..... 680
Department of Treasury, Miles *v*..... 640
Dixie Terminal Co. *v*. United States..... 645
Doherty *v*. Knowlton..... 676
Doherty *v*. Tremblay..... 676
Dohme *v*. Commissioner..... 680
Dorrance *v*. Martin..... 678, 692
Dow Chemical Co., Williams Bros. Well Treating Corp. *v*..... 690
Driscoll Benevolent Estate *v*. Shipp..... 686
Duke *v*. Committee on Grievances..... 662
Duke Power Co. *v*. Greenwood County..... 651, 669
Duplate Corp. *v*. Triplex Safety Glass Co..... 448
Du Vall *v*. United States..... 667
Elgin, J. & E. Ry., United States *v*..... 492
Elting, Compagnie Generale Transatlantique *v*..... 217
Elting, Hamburg-American Line *v*..... 217
Enelow *v*. New York Life Ins. Co..... 680
Ensminger *v*. Lehigh Valley R. Co..... 672
Equitable Life Assurance Society *v*. Salmen..... 664
Equitable Life Ins. Co., Hillsborough County *v*..... 679
Esnault-Pelterie, United States *v*..... 653
Essex Razor Blade Corp. *v*. Gillette Safety Razor Co. 649
Evans Products Co. *v*. Commissioner..... 675
Everett Mills *v*. United States..... 691
Ex parte. See name of party.
Farren *v*. Commissioner..... 653
Fidelity & Deposit Co. *v*. Pennsylvania R. Co..... 661
Fidelity & Deposit Co., Prudence Co. *v*..... 642
Fidelity & Deposit Co. *v*. United States..... 665

Page.
Fink *v.* United States..... 686
Fireman's Mutual Aid Assn. *v.* Virginia..... 677
Firestone Tire & Rubber Co., U. S. Rubber Co. *v*.... 679
First National Bank, Gully *v*..... 650
Flood, City National Bank *v*..... 666
Foley *v.* Wachs..... 637
Foust *v.* Munson Steamship Lines..... 649
Fox, *Ex parte*..... 642
Fox *v.* Capital Co..... 649, 672
Fox, Wheeling Steel Corp. *v*..... 193
Franklin *v.* Chalaire..... 678
Freeman *v.* United States..... 688
Frey & Horgan Corp. *v.* Superior Court..... 684
Frost *v.* United States..... 691
Fulton, Old Line Life Ins. Co. *v*..... 656
Gans Steamship Line *v.* Bowers..... 676
Gardner, Dallas *v*..... 668
General Electric Co., Anraku *v*..... 678
General Electric Co., Pacific Importing Co. *v*..... 678
General Motors Acceptance Corp., McNutt *v*..... 178
General Motors Corp., Pick Manufacturing Co. *v*.. 648
Georgian Hotel Corp., Allen *v*..... 673
Gifford, *Ex parte*..... 643
Gillette Safety Razor Co., Essex Razor Blade Corp. *v*..... 649
Gilmer, Chisholm *v*..... 648
Glenn, R. C. Tway Coal Co. *v*..... 238
Globe Gazette Printing Co. *v.* United States..... 682
Gooch *v.* United States..... 658
Gorson *v.* N. C. *ex rel.* Attorney General..... 662
Granger (James), Inc., Parker *v*..... 644
Graves, New York *ex rel.* Rice *v*..... 683
Graves *v.* Texas Co..... 393
Greenwood County, Duke Power Co. *v*..... 651
Grosscup, Premier-Pabst Sales Co. *v*..... 226
Guaranty Trust Co. *v.* Monier..... 670
Gully *v.* First National Bank..... 650

Page.
Gully *v.* Interstate Natural Gas Co..... 688
Gully *v.* Memphis Natural Gas Co..... 688
Gully, Memphis Natural Gas Co. *v*..... 688
Hagman, *Ex parte*..... 642
Hale, Moyerman *v*..... 671
Hall, Smith *v*..... 652
Hamburg-American Line *v.* Elting..... 217
Harper *v.* Crenshaw..... 685
Hart *v.* Virginia..... 34
Hartford Accident & Ind. Co. *v.* Illinois *ex rel.* McLaughlin..... 155
Hartford Accident & Ind. Co. *v.* Jones..... 655
Hawkins *v.* Railroad Credit Corp..... 667
Heaney, P. J. Carlin Construction Co. *v*..... 637
Helvering *v.* Carter..... 238
Helvering *v.* Illinois Life Ins. Co..... 650
Helvering, Koshland *v*..... 441
Helvering *v.* Matchette..... 677
Helvering, Schafer *v*..... 650
Henneford *v.* Paramount Pictures Distributing Co.. 665
Henwood *v.* Anglo-Continentale Treuhand..... 655
Hill *v.* U. S. *ex rel.* Wampler..... 460
Hillsborough County *v.* Buck..... 679
Hillsborough County *v.* Equitable Life Ins. Co..... 679
Hillsborough County *v.* Keefe..... 679
Hines *v.* Stein..... 94, 692
H. M. Byllesby & Co. *v.* Welch..... 686
Hocking Glass Co. *v.* Miller..... 659
Hockley, Miller *v*..... 657
Hoeltke, C. M. Kemp Mfg. Co. *v*..... 673
Hollingshead (R. M.) Co., Bassick Mfg. Co. *v*..... 415
Hopwood *v.* Abraham Lincoln Life Ins. Co..... 687
Houbigant, Inc. *v.* Commissioner..... 669
Houston *v.* Iowa Soap Co..... 657
Idaho, United States *v*..... 105
Illinois *ex rel.* McLaughlin, Hartford Co. *v*..... 155
Illinois Life Ins. Co., Helvering *v*..... 650

Page.
International Alliance of Theatrical Employees *v.* Cameron 659
International Business Machines Corp. *v.* United States 131
Interstate Natural Gas Co., Gully *v.* 688
Iowa Soap Co., Houston *v.* 657
Irving Trust Co. *v.* United States 686
Isbrandtsen-Moller Co. *v.* United States 644
James Granger, Inc., Parker *v.* 644
James Manufacturing Co., Smith *v.* 652
Jenkins, Phillips Petroleum Co. *v.* 691
Jobissy *v.* Murphy 661
Johnson *v.* United States 688
Jones, Hartford Accident & Ind. Co. *v.* 655
Jones *v.* Securities & Exchange Comm'n 1
Jordan Marsh Co., Wolff *v.* 673
Jose Rivera Soler & Co. *v.* U. S. Firemen's Ins. Co. . 651
J. T. Knight & Son *v.* Superior Fire Ins. Co 654
J. V. Lane & Co. *v.* The Californian 690
Kansas City Bridge Co. *v.* State Highway Comm'n . . 661
Kattelman *v.* Madden 660
Keefe, Hillsborough County *v.* 679
Keller, Heumann & T. Co. *v.* Coe 656
Kemp (C. M.) Mfg. Co. *v.* Hoeltke 673
Kentucky, Montjoy *v.* 646
Kleinschmidt *v.* Wallace 675
Knight (J. T.) & Son *v.* Superior Fire Ins. Co 654
Knott, United States *v.* 544
Knowlton, Doherty *v.* 676
Kolar *v.* United States 686
Koplar Co., Central States Life Ins. Co. *v.* 687
Koshland *v.* Helvering 441
Kurtz, Rhoads *v.* 658
Kustoff *v.* State Bar of California 661
KVOS, Inc. *v.* Associated Press 650
Lacey, New York Lumber Trade Assn. *v.* 684
Landau *v.* United States Attorney 665

Page.
Lane (J. V.) & Co. *v.* The Californian..... 690
Laska *v.* United States..... 689
Lee, *In re*..... 680
Lehigh Valley R. Co., Ensminger *v*..... 672
Leonardi *v.* Chase National Bank..... 677
Liggett & Myers Tobacco Co. *v.* De Parcq..... 680
Likly & Rockett Trunk Co. *v.* Provident Ins. Co.... 676
Lindh *v.* Booth Fisheries Corp..... 670
London Shoe Co. *v.* Commissioner..... 663
Lowden *v.* Northwestern Nat. Bank & T. Co..... 160
Lowell, Triplett *v*..... 691
Lynch *v.* United States..... 658, 692
Lyon Van & Storage Co., Norton *v*..... 662, 692
Madden, Kattelman *v*..... 660
Madsen *v.* Baltimore Mail S. S. Co..... 675
Manhattan Co., President of, Callaghan *v*..... 685
Marifian *v.* United States..... 686
Marine Midland Trust Co., Callaghan *v*..... 685
Marion Steam Shovel Co., Mozingo *v*..... 645
Martin, Camden Fire Ins. Co. *v*..... 672
Martin, Camden Safe Deposit & Trust Co. *v*..... 678
Martin, Dorrance *v*..... 678, 692
Maryland Casualty Co. *v.* Moore..... 666
Massachusetts Mutual Life Ins. Co. *v.* Mayo..... 683
Matchette, Helvering *v*..... 677
Mayo, Massachusetts Mutual Life Ins. Co. *v*..... 683
McCandless *v.* United States..... 342
McCarthy Co. *v.* Commissioner..... 655
McConnaughey *v.* Personal Industrial Bankers..... 674
McCrary *v.* Commissioner..... 653
McCrary, Schenebeck *v*..... 36
McDonnell, Berman *v*..... 660
McGee *v.* Baxter..... 680
McHenry Chevrolet Co., McNutt *v*..... 190
McKey *v.* Paradise..... 647
McLaughlin, Crown Willamette Paper Co. *v*..... 674
McLaughlin, Illinois *ex rel.*, Hartford Co. *v*..... 155

Page.
McNutt *v.* General Motors Acceptance Corp..... 178
McNutt *v.* McHenry Chevrolet Co..... 190
Mechanics Universal Joint Co. *v.* Culhane..... 648
Memphis Natural Gas Co. *v.* Gully..... 688
Metro-Goldwyn Pictures Corp. *v.* Sheldon..... 669
Michalek *v.* U. S. Gypsum Co..... 639
Miles *v.* Department of Treasury..... 640
Miller, Hocking Glass Co. *v*..... 659
Miller *v.* Hockley..... 657
Miller *v.* Travelers Insurance Co..... 660
Missouri-Kansas-Texas Ry., Carnahan *v*..... 664
Moffett *v.* Robbins..... 675
Monier, Guaranty Trust Co. *v*..... 670
Montjoy *v.* Kentucky..... 646
Montrose Contracting Co., Westchester County *v*.. 662
Moore, Maryland Casualty Co. *v*..... 666
Morehead *v.* New York *ex rel.* Tipaldo..... 587
Morf *v.* Bingaman..... 407, 639
Morgan *v.* United States..... 468, 646
Mortimer, *Ex parte*..... 638
Motor Improvements, Inc., A. C. Spark Plug Co. *v*. 671
Mountain States Power Co. *v.* Public Service Comm'n..... 641
Moyerman *v.* Hale..... 671
Mozingo *v.* Marion Steam Shovel Co..... 645
Munoz *v.* Porto Rico Ry., Light & Power Co..... 689
Munson Steamship Lines, Foust *v*..... 649
Murphy, Jobissy *v*..... 661
National Broadcasting Co., Uproar Co. *v*..... 670
National Casket Co. *v.* United States..... 672
National City Bank *v.* Oelbermann..... 638
National City Bank, Oelbermann *v*..... 654
National Savings & Trust Co., Baldwin *v*..... 670
Nebraska *v.* Wyoming..... 642
Neidecker, U. S. *ex rel.*, Valentine *v*..... 647
New Hampshire, Vermont *v*..... 642
New Jersey, Simon *v*..... 666

Page.
New Mexico, Texas *v*..... 639, 644
New York *ex rel.* Rice *v.* Graves..... 683
New York *ex rel.* Tipaldo, Morehead *v*..... 587
New York Life Ins. Co., Enelow *v*..... 680
New York Lumber Trade Assn. *v.* Lacey..... 684
New York Railways Corp., Brukenfeld *v*..... 687
North Carolina, Carden *v*..... 682
North Carolina *ex rel.* Atty. Gen., Gorson *v*..... 662
Northwestern Nat. Bank & T. Co., Lowden *v*..... 160
Norton *v.* Braniff Investment Co..... 663
Norton *v.* Lyon Van & Storage Co..... 662, 692
Noxon Chemical Products Co. *v.* Unger..... 679
Oakley Improved Bldg. & L. Co., Connecticut Co. *v*. 687
Oak Park Trust & Savings Bank, Van Doren *v*..... 659
O'Conner, Watson *v*..... 657
Oelbermann *v.* National City Bank..... 654
Oelbermann, National City Bank *v*..... 638
Old Line Life Ins. Co. *v.* Fulton..... 656
Oliver *v.* Richmond..... 674
O'Toole, *Ex parte*..... 639
Outlaw *v.* United States..... 665
Pacific Importing Co. *v.* General Electric Co..... 678
Pacific Western Oil Co., Bourdieu *v*..... 647
Paradise, McKey *v*..... 647
Paramount Pictures Distributing Co., Henneford *v*. 665
Parker *v.* James Granger, Inc..... 644
Parks, Estate of, Pupahl *v*..... 649
Pastime Amusement Co., Southeastern Express Co. *v*..... 653
Patterson *v.* United States..... 657
Peak *v.* Commissioner..... 666
Peketz, Chandler *v*..... 691
Pennsylvania R. Co., Aron *v*..... 658
Pennsylvania R. Co., Fidelity & Deposit Co. *v*..... 661
Pennsylvania R. Co. *v.* Public Utilities Comm'n.... 170
Personal Industrial Bankers, McConnaughey *v*..... 674
Peterson, American Diamond Lines, Inc. *v*..... 684

Page.
Peterson, The Black Gull *v*.. 684
Phillips Petroleum Co. *v*. Jenkins..... 691
Pick Manufacturing Co. *v*. General Motors Corp... 648
Piper *v*. Bingaman..... 643
Piquett *v*. United States..... 664
P. J. Carlin Construction Co. *v*. Heaney..... 637
Police Jury, Courier Publishing Co. *v*..... 675
Pollitt, *Ex parte*..... 641
Poresky *v*. Ryan..... 654, 692
Porto Rico Brokerage Co. *v*. United States..... 671
Porto Rico Ry., Light & Power Co., Munoz *v*..... 689
Premier-Pabst Sales Co. *v*. Grosscup..... 226
President of the Manhattan Co., Callaghan *v*..... 685
Proctor, Wong Shong Been *v*..... 665
Provident Life & Accident Ins. Co. *v*. Crady..... 681
Provident Mutual Life Ins. Co., Trunk Co. *v*..... 676
Prudence Company *v*. Fidelity & Deposit Co..... 642
Public Service Comm'n, Citizens Passenger Ry. Co. *v*..... 673
Public Service Comm'n, Mountain States Power Co. *v*..... 641
Public Utilities Comm'n, Pennsylvania R. Co. *v*.... 170
Pupahl *v*. Estate of Parks..... 649
Railroad Credit Corp., Hawkins *v*..... 667
Rambo, Chicago Great Western R. Co. *v*..... 99, 692
R. C. Tway Coal Co. *v*. Clark..... 238
R. C. Tway Coal Co. *v*. Glenn..... 238
Rhoads *v*. Kurtz..... 658
Rice, New York *ex rel.*, *v*. Graves..... 683
Rich, Chesapeake & Ohio Ry. *v*..... 684
Richmond, Oliver *v*..... 674
Richmond, Ruddock *v*..... 674
Rives, Sims *v*..... 682
R. M. Hollingshead Co., Bassick Mfg. Co. *v*..... 415
Robbins, Moffett *v*..... 675
Robinson *v*. Commissioner..... 663
Rogers *v*. Alemite Corp..... 415

Page.
Rosen, Uebersee Finanz-Korporation *v*..... 679
Rosenberg *v.* United States..... 669
Rosenberg, Walsh *v*..... 663
Rubin, *Ex parte*..... 642
Ruddock *v.* Richmond..... 674
Rudolph Wurlitzer Co. *v.* Commissioner..... 676
Ruzicka, Davis *v*..... 671
Ryan, Poresky *v*..... 654, 692
St. Joseph Stock Yards Co. *v.* United States..... 38
Salmen, Equitable Life Assurance Society *v*..... 664
Schafer *v.* Helvering..... 650
Schenebeck *v.* McCrary..... 36
Scott, Virginian Ry. Co. *v*..... 683
Securities & Exchange Comm'n, Jones *v*..... 1
Sheldon, Metro-Goldwyn Pictures Corp. *v*..... 669
Shepard Broadcasting Service *v.* Aeolian-Skinner Co..... 681
Shipp, Driscoll Benevolent Estate *v*..... 686
Silk Center Building, Inc. *v.* Commissioner..... 683
Simon *v.* New Jersey..... 666
Sims *v.* Rives..... 682
Smith *v.* Ajax Pipe Line Co..... 641
Smith *v.* Hall..... 652
Smith *v.* James Manufacturing Co..... 652
Snead, Beale *v*..... 685
Soler (Jose Rivera) & Co. *v.* U. S. Firemen's Insurance Co..... 651
South Carolina, Brown *v*..... 639
South Carolina Tax Comm'n, Duke Power Co. *v*.... 669
Southeastern Express Co. *v.* Pastime Amusement Co..... 653
Spencer, Beadle *v*..... 124
Starr *v.* Commissioner..... 680
State Highway Comm'n, Kansas City Bridge Co. *v*.. 661
Stein, Hines *v*..... 94, 692
Stone *v.* White..... 646
Streitz, Collins *v*..... 640

Page.
Summerall *v.* United Fruit Co..... 658
Sun Indemnity Co. *v.* Bruckner-Mitchell, Inc..... 677
Sun-Maid Raisin Growers *v.* California Packing Corp..... 668
Superior Court, Frey & Horgan *v*..... 684
Superior Fire Ins. Co., J. T. Knight & Son *v*..... 654
Tegtmeyer, *Ex parte*..... 642
Tennessee Publishing Co. *v.* American Nat. Bank... 651
Texas *v.* New Mexico..... 639, 644
Texas Co., Graves *v*..... 393
Tipaldo, New York *ex rel.*, Morehead *v*..... 587
Tipton *v.* Atchison, T. & S. F. Ry. Co..... 141
Torres, Cabanero *v*..... 661
Tousey *v.* Wabash-Harrison Building Corp..... 685
Travelers Insurance Co., Miller *v*..... 660
Tremblay, Doherty *v*..... 676
Triplett *v.* Lowell..... 691
Triplex Safety Glass Co., Duplate Corp. *v*..... 448
Trojan Powder Co. *v.* United States..... 674
True *v.* Commissioner..... 680
Tway (R. C.) Coal Co. *v.* Clark..... 238
Tway (R. C.) Coal Co. *v.* Glenn..... 238
Uebersee Finanz-Korporation *v.* Rosen..... 679
Unger, Noxon Chemical Products Co. *v*..... 679
Union Oil Co., Brimmer *v*..... 668
United Fruit Co., Summerall *v*..... 658
United States, Acker *v*..... 426, 692
United States, Adamowicz *v*..... 664
United States *v.* Atlantic Mutual Ins. Co..... 483
United States, Baltimore & Ohio R. Co. *v*..... 349
United States, Beard *v*..... 655
United States, Blume *v*..... 691
United States, Cerro de Pasco Copper Corp. *v*..... 686
United States *v.* Chicago, B. & Q. R. Co..... 689
United States *v.* Corrick..... 435, 692
United States, Cossack *v*.....654, 678, 691
United States, Craig *v*..... 637, 690

Page.
United States, DeBenque *v*. 681
United States, Dixie Terminal Co. *v*. 645
United States, Du Vall *v*. 667
United States *v*. Elgin, J. & E. Ry. 492
United States *v*. Esnault-Pelterie. 653
United States, Everett Mills *v*. 691
United States, Fidelity & Deposit Co. *v*. 665
United States, Fink *v*. 686
United States, Freeman *v*. 688
United States, Frost *v*. 691
United States, Globe Gazette Printing Co. *v*. 682
United States, Gooch *v*. 658
United States *v*. Idaho. 105
United States, International Machines Corp. *v*. 131
United States, Irving Trust Co. *v*. 686
United States, Isbrandtsen-Moller Co. *v*. 644
United States, Johnson *v*. 688
United States *v*. Knott. 544
United States, Kolar *v*. 686
United States, Laska *v*. 689
United States, Lynch *v*. 658, 692
United States, Marifian *v*. 686
United States, McCandless *v*. 342
United States, Morgan *v*. 468, 646
United States, National Casket Co. *v*. 672
United States, Outlaw *v*. 665
United States, Patterson *v*. 657
United States, Piquett *v*. 664
United States, Porto Rico Brokerage Co. *v*. 671
United States, Rosenberg *v*. 669
United States, St. Joseph Stock Yards Co. *v*. 38
United States, Trojan Powder Co. *v*. 674
United States, Wainer *v*. 652
United States, Warner Bros. Pictures, Inc. *v*. 643
United States, Weinblatt *v*. 637, 690
United States *v*. Wood. 652
United States, Zimmern *v*. 167

Page.
United States Attorney, Landau *v*. 665
U. S. *ex rel.* Neidecker, Valentine *v*. 647
U. S. *ex rel.* Wampler, Hill *v*. 460
U. S. Fidelity & Guaranty Co. *v*. Bingaman. 407
U. S. Firemen's Insurance Co., Jose Rivera Soler & Co. *v*. 651
U. S. Gypsum Co., Michalek *v*. 639
U. S. Rubber Co. *v*. Firestone Tire & Rubber Co. . . . 679
Uproar Co. *v*. National Broadcasting Co. 670
Valentine *v*. U. S. *ex rel.* Neidecker. 647
Van Doren *v*. Oak Park Trust & Savings Bank. 659
Van Vleck *v*. Commissioner. 656
Vermont *v*. New Hampshire. 642
Vincent *v*. Alabama. 682
Virginia, Firemen's Mutual Aid Assn. *v*. 677
Virginia, Hart *v*. 34
Virginian Ry. Co. *v*. Scott. 683
Wabash-Harrison Building Corp., Tousey *v*. 685
Wachs, Foley *v*. 637
Wainer *v*. United States. 652
Wallace, Crook *v*. 683
Wallace *v*. Cutten. 229
Wallace, Kleinschmidt *v*. 675
Walsh *v*. Rosenberg. 663
Wampler, U. S. *ex rel.*, Hill *v*. 460
Warner Bros. Pictures, Inc. *v*. United States. 643
Washington *v*. Commissioner. 689
Washington, West Missouri Power Co. *v*. 668
Watson *v*. O'Conner. 657
Weinblatt *v*. United States. 637, 690
Welborn *v*. Burns Trading Co. 672
Welch, H. M. Byllesby & Co. *v*. 686
Westchester County *v*. Montrose Contracting Co. . . . 662
West Missouri Power Co. *v*. Washington. 668
Wheeling Steel Corp. *v*. Fox. 193
White, Stone *v*. 646
Whitney Realty Co. *v*. Commissioner. 668

Page.
Williams Bros. Well Treating Corp. *v.* Dow Co..... 690
Wimberly *v.* Cowan Investment Corp..... 654
Wolff *v.* Jordan Marsh Co..... 673
Wong Shong Been *v.* Proctor..... 665
Wood, United States *v*..... 652
Wurlitzer Grand Piano Co. *v.* Commissioner..... 676
Wurlitzer (Rudolph) Co. *v.* Commissioner..... 676
Wyoming *v.* Colorado..... 573
Wyoming, Nebraska *v*..... 642
Zerbst, Belt *v*..... 667
Zimmern *v.* United States..... 167
Zurich General Accident & L. Ins. Co. *v.* Daffern... 667

TABLE OF CASES

Cited in Opinions

Page.

Abrams *v.* Van Schaick, 293 U. S. 188 543
Acker *v.* United States, 298 U. S. 426 436, 477
Adair *v.* United States, 208 U. S. 161 298
Adams *v.* Storey, 1 Paine 79 535
Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211 292, 298
Adkins *v.* Children's Hospital, 261 U. S. 525 297, 603–636
Aero Mayflower Transit Co. *v.* Public Service Comm'n, 295 U. S. 285 410, 412
Alabama *v.* United States, 279 U. S. 229 438, 637
Alabama Great Southern R. Co. *v.* McFadden & Bros., 232 Fed. 1000 177
Alabama & Vicksburg Ry. *v.* Jackson & Eastern Ry., 271 U. S. 244 107
Alaska Packers Assn. *v.* Industrial Accident Comm'n, 200 Cal. 579 154
Alemite Corporation *v.* Lubriar Corporation, 62 F. (2d) 899 417
Alemite Mfg. Corp. *v.* Hi-Pressure Sales Co., 33 F. (2d) 912 417
Alice State Bank *v.* Houston Pasture Co., 247 U. S. 240 605
Alleged Rebates to the U. S. Steel Corp., *In re*, 36 I. C. C. 557 502

Page.

Alpha Cement Co. *v.* Massachusetts, 268 U. S. 203 555
Alpha S. S. Corp. *v.* Cain, 281 U. S. 642 123
Alpin, The, 23 Fed. 815 491
Alton R. Co. *v.* United States, 287 U. S. 229 358
American Airways *v.* Wallace, 57 F. (2d) 877 404
American Commission Co. *v.* United States, 11 F. Supp. 965 50, 363
American Surety Co. *v.* Baldwin, 287 U. S. 156 369, 466
Anderson *v.* Watt, 138 U. S. 694 184, 186
Appalachian Coals, Inc. *v.* United States, 288 U. S. 344 331
Arizona *v.* California, 283 U. S. 423 561, 566, 569, 570
Arizona, The, *v.* Anelich, 298 U. S. 110 128, 129
Arizona Employers' Liability Cases, 250 U. S. 400 634
Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry., 284 U. S. 370 440
Arkadelphia Milling Co. *v.* St. Louis S. W. Ry. Co., 249 U. S. 134 177, 306
Armour & Co. *v.* North Dakota, 240 U. S. 510 628
Armstrong *v.* Belding Bros. & Co., 297 Fed. 728 457
Ashwander *v.* Tennessee Valley Authority, 297 U. S. 288 287, 325

Page.

Atchison, T. & S. F. Ry. *v.* Saxon, 284 U. S. 458 101, 102
Atchison, T. & S. F. Ry. *v.* United States, 284 U. S. 248 56, 379, 389
Atchison, T. & S. F. Ry. *v.* United States, 295 U. S. 193 359
Atlantic Coast Line *v.* Arcade & Attica R. Co., 194 I. C. C. 729 385, 386
Atlantic Coast Line *v.* Doughton, 262 U. S. 413 404
Atlantic Coast Line *v.* Florida, 203 U. S. 256 377
Atlantic Coast Line *v.* Florida, 295 U. S. 301 328
Atlantic Coast Line *v.* Standard Oil Co., 275 U. S. 257 175
Auto Acetylene Light Co. *v.* Prest-O-Lite Co., 276 Fed. 537 140
Backus *v.* Fort Street Union Depot Co., 169 U. S. 557 79
Baizley Iron Works *v.* Span, 281 U. S. 222 129
Baldwin *v.* Missouri, 281 U. S. 586 209
Baldwin *v.* Seelig, Inc., 293 U. S. 522 637
Baldwin *v.* Seelig, Inc., 294 U. S. 511 326
Ballard *v.* Sacramento Northern Ry., 126 Cal. App. 486 149, 152
Baltimore & Carolina Line *v.* Redman, 295 U. S. 654 638
Baltimore National Bank *v.* Tax Commission, 297 U. S. 209 540
Baltimore & Ohio R. Co. *v.* Interstate Commerce Comm'n, 215 U. S. 216 641, 645
Baltimore & Ohio R. Co. *v.* United States, 298 U. S. 349 604
Baltimore & Ohio S. W. R. Co. *v.* Settle, 260 U. S. 166 174
Banton *v.* Belt Line Ry., 268 U. S. 413 371

Page.

Barber Asphalt Paving Co. *v.* Standard Asphalt & Rubber Co., 30 F. (2d) 281 457
Barclay, *Ex parte*, 153 Fed. 669 463
Barnard *v.* Adams, 10 How. 270 489
Barrett *v.* Virginian Ry Co., 250 U. S. 473 20
Barry *v.* Edmunds, 116 U. S. 550 183, 184
Basset *v.* United States, 9 Wall. 38 170
Bassick Mfg. Co. *v.* Adams Grease Gun Corp., 39 F. (2d) 904; 52 F. (2d) 36 417
Bassick Mfg. Co. *v.* Auto Equipment Co., 13 F. (2d) 463 417
Bassick Mfg. Co. *v.* Larkin Automotive Parts Co., 19 F. (2d) 939 417
Bassick Mfg. Co. *v.* Rogers, 26 F (2d) 724 417
Bassick Mfg. Co. *v.* Standard Products Mfg. Co., 19 F. (2d) 937 417
Bassick Mfg. Co. *v.* United Grease Gun Corp., 40 F. (2d) 549 417
Bass, Ratcliff & Gretton *v.* State Tax Comm'n, 266 U. S. 271 212
Bauer *v.* Improvement District, 168 Ark. 220 37
Bauman *v.* Ross, 167 U. S. 548 78
Beals *v.* Hale, 4 How. 37 414
Beaston *v.* Farmers' Bank, 12 Pet. 102 547, 549
Beaumont, S. L. & W. Ry. *v.* United States, 282 U. S. 74 357, 359
Bedford Stone Co. *v.* Stone Cutters Assn., 274 U. S. 37 305
Beidler *v.* South Carolina Tax Comm'n, 282 U. S. 1 209, 210

Page.
Berryman *v.* Whitman College, 222 U. S. 334 181
Biddle *v.* Shirley, 16 F. (2d) 566 465
Birkley *v.* Presgrave, 1 East 220 489
Bitterman *v.* Louisville & N. R. Co., 207 U. S. 205 181
Block *v.* Hirsh, 256 U. S. 135 333, 632
Bluefield Water Works Co. *v.* Public Service Comm'n, 262 U. S. 679 49, 369, 371
Board of Assessors *v.* Comptoir National, 191 U. S. 388 210
Boldt *v.* Pennsylvania R. Co., 245 U .S. 441 119
Booth *v.* Illinois, 184 U. S. 425 628
Borden's Farm Products Co. *v.* Baldwin, 293 U. S. 194 625
Borden's Farm Products Co. *v.* Ten Eyck, 297 U. S. 251 634
Bosley *v.* McLaughlin, 236 U. S. 385 630, 633
Boston & Maine R. Co. *v.* Armburg, 285 U. S. 234 153
Bostwick *v.* Brinkerhoff, 106 U. S. 3 639
Boyd *v.* Archer, 42 F. (2d) 43 465
Boyd *v.* United States, 116 U. S. 616 24, 26, 27, 28, 33
Boyle *v.* Zacharie, 6 Pet. 348 362
Bramwell *v.* U. S. Fidelity & Guaranty Co., 269 U. S. 483 547
Brass *v.* Stoeser, 153 U. S. 391 632, 634
Brimstone R. Co. *v.* United States, 276 U. S. 104 357, 359
Bristol *v.* Washington County, 177 U. S. 133 210
Broad-Grace Arcade Corp *v.* Bright, 284 U. S. 588 184
Bronson *v.* Schulten, 104 U. S. 410 170

Page.
Bronx Brass Foundry *v.* Irving Trust Co., 297 U. S. 230 21, 30
Brooks *v.* United States, 267 U. S. 432 327, 330
Brown *v.* Maryland, 12 Wheat. 419 401
Brownfield *v.* South Carolina, 189 U. S. 426 646
Buffum *v.* Barceloux Co., 289 U. S. 227 458
Bunting *v.* Oregon, 243 U. S. 426 628, 634
Burch (R. W.), Inc. *v.* Railway Express Agency, 190 I. C. C. 520; 197 I. C. C. 85 377
Burnet *v.* A. T. Jergins Trust, 288 U. S. 508 406
Burnet *v.* Brooks, 288 U. S. 378 209, 295
Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393 94
Burns Mortgage Co. *v.* Fried, 292 U. S. 487 151
Burton *v.* Union Oil Co., 129 Cal. App. 438 154
Butler *v.* Wyman, 128 Cal. App. 736 154
Butts *v.* Merchants Transportation Co., 230 U. S. 126 316
Byars *v.* United States, 273 U. S. 28 27
Calhoun *v.* Massie, 253 U. S. 170 98
California *v.* Southern Pacific Co., 157 U. S. 229 572
California Growers' & Shippers' League *v.* Southern Pacific Co., 129 I. C. C. 25 377
Campbell River Mills Co. *v.* Chicago, M., St. P. & P. R. Co., 42 F. (2d) 775; 53 F. (2d) 69 175
Canda Bros. *v.* Michigan Malleable Iron Co., 152 Fed. 178 453, 458
Carbice Corporation *v.* American Patents Corp., 283 U. S. 27 136, 139, 425

Page.

Carborundum Co. *v.* Electric Smelting & Aluminum Co., 203 Fed. 976 457
Cargill (W. W.) Co. *v.* Minnesota, 180 U. S. 452 158
Carlisle Packing Co. *v.* Sandanger, 259 U. S. 255 121, 129
Ceballos (J. M.) & Co., *In re*, 161 Fed. 445 537
Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S. 655 74, 372
Central Loan & Trust Co. *v.* Campbell, 173 U. S. 84 640
Champlain Realty Co. *v.* Brattleboro, 260 U. S. 366 175
Champlin Rfg. Co. *v.* Corporation Commission, 286 U. S. 210 303
Chase *v.* Wetzlar, 225 U. S. 79 187, 188
Chassaniol *v.* Greenwood, 291 U. S. 584 158, 303
Cheatham *v.* United States, 92 U. S. 85 79
Chelentis *v.* Luckenbach S. S. Co., 247 U. S. 372 119, 120, 123
Cheney Brothers Co. *v.* Massachusetts, 246 U. S. 147 555, 556
Chicago & Alton R. Co. *v.* Union Rolling Mill Co., 109 U. S. 702 20
Chicago Board of Trade *v.* Olsen, 262 U. S. 1 177
Chicago, B. & Q. R. Co. *v.* Babcock, 204 U. S. 585 93
Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549 628
Chicago, B. & Q. R. Co. *v.* Osborne, 265 U. S. 14 369
Chicago Junction Case, 264 U. S. 258 74, 358, 359, 480
Chicago, M. & St. P. Ry. *v.* Coogan, 271 U. S. 472 101
Chicago, M. & St. P. Ry. *v.* Minnesota, 134 U. S. 418 364
Chicago, M. & St. P. Ry. *v.* Tompkins, 176 U. S. 167 378

Page.

Chicago, R. I. & P. Ry. *v.* United States, 274 U. S. 29 75
Child Labor Tax Case, 259 U. S. 20 289, 338
Cincinnati, N. O. & T. P. Ry. *v.* Interstate Commerce Comm'n, 162 U. S. 184 174
Citizens National Bank *v.* Durr, 257 U. S. 99 638
City Bank Co. *v.* Schnader, 291 U. S. 24 288
City of Alexandria, The, 17 Fed. 390 121
Clark *v.* Martin, 49 Pa. 289 16
Clark *v.* Poor, 274 U. S. 554 410, 412
Clark *v.* Williard, 294 U. S. 211 605
Clark Bros. & Co. *v.* Pou, 20 F. (2d) 74 165
Clark Distilling Co. *v.* Western Maryland Ry., 242 U. S. 311 540
Clarke *v.* Deckebach, 274 U. S. 392 625
Clark's Ferry Bridge Co. *v.* Public Service Comm'n, 291 U. S. 227 56, 59
Cleveland & Pittsburgh R. Co. *v.* Cleveland, 235 U. S. 50 640
Coast S. S. Co. *v.* Brady, 8 F. (2d) 16 124
Coe *v.* Errol, 116 U. S. 517 175, 301
Collector *v.* Day, 11 Wall. 113 294, 528
Collins *v.* Texas, 223 U. S. 288 413
Columbus Gas & Fuel Co. *v.* Public Utilities Comm'n, 292 U. S. 398 63
Colusa, The, 248 Fed. 21 122, 123
Commissioner *v.* Koshland, 81 F. (2d) 641 442
Commissioner *v.* Tillotson Mfg. Co., 76 F. (2d) 189 442
Conboy *v.* First National Bank, 203 U. S. 141 168
Confiscation Cases, 7 Wall. 454 20

Page.

Connecticut *v.* Massachusetts, 282 U. S. 660 568
Conroy *v.* Penn Electrical & Mfg. Co., 199 Fed. 427 457
Continental Illinois Bank *v.* Chicago, R. I. & P. Ry., 294 U. S. 648 527, 535, 536, 537
Continuous Glass Press Co. *v.* Schmertz Wire Glass Co., 219 Fed. 199 453
Cooke *v.* Boynton, 135 Pa. 102 16
Coronado Coal Co. *v.* United Mine Workers, 268 U. S. 295 304, 305
Cortes *v.* Baltimore Insular Line, 287 U. S. 367 123
Couch *v.* Steele, 3 El. & Bl. 402 121
Crane *v.* Hahlo, 258 U. S. 142 78, 80
Cricket S. S. Co. *v.* Parry, 263 Fed. 523 122, 123
Crosby Valve Co. *v.* Safety Valve Co., 141 U. S. 441 452, 455, 456, 458, 459
Cross *v.* Evans, 167 U. S. 60 641, 645
Crowell *v.* Benson, 285 U. S. 22 49, 82, 369, 392
Cullinan *v.* Walker, 262 U. S. 134 445
Cutler *v.* Rae, 7 How. 729 440
Dade *v.* Irwin's Executor, 2 How. 383 165
Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282 326, 329
Danforth *v.* Groton Water Co., 178 Mass. 472 539
Daniel *v.* Ferguson, L. R. [1891] 2 Ch. 27 16
Darnell *v.* Edwards, 244 U. S. 564 53
Davidson *v.* New Orleans, 96 U. S. 97 78
Davis *v.* Newton Coal Co., 267 U. S. 292 367
Davis *v.* Pringle, 268 U. S. 315 547

Page.

Dawson *v.* Kentucky Distilleries Co., 255 U. S. 288 400
Dayton-Goose Creek Ry. *v.* United States, 263 U. S. 456 357, 369, 370
Dayton Power & Light Co. *v.* Public Utilities Comm'n 292 U. S. 290 53, 63
Delaware, L. & W. R. Co. *v.* Peck, 255 Fed. 261 147
Denny *v.* Bennett, 128 U. S. 489 466
Denver & Rio Grande R. Co. *v.* Interstate Commerce Comm'n, 195 Fed. 968 176
Denver Union Stock Yard Co. *v.* United States, 57 F. (2d) 735 50, 363
Deputron *v.* Young, 134 U. S. 241 184
De Sobry *v.* Nicholson, 3 Wall. 420 183
Det Forenede Dampskibs Selskab *v.* Insurance Co., 31 F. (2d) 658, cert. den., 280 U. S. 571 489, 490
Detroit *v.* Detroit City Ry., 55 Fed. 569 18, 19
Detroit Heating & Lighting Co. *v.* Kemp., 182 Fed. 847 466
De Wolf *v.* Rabaud, 1 Pet. 476 183
Diamond Match Co. *v.* Ontonagon, 188 U. S. 82 175
Diamond Stone-Sawing Machine Co. *v.* Brown, 166 Fed. 306 451
Di Giovanni *v.* Camden Fire Ins. Assn., 296 U. S. 64 404
Dillingham *v.* McLaughlin, 264 U. S. 370 413
Dillon *v.* Strathearn S. S. Co., 248 U. S. 182 464
Director General *v.* Ronald, 265 Fed. 138 147
Di Santo *v.* Pennsylvania, 273 U. S. 34 328
Dixon *v.* The Cyrus, 2 Pet. Adm. 407 121
Dobson *v.* Wilson, 3 Camp. 480 489

Page.

Dohany *v.* Rogers, 281 U. S. 362 77
Donham *v.* West-Nelson Mfg. Co., 273 U. S. 657 617, 623
Dorchy *v.* Kansas, 264 U. S. 286 313, 334
Doss *v.* Tyack, 14 How. 297 170
Duplate Corporation *v.* Triplex Safety Glass Co., 42 F. (2d) 739 456
DuPont *v.* Commissioner, 289 U. S. 685 329
Eastern Class Rate Investigation, 164 I. C. C. 314 352
Easton Passenger Ry. *v.* Easton, 133 Pa. 505 16
Edelman *v.* Boeing Air Transport, 289 U. S. 249 405
Edison Electric Light Co. *v.* Peninsular Light Co., 101 Fed. 831 425
Edith Godden, The, 23 Fed. 43 121, 122
Eisner *v.* Macomber, 252 U. S. 189 444, 445
Ellis *v.* Interstate Commerce Comm'n, 237 U. S. 434 26
Emilia S. De Perez, The, 22 F. (2d) 585 489
Employers' Liability Assurance Corp. *v.* Cook, 281 U. S. 233 129
Entick *v.* Carrington, 19 Howell's St. Trials, 1030 28, 33
Ervin *v.* Alabama, 80 F. (2d) 432 400, 405
Eubank *v.* Richmond, 226 U. S. 137 312
Euclid *v.* Ambler Realty Co., 272 U. S. 365 288
Ex parte. See name of party.
Fairport, P. & E. R. Co. *v.* Meredith, 292 U. S. 589 146, 148
Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204 209, 210
Farmers & Mechanics Bank *v.* Minnesota, 232 U. S. 516 531

Page.

Farmington *v.* Pillsbury, 114 U. S. 138 183
Farrington *v.* Tokushige, 273 U. S. 284 438
Federal Compress Co. *v.* McLean, 291 U. S. 17 158
Federal Radio Comm'n *v.* Nelson Bros. Co., 289 U. S. 266 333
Federal Trade Comm'n *v.* American Tobacco Co., 264 U. S. 298 26
Federal Trade Comm'n *v.* Pacific States Paper Assn., 273 U. S. 52 174, 326
Federal Trade Comm'n *v.* Sinclair Rfg. Co., 261 U. S. 463 135
Feige *v.* Michigan Central R. Co., 62 Mich. 1 362
Fifteen Per Cent. Case, 45 I. C. C. 303 354
Fillippon *v.* Albion Vein Slate Co., 250 U. S. 76 348
First National Bank *v.* Maine, 284 U. S. 312 209, 210
Five Per Cent. Case, 31 I. C. C. 351; 32 I. C. C. 325 354
Flanagan *v.* Federal Coal Co., 267 U. S. 222 326
Flanigan *v.* Hines, 108 Kan. 133 147
Florida *v.* United States, 282 U. S. 194 74, 359, 477, 478, 480
Florida *v.* United States, 292 U. S. 1 51, 328, 377
Florida East Coast Ry. *v.* United States, 234 U. S. 167 75
Florida Fruit & Vegetable Shippers' Assn. *v.* Atlantic Coast Line, 14 I. C. C. 476 354
Folding Furniture Works *v.* Industrial Commission, 300 Fed. 991 618
Fong Yue Ting *v.* United States, 149 U. S. 698 295
443 Cans *v.* United States, 226 U. S. 172 440

Page.
Fox *v.* Washington, 236 U. S. 273 35
Frank *v.* Hicks, 4 Wyo. 502 584
Frank *v.* Mercantile National Bank, 182 N. Y. 264 165
Frank and Willie, The, 45 Fed. 494 121,122,129, 130, 131
Fredericks *v.* Huber, 180 Pa. 572 16
Frick *v.* Pennsylvania, 268 U. S. 473 209
Frisbie *v.* United States, 157 U. S. 160 633
Galveston Electric Co. *v.* Galveston, 258 U. S. 388 62, 63, 371
Garfield *v.* Goldsby, 211 U. S. 249 24, 370,
General Electric Co. *v.* Ohio Brass Co., 277 Fed. 917 425
General Interest Ins. Co. *v.* Ruggles, 12 Wheat. 408 225
General Motors Corp. *v.* United States, 286 U. S. 49 162
General Oil Co. *v.* Crain, 209 U. S. 211 177
Georgia Public Service Comm'n *v.* Atlantic Coast Line, 186 I. C. C. 157 377
Georgia Ry. Co. *v.* Decatur, 262 U. S. 432 640
Georgia Ry. & Power Co. *v.* Railroad Commission, 262 U. S. 625 76
German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389 628 632, 634
Gibbons *v.* Ogden, 9 Wheat. 1 298, 319
Gilbert *v.* David, 235 U. S. 561 184, 185
Gilvary *v.* Cuyahoga Valley Ry., 292 U. S. 57 146 148, 150, 152, 155
Glenwood Light Co. *v.* Mutual Light Co., 239 U. S. 121 181
Globe S. S. Co. *v.* Moss, 245 Fed. 54 122
Graham *v.* West Virginia, 224 U. S. 616 35
Graham & Foster *v.* Goodcell, 282 U. S. 409 414
Gray *v.* Rollo, 18 Wall. 629 165
Great Northern R. Co. *v.* Weeks, 297 U. S. 135 379
Green *v.* Neal's Lessee, 6 Pet. 291 609
Greene *v.* Darling, 5 Mason 201 165
Grimberg *v.* Admiral Oriental S. S. Line, 300 Fed. 619 123, 124
Grosjean *v.* Texas Co., 297 U. S. 697 637
Gully *v.* Interstate Natural Gas Co., 292 U. S. 16 440
Gunter *v.* Atlantic Coast Line, 200 U. S. 273 542
Haddox *v.* Richardson, 168 Fed. 635 463
Hagar *v.* Reclamation District, 111 U. S. 701 82
Hall *v.* Geiger-Jones Co., 242 U. S. 539 158, 628
Hallowell *v.* United States, 209 U. S. 101 162
Halverson *v.* Nisen, 3 Saw. 562 121, 122
Hamilton *v.* Kentucky Distilleries, 251 U. S. 146 327, 330
Hammer *v.* Dagenhart, 247 U. S. 251 295
Hammond Packing Co. *v.* Arkansas, 212 U. S. 322 640
Hanover National Bank *v.* Moyses, 186 U. S. 181 527, 535, 537, 542
Hanson *v.* Luckenbach S. S. Co., 65 F. (2d) 457 124, 128
Hans Rees' Sons *v.* North Carolina, 283 U. S. 123 208, 212
Hardware Dealers Mutual Fire Ins. Co. *v.* Glidden Co., 284 U. S. 151 80
Harriman *v.* Interstate Commerce Comm'n, 211 U. S. 407 26

Page.

Harvey Hubbell, Inc. *v.* General Electric Co., 267 Fed. 564 425
Hatch *v.* Reardon, 204 U. S. 152 35, 329, 330, 413, 540
Hawley *v.* Walker, 232 U. S. 718 633
Head Money Cases, 112 U. S. 580 326
Heald *v.* District of Columbia, 259 U. S. 114 227
Heald *v.* Rice, 104 U. S. 737 425
Healy *v.* Ratta, 292 U. S. 263 181
Heaton, The, 43 Fed. 592 121, 122
Hedley *v.* Pinkney & Sons S. S. Co., [1894] A. C. 222 122
Hegeman Farms Corp. *v.* Baldwin, 293 U. S. 163 634
Heisler *v.* Thomas Colliery Co., 260 U. S. 245 302
Helvering *v.* Minnesota Tea Co., 296 U. S. 378 447
Helvering *v.* Rankin, 295 U. S. 123 79
Henderson *v.* Carbondale Coal & Coke Co., 140 U. S. 25 170
Hendrick *v.* Maryland, 235 U. S. 610 410
Henry *v.* A. B. Dick Co., 224 U. S. 1 137
Hiawassee Power Co. *v.* Carolina-Tennessee Co., 252 U. S. 341 640
Hill *v.* Wallace, 259 U. S. 44 339
Hilton *v.* Merritt, 110 U. S. 97 79
Hirsch, *In re*, 97 Fed. 571 537
Holden *v.* Hardy, 169 U. S. 366 628
Hollingshead Co. *v.* Bassick Mfg. Co., 73 F. (2d) 543 416
Home Cab Co. *v.* Wichita, 295 U. S. 716 646
Hopkins *v.* Clemson College, 221 U. S. 636 543

Page.

Hopkins *v.* Southern California Tel. Co., 275 U. S. 393 404
Hopkins *v.* United States, 171 U. S. 578 298
Hopkins Federal Savings & Loan Assn. *v.* Cleary, 296 U. S. 315 538
Houck *v.* Little River Drainage District, 239 U. S. 254 528
Houston, E. & W. T. Ry. *v.* United States, 234 U. S. 342 532
Howard *v.* United States, 75 Fed. 986 465, 466
Howard Fire Insurance Co. *v.* Norwich & New York Transp. Co., 12 Wall. 194 542
Howarth *v.* U. S. Shipping Board E. F. Corp., 24 F. (2d) 374 124, 128
Hughes Bros. Co. *v.* Minnesota, 272 U. S. 469 175
Humphrey's Executor *v.* United States, 295 U. S. 602 81
Hunt *v.* N. Y. Cotton Exchange, 205 U. S. 322 181, 183
Illinois Commerce Comm'n *v.* United States, 292 U. S. 474 389
Imperial Irrigation District, *In re*, 10 F. Supp. 832 541
Indian Motocycle Co. *v.* United States, 283 U. S. 570 529
Indian Territory Co. *v.* Board of Equalization, 287 U. S. 573 638
Industrial Assn. *v.* United States, 268 U. S. 64 305
Ingraham *v.* Hanson, 297 U. S. 378 37
In re. See name of party.
Insurance Co. *v.* Dunham, 11 Wall. 1 489
International Harvester Co. *v.* Kentucky, 234 U. S. 216 609

Page.
International Postal Supply Co. *v.* Bruce, 194 U. S. 601 572
International Stevedoring Co. *v.* Haverty, 272 U. S. 50 130
International Textbook Co. *v.* Pigg, 217 U. S. 91 314, 316
Interstate Commerce Comm'n *v.* Brimson, 154 U. S. 447 33
Interstate Commerce Comm'n *v.* Diffenbaugh, 222 U. S. 42 75
Interstate Commerce Comm'n *v.* Louisville & N. R. Co., 227 U. S. 88 51, 359, 478, 480
Interstate Commerce Comm'n *v.* Northern Pacific Ry., 216 U. S. 538 75
InterstateCommerceComm'n *v.* Union Pacific R. Co., 222 U. S. 541 74, 319
Interstate Transit, Inc. *v.* Lindsey, 283 U. S. 183 410, 412
Ipswich, The, 46 F. (2d) 136 124
Iron Ore Rate Cases, 41 I. C. C. 181 377
Iroquois, The, 194 U. S. 240 122
Iselin *v.* United States, 270 U. S. 245 237
Ives *v.* United States 58 F. (2d) 201 124
Jackson, *Ex parte*, 96 U. S. 727 463
Jacobs *v.* Southern Ry. Co., 241 U. S. 229 119
Jacobson *v.* Massachusetts, 197 U. S. 11 292
Jamison *v.* Encarnacion, 281 U. S. 635 123
Jett Bros. Distilling Co. *v.* Carrollton, 252 U. S. 1 638
Jewell *v.* Knight, 123 U. S. 426 641, 645
Johnson *v.* Manhattan Ry. Co., 289 U. S. 479 605
Johnston *v.* Little Horse Creek Irrigating Co., 13 Wyo. 208 584

Page.
Jones *v.* Prairie Oil Co., 273 U. S. 195 609
Jones *v.* Securities & Exchange Comm'n, 298 U. S. 1 370, 643
Jones *v.* United States, 137 U. S. 202 295
Julia Fowler, The, 49 Fed. 277 121, 122
Kane *v.* New Jersey, 242 U. S. 160 410
Kansas *v.* Colorado, 185 U. S. 125 568
Kansas *v.* Colorado, 206 U. S. 46 293, 566, 568
Kansas *v.* United States, 204 U. S. 331 568
Kansas City Southern Ry. *v.* Albers Commission Co., 223 U. S. 573 74, 372
Karnuth *v.* United States, 279 U. S. 231 289
Keeney *v.* New York, 222 U. S. 525 413
Kelly *v.* Knott, 120 Fla. 580 547
Kentucky Railroad Tax Cases, 115 U. S. 321 80
Kidd *v.* Pearson, 128 U. S. 1 299, 302
Kilbourn *v.* Thompson, 103 U. S. 168 26
King *v.* Local Government Board [1914] 1 K. B. 160 482
King *v.* Mullins, 171 U. S. 404 80
King *v.* Talbot, 40 N. Y. 76 458
King Manufacturing Co. *v.* Augusta, 277 U. S. 100 363
Klein, *In re*, 1 How. 277, n. 536
Knights of Pythias *v.* Meyer, 265 U. S. 30 609
Knoxville *v.* Knoxville Water Co., 212 U. S. 1 378
Knoxville Iron Co. *v.* Harbison, 183 U. S. 13 628 633, 634
Kohler & Chase *v.* United American Lines, 60 F. (2d) 530 489

Page.
Konig *v.* M. & C. C. of Balto., 126 Md. 606 17
Kraemer *v.* Chicago & N. W. Ry., 148 Minn. 310 147
Kunzler *v.* Kohaus, 5 Hill 317 537
Lafourche Packet Co. *v.* Henderson, 94 Fed. 871 122
Lancashire Shipping Co. *v.* Elting, 70 F. (2d) 699, cert. den., 293 U. S. 594 225
Langan *v.* Warren Axe & Tool Co., 184 Fed. 720 425
Langer *v.* Grandin Farmers Coöperative Elevator Co., 292 U. S. 605 637
Larabee Flour Mills Co. *v.* First National Bank, 290 U. S. 594 641, 645
Larkin Automotive Parts Co. *v.* Bassick Mfg. Co., 19 F. (2d) 944 417
Larson Co. *v.* Wrigley Co., 277 U. S. 97 450
Lawther *v.* Hamilton, 64 Fed. 221 457
Lee *v.* New Jersey, 207 U. S. 67 35
Leeds & Catlin *v.* Victor Talking Machine Co., 213 U. S. 301 137, 425
Lehigh Valley R. Co. *v.* United States, 243 U. S. 412 438
Lehigh Valley R. Co. *v.* Utility Commissioners, 278 U. S. 24 369
Lemke *v.* Farmers Grain Co., 258 U. S. 50 326
Levin Bros. *v.* Davis Mfg. Co., 72 F. (2d) 163 453
Levy Leasing Co. *v.* Siegel, 258 U. S. 242 333, 632
Lewis *v.* New York, 289 U. S. 709 638
Lincoln County *v.* Luning, 133 U. S. 529 543
Lindgren *v.* United States, 281 U. S. 38 118, 121
Lindheimer *v.* Illinois Telephone Co., 292 U. S. 151 53, 66

Page.
Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61 35, 625
Lion Bonding Co. *v.* Karatz, 262 U. S. 77 183
Liverpool & L. & G. Ins. Co. *v.* Board of Assessors, 221 U. S. 346 210
Livingston's Executrix *v.* Story, 11 Pet. 351 183
Lizzie Frank, The, 31 Fed. 477 121
Local Government Board *v.* Arlidge [1915] A. C. 120 482
Lockwood *v.* Beckwith, 6 Mich. 168 165
Lombard *v.* Lombard, 57 Miss. 171 362
Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685 78
Los Angeles Gas Corp. *v.* Railroad Commission, 289 U. S. 287 51, 53, 62, 67, 372, 379
Louisiana *v.* McAdoo, 234 U. S. 627 572
Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555 527, 535, 536, 537
Louisville & N. R. Co. *v.* Behlmer, 175 U. S. 648 174
Louisville & N. R. Co. *v.* Garrett, 231 U. S. 298 356, 479
Lyman Mfg. Co. *v.* Bassick Mfg. Co., 18 F. (2d) 29 417
MacBeth Evans Glass Co. *v.* Smith Glass Co., 21 F. (2d) 553 453, 455
Mahler *v.* Eby, 264 U. S. 32 333
Ma-King Co. *v.* Blair, 271 U. S. 479 76
Manhattan General Equipment Co. *v.* Commissioner, 297 U. S. 129 447
Manke *v.* People, 74 N. Y. 415 464
Mantle Lamp Co. *v.* Aluminum Products Co., 297 U. S. 638 162, 641, 645

Page.
Manufacturers Ry. Co. *v.* United States, 246 U. S. 457 53, 76, 82, 359, 372
Marcus Brown Co. *v.* Feldman, 256 U. S. 170 333, 632
Marr *v.* United States, 268 U. S. 536 445
Martin *v.* Hunter's Lessee, 1 Wheat. 304 292
Masjulis *v.* U. S. Shipping Board E. F. Corp., 31 F. (2d) 284 124
Matthews *v.* Clark, 105 S. C. 13 362
Mattingly *v.* Northwestern V. R. Co., 158 U. S. 553 440
McCardle *v.* Indianapolis Water Co., 272 U. S. 400 378
McCaughn *v.* Hershey Chocolate Co., 283 U. S. 488 445
McCluskey *v.* Marysville & Northern Ry. Co., 243 U. S. 36 175
McCulloch *v.* Maryland, 4 Wheat. 316 291, 531, 538
McDowell *v.* Peyton, 10 Wheat. 454 362
McFadden & Bros. *v.* Alabama Great Southern R. Co., 241 Fed. 562 177
McFeely *v.* Commissioner, 296 U. S. 102 445
McGowan *v.* Columbia River Packers' Assn., 245 U. S. 352 20, 643
McGrath Holding Corp. *v.* Anzell, 58 F. (2d) 205 137
McKee Glass Co. *v.* Fry Glass Co., 248 Fed. 125 452, 458
McLean *v.* Arkansas, 211 U. S. 539 628, 633, 634
McMahon *v.* Montour R. Co., 270 U. S. 628 148
McMillen *v.* Anderson, 95 U. S. 37 77
McNally *v.* Hill, 293 U. S. 131 465
McNutt *v.* General Motors Acceptance Corp., 298 U. S. 178 191, 192

Page.
McPhail *v.* Forney, 4 Wyo. 566 584
Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608 640
Meeker *v.* Lehigh Valley R. Co., 236 U. S. 412 359
Meigs *v.* Milligan, 177 Pa. 66 16
Mellon *v.* Michigan Trust Co., 271 U. S. 236 547, 548
Metcalf & Eddy *v.* Mitchell, 269 U. S. 514 406
Metropolitan Life Ins. Co. *v.* New Orleans, 205 U. S. 395 210
Meyer *v.* Nebraska, 262 U. S. 390 617
Middleton *v.* Texas Power & Light Co., 249 U. S. 152 645
Miles *v.* Safe Deposit & Trust Co., 259 U. S. 247 448
Miller *v.* Aderhold, 288 U. S. 206 464
Miller *v.* Reading Co., 292 Pa. 44 147
Miller *v.* Wilson, 236 U. S. 373 630, 633
Minneapolis, St. P. & S. S. M. Ry. *v.* Popplar, 237 U. S. 369 146
Minnesota *v.* Northern Securities Co., 184 U. S. 199 572
Minnesota *v.* Northern Securities Co., 194 U. S. 48 440
Minnesota Rate Cases, 230 U. S. 352 51, 59, 158, 319, 378
Mintz *v.* Baldwin, 289 U. S. 346 158
Missouri *v.* Illinois, 200 U. S. 496 568
Missouri *ex rel.* S. W. Bell Tel. Co. *v.* Public Service Comm'n, 262 U. S. 276 92
Missouri Rate Cases, 230 U. S. 474 378
Mitchell *v.* Maurer, 293 U. S. 237 440

Page.
Monongahela Navigation Co. *v.* United States, 148 U. S. 312 365
Moore *v.* Chesapeake & Ohio Ry., 291 U. S. 205 146, 148, 150, 152
Moran *v.* Loudoun National Bank, 297 U. S. 698 640
Morf *v.* Bingaman, 298 U. S. 407 643
Morgan *v.* United States, 8 F. Supp. 766 363
Morgan Envelope Co. *v.* Albany Paper Co., 152 U. S. 425 425
Morris *v.* Gilmer, 129 U. S. 315 184, 440
Morrissey *v.* Commissioner, 296 U. S. 344 447
Motion Picture Patents Co. *v.* Universal Film Co., 243 U. S. 502 136
Mountain Timber Co. *v.* Washington, 243 U. S. 219 635, 645
Mowry *v.* Whitney, 14 Wall. 620 459
Mugler *v.* Kansas, 123 U. S. 623 228
Muller *v.* Oregon, 208 U. S. 412 630, 633
Munn *v.* Illinois, 94 U. S. 113 294, 632, 634
Murphy *v.* Sardell, 269 U. S. 530 617, 623
Murray's Lessee *v.* Hoboken Land & Imp. Co., 18 How. 272 77, 364
Mutual Loan Co. *v.* Martell, 222 U. S. 225 633
Mutual Transit Co. *v.* United States, 178 Fed. 664 174
Nashville, C. & St. L. Ry. *v.* Wallace, 288 U. S. 249 405
National Fire Ins. Co. *v.* Thompson, 281 U. S. 331 438
Near *v.* Minnesota, 283 U. S. 697 617
Nebbia *v.* New York, 291 U. S. 502 319, 327, 330, 332, 625, 628, 632, 634

Page.
New Berne, The, 80 F. (2d) 244 124
New England Divisions Case, 261 U. S. 184 74, 357, 370
New Haven Clock Co. *v.* Kochersperger, 175 Ill. 383 17
New Jersey *v.* New York, 283 U. S. 336 568
New Orleans *v.* Stempel, 175 U. S. 309 210
New York *v.* Kleinert, 268 U. S. 646 646
New York *v.* Maclay, 288 U. S. 290 549
New York Central R. Co. *v.* White, 243 U. S. 188 634, 635, 645
New York Central Securities Corp. *v.* United States, 287 U. S. 12 333
New York & Queens Gas Co. *v.* McCall, 245 U. S. 345 76
Ng Fung Ho *v.* White, 259 U. S. 276 77
Nishimura Ekiu *v.* United States, 142 U. S. 651 295
Noddleburn, The, 28 Fed. 855 121, 122
Nogueira *v.* New York, N. H. & H. R. Co., 281 U. S. 128 129
Norfolk & Western R. Co. *v.* North Carolina, 297 U. S. 682 458
Norris *v.* Alabama, 294 U. S. 587 372
Norris *v.* Montezuma Valley Irrigation District, 248 Fed. 369 543
North Chicago Rolling Mill Co. *v.* St Louis Ore & Steel Co., 152 U. S. 596 165
Northern Coal & Dock Co. *v.* Strand, 278 U. S. 142 129
Northern Pacific Ry. *v.* Department of Public Works, 268 U. S. 39 75

Page.
Northern Pacific Ry. *v.* North Dakota, 216 U. S. 579 378
North Pacific S. S. Co. *v.* Soley, 257 U. S. 216 184, 186
Norton *v.* Rich, Fed. Cas. No. 10,352 466
Ogden *v.* Saunders, 12 Wheat. 213 540
O'Gorman & Young, *v.* Hartford Fire Ins. Co., 282 U. S. 251 83, 625, 628, 634
Ohio Railroad Comm'n *v.* Worthington, 225 U. S. 101 174
Ohio Utilities Co. *v.* Utilities Commission, 267 U. S. 359 369
Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287 49, 76, 82, 369
Oklahoma Operating Co. *v.* Love, 252 U. S. 331 82
Old Mission Portland Cement Co. *v.* Helvering, 293 U. S. 289 79
Oliver *v.* Piatt, 3 How. 333 458
Oliver Iron Co. *v.* Lord, 262 U. S. 172 302
Olson *v.* Flavel, 34 Fed. 477 121, 122, 129
Olson *v.* United States, 292 U. S. 246 345
Oregon R. & N. Co. *v.* Fairchild, 224 U. S. 510 369, 372
Oregon-Washington R. & N. Co. *v.* Strauss & Co., 73 F. (2d) 912 176
Osceola, The, 189 U. S. 158 120, 121, 128, 129
Ownbey *v.* Morgan, 256 U. S. 94 640
Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555 555–557
Pacific Gas Co. *v.* San Francisco, 265 U. S. 403 378
Pacific Ry. Comm'n, *In re*, 32 Fed. 241 26, 28, 33
Page.
Pacific States Box & Basket Co. *v.* White, 296 U. S. 176 83
Pacific S. S. Co. *v.* Peterson, 278 U. S. 130 119, 120, 121
Page Machine Co. *v.* Dow, Jones & Co., 238 Fed. 369 455
Palmer *v.* McCafferty, 15 Cal. 334 346
Panama R. Co. *v.* Johnson, 264 U. S. 375 119
Panama R. Co. *v.* Johnson, 289 Fed. 964 122
Pan American Petroleum Corp. *v.* Alabama, 67 F. (2d) 590 400, 405
Panhandle Oil Co. *v.* Knox, 277 U. S. 218 395, 398, 401, 405
Passavant *v.* United States, 148 U. S. 214 79
Patterson *v.* Bark Eudora, 190 U. S. 169 628, 634
Pecor *v.* Norton-Lilly Co., 111 Cal. App. 241 154
Pennsylvania *v.* West Virginia, 262 U. S. 553 287
Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477 158
Pennsylvania R. Co. *v.* McGirr's Sons Co., 287 Fed. 334 175
People *v.* Successors of Laurnaga & Co., 32 P. R. 766 618
People *ex rel.* McLaughlin *v.* Cross Co., 361 Ill. 405 157
Perez *v.* Fernandez, 202 U. S. 80 440
Permutit Co. *v.* Refinite Co., 27 F. (2d) 695 458
Perry *v.* United States, 294 U. S. 330 528, 531
Petersen Baking Co. *v.* Bryan, 290 U. S. 570 628
Peterson *v.* The Chandos, 4 Fed. 645 122
Phelps *v.* United States, 274 U. S. 341 367
Phillips *v.* Commissioner, 283 U. S. 589 49, 77, 369

Page.

Pick Mfg. Co. *v.* General Motors Corp., 80 F. (2d) 641 140
Pierce *v.* Society of Sisters, 268 U. S. 510 288, 339, 547
Pipe Line Cases, 234 U. S. 548 175
Pittsburgh, C., C. & St. L. Ry. *v.* Backus, 154 U. S. 421 77
Pittsburgh S. S. Co. *v.* Palo, 64 F. (2d) 198 124
Plamals *v.* S. S. Pinar del Rio, 277 U. S. 151 121
Poe *v.* Seaborn, 282 U. S. 101 445
Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601 530
Pond *v.* Harwood, 139 N. Y. 111 165
Premier-Pabst Sales Co. *v.* Grosscup, 298 U. S. 226 330, 540
Prendergast *v.* N. Y. Telephone Co., 262 U. S. 43 49, 369
Prentiss *v.* Atlantic Coast Line, 211 U. S. 210 356
Price *v.* Illinois, 238 U. S. 446 35
Price *v.* Noble, 4 Taunt. 123 489
Price *v.* United States, 269 U. S. 492 547
Procter & Gamble *v.* United States, 225 U. S. 282 438
Public Utilities Comm'n *v.* Attleboro Steam & Elec. Co., 273 U. S. 83 326
Pullman's Car Co. *v.* Transportation Co., 171 U. S. 138 19, 643
Quarles, *In re*, 158 U. S. 532 530
Quong Wing *v.* Kirkendall, 223 U. S. 59 629, 630
Radice *v.* New York, 264 U. S. 292 83, 625, 630
Radio Corporation *v.* Lord, 28 F. (2d) 257 140, 425
Rahrer, *In re*, 140 U. S. 545 540

Page.

Railroad Commissioners *v.* Aberdeen & Rockfish R. Co., 144 I. C. C. 603 385
Railroad Retirement Board *v.* Alton R. Co., 295 U. S. 330 313, 335
Ralli *v.* Troop, 157 U. S. 386 489
Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362 365
Red Cross Line *v.* Atlantic Fruit Co., 264 U. S. 109 152
Reetz *v.* Michigan, 188 U. S. 505 77
Ribnik *v.* McBride, 277 U. S. 350 617, 634
Riggs *v.* Pursell, 74 N. Y. 370 466
Riley *v.* Massachusetts, 232 U. S. 671 630, 633
Rio Grande Irrigation Co. *v.* Gildersleeve, 174 U. S. 603 465
Risty *v.* Chicago, R. I. & P. Ry., 270 U. S. 378 404
Roberts *v.* Lewis, 144 U. S. 653 183, 186, 188
Roberts & Schaefer Co. *v.* Emmerson, 271 U. S. 50 413
Robinson *v.* Robins Dry Dock & Repair Co., 238 N. Y. 271 540
Rockefeller *v.* United States, 257 U. S. 176 445
Rodgers *v.* United States, 185 U. S. 83 414
Roebling's (John A.) Sons Co. *v.* Erickson, 261 Fed. 986 122
Rogers *v.* Alemite Corporation, 74 F. (2d) 1019 416
Rogers *v.* Brent, 10 Ill. 573 347
Rolette *v.* Rothstein Dental Laboratories, 289 U. S. 736 645
Ross *v.* Schooley, 257 Fed. 290 147
Rubber Co. *v.* Goodyear, 9 Wall. 788 453
St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38 319, 364, 367, 372, 389, 392, 477, 604

Page.
St. Joseph Stock Yards Co. *v.* United States, 58 F. (2d) 290 50, 55, 85, 363
St. Joseph Stockyards Co. *v.* United States, 11 F. Supp. 322 363
St. Louis, I. M. & S. Ry. *v.* Taylor, 210 U. S. 281 146
St. Louis & O'Fallon Ry. *v.* United States, 279 U. S. 461 75, 76, 359
San Diego Land & Town Co. *v.* Jasper, 189 U. S. 439 51, 74, 80
San Fernando, The, *v.* Jackson, 12 Fed. 341 489
Santa Anna Maria, The, 49 Fed. 878 491
Savage *v.* Jones, 225 U. S. 501 320
Sawyer *v.* Hoag, 17 Wall. 610 165
Scammon *v.* Kimball, 92 U. S. 362 165
Schechter Poultry Corp. *v.* United States, 295 U. S. 495 297, 304, 306, 307, 309, 311, 316, 327, 337
Scheffler *v.* Moran Towing & Transp. Co., 68 F. (2d) 11 130
Schlemmer *v.* Buffalo, R. & P. Ry., 220 U. S. 590 146
Schmidinger *v.* Chicago, 226 U. S. 578 628
Schmidt *v.* Merchants Despatch Transp. Co., 270 N. Y. 287 639
Scott *v.* Armstrong, 146 U. S. 499 165
Seaboard Air Line Ry. *v.* Horton, 233 U. S. 492 119, 123, 130
Seaboard Air Line *v.* United States, 261 U. S. 299 366
Seattle Trust Co. *v.* Roberge, 278 U. S. 116 312
Second Employers' Liability Cases, 223 U. S. 1 317
Page.
74, *Ex parte*, 58 I. C. C. 220 354
Sheppard *v.* Graves, 14 How. 505 183
Sherlock *v.* Alling, 93 U. S. 99 158
Shreveport Case, 234 U. S. 342 320, 328
Sieber *v.* Frink, 7 Colo. 148 584
Silberschein *v* United States, 266 U. S. 221 76
Simonds *v.* White, 2 Barn. & Cress. 805 489
Sinking-Fund Cases, 99 U. S. 700 540
Skinner & Eddy Corp., *Ex parte*, 265 U. S. 93 18, 20, 21, 643
Skolar *v.* Lehigh Valley R. Co., 60 F. (2d) 893 130
Sligh *v.* Kirkwood, 237 U. S. 52 158
Sloss-Sheffield Steel & Iron Co. *v.* Louisville & N. R. Co., 30 I. C. C. 597 377
Smith *v.* Ajax Pipe Line Co., 298 U. S. 641 645
Smith *v.* Illinois Bell Tel. Co., 282 U. S. 133 371
Smith *v.* Mississippi, 162 U. S. 592 646
Smithson *v.* Atchison, T. & S. F. Ry., 174 Cal. 148 149
Smyth *v.* Ames, 169 U. S. 466 85, 92
South Covington & C. St. Ry. *v.* Covington, 235 U. S. 537 158
Southern Pacific Co. *v.* Darnell-Taenzer Co., 245 U. S. 531 542
Southern Pacific Co. *v.* Henderson, 208 S. W. 561 147
Southern Pacific Terminal Co. *v.* Interstate Commerce Comm'n, 219 U. S. 498 175, 177
Southern Ry. Co. *v.* King, 217 U. S. 524 640
Southern Ry. Co. *v.* United States, 222 U. S. 20 146

Page.

Southwestern Bell Tel. Co. *v.* Public Service Comm'n, 262 U. S. 276 71
Spokane County *v.* United States, 279 U. S. 80 549
Stafford *v.* Wallace, 258 U. S. 495 45, 59, 305
Standard Oil Co. *v.* United States, 283 U. S. 235 438
Standard Oil Co. *v.* United States, 179 Fed. 614 174
Standard Stock Food Co. *v.* Wright, 225 U. S. 540 640
Starr Piano Co. *v.* Auto Pneumatic Action Co., 12 F. (2d) 586 458
State *v.* Knott, 114 Fla. 95 550
State *v.* Montgomery, 228 Ala. 93 400, 405
State *v.* Vaughan, 71 Conn. 457 464
State Corporation Comm'n *v.* Wichita Gas Co., 290 U. S. 561 49, 369
State Railroad Tax Cases, 92 U. S. 575 80
States S. S. Co. *v.* Berglann, 41 F. (2d) 456 123, 124
Steigleder *v.* McQuesten, 198 U. S. 141 184
Stellwagen *v.* Clum, 245 U. S. 605 542
Stettler *v.* O'Hara, 243 U. S. 629 624
Stevens *v.* O'Brien & Co., 62 F. (2d) 632 124
Stevenson *v.* St. Clair, 161 Minn. 444 618
Stickney *v.* Wilt, 23 Wall. 150 440
Storgard *v.* France & Canada S. S. Corp., 263 Fed. 545 122
Strang, Steel & Co. *v.* Scott & Co., L. R. 14 A. C. 601 489
Stratton *v.* St. Louis S. W. Ry., 282 U. S. 10 440
Stratton's Independence *v.* Howbert, 231 U. S. 399 464
Strickler *v.* Colorado Springs, 16 Colo. 61 584

Page.

Stromberg Motor Devices Co. *v.* Detroit Trust Co., 44 F. (2d) 958 453
Studley *v.* Boylston National Bank, 229 U. S. 523 165
Sturges *v.* Crowninshield, 4 Wheat. 122 531
Sugar From Key West, 112 I. C. C. 347 377
Sugar Institute *v.* United States, 297 U. S. 553 331, 332
Surgess *v.* Cary, Fed. Cas. No. 13,572 489
Swift & Co. *v.* United States, 196 U. S. 375 305, 306
Swift & Co. *v.* United States, 276 U. S. 311 288
Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420 45, 49, 51, 56, 73, 75, 109, 333, 369, 428, 434, 477
Tang Tun *v.* Edsell, 223 U. S. 673 77
Tarrance *v.* Florida, 188 U. S. 519 646
Terminal Railroad Assn. *v.* United States, 266 U. S. 17 356
Terminal Taxicab Co. *v.* District of Columbia, 241 U. S. 252 632
Terrace *v.* Thompson, 263 U. S. 197 288, 339
Texas *v.* Interstate Commerce Comm'n, 258 U. S. 158 572
Texas *v.* White, 7 Wall. 700 295, 528
Texas & New Orleans Ry. *v.* Northside Belt Ry., 276 U. S. 475 107
Texas & New Orleans Ry. *v.* Railway Clerks, 281 U. S. 548 317
Texas & New Orleans Ry. *v.* Sabine Tram Co., 227 U. S. 111 175, 176
Texas & Pacific Ry. *v.* Gulf, C. & S. F. Ry., 270 U. S. 266 107, 110
Texas & Pacific Ry. *v.* Rigsby, 241 U. S. 33 146, 147, 152

Page.

Thelusson *v.* Smith, 2 Wheat. 396 549
Tiffany, *Ex parte*, 252 U. S. 32 551
Tilghman *v.* Proctor, 125 U. S. 136 459
Topeka Laundry Co. *v.* Industrial Court, 119 Kan. 12 617
Towne *v.* Eisner, 245 U. S. 418 443
Trainor *v.* Baker, 89 N. Y. 460 464, 465, 466
Treat *v.* Los Angeles Gas & Electric Corp., 60 Cal. App. 466 154
Treat *v.* Los Angeles Gas & Electric Corp., 82 Cal. App. 610 154
Trinityfarm Construction Co. *v.* Grosjean, 291 U. S. 466 406
Troy Wagon Works *v.* Ohio Trailer Co., 274 Fed. 612 425
Turney *v.* Shriver, 269 Ill. 164 17
Tyler *v.* Judges, 179 U. S. 405 640
Tyler *v.* United States, 281 U. S. 497 289
Tyler County *v.* Town, 23 F. (2d) 371 543
Tyson & Bros. *v.* Banton, 273 U. S. 418 634
Underwood *v.* Gerber, 149 U. S. 224 425
Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113 212
Union Electric Welding Co. *v.* Curry, 279 Fed. 465 455
Union Pacific R. Co. *v.* Public Service Comm'n, 248 U. S. 67 372
Union Pacific R. Co. *v.* Weld County, 247 U. S. 282 404
Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194 209, 210
Union Stock Yards Co. *v.* United States, 9 F. Supp. 864 50, 363

Page.

United Fuel Gas Co. *v.* Public Service Comm'n, 278 U. S. 322 438
United Railways *v.* West, 280 U. S. 234 49, 369
United Shoe Machinery Co. *v.* United States, 258 U. S. 451 135, 137, 138, 140
United States *v.* Abilene & Southern Ry., 265 U. S. 274 75, 357, 359, 370, 477, 478, 480
United States *v.* Arizona, 295 U. S. 174 561, 570
United States *v.* Atlanta, B. & C. R. Co., 282 U. S. 522 438
United States *v.* Babcock, 250 U. S. 328 77
United States *v.* Baltimore & Ohio R. Co., 293 U. S. 454 359, 478, 480
United States *v.* Bennett, 232 U. S. 299 209
United States *v.* Boykin, 49 F. (2d) 762 124
United States v. Butler, 297 U. S. 1 292, 289, 531, 532
United States *v.* Butterworth-Judson Corp., 269 U. S. 504 552
United States *v.* California, 297 U. S. 175 538, 540
United States *v.* Columbus Marine Corp., 62 F. (2d) 795 224
United States *v.* Constantine, 296 U. S. 287 289, 531
United States *v.* Delaware & Hudson R. Co., 213 U. S. 366 499, 501, 503, 512
United States *v.* Delaware, L. & W. R. Co., 238 U. S. 516 499, 500, 501, 504
United States *v.* E. C. Knight Co., 156 U. S. 1 300
United States *v.* Erie R. Co., 280 U. S. 98 175
United States *v.* Ferger, 250 U. S. 199 334
United States *v.* Guaranty Trust Co., 280 U. S. 478 548

Page.
United States *v.* Hall, 131 U. S. 50 162
United States *v.* Hooe, 3 Cranch 73 552
United States *v.* Huckabee, 16 Wall. 414 440
United States *v.* Idaho, 298 U. S. 105 372
United States *v.* Illinois Central R. Co., 244 U. S. 82 438
United States *v.* J. H. Winchester & Co., 40 F. (2d) 472 224
United States *v.* Jones, 109 U. S. 513 79
United States *v.* Ju Toy, 198 U. S. 253 77
United States *v.* La Franca, 282 U. S. 568 289
United States *v.* Lehigh Valley R. Co., 220 U. S. 257 499
United States *v.* Lehigh Valley R. Co., 254 U. S. 255 499
United States *v.* Louisiana, 290 U. S. 70 328
United States *v.* Mack, 295 U. S. 480 547
United States *v.* Mayer, 235 U. S. 55 162, 163, 641, 645
United States *v.* New River Co., 265 U. S. 533 358
United States *v.* New River Collieries Co., 262 U. S. 341 367
United States *v.* Northern Pacific Ry., 288 U. S. 490 49, 389, 433
United States *v.* Oklahoma, 261 U. S. 253 549, 552
United States *v.* Phellis, 257 U. S. 156 445
United States *v.* Railroad Co., 17 Wall. 322 529
United States *v.* Reading Co., 253 U. S. 26 499, 504
United States *v.* River Rouge Co., 269 U. S. 411 348
United States *v.* Stevenson, Fed. Cas. No. 16,395 466
United States *v.* The Peggy, 1 Cranch 103 539

Page.
United States *v.* United Shoe Machinery Co., 247 U. S. 33 137, 138
United States *v.* United Shoe Machinery Co., 264 Fed. 138 140
United States *v.* U. S. Steel Corp., 251 U. S. 417 503, 505
United States *v.* Wampler, 10 F. Supp. 609 465
United States *v.* Weitzel, 246 U. S. 533 237
United States *v.* Worley, 281 U. S. 339 163
U. S. Shipping Board E. F. Corp. *v.* O'Shea, 55 App. D. C. 300 123, 124
Uravic *v.* Jarka Co., 282 U. S. 234 129
Utah Power & Light Co. *v.* Pfost, 286 U. S. 165 303, 312, 321, 334
Valdarno, The, 11 F. (2d) 35 128
Vance *v.* Vandercook Co. (No. 2), 170 U. S. 468 183
Van Dyke *v.* Geary, 244 U. S. 39 84
Veazie *v.* Moor, 14 How. 568 298
Veazie *v.* Wadleigh, 11 Pet. 55 20
Violet Trapping Co. *v.* Grace, 297 U. S. 119 37
Virginia *v.* Imperial Coal Sales Co., 293 U. S. 15 213
Virginian Ry. Co. *v.* United States, 272 U. S. 658 51, 76
Von Joel *v.* Hornsey, L. R. [1895] 2 Ch. 774 16
Vulcan Sheet Metal Co. *v.* North Platte Valley Irrigation Co., 220 Fed. 106 537
Wabash Valley Electric Co. *v.* Young, 287 U. S. 488 67
Wagner *v.* United States, 3 F. (2d) 864 464, 465
Wagner Typewriter Co. *v.* Webster Co., 144 Fed. 405 425
Wall Pump & C. Co. *v.* Gardner Governor Co., 28 F. (2d) 334 425

Page.

Walton *v.* Southern Pacific Co., 8 Cal. App. (2d) 290 150
Wanderer, The, 20 Fed. 140 122
Ward *v.* Erie R. Co., 230 N. Y. 230 147
Ware & Leland *v.* Mobile County, 209 U. S. 405 158
Warner *v.* Goltra, 293 U. S. 155 123
Washington *v.* Superior Court, 289 U. S. 361 640
Wavertree Sailing Ship Co. *v.* Love, L. R. (1897) A. C. 373 491
Webster *v.* Cooper, 10 How. 54 162
Weil *v.* Neary, 278 U. S. 160 465
Wells (W. L.) Co. *v.* Gastonia Cotton Co., 198 U. S. 177 184
Welton *v.* Missouri, 91 U. S. 275 298
Wenonah, The, 1 Hask. 606 121
West *v.* Chesapeake & Potomac Telephone Co., 295 U. S. 662 50, 367
Western Indemnity Co. *v.* Pillsbury, 170 Cal. 686 154
Western Paper Makers Chemical Co. *v.* United States, 271 U. S. 268 75
Westinghouse Electric Co. *v.* Wagner Electric Co., 225 U. S. 604 457, 458
West Ohio Gas Co. *v.* Public Utilities Comm'n, 294 U. S. 79 71
Wetmore *v.* Rymer, 169 U. S. 115 184

Page.

Wheeler Lumber Co. *v.* United States, 281 U. S. 572 405, 406
Wheeling Steel Corporation Assessment, *In re,* 115 W. Va. 553 205
White *v.* Johnson, 282 U. S. 367 162, 163
White River Co. *v.* Arkansas, 279 U. S. 692 641
Whitfield *v.* Ohio, 297 U. S. 431 540
Whitney *v.* California, 274 U. S. 357 641, 646
Willcutt & Sons Co. *v.* Driscoll, 200 Mass. 110 362
Williams *v.* Eggleston, 170 U. S. 304 362
Williams *v.* Great Southern Lumber C., 277 U. S. 19 348
Williams *v.* Standard Oil Co., 278 U. S. 235 312
Wilson, *Ex parte,* 114 U. S. 417 465, 467
Wilson *v.* Daniel, 3 Dall. 401 182
Wisconsin *v.* Illinois, 278 U. S. 367 570
Wisconsin Railroad Comm'n *v.* Chicago, B. & Q. R. Co., 257 U. S. 563 320, 328
Wolff Packing Co. *v.* Industrial Court, 262 U. S. 522 617
Wood *v.* Vandalia R. Co., 231 U. S. 1 377
Wyoming *v.* Colorado, 259 U. S. 419 566, 568
Young, *Ex parte,* 209 U. S. 123 285, 341
Zinnel *v.* U. S. Shipping Board E. F. Corp., 10 F. (2d) 47 124, 128

TABLE OF STATUTES

Cited in Opinions

(A) STATUTES OF THE UNITED STATES

Page.

1872, June 1, c. 255, 17 Stat. 196, 197..... 183
1874, June 9, c. 260, 18 Stat. 64..... 128
1875, Mar. 3, c. 137, 18 Stat. 470, 472..... 187
1875, Mar. 3, c. 137, § 5, 18 Stat. 470..... 182
1887, Feb. 4, c. 104, §§ 1, 15, 24 Stat. 379, as amended..... 351–392
1893, Mar. 2, c. 196, 27 Stat. 531..... 145
1898, July 1, c. 541, 30 Stat. 544..... 524
1903, Mar. 2, c. 976, 32 Stat. 943..... 145
1906, June 29, c. 3591, 34 Stat. 584, 585..... 498
1908, Apr. 22, c. 149, 35 Stat. 65..... 99, 128, 149
1908, Apr. 22, c. 149, 35 Stat. 65, 66..... 131
1908, Apr. 22, c. 149, § 1, 35 Stat. 65..... 118
1910, June 18, c. 309, § 1, 36 Stat. 539..... 438
1910, June 18, c. 309, § 3, 36 Stat. 539..... 110
1910, Apr. 5, c. 143, 36 Stat. 291..... 149
1910, Apr. 14, c. 160, 36 Stat. 298..... 145
1913, Mar. 1, c. 92, 37 Stat. 701 391
1913, Oct. 3, c. 16, 38 Stat. 114..... 443
1913, Oct. 22, c. 32, 38 Stat. 208... 110, 382, 438

Page.

1913, Oct. 22, c. 32, 38 Stat. 208, 219..... 477
1914, Oct. 15, c. 323, § 3, 38 Stat. 730..... 132–140
1916, Sept. 8, c. 463, 39 Stat. 756..... 444
1918, Sept. 19, c. 174, 40 Stat. 960..... 603–636
1919, Feb. 24, c. 18, 40 Stat. 1057..... 444
1920, Feb. 28, c. 91, § 402, 41 Stat. 456..... 106
1920, June 5, c. 250, 41 Stat. 988, 1007..... 115, 127
1920, June 5, c. 250, §§ 3, 4, 41 Stat. 988..... 119
1920, June 5, c. 250, § 33, 41 Stat. 988..... 118
1921, Aug. 15, c. 64, 42 Stat. 159..... 45, 427, 436, 471
1921, Aug. 15, c. 64, § 306, 42 Stat. 159..... 439
1921, Aug. 15, c. 64, § 310, 42 Stat. 159. 439, 473, 481
1921, Aug. 15, c. 64, § 316, 42 Stat. 159.... 438, 477
1921, Nov. 23, c. 136, § 201 (d), 42 Stat. 227.... 444
1922, Sept. 21, c. 369, § 6 (b), 42 Stat. 998.. 234–237
1924, May 26, c. 190, § 20, 43 Stat. 153..... 222
1924, June 2, c. 234, § 201 (f), 43 Stat. 253.... 444
1924, June 7, c. 355, § 2, 43 Stat. 659..... 100
1925, Feb. 13, c. 229, 43 Stat. 936..... 638, 644

Page.
1926, Feb. 26, c. 27, § 201 (f), 44 Stat. 9..... 444
1926, July 2, c. 723, § 2, 44 Stat. 790..... 98
1928, May 29, c. 852, §§ 111 (a), 113, 45 Stat. 791..... 446
1928, May 29, c. 852, § 115 (f), 45 Stat. 791.. 443, 444
1928, Dec. 21, c. 42, 45 Stat. 1057..... 560
1928, Dec. 21, c. 42, § 1, 45 Stat. 1057.. 561, 565, 569
1928, Dec. 21, c. 42, § 4 (a), 45 Stat. 1057..... 571
1928, Dec. 21, c. 42, § 5, 45 Stat. 1057.. 564, 569, 571
1928, Dec. 21, c. 42, §§ 6, 8 (a), 45 Stat. 1057.. 569
1930, June 10, c. 436, 46 Stat. 531..... 158
1930, June 10, c. 436, § 15, 46 Stat. 531..... 159
1932, June 6, c. 209, § 115 (f), 47 Stat. 169.... 444
1933, Mar. 3, c. 204, § 68 (a), 47 Stat. 1467.... 163
1933, Mar. 3, c. 204, § 77, 47 Stat. 1467.... 161, 536
1933, Mar. 3, c. 204, § 77 (c) (7), 47 Stat. 1467 164
1933, Mar. 31, c. 3, §§ 4, 7, 48 Stat. 9..... 97
1933, May 27, c. 38, 48 Stat. 74..... 9
1933, May 27, c. 38, § 2 (4), 48 Stat. 74..... 10
1933, May 27, c. 38, § 5 (a), 48 Stat. 74..... 10, 18
1933, May 27, c. 38, § 6 (a), 48 Stat. 74..... 10, 12
1933, May 27, c. 38, § 8 (a), (d), 48 Stat. 74.. 10, 12, 15
1933, May 27, c. 38, § 8 (e), 48 Stat. 74..... 11, 29
1933, May 27, c. 38, § 12, 48 Stat. 74..... 30
1933, May 27, c. 38, § 19 (b), 48 Stat. 74.... 11, 25, 29, 30
1933, May 27, c. 38, § 22 (b), 48 Stat. 74..... 11

Page.
1933, May 27, c. 38, § 22 (c), 48 Stat. 74..... 31
1933, May 27, c. 38, § 24, 48 Stat. 74..... 18, 30
1934, May 10, c. 277, § 115 (f), 48 Stat. 680.... 444
1934, May 24, c. 345, §§ 78, 79, 80, 48 Stat. 798.. 523, 524, 534
1934, June 6, c. 404, 48 Stat. 881..... 9
1934, June 6, c. 404, § 210, 48 Stat. 881..... 10
1934, June 7, c. 424, § 77 B, 48 Stat. 911..... 536
1935, Aug. 12, c. 510, § 2, 49 Stat. 607..... 98
1935, Aug. 30, c. 824, 49 Stat. 991..... 278–341
1936, Apr. 10, c. 186, 49 Stat. 1198..... 523, 535
Constitution. See Index at end of volume.
Judicial Code.
§ 24 (1)..... 179, 182
§ 24 (28)..... 358
§ 37..... 182, 186
§ 57..... 187
§ 237 (a)..... 638, 644
§ 237 (c)..... 638, 645
§ 238..... 132, 408
§ 239..... 161, 463
§ 266..... 173
§ 269..... 343, 347
Revised Statutes.
§ 914..... 183
§§ 1041, 1042..... 463
§ 3466..... 547, 551
§ 4919..... 450
§ 4921..... 450, 459
U. S. Code.
Title 5, § 517..... 478
Title 6, §§ 1–11..... 547
Title 7,
c. 9..... 427, 436
§§ 181–229.... 45, 471
§ 207..... 439
§ 211..... 439, 473
§ 217..... 45, 438, 472, 477
§§ 499a–499r..... 158
Title 8, § 167 (a)..... 222

Page.

U. S. Code—Continued.
Title 11,
§ 108..... 163
§ 205..... 161
§ 207..... 536
§§ 301, 302, 303.. 523, 534
Title 15,
§ 14..... 132
§ 77a..... 9
Title 18, §§ 569, 641... 463
Title 28,
§ 41 (1)..... 179, 182
§ 41 (8), (27).... 438
§ 41 (28)..... 351, 358, 438
§§ 44–46..... 351
§ 47..... 45, 438, 472
§ 47 (a)..... 353
§ 80..... 182
§ 118..... 187
§ 230..... 169
§ 250 (1)..... 490
§ 262..... 488
§ 345..... 395
§ 346..... 161, 463
§ 380..... 173, 179
§ 391..... 347
§ 724..... 183

Page.

U. S. Code—Continued.
Title 35,
§ 57..... 450
§ 70..... 450, 459
Title 38,
§§ 111, 114, 115.. 97
§ 450..... 98
Title 45,
c. 1, §§ 22–34.... 100
c. 2, §§ 51–59.... 99
§§ 1–16..... 145
§ 8..... 146
§§ 22–34..... 150
§ 51..... 118
§§ 51–59..... 149
§ 53..... 119, 131
§ 54..... 119
§§ 56–59..... 149
Title 46,
§§ 544, 563..... 128
§ 688.... 155, 118, 127
§§ 701–713..... 128
Title 49,
§ 1..... 174–177
§ 1 (8)..... 498, 499
§ 45..... 499

(B) Statutes of the States and Territories

Alabama.
Constitution, § 14..... 403
1923 Gen. Acts, p. 36, Act of July 10.. 395–404
1927 Gen. Acts,
p. 16, Act of Jan. 25..... 395–404
p. 326, Act of Aug. 27..... 395–404
p. 635, Act of Sept. 9..... 395–404
1931 Gen. Acts,
p. 527, Act of July 17..... 395–404
p 859, Act of July 27..... 395–404
1932 Gen. Acts, p. 314, Act of Nov. 5.. 395–404

Alabama—Continued.
1935 Gen. Acts,
p. 30, Act of Jan. 31..... 395–404
p. 508, Act of July 10..... 395–404
Arizona.
1923 Laws, c. 3, § 1.. 617
1935 Laws, c. 17..... 540
Arkansas.
1935 Acts, Acts Nos. 16 and 325..... 36, 37
Crawford & Moses Digest, § 7108..... 617
California.
1929 Stats., c. 16, p. 38, Act. of Mar. 4.. 560, 564
1934 Laws (Extra Sess.) c. 4..... 540

Page.

California—Continued.
Deering's Gen. Laws, Vol. II,
pp. 2276–7, § 6... 152
p. 2316, § 69..... 153
Florida.
1933 Laws,
c. 15878..... 540
c. 16248..... 546
Gen. Laws,
§ 6302..... 545, 548
§ 6303..... 545
Illinois.
Cahill's Stats., c. 5, §§ 24–32..... 156
Smith-Hurd's Stats., c. 5, §§ 17–24..... 156
Indiana.
1935 Acts, c. 231.. 179, 191
Massachusetts.
Gen. Laws, c. 63, §§ 39–43..... 554
New Mexico.
1935 Laws,
c. 56..... 408
c. 136..... 409
New York.
1933 Laws, c. 584.. 603–636

Page.

New York—Continued.
Consolidated Laws, c. 31, Art. 19..... 603–636
Ohio.
1934 Laws (2d Special Sess.), No. 77..... 540
Pennsylvania.
1935 Acts, Act No. 398 of July 18..... 234–237
50 P. S., §§ 941 *et seq*..... 96
Texas.
Constitution,
Art. 3, § 52..... 527
Art. 16, § 59a..... 527
1935 Acts, Act of Apr. 27..... 527
Virginia.
1930 Code, §§ 5049, 5051..... 34
West Virginia.
Code, c. 11,
Art. 3, §§ 12, 13, 15.....
Art. 5, § 1.....
Art. 6, § 2.....
Art. 12, § 71.....
Art. 12, § 71..... 204
Code, c. 31, Art. 1, § 79. 204

(C) Foreign Statutes

English.
4 Anne, c. 17, § 11.... 163
5 Geo. II, c. 30, § 28.. 163
39–40 Vict., c. 80, § 5. 122

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1935.

JONES *v.* SECURITIES & EXCHANGE COMMISSION.

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

No. 640. Argued March 10, 11, 1936.—Decided April 6, 1936.

1. The day before a registration statement filed with the Securities and Exchange Commission would have become "effective" under the Securities Act of 1933, as amended, the Commission began a proceeding under § 8 (d) of the Act challenging the truth and sufficiency of the statement and notified the registrant to appear at a hearing some weeks later and show cause why a stop order should not issue suspending its effectiveness. Thereafter, the Commission's subpoena was served on the registrant commanding him to appear and testify and bring designated books and papers. The registrant then gave formal notice that his statement was withdrawn and submitted motions to quash the subpoena, which he declined to obey, and to dismiss the proceeding. The Commission, however, persisted in the investigation and obtained from the District Court, under § 22 (b) of the Act, an order requiring the registrant to appear before the Commission and answer questions. *Held:*

(1) That the stop order proceeding was analogous to a suit for an injunction; so that, while it was pending, the effectiveness of the registration statement was suspended and the registrant, if he acted under it, would act at his peril. P. 15.

(2) Arbitrary power to forbid withdrawal of such statements is not conferred upon the Commission by the statute. P. 18.

(3) The power of the Commission to prevent withdrawal is no greater than that of the courts to prevent dismissal by a plaintiff of his complaint at law or bill in equity. P. 18.

65773°—36——1

(4) A rule of the Commission declaring that any registration statement may be withdrawn "if the Commission consents" and that such consent shall be given "with due regard to the public interest and the protection of investors" implies that withdrawal of a statement not as yet effective is of right if no prejudice will result to the public or to investors. P. 21.

(5) The filing of a registration statement under the Securities Act is in effect an *ex parte* application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the Act. Withdrawal of the application before it has become effective can not affect any right of the general public, nor can it be said to prejudice investors, when, as in this case, no step towards the issuance of the securities sought to be registered has been taken and no investor, actual or potential, in such securities, is shown to exist. P. 22.

(6) The registrant's right to withdraw his statement was unqualified; and the Commission's proceeding, limited to the purpose of determining whether the effectiveness of the statement should be suspended, was terminated by the withdrawal. P. 23.

(7) After the withdrawal, no authority for the enforcement of the subpoena could be exercised by court order under § 22 (b) of the Act. P. 23.

(8) The stop order proceeding, having been ended by the withdrawal, could afford no basis for continuing the inquisition under a general power claimed by the Commission under § 19 (b). P. 25.

2. After a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the *status quo ante,* wholly irrespective of the merits as they may be ultimately adjudged. P. 15.
3. In the federal tribunals a plaintiff has the unqualified right, unless otherwise provided by a specific rule of court, to dismiss his complaint at law or bill in equity, if no plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the same subject matter. P. 19.
4. To the extent that the mere will of an official or of an official body is permitted to take the place of allowable official discretion, or to supplant the standing law as a rule of conduct, the Government ceases to be one of laws and becomes an autocracy. The courts, in the performance of their duties, must be ever vigilant to detect and turn aside this danger at its beginnings. P. 23.

5. Arbitrary power and the rule of the Constitution can not both exist. Our institutions must be kept free from all assumptions of such power, whether by the three primary departments of the Government or by lesser agencies. P. 24.
6. An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. P. 25.
7. A citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. P. 25.
8. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and can not be made lawful by what it might bring, or by what it actually brings, to light. P. 27.
9. The philosophy that constitutional limitations and legal restraints may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. P. 27.
10. The constitutionality of the Securities Act of 1933 is not considered in this case. P. 28.

79 F. (2d) 617, reversed.

CERTIORARI, 297 U. S. 699, to review the affirmance of an order of the District Court, 12 F. Supp. 210, requiring the present petitioner to appear and testify before the Securities & Exchange Commission.

Messrs. Harry O. Glasser and *James M. Beck,* with whom *Messrs. Bainbridge Colby, J. N. Saye,* and *H. I. Fishbach* were on the brief, for petitioner.

Mr. John J. Burns, General Counsel, Securities & Exchange Commission, and *Solicitor General Reed,* with whom *Messrs. Charles E. Wyzanski, Jr.,* and *Alger Hiss* were on the brief, for respondent.

The registration statement filed by the petitioner became effective by operation of law despite petitioner's attempts to withdraw it. The Commission properly

refused to permit withdrawal pursuant to a valid regulation which is authorized both by § 19 (a) of the Act and by the inherent power of the Commission, as a quasi-judicial tribunal, to limit the right of petitioner to terminate the proceedings before the Commission.

In effect, the regulation merely imposes a reasonable condition upon the right of the registrant to terminate the orderly procedure which he has set in motion by the filing of his registration statement. Analogous rules regulating the voluntary dismissal of bills of complaint have long been familiar in courts of equity. In the federal practice, the complainant must move for an order of dismissal and let the court fix the terms. *American Zylonite Co.* v. *Celluloid Manufacturing Co.*, 32 Fed. 809. And a local equity rule which allows the court to refuse a plaintiff permission to discontinue his action where justice so requires, even though the defendant can not have affirmative relief under the pleadings and though his only prejudice is a possible second suit, has been adjudged valid. *Bronx Brass Foundry* v. *Irving Trust Co.*, 297 U. S. 230; *Young* v. *Southern Pacific Co.*, 25 F. (2d) 630. Irrespective of the rule which may be applicable if no regulation of the complainant's right to withdraw exists (see *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86), a regulation limiting that right is procedural and within the power of a quasi-judicial tribunal such as the respondent.

The standard applied in this regulation—"with due regard for the public interest and the protection of investors"—is consonant with the spirit and purpose of the whole Act, and some limitation on the right of a registrant to withdraw is necessary for the effective administration of the Act. It is obvious that a registration statement ceases to be effective upon withdrawal, and can thus be no longer the subject of a stop order hearing, which can only result in an order suspending the effectiveness of the statement.

To allow a registrant an unqualified privilege of withdrawal, with the consequent ability to terminate any stop order hearing or to prevent such a hearing, would seriously embarrass the work of the Commission. Such a broad privilege would permit the registrant to avoid, in large part, the registration requirements of the Act, by filing a registration statement with such limited information as he chose to give, withdrawing it when its deficiencies were detected, and repeating the process *ad infinitum* in the hope that by perseverance he might escape the vigilance of the examiner.

Of even greater significance is the fact that stop order hearings in regard to particular registration statements, and the final orders and opinions based thereon, constitute the most effective of the methods by which the Commission is to insure the accuracy and completeness of registration statements in general. The Commission may, it is true, investigate pursuant to § 19 (b), and if it finds that the matters set out in the registration statement are false or incomplete, it may enjoin the continuance of this violation, or recommend criminal prosecution if the violation be willful. These, however, are extraordinary remedies requiring resort to the courts; they are not to be lightly undertaken and are to be used only in exceptional cases.

The publication of this regulation satisfied the requirements of § 19 (a) of the Act and was clearly adequate to give reasonable notice of its promulgation. Petitioner does not claim he was ignorant of the regulation. The Act does not improperly delegate legislative power to the Commission, for the power to regulate the minutiae of its own procedure may certainly be delegated to a quasi-judicial tribunal.

The regulation was properly applied in this case, for the Commission was not required to find that its refusal to permit withdrawal of the statement was in the public in-

terest and for the protection of investors. Such a finding is a preliminary determination of fact resting in the discretion of the Commission; no principle of law requires a finding by a court or an administrative tribunal prior to the application of an interlocutory procedural regulation.

It follows that petitioner's registration statement is still effective, and the stop order hearing thereon, in which the petitioner was subpoenaed to testify, is still pending before the Commission. Sections 8 (d) and 8 (e) of the Act expressly authorize subpoenas *duces tecum* in such a hearing, so that the less onerous subpoena *ad testificandum* must also be authorized. This follows, too, from the finality attributed to the findings of the Commission on review by a Circuit Court of Appeals (§ 9). Even though the Commission may issue a stop order if the issuer refuses to testify, this is not the only remedy available, for such a construction would work an injustice in some cases. In any event, § 8 is implemented by § 19 (b), expressly authorizing subpoenas in all investigations necessary for the enforcement of the Act.

Petitioner's claim that the Commission is engaged on a "fishing expedition" is rebutted by the notice of the stop order hearing, specifying in detail the items in the registration statement on which information is desired, and by the order of the District Court, requiring petitioner to testify only as to pertinent matters.

For purposes of determining the validity of the present order the only section which is material is § 5 (a). Since petitioner did not wait for specific questions to be put to him, but flatly refused to appear before the Commission, he must demonstrate that there is no question which the Commission validly might ask concerning his registration statement. *Bevan* v. *Krieger,* 289 U. S. 459, 465; *Blair* v. *United States,* 250 U. S. 273. Similarly, to sustain the validity of the present order, the Commission need only show that there is some purpose for which the Commis-

sion can validly require that petitioner appear before the Commission for questioning upon matters contained in his registration statement.

An analysis of § 5 (a) reveals that the section does not purport to require registration of a security as a condition precedent to every transaction concerning that security. Registration is required as a condition precedent only to such transactions relating to the sale of the security as involve (1) the use of the mails; (2) the use of means or instruments of transportation in interstate commerce; and (3) the use of means or instruments of communication in interstate commerce.

It is plain that if the Congress has constitutional power to require registration as a condition precedent to any one of these courses of action, the requirement as applied to petitioner is valid. It is further evident that if registration may properly be required, reasonable examination of registrants in connection with such registration is lawful. *Interstate Commerce Comm'n* v. *Brimson,* 154 U. S. 447; *Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 42.

The postal power of Congress is a plenary one and under it Congress has wide discretion as to the matter which shall be carried and that which shall be excluded from the mails. This power is not limited to excluding only that matter which might be injurious to the postal service or personnel, for in numerous cases this Court has sustained statutes excluding from the mails matter deemed injurious to the public, such as lottery tickets, obscene matter, and communications in furtherance of a scheme to defraud. *Ex parte Jackson,* 96 U. S. 727; *Ex parte Rapier,* 143 U. S. 110; *Badders* v. *United States,* 240 U. S. 391; *United States* v. *Chase,* 135 U. S. 255; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508; *Horner* v. *United States,* 143 U. S. 207, 570; *Coomer* v. *United States,* 213 Fed. 1; *U. S. ex rel. Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407. The requirements

of § 5 in issue in the present case are another instance of the exercise of the established power of Congress to close the mails to matter which it deemed contrary to the public welfare, and are thus amply sustained by these cases.

Congress may exclude securities which themselves contain misstatements. Congress may also exclude such securities if they are an integral part of a scheme to defraud. Further, Congress may require registration of all securities since this is reasonably necessary to make effective the exercise of its regulatory power. Finally, that the Act will not bar from the mails all harmful securities is no objection to its validity; Congress may certainly limit the exercise of its power to the particular type of evil here involved, namely, the failure to disclose the true character of securities.

Petitioner contends that § 5 (a) of the Act conflicts with the Tenth Amendment. This Court has, however, several times pointed out that Congress need not have power to deal with crime or immorality within the States in order to forbid the use of the mails in furthering such activities. Nor does the Act, as petitioner contends, apply to persons rather than to objects mailed, although even if it be so construed, its constitutionality is clearly sustained by previous decisions of this Court. Petitioner's final contention that a requirement of registration violates the due process clause of the Fifth Amendment is unsound, for such a requirement in state securities acts has frequently been sustained by this Court, and a substantially similar requirement was upheld in connection with the power of Congress to classify mailable matter.

In support of its contention that the registration provisions of the Securities Act are a valid exercise of the commerce power of Congress, respondent submits that (1) securities are subjects of commerce, and (2) a prohibition against the interstate transportation of unregistered securities is within the regulatory power of Congress.

Securities are "subjects of commerce" not only because they are so treated by ordinary business usage and state legislation, but also because they comply with the applicable legal standards formulated in the *Lottery Case,* 188 U. S. 321, and the insurance cases. Cf. *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495, 508; *Paul* v. *Virginia,* 8 Wall. 168, 183; *International Textbook Co.* v. *Pigg,* 217 U. S. 91. If they are transported across state lines without being truthfully described they may injure persons in the State of destination.

The prevention of the spread of evil across state lines and the prohibition against the use of the facilities of interstate commerce as an agency to promote dishonesty are shown by prior decisions to be within the scope of congressional regulatory power. *Lottery Case,* 188 U. S. 321; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Brooks* v. *United States,* 267 U. S. 42; *Caminetti* v. *United States,* 242 U. S. 470. Since in the Securities Act the regulatory power has been used merely to require a disclosure of the character of subjects carried and not to affect their local production, the Act does not fall within the prohibition of the Tenth Amendment nor of *Hammer* v. *Dagenhart,* 247 U. S. 251. The particular form of securities regulation involved in registration has already been held to afford due process in the substantially similar field of state Blue Sky legislation. See *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559; *Merrick* v. *Halsey & Co.,* 242 U. S. 568; cf. *Hall* v. *Geiger-Jones,* 242 U. S. 539.

Mr. Justice Sutherland delivered the opinion of the Court.

This case arises under "The Securities Act of 1933," c. 38, 48 Stat. 74, U. S. C. Title 15, § 77a *et seq.,* as amended by act of June 6, 1934, c. 404, 48 Stat. 881. Prior to the

amendment, the act was administered by the Federal Trade Commission; but by § 210, 48 Stat. 908, the administration was transferred to the respondent.

The act, § 2 (4), defines the term "issuer" as including every person who issues or proposes to issue any security, with certain exceptions. Section 6 (a) of the act provides—"Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer . . ." The filing of the registration statement must be accompanied by the payment to the commission of a fee measured by the maximum aggregate price at which the securities are to be offered. The information contained in the statement is to be made available to the public under such regulations as the commission may prescribe. The act prescribes in detail the character of information which is to be set out in the statement. Elaborate provisions are made in respect of liability on account of false registration statements, etc., and penalties are imposed for willful violations of any of the provisions of the act, or the rules and regulations promulgated by the commission under authority thereof, and for willfully untrue statements of material facts or omissions to state material facts. Section 5 (a) provides that unless a registration statement is in effect as to a security, it shall be unlawful for any person directly or indirectly to make use of the instrumentalities of interstate commerce or of the mails to sell or offer to buy such security, etc., or to transport any such security for sale or for delivery after sale.

"Sec. 8 (a) The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, . . .

"(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact

required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. . . .

"(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to coöperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order."

Section 19 (b) provides that for the purpose of all investigations which the commission think necessary and proper for the enforcement of the act, any member of the commission or any designated officer may administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of books, papers, etc. Section 22 (b) provides that in case of contumacy or refusal to obey a subpoena issued [by authority of the commission] to any person, the district courts of the United States and others named, upon application by the commission, may issue to such person an order requiring him to appear

before the commission or one of its examiners, and there produce documentary evidence and give evidence touching the matter in question.

May 4, 1935, petitioner filed with the commission a registration statement in pursuance of § 6 (a) of the act, covering a proposed issue of participation trust certificates. This registration statement under the terms of the act was to become effective 20 days later. On the 19th day, however, the commission, having already directed that stop-order proceedings be instituted, pursuant to § 8 (d), sent petitioner a telegraphic notice reciting that the registration statement appeared to contain untrue statements of material facts and to omit material facts required and necessary and fixing a hearing at the office of the commission for Thursday, June 6, 1935, "at which time and place registrant may appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement." The hearing was postponed until June 18th.

On June 13, a subpoena *duces tecum* was issued commanding petitioner to appear before an officer of the commission on the 18th to testify with respect to his registration statement and to bring with him designated books, records and papers, listed as follows: "General ledger, subsidiary ledgers, journal, cash book, books of account and financial statements of J. Edward Jones; general ledger, journal, cash book and books of account of J. Edward Jones relating to J. Edward Jones Royalty Trust, Series 'M'; all contracts, agreements and correspondence of J. Edward Jones relating to the distribution of Participation Trust Certificates in J. Edward Jones Royalty Trust, Series 'M'; all correspondence and communications of J. Edward Jones with any State authority relating to the distribution of Participation Trust Certificates in J. Edward Jones Royalty Trust, Series 'M.'"

June 18, in a written communication to the commission, petitioner formally withdrew his application for registration, assigning as a reason, among others, that the commission's action had been given widespread publicity and placed him in a situation to be severely damaged. The same day, his counsel appeared before the examiner for the commission and presented this written withdrawal, which was marked for identification, but excluded from consideration. On June 27, counsel for petioner appeared again before the examiner, and filed a dismissal signed by petitioner dismissing "his registration statement heretofore filed" and withdrawing "all application for consideration thereof or action thereon." At the same time, petitioner's counsel filed a motion to dismiss and for an order from the commission permitting the withdrawal of the registration statement and dismissing the registration proceeding and all matters pertaining thereto at petitioner's cost, and also a motion to quash the subpoena which had been issued and served on petitioner. The examiner acting for the commission denied the motions and refused to allow the withdrawal, no reason for his action being assigned. In so doing, the commission and its examiner assumed to act under and in conformity with a regulation of the commission which provides as follows:

"Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with the date of the giving of such consent and in the following manner: 'Withdrawn upon the Request of the Registrant, the Commission consenting

thereto.' Such consent shall be given by the Commission with due regard to the public interest and the protection of investors."

On June 28th, petitioner filed with the court below a petition asking for a review of the commission's rulings which that court dismissed for lack of jurisdiction. A petition for a writ of certiorari to review that action was denied by this court. 297 U. S. 705.

July 3, 1935, the commission filed an application in a federal district court for an order requiring petitioner to appear before the examiner to give evidence in the matter of petitioner's registration statement. Petitioner appeared and challenged, among other things, the validity of the orders of the commission denying petitioner's right to withdraw his registration statement, overruling his motions to withdraw and dismiss the proceedings and refusing to quash the subpoena which had been issued and served on petitioner. The district court denied petitioner's contentions and entered an order directing him to appear before the commission at a time and place fixed, to testify in the matter of the registration statement and to answer all pertinent questions regarding the information and documents filed by him with the commission in respect of such statement. 12 F. Supp. 210. On appeal, the court of appeals affirmed this order. 79 F. (2d) 617.

The principal points urged by petitioner as ground for reversing the judgment below, and the only ones that need be stated, are as follows: That the commission was bound as matter of law to sustain petitioner's withdrawal of and motion to withdraw the registration statement; that the right to withdraw such statement under the circumstances disclosed was unqualified; that the commission, therefore, was without authority to require petitioner to appear and testify or to submit his private books, records, and papers for the inspection of the com-

mission; that the Securities Act is unconstitutional, because it constitutes an attempt to exercise powers reserved to the states; and that it finds no warrant in either the commerce clause or in the power to regulate the use of the mails under the constitutional authority to establish post offices and post roads, or in any other provision of the federal Constitution.

First. By § 8 (d), when it appears to the commission that any untrue statement of a material fact has been made in the registration statement, or material facts have been omitted which are required or necessary to make the statements therein not misleading, the commission may institute an inquiry to determine whether a stop order shall issue suspending the effectiveness of the registration statement. Proceeding under that section, as we have seen, the commission, before the registration statement was to become effective by the terms of § 8 (a), directed that a stop-order proceeding be instituted, and caused to be served on petitioner a telegraphic notice fixing a time for him to "appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement."

Such a proceeding is analogous to a suit in equity to obtain an injunction, and should be governed by like considerations. Applying those considerations, then, what was the status of the registration statement pending the inquiry under § 8 (d)? Notwithstanding the provision of § 8 (a), that the effective date of a registration statement shall be the twentieth day after it is filed, did this intervening action of the commission nevertheless have the effect of suspending the effective operation of the statement pending the hearing and determination of the stop-order proceeding? We are of opinion that it did have that effect. The rule is well settled, both by the courts of England and of this country, that where a suit is brought to enjoin certain acts or activities, for example,

the erection of a building or other structure, of which suit the defendant has notice, the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued. We briefly review some of the decisions.

In *Daniel* v. *Ferguson,* L. R. [1891] 2 Ch. 27, suit had been brought to restrain defendant from building so as to darken plaintiff's lights. Notice of motion for a temporary injunction to be made upon a designated future day was served on the defendant. After receiving notice, the defendant put on a large number of men and proceeded with his building, running a wall up to a height of about 39 feet from the ground before the injunction was granted. The court, without regard to the ultimate rights of the parties, held that the wall thus run up by defendant should be torn down at once, as an attempt to anticipate the order of the court. A like situation was presented in *Von Joel* v. *Hornsey,* L. R. [1895] 2 Ch. 774. In that case, the evidence showed that defendant had repeatedly evaded attempts to serve him with process, and in the meantime had gone on with the building. Again, without regard to the ultimate rights of the parties, the court directed defendant to pull down that part of the building thus erected.

The Supreme Court of Pennsylvania in several cases has followed the same rule. *Clark* v. *Martin,* 49 Pa. 289, 298–299; *Easton Passenger Ry. Co.* v. *Easton,* 133 Pa. 505, 519; 19 Atl. 486; *Cooke* v. *Boynton,* 135 Pa. 102; 19 Atl. 944; *Meigs* v. *Milligan,* 177 Pa. 66, 72, 76; 35 Atl. 600; *Fredericks* v. *Huber,* 180 Pa. 572, 575; 37 Atl. 90. In *Cooke* v. *Boynton,* a bill in equity had been filed praying for a preliminary and perpetual injunction preventing defendants from interfering with a certain tramway of the plaintiff. Before a preliminary injunction was obtained, the defendants, on three separate occasions, had

torn up the track which the plaintiffs had replaced. The third incident occurred while plaintiff was obtaining a preliminary injunction. The court said, "The writ was served just as they had finished the work of demolition, and this coincidence is strongly suggestive of a race against the law." The trial court had dissolved the injunction, in part on the ground that the act sought to be restrained had already been done, and that it was without power at that stage of the cause to restore the property to its former condition by mandatory injunction. The supreme court reversed. "What we did in the Easton case," the court said, p. 110, "we will do here. We will restore the injunction, without passing upon the merits of the case. They will be considered when it comes here upon final hearing."

In *New Haven Clock Co.* v. *Kochersperger,* 175 Ill. 383; 51 N. E. 629, the state supreme court held that the forced payment of a tax after the court has acquired jurisdiction of a bill to enjoin its collection may be restored by the court, even though no preliminary injunction was granted; and that such payment cannot be availed of as a defense upon the ground that the tax having been paid there is nothing to enjoin. The same court in *Turney* v. *Shriver,* 269 Ill. 164, 172; 109 N. E. 708, held the rule to be that "where a bill for injunction has been filed and the court has acquired jurisdiction of both the person and the subject matter of the suit and the defendant does any act which the bill seeks to enjoin, such party acts at his peril and subject to the power of the court to compel a restoration of the status, . . ." See also, *Konig* v. *M. & C. C. of Balto.,* 126 Md. 606, 627; 95 Atl. 478.

The conclusion to be drawn from all the cases is that after a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his

peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided. 1 High on Injunctions (4th ed.), § 5 (a).

We hold the principle of this rule to be applicable to the present case. When proceedings were instituted by the commission and the registrant was notified and called upon to show cause why a stop order should not be issued, the practical effect was to suspend, pending the inquiry, all action of the registrant under his statement. Unless the registration statement is effective, the issuer of a security who makes use of the mails or of the instrumentalities of interstate commerce to sell the security or to carry the same for the purposes of sale or delivery after sale, § 5 (a) of the act, is liable to severe penalties of fine and imprisonment. § 24. The word "effective," as here employed, connotes completeness of operative force and freedom to act. And a registration statement which, while still *in fieri*, is brought under official challenge in respect of its validity and subjected to an official proceeding aimed at its destruction, cannot be so characterized until the challenge is determined in favor of the registrant. In the meantime, since he can act only at his peril, the registration statement can in no real sense be called effective.

Second. In this situation, does a registrant have the unqualified right to withdraw his registration statement or, in other words, to dismiss a pending proceeding by which, for his own advantage, he is seeking the use of the mails and the instrumentalities of interstate commerce? If he have such right, there is no basis for the exercise of discretion in respect of the matter on the part of the commission; for it is obvious that discretion does not exist where there is no power to act except in one way. Cf. *Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569, 573; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93.

The act contains no provision upon the subject; and it may not be construed as attempting to confer upon the commission an arbitrary power, under rule or otherwise, to deny, without reason, a motion to dismiss. We are unable to find any precedent for the assumption of such power on the part of an administrative body; and we go to the practice and rules of the courts in order to determine by analogy the scope and limit of the power; for, at least in the absence of a statute to the contrary, the power of a commission to refuse to dismiss a proceeding on motion of the one who instituted it cannot be greater than the power which may be exercised by the judicial tribunals of the land under similar circumstances. Both parties here seem to recognize the appositeness of this test.

The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter. *Pullman's Palace Car Co.* v. *Transportation Co.*, 171 U. S. 138, 145–146. In announcing the rule, this court approved and cited as authority the decision rendered by Chief Justice Taft, then circuit judge, in *Detroit* v. *Detroit City Ry. Co.*, 55 Fed. 569. The opinion in the latter case, reviewing the English and American authorities, states the rule as follows [p. 572]:

"It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. . . . The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

Chicago & Alton R. Co. v. *Union Rolling Mill Co.,* 109 U. S. 702, 713–715; *Barrett* v. *Virginian Ry. Co.,* 250 U. S. 473, 476; *McGowan* v. *Columbia River Packers' Assn.,* 245 U. S. 352, 358; *Veazie* v. *Wadleigh,* 11 Pet. 55, 61–62; *Confiscation Cases,* 7 Wall. 454, 457–458. The foregoing decisions, together with others, are reviewed in an opinion delivered by Chief Justice Taft in *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86, and the conclusion stated as follows:

"The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action. The fact that he may not have disclosed all his reasons or may not have given the real one can not affect his right.

"The usual ground for denying a complainant in equity the right to dismiss his bill without prejudice at his own costs is that the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action. Having been put to the trouble of getting his counter case properly pleaded and ready, he may insist that the cause proceed to a decree. . . .

"The Government had not when the case was dismissed given any time or expense to the preparation and filing of a cross bill or of the evidence to sustain it. It had not taken any action in respect to the cause which entitled it to say that it would be prejudiced by a dismissal within the meaning of the authorities. It suddenly was awakened by the motion to dismiss to the fact that by eighteen months' delay, it was losing a possible opportunity to litigate a cross claim in the Court of Claims and without a jury. We think the same rule should obtain in the procedure of the Court of Claims as in federal courts of law and equity in respect to the dismissal of cases without prejudice."

The commission apparently concedes that in the absence of a regulation to the contrary, the foregoing general rule would be applicable. The commission, however, relying upon our recent decision in *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, 297 U. S. 230, contends that its regulation, quoted *ante,* justifies the adverse action of the commission. In the *Brass Foundry* case, proof of a claim in bankruptcy had been filed. The trustee in bankruptcy moved to expunge the claim on the ground that the creditor had received certain payments on account which constituted unlawful preferences. Several hearings were held before the referee, and the evidence indicated that the contention of the trustees was well founded. Before the hearing closed, the creditor filed a withdrawal of its claim and abandoned the hearing. The trustee insisted that it was entitled to an adjudication whether the payments made were unlawful preferences. The referee refused to permit a withdrawal of the claim; and his action was approved by the district court, and its judgment in turn affirmed by the circuit court of appeals having jurisdiction. We affirmed, holding that the general rule as stated in *Ex parte Skinner & Eddy Corp., supra,* had been modified by a rule of the district court which authorized the court to refuse, after issue joined, "to permit the plaintiff to discontinue even though the defendant cannot have affirmative relief under the pleadings, and though his only prejudice be the vexation and expense of a possible second suit upon the same cause of action."

Assuming, without deciding, that the regulation of the commission was within its power and in force, it differs essentially from the foregoing rule of the district court. As applied to this proceeding in which there are no adversary parties, the regulation does not restrict the common-law rule. That rule, as we have seen, is that the right to dismiss is unqualified unless the dismissal would legally prejudice the defendants in some other

way than by future litigation of the same kind. The regulation is "Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the commission consents thereto. . . . Such consent shall be given by the commission with due regard to the public interest and the protection of investors." This regulation is quite as general as the rule of the common law, and the possibility that the same registration may be attempted in the future is not within its terms any more than it is within the terms of the common-law rule. The question under the regulation is whether due regard to the public interest and the protection of investors requires that the withdrawal be denied. The test is the absence or presence of prejudice to the public or investors; and, plainly enough, under the decisions of this court, the doctrine that a dismissal must be granted if no prejudice be shown beyond the prospect of another suit, *unless there be a specific rule of court to the contrary,* is applicable, and the withdrawal should have been allowed as of course.

We are unable to find anything in the record, the arguments of the commission, or the decision of the court below that suggests the possibility of any prejudice to the public or investors beyond the assumption, as put by the court below, 79 F. (2d) at p. 620, that "an unlimited privilege of withdrawal would have the effect of allowing registrants whose statements are defective to withdraw before a stop order was issued and then to submit another statement with slight changes."

In this proceeding, there being no adversary parties, the filing of the registration statement is in effect an *ex parte* application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the act. We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect. Peti-

tioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied. So far as the record shows, there were no investors, existing or potential, to be affected. The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned.

An additional reason why the action of the commission and of the court below cannot be sustained is that the commission itself had challenged the integrity of the registration statement and invited the registrant to show cause why its effectiveness should not be suspended. In the face of such an invitation, it is a strange conclusion that the registrant is powerless to elect to save himself the trouble and expense of a contest by withdrawing his application. Such a withdrawal accomplishes everything which a stop order would accomplish, as counsel for the commission expressly conceded at the bar. And, as the court below very properly recognized, a withdrawal of the registration statement "would end the effect of filing it and there is no authority under § 19 (b) to issue the Commission subpoena and it could not be enforced by order of the district court under § 22 (b)." 79 F. (2d) 619.

The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—, because to the precise extent that the mere will of an official or

an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd* v. *United States,* 116 U. S. 616, 635, should never be forgotten: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—"there is no place in our constitutional system for the exercise of arbitrary power." *Garfield* v. *Goldsby,* 211 U. S. 249, 262. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the

fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.

Third. The proceeding for a stop order having thus disappeared, manifestly it cannot serve as a basis for the order of the district court compelling petitioner to appear, give testimony, and produce his private books and papers for inspection by the commission. But the commission contends that the order may rest upon the general power to conduct investigations which it says is conferred by § 19 (b). The difficulty with that is that the investigation was undertaken for the declared and sole purpose of determining whether a stop order should issue. The first action taken by the commission was on May 20th, four days before the registration was to become effective under the statute. The commission then, after averring that upon reasonable grounds it believed the registration statement was false in material facts, directed that stop-order proceedings be instituted against the statement. It never has averred or directed anything else. This action was followed by a notice containing like recitals of a more detailed character, and calling upon the registrant to appear and show cause why a stop order should not be issued suspending the effectiveness of the statement. It was upon this direction and notice that all subsequent proceedings were had and upon which they must stand or fall. We do not interpret the order of the district court, the substance of which has already been stated, as resting upon a different view.

Nothing appears in any of the proceedings taken by the commission to warrant the suggestion that the investigation was undertaken or would be carried on for any other purpose or to any different end than that specifically named. An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is

a mere truism to say that the end must be a legitimate one to justify the means. The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer. Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as "a fishing expedition . . . for the chance that something discreditable might turn up" (*Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434, 445)—an undertaking which uniformly has met with judicial condemnation. *In re Pacific Ry. Comm'n,* 32 Fed. 241, 250; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190, 192, 193, 195, 196; *Boyd* v. *United States,* 116 U. S. 616; *Harriman* v. *Interstate Commerce Comm'n,* 211 U. S. 407, 419; *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298, 305–307.

In re Pacific Ry. Comm'n involved the power of a Congressional commission to investigate the private affairs, books and papers of officers and employees of certain corporations indebted to the government. That commission called before it the president of one of these corporations, required the production of private books and papers for inspection, and submitted interrogatories which the witness declined to answer. Acting under the statute, the commission sought a peremptory order from the circuit court to compel the witness to answer the interrogatories. The court, consisting of Mr. Justice Field, Circuit Judge Sawyer, and District Judge Sabin, denied the motion of the district attorney for the order

and discharged the rule to show cause. Opinions were rendered *seriatim,* the principal one by Justice Field. The authority of the commission was definitely denied. That decision has frequently been cited and approved by this court. Judge Sawyer, in the course of his opinion (at p. 263), after observing that a bill in equity seeking a discovery upon general, loose and vague allegations is styled "a fishing bill," and will, at once, be dismissed on that ground (Story, Eq. Pl. § 325), said: "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing, where the practice under it would end."

The fear that some malefactor may go unwhipped of justice weighs as nothing against this just and strong condemnation of a practice so odious. And, indeed, the fear itself has little of substance upon which to rest. The federal courts are open to the government; and the grand jury abides as the appropriate constitutional medium for the preliminary investigation of crime and the presentment of the accused for trial.

The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government. An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or by what it actually succeeds in bringing, to light. Cf. *Byars* v. *United States,*

273 U. S. 28, 29, and cases cited. If the action here of the commission be upheld, it follows that production and inspection may be enforced not only of books and private papers of the guilty, but those of the innocent as well, notwithstanding the proceeding for registration, so far as the power of the commission is concerned, has been brought to an end by the complete and legal withdrawal of the registration statement.

Exercise of "such a power would be more pernicious to the innocent than useful to the public"; and approval of it must be denied, if there were no other reason for denial, because, like an unlawful search for evidence, it falls upon the innocent as well as upon the guilty and unjustly confounds the two. *Entick* v. *Carrington,* 19 Howell's St. Trials, 1030, 1074—followed by this court in *Boyd* v. *United States,* 116 U. S. 616, 629–630. No one can read these two great opinions, and the opinions in the *Pacific Ry. Comm'n* case, from which the foregoing quotation is made, without perceiving how closely allied in principle are the three protective rights of the individual—that against compulsory self-accusation, that against unlawful searches and seizures, and that against unlawful inquisitorial investigations. They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine,* lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others.

Fourth. The foregoing disposes of the case and requires a reversal of the judgment of the lower court. In that view, it becomes unnecessary to consider the constitutional validity of the act.

Reversed.

MR. JUSTICE CARDOZO, dissenting.

I am unable to concur in the opinion of the court.

A subpoena *duces tecum* was issued by the Commission on June 13 before any attempt had been made to withdraw the registration statement. On June 18, the day of the attempted withdrawal, there was issued a second subpoena commanding the registrant to appear and testify, and this was served upon him by the Marshal. Then and for months earlier a standing Regulation gave warning to him and to the world that without the consent of the Commission there could be no withdrawal of a statement once placed upon the files. I am persuaded that the Rule is valid; that the Commission had abundant reasons for maintaining jurisdiction; and that notice of withdrawal did not nullify the writ.

The subpoena flouted by the witness was issued under § 19 (b) of the statute as well as under § 8 (e). So the sworn petition for the Commission explicitly informs us. It was issued in aid of any legitimate inquiry that the Commission had authority to initiate and prosecute by reason of a false and defective statement then part of the official records. Nothing in the case gives color to the argument that the witness was to be subjected to a roving examination without the restraints of pleadings or bounds analogous thereto. On the contrary, the order of the District Court upholding the subpoena directs him to make answer to questions pertinent to the documents already filed with the Commission, to these and nothing more. If the petitioner is to prevail in his attack upon the writ, it will have to be on broader grounds than those of form and method. He must be able to make good his argument that by the mere announcement of withdrawal, he achieved results analogous to those of a writ of prohibition.

Recklessness and deceit do not automatically excuse themselves by notice of repentance. Under § 24 of the Act, there is the possibility, at times the likelihood, of penal liability. A statement wilfully false or wilfully defective is a penal offense to be visited, upon conviction, with fine or imprisonment. Under § 12, there is the possibility, if not the likelihood, of liability for damages. The statement now in question had been effective for over twenty days, and the witness did not couple his notice of withdrawal with an affidavit or even a declaration that securities had not been sold. Nor is the statute lacking in machinery with which to set these liabilities in motion upon appropriate occasion. Under § 19 (b), plenary authority is conferred on the Commission to conduct all investigations believed to be necessary and proper for the enforcement of the Act and of any of its provisions. There will be only partial attainment of the ends of public justice unless retribution for the past is added to prevention for the future. But the opinion of the court teaches us that however flagrant the offense and however laudable the purpose to uncover and repress it, investigations under § 19 (b) will be thwarted on the instant when once the statement of the registrant has been effectively withdrawn. If that is so, or even indeed if the effect of the retraction is to embarrass the inquiry—to cloud the power to continue—the fairness of the Rule is proved out of the mouths of its accusers. If such consequences are inherent in a privilege of withdrawal indiscriminately bestowed, there is need of some restraint upon the power of the wrongdoer to mitigate the penalties attaching to his wrong. Shall the truth be shown forth or buried in the archives? The Commission is to determine in the light of all the circumstances, including its information as to the conduct of the applicant, whether the public interest will be prompted by forgetting and forgiving. *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, 297 U. S. 230.

The objection is inadequate that an investigation directed to the discovery of a crime is one not for the Commission, but for the prosecuting officer. There are times when the functions of the two will coincide or overlap. Congress has made it plain that any inquiry helpful in the enforcement of the statute may be pursued by the Commission, though conduct punishable as a crime may thereby be uncovered. Indeed, the Act is explicit—§ 22 (c)—that a witness is not excused from testifying on the ground that the testimony required of him may tend to incriminate him or expose him to a penalty or forfeiture. He may, however, claim his privilege, and if then compelled to testify, may not be prosecuted thereafter for any matter thus revealed. All this is far from proving that there can be no practical advantage in keeping the proceeding open. Aside from the possibility of civil liability, the offender may not choose to claim the privilege, and even if he does, and is then excused from testifying, other witnesses may be available, for example, employes, who are not implicated in the offense and who can bring the facts to view. Moreover, amnesty for one offender may mean conviction for another, an associate in the crime. Inquiry by the Commission is thus more penetrating and efficient than one by a grand jury where there is no statutory grant of amnesty to compel confederates to speak. More important still, the enforcement of the Act is aided when guilt is exposed to the censure of the world, though the witness in the act of speaking may make punishment impossible. It is no answer to all this that upon the record now presented a crime has not been proved or even definitely charged. An investigator is not expected to prove or charge at the beginning the offenses which he has reason to suspect will be uncovered at the end. The petition in behalf of the Commission enumerates one by one the false statements and the omissions imputed to the registrant. Some at least are of

such a nature that if chargeable to him at all, they can hardly have been made otherwise than with criminal intent. To give the investigating officer an opportunity to reach down into the hidden wells of knowledge and the more hidden wells of motive is the very purpose of the Regulation by which the proceeding is kept open after the registrant has tried to end it.

The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely. But timely too is the reminder, as a host of impoverished investors will be ready to attest, that there are dangers in untruths and half truths when certificates masquerading as securities pass current in the market. There are dangers in spreading a belief that untruths and half truths, designed to be passed on for the guidance of confiding buyers, are to be ranked as peccadillos, or even perhaps as part of the amenities of business. When wrongs such as these have been committed or attempted, they must be dragged to light and pilloried. To permit an offending registrant to stifle an inquiry by precipitate retreat on the eve of his exposure is to give immunity to guilt; to encourage falsehood and evasion; to invite the cunning and unscrupulous to gamble with detection. If withdrawal without leave may check investigation before securities have been issued, it may do as much thereafter, unless indeed consistency be thrown to the winds, for by the teaching of the decision withdrawal without leave is equivalent to a stop order; with the result that forthwith there is nothing to investigate. The statute and its sanctions become the sport of clever knaves.

Appeal is vaguely made to some constitutional immunity, whether express or implied is not stated with distinctness. It cannot be an immunity from the unreasonable search or seizure of papers or effects: the books and documents of the witness are unaffected by the challenged

order. It cannot be an immunity from impertinent intrusion into matters of strictly personal concern: the intimacies of private business lose their self-regarding quality after they have been spread upon official records to induce official action. In such circumstances the relevance of *Entick* v. *Carrington,* 19 Howell's St. Trials, 1030, 1074, or *Boyd* v. *United States,* 116 U. S. 616, 629, or *In re Pacific Railway Comm'n,* 32 Fed. 241, 250, is not readily perceived. Cf. *Interstate Commerce Comm'n* v. *Brimson,* 154 U. S. 447, 469, 478. If the immunity rests upon some express provision of the Constitution, the opinion of the court does not point us to the article or section. If its source is to be found in some impalpable essence, the spirit of the Constitution or the philosophy of government favored by the Fathers, one may take leave to deny that there is anything in that philosophy or spirit whereby the signer of a statement filed with a regulatory body to induce official action is protected against inquiry into his own purpose to deceive. The argument for immunity lays hold of strange analogies. A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile.

The Rule now assailed was wisely conceived and lawfully adopted to foil the plans of knaves intent upon obscuring or suppressing the knowledge of their knavery.

The witness was under a duty to respond to the subpoena.

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

HART *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 857. Jurisdictional statement distributed March 28, 1936.—Decided April 13, 1936.

A convict in a Virginia penitentiary who kills an officer or guard having him in custody is not chargeable under §§ 5049 and 5051 of the Virginia Code of 1930, as construed by the Virginia courts, if the killing was done in self-defense.

Appeal dismissed.

APPEAL from a judgment sustaining a verdict and sentence for felonious homicide.

Mr. S. H. Bond for appellant.

Mr. Abram P. Staples, Attorney General of Virginia, for appellee.

PER CURIAM.

Appellant, a convict, was convicted of the felonious killing of one Alton Leonard, a prison guard, in whose custody appellant was working. The jury fixed his punishment at death. The conviction and sentence were pursuant to §§ 5049 and 5051 of the Virginia Code, 1930, providing, so far as pertinent, as follows:

"§ 5049. A convict confined in the penitentiary, or in custody of an officer, shall be deemed guilty of felony if he kill, wound, or inflict other bodily injury upon an officer or guard of the penitentiary; . . ."

"§ 5051. A convict guilty of such killing as is mentioned in section five thousand and forty-nine, or of any act therein mentioned, from which death ensues to such officer or guard, shall be punished with death."

Appellant challenged these provisions as being repugnant to the due process and equal protection clauses

of the Fourteenth Amendment of the Federal Constitution. His main contentions were that the statute was so broad as to embrace excusable homicide and that, as a convict he was deprived of the equal protection of the laws relating to murder and manslaughter.

We take the statute as construed by the state court and applied in the instant case. Appellant defended the killing of Leonard upon the ground of self-defense. The evidence in support of that defense, with all the circumstances of the case, was submitted to the jury under appropriate instructions which recognized the admissibility of the defense under the statute. The trial court, defining with care the right of self-defense, charged the jury that if appellant had acted in the exercise of that right, the jury should find him not guilty. The Supreme Court of Appeals refused to review the judgment upon the ground that it was "plainly right."

As we find no substantial federal question presented, the appeal is dismissed for the want of jurisdiction. (1) *Lee* v. *New Jersey,* 207 U. S. 67, 70; *Hatch* v. *Reardon,* 204 U. S. 152, 160; *Fox* v. *Washington,* 236 U. S. 273, 277; (2) *Graham* v. *West Virginia,* 224 U. S. 616, 630; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78, 79; *Price* v. *Illinois,* 238 U. S. 446, 453.

Dismissed.

SCHENEBECK *v.* McCRARY ET AL.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 810. Jurisdictional statement distributed March 28, 1936.—Decided April 13, 1936.

A taxpayer in Arkansas has no vested interest in public funds deposited by a county treasurer in a designated depositary; consequently, state legislation releasing the treasurer and his bondsmen and the bondsmen of the depositary from liability for deposits lost through the insolvency of the depositary, was not in this case an impairment of the obligation of contracts.

191 Ark. 698; 87 S. W. (2d) 572, affirmed.

APPEAL from a judgment affirming in part and in part reversing a judgment of the trial court in an action to recover county funds.

Mr. John Ross Thompson for appellant.

Mr. Charles A. Walls for appellees.

PER CURIAM.

Prior to its insolvency, the Lonoke County Bank was the duly designated depository for the public funds of Lonoke County, Arkansas. In November, 1934, the County Court entered an order compromising the liability of the sureties on the depository bond. In December, 1934, appellant, a taxpayer of the county, brought this action, in the first count, against the county treasurer and her bondsmen, and in the second count, against the bondsmen for the depository, seeking to recover the amount of public funds on deposit in the bank when it closed.

The defense relied upon Acts No. 16 and No. 325 of the Acts of Arkansas of 1935. Act No. 16 released county treasurers and their bondsmen from liability where deposited funds had been lost by reason of the insolvency

of the bank and not through defalcation of the county treasurer. By Act No. 325 similar relief was given to the bondsmen for a county depository. Appellant contended that the legislation impaired the obligation of contracts in violation of Article I § 10, of the Constitution of the United States.

The trial court sustained the plea of the county treasurer and her bondsmen, under Act No. 16, and overruled the plea of the bondsmen for the depository, and rendered judgment accordingly. On appeal and cross appeal, the Supreme Court of the State affirmed the judgment with respect to the county treasurer and her bondsmen, and reversed the judgment and dismissed the cause with respect to the bondsmen for the depository, construing and sustaining the legislation invoked. The Supreme Court of the State decided that the individual taxpayers had no vested interest in the public funds in question and hence that there was no impairment of the obligation of contracts. The state court drew a distinction between the case of such taxpayers in relation to general public funds, and those who have a vested interest in the funds of an improvement district, citing *Bauer* v. *North Arkansas Highway Improvement District No. 1,* 168 Ark. 220, 224; 270 S. W. 533.

While this Court, when a question under the contract clause is raised, may examine the alleged contract in order to determine the obligations which inhere in it, we find no ground for disturbing the ruling of the state court as to petitioner's lack of a vested interest in the funds deposited. Compare *Violet Trapping Co.* v. *Grace,* 297 U. S. 119; *Ingraham* v. *Hanson,* 297 U. S. 378.

The judgment is

Affirmed.

ST. JOSEPH STOCK YARDS CO. *v.* UNITED STATES ET AL.

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

No. 497. Argued March 2, 1936.—Decided April 27, 1936.

1. Past conditions of the business affected, during a reasonable period, as well as existing conditions, are properly to be considered by a rate-making authority in fixing rates for the future. P. 46.
2. An order of the Secretary of Agriculture fixing stockyards rates, not shown to be confiscatory by the evidence before him, and against which no further evidence was offered by the company affected in its suit for an injunction, *held* not invalid because the Secretary had refused to grant a further hearing on adverse changes in the company's business conditions alleged to have occurred after the close of the hearing granted. P. 47.
3. Where the issue is whether rates fixed by the Secretary of Agriculture for stockyards services operate to confiscate property of the company affected, a court is not bound to accept the findings of the Secretary though supported by substantial evidence, but must weigh the evidence and pass upon the questions of fact. P. 49.
4. In the fixing of rates—a legislative act—the legislature has a broad discretion which it may exercise directly or through a legislative agency authorized to act in accordance with standards prescribed by the legislature. P. 50.
5. Courts do not sit as boards of revision to substitute their judgment for that of the legislature or its agents as to matters within the province of either. P. 51.
6. Where the legislature itself fixes rates, acting within the field of legislative discretion, its determinations are conclusive. P. 51.
7. Where the legislature appoints a rate-fixing agent to act within the limits of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. In such cases, the judicial inquiry into the facts goes no farther than to ascertain whether there is evidence to support the findings; and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority. P. 51.

8. The Constitution fixes limits to the rate-making power by prohibiting deprivation of property without due process of law or the taking of private property for public use without just compensation. P. 51.
9. Acts of the legislature or of its agent in rate-making, when properly challenged as exceeding these constitutional limits, are necessarily subject to judicial review upon the facts and the law, to the end that the Constitution, as the supreme law of the land, may be maintained. P. 51.
10. Judicial scrutiny of legislative rates, their constitutionality being in issue, cannot be avoided by declarations or findings made by the legislature or its agent. P. 51.
11. To say that the findings of fact of legislative agencies may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and that constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously impair the security inherent in our judicial safeguards. P. 52.
12. The judicial duty to examine the weight of the evidence exists for the protection of property rights as well as rights of liberty under the Constitution. P. 52.
13. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. P. 52.
14. In determining whether a legislative rate consists with due process under the Constitution, the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation; the judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests; the complaining party carries the burden of making a convincing showing, and the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. P. 53.
15. Primary or subordinate findings of fact made by a legislative agency in fixing a rate will not be disturbed save as in particular instances they are plainly shown to be overborne. P. 54.
16. Upon the question whether rates fixed by the Secretary of Agriculture for a stockyards company under the Packers & Stockyards Act are confiscatory, the Court in this case examines the

evidence and sustains findings made by the District Court and findings of the Secretary adopted by that court as to: (1) value of land used and useful in the business, p. 56; (2) value of structures; existing depreciation, p. 61; (3) going concern value, p. 62; (4) annual depreciation allowance, p. 65; and (5) income, p. 68.

17. In fixing rates under the Packers & Stockyards Act, the Secretary of Agriculture was not estopped by findings and allowances made in an earlier proceeding which was abandoned. P. 63.
18. In fixing rates of a stockyards company, a hotel run at a loss and not helpful to the stockyards business is properly excluded from the rate base. P. 57.
19. Land, as part of the property valued in fixing rates, should be allowed its fair market value for all available uses and purposes, including value due to special adaptation to particular purposes, but excluding increments of value due to the public use. P. 59.
20. In fixing rates, a separate allowance of going-concern value supported only by assumptions and speculations of an expert, *held* properly denied. P. 62.
21. In fixing rates for stockyards service, it was open to the Secretary of Agriculture to increase a company's charges for the use of feed lots, owned by it and included in the rate base, upon the ground that the existing charges produced discrimination and should be made reasonable for all customers; and it was not necessary to permit the company an alternative in removing the discrimination. P. 67.
22. In fixing rates under the Act, the Secretary may classify them. P. 69.
23. If rates, reasonable when fixed under the Packers & Stockyards Act, are shown by subsequent test to have become unreasonably low, application may be made to the Secretary of Agriculture to have them modified. P. 72.

11 F. Supp. 322, affirmed.

APPEAL from a decree of the District Court, of three judges, which dismissed a bill to enjoin enforcement of rates fixed by the Secretary of Agriculture under the Packers & Stockyards Act.

Mr. Ross Dean Rynder, with whom *Mr. William N. Strack* was on the brief, for appellant.

Upon the question whether the court was bound to accept the findings of fact of the Secretary of Agriculture if supported by substantial evidence, they cited the following cases from this Court:

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287; *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43; *Bluefield Water Co.* v. *Public Service Comm'n*, 262 U. S. 679; *Northern Pacific R. Co.* v. *Department of Public Works*, 268 U. S. 39; *Lehigh Valley R. Co.* v. *Public Utility Comm'rs*, 278 U. S. 24; *United Railways* v. *West*, 280 U. S. 234; *Phillips* v. *Commissioner*, 283 U. S. 589; *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U. S. 80; *Crowell* v. *Benson*, 285 U. S. 22; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151; *Dayton Power & Light Co.* v. *Public Utilities Comm'n*, 292 U. S. 290; *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n*, 292 U. S. 398; *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 79; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499; *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193; *West* v. *Chesapeake & Potomac Tel. Co.*, 295 U. S. 662.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed* and *Messrs. Wendell Berge, J. Stephen Doyle, Jr.*, and *G. N. Dagger* were on the brief, for the United States et al.

The following discussion of the question above mentioned is from their brief:

The District Court stated at several places in the opinion that the findings of fact made by the Secretary are conclusive if supported by substantial evidence. Appellant contends that this was error.

It should be observed that § 316 of the Packers & Stockyards Act adopts the same procedure for enjoining the enforcement of orders of the Secretary of Agriculture that had been provided by previous laws for enjoining the enforcement of orders of the Interstate Commerce Commission. 42 Stat. 168; 7 U. S. C. 217. The findings of the Commission, of course, are subject to review, "but when supported by evidence are accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541, 547–548. See also *Illinois Central R. Co.* v. *Interstate Commerce Comm'n*, 206 U. S. 441, 454. This Court has held that the decisions involving review of orders of the Interstate Commerce Commission are also applicable to the review under § 316 of the Packers & Stockyards Act of rate orders of the Secretary of Agriculture. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 442.

Rate making, of course, is a legislative process. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226. This Court has said that "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice* v. *New York*, 264 U. S. 292, 294.

Factual determinations made by a legislature as a basis for the enactment of a regulatory statute, even in a suit attacking the constitutionality of the statute, are accorded a presumption of correctness. The same presumption of correctness should be accorded findings of fact of

a rate-making body, even in a suit attacking the constitutionality of an order based thereon. Even though the courts have a duty to review the evidence more critically when confiscation is an issue and to reach their independent conclusions of constitutional fact, it would not be feasible to require them to substitute their independent judgment as to the weight of the evidence for that of the body exercising delegated legislative power upon every factual question as to which conflicting evidence is presented. It is submitted that constitutional rights are adequately protected if the reviewing court examines the evidence for itself and determines that it does not compel arrival at different conclusions of fact than those reached by the rate-making authority. The proper scope of review is that stated by this Court in *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, when, in upholding a rate order, it was said (pp. 315–316): "our inquiry must be . . . whether the evidence requires the conclusion that by reason of the inadequacy of the valuation the result is confiscation."

It is quite apparent that the District Court made a minute and careful analysis of the evidence. The opinion discusses in considerable detail the evidence on the various questions presented, and makes many specific findings. The court also, in addition to specific findings contained in the opinion, adopted the findings of the Secretary as its own, thereby indicating that its review of the evidence led it to substantial agreement with the Secretary's findings of fact. It is submitted that appellant had an adequate judicial review in the District Court.

But even if the District Court in its discussion of the scope of judicial review adopted an erroneous position, it would not follow that the decree should be reversed. The issue in this case is not the reasoning adopted by the lower court in reaching the conclusion that the maximum rates prescribed by the Secretary are not confiscatory, but

whether those rates are in fact confiscatory. This is an equity case and it comes before this Court on appeal. All of the material portions of the record before the Secretary and the District Court are now before this Court. Appellees are willing to submit the order herein challenged to the test of any degree of judicial review which this Court deems to be required by the Constitution. If this Court finds that the maximum rates prescribed by the Secretary are not in fact confiscatory, the decree of the lower court is correct and should be affirmed irrespective of possible error in its reasoning. *West* v. *Chesapeake & Potomac Tel. Co.,* 295 U. S. 662, 680.

The Government contends that in so far as the ultimate decision of this case is concerned, it is immaterial what scope is given to judicial review because it is believed that a clear preponderance of the evidence shows that the maximum rates prescribed are fair, reasonable, and non-confiscatory.

It is clear, however, that the judgment of the Secretary on the evidence should be given great weight and should not be treated as nugatory. The Secretary is "a tribunal appointed by law and informed by experience" to determine reasonable and non-discriminatory stockyard rates, and it is patent from an examination of the order challenged herein that a vast amount of careful study in the light of technical knowledge surrounding the operation of stockyards has gone into the preparation of this order.

The burden of proof rests heavily upon appellant to prove by convincing evidence that the order is confiscatory. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 304–305. See also *Lindheimer* v. *Illinois Bell Tel. Co.,* 292 U. S. 151, 169; *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290, 298.

Manifestly it is not enough for appellant to establish that the Secretary may have erred with respect to some of the minor factual items or that the District Court may

have erred in some of its reasoning. The position which appellant must sustain in order to succeed in this appeal is to prove beyond reasonable doubt that the total result of the Secretary's determination as to maximum just and reasonable rates is necessarily confiscatory. Even if error may have been committed in some particulars, the order should be sustained if such error is offset by liberality in other particulars. *Lincoln Gas Co.* v. *Lincoln,* 250 U. S. 256, 266–268. It is respectfully submitted that the record in this case demonstrates beyond doubt that appellant has completely failed to sustain its burden of proof.

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

This suit was brought by St. Joseph Stock Yards Company to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for the Company's services. The District Court, composed of three judges, dismissed the bill of complaint, 11 F. Supp. 322, and appeal lies directly to this Court. 7 U. S. C. 217; 28 U. S. C. 47.

In October, 1929, the Secretary of Agriculture initiated a general inquiry into the reasonableness of appellant's rates. After hearing, the Secretary prescribed maximum rates which were enjoined by the District Court. *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290. The Secretary reopened the proceeding and hearing was had in 1933. While the matter was under consideration, appellant filed in February, 1934, a petition for a further hearing. On May 4, 1934, the Secretary denied the petition and made the order now in question.

The validity of the provisions of the Packers and Stockyards Act, 1921 (42 Stat. 159, 7 U. S. C. 181–229) authorizing the Secretary of Agriculture to prescribe maximum charges for the services of stock yards has been sustained. *Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moor-*

head v. *United States,* 280 U. S. 420. In this suit, appellant attacked the Secretary's order as lacking the support of essential findings, and also as confiscatory, thus violating the Fifth Amendment of the Federal Constitution. The denial of the request for a further hearing was assailed. No additional evidence was introduced in the District Court and the case was submitted at the final hearing upon the record made before the Secretary.

First.—The Secretary's findings.—The findings are elaborate. They include detailed findings with respect to the services rendered by appellant and its rates, the used and useful character of appellant's property, the valuation of used and useful land, the value of appellant's structures on the basis of cost of reproduction new less depreciation, working capital, going concern value, fair value on the basis of the facts found, fair rate of return, reasonable operating expenses (including repairs, depreciation and taxes), necessary revenue and volume of business. The Secretary found that the existing rates produced revenues in excess of those necessary to pay reasonable expenses and afford a fair return; that "the schedule of rates and charges now in effect is unreasonable and unjustly discriminatory."

As a guide to his determination of reasonable rates, the Secretary caused an analysis to be made of the books and records of the appellant covering the six-year period from 1927 to 1932. He reached his conclusion in the light of that evidence. Appellant contends that, as a prerequisite to a reduction of rates, it was necessary for the Secretary to find that the rates were unreasonable "at the time of the hearing," and that there were no findings to support such a conclusion with respect to the year 1932, the year immediately preceding the hearing. But in determining whether the existing rates were unreasonable, the Secretary was not confined to evidence as to

their operation at the precise time of his hearing, or in the months, or even a year, immediately prior thereto. He was entitled to consider the conditions which then obtained and also to extend his examination over such a reasonable period of past operations as would enable him to make a fair prediction in fixing the maximum rates to be charged in the future. The Secretary had before him the particular conditions which prevailed in the year 1932; and in the selection of the six-year period including that year, and in not taking the year 1932 as a sole criterion, we find nothing arbitrary. There are also objections to the failure of the Secretary to make specific findings on certain points of fact, but, so far as the requirement of findings is concerned, we think that the extensive findings that were made adequately supported his order.

Second.—The refusal of the Secretary to reopen the proceeding.—The hearing was closed on February 16, 1933. In the following January, a copy of the proposed order was transmitted to counsel for appellant and opportunity was given to file exceptions. Numerous exceptions were filed and at the same time (February, 1934) appellant asked for a further hearing upon the ground that there had been such a serious change in conditions affecting the value of the Company's property, its income, and the probable receipts of live stock and expenses of its yards, that the record no longer fairly reflected these matters. The application pointed to the Agricultural Adjustment Act of May 12, 1933, the National Industrial Recovery Act of June 16, 1933, and the Gold Reserve Act of January 30, 1934,—all as producing changes of which account should be taken. Appellant also alleged that its books and records were available to give the complete results of its operations for the year 1933, which showed a lower net operating income than that stated in the Secre-

tary's proposed report. The Secretary heard argument, made an informal investigation, and denied the application. He was careful to say that, while as a result of his investigation he found no adequate ground for reopening the proceeding, he did not use the facts thus elicited as a part of the record upon which his determination of rates was based. After stating what he deemed to be comparative results of operations in 1933, and in January and February, 1934, the Secretary gave as the general grounds for his action that it was inevitable that in such determinations considerable time must be consumed and that there would be some economic change; that appellant had obtained one rehearing because the first hearing had been followed by a general business depression which adversely affected its gross revenues; that it sought another because since the last hearing there had been a general improvement in those conditions; that in determining the values used as a rate base, "depression or stagnation values" had carefully been avoided and "normals" used; that the prescribed rates which the Secretary deemed to be fair at that time would "as the economic improvement continues, become liberal"; that the matter had been "in hearing and litigation since the year 1929" and the time had come for decision.

The decree of the District Court was filed on May 1, 1935. Despite the opportunity which the suit afforded, the record shows no endeavor on the part of appellant to prove any additional facts as to the conditions which obtained in 1933, or as to its operations in that year or at any time down to the hearing in the District Court, or as to any matter outside the record which had been made before the Secretary. The court concluded that the effect of the legislation of 1933 was speculative; that the difference between the amount which appellant claimed would have been earned under the prescribed rates, if applied to the business of 1933, and the amount found by

the Secretary to constitute the reasonable net return, was "too small to be taken as a guide for a rate"; that in order "to gauge the future," the Secretary had taken six years, "two of which were deeply affected by the depression," and that the experience before the Secretary "was up to ten days before the date of the hearing." In that view the court decided that the proceeding should not be reopened and that the question of the effects urged by appellants in that relation should await the test of actual experience upon which, if sufficient reasons were shown, the Secretary's order could be challenged. 11 F. Supp. p. 325. We find no error in that conclusion. If it be found that the rates as prescribed were not confiscatory, we see no reason for holding the Secretary's order to be ineffective because of his refusal to reopen the proceeding. *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490.

Third.—The scope of judicial review upon the issue of confiscation.—The question is not one of fixing a reasonable charge for a mere personal service subject to regulation under the commerce power, as in the case of market agencies employing but little capital. See *Tagg Bros. & Moorhead* v. *United States, supra,* pp. 438, 439. Here, a large capital investment is involved and the main issue is as to the alleged confiscation of that investment.

A preliminary question is presented by the contention that the District Court, in the presence of this issue, failed to exercise its independent judgment upon the facts. 11 F. Supp. pp. 326–328. See *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 50; *Bluefield Water Works Co.* v. *Public Service Comm'n,* 262 U. S. 679, 689; *United Railways* v. *West,* 280 U. S. 234, 251; *Tagg Bros. & Moorhead* v. *United States, supra,* pp. 443, 444; *Phillips* v. *Commissioner,* 283 U. S. 589, 600; *Crowell* v. *Benson,* 285 U. S. 22, 60; *State Corporation Comm'n* v. *Wichita Gas*

Co., 290 U. S. 561, 569. The District Court thought that the question was still an open one under the Packers and Stockyards Act, and expressed the view that, even though the issue is one of confiscation, the court is bound to accept the findings of the Secretary if they are supported by substantial evidence and that it is not within the judicial province to weigh the evidence and pass upon the issues of fact. The Government points out that, notwithstanding what was said by the court upon this point, the court carefully analyzed the evidence, made many specific findings of its own, and in addition adopted, with certain exceptions, the findings of the Secretary. The Government insists that appellant thus had an adequate judicial review and, further, that the case is in equity and comes before the court on appeal, and that from every point of view the clear preponderance of the evidence shows that the prescribed rates were in fact just and reasonable. Hence, the Government says that the decree should be affirmed irrespective of possible error in the reasoning of the District Court. See *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 680.

In view, however, of the discussion in the court's opinion,[1] the preliminary question should be considered. The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards.

[1] See, also, *Denver Union Stock Yard Co.* v. *United States*, 57 F. (2d) 735, 739; *St. Joseph Stock Yards Co.* v. *United States*, 58 F. (2d) 290, 295; *Union Stock Yards Co.* v. *United States*, 9 F. Supp. 864, 875; *American Commission Co.* v. *United States*, 11 F. Supp. 965, 969.

The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446; *Minnesota Rate Cases,* 230 U. S. 352, 433; *Los Angeles Gas Corp.* v. *Railroad Commission,* 289 U. S. 287, 304. When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States, supra,* p. 444; *Florida* v. *United States,* 292 U. S. 1, 12. In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent juris-

diction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. The question under the Packers and Stockyards Act is not different from that arising under any other act, and we see no reason why those decisions should be overruled.

But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. We have said that "in a question of ratemaking there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing." *Darnell* v. *Edwards,* 244 U. S. 564, 569. The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. *Los Angeles Gas Corp.* v. *Railroad Commission,* 289 U. S. 287, 305; *Lindheimer* v. *Illinois Telephone Co.,* 292 U. S. 151, 169; *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290, 298.

A cognate question was considered in *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 470, 488–490. There, appellees insisted that the finding of the Interstate Commerce Commission upon the subject of confiscation was conclusive, or at least that it was not subject to be attacked upon evidence not presented to the Commission. We did not sustain that contention. Nevertheless, we

pointed out that correct practice required that "in ordinary cases, and where the opportunity is open," all the pertinent evidence should be submitted in the first instance to the Commission. The Court did not approve the course that was pursued in that case "of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory." And it was regarded as beyond debate that, where the Commission after full hearing had set aside a given rate as unreasonably high, it would require a "clear case" to justify a court, "upon evidence newly adduced but not in a proper sense newly discovered," in annulling the action of the Commission upon the ground that the same rate was so unreasonably low as to deprive the carrier of its constitutional right of compensation. With that statement, the Court turned to an examination of the evidence. The principle thus recognized with respect to the weight to be accorded to action by the Commission after full hearing applies *a fortiori* when the case is heard upon the record made before the Commission or, as in this case, upon the record made before the Secretary of Agriculture. It follows, in the application of this principle, that as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.

As the District Court, despite its observations as to the scope of review, apparently did pass upon the evidence, making findings of its own and adopting findings of the Secretary, we do not think it necessary to remand the cause for further consideration and we turn to the other questions presented by the appeal.

Fourth.—Valuation of property, income, expenses, and fair return.—The Secretary found the fair value of ap-

pellant's property, used and useful in its stock-yards service, to be $2,743,000. The District Court made certain additions of land which the Secretary had excluded from his appraisal, arriving at a rate base of $2,752,964. The Secretary found seven per cent. to be a reasonable rate of return, which would mean net earnings of $192,010 on his rate base, or $192,710 on that of the court below. The Secretary estimated that under the prescribed rates appellant's net income available for return upon its investment would be $195,564 or 7.13 per cent. on his valuation.

Elaborate briefs have discussed a host of details in attacking and defending these estimates. While we have examined the evidence and appellant's contentions on each point, it is impracticable to attempt in this opinion to state more than our general conclusions.

1.—*Property values.*—For the purpose of demonstrating that its rates were not unreasonable prior to 1932, appellant states that it adopts the findings of the Secretary in his first decision as to the total value of its property. That value was then fixed at $3,382,148, to which appellant adds the value of certain additional land now found to be used and useful, $329,163, giving a total value, which appellant says is applicable to the years 1927-1931, of $3,711,311. But the first hearing was begun and concluded in December, 1929, and while the order was not promulgated until July 20, 1931, it was predicated, as the District Court said in reviewing that order, upon the value of the property as of the year 1928 and the volume of business during that year. *St. Joseph Stockyards Co.* v. *United States,* 58 F. (2d) p. 291. Appellant insisted in its bill of complaint in the first suit that the Secretary's denial of its request for reopening was arbitrary, as economic conditions had materially changed since 1928. The District Court, applying the principle of our decision in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S.

248, held that a rehearing should have been granted, 58 F. (2d) pp. 296, 297. The Secretary then vacated his prior order and reopened the proceeding. There is no question of *res judicata*. *Tagg Bros. & Moorhead* v. *United States, supra,* p. 445; compare *Clark's Ferry Bridge Co.* v. *Public Service Comm'n,* 291 U. S. 227, 233. Appellant could not obtain an examination of the changed conditions with respect to its income and outlays in the period after 1928 and at the same time insist that the change in values due to the depression should be ignored.

Appellant provides the physical facilities for a market and renders various services in connection with livestock. It supplies office buildings, docks for loading and unloading, "chute pens," "sales pens" and alleys, and the various appurtenances for the proper care of livestock that are essential to its service in warehousing. The property thus consists of land and various structures.

Value of land.—The Secretary found that of the land owned by appellant there were 4,410,361 square feet used and useful in its stockyards services. The District Court added 122,041 square feet. 11 F. Supp. 336. Appellant complains, on this appeal, of the exclusion of the property known as the "Transit House" and of the value assigned to the property which was included in the rate base.

The "Transit House" is a commercial hotel (occupying 15,805 square feet of land) with a limited patronage supplied by shippers and drivers of trucks. Appellant claims that the land and building are worth $120,143. Appellant points to the ruling of the Secretary in the first proceeding that the hotel should be considered a part of the used and useful property in the stockyards service. In his second decision, now under review, the Secretary found that the hotel was constructed many years ago when transportation facilities between the stockyard area and the "main-uptown" area were limited; that at the time of the first hearing the hotel was leased for a rental

of $1200 a year, and that the business had not warranted an increase, as provided in the lease, up to the time of the second hearing; that the decadence of the property had resulted principally from the development of good roads and the use of motor vehicles and the street car system of the city of St. Joseph, as well as from the change in the method of marketing livestock. It did not appear that the hotel produced enough revenue to pay taxes, insurance and upkeep, to say nothing of a return on its alleged value, and it is plain that if its value were to be included in the rate base the effect would be to levy an annual charge upon the patrons of the yards, principally the original shippers, in order to maintain hotel facilities on a non-compensatory basis for the special benefit of the truck drivers and others who patronized it.

The District Court held that it would have to be shown very clearly that the business of the yards would be materially affected by the absence of a nearby hotel before it could be said that its maintenance was so related to the stockyards business as to be properly included in fixing the rate for yard services. The court said that there was no such showing. We take the same view.

The land found to be used and useful is divided into several zones. Appellant assigns error in valuation only in the case of Zone A, in which, however, 70 per cent. of the used and useful land, or 3,003,973 square feet, is included. The Secretary valued this land at 16 cents per square foot, or at $480,635. Appellant contends that it is worth at least $275,164 more, which would be at the rate of about 25 cents a square foot.

Expert witnesses for both parties testified at length. At the first hearing, in 1929, two witnesses for appellant valued the land in Zone A at 30 cents per square foot. The witness for the Government valued it at 35 cents, predicated upon its particular value for stockyard use; otherwise at 20 cents. Before the second hearing, in 1933,

two of these witnesses had died. The surviving witness for appellant again testified giving a value, as of August, 1932, of 26 cents per square foot, and a second witness for appellant thought it worth 35 cents. The new witness for the Government placed the value as of November, 1932, at $5000 an acre, or about 11½ cents per square foot.

All the witnesses were highly qualified experts. Their valuations were of the naked land, without improvements. The three witnesses at the second hearing had collaborated in examining about 147 different transactions relating to property in the general vicinity, but they reached independent conclusions. The Government's witness attached special weight to five sales, or groups of sales, made at different times from 1918 to 1930 at prices as low or lower than the valuation he fixed. Appellant points to other transfers at other locations at higher prices. Manifestly these transactions involved collateral inquiries and in the end simply afforded information of varying significance to aid the forming of an expert judgment. Appellant recognizes the impracticability of attempting to analyze "the rather involved transfers and locations in an attempt to determine the truth as between the land appraisers." Accordingly, appellant seeks to demonstrate that the Secretary's finding is vitiated by what is asserted to be his reliance upon an erroneous analysis of a sale by appellant, in 1929, of the entire capital stock of a terminal belt railway company which served the stockyards and the adjacent industrial area. It is said that none of the expert witnesses based their appraisals upon that transaction. We think that appellant overestimates the relative weight given to it by the Secretary and fails to take proper account of the effect of its use. The Secretary found that the valuation by the Government's witness at 11½ cents per square foot was "well supported by analysis of transactions in adjacent

and similar lands," but the Secretary thought that the witness had failed to give consideration to the belt railway sale. That led the Secretary to give a higher valuation than that of the Government's witness. And on all the evidence the Secretary fixed the value at 16 cents per square foot, which he said did not represent "depression or stagnation value" but constituted "the reasonable normal value of the land giving weight to values existing immediately preceding as well as those existing during the present depression."

The weight to be accorded to the testimony of the experts cannot be determined without understanding their approach to the question and the criteria which governed their estimates. The testimony of appellant's witnesses shows quite clearly that they proceeded, in part at least, upon an erroneous basis. The Packers and Stockyards Act treats the various stockyards of the country "as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East." It assumes that "they conduct a business affected by a public use of a national character and subject to national regulation." *Stafford* v. *Wallace, supra,* p. 516. Appellant, conducting such a business, was entitled to be allowed in the fixing of its rates the fair market value of its land for all available uses and purposes, which would include any element of value that it might have by reason of special adaptation to particular uses. But it was not entitled to an increase over that fair market value by virtue of the public use. *Minnesota Rate Cases,* 230 U. S. 352, 451, 455; *Clark's Ferry Bridge Co.* v. *Public Service Comm'n, supra,* p. 238. We think that appellant's witnesses failed to give proper heed to this principle. Their testimony indicates that they did not consider simply the availability of the land for all uses and purposes, including its availability for a stockyard, but attached special weight to the actual and profitable public

use. They apparently included in their estimates an increment of value, by virtue of that use, which is inadmissible in a proceeding to determine the reasonable rates to be charged for the public service.

The point is illustrated by the difference in their estimate of the value of the land in Zone B. That is a tract of about seventeen acres adjoining Zone A. One of appellant's witnesses described the land in Zone B as "of the same character" as that occupied by appellant's hog sheds and that it had equal railroad service. It was said to adjoin that portion of appellant's land which "is actively used in the conduct of its business." The other witness for appellant said that "with respect to topography, rail service and accessibility this ground is much the same as Zone A, which lies immediately to the north." But the first witness placed a value of 13 cents per square foot on the land in Zone B as compared with 26 cents per square foot on that of Zone A, and the second witness valued the former at 15 cents per square foot and the latter at 35 cents. The first witness said that Zone B was not valued as high as Zone A because "it is not actually in use" by appellant "for the immediate conduct of its business but is in waiting"; that it "had not been brought into its highest and best use," but when it had been brought into that use, it would "be worth just as much as the land in tract A." When we consider that the question was of the fair market value of the bare land in the light of its availability, but without improvements (which were separately valued), the erroneous theory on which appellant's witnesses valued Zone A is apparent. The Secretary fixed the value of the land in Zone A and the similarly available land in Zone B at the same amount.

Our conclusion is that the evidence falls short of that convincing character which would justify us in disturbing the Secretary's finding.

Value of structures.—There appears to be no dispute as to the method of valuation, which was on the basis of cost of reproduction new, less depreciation. The property was inventoried and appraised independently by two qualified engineers, one employed by appellant and the other by the Government. Their estimates of the cost of reproduction new were not very far apart. On that evidence the Secretary found that cost, excluding non-useful property, to be $2,637,186. This included construction overheads, general salaries and expenses, legal expenses, compensation of architects and engineers, fire and tornado insurance, workmen's compensation and public liability insurance, and taxes during construction, making a total of $2,494,043, on the 1927 inventory, which was increased by $143,143 for the additions and betterments to 1932.

Appellant presents no contention as to this valuation but contests the amount deducted by the Secretary for existing depreciation. He took 76.04 per cent. of the cost of reproduction new as representing the depreciated value of the structures and thus his deduction amounted to $597,570. That was close to the estimate of the Government's engineer. Appellant's engineer testified that the present condition was 89 per cent.

Appellant's contention is that there was no evidence to support the Secretary's deduction for existing depreciation and that the only legal evidence on this point was that of appellant's witness. The precise criticism is that the percentage used by the Government's engineer in his testimony was based on an average of percentages given by five of his assistants, none of whom testified. It appears, however, that the Government's witness had personally inspected the property in preparation for the first hearing, at which he testified as to the result of the inspection and the methods he adopted. At the second hearing he testified that he followed the principles of his first

appraisal in that of 1932, except that he had his five assistant engineers make separate estimates of which he took the average. In answer to appellant's contention as to their failure to testify, the Government produces a stipulation as to the record which shows that when the exhibits covering the appraisal by the Government's witness and the estimates of the assistants were offered in evidence, the Government's counsel stated that if there was any objection upon the ground that they had not testified, the Government would produce any or all of them for cross-examination respecting the exhibits. Later, after an opportunity for an examination of the exhibits by appellant's counsel, they were received in evidence, appellant's counsel stating that no objection was made other than the general one theretofore made, and applicable throughout the proceeding, that the Secretary had no power to find the value of appellant's property. Appellant did not seek to avail itself of the Government's offer to produce the assistants. In these circumstances we find no basis for the argument that the testimony of the Government's witness as to the existing depreciation and the accompanying exhibits should not be considered. The Secretary reviewed the method adopted by appellant's engineer as compared with that of the Government's engineer and reached a reasoned conclusion upon all the evidence. We think that the evidence affords no sufficient ground for upsetting his finding.

The remaining contention affecting the rate base is in relation to going concern value.

Going concern value.—Appellant's witness, who testified at length at both hearings, followed an elaborate method involving assumptions and speculations of the sort which fail to furnish a sound basis for computing a separate allowance for that element. Compare *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 394; *Los Angeles*

Gas Corp. v. *Railroad Commission, supra,* pp. 314, 318, 319; *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290, 309; *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n,* 292 U. S. 398, 412. The witness differentiated his method from the "past deficit" method. *Galveston Electric Co.* v. *Galveston, supra.* He styled his method as "the cost of reproduction method of evaluating the business." It compared "to the past deficit method in just exactly the same way that reproduction new of physical property compares to historical cost of physical property." His calculations depended upon assumptions of theoretical future deficits. They involved elaborate guesswork, according to assumed valuations of physical plant, the length of time required for the complete recovery of the business, and the rate of return. At the first hearing he computed the going concern value at $666,666. At the second hearing, by a similar method he made various calculations dependent on assumed valuations of the property, that is, $294,000 on a total valuation of $5,000,000; $358,000 on a valuation of approximately $3,500,000; and about $400,000, or approximately 22½ per cent. of the physical plant value, on a valuation of $2,000,000. That is, as he said, "Depending upon the final value as fixed by the Secretary, the going value will range in approximately a straight line variation" between the limits "of 22½ per cent. for a minimum value of $2,000,000, and 6 per cent. or $294,000 for a maximum value of $5,000,000." The Secretary treated such speculations as "in no real sense evidence." We agree with that conclusion.

Appellant contends, however, that the Secretary and the District Court erred in saying that appellant's claim is based wholly upon the testimony of this witness. Appellant strongly relies upon the fact that on the first hearing the Secretary made an allowance of $300,000 for

going concern value and that in his answer in the first suit he denied that no evidence upon that subject had been offered on the Secretary's behalf, but on the contrary stated that much evidence was introduced by the Secretary tending to show the value of that element. That answer was made to the allegation that appellant was entitled to an allowance of at least $666,663, and the Secretary further answered that the separate allowance he had made was more than adequate.

The Secretary was not estopped or controlled by the ruling in the first proceeding. He was entitled, and it was his duty, to re-examine the case on the second hearing and to reach the conclusion which the evidence justified. In that process, he in effect overruled the earlier allowance and left it without force. The question remains one of evidence. The Secretary recognized the fact that there is an element of value in an "established plant doing business and earning money over one not thus advanced." But he thought that in the rate base he had fixed there was an adequate allowance for that element and that it was "inextricably interwoven with other values." The Government's argument in support of this view points to the overheads allowed and emphasizes the fact that the Secretary's method took as his basis reproduction cost "unmodified by considerations of actual or historical cost." It is urged that the Secretary in fact made a liberal valuation which gave a margin large enough to cover the value inherent in a going concern.

We think it unnecessary to review that argument in detail. The decisive point on this appeal is that in seeking a separate allowance for going concern value, in addition to the value of the physical plant as found, and in maintaining that the property was being confiscated because of the absence of that allowance, it was incumbent upon appellant to furnish convincing proof. That proof we do not find in the record.

Operating expenses.—The point of contention is the annual allowance for depreciation reserve. The argument that the Secretary was without authority to prescribe the amount of this allowance is obviously ineffectual. In fixing reasonable rates for the stockyards service it was necessary for the Secretary to ascertain the outlays which that service would require and the amount which should reasonably be reserved out of income to cover depreciation in the property used. It was also necessary for the Secretary in estimating the latter allowance to examine the history of the property and the amounts which in the course of appellant's operations had been found necessary for repairs and replacements. On the facts disclosed by the extensive evidence, the Secretary concluded that $80,000 was an adequate amount to be included in appellant's annual expenses "to cover repairs and provision for depreciation reserve." The Secretary had found that the amount expended for repairs on appellant's used and useful property for the preceding ten years had averaged about $38,500 a year. This finding does not appear to be contested, and from it appellant concludes that the Secretary has allowed the remainder of $80,000, or $41,500, to be carried annually to the depreciation reserve account. Appellant insists that the yearly depreciation allowance should be not less than $100,000.

On December 31, 1932, appellant had accumulated a depreciation reserve of $1,771,063. This reserve had been accumulated since 1914. In an appraisal made by the American Appraisal Company in 1922, on the basis of reproduction new, the then existing depreciation was estimated at $621,171 and a reserve of that amount was then provided by a surplus adjustment. From that time until 1932 appellant set aside from $120,000 to $130,000 annually making a total provided for depreciation since 1914 of about $1,887,000. In that entire period, by the computation of the Government which does not seem to be

controverted, there had been charged against the depreciation reserve for retirements only about $116,405, of which about $103,500 were for retirements in the period 1922 to 1932, inclusive. The Government contends that the structural property in the pen areas, embracing pens, fences, runways and other yard structures, had been kept in proper operating condition principally by ordinary repairs and piecemeal replacements. The Government argues that the cost of reproduction new of this part of the property is approximately one-half of the reproduction cost of the entire property, and that from 1916 to 1932 the value of that portion of the property which was retired amounted to about $40,000. Appellant states that in 1926 to 1930, inclusive, the amount of pen structures which were retired was $41,639. On the other hand, it appears that the amount set up for depreciation on that class of assets was over $600,000.

Whatever may be said of this or that detail, it is quite clear that the amounts carried annually to the depreciation reserve were excessive. The Government's analysis tends to show that an average of approximately $47,000 annually would have been sufficient to take care of the repairs, maintenance and retirements during the period for which the financial history of appellant is available, and that the Secretary's allowance of $80,000 for both repairs and depreciation reserve is about $33,000 in excess of the amount shown to be actually required on the basis of that experience.

In the light of appellant's practice in accumulating an excessive reserve by its charges to operating expenses, a close examination was called for and a considerable deduction in the amount of such allowances in fixing reasonable rates was necessary. We have had occasion recently to discuss the general question of depreciation reserves at some length (*Lindheimer* v. *Illinois Telephone*

Co., 292 U. S. 151) and we need not repeat what was there said. The question now presented is one of sound judgment upon the present record. We agree with the District Court that the Secretary endeavored to reach a fair conclusion and that the Government's analysis is persuasive. The argument that the Secretary employed the sinking fund method and upon that basis made an inadequate allowance does not find support in his findings. It is apparent that he sought to make an allowance which according to the nature of the property and appellant's experience would be adequate to cover repairs and replacements with a further provision to maintain a reasonable depreciation reserve. The evidence and appellant's contentions with respect to it do not satisfy us that the Secretary reached an unjustified result.

Income.—The Secretary allowed seven per cent. as the rate of return, and appellant presents no complaint as to that. *Wabash Valley Electric Co.* v. *Young*, 287 U. S. 488, 502; *Los Angeles Gas Corp.* v. *Railroad Commission, supra*, p. 319. Applying the rates he fixed, the Secretary estimated the annual gross income at $621,831, and operating expenses, including the contribution to depreciation reserve as above stated, at $426,267, leaving a net balance of $195,564, slightly over seven per cent. on the fair value of the property.

Appellant's revenue is derived from yardage charges, from the sale of feed and bedding, and from special services. The Secretary made no change in the charges for miscellaneous services, such as loading and unloading, dipping and spraying, cleaning and disinfecting, etc. The revenue from these services was estimated at $90,500. The profit on sales of feed and bedding was estimated at $82,800. The yardage revenues are derived from charges (1) for yarding livestock arriving fresh from the country, (2) for yarding livestock resold or reweighed for purpose

of sale, and (3) for the use of feed lot facilities. The reductions directed by the Secretary were in (1) and (2) and the revenue from the new rates for these services was estimated at $412,775. As to (3), for livestock held in the feed lots, the Secretary provided for an increase of charges, fixing maximum rates estimated to produce a revenue of $35,756.

It appears that formerly the feed lots were leased and on the first hearing before the Secretary their value was excluded from the rate base. After 1930 they were operated under appellant's supervision and appellant filed its rates for their use. Accordingly, on the second hearing, the Secretary found that the feed lots were used and useful and included them in the rate base. The principal "feeding business" is the feeding of sheep. The increase in rates, for which the Secretary provided, was from 15 cents and 35 cents per head for cattle (depending upon the use of sheds and other enclosures) to 60 cents, and from 5 cents per head for hogs and sheep to 38 cents. Despite the increase, appellant contends that the order as to feed lot charges is void; that there were no findings to support it and no true hearing; that the evidence did not sustain the Secretary's conclusions, and that although the order was based upon a finding of unjust discrimination, there was no alternative permitted in removing it.

It is manifest, however, that when the feed lots were brought into the rate base, it was appropriate that the reasonableness of the charges for their use should be considered. This was part of the subject before the Secretary. In the order for reopening the proceeding, the Secretary had stated that a general inquiry would be made "into the reasonableness and lawfulness of each and every rate and charge . . . stated in any and all schedules of rates and charges filed by respondent" (appellant here). The Secretary found that "under the existing schedule shippers of livestock who consign their animals to commission men"

were charged more for the use of appellant's facilities "in handling such livestock for a shorter period of time" than those who used the "feed lots for a much longer period of time." The Secretary found that the existing rates were "unreasonable and unjustly discriminatory." The feed lots were embraced in the tracts the value of which was estimated on a unit basis. The findings show appellant's operating expenses. We find no merit in the contentions that there was a lack of notice, or a lack of evidence as to the use of the feed lots or as to the discriminatory effect of the existing rates. We do not think that the decisions cited as to the affording of an alternative for the removal of discrimination are applicable to the present case. For the Secretary's action here was to provide for a reasonable charge for the use of the feed lots, so that those who did not use them should not bear an unreasonable burden. Whether appellant would be able to obtain the estimated revenue from the increased rates should be determined by a fair test of the permitted charges.

The reductions by the Secretary were in the charges for yardage services. The Secretary made different reductions for rail and truck shipments, and this differentiation is challenged. For example, under the existing rates, appellant's charge was 35 cents per head of cattle received by rail and 40 cents per head received by truck. The Secretary reduced the charge to 27 cents as to the former and to 35 cents as to the latter. There are differences in the two sorts of receipts in that in the one case there is a loading and unloading charge and, as detailed testimony showed, cattle received by rail consumed, as a rule, more feed than those received by truck. The evidence disclosed the services rendered in the case of cattle and other livestock, and the question is simply as to a fair determination in the light of all the circumstances. If the rates as prescribed were not confiscatory, the classification of rates was clearly within the Secretary's statutory authority.

There is a separate contention with respect to the rates for yarding livestock which was resold or reweighed for the purpose of sale. Appellant states that the Secretary's charges differed from its own in only one instance, that is, that the former are 1.5 cents per head lower on calves, but as the number of calves resold is negligible, that difference would not appreciably affect appellant's income. Appellant's tariff provided that on livestock resold in the commission division, there would be an additional charge of one-half the yardage charges. The Secretary found that despite this limitation, appellant in practice had imposed the charge on other resales, if they did not involve livestock "to go to the country," that is, bought by farmers to be fed. The Government's contention is that the practice lacked uniformity. The Secretary concluded that to impose the charge on resales in the commission division, but not on those in the traders division or elsewhere in the yard, was unreasonable and constituted an unjust discrimination. Appellant insists that the Secretary over-estimated the income from this source by $20,803. The controversy is over the number of livestock to which the charges for resales or reweighs for the purpose of sale would apply. The Secretary made a general estimate. He also found the number of head to which the charge would have been applicable in 1931 and 1932, and his estimate for the future was less than the average of those years. Appellant challenges the correctness of the computation and says that it rests upon an erroneous assumption that "order buyers" would pay a resale charge. The Government insists that the criticism is unjustified and points to evidence which is said to demonstrate conclusively that the Secretary's figures as to resales and reweighs are correct, and that appellant's argument is based on an application of the prescribed rates to "the wrong volume." It is unnecessary to recite the evidence. We think the Government substantiates its point.

The remaining question is with respect to the effect of the reduction of the other yardage charges, that is, for the yarding of livestock arriving fresh from the country; and, then, whether upon the whole case there would be such a deficiency in revenue as to establish confiscation. The revenue, of course, depends upon the quantity of livestock handled. The Secretary considered the fluctuation in receipts for a period of twenty-four years. The Government points to the statistical analysis as showing that cyclical fluctuations are characteristic of the business and that years of decline have been followed normally by an upward swing. The Secretary examined the actual receipts of each sort of livestock for the six years 1927 to 1932, inclusive. He did not attempt to make an exact prediction. Nor did he take an average of the six years. He took into consideration the lower volume of business in the later part of the period and made an estimate of the probable receipts which cannot be considered unfair. It was not an unsupported prophecy (compare *West Ohio Gas Co.* v. *Public Utilities Comm'n,* 294 U. S. 79, 82), but rather an endeavor to perform the essential duty of making "an honest and intelligent forecast" in view "of all the relevant circumstances." *Southwestern Bell Telephone Co.* v. *Public Service Comm'n,* 262 U. S. 276, 278. Applying the factors thus arrived at, the Secretary found that the prescribed rates would yield revenue sufficient to give the return above mentioned.

Appellant criticises the Secretary's estimates and insists that the prescribed rates would have been confiscatory during the entire period which the Secretary considered, making separate calculations for the period 1927 to 1931, and for 1932. The Government in turn points to necessary corrections in appellant's statements both of income and expenses and with those adjustments shows that under the prescribed rates appellant would have had an average yearly net return, for 1927 to 1931, of approxi-

mately $266,237, or about 9.7 per cent., and for the six-year period, 1927 to 1932, approximately $247,698, or about 9 per cent., on the fair value of its property as found. And while considering it to be improper to take the year 1932—the worst year of the depression period—as the basis for estimating return, the Government urges that, even in the abnormal conditions of that year, the prescribed rates would have produced a net return of 5.67 per cent.

Appellant seeks to buttress its case by reference to results of operations in later years. Its brief attempts to present the transactions of 1935. But there is no evidence properly before us save that contained in the record before the Secretary. Upon that record appellant stood in the District Court, and upon that record appellant must stand here. The hearing before the Secretary, held in 1933, necessarily proceeded upon an examination of the operations of the preceding years. The Secretary examined the course of business for a period sufficiently long to afford a basis for a reasonable estimate with due regard to the years preceding, and those during, the depression. His selection, and the use he made of it, is not open to any sound criticism. If the operations of later years show that the rates have become unreasonably low, appellant has its remedy. It has had, and still has, opportunity to apply to the Secretary of Agriculture for a modification of the prescribed charges. The only request for reopening the proceeding or for an adjustment of the rates, so far as now appears, was made early in 1934 prior to the order in question and before any adequate test of the rates.

We conclude that the appellant has failed to prove confiscation and the decree of the District Court is

Affirmed.

MR. JUSTICE ROBERTS concurs in the result.

MR. JUSTICE BRANDEIS, concurring.

I agree that the judgment of the District Court should be affirmed; but I do so on a different ground.

The question on which I differ was put thus by the District Court: "If in a judicial review of an order of the Secretary his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when a constitutional issue is involved? Is there anything in the Constitution which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?" 11 F. Supp. 322, 327.

Like the lower court, I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.

Suits to restrain or annul an order of the Secretary of Agriculture are governed by the provision which Congress has made for reviewing orders of the Interstate Commerce Commission. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 432–433, 442–444. That provision does not, in my opinion, permit a district court

to set aside an order on the ground that the Secretary erred in making a finding of fact; and the jurisdiction of this Court to review its judgment is necessarily subject to the same limitation. As the District Court concluded that no applicable rule of law was disregarded by the Secretary; that for his findings there was ample support in the evidence; that taken together they support his conclusion that the rates are compensatory; and that the proceeding was in no respect irregular, it was in duty bound to dismiss the bill without enquiring into the correctness of his findings of subsidiary facts.

First. An order of the Secretary may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory. For the order of an administrative tribunal may be set aside for any error of law, substantive or procedural. *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541, 547. Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State. Compare *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668–669. It may set aside an order for lack of findings necessary to support it, *Florida* v. *United States*, 282 U. S. 194, 212–215; or because findings were made without evidence to support them, *New England Divisions Case*, 261 U. S. 184, 203; *Chicago Junction Case*, 264 U. S. 258, 262–266; or because the evidence was such "that it was impossible for a fair-minded board to come to the result which was reached," *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 442; or because the

order was based on evidence not legally cognizable, *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274, 286–290; or because facts and circumstances which ought to have been considered were excluded from consideration, *Interstate Commerce Comm'n* v. *Northern Pacific Ry.*, 216 U. S. 538, 544–545; *Northern Pacific Ry.* v. *Department of Public Works*, 268 U. S. 39, 44; or because facts and circumstances were considered which could not legally influence the conclusion, *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U. S. 42, 46–47; *Florida East Coast Ry.* v. *United States*, 234 U. S. 167, 187; or because it applied a rule thought wrong for determining the value of the property, *St. Louis & O'Fallon Ry.* v. *United States*, 279 U. S. 461. These cases deal with errors of law or irregularities of procedure.

Second. The contention of the appellant is that the Secretary of Agriculture erred in making findings on which rest his conclusion that the rates prescribed are compensatory. The matters here in controversy are questions of fact—subsidiary issues, about 63 in number, bearing upon two main issues of fact: What is the "value" of the property used and useful in the business? What will be the income earned on that valuation if the prescribed rates are put into force?

By the Packers and Stockyards Act, the duty of investigating and determining the facts was committed by Congress to the Secretary. It was not disputed that ordinarily his findings made upon substantial evidence in properly conducted proceedings are conclusive. *Tagg Brothers & Moorhead* v. *United States*, 280 U. S. 420, 444. This Court has consistently declared in cases arising under the Interstate Commerce Act, that to "consider the weight of the evidence is beyond our province," *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; *Chicago, R. I. & P. Ry.* v. *United*

States, 274 U. S. 29, 33–34; and that courts have no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions of fact, or with the alleged inconsistency of the findings with those made in other proceedings, *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663, 665–666. Compare *New York & Queens Gas Co.* v. *McCall,* 245 U. S. 345, 348; *Georgia Ry. & Power Co.* v. *Railroad Commission,* 262 U. S. 625, 634; *Silberschein* v. *United States,* 266 U. S. 221, 225; *Ma-King Co.* v. *Blair,* 271 U. S. 479, 483.

The cases are numerous in which the attempt was made to induce this Court to annul an order of the Commission for error of fact; but in every case relief was denied. See *St. Louis & O'Fallon Ry.* v. *United States,* 279 U. S. 461, 493, n. 8. In this case also, the Court refuses to set aside the order. But it declares that an exception to the rule of finality must be made, because a constitutional issue is involved; and that the Court, weighing the evidence, must in its independent judgment determine the correctness of the findings of fact made by the Secretary. That view finds support in *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, and in general statements made in *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 488–490, and other cases; but it is inconsistent with a multitude of decisions in analogous cases hereafter discussed.

Third. The Fifth Amendment, like the Fourteenth, declares that property may not be taken without due process of law. But there is nothing in the text of the Constitution (including the Amendments) which tells the reader whether to constitute due process it is necessary that there be opportunity for a judicial review of the correctness of the findings of fact made by the Secretary of Agriculture concerning the value of this property or its net income. To learn what the procedure must be in a particular situation, in order to constitute due process, we

turn necessarily to the decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. *Pittsburgh, C., C. & St. L. Ry.* v. *Backus,* 154 U. S. 421, 426–427; *Reetz* v. *Michigan,* 188 U. S. 505, 508; *Dohany* v. *Rogers,* 281 U. S. 362, 369. They tell us that due process is not necessarily judicial process. *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 280; *McMillen* v. *Anderson,* 95 U. S. 37, 41; *United States* v. *Ju Toy,* 198 U. S. 253, 263. And they draw distinctions which give clear indication when due process requires judicial process and when it does not.

The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the Government, *United States* v. *Babcock,* 250 U. S. 328, 331) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights. Compare *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597. A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. Compare *Ng Fung Ho* v. *White,* 259 U. S. 276, 282–285, with *United States* v. *Ju Toy,* 198 U. S. 253, and *Tang Tun* v. *Edsell,* 223 U. S. 673, 675. But a multitude of decisions tells us that when dealing with property a much more liberal rule applies. They show that due process of law does not always entitle an owner to have the correctness of findings of fact reviewed by a court; and that in deciding whether such review is required, "respect must be had to

the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found suitable or admissible in the special case, it will be adjudged to be 'due process of law.'" Mr. Justice Bradley, in *Davidson* v. *New Orleans,* 96 U. S. 97, 107.

Our decisions tell us specifically that the final ascertainment of the facts regarding value or income may be submitted by Congress, or state legislatures, to an administrative tribunal, even where the constitutionality of the taking depends upon the value of the property or the amount of the net income. Thus:

(a) No taking of property by eminent domain is constitutional unless just compensation is paid. But in condemnation proceedings the value of the property, and hence the amount payable therefor, need not be determined by a court. "By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury." *Bauman* v. *Ross,* 167 U. S. 548, 593. In *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 695, it was said that "there is no denial of due process in making findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings." In *Crane* v. *Hahlo,* 258 U. S. 142, 148, the Court said in applying the same rule to a statute which allowed a judicial review of the facts only in case of "lack of jurisdiction, or fraud, or wilful misconduct on the part of the members of the Board": "This

afforded ample protection for the fundamental rights of the plaintiff in error, and the taking away of the right to have examined mere claims of honest error in the conduct of the proceeding by the Board did not invade any federal constitutional right." See also, *United States* v. *Jones,* 109 U. S. 513, 519; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 569.

(b) No taking of property by taxation is constitutional unless the exaction is laid according to value, income or other measure prescribed by law. But Congress has, with the sanction of this Court, broadly given finality to the determination by the Board of Tax Appeals of the facts concerning income. By its legislation the jurisdiction of courts is limited to deciding "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." *Helvering* v. *Rankin,* 295 U. S. 123, 131; *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289, 294. Compare *Cheatham* v. *United States,* 92 U. S. 85, 88–89. No court may pass upon the correctness in fact of any finding of the Board.

(c) The due process clause is not violated by giving in tariff acts finality to the valuations made by appraisers of imported merchandise belonging to American citizens. *Hilton* v. *Merritt,* 110 U. S. 97, 107. "It was certainly competent for Congress," said the Court in *Passavant* v. *United States,* 148 U. S. 214, 219, "to create this board of general appraisers, called 'legislative referees' in an early case in this court, (*Rankin* v. *Hoyt,* 4 How. 327, 335,) and not only invest them with authority to examine and decide upon the valuation of imported goods, when that question was properly submitted to them, but to declare that their decision 'shall be final and conclusive as to the *dutiable value* of such merchandise against all parties interested therein.' "

(d) The due process clause is not violated by legislation which requires a fire insurance policy to provide that the amount of the loss (and hence values) shall be determined by a board of appraisers; and that their decision, if not grossly excessive, or inadequate, or procured by fraud, shall be conclusive as to the amount of the loss. *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U. S. 151.

(e) The due process clause is not violated by giving finality to assessments of value made for the purpose of *ad valorem* taxation, although in those proceedings the opportunity for a hearing is far less ample than under the statute here in question. Compare *State Railroad Tax Cases,* 92 U. S. 575, 610; *Kentucky Railroad Tax Cases,* 115 U. S. 321; *King* v. *Mullins,* 171 U. S. 404, 429–431.

As we said in *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446: "We do not sit as a general appellate board of revision for all rates and taxes in the United States"; and in *Coulter* v. *Louisville & Nashville R. Co.,* 196 U. S. 599, 607: "Of course, no court would venture to intervene merely on the ground of a mistake of judgment on the part of the officer to whom the duty of assessment was entrusted by the law."

Answering the suggestion of possible error in the final action of a board in valuing and assessing railroad property, the Court said in *Kentucky Railroad Tax Cases,* 115 U. S. 321, 335: "Such possibilities are but the necessary imperfections of all human institutions, and do not admit of remedy; at least no revisory power to prevent or redress them enters into the judicial system, for, by the supposition, its administration is itself subject to the same imperfections." In *Crane* v. *Hahlo,* 258 U. S. 142, 148, the Court intimating that even judges may err in their determinations of fact, held that legislators might,

in proceeding for the taking of property, act on "the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him."

These cases show that in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the Court has refused to be governed by a rigid rule. It has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action based on *ex parte* casual inspection or unverified information, where no record is preserved of the evidence on which the official acted, and formal, deliberate quasi-judicial decisions of administrative tribunals based on findings of fact expressed in writing, and made after hearing evidence and argument under the sanctions and the safeguards attending judicial proceedings. It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of government for prompt final decision. It has recognized that there is a limit to the capacity of judges; and that the magnitude of the task imposed upon them, if there be granted judicial review of the correctness of findings of such facts as value and income, may prevent prompt and faithful performance. It has borne in mind that even in judicial proceedings the finding of facts is left, by the Constitution, in large part to laymen. It has enquired into the character of the administrative tribunal provided and the incidents of its procedure. Compare *Humphrey's Executor* v. *United States,* 295 U. S. 602, 628. And where that prescribed for the particular class of takings appeared "appropriate to the case, and just to the parties to be

affected," and "adapted to the end to be attained," *Hagar* v. *Reclamation District,* 111 U. S. 701, 708, the Court has held it constitutional to make the findings of fact of the administrative tribunal conclusive. Thus, the Court has followed the rule of reason.

Fourth. Congress concluded that to give finality to the findings of the Secretary of Agriculture of the facts as to value and income is essential to the effective administration of the Packers and Stockyards Act. The *Ben Avon* case, and the statements in *Manufacturers Ry. Co.* v. *United States,* and casual references in other cases, should not lead us to graft upon the rule discussed, and so widely applied to other takings, a disabling exception applicable to rate cases. In none of the rate cases relied upon was there any reason given for denying to Congress that power; nor was there mention of the many decisions in which the power to prescribe finality was upheld. In none was there noted the distinction between challenging the correctness of findings of fact on which rest the conclusion as to confiscation, and challenging the conclusion of law as to confiscation on facts found. Here, some reasons have been offered in support of making the exception; but no reason given seems to me sound.

(a) It is urged that since Congress did not, and could not, delegate to the Secretary authority to prescribe a confiscatory rate, the facts in issue are jurisdictional and, hence, the Court must have power to review them. But, as was said in *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, 336: "The challenge of a prescribed rate as being confiscatory raises a question not as to the scope of the Commission's authority but of the correctness of the exercise of its judgment." Therefore, *Crowell* v. *Benson,* 285 U. S. 22, has no application here.

(b) It is said that, since regulating rates is legislation, courts must have the same power to review facts which they possess in passing on the constitutionality of

statutes—otherwise the supremacy of law could be impaired by delegation to an administrative tribunal of a power to make final determinations that the legislature lacks. To that argument there are several answers. It fails to note that a rate order may be complained of as being confiscatory, not because of error in a finding of value or income, but because the regulating body has, in reaching its conclusions, ignored established principles or incontestable facts, or been guilty of dishonesty or of other irregularity in the proceeding. Whenever a legislative body regulates a subject within the scope of its power, a presumption of constitutionality prevails, in the absence of some factual foundation of record for overthrowing the regulation, *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 257–258; and this rule extends to such action by an administrative body. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 185–186. If there be in the record conflicting evidence as to the facts assumed, a court may not substitute its independent judgment for that of the legislative body. Mere denial of facts relied upon as conditioning the validity of legislation does not confer upon a court authority to decide what is called the truth; that is, the absolute existence in reality of facts alleged. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice* v. *New York*, 264 U. S. 292, 294. Here, the Court's duty is to determine merely whether there was evidence upon which reasonable men could have found as the Secretary did, with regard to value and income. Obviously the case at bar is not one in which "it was

impossible for a fair-minded board to come to the result which was reached." Compare *Van Dyke* v. *Geary*, 244 U. S. 39, 48–49.

Moreover, argument based on the analogy of the review of statutes fails to note the distinction between determinations of fact made in a quasi-judicial proceeding surrounded by all the safeguards which attend trials by a court, and assumptions, or conclusions, as to facts made by a legislature on information which lacks those safeguards. It fails to note also the subsidiary character of the issue involved in a finding of value or income; and that it is only as to these subsidiary issues that finality of the finding is asserted here.

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command.

Fifth. The history of this case illustrates that regulation cannot be effective unless the legality of the rates prescribed may, if contested, be determined with reasonable promptness. Six and one-half years have elapsed since the Secretary of Agriculture concluded that the rates of this utility were so high as to justify enquiry into their reasonableness, and nearly two years since entry of his order prescribing the reduced rates. In the judgment of the lower court and of this Court the attack upon the order

reducing them was unwarranted. But the rates of 1929 have remained in force; and, despite the supersedeas and injunction bonds, there will be practically no redress for the wrong done to the business community throughout the long years in which excessive rates have been exacted. Neither party is chargeable with lack of diligence in the investigation or litigation; and there is no suggestion of undue delay on the part of either court. The long delay is due to other causes.

The investigation of the Company's rates was ordered October 9, 1929. The hearing began December 2, 1929. All the subsidiary enquiries of fact commonly incident to applying the rule of *Smyth* v. *Ames*, 169 U. S. 466, were entered upon. After the hearing had closed, the Company sought to have it reopened for the admission of evidence showing how the changed conditions of business since 1929 would affect plaintiff's income and the net return on the property used. This application was refused by the Secretary; and he entered an order fixing maximum rates, which, on his valuation of the property and estimate of earnings, would have yielded a return of 7½ per cent. if in effect in 1928. Thereupon, the Company filed a bill in the District Court to set aside the order on the ground that it would deprive petitioner of its property in violation of the due process clause. That court heard additional evidence, as well as receiving the record of the proceedings before the Secretary. It considered, but did not pass on, the merits. For it set aside the order on the ground that the Secretary should have acceded to the request to reopen the hearings. *St. Joseph Stock Yards Co.* v. *United States*, 58 F. (2d) 290. The new hearing was begun January 10, 1933 and did not close until February 16, 1933. Thereafter, the Secretary entered the order here under review; and the second suit followed which is here on appeal.

Sixth. The abstract of record made before the Secretary and submitted to the District Court for review consisted of 1648 printed pages of evidence, besides 111 exhibits, many being extensive. Twenty-two witnesses testified orally. The 71 exhibits certified to this Court alone comprise 1358 pages of tabulations or like detail. In addition they contain 18 graphs, 30 maps or photographs, and 600 pages of reading matter. Consideration of most of the evidence presented to the Secretary was deemed essential to a proper determination by the District Court of the issues of fact now controverted. Consideration of most of the evidence introduced below is now deemed by counsel necessary for a proper decision of the case by this Court. The condensed narrative statement of the evidence other than exhibits fills 721 pages of the printed record in this Court. Seventy-one exhibits (although not required to be printed) were required to be transmitted to this Court as a part of the record before us. The number of pages of the evidence (including exhibits) before us bearing more or less specifically upon the question of confiscation is 2717. The total number of pages—briefs, exhibits, and evidence—before this Court is 3466.

The magnitude of the task involved in a judicial review which requires a determination by the Court, in its independent judgment, of the correctness of the findings of fact as to value and income which the Secretary made, cannot be measured by looking alone at the volume of the evidence. The multiplicity of the issues, and the character of the evidence bearing on them respectively, impose a peculiar burden. The findings as numbered and lettered by the Secretary total 215. The number of determinations of fact bearing upon confiscation involved in these findings is, roughly, 250, as gathered from the 108-page opinion of the Secretary. To decide whether any one of these 250 determinations of fact alleged to be errone-

ous is, or is not, correct, involves separate examination of the evidence relating specifically to it; since as to each of these determinations the reviewing court is called upon to make a decision, in the exercise of an independent judgment. Such a decision involves, in many cases, weighing specific evidence and resolving conflicts.

(a) There is controversy as to the extent to which property owned by the Company is used or useful. That enquiry relates to 52 different items. The testimony and exhibits bearing upon this issue occupy 194 pages. On it there are approximately 50 findings. The correctness of only one of these is controverted here.

(b) There is controversy as to the value of the land. It consists of 60 different tracts. The testimony and exhibits bearing upon their value occupy 596 pages (the exhibits number 20). On this issue there are about 10 findings. The correctness of 3 is controverted here, dealing with the land in a single "zone."

(c) There is controversy as to the value of the structures. It deals with reproduction costs; it requires separate consideration of materials and labor, of overheads and depreciation. The testimony and exhibits occupy 629 pages (the exhibits number 12). On these issues there are some 40 findings. Those dealing with depreciation are controverted here.

(d) There is controversy as to going concern value. The testimony and exhibits on this issue occupy 113 pages. The Secretary decided that no separate allowance should be made. That conclusion is controverted here.

(e) There are controversies as to the estimated income, as to the expenses, and as to charges. The testimony and exhibits bearing upon them occupy, in the aggregate, 663 pages (the exhibits number 42). On these issues there are approximately 140 determinations. Of these about 50 seem to be controverted here.

The decisions by the reviewing court on the correctness of many of these determinations must depend upon its judgment as to the credibility of the witnesses. For instance, the Company insists, as to the land in one zone, that it is worth, on the average, 25 cents per square foot. The Secretary found it was worth 16 cents. On that issue 5 witnesses testified.

This case, like a laboratory experiment, presents the task of rate-regulation in its simplest form. The rates to be regulated are but few in number. The rate base is ordinary stockyard property small in extent as compared with some plants. The Secretary valued it at $2,743,000; and the Company claims it is worth $1,010,406 more. The Secretary found that, at the prescribed rates, the receipts would yield a net income of $195,564; the Company claims that it would not have been more than $81,026 in 1932 had these rates been in effect. But, under the prevailing view, an enquiry of the scope described was necessary, although involving hearings and lawsuits so protracted as to frustrate rate-regulation.

Seventh. The greater delay, and the cost, in rate investigations affecting the larger utilities, is illustrated by cases which have come before this Court in recent years.

(*a*) *Chicago Telephone Rates.* On September 13, 1921, the Illinois Commerce Commission, the regulating body, issued an order that the Company show cause why its rates should not be reduced. The hearing began November 17, 1921, and closed July 31, 1923. On August 16, 1923, the Commission entered an order reducing the rates, to become effective October 1, 1923. Before that date, enforcement was enjoined by the federal court, on a bill which charged that the rates prescribed were confiscatory. On April 30, 1934, this Court sustained the validity of the rate order entered August 16, 1923. Thus the rates became effective twelve and a half years after the com-

mencement of the investigation; and nearly eleven years after they were prescribed.

On June 11, 1934, the District Court ordered the Company to reimburse consumers who had been charged excessive rates a sum estimated, in April, 1936, as almost $19,000,000; and, on July 23, 1934, directed that the lawyers who appeared for the consumers in and after 1929 should receive as fees an amount equal to 7½ per cent of the refunds. By March 31, 1936, 1,153,515 payments had been made. The task of making the refunds, only three-quarters complete, has required a special force of 2,000 of the Company's employees, and is said to have cost it (to November 30, 1935) $2,575,412.89. Over $2,100,000 remains to be disposed of or paid.

The transcript of evidence and arguments at the hearing before the Illinois Commission fills about 4500 pages; and there were besides more than 200 elaborate exhibits. The presentation of the evidence before the District Court at the first hearing on the merits occupied more than two months, resulting in a printed record of over 3000 pages of testimony and 281 elaborate exhibits. The taking of depositions for presentation to that court on the second hearing on the merits, and other preparations for trial, took over a year. The hearing itself occupied five months, and resulted in a record of 16,168 pages. The record on the first appeal to this Court consisted of seven large volumes. The record of the additional evidence on the second appeal to this Court filled nine volumes; and the appellant's brief here, with appendix, nearly 700 pages.

The investigation of rates for Chicago continues. On July 10, 1934, the Commission asked the Company to show cause why its rates should not be reduced. The latter spent over a year and a half preparing its case for presentation to the Commission, at a cost, including a new appraisal and inventory, of more than $1,200,000. Hearings are now in progress.

For the history of the investigation and litigation, see in this Court: 269 U. S. 531; 282 U. S. 133; 283 U. S. 794; 283 U. S. 808; 292 U. S. 151; in the lower court: 39 F. (2d) 157; 38 F. (2d) 77; 3 F. Supp. 595; in the Commission: 7 Opinions and Orders of Ill. P. U. Comm. 1920, 888; 8 *id.* 1921, 372; 3 Opinions and Orders of Ill. Commerce Comm. 1924, 75–99; 6th Administrative Report of Directors of Departments, Ill. Commerce Comm. 1923, 975; 7th *id.* 1924, 1166; 17th Annual Report Ill. Commerce Comm. 1934, 3, 18, 42; 18th Annual Report Ill. Commerce Comm. 1935, 20. See also N. Y. Times, May 1, 1934, at 10; June 12, at 10; October 15, at 27; Report to Stockholders of Ill. Bell Telephone Co. 1935, 7, 8, 15.

(*b*) *New York telephone rates.* In the winter of 1919 the Company increased its rates. Protests followed; and on October 18, 1920, hearings thereon began before the Public Service Commission. On March 3, 1922, a temporary order slightly reducing certain rates issued. Enforcement was enjoined by the federal court on a bill which charged that the rates prescribed were confiscatory. Since that time, the rates prescribed, and to be prescribed, have been continuously under investigation and litigation.

Before the Commission there were, between 1920 and 1926, 189 days of hearings, 450 witnesses being examined orally. The evidence introduced fills, in the aggregate, 26,417 pages; and there were, in addition, 1,043 elaborate exhibits, one alone being in 22 volumes. Hearings were also held from January 28, 1930, to April 18, 1930. The opinions of the Commission in these proceedings fill 396 pages. In the District Court the hearings before the master occupied 416 days and extended over a period of four years, 610 witnesses being examined orally. They were recalled a total of 688 times. The evidence of that hearing fills 36,893 pages; and there were in addition 3,324 exhibits. The decree below was entered November

7, 1929. The Company's counsel then labored two years in preparing a draft of the condensed narrative statement of the evidence required for the transcript of record on the appeal to this Court. On submitting this draft to counsel for the Commission, the City, and the State, many errors were discovered. On 3000 of the items, counsel disagreed; months were devoted to composing the differences; and finally the items on which counsel could not agree were settled by the lower court. On November 14, 1933, more than four years after entry of the decree appealed from, the Company filed here a record of 5700 pages. On February 19, 1934, that appeal was dismissed.

On May 2, 1934, the Commission instituted a new investigation into the rates of the Company. Hearings began May 10, 1934, and are still going on. The subjects covered are again those required by the rule of *Smyth* v. *Ames*—reproduction cost, going value, depreciation, and so forth. Up to April 14, 1936, 86 hearings had been had, stretching through every month but one since the beginning of the enquiry. One hundred and forty witnesses had been heard, and 10,840 pages of testimony taken. The exhibits already introduced total 397, one being in 34 volumes.

For the history of the investigation and litigation, see in this Court: 261 U. S. 312; 262 U. S. 43; 291 U. S. 645; in the lower court: S. D. N. Y. No. 23–252, in equity, May 25, 1922 (not reported); 300 Fed. 822; 11 F. (2d) 162; 36 F. (2d) 54; in the Commission: 14th Annual Report, Pub. Ser. Comm. (2d Dist.) 1920, 79; Report Pub. Ser. Comm. 1921, 13, 234–254, 369–389, 398–407, 447–458; 1922, 15; 1923, 13, 93–214; 1924, 13, 127–138; 1925, 13; 1926, 17, 170–273; 1927, 14; 1928, 18; 1929, 16; 1930, 42, 134–145, 213–294; 1933, 11. See also Report of Pub. Ser. Comm. to State Senate Relative to Rates of N. Y. Telephone Co., Legis. Doc. No. 73, 1926 (254 pages); Report of Commission on Revision of N. Y. Pub. Ser. Comm. Law, Legis.

Doc. No. 75, 1930, 28–31, 262–268; "Your Company and the Rate Decision," a bulletin issued for the use of its employees by the N. Y. Telephone Co., 1930; Nathaniel Gold, "One More Telephone Decision," 15 Nat. Mun. Rev. 419; "The New York Telephone Rate Decision," 19 *id.* 180; "An Example of Rate Litigation and Its Significance," 23 *id.* 584; John Bauer, "An Example of Futility in Present Methods of Public Utility Regulation," 15 Am. Econ. Rev. 586; Leland Olds, "The Public Utility Issue," 24 Yale Review (N. S.) 704, 706–707; New York Times, May 2, 1934, at 1; May 11, at 1; May 17, at 25; September 21, at 25; February 27, 1935, at 20; March 30, at 7.

Eighth. In deciding whether the Constitution prevents Congress from giving finality to findings as to value or income where confiscation is alleged the Court must consider the effect of our decisions not only upon the function of rate regulation, but also upon the administrative and judicial tribunals themselves. Responsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?

The obstacles encountered in the case at bar and in the regulation of the rates of the large utilities are attributable, in the main, to the Court's adherence to the rule declared in *Smyth* v. *Ames* for determining the value of the property. In *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Comm'n,* 262 U. S. 276, 289, I stated my reasons for believing that the Constitution did not require the Court to adopt that rule which so seriously impairs the power of rate-regulation. But since the decision of *Smyth* v. *Ames* is adhered to, there is the greater need of applying to cases in which rate-regulation is alleged to be confiscatory the rule of reason

under which the Court has sanctioned, in other cases of taking, the legislative provision giving finality to quasi-judicial findings of value and income by administrative tribunals.

Surely, all must agree with the Secretary of Agriculture that: "If rate regulation is to be effective, there must come at some time an end of hearings and a decision of the questions involved." In *Chicago, Burlington & Quincy Ry.* v. *Babcock,* 204 U. S. 585, 598, we said of valuations made by the State Board of Equalization and Assessment: "Within its jurisdiction, except as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end." Congress concluded that a wealthy and litigious utility might practically nullify rate regulation if the correctness of findings by the regulating body of the facts as to value and income were made subject to judicial review. For that conclusion experience affords ample basis. I cannot believe that the Constitution, which confers upon Congress the power of rate-regulation, denies to it power to adopt measures indispensable to its effective exercise.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concurring in the result:

We think the opinion of Mr. Justice Brandeis states the law as it ought to be, though we appreciate the weight of precedent that has now accumulated against it. If the opinion of the Court did no more than accept those precedents and follow them, we might be moved to acquiescence. More, however, has been attempted. The opinion reëxamines the foundations of the rule that it declares, and finds them to be firm and true. We will not go so far.

The doctrine of *stare decisis,* however appropriate and even necessary at times, has only a limited application in the field of constitutional law. See the cases collected by Brandeis, J., dissenting, in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 407, 408. If the challenged doctrine is to be reconsidered, we are unwilling to approve it.

For the reasons stated by MR. JUSTICE BRANDEIS the decree should be affirmed.

HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, *v.* STEIN, GUARDIAN.

CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, WESTERN DISTRICT.

No. 659. Argued April 6, 7, 1936.—Decided April 27, 1936.

A state court which has appointed a guardian for an incompetent veteran has authority to order payment, out of funds belonging to the veteran and in the hands of such guardian, of a reasonable sum for services and expenses of an attorney, who represented the guardian in a claim before the Veterans' Administration for reinstatement of the veteran's compensation. Executive and administrative regulations (pursuant to Acts of Congress, 48 Stat. 9; U. S. C., Title 38, §§ 111, 114, 115) limiting the fees of attorneys in pension matters are inapplicable and do not prevent. P. 97.

118 Pa. Super. Ct. 549; 180 Atl. 577, affirmed.

CERTIORARI, 297 U. S. 700, to review the affirmance by the court below of an order of the Court of Common Pleas of Pennsylvania granting permission to the guardian of an incompetent veteran to pay fees and expenses of an attorney at law. Hines, the petitioner here, had intervened. The Supreme Court of the State refused an appeal.

Messrs. James T. Brady and *Edward E. Odom,* with whom *Messrs. Y. D. Mathes* and *Vincent A. Baldauf* were on the brief, for petitioner.

The United States has the power to limit fees payable to attorneys for legal services rendered in behalf of veterans in connection with their claims for pension or other benefits due or alleged to be due from the United States. *Phillips* v. *Ballinger,* 37 App. D. C. 46; *Calhoun* v. *Massie,* 253 U. S. 170; *Frisbie* v. *United States,* 157 U. S. 160; *United States* v. *Hall,* 98 U. S. 343; *Spicer* v. *Smith,* 288 U. S. 430; *In re Shinberg,* 263 N. Y. 354; *In re Minor's Guardianship,* 164 Miss. 329; *Hines* v. *McCoy,* 172 Miss. 153; *Hines* v. *Paregol,* 77 F. (2d) 953; *Hines* v. *Clark,* 252 N. Y. S. 777; *Hines* v. *Hook,* 89 S. W. (2d) 52, 55 (Mo.); *Veterans' Bureau* v. *Thomas,* 156 Va. 902.

The United States statutes and regulations are applicable to this case, and are binding upon the state court. Const., Art. VI. Distinguishing: *McIntosh* v. *Aubrey,* 188 U. S. 122; *State ex rel. Smith* v. *Commissioners,* 132 Kan. 233; *Spicer* v. *Smith,* 288 U. S. 430; *Trotter* v. *Tennessee,* 290 U. S. 354.

The fee allowed by the Superior Court was illegal for (a) it was contrary to the statutes as to amount, and (b) it was contrary to the statutes and the regulations (Executive Orders) as to method of allowance and payment. *Welty* v. *United States,* 2 F. (2d) 562, 564; *United States* v. *Moyers,* 15 Fed. 411; *Hall* v. *Kimmer,* 61 Mich. 269; *Smart* v. *White,* 37 Me. 333; *Christie* v. *Steger's Administrator,* 56 S. W. 521 (Ky.); *In re Minor's Guardianship,* 164 Miss. 329; *Hines* v. *McCoy,* 172 Miss. 153; *United States* v. *Reynolds,* 48 Fed. 721; *United States* v. *Nicewonger,* 20 Fed. 438; *United States* v. *Brown,* 40 Fed. 457; *United States* v. *Van Leuven,* 62 Fed. 52, cited in *Calhoun* v. *Massie,* 253 U. S. 173; *Wolcott* v. *Frissell,* 134 Mass. 1. Distinguishing: *Caverly* v. *Robbins,* 149 Mass. 16; *Hall* v. *Kimmer,* 61 Mich. 269; *Ladd* v. *Boston,* 64 N. H. 613.

The construction now asserted by petitioner as proper has the sanction of administrative approval over a long

period of years, and apparently has not been questioned in any appellate court heretofore except in *Phillips* v. *Ballinger,* 37 App. D. C. 46.

The fee being illegal, the contract therefor was invalid, and the court could not enforce it. It is well settled law, as stated by the Supreme Court of Pennsylvania in *Waychoff* v. *Waychoff,* 309 Pa. 300, that a contract which is illegal or against public policy will not be enforced.

Mr. David A. Reed for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

Respondent, as guardian for her son, an incompetent veteran, applied to the Court of Common Pleas, Allegheny County, Pennsylvania, to whose orders she was subject (50 P. S. § 941 *et seq.*), for permission to pay "out of the funds in her hands the sum of $100.00 to Hallock C. Sherrard, Esq., for his services and expenses and making the trip to Washington, D. C., to represent her in her claim for her said son's estate before said Board of Veterans' Appeals." The Administration had discontinued the veteran's compensation of $100.00 per month, upon the ground that disability existed prior to enlistment. Request for reinstatement was set for hearing before the Board of Veterans' Appeals at Washington, March 28, 1934. Respondent held for the estate $2,000.00, apparently pension money received from the Veterans' Administration. Mr. Sherrard had represented her since appointment and acted upon her request.

Petitioner, Frank T. Hines, appearing by counsel, admitted rendition of the services as stated. Reasonableness of the charge, if not inhibited by law, was not questioned. He denied the guardian's authority to contract for the expenditure and insisted that the application for permission to pay was not according to law. He asked

that the prayer be limited to actual expenses incurred and a fee of $2.00.

The Court of Common Pleas granted the guardian permission to pay as she had prayed; upon the Administrator's appeal, the Superior Court approved; the Supreme Court refused further hearing.

Petitioner submits that Congress, proceeding within its delegated power, directly, or through authorized executive action, has prescribed permissible fees for services such as those rendered by Sherrard, and directed how they may be paid. Also has inhibited payment of other or different sum in any manner.

We need not consider the extent of Congressional power in this regard, since we are of opinion that, properly construed, the provisions relied upon do not apply where payments like the one here involved are directed by a state court having jurisdiction over the guardian of an incompetent veteran.

The petition for certiorari asserts that the objections to respondent's application to the Court of Common Pleas were based upon the President's Order of March 31, 1933 (Veterans' Regulation No. 10), permitted by §§ 4 and 7 of the Act of March 20, 1933, c. 3, 48 Stat. 9; "Instructions" promulgated by the Administrator under authority of that Order; and §§ 111, 114 and 115, Title 38, U. S. C.

It is true that the provisions cited place general restrictions upon the fees of attorneys in connection with pension matters and prescribe the method of payment. But we find nothing in any of these Acts of Congress which definitely undertakes to put limitation upon state courts in respect of guardians or to permit any executive officer, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them. Conflict in respect of such matters between state courts and the federal government, its officers or bureaus would be un-

seemly, perhaps extremely unfortunate. And in the absence of compelling language, we cannot conclude that there was intention to create a situation where this probably would occur.

During many years, Congress has recognized the propriety, if not the necessity, of entrusting the custody and management of funds belonging to incompetent pensioners to fiduciaries appointed by state courts, without seeking to limit judicial power in respect of them. To the contrary, it has directed that whenever any guardian, curator, or conservator fails properly to execute his trust, etc., the Administrator may "appear in the court which has appointed . . . and make proper presentation of such matters." C. 723, § 2, 44 Stat. 792; c. 510, § 2, 49 Stat. 607; 38 U. S. C., § 450. Authority of the state courts over guardians for incompetents is thus definitely recognized. The Administrator is expressly empowered to suspend further payments if the guardian is found to be acting improperly; so much is possible without conflict.

Nothing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries, or to sanction the promulgation of rules to that end by executive officers or bureaus.

The broad purpose of regulations in respect of fees of those concerned with pension matters is to protect the United States and beneficiaries against extortion, imposition or fraud. *Calhoun* v. *Massie,* 253 U. S. 170, 173. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought.

The challenged decree must be

Affirmed.

CHICAGO GREAT WESTERN RAILROAD CO. *v.* RAMBO, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 696. Argued April 1, 1936.—Decided April 27, 1936.

1. Upon review of a judgment of a state court in a case under the Federal Employers' Liability Act, this Court must examine the record and determine for itself whether, as matter of law, the evidence is sufficient to sustain a finding of negligence. P. 101.
2. Evidence *held* insufficient to sustain a finding that the railroad had negligently failed to equip its locomotive with a headlight of the illuminating power required by federal law. P. 101.

195 Minn. 331; 263 N. W. 112, reversed.

CERTIORARI, 297 U. S. 701, to review a judgment affirming a judgment against the railroad company in an action under the Federal Employers' Liability Act.

Mr. Harry S. Stearns, with whom *Messrs. Ralph A. Stone* and *Walter H. Jacobs* were on the brief, for petitioner.

Mr. Harold E. Stassen, with whom *Mr. Elmer J. Ryan* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Half an hour after sunset (5:10), December 8, 1933, respondent's intestate, a signal maintainer, while riding his gasoline speeder over the rails, was run down and killed three miles south of Hampton, Minnesota, by petitioner's passenger train from Minneapolis, moving down grade sixty miles per hour. Darkness had come; the weather was cloudy; the train late; an hour earlier it had collided with a truck and killed a man.

Relying upon the Federal Employers' Liability Act, 45 U. S. C., c. 2, §§ 51–59, and the Boiler Inspection Act as

amended June 7, 1924, 45 U. S. C., c. 1, §§ 22–34, respondent sued for damages in Dakota County District Court. The jury found for her; judgment upon the verdict was affirmed by the Supreme Court. 195 Minn. 331; 263 N. W. 112.

Several acts of negligence were alleged, but the trial court submitted only one to the jury: Failure to equip the locomotive with a headlight of the illuminating power required by federal law.

Section 23 of the Boiler Inspection Act is in the margin.[1]

Under permission of that Act, the Interstate Commerce Commission adopted the following rule:—

"129. Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition."

The Supreme Court declared:—"Since there was no motion for new trial, the assignments of error reach only the question whether there is any substantial evidence in support of the judgment. As stated, the sole act of negligence upon which the jury could base a recovery,

[1] "Sec. 23. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

under the charge of the court, was a violation of the quoted rule as to headlight; and, if defendant was negligent in that respect, is there sufficient evidence that the deficient headlight was the proximate cause of Rambo's death? The quantum of proof must measure up to the rule clearly and adequately stated in *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521." It held the evidence adequate.

In cases like this, we must examine the record and determine for ourselves whether as matter of law there is enough to sustain a finding of negligence. *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, 474; *Atchison, T. & S. F. Ry. Co.* v. *Saxon,* 284 U. S. 458, 459.

The following excerpt from its opinion indicates the view of the Supreme Court.

"It is true that there is direct proof that the headlight was inspected at the time the locomotive was attached to the train in Minneapolis and when it arrived at its destination at Oelwein, Iowa, and that it then satisfied the requirement of rule 129; also, that it was burning brightly when the train passed Hampton and shortly after the accident when the chief electrician of defendant, who happened to be on the train, having walked to the front thereof when the emergency stop was made, ascertained, and so testified at the trial, that the track ahead was illuminated properly for more than 800 feet. But this notwithstanding, we think there are facts testified to which authorized the jury in finding that the headlight did not comply with the standard fixed under the Federal Boiler Inspection Act. Most persuasive of this is the testimony of the engineer himself, who testified that he was watching the straight track ahead but could see no object thereon until he was within 500 feet of what he took to be a couple of dogs, and not until he came 100 or more feet nearer could he make out that it was a man on a speeder. There is no suggestion that the engineer did not have the visual

capacity required of locomotive engineers. The fact that Rambo was seen to make no move to leave the speeder indicates that the headlight did not cast its rays sufficiently around where he was so as to give warning of the approach of the train. There is evidence to show that a person on a running speeder can quickly and without great danger swing himself clear of the rails. Then there is the testimony of a 15 year old lad, who lived adjacent to the track where Rambo was run down and who witnessed the accident, that while he heard a speeder coming he could not see it until the train which he heard and saw approaching came within about 100 feet of the speeder, when the headlight disclosed its presence to him, and that, when he heard the blasts of the whistle and saw the sparks from the application of the brakes, the locomotive was less than 50 feet from the speeder. It is thought that the testimony of the engineer that the illumination of the headlight was so deficient that he could not ascertain what the object ahead of him on the track was until he was within 300 feet thereof, corroborated by the fact that the rays of light were not sufficient to arouse the attention of Rambo to the presence of the locomotive, and the testimony of the lad, who witnessed the accident standing a few rods from the track, that he, although knowing that both train and speeder were approaching, could not see the speeder until the headlight was within 100 feet thereof, justify the jury in finding that the headlight did not comply with the requirements of the Federal Boiler Inspection Act."

This apprizement of the evidence, we think, is not well founded. Properly interpreted, the record fails to establish that the headlight fell below the prescribed standard. The argument for respondent dwells too hard on conjecture. *Atchison, T. & S. F. Ry. Co.* v. *Saxon, supra,* 460.

The most important bit of evidence was given by the engineer, called as a witness for respondent. In substance it follows. "I saw something down on the track, at first when I noticed it, I thought it was a dog or two running down the track, when I got a little closer, I discovered it was a speeder, and I pulled the whistle. I gave a number of short blasts and the man on the speeder never turned or looked." "It [the object] might have been eight or nine [railroad] car lengths, eight, probably seven." A car length is around fifty feet. "I was watching ahead to see what it was, and I discovered it was a speeder." I discovered it was a speeder about five or six car lengths ahead. Immediately, "I put the brake in the emergency." I was looking ahead at all times after I rounded the curve until I hit the speeder traveling in the same direction. While I observed him, the man on the speeder "did not turn at all."

Treating the foregoing as a positive statement of observed facts, counsel argue that the headlight must have failed to illumine the track 800 feet ahead; otherwise, it is said the engineer would have seen the speeder at that distance and applied the brakes earlier. Also that, if warned by the light when 800 feet away, the decedent would have made visible effort to leave the speeder and thus escape. The presence of conjecture is plain enough. Simply because the engineer failed to see some object 800 feet ahead, does not show that he *could* not have seen so far; his attention might have been directed to points nearer to him or momentarily diverted. How far ahead he was looking does not appear. Nor can it be said that, since the deceased was not seen to change position on the speeder, he received no warning.

Further, the engineer's statements must be considered in connection with the circumstances attending the accident and other portions of his testimony. The train was

moving 88 feet per second in the dark and under clouds. In a writing signed two days after the accident, he affirmed, "I first saw some object on the track in the glare of the headlight when the engine was 10 to 12 coach lengths away. It may have been a little less than 1,000 feet or could have been a little more. I saw no light on the object and when first seen it appeared to be two dogs running down the track. I pinched up on the brakes making a service application and when the engine was within 6 to 8 coach lengths I could make out for the first time that it was a motor car and a man on it going same way we were. I immediately continued the brake application into emergency, opened the sanders and started sounding a series of short blasts of whistle. I could make out a man on the car with his back to us, his coat collar turned up and looking ahead. I expected every second to see him make some effort to get off the car but so far as I could see he never changed his position until struck."

While on the stand (May, 1934), he said that the emergency brakes were applied "five or six car lengths" from the speeder. "It might have been more, it might have been less, it might have been a little more." Also that the "seven, eight or nine car lengths" was merely a guess. "It might have been eight, nine, or ten car lengths, it might have been a thousand feet or more, or it might have been a little bit less." Evidently, his statements were merely guesses; under the circumstances, accurate estimate of distances by him was impossible.

The 15 year old lad was in his father's yard 600 feet from the track, engaged in the exacting business of catching half grown chickens in the dark. In substance, he said:— "I heard a train coming." Next, "I noticed the train coming down the track." "Then I heard the speeder." By the light of the train, I saw the speeder in front. "When the train came closer, he whistled." When he got

still closer, a rod away, I saw fire from the brakes. When I heard the speeder and heard the train, I looked away from the track towards some cornstalks to see if there was a chicken there. "When I looked back, then I saw it." Could not see man on speeder very plain and could not say whether he moved before being hit. Saw train "about a hundred feet or so" before it struck speeder, headlight beaming, man sitting down on speeder.

Nothing in all this gives substantial support to the notion that the headlight failed to illuminate the track 800 feet ahead, or was below the required standard. Other portions of the evidence stressed for respondent are no more helpful to her position.

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

Reversed.

MR. JUSTICE BRANDEIS took no part in the consideration or decision of this cause.

UNITED STATES ET AL. *v.* IDAHO ET AL.

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

No. 420. Argued March 13, 1936.—Decided April 27, 1936.

1. A decree of the District Court annulled and enjoined the enforcement of an order of the Interstate Commerce Commission authorizing the abandonment of trackage, on the ground that the trackage in question was a "spur" within par. 22 of the Interstate Commerce Act and that the order therefore was not within the authority of the Commission. *Held*, that the decree was based on findings amply supported by the evidence. P. 108.
2. Upon the question whether trackage is a "spur," an order of the Commission adjudging it not so and permitting abandonment is

not conclusive, even though based on substantial evidence, but is subject to judicial review. P. 109.

3. Although the better practice in such cases is to introduce all relevant evidence before the Commission, new evidence upon the question whether the trackage is a "spur"—a mixed question of law and fact—may be received by the District Court in a suit to set aside the order permitting abandonment. P. 109.
4. In a suit to set aside for error or irregularity an order of the Interstate Commerce Commission on a matter within its jurisdiction, the United States is the only party named as defendant; others become parties by intervention. P. 109.
5. A suit against the United States, the Interstate Commerce Commission and a railroad company to enjoin the abandonment of trackage under an order allowing it made by the Commission in excess of its jurisdiction, and also to annul the order,—*held* properly brought in the three-judge District Court, and the decree appealable to this Court directly. P. 109.

10 F. Supp. 712, affirmed.

APPEAL from a decree of the District Court of three judges setting aside and enjoining action under a certificate of the Interstate Commerce Commission purporting to permit a railroad company to abandon certain trackage. The suit was brought against the United States, the Commission and the railroad company, as defendants.

Mr. Daniel W. Knowlton, with whom *Solicitor General Reed, Assistant Attorney General Dickinson,* and *Messrs. Elmer B. Collins* and *Edward M. Reidy* were on the brief, for the United States and Interstate Commerce Commission, appellants.

Messrs. J. M. Souby, George H. Smith, Robert B. Porter, and *W. Hal Farr* filed a brief on behalf of the Oregon Short Line R. Co., appellant.

Mr. Maurice H. Greene, with whom *Mr. Bert H. Miller,* Attorney General of Idaho, was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Interstate Commerce Act provides in Paragraph 18 of Section 1 that no interstate carrier "shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the [Interstate Commerce] Commission a certificate that the present or future public convenience and necessity permit of such abandonment." Paragraph 22 provides that the "authority of the Commission" conferred by Paragraph 18 shall not extend to the "abandonment of spur, industrial, team, switching or side tracks, located . . . wholly within one State." Transportation Act, 1920, c. 91, § 402, 41 Stat. 456, 477–478. Compare *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266; *Alabama & Vicksburg Ry.* v. *Jackson & Eastern Ry.*, 271 U. S. 244; *Texas & New Orleans R. Co.* v. *Northside Belt Ry.*, 276 U. S. 475.

The Oregon Short Line Railroad, an interstate carrier, owns nine miles of track, in Teton County, Idaho, known as the Talbot branch and extending to a coal mine at Talbot. It applied to the Interstate Commerce Commission for authority to abandon that trackage. The State intervened through its Attorney General and Public Utilities Commission. They objected, among other things, on the ground that the Interstate Commerce Commission was without jurisdiction, since the so-called Talbot branch was in fact a "spur" or "industrial track" located wholly within the State. The objection was overruled; and authority to abandon the trackage was granted by Division 4. Oregon Short Line Railroad Company Abandonment, 193 I. C. C. 697.

The State and its Public Utilities Commission then brought this suit in the federal court for Utah against the

United States, the Interstate Commerce Commission, and the Oregon Short Line, a Utah corporation, praying that the order authorizing abandonment be set aside and other relief. The case was heard before three judges. The sole controversy was whether the trackage was a "spur" or "industrial track"; and, therefore, excluded from the jurisdiction of the Interstate Commerce Commission. The record made before the Commission was introduced in evidence; also some testimony "which merely amplified evidence already in the record." The court found, among other things:

(1) The trackage was constructed during the period of federal control by the United States Railroad Administration, pursuant to a contract with the owners of coal mines situated at Talbot, for the single purpose of serving them. The owners agreed to furnish the right of way and to pay part of the cost of construction; and they agreed also that the railroad might tear up the tracks on their failure to supply for transportation a minimum specified tonnage. For a period of four years after construction no rail transportation was maintained, because of litigation involving the mines.

(2) In 1924, on application of the coal company, the Public Utilities Commission of Idaho, over objection of the Oregon Short Line that it lacked jurisdiction, held that the line was a spur track. It ordered the railroad to repair and operate it upon receiving from the coal company a bond conditioned upon the company delivering a specified minimum coal tonnage each year for five years. The railroad complied with the order. Subsequently, it procured a judgment on the bond for breach of the condition.

(3) The Oregon Short Line has never maintained a train schedule or regular service over this trackage; has never furnished express, passenger or mail service; has maintained no buildings, loading platforms or agent at

any point along the trackage; and has had no telegraph or telephone line in connection therewith. Bills of lading for cars of coal are made out by the mine company. There are practically no shipments in the opposite direction, the few supplies for the mine being sent up in the empty coal cars when ordered.

The District Court concluded that the Talbot branch was constructed and has been maintained for the purpose of serving a single industry; that practically no other industry is served; that this trackage does not invade new territory; that its continued operation or abandonment is of local and not of national concern; that it is therefore a "spur"; and hence, that the order of the Interstate Commerce Commission was in excess of its jurisdiction. The court annulled the order and enjoined its enforcement. 10 F. Supp. 712.

The decree should be affirmed, because on findings amply supported by the evidence the trackage is a spur. Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 444. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a "spur" is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission.

This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction. In such a proceeding the United States is the only party named as defendant; others interested become parties by intervention. See Commerce

Court Act, June 18, 1910, c. 309, § 3, 36 Stat. 539, 542, Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219. Here, the jurisdiction of that Commission was challenged. It and the Oregon Short Line were joined as defendants in the original bill. Paragraph 20 of Section 1 of the Interstate Commerce Act authorizes any party in interest to apply to "any court of competent jurisdiction" to enjoin an unauthorized abandonment; and if, on such application, Talbot branch should be held to be a spur, it could not be abandoned legally without the consent of the Public Utilities Commission of Idaho. It is only because the plaintiffs sought also to have the order of the Interstate Commerce Commission annulled (compare *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 271–274) that the case was one for three judges and could be brought here by direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220.

Affirmed.

THE ARIZONA ET AL. *v.* ANELICH, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 667. Argued April 1, 2, 1936.—Decided April 27, 1936.

1. The provisions of the Jones Act allowing seamen a common-law form of remedy for injuries in which "all statutes of the United States modifying or extending the common law right or remedy in case of personal injury to railway employees shall apply," and granting like remedies to the personal representatives of seamen when injuries result in death, became integral parts of the maritime law and are to be construed liberally and in harmony with the principles of that law as they were before the enactment. P. 118.
2. Under the maritime law, prior to the Jones Act, a seaman injured in the course of duty on navigable waters, due to negligence in providing a defective appliance for use in his work on the ship,

had a cause of action for indemnity against the ship or owner, to which assumption of risk was not a defense. P. 120.

3. Construing the Jones Act in harmony with this principle, assumption of risk is not a defense to an action brought under that Act for the death of a seaman caused by the negligence of the master in providing a defective appliance. From the failure of the Employers' Liability Act to abolish this defense in cases of injury or death of railway employees not caused by violations of the Safety Appliance Act there cannot be inferred an intention in the Jones Act to introduce the defense into the maritime law. P. 123.

183 Wash. 467; 49 P. (2d) 3, affirmed.

CERTIORARI, 297 U. S. 701, to review the affirmance of a judgment recovered by the administratrix of the estate of a deceased seaman in an action for wrongful death attributed to a defective appliance for stopping a winch used for hauling in fish nets aboard ship.

Mr. Ralph S. Pierce for petitioners.

In *The Osceola,* 189 U. S. 158, were stated certain propositions of maritime law which could be regarded as settled, but the Court did not undertake to state all the principles of maritime law governing personal injuries to seamen. Contributory negligence has always been regarded in admiralty as a defense, in part at least, *The Max Morris,* 137 U. S. 1, yet there is no mention of it in *The Osceola.* Assumption of risk is regarded as peculiarly applicable to seamen in *The Iroquois,* 194 U. S. 240, and there is likewise no mention of it in *The Osceola.* The language used in *The Osceola* is clear cut and definite and should not be construed as an attempt to cover the whole field of maritime torts in four short propositions.

Moreover, as pointed out in *Lindgren* v. *United States,* 281 U. S. 38, this is a situation in which *The Osceola* is not applicable. That decision was dealing solely with the rights of an injured seaman; and by the admiralty law his personal representatives, upon his death, had no cause of

action against the master of the vessel. The cause of action which the seaman had, based upon unseaworthiness, died with him.

By the Jones Act, Anelich's personal representatives, he having died as the result of his personal injuries, may maintain an action for damages at law with a trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees are applicable.

The right of action thus asserted is identical, conferred by the same section of the Act of Congress, with that which a railway employee's personal representative might assert; it is for alleged negligence on the part of the employer contributing proximately to the employee's injury. Petitioners cannot see any basis for a distinction between the rights of the personal representatives of a railway employee and of a seaman. The former is given a right of action, which he may exercise under certain conditions; the latter, once utterly without remedy, is given the same right as the former, by virtue of the same statute, which he may exercise under the same conditions.

Respondent's right here differs in no degree from what Anelich's would have been had he lived. The Jones Act gave to his personal representative the identical right possessed by representatives of a railway employee; and it is our position that it also gave to the seaman himself the same rights, to be exercised to the same extent, as a railway employee's. Assumption of risk, a common law defense to an action at law for negligence, is available to the employer of railway employees; and it is equally available to the employers of seamen when an action at law is brought for damages, for negligence, under the Jones Act.

The pronouncements of this Court regarding the Jones Act indicate that this is the proper interpretation of the enactment. *Panama R. Co.* v. *Johnson,* 264 U. S. 375.

Respondent's action is based upon negligence, a common law concept, a common law breach of duty, brought into the maritime law. *Engel* v. *Davenport,* 271 U. S. 33.

If the seaman must assume the burden of proving negligence and subjects himself under § 53 to the defense of contributory negligence, there seems no logical reason why, under § 54, he does not assume the risk, a common law defense to the common law right he seeks to assert. *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130, 138. *Warner* v. *Goltra,* 293 U. S. 155, indicates nothing to the contrary.

The continued use by certain courts of the term "unseaworthiness" in decisions of cases arising under the Jones Act seems inexplicable; negligence is the only proper term, and unless the seaman is invoking, as he might, the relief accorded to him by the old maritime rules, unseaworthiness is not a true part of the picture. We find, however, certain courts, particularly the Second Circuit, stating, in actions brought under the Jones Act, that as to any unseaworthiness or defective conditions of the vessel or equipment, there can be no defense of assumption of risk. *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619; *Ives* v. *United States,* 58 F. (2d) 201.

The majority of the courts, when confronted with cases under the Jones Act, properly have treated the question of assumption of risk as though common law negligence and its defense, as modified by the Federal Employers' Act, were alone involved. *In re Luckenbach S. S. Co.,* 16 F. (2d) 168, 171; *Peterson* v. *Sanford Tug Co.,* 28 F. (2d) 283; *The Ipswich,* 46 F. (2d) 136; *McCahan Sugar Co.* v. *Stoffel,* 41 F. (2d) 651; *Cronec* v. *Ohio R. Co.,* 48

F. (2d) 497; *The Calvert,* 51 F. (2d) 494; *The Zealand,* 49 F. (2d) 781; *Stevens* v. *O'Brien & Co.,* 62 F. (2d) 633; *The Cricket,* 71 F. (2d) 261; *Maloney* v. *United States,* 7 F. Supp. 14; *Southern Ry. Co.* v. *Hermans,* 44 F. (2d) 366.

State courts have likewise applied the common-law rule of assumption of risk to actions involving maritime torts. The State of Washington, prior to the latest decision in this case, had in many cases permitted to the employer of seamen or of other maritime workers the defense of assumption of risk, both before and after the passing of the Jones Act. Assumption of risk is and always has been a maritime defense. *The Iroquois,* 194 U. S. 240; *The Cricket,* 71 F. (2d) 261; *Maloney* v. *United States,* 7 F. Supp. 14.

Nor is this confined merely to risks of heavy seas or of falling from aloft, but has been applied in many cases prior to the Jones Act which involved unseaworthy condition of ships or appliances. *The Maharajah,* 40 Fed. 784; *The Serapis,* 51 Fed. 91; *The Luckenbach,* 53 Fed. 662; *The Saratoga,* 94 Fed. 221; *Jeffries* v. *DeHart,* 102 Fed. 765; *The Scandinavia,* 156 Fed. 403; *Globe S. S. Co.* v. *Moss,* 245 Fed. 54; *Cunard S. S. Co.* v. *Smith,* 255 Fed. 846, 849.

Petitioners concede that when a seaman is ordered by his superior officer to use defective equipment, and that order is the impelling force causing such use, there is no assumption of the risk of danger from such use.

With but few exceptions, all of the decisions of the Circuit and District Courts, and without exception all of the decisions of this Court, indicate that the defense of assumption of risk and the other common law defenses are equally a part of the maritime law except in so far as the exigencies of maritime life require an alteration; and so far as assumption of risk is concerned, the only alteration

required is that made necessary by the stern duty of obedience upon the part of a seaman to orders from his superior officers. When that factor is removed, so far as assumption of risk is concerned there is no distinction between maritime and common law assumption of risk; and the last cited cases from the Second Circuit illustrate that where the reason for the distinction fails, the distinction also fails.

Mr. Wilbur Zundel, with whom *Mr. Samuel B. Bassett* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted because of the importance of the question, to review a determination of the Supreme Court of the State of Washington, 183 Wash. 467; 49 P. (2d) 3, that assumption of risk is not a defense to an action brought under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, to recover damages for the injury and death of a seaman caused by a defective appliance, a part of the equipment of a fishing vessel on which he was employed.

The injury occurred at sea, when respondent's intestate was engaged in hauling in, with a power winch, the purse line of a fishing net. During this operation the drums of the winch, as was customary, were kept in continuous revolution at a speed of about eighty revolutions per minute. The two ends of the purse line, whose function is to purse, or close, the net at the bottom, were reeved through blocks hanging from a davit at the side of the vessel, from which they ran respectively to the aft and forward drums of the winch. Decedent was stationed at the aft drum, where his duty, like that of the winchman at the forward drum, was to take several turns of his end of the purse line about the revolving drum and

hold the line taut, so that the winch would haul it in, and to coil the line as it came off the drum. When the rings at the bottom of the net through which the purse line passes came to the surface of the water, a bridle, or strap, was passed around the net and rings and attached to block and tackle suspended from a boom of the vessel. The purse line is then customarily thrown off the drums, and the net is raised higher by taking several turns about the forward drum with the line from the block and tackle, which then carries a load of about a ton and a half, and hauling on it. It was at this stage of the operation that decedent was injured. The purse line had been removed from the forward drum, and several turns of the line from the block and tackle, which was supporting the net, had been taken around this drum, when, in some way which does not clearly appear, the decedent's leg became entangled in the purse line, which was not clear of the aft drum. Before the winch could be stopped his leg was drawn onto the drum by the purse line, the bones were broken and the flesh lacerated. Septicemia ensued, from which he died.

Power was transmitted to the winch by a countershaft connected by a chain gear drive with the main, or propeller, shaft. There were two methods for starting and stopping the winch. One was by the operation of a lever located between decks, near the engine, which controlled the clutch on the main shaft. The other was by a lever located above deck, on the starboard side of the winch frame, between the drums, by which the jaws of the clutch connecting with the chain drive of the winch could be engaged with the corresponding jaws of the clutch keyed onto the main shaft. Attached to the winch frame by a string was a forked piece of wood designed for use as a brace to hold the winch lever in a position which would cause the clutch to engage, and prevent its slipping

or disengaging while the winch was in motion. When placed in position this brace extended from a cleat on the frame of the winch to the winch lever.

It is respondent's contention that the clutch was so defective, through long wear, that it would not remain engaged without the use of the brace to hold it in position; that the presence of the brace in position at the moment of the accident so prevented or delayed use of the lever at the winch that it was necessary to use the lever below deck to disengage the clutch on the main shaft in order to stop the winch; and that the consequent delay, after the alarm was given, was the proximate cause of decedent's injury.

The trial court refused petitioners' request to charge that voluntary assumption by decedent of the risk of injury by the unsafe appliance was a defense to the action, and denied their motion for a non-suit and for a directed verdict. It left it to the jury to say whether petitioners had negligently failed to provide decedent with a safe appliance with which to work, and whether such failure was the proximate cause of the injury and death. The state Supreme Court sustained the judgment of the trial court upon a verdict for respondent, holding that, in the circumstances disclosed by the evidence, assumption of risk is not a defense in a suit under the Jones Act.

We granted certiorari to review the ruling upon the assumption of risk, and not for the purpose of reëxamining the evidence of negligence and proximate cause. With respect to the latter, it suffices to say that, although the testimony was conflicting, there was evidence from which the jury could have found that the clutch controlled by the lever at the winch was negligently allowed to remain in a defective condition; that because of the defect it would not remain engaged and the winch drums would not turn continuously unless the lever controlling the clutch was

held in position by the brace; that the use of the brace to prevent the worn clutch from slipping or disengaging rendered the winch defective, and unsafe to those required to work in its vicinity, and that the use of the brace, and the consequent delay in stopping the winch from the engine room, when the alarm was given, was the proximate cause of the injury and death. We do not discuss other questions of lesser moment, including those growing out of the alleged negligent failure of petitioners to provide decedent with prompt and appropriate medical attention as a contributing cause of his death, but direct our attention to the question brought here for review, whether assumption of risk is a defense to suits under the Jones Act.

Since the maritime law allowed no recovery for the wrongful death of a seaman, see *Lindgren* v. *United States,* 281 U. S. 38, respondent's asserted right of action is conferred by § 33 of the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, which gives to a seaman injured in the course of his employment, at his election, a right of action for damages at law, with trial by jury, in which "all statutes of the United States modifying or extending the common law right or remedy in case of personal injury to railway employees shall apply." In case of the death of the seaman, as a result of the injury, it similarly gives a right of action to his personal representatives in which "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51, thus incorporated in the Jones Act by reference, gives a right of recovery for the injury or death of an employee of a common carrier by rail, in interstate or foreign commerce, "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or

insufficiency, due to its negligence, in its . . . appliances, machinery . . . or other equipment." By § 3 of the Act, 45 U. S. C. § 53, contributory negligence does not bar recovery, but is ground for apportionment of the damages between employer and employee, and by §§ 3 and 4, 45 U. S. C. §§ 53, 54, it is provided that no employee shall be held to have been guilty of contributory negligence or "to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The Jones Act thus brings into the maritime law new rules of liability. The source from which these rules are drawn defines them but prescribes nothing as to their operation in the field to which they are transferred. "In that field their strength and operation come altogether from their inclusion in the maritime law" by virtue of the Jones Act. The election for which it provides "is between the alternatives accorded by the maritime law as modified and not between that law and some non-maritime system," *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 388, 389; and see *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 380, 381; *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130.

In applying the Federal Employers' Liability Act, in suits brought by railroad employees, it has been settled by numerous decisions of this court that assumption of risk is a defense in a suit brought to recover for injuries resulting from defective appliances, the use of which is not required by the Federal Safety Appliance Act, see *Seaboard Air Line Ry. Co.* v. *Horton,* 233 U. S. 492; *Jacobs* v. *Southern Ry. Co.,* 241 U. S. 229; *Boldt* v. *Pennsylvania R. Co.,* 245 U. S. 441, 445. The fact that the statute deals with and extends a common law form of liability, provides for its enforcement in common law courts, and prescribes that certain common law defenses, including assumption

of risk, shall not be available in specified cases, led to the conclusion that such defenses, when not excluded by the terms of the statute, are impliedly authorized.

But the Jones Act does not, by its own terms, or by those adopted by reference from the Employers' Liability Act, prescribe that assumption of risk shall be a defense to the liability imposed for injuries to seamen on navigable waters, or, apart from the specific references to the fellow servant and contributory negligence rules, purport to enlarge or modify the defenses available in maritime law to suits brought to recover for such injuries. In the absence of such a definite command the scope of the new rules of liability and the nature of the defenses to them must be ascertained by reference to their new setting in the admiralty system.

While the martime law before the enactment of the Jones Act permitted no recovery for injuries resulting in the death of a seaman, or generally for injuries resulting from the negligence of a fellow servant or the master,[1] a seaman who fell sick or was injured in the course of his employment was entitled to "maintenance and cure," "at least as long as the voyage continued," see *Pacific Steamship Co.* v. *Peterson, supra,* and to recover from vessel or owner indemnity for injuries due to unseaworthiness of the vessel or "failure to supply and to keep in order the proper appliances appurtenant to the ship." These propositions were laid down in answering certified questions in *The Osceola,* 189 U. S. 158, 175, and they have often been cited with approval by this Court. See *Chelentis* v. *Luckenbach S. S. Co., supra,* 379,

[1] In *The Osceola,* 189 U. S. 158, the Court did not answer the certified question, whether the master is a fellow servant, since it concluded that in any event the owners were not liable generally for injuries resulting from negligence unless they were occasioned by unseaworthiness or defect in appliances appurtenant to the ship.

380; *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255; *Pacific Steamship Co.* v. *Peterson, supra,* 134; *Lindgren* v. *United States, supra.*

In declaring, in *The Osceola,* without qualification as to the assumption of risk, that the owner and vessel were liable to indemnify seamen for injuries caused by unseaworthiness of the vessel, and that unseaworthiness embraced defective appliances appurtenant to the ship, this Court adopted the pronouncements of many earlier cases in admiralty in which the rule was applied or recognized.[2] It was definitely applied by this Court in *Carlisle Packing Co.* v. *Sandanger, supra;* cf. *Plamals* v. *S. S. Pinar del Rio,* 277 U. S. 151, 155.

[2] The seaman's right of indemnity for injuries caused by defective appliances or unseaworthiness seems to have been a development from his privilege to abandon a vessel improperly fitted out. The privilege was recognized in *Dixon* v. *The Cyrus,* 2 Pet. Adm. 407 (D. C. Pa. 1789), where it was held that the law will imply an engagement to the mariners that "the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy." This case was relied on in several early cases recognizing the seaman's right to consequential damages for injuries resulting from faulty equipment. *Halverson* v. *Nisen,* 3 Saw. 562; *The Noddleburn,* 28 Fed. 855; *The Lizzie Frank,* 31 Fed. 477; and see *The Wenonah,* 1 Hask. 606. The rule that unseaworthiness releases the seaman from his contract is of uncertain origin, but it is closely related to the master's obligation to owner and shipper that the vessel be well equipped and ballasted. See Marine Ordinances of Louis XIV, Book II, Art. VIII, Moloy, De Jure Maritimo et Navali, (7th ed. 1722) p. 223. The seaman's right of indemnity was sustained in *The City of Alexandria,* 17 Fed. 390; *The Edith Godden,* 23 Fed. 43; *Olson* v. *Flavel,* 34 Fed. 477; *The A. Heaton,* 43 Fed. 592; *The Frank and Willie,* 45 Fed. 494; *The Julia Fowler,* 49 Fed. 277. A seaman was denied recovery for injuries in *Couch* v. *Steele,* 3 El. & Bl. 402 (1853), on the ground that the owner owed to seamen no duty to make the vessel seaworthy. This case was disapproved in *The Noddleburn, supra,* 857, which allowed recovery for an injury due to defective rigging. The Mer-

Before the Jones Act contributory negligence was ground for mitigation of damages in suits brought by seamen to recover for injuries attributable to defective equipment, see *The Wanderer,* 20 Fed. 140; *Olson* v. *Flavel,* 34 Fed. 477, overruling *Peterson* v. *The Chandos,* 4 Fed. 645; *The Frank and Willie,* 45 Fed. 494; *The Julia Fowler,* 49 Fed. 277; *John A. Roebling's Sons Co.* v. *Erickson,* 261 Fed. 986, 987; *Cricket S. S. Co.* v. *Parry,* 263 Fed. 523; *Storgard* v. *France & Canada S. S. Corp.,* 263 Fed. 545; *Panama R. Co.* v. *Johnson,* 289 Fed. 964, aff'd 264 U. S. 375. But no American case appears to have recognized assumption of risk as a defense to such a suit. In numerous cases this defense was either denied or ignored in circumstances plainly calling for its application had it been available. *Halverson* v. *Nisen,* 3 Saw. 562; *The Edith Godden,* 23 Fed. 43; *The Julia Fowler, supra; The Noddleburn,* 28 Fed. 855; *Olson* v. *Flavel, supra; The A. Heaton,* 43 Fed. 592; *Lafourche Packet Co.* v. *Henderson,* 94 Fed. 871; *Globe S. S. Co.* v. *Moss,* 245 Fed. 54; *The Colusa,* 248 Fed. 21; *Cricket S. S. Co.* v. *Parry, supra.*

The seaman assumes the risk normally incident to his perilous calling, see *The Iroquois,* 194 U. S. 240, 243; *Cricket S. S. Co.* v. *Parry, supra,* but it has often been pointed out that the nature of his calling, the rigid discipline to which he is subject, and the practical difficulties of his avoiding exposure to risks of unseaworthiness and

---

chant Shipping Act of 1876, 39–40 Vict. Ch. 80, § 5, provided that there should be imported into every contract of service between the owner of the vessel and the seamen on board an implied obligation "that the owner of the ship and the master, and every agent charged with the loading of the ship or the preparing thereof for sea or the sending thereof to sea shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage during the same." See *Hedley* v. *Pinkney & Sons S. S. Co.,* [1894] A. C. 222, strictly construing this statute.

defective appliances, make such a defense, as distinguished from contributory negligence, see *Seaboard Air Line Co.* v. *Horton, supra,* 503, peculiarly inapplicable to suits by seamen to recover for the negligent failure to provide a seaworthy ship and safe appliances. See *The Colusa, supra,* 24, 25; *Cricket S. S. Co.* v. *Parry, supra,* 526; *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619, 621; *U. S. Shipping Board E. F. Corp.* v. *O'Shea,* 55 App. D. C. 300; 5 F. (2d) 123, 125; *States S. S. Co.* v. *Berglann,* 41 F. (2d) 456, 457.

Like considerations, and others to be mentioned, require a like conclusion with respect to the modified and in some respects enlarged liability imported into the maritime law by the Jones Act. The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Cf. *Chelentis* v. *Luckenbach S. S. Co., supra.* Its provisions, like others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end, see *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 375; *Jamison* v. *Encarnacion,* 281 U. S. 635, 639; *Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642; *Warner* v. *Goltra,* 293 U. S. 155, 157, 160, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part. The denial in the Federal Employers' Liability Act of the defense of assumption of risk refers only to suits founded on the Federal Safety Appliance Act, applicable alone to railroads. It can raise no inference as to the availability of the defense in suits brought to recover for injuries to seamen. No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act and the nature of the juristic field in which it is to be applied, preclude the assumption that Congress intended, by its adoption, to modify that rule by implication. Such has been the conclusion

reached generally by the lower federal courts, although not with entire unanimity.[3]

Affirmed.

BEADLE *v.* SPENCER.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 676. Argued March 31, 1936.—Decided April 27, 1936.

1. The provisions of the Employers' Liability Act specifically imposing liability for injuries caused by negligence of officers and fellow employees, or by defects in equipment due to negligence, were adopted for the maritime law by the Jones Act, 46 U. S. C. 388. P. 128.
2. Assumption of risk is not a defense to a suit brought under the Jones Act by one who is a seaman according to the maritime law, for personal injuries resulting from negligent failure of the master to provide safe appliances or a safe place in which to work. *The Arizona, ante,* p. 110, followed. P. 129.
3. This rule applies although the injured seaman was employed on a coasting vessel which was in port at the time of his accident. P. 129.
4. It is unnecessary to decide in this case whether employees on a vessel who are not seamen according to the maritime law, but who have been given the status of seamen for the purpose of enabling them to bring suit under the Jones Act, see *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, are entitled to the immunity from the defense of assumption of risk accorded by the maritime law to seamen. P. 130.

---

[3] Denying the defense: *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619; *U. S. Shipping Board E. F. Corp.* v. *O'Shea,* 55 App. D. C. 300; 5 F. (2d) 123; *Coast S. S. Co.* v. *Brady,* 8 F. (2d) 16; *Zinnel* v. *U. S. Shipping Board E. F. Corp.,* 10 F. (2d) 47; *Howarth* v. *U. S. Shipping Board E. F. Corp.,* 24 F. (2d) 374; *Masjulis* v. *U. S. Shipping Board E. F. Corp.,* 31 F. (2d) 284; *States S. S. Co.* v. *Berglann,* 41 F. (2d) 456; *United States* v. *Boykin,* 49 F. (2d) 762; *Ives* v. *United States,* 58 F. (2d) 201; *Pittsburgh S. S. Co.* v. *Palo,* 64 F. (2d) 198; *Hanson* v. *Luckenbach S. S. Co.,* 65 F. (2d) 457; *The New Berne,* 80 F. (2d) 244. Contra: *The Ipswich,* 46 F. (2d) 136; *Stevens* v. *R. O'Brien & Co.,* 62 F. (2d) 632.

5. Contributory negligence is not a defense to a suit brought either under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment. It is ground only for apportionment of the damages. P. 130.

4 Cal. (2d) 313; 48 P. (2d) 678, affirmed.

CERTIORARI, 297 U. S. 701, to review the affirmance of a judgment for damages in an action by a seaman who was injured by falling into a hatch.

Mr. Harold M. Sawyer for petitioner.

Upon the authority of *Pryor* v. *Williams,* 245 U. S. 43; *Southern Ry. Co.* v. *Hermans,* 44 F. (2d) 366; and *Holy Cross Gold Mining Co.* v. *O'Sullivan,* 27 Colo. 237, the District Court of Appeal held that in the instant case, under the pleadings and the evidence, the jury should have been instructed with regard to the defense of assumption of ordinary risks and hazards of the employment and the legal effect thereof, and because of the failure so to instruct, reversed the judgment of the trial court.

It has been repeatedly urged throughout this litigation that the above authorities involve injuries sustained in the operation of railroads, and that consequently these authorities furnish no rule whatever for the application of the doctrine of assumption of the risk of the ordinary and obvious hazards in the case of seamen suing under the Jones Act.

Long before the Jones Act was passed, this Court said, in the case of *The Iroquois,* 194 U. S. 240: "A seafaring life is a dangerous one. Accidents of this kind are peculiarly liable to occur and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen."

There can be no doubt that the defense of assumption of the risk in suits brought by seamen prior to the passage of the Jones Act was available to their employers.

It is true that some of the inferior federal and state courts have held that the entire doctrine of assumption of the risk is not applicable to seamen because of the peculiarities of their occupation which distinguish it from land occupation. The chief distinction between the two occupations is that the seaman at sea is acting under orders, disobedience to which may imperil the safety of vessel, persons on board, and the cargo. But in this case the respondent occupied no such position. He was on a vessel moored at a dock discharging cargo. He was injured early on Monday morning, having been ashore since the preceding Saturday afternoon. He had not signed articles and could have quit his job at any time he liked without penalty or forfeiture. Under these circumstances there is no occasion for relaxing the rule of assumption of the risk because the reason upon which such relaxation is based does not exist. Other courts have found no difficulty in applying the rule of assumption of the risk in cases under the Jones Act where, as here, the seaman was not acting under compulsion. *Skolar* v. *Lehigh Valley Ry. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing Co.*, 1934 A. M. C. 441.

It is therefore submitted that when Congress saw fit to enlarge the privileges of seamen by conferring upon them the same rights and remedies as were conferred upon employees in interstate commerce by the Federal Employers' Liability Act, it fully intended to reserve to the maritime employer the same defense of assumption of risk that had been reserved to the land employer.

Mr. John L. McNab submitted for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted to review a ruling of the Supreme Court of California, 4 Cal. (2d) 313; 48 P. (2d) 678, that assumption of risk is not a defense to a suit

brought by a seaman under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, to recover for personal injuries due to the negligent failure of the officers of the vessel to provide him with a safe place in which to work.

Respondent was employed by petitioner as a seaman on a coasting vessel. While engaged in unloading lumber from the deck he was injured by a fall into an open hatch. On the trial there was evidence from which the jury could have found that the deck of the vessel, from the bulwarks to within about forty inches of either side of the hatch coamings, was loaded with heavy timbers, and that the remaining deck space, at the sides of the hatch, was loaded with loose lumber, consisting of pieces 2″ x 3″ and 1″ x 12″, to a height five or six feet above the deck; that this lighter lumber, or a substantial part of it, had been loaded in sling loads, without re-piling, in such negligent fashion as to render it unstable; that the pile of lumber, with the open hatch alongside, constituted an unsafe place to work for those required to go upon it, as the master knew; and that the upper part of the pile of lumber, on which respondent was standing in order to adjust a sling about some of the lumber to be unloaded, toppled over because of its instability, throwing him through the open hatch into the hold and causing the injuries complained of. The trial court refused requests to charge that assumption of the risk by respondent was a defense, but left it to the jury to say whether there was negligent failure of the master to provide a safe place for the respondent to work, and whether the failure was the proximate cause of the injury. It reduced the jury's verdict for respondent and gave judgment accordingly, which the state supreme court sustained.

Numerous grounds for reversal are urged here, of which only two require our notice. One is petitioner's contention that even though assumption of risk is not generally a defense to a suit brought under the Jones Act, it must

be deemed available where, as in the present case, the injured seaman is employed on a coasting vessel which was in port at the time of the accident. It is argued that as he was not required to sign articles, 18 Stat. 64, 46 U. S. C. § 544, compare 46 U. S. C. § 563, and consequently was not subject to the punishment for desertion prescribed by 46 U. S. C. §§ 701–713, he was free to avoid the risk by leaving the vessel and his employment. The other objection is that the trial court erred in refusing petitioner's request to charge that if the jury should find that respondent, in placing the sling underneath the lumber, "chose to perform the act in a dangerous manner such as stepping too near the edge of the deck load when there was a safe method of doing the work involving no risk of the edge of the deck load giving away, then the plaintiff cannot recover."

1. The effect of the Jones Act in bringing into the maritime law new rules of liability prescribed by the Federal Employers' Liability Act, has been considered in *The Arizona,* decided this day, *ante,* p. 110, and does not require extended discussion here. The injury resulting to the employee from the negligently piled lumber, in proximity to the open hatch, is made actionable by the Jones Act, by its adoption for the maritime law of the provisions of the Employers' Liability Act, which specifically imposes liability for negligence of officers and fellow employees, and for defects in equipment due to negligence. See *Zinnel* v. *U. S. Shipping Board E. F. Corp.,* 10 F. (2d) 47; *The Valdarno,* 11 F. (2d) 35; *Howarth* v. *U. S. Shipping Board E. F. Corp.,* 24 F. (2d) 374; *Hanson* v. *Luckenbach S. S. Co.,* 65 F. (2d) 457. Before the enactment of the Jones Act it was recognized that a "failure to supply and keep in order the proper appliances appurtenant to the ship" is equivalent to unseaworthiness, and that it was likewise actionable under the maritime law, if it caused injury to a seaman. See *The Osceola,* 189 U. S. 158, 175. Judge

Addison Brown, sitting in admiralty, had allowed recovery to a seaman for injuries received in unloading lumber in circumstances substantially like the present, in *The Frank and Willie,* 45 Fed. 494, cited with approval in *The Osceola, supra,* 174. See also *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255; *Olson* v. *Flavel,* 34 Fed. 477.

2. It is unnecessary to repeat here the reasons given in the opinion in *The Arizona, supra,* for our conclusion that assumption of risk is not a defense to a suit brought by a seaman under the Jones Act for negligent failure of the master to provide safe appliances or a safe place in which to work. Those reasons neither require nor admit of a different rule because of the circumstances of respondent's employment on which the petitioner relies. The rules, peculiar to admiralty, of liability for injuries to seamen or others, are as applicable when the injury occurs upon a vessel in port as when at sea, although the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored. *The Frank and Willie, supra;* and see *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142; *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128; *Baizley Iron Works* v. *Span,* 281 U. S. 222; *Employers' Liability Assurance Corp.* v. *Cook,* 281 U. S. 233; *Uravic* v. *Jarka Co.,* 282 U. S. 234.

Nor do we perceive any adequate ground for judicial relaxation of the admiralty rule, applicable under the Jones Act, that assumption of risk is not a defense to a suit to recover for injury to a seaman resulting from unseaworthiness or defective equipment, because he chances to be in some measure less amenable to the iron discipline of the sea than others who go upon foreign voyages. Even so his freedom to avoid the risk is far from comparable to that of the employee on land where the defense of assumption of risk originated and has been maintained.

No such distinction appears to have been recognized in the maritime law. And we discern nothing in the purpose or in the language of the Jones Act or in the rules of liability which it prescribes to suggest that Congress undertook to introduce such a distinction into the maritime law.

It is unnecessary to decide whether employees on a vessel who are not seamen according to the maritime law, but who have been given the status of seamen for the purpose of enabling them to bring suit under the Jones Act, see *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, are entitled to the immunity from the defense of assumption of risk accorded by the maritime law to seamen. Cf. *Scheffler* v. *Moran Towing & Transportation Co.,* 68 F. (2d) 11; *Skolar* v. *Lehigh Valley R. Co.,* 60 F. (2d) 893.

3. We find no prejudicial error in the refusal to give the requested charge as to the respondent's use of the sling. The trial judge did charge the jury that there could be no recovery unless it found that negligence of petitioner was the cause of the injury. Respondent was using the defectively piled lumber as a platform on which to stand when adjusting the sling under some of the lumber about to be unloaded. There is no suggestion in the evidence or by petitioner's requests that he could have stood elsewhere when performing that operation, or that he had any choice but to do his work there or leave the vessel. It may be that he was negligent in standing at one point rather than at another upon the unsafe pile of lumber, see *Seaboard Air Line Ry. Co.* v. *Horton,* 233 U. S. 492; cf. *The Frank and Willie, supra,* and that an instruction as to the effect of his negligence would have been appropriate. But we think the charge in the form requested, so far as applicable to the evidence, and in view of that actually given, amounted to

no more than a request to charge that his negligence was a defense. Contributory negligence is not a defense to a suit brought either under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment. Under both it is ground only for apportionment of the damage, see *The Frank and Willie, supra;* 35 Stat. 66, 45 U. S. C. § 53. So far as the record discloses petitioner made no request for an instruction as to apportionment of the damage.

Affirmed.

INTERNATIONAL BUSINESS MACHINES CORP. *v.* UNITED STATES.

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

No. 758. Argued April 8, 1936.—Decided April 27, 1936.

Section 3 of the Clayton Act declares it unlawful for any person engaged in commerce to lease machinery "whether patented or unpatented" on the condition that the lessee shall not use supplies or other commodities of the lessor's competitor, where the effect of the condition "may be" to lessen competition substantially or tend to create a monopoly. *Held:*

1. The prohibition is violated by a condition requiring a lessee to operate the leased machine only with supplies from the lessor, since this, in effect, precludes the use of supplies of a competitor. P. 134.

2. While the section does not purport to curtail the patent monopoly of the lessor, the prohibition of tying clauses is not limited to unpatented supplies but includes also supplies which have been patented to the lessor either separately or in combination with the patented machine. P. 136.

3. Assuming that, by implied exception, a tying clause would not violate the provision, though it tended to create a monopoly, if its purpose and effect were to protect the good will of the lessor in the leased machines, there is no basis for the exception where the substantial benefit of the clause to the lessor is in the elimina-

tion of competition and where it does not appear that protection of his good will cannot be achieved by methods that do not tend to monopoly and are not otherwise unlawful. P. 138.

13 F. Supp. 11, affirmed.

APPEAL from a decree enjoining, as contrary to the Clayton Act, certain clauses which the appellant had been placing in its leases of tabulating machines, requiring the use of tabulating cards of its own manufacture.

Messrs. Martin A. Schenck and *Drury W. Cooper,* with whom *Mr. Edward Cornell* was on the brief, for appellant.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed* and *Messrs. Charles H. Weston* and *George P. Alt* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal, § 238 of the Judicial Code, from so much of a decree of a District Court for Southern New York as enjoins the appellant from leasing its tabulating and other machines upon the condition that the lessees shall use with such machines only tabulating cards manufactured by appellant, as a violation of § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14.

The Government brought the suit against appellant and three other corporations, all manufacturers of machines performing substantially the same functions as appellant's, to restrain the use by each of the defendants of a specified type of lease of their machines as a violation of the Clayton Act, and to declare void under the Sherman Act a contract into which they had entered, by which each agreed to use that type of lease, and not to solicit the lessees of machines of the others to purchase tabulating cards which it manufactures. The case was tried upon the pleadings and a stipulation of facts, in which the defendants consented to a decree cancelling

their agreement with each other. Two of the defendants have been eliminated from the suit, one by dissolution and the other by merger with appellant. A third defendant, Remington Rand, Inc., has stipulated that the decree to be entered against it shall conform to that entered against appellant upon this appeal.

Appellant's machines and those of Remington Rand, Inc., are now the only ones on the market which perform certain mechanical tabulations and computations, without any intervening manual operation, by the use in them of cards upon which are recorded data which are the subject of tabulation or computation. Appellant manufactures three types of machines, known as punching machines, sorters and tabulators. The punching machines are used to perforate cards, called tabulating cards, in such manner that the positions of the perforations indicate numerical or other data. When the cards are passed through the sorter or tabulator, control of its mechanism is effected by electrical circuits established by contacts through the perforations. The cards are thus made permanent records of information, and by the perforations are given such form that they may be used, as often as required, to control the function of the machines through which they are passed. The sorting machines are used to sort the perforated cards so as to classify them by the selection and segregation, in the desired manner, of those signifying any particular type of information. The tabulating machines are used to record the information denoted by the perforated cards or to make computations based upon it. In the Remington Rand machines the control is not electrical, but is accomplished by the use of cards which admit of the movement, into the perforations, of small pins which, by linkage, guide the mechanical operation of the machine so as to effect the desired result.

To insure satisfactory performance by appellant's machines it is necessary that the cards used in them conform to precise specifications as to size and thickness, and that they be free from defects due to slime or carbon spots, which cause unintended electrical contacts and consequent inaccurate results. The cards manufactured by appellant are electrically tested for such defects.

Appellant leases its machines for a specified rental and period, upon condition that the lease shall terminate in case any cards not manufactured by the lessor are used in the leased machine. A special form of lease has been granted to the Government by which it is permitted to use cards of its own manufacture upon paying a 15% increase in the rental of the leased machines, but upon condition that the lease shall be terminable if the Government uses such cards without payment of the additional rental.

Appellant insists that the condition of its leases is not within the prohibition of the Clayton Act, and it has assigned as error the conclusion of the district court that the condition tends to create monopoly. But its principal contentions are that its leases are lawful because the protection secured by the condition does not extend beyond the monopoly which it has acquired by patents on the cards and on the machines in which they are used, and that in any case the condition is permissible under § 3 of the Clayton Act because its purpose and effect are only to preserve to appellant the good will of its patrons by preventing the use of unsuitable cards which would interfere with the successful performance of its machines.

1. Section 3 of the Clayton Act, so far as it is applicable to the present case, provides that "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease . . . machinery . . . whether patented or unpatented, for use . . . within the United States . . . on the condition . . . that the lessee . . .

shall not use . . . supplies or other commodities of a competitor . . . , where the effect of such lease . . . or such condition . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The statute thus in precise terms makes unlawful a condition that the lessee shall not use the supplies or commodities of a competitor of the lessor if the effect of the condition "may be" to lessen competition substantially, or if it tends to create a monopoly.

Little need be said of the contention that the condition of appellant's leases does not infringe these prohibitions. It is true that the condition is not in so many words against the use of the cards of a competitor, but is affirmative in form, that the lessee shall use only appellant's cards in the leased machines. But as the lessee can make no use of the cards except with the leased machines, and the specified use of appellant's cards precludes the use of the cards of any competitor, the condition operates in the manner forbidden by the statute. See *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 457, 458; compare *Federal Trade Comm'n* v. *Sinclair Refining Co.,* 261 U. S. 463, 474. A different question is presented from that in the *Sinclair* case, where a wholesale distributor of gasoline leased gasoline pumps to retail dealers with the stipulation that they should not be used for the pumping of gasoline of the lessor's competitors. As the only use made of the gasoline was to sell it, and as there was no restraint upon the purchase and sale of competing gasoline, there was no violation of the Clayton Act.

The conclusion of the trial court that appellant's leases infringe the monopoly provisions of the section does not want for support in the record. The agreed use of the "tying clause" by appellant and its only competitors, and the agreement by each of them to restrict its competition in the sale of cards to the lessees of the others, have oper-

ated to prevent competition and to create a monopoly in the production and sale of tabulating cards suitable for appellant's machines, as the district court found. The commerce in tabulating cards is substantial. Appellant makes and sells 3,000,000,000 cards annually, 81% of the total, indicating that the sales by the Remington Rand company, its only competitor, representing the remaining 19%, are approximately 600,000,000. It is stipulated that appellant derives a "substantial" profit from its card sales. The gross receipts from its machines during the past ten years have averaged $9,710,389 a year, and an average of $3,192,700 has been derived annually from the sale of its cards. These facts, and others, which we do not stop to enumerate, can leave no doubt that the effect of the condition in appellant's leases "may be to substantially lessen competition," and that it tends to create monopoly, and has in fact been an important and effective step in the creation of monopoly.

2. On the trial appellant offered to prove its ownership of patents which, it asserts, give it a monopoly of the right to manufacture, use and vend the cards, separately, and in combination with its sorting and tabulating machines, of which, it insists, they are a part. It argues that the condition of its leases is lawful because it does not enlarge the monopoly secured by the patents, and that the trial court erred in refusing to consider appellant's patent monopoly as a defense to the suit.

Appellant's patents appear to extend only to the cards when perforated, and to have no application to those which the lessees purchase before they are punched. The contention is thus reduced to the dubious claim that the sale of the un-punched cards is a contributory infringement of the patents covering the use of perforated cards separately and in combination with the machines. See *Carbice Corporation* v. *American Patents Development Corp.*, 283 U. S. 27; *Motion Picture Patents Co.* v. *Uni-*

versal Film Mfg. Co., 243 U. S. 502; *McGrath Holding Corp.* v. *Anzell,* 58 F. (2d) 205; cf. *Leeds & Catlin Co.* v. *Victor Talking Machine Co.,* 213 U. S. 325.

But we do not place our decision on this narrow ground. We rest it rather on the language of § 3 of the Clayton Act which expressly makes tying clauses unlawful, whether the machine leased is "patented or unpatented." The section does not purport to curtail the patent monopoly of the lessor or to restrict its protection by suit for infringement. But it does in terms deny to the lessor of a patented, as well as of an unpatented machine, the benefit of any condition or agreement that the lessee shall not use the supplies of a competitor. The only purpose or effect of the tying clause, so far as it could be effectively applied to patented articles, is either to prevent the use, by a lessee, of the product of a competitor of the lessor, where the lessor's patent, *prima facie,* embraces that product, and thus avoid judicial review of the patent, or else to compel its examination in every suit brought to set aside the tying clause, although the suit could usually result in no binding adjudication as to the validity of the patent, since infringement would not be in issue. The phrase "whether patented or unpatented" would seem well chosen to foreclose the possibility of either alternative.

When Congress had before it the bill which became § 3 of the Clayton Act, it was familiar with the decision of this Court in *Henry* v. *A. B. Dick Co.,* 224 U. S. 1, and with the contentions made in *United States* v. *United Shoe Machinery Co.,* 247 U. S. 33, then pending before this Court—cases in which it was held that a tying clause could lawfully be extended to unpatented supplies for a leased patented machine. Cong. Rec., Vol. 51, Part 14, 63rd Cong., 2d Sess., 14,089 ff.; see Henderson, The Federal Trade Commission, 30. One purpose of § 3 undoubtedly was to prevent such use of the tying clause. *United Shoe*

Machinery Co. v. *United States,* 258 U. S. 451. But the debates on § 3, on the floor of the Senate, disclose that it was well known to that body that one of the contentions in the pending cause, *United States* v. *United Shoe Machinery Co.,* 247 U. S. 33, was that it was permissible, in any circumstances, for a lessor to tie several patented articles together. They show that the proponents of the bill were as much concerned that that practice should be prohibited as that the tying of non-patented to patented articles should be ended. Cong. Rec., Vol. 51, Part 14, 63rd Cong., 3d Sess., 14275. The phrase, "whether patented or unpatented" as used in § 3 is as applicable to the one practice as to the other. It would fail of the purpose which it plainly expresses if it did not operate to preclude the possibility of both, and to make the validity of the tying clause a matter to be determined independently of the protection afforded by any monopoly of the lessor. Such, we think, must be taken to be the effect of the section unless its language and history are to be disregarded. Under its provisions the lawfulness of the tying clause must be ascertained by applying to it the standards prescribed by § 3 as though the leased article and its parts were unpatented.

3. Despite the plain language of § 3, making unlawful the tying clause when it tends to create a monopoly, appellant insists that it does not forbid tying clauses whose purpose and effect are to protect the good will of the lessor in the leased machines, even though monopoly ensues. In support of this contention appellant places great emphasis on the admitted fact that it is essential to the successful performance of the leased machines that the cards used in them conform, with relatively minute tolerances, to specifications as to size, thickness and freedom from defects which would affect adversely the electrical circuits indispensable to the proper

operation of the machines. The point is stressed that failure, even though occasional, to conform to these requirements, causes inaccuracies in the functioning of the machine, serious in their consequences and difficult to trace to their source, with consequent injury to the reputation of the machines and the good will of the lessors. There is no contention that others than appellant cannot meet these requirements. It affirmatively appears, by stipulation, that others are capable of manufacturing cards suitable for use in appellant's machines, and that paper required for that purpose may be obtained from the manufacturers who supply appellant. The Remington Rand company manufactures cards suitable for its own machines, but since it has been barred by the agreement with appellant from selling its cards for use in appellant's machines, its cards are not electrically tested. The Government, under the provisions of its lease, following its own methods, has made large quantities of the cards, which are in successful use with appellant's machines. The suggestion that without the tying clause an adequate supply of cards would not be forthcoming from competitive sources is not supported by the evidence. "The very existence of such restrictions suggests that in its absence a competing article of equal or better quality would be offered at the same or at a lower price." *Carbice Corporation* v. *American Patents Development Corp., supra,* 32, Note 2, quoting Vaughan, Economics of Our Patent System, 125, 127. Appellant's sales of cards return a substantial profit and the Government's payment of 15% increase in rental to secure the privilege of making its own cards is profitable only if it produces the cards at a cost less than 55% of the price charged by appellant.

Appellant is not prevented from proclaiming the virtues of its own cards or warning against the danger of using, in its machines, cards which do not conform to the

necessary specifications, or even from making its leases conditional upon the use of cards which conform to them. For aught that appears such measures would protect its good will, without the creation of monopoly or resort to the suppression of competition.

The Clayton Act names no exception to its prohibition of monopolistic tying clauses. Even if we are free to make an exception to its unambiguous command, see *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 167;[1] *Auto Acetylene Light Co.* v. *Prest-O-Lite Co.*, 276 Fed. 537; *Pick Manufacturing Co.* v. *General Motors Corp.*, 80 F. (2d) 641; cf. *Radio Corporation* v. *Lord*, 28 F. (2d) 257, we can perceive no tenable basis for an exception in favor of a condition whose substantial benefit to the lessor is the elimination of business competition and the creation of monopoly, rather than the protection of its good will, and where it does not appear that the latter can not be achieved by methods which do not tend to monopoly and are not otherwise unlawful.

Affirmed.

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

---

[1] In this case the Government sought no review of the determination of the district court that the tying clause was valid so far as it requires lessees to purchase of the lessor supplies and parts of the leased machines. See *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451.

TIPTON *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

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

No. 664. Argued March 31, 1936.—Decided April 27, 1936.

1. The remedy of an employee of a railway which is a highway of interstate commerce for personal injuries suffered while he is engaged about intrastate transportation, and caused by a breach of the Federal Safety Appliance Acts, is the remedy afforded by the common or statutory law of the State. P. 146.
2. In such cases, the State is at liberty to afford any appropriate remedy for breach of the duty imposed by the federal Acts, including the remedy of workmen's compensation; and the state law on the subject is binding on the federal courts. P. 147.
3. In California, the exclusive remedy in such cases is under the state workmen's compensation act. P. 149.
4. A construction of a state statute by the state courts resulting from their erroneous conception of federal statutes, is not binding on the federal courts. P. 151.

78 F. (2d) 450, affirmed.

CERTIORARI, 297 U. S. 700, to review the affirmance of a judgment dismissing an action by a railway employee against the Railway Company to recover damages for personal injuries alleged to have been caused by a defective coupling on a freight car, used in violation of the Federal Safety Appliance Acts.

Mr. Herman A. Bachrack submitted for petitioner.

It is now beyond dispute that the Safety Appliance Acts apply to cars in use on a highway of interstate commerce regardless of the type of commerce (interstate or intrastate) in which the cars are being used. *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33; *Moore* v. *Chesapeake & Ohio Ry. Co.,* 291 U. S. 205; 45 U. S. C. 8.

It is also beyond dispute that the duty thus laid upon the railroad gives rise to a correlative right in favor of an

employee proximately injured by reason of a violation of this duty regardless of the type of commerce in which the employee was engaged when injured. Cases *supra; Fairport, P. & E. Ry.* v. *Meredith,* 292 U. S. 589; *United States* v. *California,* 297 U. S. 175.

Since this right is a creation of the federal statute, it must be conceded that, if the remedy is also a creation of the federal statute, no mandatory state Workmen's Compensation Act can destroy either. *Ward* v. *Erie R. Co.,* 230 N. Y. 230, cert. den., 256 U. S. 696, and cases cited.

Assuming that the remedy afforded for the violation of the duty is not a creation of federal law, but has been left to the States, the question still remains as to whether or not the State can abrogate the right of action given by the common law by adopting a compulsory compensation act.

From the decision of this Court in *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, to the decisions of this Court during the 1933 October Term hereinafter referred to, it was the almost unanimous opinion of the bar and of the federal and state bench that the right and the remedy were creations of the federal statute. The arguments proving the basic soundness of this position and the reasons therefor are set forth in the *Rigsby* case, *supra,* and are clearly expressed in the majority opinion of the Court of Appeals of New York in *Ward* v. *Erie R. Co., supra.*

This view has been adhered to in the following cases involving compulsory compensation acts: *McMahon* v. *Montour R. Co.,* 270 U. S. 628; *Ross* v. *Schooley,* 257 Fed. 290, cert. den., 249 U. S. 615; *Ward* v. *Erie R. Co.,* 230 N. Y. 230, cert. den., 256 U. S. 696; *Geraghty* v. *Lehigh Valley Ry. Co.,* 70 F. (2d) 300; *Leuthe* v. *Erie R. Co.,* 12 F. Supp. 161; *Miller* v. *Reading Co.,* 292 Pa. 44; *Kenna* v. *Calumet, H. & S. E. R. Co.,* 284 Ill. 301; *Flanigan* v. *Hines,* 108 Kan. 133; *Kraemer* v. *Chicago & N. W.*

R. Co., 148 Minn. 310; *Southern Pacific Co.* v. *Henderson,* 208 S. W. 561 (Tex.).

A contrary view is expressed in *Delaware, L. & W. R. Co.* v. *Peck,* 225 Fed. 261, but a different conclusion was reached in *Ross* v. *Schooley,* 257 Fed. 290, cert. den., 249 U. S. 615. See *Director General* v. *Ronald,* 265 Fed. 138.

That the view hereinbefore set forth has been universally adopted and that the rule so laid down has become a settled principle of law, upon which rights have rested for many many years, is shown by the great body of reported cases that have followed the theory of the *Rigsby* case. *San Antonio Ry.* v. *Wagner,* 241 U. S. 476, 480; *Pennsylvania R. Co.* v. *Logansport Loan & Trust Co.,* 29 F. (2d) 1; *Detroit Ry.* v. *Cravens,* 13 F. (2d) 352; *Devine* v. *Baltimore & Ohio R. Co.,* 253 Fed. 948; *Dedinger* v. *Pennsylvania R. Co.,* 39 F. (2d) 799; *St. Louis R. Co.* v. *Smith,* 254 Fed. 581; *Tyon* v. *Wabash Ry. Co.,* 207 Mo. App. 337; *Carey* v. *New York Central R. Co.,* 250 N. Y. 345; *Ewing* v. *Coal & Coke Ry.,* 82 W. Va. 433; *St. Louis & S. F. R. Co.* v. *Barron,* 166 Ark. 647; *Grew* v. *Boston Ry. Co.,* 83 N. H. 385; *Sims* v. *Pennsylvania R. Co.,* 279 Pa. 114; *Anderson* v. *Chesapeake & Ohio Ry. Co.,* 352 Ill. 561, cert. den., 290 U. S. 675.

No decision save the one now under review before this Court has held that a compulsory Workmen's Compensation Act is the sole remedy of an employee injured by reason of a violation of the Safety Appliance Act or indeed that the right and remedy are not created by that Act. The cases decided by this Court in the October Term, 1933, do not so hold. Distinguishing: *Fairport, P. & E. Ry.* v. *Meredith,* 292 U. S. 589; *Gilvary* v. *Cuyahoga Valley R. Co.,* 292 U. S. 57; *Moore* v. *Chesapeake & Ohio Ry.,* 291 U. S. 205.

Assuming that the right is a creation of the federal statute and that the remedy for violation of the right

springs from the common law of the States, we come to the question of how far the States can abrogate the right.

It is important to consider that the compensation given under a compulsory Workmen's Compensation Act is not damages for violation of a right. It is compensation arising because of a status and has nothing to do with a violation of a duty. *Kenna* v. *Calumet H. & S. E. R. Co.*, 284 Ill. 301; *North Alaska Salmon Co.* v. *Pillsbury*, 174 Cal. 1; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532.

The right created by the federal statute exists only in so far as it can be enforced by action. There is no right as distinguished from the right to enforce the liability for the breach of duty. As the courts have stated, the creation of the duty by Congress gave rise to a correlative right and that right can only be a right to recover damages. Regardless of how far the States can regulate the particular remedy for a violation of that right, they can not destroy the right by refusing any remedy, any more than they could make "assumption of risk" a defense. This, a compulsory compensation act purports to do, and this it can not do.

Consequently whether the right and remedy are creations of the federal Act, or only the right is a creation of the federal Act, in neither event can the right be destroyed by a compulsory compensation Act.

Assuming that the existence of any remedy for injury, caused by a violation of the Safety Appliance Acts, is a matter left to the States and that a State can adopt a compulsory compensation Act and make it the sole remedy, California, where the accident occurred, has not done this.

The Court accepts the meaning and scope given to a state Workmen's Compensation Act by a local state court.

Mr. Leo E. Sievert, with whom *Messrs. Robert Brennan* and *Charles H. Woods* were on the brief, for respondent.

The Federal Safety Appliance Act does not give petitioner any right to sue his employer. *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U. S. 205; *Minneapolis, St. P. & S. S. M. R. Co.* v. *Popplar*, 237 U. S. 369; *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57.

Petitioner's rights are defined by the California Workmen's Compensation Act within the jurisdiction of the Industrial Accident Commission of the State, by appropriate proceedings therein, and not by any action at law in the courts.

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner, a citizen of California, brought an action against the respondent in the Superior Court of the State to recover for injuries sustained in the course of his employment as a switchman. The complaint recites that the respondent, a Kansas corporation, is a common carrier by railroad in interstate commerce, authorized to transact business in California, and that the line on which the accident occurred is a highway of interstate commerce. The cause of petitioner's injury is alleged to have been a defective coupling apparatus upon a freight car, used in violation of the Federal Safety Appliance Acts.[1] The complaint does not state that, at the time of the accident, petitioner was engaged in interstate commerce. After removal to the federal court a demurrer was filed challenging the complaint for failure to state a cause of action. The demurrer was sustained and leave to amend refused. The Circuit Court of Appeals affirmed, holding that as the petitioner, when injured, was not engaged in interstate commerce, he may seek redress only

[1] March 2, 1893, c. 196, 27 Stat. 531, U. S. C. Tit. 45, §§ 1–7; March 2, 1903, c. 976, 32 Stat. 943, U. S. C. Tit. 45, §§ 8–10; April 14, 1910, c. 160, 36 Stat. 298, U. S. C. Tit. 45, §§ 11–16.

under the California workmen's compensation act.[2] The petitioner sought review by this court on the ground that the decision conflicts with adjudications of the California courts sustaining the right to maintain an action for damages in like circumstances. We granted certiorari.

The Safety Appliance Acts impose an absolute duty upon an employer and prescribe penal sanctions for breach. The earliest, that of 1893, affected only cars which were being used in interstate commerce. By the Act of 1903 the duty was extended to all cars used upon any railroad which is a highway of interstate commerce.[3] The absolute duty imposed necessarily supersedes the common law duty of the employer. But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states.[4] The Safety Appliance Acts modify the enforcement, by civil action, of the employe's common law right in only one aspect, namely, by withdrawing the defense of assumption of risk.[5] They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act.[6]

---

[2] 78 F. (2d) 450.

[3] Section 1, U. S. C. Tit. 45, § 8; *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

[4] *Moore* v. *Chesapeake & O. Ry. Co.*, 291 U. S. 205, 215–216.

[5] *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Popplar*, 237 U. S. 369, 372.

[6] *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281; *Schlemmer* v. *Buffalo R. & P. Ry. Co.*, 220 U. S. 590; *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Popplar*, 237 U. S. 369, 372; *Texas & P. Ry.* v. *Rigsby*, 241 U. S. 33; *Moore* v. *Chesapeake & O. Ry. Co.*, 291 U. S. 205; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57; *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589.

In *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, it was decided that, as the first Safety Appliance Act had been extended by later legislation to equipment used in intrastate transportation upon a railroad which is a highway of interstate commerce, an employe injured as the result of a violation of the act, in respect of a car so used, is entitled to recover for breach of the duty imposed on the carrier. Nothing more was there adjudicated. While the opinion discussed the power of Congress, in connection with such regulation of the instrumentalities of interstate commerce, not only to enlarge the common law duty of the employer and thus alter substantive rights of the employe, but also to afford a correlative remedy, the construction put upon the Safety Appliance Acts was that they remit the person injured to such remedy as the state law affords.

As respects an injury occurring during the course of employment in intrastate activities on a highway of interstate commerce, the question has arisen whether a state may substitute workmen's compensation for the common law or statutory action whereby damages could have been recovered for violation of the Safety Appliance Acts. A number of courts have interpreted the discussion in the *Rigsby* case as a denial of the power of the states to make the substitution.[7]

This court has recently reaffirmed the principle that the Safety Appliance Acts do not give a right of action

[7] *Ross* v. *Schooley,* 257 Fed. 290; *Director General* v. *Ronald,* 265 Fed. 138; *Flanigan* v. *Hines,* 108 Kan. 133; 193 Pac. 1077; *Kraemer* v. *Chicago & N. W. Ry.,* 148 Minn. 310; 181 N. W. 847; *Ward* v. *Erie R. Co.,* 230 N. Y. 230; 129 N. E. 886; *Miller* v. *Reading Co.,* 292 Pa. 44; 140 Atl. 618; *Southern Pacific Co.* v. *Henderson,* (Tex. Civ. App.) 208 S. W. 561. Contra: *Delaware, L. & W. R. Co.* v. *Peck,* 255 Fed. 261.

for their breach but leave the genesis and regulation of such action to the law of the states. In *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U. S. 205, it was held competent to a state to embody the provisions of the Federal Safety Appliance Acts in its own statute and to provide that an employe injured by violation of the federal acts should have a cause of action under the local statute. In *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57, it was decided that an elective compensation act afforded appropriate redress to an employe injured in intrastate transportation as a result of violation of the Safety Appliance Acts; and it was said that those acts do not dictate or prescribe the method of the enforcement of the liability arising from the breach of the duty they impose, or extend to the field occupied by a state compensation act. In *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, an action in a state court, based upon a violation of the Safety Appliance Acts, this court held the application of the doctrines of contributory negligence and last clear chance by the state court raised no federal questions reviewable here.

In *McMahon* v. *Montour R. Co.*, 270 U. S. 628, cited by the petitioner, the judgment of the state court was reversed, not because that court had held that remedy for breach of the duty imposed by the Safety Appliance Acts was afforded by the state workmen's compensation law, but because of its erroneous decision that the federal acts were inapplicable to the cars used in intrastate operations of the railroad, although it was a highway of interstate commerce.[8]

California is at liberty to afford any appropriate remedy for breach of the duty imposed by the Safety Appliance Acts. Her choice in the matter raises no federal question and the federal courts are as much bound as those of

[8] *McMahan* v. *Montour R. Co.*, 283 Pa. 274, 276; 128 Atl. 918.

California to conform to the remedial procedure she has adopted. There is nothing to prevent her prescribing workmen's compensation, elective or compulsory, in lieu of a common law or statutory action for disability or death arising from a breach of the duty imposed. The question is: has California, as the petitioner insists, excepted from the scope of her workmen's compensation act injuries sustained by an employe engaged in intrastate transportation? The Circuit Court of Appeals thought she had not. Whether this conclusion is right depends upon the force and effect of two District Court of Appeal decisions, which the Supreme Court of the State refused to review.

Ballard v. *Sacramento Northern Ry. Co.*, 126 Cal. App. 486; 14 P. (2d) 1045, 15 P. (2d) 793, was an action by the administratrix of a brakeman who was killed as a result of a violation of the Safety Appliance Acts. The defendant's railroad was a highway of interstate commerce but the decedent was not engaged in interstate commerce at the time of the accident. The complaint contained no count based upon the Federal Employers' Liability Act. Nevertheless, the court in affirming a judgment for the plaintiff, dealt with the trial court's charge as to contributory negligence as if the action were one brought under the Federal Employers' Liability Act,[9] and referred to the amending Act of 1910,[10] conferring on state and federal courts concurrent jurisdiction of actions for damages under the Liability Act, which has no bearing upon actions brought under the Safety Appliance Acts.

The railway company insisted that the state workmen's compensation act afforded the only redress for the decedent's death. In overruling the contention the court cited *Smithson* v. *Atchison T. & S. F. Ry. Co.*, 174 Cal.

[9] April 22, 1908, c. 149, 35 Stat. 65, U. S. C. Tit. 45, §§ 51–59.

[10] April 5, 1910, c. 143, 36 Stat. 291, U. S. C. Tit. 45, §§ 56–59.

148; 162 Pac. 111, a case dealing not with the Safety Appliance Acts but with the Employers' Liability Act, saying that the two statutes correspond in force and effect. The court added (p. 495):

"By subdivision 'C' of section 69 of the Workmens' Compensation Act, it is expressly provided that where interstate commerce questions are presented, resort to the courts is not prohibited."

In *Walton* v. *Southern Pacific Co.*, 8 Cal. App. (2d) 290; 48 P. (2d) 108, plaintiff as administratrix sued for the death of her husband, an employee of the defendant. The first and third counts were based upon the Federal Employers' Liability Act; alleged the decedent and the defendant were engaged in interstate commerce at the time of the accident; and described the negligence alleged to have caused the decedent's death. The second count was founded upon the Federal Boiler Inspection Act.[11] A trial resulted in a judgment for the plaintiff. Holding that the decedent was not engaged in interstate transportation, the court proceeded to discuss the count framed under the Boiler Inspection Act. It overruled the defendant's contention that the cause of action was barred, basing its decision upon the section of the state code of civil procedure limiting the time within which to bring an action for death. In this connection the court referred to *Moore* v. *Chesapeake & Ohio Ry. Co., supra,* as deciding that the Safety Appliance Acts do not affect the time of bringing suit or govern the right to recover for death; and also noted the statement in *Gilvary* v. *Cuyahoga Valley Ry. Co., supra,* that the right to recover damages sustained by the injured employe "sprang from the principle of the common law" and was left to be enforced accordingly or, in the case of death, "according to the applicable statute,"

[11] U. S. C. Tit. 45, §§ 22–34.

and that the safety acts "do not extend to the field occupied by the State Compensation Act." Correctly holding that the same principles apply in an action under the Boiler Inspection Act as in one under the Safety Appliance Acts, the court said that the former does not purport to provide remedial procedure where it is invoked as a ground of recovery for death caused in an intrastate operation, and added: "Hence, in an intrastate case such as this, the state law applies." Dealing with the defendant's contention respecting the Workmen's Compensation Act, the court said (p. 115):

"The appellant's contentions that the sole remedy of an employee of a common carrier, engaged in interstate transportation, or, in this case, of his personal representative, where, at the time of the injury, the employee was not engaged in interstate transportation, but under circumstances where there has been a violation of duty imposed by the Boiler Inspection Act, is under the State Workmen's Compensation Act are untenable (St. 1917, p. 831, as amended). The evidence here shows that the accident happened on a highway of interstate commerce. . . .

"Under the authority of *Ballard* v. *Sacramento Northern Railway Co.*, 126 Cal. App. 486, 14 P. (2d) 1045, 15 P. (2d) 793, the instant suit is maintainable."

If these decisions of intermediate courts of appeal, and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its terms, no application in the circumstances, they are binding authority in federal courts.[12] If, on the other hand, the state courts excluded railroad employees injured in intrastate operations from the benefits of the compensation act, not as a matter of construction of the statute, but because they thought the Safety Appliance Acts required the State to

[12] *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, 492.

afford a remedy in the nature of an action for damages, then the court below was right in disregarding that erroneous construction of the federal acts.[13]

In the *Ballard* case the court thought the Safety Appliance Acts, in addition to imposing a duty, afforded a remedy, and to deny that remedy would be to disregard the mandate of the federal statutes. It was proper, in this view, to construe the language of the compensation act accordingly. In the *Walton* case, while holding the Boiler Inspection Act irrelevant upon the question of the appropriate remedy, the court denied the application of the workmen's compensation law, upon the authority of the *Ballard* case.

The Supreme Court of the State refused to review either of the cases although this court had recently defined the scope of the Safety Appliance Acts in the *Moore* and *Gilvary* cases. If we were convinced that the court acted solely upon a construction of the workmen's compensation law, uninfluenced by the decisions following the supposed authority of the *Rigsby* case, we should not hesitate to hold United States courts bound by such construction of the state statute. But the terms of the state compensation law, and the California decisions construing it, lead us to doubt that this is so.

The act, in § 6, provides: [14]

"(a) Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment . . .

"(b) Where such conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer for the injury or death; . . . "

---

[13] *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120.

[14] II Deering's General Laws of California, pp. 2276–7.

Section 69 provides:[15]

"(c) *Employers engaged in interstate commerce.* This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

Thus, by its plain terms, the compensation law embraces injuries to an employe circumstanced as was the petitioner in this case. Employers or employments in interstate commerce (the phrase used) obviously signifies situations covered by the Federal Employers' Liability Act which gives a right of action for breach. The phrase does not exclude injuries consequent upon violation of the Safety Appliance Acts in intrastate commerce and the remainder of the section evinces a determination that the compensation act shall govern the rights of employes in interstate commerce so far as permissible under the federal laws.[16] As has been shown, these laws do not forbid its application in the instant case.

The Supreme Court of California has repeatedly declared the purpose and effect of the compensation act.

"The enactment substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their workmen. The change thus made is radical, not to say revolutionary. In place of the old action, in which the employer was liable only if he, or someone representing him, had been guilty of negligence or misconduct, the new law imposes upon the employer a liability for any accidental injuries to his employees arising out of the employment—a liability not

[15] II Deering's General Laws of California, p. 2316.

[16] Compare *Boston & M. R. Co.* v. *Armburg,* 285 U. S. 234.

conditioned upon any negligence of the employer, or any want of negligence on the part of the employee."[17]

"The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable. (*Netherlands American Steam Nav. Co.* v. *Gallagher,* 282 Fed. 171, 183.) The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages. (*Cooper* v. *Industrial Acc. Com.,* 177 Cal. 685, 687 [171 Pac. 684].) It substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their employees. (*Western Indemnity Co.* v. *Pillsbury,* 170 Cal. 686, 692 [151 Pac. 398].) When the specified conditions exist, the remedy provided by the act is exclusive of all other statutory or common-law remedies. (*DeCarli* v. *Associated Oil Co.,* 57 Cal. App. 310 [207 Pac. 282].)" [18]

We are not persuaded that if the state courts had thought that California was free to ordain a plan of workmen's compensation in lieu of an action for damages for breach of the duty imposed by the Safety Appliance Acts they would have restricted the scope of the Workmen's

[17] *Western Indemnity Co.* v. *Pillsbury,* 170 Cal. 686, 692; 151 Pac. 398.

[18] *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 200 Cal. 579, 583. See also *Treat* v. *Los Angeles G. & E. Corp.*, 60 Cal. App. 466; *Treat* v. *Los Angeles G. & E. Corp.,* 82 Cal. App. 610; *Pecor* v. *Norton-Lilly Co.,* 111 Cal. App. 241; *Butler* v. *Wyman,* 128 Cal. App. 736; *Burton* v. *Union Oil Co.,* 129 Cal. App. 438.

Compensation Act as was done in the *Ballard* and *Walton* cases. A definite and authoritative decision that its scope is so limited, and that the appropriate remedy under state law is an action for damages, will, of course, be binding upon federal courts. In the absence of such a pronouncement we are of opinion the Circuit Court of Appeals committed no error in construing the Workmen's Compensation Act as affording the only remedy available to the petitioner.

The judgment is

Affirmed.

MR. JUSTICE CARDOZO concurs in the result upon the authority of *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57.

HARTFORD ACCIDENT & INDEMNITY CO. *v.* ILLINOIS EX REL. McLAUGHLIN, DIRECTOR OF AGRICULTURE.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 692. Argued March 31, 1936.—Decided April 27, 1936.

1. State regulation of the business of commission merchants who solicit consignments of farm produce from within and without the State and sell them locally on commission, affects interstate commerce only indirectly and is within the police power, in the absence of conflicting regulation by Congress. P. 157.
2. An Illinois statute requiring that commission merchants who solicit for sale and sell within the State consignments of farm produce, including fresh fruit and vegetables consigned from outside the State, shall procure a license, post a bond, keep records, and account and pay for produce received for sale,—*held* not inconsistent with the Act of Congress of June 10, 1930, which requires those who are engaged in the business of receiving in interstate or foreign commerce fresh fruits and vegetables, for sale on commission, to procure a license from the Secretary of Agriculture, and

which covers in part the same ground as the Illinois law, but which does not require a bond and expressly declares that state statutes dealing with the same subjects as the federal Act shall remain in effect except in so far as they are inconsistent with it. P. 158.
361 Ill. 405; 198 N. E. 356, affirmed.

APPEAL from a judgment sustaining a judgment in favor of the Director of Agriculture of the State of Illinois, in consolidated actions on two bonds, given by a commission merchant pursuant to an Illinois statute for the security of consignors of farm produce. The surety took the appeal, severing the principal, which had become bankrupt.

Mr. J. F. Dammann, with whom *Mr. Arthur L. Israel* was on the brief, for appellant.

Mr. Otto Kerner, Attorney General of Illinois, and *Mr. Louis Salinger,* Assistant Attorney General, were on the brief for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

An Illinois statute [1] forbids persons, associations, and corporations to receive, sell, offer, or solicit consignments of farm produce for sale, on commission, within Illinois, unless licensed; requires an applicant for a license to make a showing as to character, responsibility, and good faith in the conduct of the proposed business; and directs that a license must be procured for each location where the business is to be transacted, a fee paid therefor, and a bond, in the sum of $5,000, with satisfactory surety, executed, conditioned on honest accounting and handling of produce received and against fraudulent conduct. Provision is made for the granting and revocation of licenses

[1] Smith-Hurd, c. 5, §§ 17–24; Cahill's Ill. Stat. c. 5, §§ 24–32.

by the Director of Agriculture. A licensee is required to follow certain business methods, to keep records, which are to be subject to inspection, to account and to pay for produce received for sale. The Director is empowered to bring action upon the licensee's bond for the recovery of sums due consignors for goods sold, if payment is not made by the licensee, or for the recovery of damages suffered by consignors as a result of fraudulent acts or wrongful handling on the part of the licensee. Should the penalty of the bond prove insufficient to pay all such liabilities, the consignors are to receive payment of any amount recovered in proportion to their several claims.

The Cross Company took licenses, and the appellant became surety on its bonds, for the years ending July 1, 1932, and July 1, 1933. In October, 1932, the Cross Company became bankrupt and failed to account for numerous consignments of fresh fruits and vegetables. Some were shipped from Illinois but most were from other states. The Director of Agriculture brought actions in a state court on both bonds. The court consolidated the cases and they were tried together on stipulated facts.

The appellant, in addition to defenses raising no federal question, pleaded that the statute was beyond the state's power because a restriction upon, and a regulation of, interstate commerce. Judgment was entered against the Cross Company and the appellant. Both appealed to the Supreme Court of the State, which affirmed the judgment.[2] The appellant summoned and severed the Cross Company and prosecuted an appeal to this court.

The sole question presented is the constitutional validity of the act as it affects the appellant's liability under its bonds. The statute is a police regulation. The business regulated is local, having its situs within the state

[2] *People ex rel. McLaughlin* v. *G. H. Cross Co.*, 361 Ill. 405; 198 N. E. 356.

and being conducted therein. The fact that the commission merchant contracts to sell, and sells, farm produce forwarded to him from points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders.[3] Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article I, § 8, of the federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective.[4]

The appellant urges, however, that Congress has adopted an act[5] regulating the same business and the Cross Company was required to take a license under that act. This alone is not sufficient to nullify the state law, if the federal act does not cover the same field, or is consistent with it.[6] But it is said the state and federal laws are similar in their provisions and, therefore, the exercise by Congress of its paramount power nullifies the state statute. The federal act requires every person, partnership, association, or corporation, who is engaged in the business of receiving in interstate or foreign commerce perishable agricultural commodities, defined as "fresh fruits and vegetables of every kind and character," for sale on commission, to procure a license from the Secre-

[3] *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 470; *Ware & Leland* v. *Mobile County*, 209 U. S. 405; *The Minnesota Rate Cases*, 230 U. S. 352, 410; *South Covington & C. St. Ry.* v. *Covington*, 235 U. S. 537; *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 557; *Federal Compress Co.* v. *McLean*, 291 U. S. 17; *Chassaniol* v. *Greenwood*, 291 U. S. 584.

[4] *Sherlock* v. *Alling*, 93 U. S. 99; *Pennsylvania R. Co.* v. *Hughes*, 191 U. S. 477.

[5] Act of June 10, 1930, c. 436, 46 Stat. 531. U. S. C. Tit. 7, §§ 499a–499r.

[6] *Sligh* v. *Kirkwood*, 237 U. S. 52; *Mintz* v. *Baldwin*, 289 U. S. 346.

tary of Agriculture. The act parallels the state statute in respect of the requirements of proper accounting, honest dealing, and prompt remittance. While it provides for awards of reparation by the Secretary of Agriculture for non-compliance with its prescriptions, gives a right of action to consignors and shippers for violation of its provisions, authorizes the revocation of licenses and imposes penalties, thus covering to some extent the same ground as the State law, it does not call for the giving of any bond by a licensee. Moreover, § 15 provides:

"This Act shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects as this Act; but it is intended that all such statutes shall remain in full force and effect except in so far only as they are inconsistent herewith or repugnant hereto."

Thus the act of Congress not only omits the requirement of a bond, but affirmatively saves the provision of the Illinois act as to that form of security. As respects the bond and the protection thereby afforded to consignors, there is no inconsistency between the two acts and both may be given effect.

The judgment is

Affirmed.

LOWDEN ET AL., TRUSTEES, *v.* NORTHWESTERN NATIONAL BANK & TRUST CO.

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

No. 743. Argued April 3, 1936.—Decided April 27, 1936.

1. The Court will not answer on certificate questions unrelated to the pending controversy, or questions unnecessarily general, or questions which admit of one answer in one set of circumstances and a different answer in another, the differentiating circumstances being imperfectly disclosed. P. 162.
2. The question whether and to what extent a bank owing money to a railway and owning some of the railway's bonds may be allowed to set them off in an action on the debt brought by trustees appointed for the railway in reorganization proceedings under § 77 of the Bankruptcy Act, is not a question that can be answered on certificate without full knowledge of all the relevant particulars of the situation. P. 164.

Certificate dismissed.

QUESTIONS certified with relation to an appeal to the court below from a judgment, 11 F. Supp. 929, allowing a set-off in favor of the Bank, in an action by the trustees appointed for the Chicago, Rock Island & Pacific Railway Company in reorganization proceedings.

Messrs. Edward S. Stringer and *Marcus L. Bell,* with whom *Messrs. Alexander E. Horn, Daniel Taylor,* and *Otis F. Glenn* were on the brief, for Lowden et al., Trustees.

Mr. Claude G. Krause for Northwestern National Bank & Trust Co.

By leave of Court, *Mr. Garfield E. Breese* filed a brief as *amicus curiae* urging an affirmative answer to all three of the questions certified.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

On June 7, 1933, the Chicago, Rock Island and Pacific Railway Company filed in the United States District Court for the Northern District of Illinois its petition for reorganization under § 77 of the Bankruptcy Act. 11 U. S. C. § 205.* At that time the railroad had to its credit the sum of $36,908.72 in a checking account with the Northwestern National Bank and Trust Company of Minneapolis. The bank was then the owner of First and Refunding Gold Bonds issued by the railroad of the par value of $100,000, not yet in default in respect of principal or interest. On June 19, 1933, seven days after receiving a copy of an order approving the petition for reorganization, the bank set off the deposit against the bonds by appropriate entries upon its books of account. Trustees of the estate of the railroad were appointed by the court in accordance with the statute, though whether before the attempted set-off or thereafter the record does not tell us. They brought suit against the bank in the United States District Court for Minnesota, not the court of bankruptcy administration, to recover the amount of the deposit set off against the bonds. After answer by the bank and a trial of the issues, the court entered a decree upholding the validity of the set-off, with a correction not now material as to the amount of the deposit. 11 F. Supp. 929. The trustees appealed to the Circuit Court of Appeals for the Eighth Circuit. That court, after certifying the facts substantially as summarized above, requested our instructions upon the following questions (Judicial Code, § 239; 28 U. S. C. § 346):

* The references in this opinion are to § 77 as enacted March 3, 1933, 47 Stat. 1474, and not to the amendments of August 27, 1935, 49 Stat. 911, 926.

"Question 1. Does the right of set-off recognized by section 68 (a) of the Bankruptcy Act apply to reorganization proceedings under section 77 of that act?

"Question 2. If the first question be answered in the affirmative, can a bank which owns the unmatured bonds of a railroad corporation set off a deposit account of the railroad with the bank against the bonds, upon the filing by the railroad of a petition for reorganization under section 77 of the Bankruptcy Act, alleging that the railroad is unable to meet its debts as they mature?

"Question 3. If the first and second questions be answered in the affirmative, may the United States District Court, for the District of Minnesota, in the suit by the trustees of the railroad's estate to recover the amount deducted from the account of the railroad by the bank under the claimed right of set-off, recognize and establish as a proper set-off by the bank one which was not made until after the filing of the petition for reorganization and which has never been ordered, authorized, approved, or consented to by the court in which that petition was filed and approved?"

This court has had occasion recently to restate the rules announced in earlier decisions as to the mode of formulating questions coming here upon certificates. *Mantle Lamp Co.* v. *Aluminum Products Co.,* 297 U. S. 638. We will not answer abstract questions unrelated to the pending controversy, or questions unnecessarily general, or questions which admit of one answer in one set of circumstances and a different answer in another, the differentiating circumstances being imperfectly disclosed. *White* v. *Johnson,* 282 U. S. 367, 371; *United States* v. *Mayer,* 235 U. S. 55, 66; *United States* v. *Hall,* 131 U. S. 50, 52; *Webster* v. *Cooper,* 10 How. 54, 55; *Hallowell* v. *United States,* 209 U. S. 101, 107; *General Motors Corp.* v. *United States,* 286 U. S. 49, 63. The questions now be-

fore us have been framed without adequate regard to these established rules of practice.

Question No. 1 is too general and abstract, its relation to the controversy being indirect and problematical. "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." Bankruptcy Act, § 68 (a); 11 U. S. C. § 108. The precept, framed on the example of ancient laws across the seas (4 Anne, c. 17, § 11; 5 Geo. II, c. 30, § 28), is now applicable by force of statute to the liquidation of estates in bankruptcy. We are asked to announce broadly whether it is applicable with similar inclusiveness to proceedings to reorganize a railroad, though the question tells us nothing as to the facts behind the controversy. "The court has repeatedly held that it will not answer questions of objectionable generality." *White* v. *Johnson, supra; United States* v. *Worley,* 281 U. S. 339, 340; *United States* v. *Mayer, supra.* Without a showing of the facts an answer to this question would declare a mere abstraction which might seem too narrow or too broad thereafter when the facts were shown forth. One must see the controversy in its setting before the implications of a ruling can be prefigured with assurance.

Question No. 2 is dependent by its terms upon an affirmative answer to question No. 1. It is open, however, to objections on its own account. Like question No. 1 it is far too general in its range. Moreover, it is silent as to facts which a court of equity should know before hazarding an answer. A proceeding to reorganize is not a bankruptcy, though an amendment to the bankruptcy act creates and regulates the remedy. From the fact without more that such a proceeding has been initiated, one cannot know that it will be necessary to have recourse to § 68,

which was meant in its enactment to prescribe the rule of set-off upon a distribution of the assets. That stage of administration, or the analogous stage of a revision of the debts, may never be attained in a proceeding to reorganize, though a petition has been approved and trustees have been appointed. If a plan of reorganization is not proposed or accepted, or, being proposed and accepted, is not confirmed by the court within a reasonable time, the whole proceeding may be dismissed, § 77 (c) (7), the title to the estate thus reverting to the debtor. By that time there may even be ability to pay demands as they mature. What is done at the beginning amounts to little more than a provisional sequestration to give protection for the future.

The right of set-off must fit itself to these procedural conditions. It is not susceptible of definition in the abstract without reference to the time or occasion of the controversy or the relation of the suit to the primary proceeding. Irrespective of the acceptance or confirmation of a plan, the trustees must have the power to gather in the assets and keep the business going. To exercise that power, they may find it necessary to sue, and the suit may turn upon the right of set-off, as it does in the case at hand. In a suit for such a purpose, a suit collateral to the main proceeding and initiated at a time when the outcome of that proceeding is still unknown and unknowable, § 68 of the statute does not control the disposition of the controversy *ex proprio vigore*. It governs, if at all, by indirection and analogy according to the circumstances. The rule to be accepted for the purpose of such a suit is that enforced by courts of equity, which differs from the rule in bankruptcy chiefly in its greater flexibility, the rule in bankruptcy being framed in adaptation to standardized conditions, and that in equity varying with the needs of the occasion, though remaining

constant, like the statute, in the absence of deflecting forces. *Scott* v. *Armstrong,* 146 U. S. 499, 507; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.,* 152 U. S. 596, 615; *Scammon* v. *Kimball,* 92 U. S. 362, 366; *Sawyer* v. *Hoag,* 17 Wall. 610, 622; *Clark Bros. & Co.* v. *Pou,* 20 F. (2d) 74, 77, 78; *Greene* v. *Darling* (Story, J.), 5 Mason 201, 210; *Gray* v. *Rollo,* 18 Wall. 629, 632; *Dade* v. *Irwin's Executor,* 2 How. 383, 390, 391; *Studley* v. *Boylston National Bank,* 229 U. S. 523, 528, 529; *Pond* v. *Harwood,* 139 N. Y. 111, 119; 34 N. E. 768; *Frank* v. *Mercantile National Bank,* 182 N. Y. 264, 268; 74 N. E. 841; *Lockwood* v. *Beckwith,* 6 Mich. 168, 175; Story, Equity Jurisprudence, 14th ed., §§ 1871, 1872.

The defects of the certificate, its incomplete disclosure of the facts conditioning an answer, are thus exhibited in clear relief. "Insolvency" in proceedings to reorganize (§ 77) is often very different from "insolvency" in ordinary bankruptcy. § 1 (15). There is at least a possibility that at times the difference may be great enough to vary the resulting equities. When things are called by the same name it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning. A court of equity in allowing or rejecting set-off will not be guilty of that fallacy. To know "the justice of the particular case" (*Scott* v. *Armstrong, supra;* Story, Equity Jurisprudence, *supra*), one must know the case in its particulars. More concretely, one must know the value of the assets, the temporary or permanent character of the debtor's inability to pay its debts as they mature, the liens, if there are any, superior to the bonds in controversy, the probability of an understanding that the bonds, though unmatured, would be used to cancel the deposits, all the circumstances, in brief, that might affect the judgment of the chancellor in weighing the competing equities of the

interested factions and shaping his decree accordingly. We have no thought at this time to foreshadow the result of an exploring expedition directed to those ends. When all the facts are known, they may be found to offer no excuse for a departure from the rule in bankruptcy which, as indicated already, is generally, even if not always, the rule in equity as well. They may point, on the other hand, to the need for an exception, or may even lead to a decree in the nature of a compromise, the moneys being paid into the registry of the court to abide its future action. A decision balancing the equities must await the exposure of a concrete situation with all its qualifying incidents. What we disclaim at the moment is a willingness to put the law into a strait-jacket by subjecting it to a pronouncement of needless generality.

Question No. 3 is so framed as not to call for an answer unless an affirmative answer is given to questions Nos. 1 and 2.

Our conclusion as to the defective form of the certificate is borne out in a striking way by the concession of the parties. Before the argument on the questions, plaintiffs and defendant joined in moving us for an order to bring up the whole case. That motion was denied. Nothing in the nature of the controversy called for a writ of certiorari in advance of a decision by the court of intermediate appeal. The significant thing, however, is that in briefs submitted on that motion both parties admitted that the second question was defective. The plaintiffs said: the statement "is not sufficiently complete to enable this court to answer the second question as applied to this case." The defendant made a like objection. Plaintiffs and defendant fortified their general criticism by the enumeration of particular defects.

The certificate is

Dismissed.

ZIMMERN ET AL. *v.* UNITED STATES.

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

No. 766. Argued April 3, 1936.—Decided April 27, 1936.

An order made by a district judge on his own motion during the term at which a decree has been entered, reciting the need for an amendment of the decree and extending the term to a future day for the declared purpose of allowing such amendment, without specifying the change in contemplation, has the effect of suspending the operation of the decree so that no appeal can be taken from it until it has been amended or confirmed. P. 169.

79 F. (2d) 703, reversed.

CERTIORARI, 297 U. S. 701, to review a judgment dismissing an appeal.

Mr. Lawrence Koenigsberger for petitioners.

Mr. Charles E. Wyzanski, Jr., with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *S. E. Blackham* were on the brief, for the United States.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question in this case is whether the petitioners appealed to the Circuit Court of Appeals within the time prescribed by law.

The United States brought suit to set aside a deed by Samuel Zimmern to his wife, and another deed, in which the wife joined, to his children, a separate parcel of real estate being the subject of each. At the time of the conveyance Samuel Zimmern was indebted to the complainant for a deficiency of income taxes duly assessed against him. The deeds were attacked upon the ground that they

had been made without consideration and with fraudulent intent. The District Court after a trial sustained the charge of fraud and gave judgment in favor of the complainant for the relief prayed for in the bill. Its decree, which was entered on March 3, 1934, directed a sale of the two parcels, and the payment of the proceeds to the United States to be applied upon the taxes after deducting what was due to the wife by reason of a homestead exemption allowed by the local law. Nothing was said in the decree as to the exception or reservation from the sale of her inchoate right of dower.

The term at which the cause was tried would have expired, unless extended, on May 28, 1934. However, before that date, the judge made an order extending the term for ninety days, the order being prefaced with the following recital: "It appearing to the court that a decree was entered in this cause on March 3rd, 1934 and for good reason shown it will be necessary to modify or amend said decree."* No petition for rehearing in behalf of the wife, Leila Zimmern, appears in the record, nor any motion for an amendment. A petition in behalf of Samuel Zimmern does appear, but it was filed on August 11, 1934, when the time to appeal had already gone by if the original decree was then presently in force. Cf. *Conboy* v. *First National Bank of Jersey City,* 203 U. S. 141, 145. Two

* For greater certainty the terms of the order are here stated in full:

"It appearing to the Court that a decree was entered in this cause on March 3rd, 1934 and for good reason shown it will be necessary to modify or amend said decree,

"It is, therefore, ordered and adjudged by the Court that the November Term of this Court which expires on the 28th day of May, 1934 be, and the same is, extended for ninety (90) days from that date, in which time all matters and orders in connection with this cause and the amendments of the decree may be entered.

"Done this 11th day of May, A. D., 1934.

ROBERT T. ERVIN, Judge."

days later the judge made an order amending the decree by directing that the sale be subject to any dower rights of the wife, and in all other respects denying whatever motions were before him. Appeals by all the defendants were taken and allowed. Under the applicable statute (28 U. S. C. § 230), the appeals were too late if the time is to be computed from the date of the decree as originally entered. They were regular if the time is to be computed from the date of the amendment. The Court of Appeals held that what had been corrected by the amendment was an accidental slip or omission, not affecting the issues in suit (Federal Equity Rule 72), and inoperative to toll the statute. Accordingly, the appeals were dismissed, two opinions being written, one upon the original hearing and the other upon rehearing. 79 F. (2d) 703; 80 F. (2d) 993. This court granted certiorari to review a ruling as to practice that might tend, if erroneous, to introduce confusion into the law.

We think the decision misapprehends the effect of the order of May 11, 1934, in which the judge who had tried the cause declared himself dissatisfied with the decree that he had made, and to give himself an opportunity to make the necessary changes extended the term then drawing to a close. He did not limit the amendment to matters of form only as distinguished from those of substance. He did not act, so far as the record shows, at the instance of the defendants, still less upon a showing of error in only one particular. He stated broadly and, for all that appears, of his own motion that changes must be made, and without a word to indicate whether he meant them to be great or little. We think the effect of that order was to suspend the operation of the decree so that no appeal could be taken from it until it had been amended or confirmed, and its vigor thus restored. Until such action had been taken it was no longer a decree at all. The judge had plenary power while the term was in existence

to modify his judgment for error of fact or law or even revoke it altogether. *Doss* v. *Tyack,* 14 How. 297, 313; *Basset* v. *United States,* 9 Wall. 38, 41; *Bronson* v. *Schulten,* 104 U. S. 410, 415; *Henderson* v. *Carbondale Coal & Coke Co.,* 140 U. S. 25, 40. Finality was lacking until his choice had been announced.

The appeals being timely, the decree which dismissed them should be reversed, and the cause remanded to the Court of Appeals for the Fifth Circuit for further proceedings in harmony with this opinion.

Reversed.

PENNSYLVANIA RAILROAD CO. ET AL. *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL.

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

No. 746. Argued April 7, 8, 1936.—Decided April 27, 1936.

1. The carriers to whom the Interstate Commerce Act applies are common carriers exclusively. P. 173.
2. For the purpose of determining the application of the Interstate Commerce Act, transportation begins when the merchandise has been placed in the possession of a common carrier. P. 175.
3. Coal mined in Pennsylvania was carried by the owner's private facilities to his plant in Ohio, where it was cleaned, broken and sorted; thence it was shipped by rail to the owner's customers in Ohio. *Held,* that the movement by rail was not part of an interstate movement subject to the Interstate Commerce Act, and that the rail rates were subject to Ohio regulation. P. 175.
4. The Court will not examine points not made in the complaint nor included in the assignments of error or the statement of points relied upon for reversal. P. 177.

Affirmed.

APPEAL from a decree of the District Court, of three judges, refusing injunctive relief from an order of a state commission fixing switching charges.

Messrs. Frederic D. McKenney and *Guernsey Orcutt,* with whom *Messrs. Leo P. Day* and *John J. Fitzpatrick* were on the brief, for appellants.

Messrs. August G. Gutheim and *Donald C. Power,* with whom *Mr. John W. Bricker,* Attorney General of Ohio, was on the brief, for the Ohio appellees.

Mr. Don Rose for Pittsburgh Coal Co., appellee.

Mr. Justice Cardozo delivered the opinion of the Court.

An order of the Public Utilities Commission of Ohio directs the Pennsylvania Railroad Company and the Erie Railroad Company, appellants in this court, to adhere to local or intrastate rates in switching and delivering four carloads of bituminous coal to consignees in Youngstown, Ohio, and in switching and delivering any other carloads that may be tendered hereafter in similar conditions. The question is whether the effect of such an order as applied to the transactions exhibited in the record is to regulate common carriers by rail in the business of interstate transportation, and thus to trench upon the jurisdiction of the Interstate Commerce Commission.

Pittsburgh Coal Company, an appellee in this court, is the owner of coal mines in Pennsylvania, so situated that the product of the mines can readily be conveyed by use of the owner's cars and tipple to barges waiting to receive it on the Monongahela River. Much of the coal is sold to consumers in Ohio. The company has its own barges in which the coal is towed by its own tug boats, first over the Monongahela River and then over the Ohio, to Smith's Ferry, Pennsylvania. There it has its own right of way, with tracks and cars and engine. The coal, when transferred from the barges to the cars, is taken over this right of way, a distance of about eleven miles, to Negley, Ohio. At Negley, or near by, is the

Brush River Plant, owned by the coal company, where the coal is dumped from the cars, washed, freed from foreign matter and impurities, and broken up or assorted into the sizes desired by the customers. Then for the first time it is ready for shipment to fill specific orders, which often are not received until after it has left the mines. Up to that point the carriage has been solely by a private carrier, making use of its own facilities, its trains and tugs and barges.

At Negley the coal after being put in shape for sale is loaded upon the cars of the Pittsburgh, Lisbon and Western Railroad Company, referred to in the record as Lisbon, for transportation to consignees at Youngstown or elsewhere. Lisbon is a common carrier by rail, which connects at Signal, Ohio, with the tracks of the Youngstown and Suburban Railroad Company, referred to in the record as the Y. & S. The route of that line, about 22.2 miles, is between Signal and Youngstown, where there are interchange facilities with the Pennsylvania and the Erie.

On September 17, 1934, Lisbon received from the Pittsburgh Coal Company at Negley four carloads of bituminous coal to be transported via the Y. & S. to Youngstown, the cars to be there transferred, first to the Pennsylvania and then to the Erie, for delivery to consignees in Youngstown identified in the shipping orders. Lisbon and Y. & S. followed these instructions. Upon tender of the cars at the proper interchange track, Pennsylvania refused to accept or switch them except upon payment of the road haul charges on file with the Interstate Commerce Commission. The switching rates prescribed by the State Commission were $7.65 per car, a charge which covered the intermediate service of the Pennsylvania and the delivery service of the Erie. No switching rates for such traffic had been filed with the federal Commission by any of the trunk lines, but the haul charges, calcu-

lated to the next destination beyond, were $94.50 per car. Upon the rejection of the four carloads the Pennsylvania gave written notice to the Y. & S. that thereafter carloads of bituminous coal from mines outside Ohio would not be accepted for delivery within the Youngstown switching limits until all charges were prepaid at rates published in the tariffs on file with the federal Commission.

Following the receipt of this notice, the Y. & S. filed with the Ohio Commission its complaint against the Pennsylvania and the Erie, the two companies having acted in concert in demanding the higher rates. Other lines, including the Baltimore & Ohio Railroad Company, and the Pittsburgh and Lake Erie Railroad Company, intervened in the proceedings, as did also the Pittsburgh Coal Company. After a full hearing the Commission held in a careful opinion that in the circumstances stated the State of Ohio had jurisdiction by its Commission to regulate the charges for switching services at Youngstown, and that the rates thereby prescribed were binding on the carriers. An order was made accordingly. This order was sustained by a District Court of three judges, application having been made for relief by injunction both interlocutory and final. Judicial Code § 266; 28 U. S. C. § 380. The case is here upon appeal. *Ibid.*

First: The transportation of the coal from Negley, Ohio, to Youngstown in the same state, was an intrastate service, not subject to the provisions of the Interstate Commerce Act, and its character in that regard was not changed because of preliminary carriage from the Pennsylvania mines in barges and cars belonging to the shipper.

Appellants say that from the moment the coal left the mines in Pennsylvania there was a continuing intention to deliver it to consumers in another state, whether their identity at the beginning was known or unknown, and

that a movement impelled by that intention is interstate commerce which Congress has the power to regulate at any stage of the ensuing transit. *Baltimore & Ohio S. W. R. Co.* v. *Settle,* 260 U. S. 166, 173; *Ohio Railroad Comm'n* v. *Worthington,* 225 U. S. 101, 108; *Federal Trade Comm'n* v. *Pacific States Paper Assn.,* 273 U. S. 52, 64. But there is confusion of thought in such a statement of the problem. Not all commerce is transportation, and not all transportation is by common carriers by rail. The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. The Interstate Commerce Act (49 U. S. C. § 1 *et seq.*) is aimed at common carriers exclusively, § 1 (1), (3), and not even at all these. With exceptions plainly unrelated to this case, § 1 (1) (b), (c), carriers, even though common, are unaffected by the act unless they are carriers wholly by railroad, or if partly by railroad and partly by water, are operating under "a common control, management, or arrangement for a continuous carriage or shipment." § 1 (1) (a). Cf. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Comm'n,* 162 U. S. 184; *Louisville & N. R. Co.* v. *Behlmer,* 175 U. S. 648; *Standard Oil Co.* v. *United States,* 179 Fed. 614; *Mutual Transit Co.* v. *United States,* 178 Fed. 664. There are limitations, moreover, in respect of the conduct to be controlled in addition to the foregoing limitations in respect of the carriers to be regulated. Even though the activities are those of common carriers by rail, the statute does not apply "to the transportation of passengers or property . . . wholly within one State and not shipped to or from a foreign country from or to any place in the United States." § 1 (2) (a), (b). For many purposes, as for example in testing the validity of state taxation, merchandise is deemed

to be in interstate commerce when it has started on its journey, though still in the possession of consignor or seller. *Hughes Bros. Co.* v. *Minnesota,* 272 U. S. 469, 475; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366. Not so, however, in determining the application of this act. Transportation begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier. *Hughes Bros. Co.* v. *Minnesota, supra; Coe* v. *Errol,* 116 U. S. 517, 528; *Diamond Match Co.* v. *Ontonagon,* 188 U. S. 82, 95; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498, 527. And "wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier.'" § 1 (3).

With the aid of these definitions the problem before us takes on a new simplicity. The only transportation of this coal by a common carrier of merchandise either by railroad or by water was intrastate transportation in Ohio between Negley and Youngstown. The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. Appellants would have us hold that this interstate transportation by an owner who does not carry for any one else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process. *The Pipe Line Cases,* 234 U. S. 548, 562; *McCluskey* v. *Marysville & Northern Ry. Co.,* 243 U. S. 36, 39, 40; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U. S. 257; *Campbell River Mills Co.* v. *Chicago, M., St. P. & P. R. Co.,* 42 F. (2d) 775, 777, 778; aff'd, 53 F. (2d) 69, 72, 73; *Pennsylvania R. Co.* v. *McGirr's Sons Co.,* 287 Fed. 334.

Two cases in this court (*United States* v. *Erie R. Co.,* 280 U. S. 98, and *Texas & New Orleans Ry. Co.* v. *Sabine*

Tram Co., 227 U. S. 111) are put forward with special emphasis by appellants as supporting a different conclusion.

Of these, the first had to do with a shipment of wood pulp imported from abroad to Hoboken, New Jersey, where the merchandise was to be transshipped by rail to Garfield in the same state. The haul from Hoboken to Garfield was held to be subject to regulation by the federal Commission. The case differs from the one at hand in at least three particulars: (1) the carriage to Hoboken, as will appear from an examination of the record, was effected by a common carrier; (2) the ultimate consignee was known from the beginning; (3) the rail transportation was "in fact a part of foreign commerce." 280 U. S. at p. 102. Upon a shipment of merchandise to or from a foreign country, the Interstate Commerce Act applies to the carriage in this country, though that part of the carriage is within the limits of a single state. § 1 (1) (c), (2) (a). Cf. *Denver & Rio Grande R. Co.* v. *Interstate Commerce Comm'n*, 195 Fed. 968, 972; *Oregon-Washington R. & N. Co.* v. *Strauss & Co.*, 73 F. (2d) 912; Lees & Sons Co. *v.* Reading Co., 148 I. C. C. 603; In re Transportation of Sugar, 22 I. C. C. 558.

Texas & New Orleans Ry. Co. v. *Sabine Tram Co.*, *supra*, though differing in details from the case of the Erie Railway, illustrates the same principle, and is to be distinguished on like grounds.

Neither in the cases cited by the appellants nor in any others known to us has transportation by a common carrier been combined with carriage by an owner for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt. Such a fusion, if permitted, would lead to strange results. The situation laid before us would not be changed in its essentials if a coöperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to

carry milk or vegetables from Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be.

We have found it unnecessary to consider in the disposition of the case whether the treatment of the coal at Negley would break the continuity of the movement from the mines, even if interstate transportation would otherwise exist. Cf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n, supra,* at p. 526; *Alabama Great Southern R. Co.* v. *McFadden & Bros.,* 232 Fed. 1000; aff'd, *McFadden & Bros.* v. *Alabama Great Southern R. Co.,* 241 Fed. 562; *Board of Trade of Chicago* v. *Olsen,* 262 U. S. 1, 33; *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, 151, 152; *General Oil Co.* v. *Crain,* 209 U. S. 211.

Second: The appellants have woven into their brief a suggestion, not contained in their statement of points relied upon for reversal, that the ownership by the coal company of a controlling interest in the shares of the Lisbon and the Y. & S. has a bearing on the nature of the transit between Negley and the mines. There is insinuation, if not argument, that in building and operating a private right of way the coal company has nullified restraints imposed upon the railroads by the federal Commission, and for that reason must be treated as if it were a common carrier itself.

No such point was made in the complaint, nor do the assignments of error present it adequately here.

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

Affirmed.

65773°—36——12

McNUTT, GOVERNOR OF INDIANA, ET AL. *v.* GENERAL MOTORS ACCEPTANCE CORP.

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

No. 709. Argued April 1, 1936.—Decided May 18, 1936.

1. In a suit in the District Court to enjoin, as unconstitutional, the enforcement of a state statute requiring the plaintiff to obtain a license for his business and otherwise subjecting the business to regulation, the value in controversy, in the absence of a showing that the plaintiff cannot obtain the license or is prevented by the statute from prosecuting the business, is not the value or net worth of the business but the value of the right to be free from the regulation; and this may be measured by the loss, if any, that would follow the enforcement of the rules prescribed. P. 181.
2. Under § 5 of the Act of March 3, 1875, Jud. Code, § 37, 28 U. S. C. 80, a plaintiff in the District Court must plead the essential jurisdictional facts and must carry throughout the litigation the burden of showing that he is properly in court; if his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof; and even where they are not so challenged, the court may insist that the jurisdictional facts be established by a preponderance of evidence or the case be dismissed. Pp. 182, 189.
3. In a suit for an injunction in the District Court, the allegation of the jurisdictional amount may be traversed by answer. P. 189.
4. In a case in the District Court, the allegation of jurisdictional amount had been traversed, yet no adequate finding on the issue of fact was made by the court and no evidence to support the allegation was introduced. *Held* that the bill should be dismissed for want of jurisdiction. P. 190.

Reversed.

APPEAL from a decree of the District Court of three judges which enjoined the enforcement of a statute regulating the business of purchasing contracts arising out of retail instalment sales.

Mr. Joseph W. Hutchinson, Assistant Attorney General of Indiana, and *Mr. Leo M. Gardner,* with whom *Mr. Philip Lutz, Jr.,* Attorney General, was on the brief, for appellants.

Messrs. John Thomas Smith and *Phillip W. Haberman,* with whom *Messrs. Duane R. Dills, Stanley B. Ecker,* and *Paul Y. Davis* were on the brief, for appellee.

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

Respondent, General Motors Acceptance Corporation of Indiana, brought this suit to restrain the enforcement of Chapter 231 of the Acts of 1935 of the General Assembly of Indiana. That Act provides for the regulation of the business of purchasing contracts arising out of retail installment sales, including provisions for licenses, for classifications of contracts, and for fixing maximum "finance charges." The validity of the Act was challenged as depriving respondent of its property without due process of law and denying it the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution. An interlocutory injunction was sought and, upon hearing by three judges (28 U. S. C. 380), a final decree was entered, upon findings of facts and conclusions of law, granting a permanent injunction. No opinion was rendered. The case comes here by direct appeal.

The question arises whether the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, so as to give the District Court jurisdiction. Jud. Code, § 24 (1), 28 U. S. C. 41 (1). The complaint alleged that the requisite amount was involved and this

allegation was denied by the answer. On the argument in this Court, leave was given to file an additional brief upon the question of jurisdiction and respondent has submitted its brief accordingly.

Respondent points to the allegations of its bill that the "net worth" of its business exceeds $50,000; that in 1934 it purchased retail installment contracts in Indiana aggregating in excess of $7,000,000; that the value of such purchases for the first six months of 1935 was in excess of $4,000,000; and that during 1934 respondent purchased in Indiana approximately 23,000 installment sales contracts from more than 500 retail dealers. These allegations were sustained by the findings of the District Court. The bill also alleged that respondent maintained offices in Indiana for which it paid yearly an aggregate rental of $13,147; that it employed on the average 85 employees whose aggregate annual salaries amounted to about $150,000. Respondent also refers to its allegations that the Act limits the amount which respondent "may receive as its gross profit for the purchase of an installment contract to a sum not exceeding the maximum 'finance charge' which may be fixed by the Department of Financial Institutions,"—by prohibiting respondent "from purchasing any retail installment contracts at a less price than the unpaid balance thereon"; that the Act limits the amount which may be given by respondent "to retail sellers out of the gross 'finance charge' received from retail buyers under installment sale contracts" sold to respondent, by requiring the Department "to fix this maximum amount without regard to any differentiation as between contracts sold to licensees by retail sellers with recourse against such sellers, and contracts sold by retail sellers without recourse against them; and that in other respects the statute imposes burdensome requirements which impair the "efficiency of the operations and earnings" of respondent.

Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322; *Bitterman* v. *Louisville & Nashville R. Co.,* 207 U. S. 205; *Berryman* v. *Whitman College,* 222 U. S. 334; *Glenwood Light Co.* v. *Mutual Light Co.,* 239 U. S. 121; *Healy* v. *Ratta,* 292 U. S. 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it.

In the absence of any showing in the record to support that general allegation, the question is upon which party lay the burden of proof. Respondent contends that the burden of proving the lack of jurisdiction rests upon the party challenging the jurisdiction and cites decisions of this Court to that effect. The question is thus sharply presented.

The jurisdiction of the District Court in a civil suit of this nature is definitely limited by statute to one— "where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens or subjects." Jud. Code, § 24 (1), 28 U. S. C. 41 (1).

Further, the Act of March 3, 1875, c. 137, § 5 (18 Stat. 472) as now applied to the District Courts (Jud. Code, § 37, 28 U. S. C. 80), explicitly charges those courts with the duty of enforcing these jurisdictional limitations. The provision in its present form is as follows:

"If in any suit commenced in a District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case. "Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded." *Wilson* v. *Daniel,* 3 Dall.

401, 407, 408; *Barry* v. *Edmunds,* 116 U. S. 550, 560; *Vance* v. *Vandercook Co. (No. 2),* 170 U. S. 468, 481; *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 85, 86. Where the pleadings properly alleged the jurisdictional facts, as for example, with respect to diversity of citizenship and jurisdictional amount, it was necessary at common law, and before the passage of the Act of 1875, to raise the issue of want of jurisdiction by plea in abatement. And where the jurisdictional issue was thus raised, the burden of proof was upon the defendant. The objection was waived by pleading to the merits. *De Wolf* v. *Rabaud,* 1 Pet. 476, 498; *Sheppard* v. *Graves,* 14 How. 505, 510; *De Sobry* v. *Nicholson,* 3 Wall. 420, 423; *Farmington* v. *Pillsbury,* 114 U. S. 138, 143. In equity, the defense could be presented by plea or demurrer but not by answer. *Livingston's Executrix* v. *Story,* 11 Pet. 351, 393; *De Sobry* v. *Nicholson, supra; Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, 333. Demurrers and pleas were abolished by Rule 29 of the Equity Rules promulgated in 1912. 226 U. S., appendix p. 8.

By the Conformity Act of 1872 (17 Stat. 197; R. S. 914; 28 U. S. C. 724) all defenses in civil actions at law were made available to a defendant in the federal courts under any form of plea, answer or demurrer which would have been open to him under like pleading in the courts of the State within which the federal court was held. In that view we decided that where, under the Nebraska Code of Civil Procedure, the answer took the place of all pleas at common law, in abatement or to the merits, the allegation of the citizenship of the parties, which was properly made in the petition and put in issue by the answer, must be proved by the plaintiff. And where the record showed "no proof or finding upon this essential point" the judgment was reversed for want of jurisdiction. *Roberts* v. *Lewis,* 144 U. S. 653, 656–658. See, to

the same effect, *W. L. Wells Co.* v. *Gastonia Cotton Co.*, 198 U. S. 177, 182.

The Act of 1875, in placing upon the trial court the duty of enforcing the statutory limitations as to jurisdiction by dismissing or remanding the cause at any time when the lack of jurisdiction appears, applies to both actions at law and suits in equity. The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, "inquire into the facts as they really exist." *Wetmore* v. *Rymer,* 169 U. S. 115, 120; *Gilbert* v. *David,* 235 U. S. 561, 567; *North Pacific Steamship Co.* v. *Soley,* 257 U. S. 216, 221. This Court has had occasion to consider the application of the statute under varying conditions. See *Barry* v. *Edmunds, supra; Morris* v. *Gilmer,* 129 U. S. 315; *Deputron* v. *Young,* 134 U. S. 241; *Anderson* v. *Watt,* 138 U. S. 694, 701; *Wetmore* v. *Rymer, supra; Steigleder* v. *McQuesten,* 198 U. S. 141, 143; *Gilbert* v. *David, supra; North Pacific Steamship Co.* v. *Soley, supra; Broad-Grace Arcade Corp.* v. *Bright,* 284 U. S. 588.

In *Anderson* v. *Watt, supra,* a suit in equity, the Court said that under the Act of 1875 "the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted." In *Wetmore* v. *Rymer, supra,* an action of ejectment, after a verdict and judgment for the plaintiff, the trial court set them aside and entertained defendant's motion to dismiss for want of jurisdiction, giving leave to both parties to file affidavits showing the value of the land in controversy. Upon consideration of the evidence, the trial court decided that the jurisdictional amount was not involved. This Court disagreed with that conclusion. Speaking of the effect of

the Act of 1875, the Court observed that the statute did not prescribe any particular mode in which the question of jurisdiction was to be brought to the attention of the court, nor how, when raised, it should be determined. The Court said: "When such a question arises in an action at law its decision would usually depend upon matters of fact, and also usually involves a denial of formal, but necessary, allegations contained in the plaintiff's declaration or complaint. Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different States, or when, as in the present case, the allegation that the matter in dispute was of sufficient value to give the court jurisdiction was denied.—In such cases, whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury." But "the questions might arise in such a shape that the court might consider and determine them without the intervention of a jury" and "it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge."

In *Gilbert* v. *David, supra,* an action at law in the federal court in Connecticut, the question arose with respect to the citizenship of the plaintiff—which was put in issue by defendants' answer. Later, defendants moved to dismiss the cause for want of jurisdiction. Plaintiff then moved to strike that motion from the files upon the ground that it was an irregular method of raising the question and because the matter was already in issue under the pleadings. Taking that view, the trial court directed the trial to proceed upon the question of jurisdiction, and upon hearing the testimony the court found that both parties were citizens of Connecticut and dismissed the action. The judgment was affirmed by this Court. The Court said: "Under the former practice,

before the passage of the Act of 1875 . . . it was necessary to raise the issue of citizenship by a plea in abatement, when the pleadings properly averred the citizenship of the parties. . . . The objection may be made now by answer before answering to the merits, or it may be made by motion. . . . It may be raised by a general denial in the answer, where the state practice permits of that course. *Roberts* v. *Lewis,* 144 U. S. 653. In the State of Connecticut, under the form of denial contained in this answer, the answer raised the issue. . . . Moreover, the parties to the suit regarded the matter as at issue under the pleadings, and it was so held by the court. . . . The question was properly before the court." The Court further held that while the question might have been submitted to the jury, the trial court was not bound to take that course and that it was its privilege to dispose of the issue upon the testimony. From the citation of *Roberts* v. *Lewis, supra,* it is apparent that the Court considered that the burden of proof upon the issue of citizenship was upon the plaintiff, and it also appeared from the record that the plaintiff assumed that burden upon the trial.

In *North Pacific Steamship Co.* v. *Soley, supra,* the suit was in equity and the question was whether the jurisdictional amount was involved. The plaintiff's allegation to that effect was denied by the answer. Upon hearing the evidence offered by the complainant, and that of the defendant, the trial court held that the jurisdictional amount was not involved and dismissed the suit. On direct appeal to this Court, under the former practice where jurisdictional questions alone were presented, the Court said: "The objection that jurisdiction to entertain the suit did not exist is one which may be taken by answer. *Anderson* v. *Watt,* 138 U. S. 694. Indeed, under § 37 it is the duty of the court, when it shall appear to its satisfaction that the suit does not really and substan-

tially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the court may do whether the parties raise the question or not. In the present case the issue was raised by answer, and, therefore, it became necessary for the court to determine the question of jurisdiction upon the facts presented, and when brought directly here, it is the duty of this court to review the decision upon the testimony as one presenting a jurisdictional question." The Court then considered the facts and sustained the ruling of the District Court.

The question of the burden of proof was considered by this Court in *Chase* v. *Wetzlar,* 225 U. S. 79. That was a suit in equity in the federal court in New York to enforce "equitable liens upon or claims to the title of personal property," and jurisdiction depended on the presence of the property within the district. 18 Stat. 472; Jud. Code, § 57; 28 U. S. C. 118. The allegation of the bill that the property was within the district was traversed by the plea, which was held to be "sufficient in law and form," and to which a general replication was filed. The case was heard upon the pleadings and the trial court ruled that the burden was upon the complainant to establish the existence of the essential jurisdictional facts which the plea traversed, and as no proof had been offered by the complainant the bill was dismissed for the lack of jurisdiction. On direct appeal this Court affirmed the decree.

As to the contention that the defendant was bound to prove the allegations of his plea, the Court observed: "The theory as to the burden of proof being on the defendant, on which this proposition proceeds, it is insisted, is sanctioned by the following decisions of this court: *Sheppard* v. *Graves* (1852), 14 How. 505; *De Sobry* v. *Nicholson* (1865), 3 Wall. 420; *Wetmore* v. *Rymer* (1898), 169 U. S. 115; *Hunt* v. *New York Cotton Exchange* (1907), 205 U. S. 322. And a decision of the Cir-

cuit Court of Appeals for the Eighth Circuit in *Hill* v. *Walker*, 167 Fed. 241, is also referred to as containing a full summary of the decided cases on the subject." The Court distinguished those cases upon the ground that none of them involved the question of jurisdiction under the statute requiring the presence of property within the district. In view of that distinction, the Court thought it unnecessary "to now consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the act of 1875 requiring a Federal court of its own motion to dismiss a pending suit when it is found not to be really within its jurisdiction—see *Roberts* v. *Lewis*, 144 U. S. 653, and the cases cited in the dissenting opinion in *Hill* v. *Walker, supra,*" because the Court thought that the doctrine was inapplicable to the case before it. The existence of property within the jurisdiction was deemed to be such a fundamental prerequisite to the exercise of power to render a binding decree that in no possible view could it be said that the plaintiff did not have the burden of proving the essential jurisdictional fact. The Court concluded its discussion of the point by saying: "In other words, even putting aside for the sake of argument the effect on the doctrines announced in the decisions relied upon of the enactment of the act of 1875 as to the duty to dismiss to which we have referred, the burden of proof to establish that the court was vested with power to act, we think, in a case like this, in the nature of things rested upon the complainant." *Chase* v. *Wetzlar, supra,* pp. 85–87.

The question which was thus suggested and put aside in *Chase* v. *Wetzlar* is definitely before us in the instant case and should be decided. The Act of 1875 prescribes a uniform rule and there should be a consistent practice in dealing with jurisdictional questions. We think that

the terms and implications of the Act leave no sufficient ground for varying rules as to the burden of proof. The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty.

Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground.

The decree is reversed and the cause is remanded to the District Court with directions to dismiss the bill of complaint for the want of jurisdiction.

Reversed.

MR. JUSTICE STONE took no part in the consideration and decision of this case.

McNUTT, GOVERNOR OF INDIANA, ET AL. *v.* McHENRY CHEVROLET CO., INC.

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

No. 710. Argued April 1, 1936.—Decided May 18, 1936.

Decided upon the authority of the case last preceding.
Reversed.

APPEAL from a decree of the District Court of three judges permanently enjoining the enforcement of a statute regulating the business of purchasing retail contracts of sale on the instalment plan. The case was tried with the one next preceding.

Mr. Joseph W. Hutchinson, Asst. Atty. Gen. of Indiana, and *Mr. Leo M. Gardner,* with whom *Mr. Philip Lutz, Jr.,* Atty. Gen., was on the brief, for appellants.

Messrs. John Thomas Smith and *Phillip W. Haberman,* with whom *Messrs. Duane R. Dills, Stanley B. Ecker,* and *Paul Y. Davis* were on the brief, for appellee.

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

This is a companion case to *McNutt* v. *General Motors Acceptance Corp.*, decided this day, *ante*, p. 178. Respondent, McHenry Chevrolet Co., Inc., is a dealer, selling automobiles at retail for cash or on the installment plan. It brought this suit to restrain the enforcement of Chapter 231 of the Acts of 1935 of the General Assembly of Indiana, providing for the regulation of the business of retail installment sales. Respondent assailed the Act as depriving it of its property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment. The District Court granted a permanent injunction, and a direct appeal lies.

The allegation of the complaint that the matter in controversy exceeds the sum of $3,000 in value, exclusive of interest and costs, was denied by the answer. In support of the general jurisdictional allegation, respondent refers to the facts, as found by the District Court or not questioned by appellants, that the net worth of its business is in excess of $3,000; that it has on hand cars of the combined value of $16,000; that in the five months expiring May 31, 1935, it sold 481 cars, the aggregate retail prices of which amounted to about $164,000; that a substantial majority of its sales—about 65 per cent. during the first five months of 1935—consisted of installment or time sales; that based upon orders and criteria commonly employed to forecast future sales, it expected to sell approximately 330 cars in June and July of 1935, and 495 cars during the second six months of that year. Respondent also refers to allegations of its complaint that its present and future earnings and the conduct of its business would be rendered uncertain by reason of the risk involved in making future commitments for the purchase of automobiles and the inability to obtain future commitments for the resale of such automobiles and for

those on hand, and for the sale of retail installment contracts covering the automobiles on hand, as well as cars which might be ordered, to the General Motors Acceptance Corporation or any other finance company. These allegations were put in issue.

The District Court made findings with respect to the character and extent of respondent's business but the record contains no finding or evidence showing the amount of the loss, if any, which would be caused by the regulations assailed.

Respondent contends that the burden of proving the lack of jurisdiction rested upon those challenging the jurisdiction. We have considered and overruled the similar contention in our opinion in *McNutt* v. *General Motors Acceptance Corp., supra.* In this aspect we find no substantial difference between the two cases.

The decree of the District Court is reversed and the cause is remanded with directions to dismiss the bill of complaint.

Reversed.

MR. JUSTICE STONE took no part in the consideration and decision of this case.

Syllabus.

WHEELING STEEL CORP. *v.* FOX, STATE TAX COMMISSIONER, ET AL.

APPEAL FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA.

No. 663. Argued March 9, 10, 1936.—Decided May 18, 1936.

1. Intangible property, such as accounts receivable and bank deposits, may have a situs for taxation by a State other than that of the owner's domicile through being part of a business localized in the taxing State. P. 208.
2. The State in which intangible property belonging to a foreign corporation is thus localized cannot be denied constitutional power to tax it upon the ground that, by legal fiction, the property is so attributable to the State by which the corporation was chartered as to vest in that State the sole power to tax it. P. 211.

   So *held* where the corporation maintained in the State of its incorporation an office styled its "principal" office, in which a duplicate stock ledger and records of capital stock transactions were kept, but actually conducted its business outside of that State.
3. A Delaware manufacturing corporation conducted none of its business in that State but established its commercial domicile in West Virginia. There it maintained its general business offices where its general accounts were kept and in which its stockholders and directors held their meetings and from which its officers managed and controlled its operations, including what was done in its plants and sales offices in other States. All contracts of sale were subject to the approval of this main office and all invoices were payable there. It had bank deposits outside of West Virginia, resulting from deposits by its West Virginia office of commercial paper received from customers, which deposits were used in meeting payrolls and in paying for materials, equipment, and maintenance and operating expenses in the course of its manufacturing activities but were drawn upon only by the West Virginia office or under its direction.

   Held, that the bank deposits and accounts receivable for goods made at the plants and sold through the sales offices were taxable by West Virginia. P. 211.

   Note: The West Virginia assessment, as amended and approved by the state court, permitted a deduction of an amount taxed by

the State of Ohio on "accounts and notes receivable." The record, however, presents the question of the constitutionality of the tax in West Virginia, and no question of the amount or validity of any tax assessed elsewhere.

4. The West Virginia statutes, as construed by the state court, tax only such part of the intangible property of a foreign corporation as upon the facts and the applicable principles of law the State may rightfully tax. P. 215.

5. No delegation of authority, violative of the Federal Constitution, exists in permitting the state tax officials to fix the assessment of intangible property of a foreign corporation by applying the law to the facts, subject to review by the state courts and ultimately to review, as to any federal questions arising, by this Court. P. 215.

6. The assertion that the West Virginia tax on intangible property of foreign business corporations, in comparison with taxes on property of natural persons, railroads and other public utilities, denies to business corporations the equal protection of the laws, is not sustained by the record in this case. P. 215.

Affirmed.

APPEAL from a judgment of a Circuit Court of West Virginia in a statutory proceeding for the review of a tax assessment. The Supreme Court of Appeals of the State denied a writ of error, the judgment having been entered pursuant to its decision on a previous review. *In re Wheeling Steel Corporation Assessment,* 115 W. Va. 553; 177 S. E. 535.

Messrs. J. E. Bruce and *Wright Hugus* for appellant.

The statutory provisions, as construed, operate to tax property over which the State has no jurisdiction.

The State creating a corporation has the sole right to tax the intangible property of that corporation unless such intangible property has acquired a "business situs" elsewhere,—that is, it has been derived from, and is being held for use in, a purely local business. And conversely, a State which is not the domicile of the taxpaying corporation, and in which the intangible property of

such corporation has not acquired a "business situs," cannot, consistently with the due process clause of the Fourteenth Amendment, impose a tax upon such property. *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *Liverpool & L. & G. Ins. Co.* v. *Board,* 221 U. S. 346; *Baldwin* v. *Missouri,* 281 U. S. 586.

West Virginia is not the domicile of the appellant. Appellant was organized and now exists under and by virtue of the laws of Delaware. It operates in West Virginia, Ohio and Minnesota as a foreign corporation, having complied with the laws of each of those States taxing and regulating foreign corporations doing business therein.

The laws of West Virginia do not provide for the domestication of foreign business corporations. On the contrary, c. 31, Art. 1, § 79 (Michie Code, 1932, § 3091) provides that foreign corporations may do business, as foreign corporations, within West Virginia under certain conditions. Foreign corporations doing business within the State preserve their status as foreign corporations. Chapter 11, Art. 12, § 71 (Michie Code, 1932, § 939) illustrates that different methods are used in calculating license taxes imposed on foreign, as distinguished from domestic, corporations, and that the policy of West Virginia is to maintain that distinction.

The Supreme Court of Appeals in its opinion took the position that, notwithstanding the facts that appellant is a foreign corporation, that 72.90% of its real estate and tangible personal property is located outside of West Virginia, and that 75.80% of its shipments in 1932 originated from its manufacturing plants located outside of West Virginia, its entire business had been localized in West Virginia.

This overthrows the distinction between domestic and foreign corporations as now existing in the law, and

attempts to substitute therefor a distinction depending, apparently, upon the place where the executive and management functions are exercised. It transfers to the place of control at least one of the attributes of domicile—the power to tax the total intangible property of a corporate taxpayer irrespective of the fact that its real estate and tangible personal property may be located elsewhere.

From the finding that all the property of the appellant is controlled by the executive offices in West Virginia, the state court deduces that all the intangible personal property owned by appellant, wherever it may be said to be located and however arising, except that portion actually taxed in other States, is taxable by West Virginia. It may just as well be argued that all the real property and all the tangible personal property owned by appellant is likewise controlled by the West Virginia office; and, if the court's reasoning is correct, should also be amenable to assessment and taxation in West Virginia. But the court does not attempt to extend the argument to its logical conclusion.

If taxation of real and tangible personal property located outside of the jurisdiction of the taxing authority is deprivation of property without due process (*Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194), the assessment and taxation of intangible personal property located or arising from business done outside of the jurisdiction of the taxing authority is just as much an attempted deprivation of property without due process.

Appellant owns and operates manufacturing facilities both within and without the State of West Virginia. Only 27.10% of the assessed value of its real estate and tangible personal property is located in West Virginia. Only 24.20% of its shipments originated in West Virginia in 1932. Its West Virginia production was 15.6% of the total production in 1932. Only 19.45% of its employees

were employed in West Virginia in 1932. Its West Virginia payrolls were only 16.22% of the total payrolls in 1932. Its West Virginia ingot capacity is only 16.6% of its total ingot capacity, and ingot capacity is a recognized basis of determining the producing ability of a steel company.

It is clear that the larger portion of appellant's intangibles sought to be assessed and taxed by West Virginia was derived from operations carried on outside of West Virginia. If intangibles can have any situs for taxation other than at appellant's domicile in Delaware, such situs cannot be determined solely by control, for such a rule would result in taxation of property outside of the jurisdiction of the State. The use of tangible property, both real and personal, in business, creates intangible property; and it is submitted that the only fair rule for the taxation of property in States other than the State of the domicile is a rule which allocates intangibles on the basis of tangible property owned and used in production of material for sale. Such a rule will permit each State in which tangible property is located and operated for profit to tax a fair proportion of the intangible property created within its borders.

It is well settled in the law that a corporation is domiciled in the State of its creation, and that it cannot migrate. It may own property and do business in other States, but its domicile is not thereby changed. To hold that a corporation may have a roving domicile, dependent upon the place its executive functions are exercised from time to time, would be an anomaly. *Adams Express Co.* v. *State Auditor,* 166 U. S. 185.

The money and accounts receivable here sought to be taxed are property derived from business done for the most part in the State of Ohio. The management activities in West Virginia, particularly the "control" emphasized by the state court, did not create these intangibles.

Appellant's business is not localized in West Virginia. Its general offices in Wheeling did not and could not bring into existence such intangibles without the acts of manufacture and shipment in and from the State of Ohio. The most important act—the manufacture of the steel—was performed in Ohio. No money would have been received, and no credits would have been created but for such manufacture. If intangibles arising from appellant's Ohio manufacturing operations are taxable in any State, other than Delaware, they are taxable in Ohio. They are not taxable in West Virginia. *Hans Rees Sons, Inc.* v. *North Carolina,* 283 U. S. 123; *American Barge Line Co.* v. *Board,* 246 Ky. 573; *Looney* v. *Crane Co.,* 245 U. S. 178; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312.

The state law, as construed, results in multiple taxation. Cases hereinafter discussed involve not only property taxes, but also transfer, inheritance, license and income taxes, but the same general jurisdictional principles govern all types of taxation. *Frick* v. *Pennsylvania,* 268 U. S. 473.

The modern view of this Court, to the effect that multiple taxation of intangible personal property is repugnant to the due process clause of the Fourteenth Amendment, apparently had its inception in the case of *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83.

That intangibles consisting of negotiable bonds and certificates of indebtedness are subject to the imposition of an inheritance tax only by the State of the decedent's domicile was held in *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204. This case expressly overruled *Blackstone* v. *Miller,* 188 U. S. 189.

Baldwin v. *Missouri,* 281 U. S. 586, involved other types of intangible property. In that case the Court

refused to apply the "business situs" doctrine. Mr. Justice Holmes, in his dissenting opinion, recognized that the majority opinion in effect overruled the cases upholding "business situs" as a basis for taxation of intangible property. See: *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312.

A franchise or license tax imposed by a State upon a foreign corporation for the privilege of doing business within that State, but measured in part by property owned or business done outside, is a deprivation of property without due process of law. *Looney* v. *Crane Co.,* 245 U. S. 178; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203.

An income tax imposed by a State upon a foreign corporation measured in part by income received from property owned or business done outside of that State, is a deprivation of property without due process of law. *Hans Rees Sons* v. *North Carolina,* 283 U. S. 123; *Newport Co.* v. *Wisconsin Tax Comm'n,* 219 Wis. 293.

The fact that the state court's opinion permits the deduction of intangible property owned by appellant and taxed in Ohio during the same tax period does not assist in any determination of the question of jurisdiction to tax.

All the receivables arising from business transacted within Ohio are taxable there and could be taxed in that State if Ohio should at some time prohibit the deduction of indebtedness, which is not improbable in view of the fact that West Virginia has prohibited the deduction of indebtedness.

The state court acknowledges that Ohio has power to tax a portion of appellant's intangibles, apparently under the "business situs" theory. Suppose that Ohio did not choose to exercise that power. Would West Virginia, because of Ohio's failure to exercise an acknowledged

power, acquire jurisdiction to tax intangibles derived from Ohio business?

It is doubtful that the "business situs" theory of taxation, even if it would now be upheld by this Court, is applicable under West Virginia statutes. Those statutes contain no provision for allocation to that State of intangible property which is within its jurisdiction, as distinguished from such property over which it has no jurisdiction.

If the legislature has not prescribed a clear and specific manner in which taxes shall be assessed, neither the administrative officers nor the courts may supply the defect. Statutes imposing taxes are to be construed most strongly against the Government and in favor of the taxpayer.

The statutes in question, as construed below, when read in connection with § 15, Art. 3, c. 11 of the West Virginia Code, which limits the assessment for taxation of similar property owned by an individual or unincorporated firm to money derived from or belonging to and credits arising out of business done by such individual or unincorporated firm within the State of West Virginia, operate to deny to appellant the equal protection of the laws.

And, when read in connection with §§ 2, 4, 5, 6 and 7, Art. 6, c. 11 of the Code, which limit the assessment for taxation of similar property owned by persons, firms or corporations operating as public utilities to property "wholly held or used in this State," they again operate to deny appellant the equal protection of the laws.

Mr. Homer A. Holt, Attorney General of West Virginia, with whom *Messrs. Ira J. Partlow* and *W. Holt Wooddell,* Assistant Attorneys General, were on the brief, for appellees.

The accounts receivable and money on deposit have a taxable situs in West Virginia.

Generally, the taxable situs of accounts receivable and of money in bank is at the domicile of the owner. *Baldwin* v. *Missouri,* 281 U. S. 586, 591; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, 8. They may, however, acquire a situs for purposes of taxation at some place other than the technical domicile of the owner. *In re Wheeling Steel Corporation Assessment* (this case), 115 W. Va. 553; *Miami Coal Co.* v. *Fox,* 203 Ind. 99; *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *Board of Assessors* v. *Comptoir National D'Escompte,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool & L. & G. Ins. Co.* v. *Assessors,* 221 U. S. 346; *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *Commonwealth* v. *United Cigarette Machine Co.,* 119 Va. 447; *Bemis Bros. Bag Co.* v. *Tax Commission,* 158 La. 1; *Buck* v. *Miller,* 147 Ind. 586; *Higgins* v. *Commonwealth,* 126 Ky. 211; *Finch* v. *York County,* 19 Neb. 50.

Our position in this case is that the accounts receivable and bank deposits have acquired a taxable situs in West Virginia, and that they have no taxable situs in Delaware, the technical domicile of the corporation, and that the record does not show the acquisition of a taxable situs in any other State by any part of said intangibles, though we have not assigned cross error to the judgment of the Supreme Court of Appeals of West Virginia in deducting $250,133.42 from the assessment as originally approved by the tax commissioner, upon the mere showing that that amount had been assessed in the State of Ohio.

Just as a part of the business of a corporation may be localized in a State other than that of the technical domicile, so may all of such business become so localized if in fact the corporation is not doing business and is not man-

aging and controlling its assets and operations in the State of its technical domicile, but is, in fact, managing, keeping, and controlling its assets and business in another State.

Here, Wheeling Steel Corporation has not merely localized a part of its business in West Virginia through the activities of an agent, but has localized its entire fiscal management in West Virginia through its principals.

All of the manufacturing business of appellant has not been so localized in West Virginia, but it is believed that it is sufficient for the purposes of *ad valorem* property taxes upon the intangibles of appellant that the business of keeping, managing and controlling all of such intangibles has been localized in West Virginia.

The theory that intangible personal property can be taxed only when related to the taxation of real estate or tangible personal property was rejected by this Court in *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15, 20.

We are not considering an income tax, but an *ad valorem* property tax upon intangible property. The source of the property is not determinative. That which is determinative is the situs of the intangible property on the assessment date. West Virginia, of course, cannot tax the personal property, iron and steel, manufactured by appellant and located in Ohio. Obviously, however, if such iron and steel were removed from Ohio to West Virginia, West Virginia could then tax them as tangible personal property, and the source from which they were obtained by the corporation would not be material. Likewise, if the iron and steel be not removed to West Virginia, but be exchanged for money or accounts receivable, and in the course of the transaction such money or accounts receivable be transferred to West Virginia, then West Virginia may impose an *ad valorem* property tax upon such intangibles.

It is significant that in the cases of *Baldwin* v. *Missouri*, 281 U. S. 586, 593; *Farmers Loan & Trust Co.*

v. *Minnesota,* 280 U. S. 204, 213; *First National Bank* v. *Maine,* 284 U. S. 312, 330; and *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, 9, in each of which cases an inheritance tax was involved, the Court was careful to point out that the intangible personal property involved had not acquired a business situs in the States which sought to impose the taxes.

The rule that the taxable situs of intangibles is at the technical domicile of the owner is but a mere fiction, and will not be followed when the fact is clear that the intangible property has a situs elsewhere. Cf. *Bristol* v. *Washington County,* 177 U. S. 133, 141. See also *Board of Assessors* v. *Comptoir National D'Escompte,* 191 U. S. 388, 404; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 92.

In *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15, the decision was not placed solely upon the ground that the corporation was a Virginia corporation, but as well upon the ground that the intangibles were managed and controlled within Virginia.

In *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, the opinion commented upon the fact that the actual presence and control of the intangibles were elsewhere than at the domicile of the beneficiaries. Following this, reference was made to many of the "business situs" cases to which we have heretofore referred.

The record does not show a taxable situs in Ohio of any of appellant's accounts receivable. We do not concede that the voluntary return of accounts receivable by appellant to the taxing authorities of Ohio and the payment of taxes thereon, when the record does not show any taxable situs in Ohio, deprives West Virginia of the right to tax all of the intangibles of appellant which the record, we believe, shows to have a taxable situs in West Virginia.

The statutes of West Virginia under which appellant's intangible property was assessed, as interpreted by the state courts, are not in violation of the equal protection clause of the Fourteenth Amendment when considered in connection with the statutes relating to the assessment of like property of either natural persons or public utility corporations. Appellant's error in this regard results from a failure to consider all of the pertinent statutes. [Citing and discussing many statutes of the State.]

Appellant has shown no facts of discrimination with respect to it and any other taxpayer, either business corporation, public utility corporation, or natural person. It is believed that the pertinent statutes plainly show a constant purpose and intent to tax all intangibles within the State and to tax no intangibles which are without the State. However, even though the statute were susceptible of an interpretation, which, if adopted, would result in discrimination against appellant, no showing of any administrative action which is discriminatory in fact is presented.

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

This appeal presents the question of the validity of an *ad valorem* property tax laid by West Virginia upon accounts receivable and bank deposits of appellant, Wheeling Steel Corporation, organized under the laws of Delaware.

The tax statutes [1] were assailed upon the ground that, as applied, they violated the due process and equal pro-

[1] The statutes to which appellant refers are: Code of West Virginia, Chapter 11, Article 3, §§ 12, 13, 15, Article 5, § 1, Article 6, § 2, Article 12, § 71; Chapter 31, Article 1, § 79.

tection clauses of the Fourteenth Amendment of the Constitution of the United States. The proceeding was a statutory one, instituted by appellant in the Circuit Court of Ohio County, West Virginia, to review a county assessment which was made as of January 1, 1933. The judgment of that court, reducing the assessment, was reversed by the Supreme Court of Appeals of West Virginia. *In re Wheeling Steel Corporation Assessment,* 115 W. Va. 553; 177 S. E. 535. The Circuit Court then entered final judgment which the Supreme Court of Appeals refused to review. The case comes here on appeal.

The case was submitted upon agreed statements which disclosed the following facts: The Corporation maintains its principal office in Delaware through the Corporation Service Company, as permitted by the laws of that State. It keeps there a duplicate stock ledger and records of all transactions with respect to its capital stock, the originals of such ledger and records being kept in New York City. It files reports and pays franchise taxes as required by Delaware.

The general business offices of the Corporation are located in Wheeling, Ohio County, West Virginia. There, the general books and accounting records are kept. The chairman of the board, president, treasurer, secretary and chief counsel reside at Wheeling. There, its stockholders' and directors' meetings, as permitted by the laws of Delaware, are held. Dividends, when declared, are ordered to be paid and distributed at meetings held at Wheeling, although the checks are drawn and distributed by the dividend disbursing agent located in New York City and are paid with funds there deposited.

The Corporation maintains sales offices in various cities of the United States. Sales contracts are negotiated and orders are taken by these offices subject to acceptance or rejection at Wheeling.

The principal manufacturing plants of the Corporation are located in the State of Ohio. The plant offices maintain original detailed accounting records showing materials received, railroad cars received and shipped, detailed labor costs, production and shipments, and detailed stocks of goods and payrolls. Employment offices are maintained at each plant. The Portsmouth, Ohio, plant makes up and mails out invoices for all products shipped from that plant, together with bills of lading and shipping notices. The other plants prepare complete invoices with exception of information relating to the price of materials described. The latter invoices are then forwarded to Wheeling where they are completed and mailed to the customer. Bills of lading and shipping notices are, however, mailed to customers from the individual plants. All invoices are payable in Wheeling. The majority of commercial accounts are paid by check issued at Wheeling. Payrolls are made up and payroll checks are prepared and signed at the various plants and are there distributed to the employees. Such checks are paid with funds on deposit in banks in the localities where the plants are situated.

The Corporation owns vessels operating on the Allegheny, Ohio and Mississippi Rivers, transporting coal and steel. These vessels are registered at the port of Pittsburgh.

The total assessed value of the real estate and tangible personal property owned by the Corporation on January 1, 1933, was $31,977,600. The assessed value of its real estate and tangible personal property in West Virginia was $8,673,205, or 27.10 percent. of the total.

At least 80 percent. of the sums spent by the Corporation in the conduct of its business, including the purchase of materials, maintenance and repairs of plants, building of improvements, property additions, payrolls and other operating expenses were made in connection

with the operation of its plants and business outside the State of West Virginia and all such payments, aside from moneys borrowed, were made from the proceeds of sales of its products. The moneys thus expended in the conduct of its business in Ohio and States other than West Virginia are expended by executive action taken at Wheeling, and by the drawing of checks or drafts at that place, except in connection with the payment of payrolls at its Portsmouth, Ohio, and Steubenville, Ohio, plants, where payroll checks or orders are drawn against moneys sent to banks at those points for the express purpose of meeting the payrolls and for incidental items as they arise. All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, it is made only under specific or general direction and control of that office.

On January 1, 1933, the Corporation had on deposit to its credit in various banks the sum of $2,307,773.61, of which $849,161.99 was on deposit in West Virginia. Of the last mentioned amount the Corporation had received $121,684.91 from sales of goods manufactured in West Virginia and the remainder from sales of goods manufactured in, and shipped from, points outside that State. The money on deposit in banks outside West Virginia on January 1, 1933, had been deposited by the Corporation by sending from its Wheeling office the original checks or drafts received from its customers. The deposits outside West Virginia are not segregated for the purpose of keeping separately the receipts from sales of products manufactured in, and shipped from, West Virginia plants. Ordinarily not more than 20 percent. of the total amounts on deposit at any time within and without West Virginia have been derived from sales of products manufactured in that State.

The total amount of the Corporation's accounts and notes receivable on January 1, 1933, was $2,234,743.11.

Of this amount, $374,410.42 were receivables for goods sold and manufactured in, and shipped from, West Virginia to resident and non-resident purchasers. It appeared that the Corporation had been assessed in Ohio, as of January 1, 1933, on accounts and notes receivable amounting to $250,133.42.

The Supreme Court of Appeals of West Virginia held that there had been "such a localization of the corporation's business at Wheeling" that there was imparted "to its entire intangible property a *prima facie* situs for taxation at that place." But the court thought that the "statutory limitation of the assessment to property 'liable to taxation'" indicated that the legislature "did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction." And referring to the above mentioned taxation in Ohio, the Supreme Court of Appeals said: "For the purposes of this opinion, we assume that the claim of our sister state is well founded, and should be deducted from the assessment as corrected by the Tax Commissioner." And in remanding the cause to the Circuit Court, the Supreme Court of Appeals gave opportunity to have it determined "whether or not further deductions should be made in deference to the legal demands of other states." In the further proceeding in the Circuit Court, it was stipulated that "no states other than Ohio and West Virginia have assessed taxpayer upon any of its intangibles for the year 1933."

First.—The tax is not a privilege or occupation tax. It is not a tax on net income. See *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123, 133. It is an *ad valorem* property tax. We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state. This rule receives its most familiar illustration in the case of land. The rule has been ex-

tended to tangible personal property which is thus subject to taxation exclusively in the State where it is permanently located, regardless of the domicile of the owner. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 204, 206; *Frick* v. *Pennsylvania,* 268 U. S. 473, 489. We have said that the application to the States of the rule of due process arises from the fact "that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution." *United States* v. *Bennett,* 232 U. S. 299, 306. Compare *Burnet* v. *Brooks,* 288 U. S. 378, 401. When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 211. And having thus determined "that in general intangibles may be properly taxed at the domicile of their owner," we have found "no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles." *Id.,* p. 212. The principle thus announced in *Farmers Loan & Trust Co.* v. *Minnesota* has had progressive application. *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312, 328, 329. But despite the wide application of the principle, an important exception has been recognized.

In the case of tangible property, the ancient maxim, which had its origin when personal property consisted in

the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used." *First National Bank* v. *Maine, supra.* It was in view "of the enormous increase of such property since the introduction of railways and the growth of manufactures" that it came to be regarded as "having a situs of its own for the purpose of taxation, and correlatively to [be] exempt at the domicile of its owner." *Union Refrigerator Transit Co.* v. *Kentucky, supra,* p. 207. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *Board of Assessors* v. *Comptoir National,* 191 U. S. 388; *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool & L. & G. Insurance Co.* v. *Board of Assessors,* 221 U. S. 346.

These cases, we said in *Farmers Loan & Trust Co.* v. *Minnesota, supra,* p. 213, "recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business." We adverted to this reservation in *Beidler* v. *South Carolina Tax Comm'n, supra,* p. 8, and in *First National Bank* v. *Maine, supra,* p. 331.

In the instant case, both parties recognize the principle and the exception. It is appellant's contention that the State creating a corporation has the sole right to tax its intangible property "unless such intangible property has acquired a 'business situs' elsewhere." Counsel for the State agrees with appellant on this point and in fact asserts "that, generally, the taxable situs of accounts receivable and of money in bank is at the domicile of the owner." But the State insists that the accounts receiv-

able and bank deposits of the Wheeling Steel Corporation had acquired a taxable situs in West Virginia and that they have no taxable situs in Delaware, where the Corporation was chartered.

Second.—The Corporation complied with the laws of the State of its creation in designating its "principal" office in that State. It is manifest that this designation, while presumably sufficient for the purpose, was a technical one and that the office is not a principal office so far as the actual conduct of business is concerned. While a duplicate stock ledger and records of transactions with respect to capital stock are maintained in Delaware, the business operations of the Corporation are conducted outside that State. The office in Delaware is maintained through the service of an agency organized to furnish this convenience to corporations of that description. To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the tangible possessions of the Corporation without regard to their actual location.

The constitutional authority of West Virginia to tax the accounts receivable and bank deposits in question cannot be denied upon the ground that they are taxable solely in Delaware. The question is whether they should be deemed to be localized in West Virginia.

Third.—The Corporation established in West Virginia what has aptly been termed a "commercial domicile." It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the Corporation. There, as appellant's

counsel well says, "the management functioned." The Corporation has manufacturing plants and sales offices in other States. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government.

The question here is not of the taxation of the plants in other States. The real estate, equipment and all tangible property there located are taxable by those States respectively. The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120, 121; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271, 282, 283; *Hans Rees' Sons* v. *North Carolina, supra.* Such a tax on net gains is distinct from an *ad valorem* property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one "which allocates intangibles on the basis of tangible property owned and used in production of material for sale." This is to confuse two distinct subjects of *ad valorem* property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale. We said, in *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15, 20, that we were not able to perceive "any sound reason for holding that the owner must have real estate or tangible property within the State in order to subject its intangible property within the State to taxation."

The tax is laid both on accounts receivable and on the amount of deposits in banks. It appears that the Corporation has deposit accounts in several States. The deposits outside West Virginia were made by sending from the Wheeling office to the various banks the original checks or drafts received by the Corporation from its customers. From these deposit accounts the Corporation, by executive action at Wheeling, pays the amounts required for payrolls, materials, equipment, maintenance and operating expenses as these amounts become payable in the course of its operations in Ohio and other States. Checks and drafts on these bank accounts are drawn at Wheeling, except in connection with the payment of payrolls at certain manufacturing plants where payroll checks or orders are drawn against moneys sent to banks at such points for that express purpose and for meeting incidental items. The agreed statement shows that "All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be

made elsewhere, such immediate expenditure is made only under specific or general direction and control of the Wheeling office." The so-called "money in bank" is not cash or physical property of the Corporation but is an indebtedness owing by the bank to the Corporation by virtue of the deposit account. From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled. In the light of this course of business as shown by the agreed statements of fact, we find no sufficient basis for concluding that the bank accounts thus maintained and controlled were properly attributable to the Corporation at any place other than at its general office at Wheeling. If there were any special circumstances by which any of these deposits could be deemed to have been localized elsewhere, they do not appear upon the present record.

The state court permitted the deduction of the amount of the intangible property of the Corporation which had been assessed in Ohio. That assessment, according to the agreed statement, was "on accounts and notes receivable." Counsel for the State, while insisting that the record does not show a taxable situs in Ohio of any of appellant's accounts receivable, has not taken a cross appeal or sought to assign error with respect to this part of the judgment of the Supreme Court of Appeals. The State is not in a position to complain of the deduction and no question as to its propriety is before us upon this record. Appellant urges that in Ohio "only the excess of receivables and prepaid items over current payables" is actually taxed, and that the deduction of "current indebtedness" accounts for the amount of the Ohio assessment. The inference is sought to be drawn that the amount of accounts receivables taken into consideration in Ohio was thus larger than the amount assessed. We find no basis for a conclusion whether, or to what extent, deductions were allowed in Ohio. The stipulation states

that the appellant had been assessed "on accounts and notes receivable" in the amount which the state court of West Virginia has allowed. Upon this record the question before us is with regard to the constitutional validity of the tax as assessed in West Virginia and not as to the amount or validity of any tax assessed elsewhere.

Further, we find no ground for appellant's contention that the statutes of West Virginia, under which the tax is laid, are invalid in the view that they require the taxation of all the intangibles of a foreign corporation doing business within the State, regardless of the place where such intangibles may properly be the subject of taxation. We think the argument is sufficiently met by the construction placed upon these statutes by the state court. It held that the legislature intended to limit the assessment to property which was liable to taxation according to the facts and the applicable principles of law. Nor would this inquiry of the state officials into the facts involve, as contended, any delegation of authority of which complaint could be made under the Federal Constitution. The taxing officials would apply the law to the facts of the case subject to review by the courts of the State and ultimately by this Court so far as any federal question might be involved.

Our conclusion is that appellant has failed to show that West Virginia in laying the tax has transcended the limits of its jurisdiction and thus deprived appellant of its property without due process of law.

Fourth. Appellant also contests the tax upon the ground that equal protection of the laws has been denied. The argument is that the statutes, as construed, require that the total intangibles of appellant are to be reported and assessed, except that portion taxed in other States, and hence that the statutes discriminate unlawfully against business corporations and in favor of natural persons. Appellant also urges discrimination on the

basis of a comparison with the provisions for the taxation of the property of railroads and other public utilities. Counsel for the State presents an analysis of the state statutes and insists that there is no discrimination between the assessment of the intangibles of corporations, either foreign or domestic, and of those of natural persons, or with respect to the assessment of corporations engaged in public service.

The contention of appellant is that we should deduce the protested discrimination from the face of the respective statutes. But we do not find that their provisions require the asserted construction and we have not been advised of decisions of the state court placing such a construction upon them. The decision in the instant case, as we have seen, is not that the statutes require taxation in West Virginia of all of the intangibles of appellant, without due regard to the place where they may properly be deemed to be localized, but only of such intangibles as upon the facts and the law, according to the course of business, may be deemed to be within the jurisdiction of the State. The record discloses no discrimination of which appellant is entitled to complain.

The judgment of the state court is

Affirmed.

Counsel for Parties.

COMPAGNIE GENERALE TRANSATLANTIQUE *v.* ELTING, COLLECTOR OF CUSTOMS.*

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

No. 6. Argued October 14, 1935.—Decided May 18, 1936.

1. Section 20 (a) of the Immigration Act of 1924 imposes a fine upon "the owner, charterer, agent, consignee or master" of any vessel arriving in the United States from any place outside, who fails to detain any alien seaman employed on such vessel, after inspection by the immigration officer in charge at the port of arrival, if required by such officer to do so.

   Held, that the duty to detain is personal, and that where the requirement is made of the master, the owner, if not notified of it, is not liable if the seaman escapes. P. 222.

2. While the admiralty law regards the master of a ship as the agent of the owner, § 20 (a), *supra*, takes no account of that relation but deals with the master just as it does with the owner; if either is notified to detain, he must comply or be subjected to fine. Nothing in the section indicates that notice to the master to detain an alien seaman, and his failure to obey the direction, are to be imputed to the owner and made the basis of fining him. P. 225.

74 F. (2d) 209, reversed.

CERTIORARI in two cases, 295 U. S. 724, to review judgments upholding fines imposed by immigration authorities upon the owners of two vessels for failure to detain on board certain alien seamen. The actions were by the shipowners for the recovery of sums deposited by them in advance to obtain clearance of their vessels.

Mr. Roger O'Donnell, with whom *Messrs. William J. Peters* and *Lambert O'Donnell* were on the brief, for petitioners.

* Together with No. 7, *Hamburg-American Line* v. *Elting, Collector of Customs.* Certiorari to the Circuit Court of Appeals for the Second Circuit.

Assistant Attorney General MacLean, with whom *Solicitor General Reed* and *Messrs. Paul A. Sweeney, M. Leo Looney, Jr.,* and *W. Marvin Smith* were on the brief, for respondent.

Service on the commander and the fourth officer of the Ile De France and on the chief officer of the Milwaukee of notices directing the owners of these vessels to detain alien seamen on board, constituted a sufficient compliance with the statute and immigration rules to charge the owners of the vessels with liability to fine for failure to detain as required.

Section 20 of the Immigration Act of 1924 finds its origin in § 32 of the Immigration Act of 1917 which it expressly repealed. Section 32 of the 1917 act imposed liability only for "negligent failure" to detain, and made a notice in writing to detain "by the immigration officer in charge at the port of arrival" a condition precedent to liability to fine. This section was found inadequate to prevent the illegal entry into this country of aliens under the guise of seamen. The entire purpose of § 20 was to provide more effective means to combat such illegal entry. *United States* v. *Winchester & Co.,* 40 F. (2d) 472, 473. The existence of negligence and the requirement of "notice in writing" as a condition precedent to liability to the penalty were eliminated. The statute places upon the persons named therein an absolute duty to detain all seamen on board prior to their inspection by the immigration authorities, and continues this duty, after inspection, as to such alien seamen as are required to be detained by the immigration authorities.

During the absence of the master, the person in charge of a vessel is obviously the acting master, at least so far as the control of the crew is concerned. In the instant cases there is no evidence in the record that the officers served were not in charge of the vessels at the time service was made, or that the masters were actually

on board and in charge at such time. It was the duty of the immigration officers to serve the officers who were in charge of the vessels. The law is well settled that there is a presumption of regularity attaching to the acts of public officials.

Unless the officer who is the acting master during the master's absence may lawfully be served, alien seamen might be allowed to land illegally and no one would be chargeable with the duty of detaining them on board.

The master of the vessel is the agent of the owner. *American Asiatic Co.* v. *Robert Dollar Co.*, 282 Fed. 743, 749; *The Penza*, 9 F. (2d) 527; cf. *Suzuki* v. *National Surety Co.*, 290 Fed. 942. It has been held that service on the master of a notice to detain alien seamen on board is sufficient to charge the owner with liability for failure to detain such alien seamen on board as required. *British Empire Steam Nav. Co.* v. *Elting*, 74 F. (2d) 204, cert. den., 295 U. S. 736; *United States* v. *Winchester & Co.*, 40 F. (2d) 472; *United States* v. *Columbus Marine Corp.*, 62 F. (2d) 795.

It is obvious that a corporation which owns a vessel can only be served with notice to detain on board through the medium of an agent, and if such notice is to be effective, such agent must be on board the vessel. The master is the agent of the owner for all purposes. *The Woodland*, 104 U. S. 180; *The J. P. Donaldson*, 167 U. S. 599.

The obvious intention of the Act would seem to be, in the final analysis, to make the owner, through the medium of the vessel, the guarantor of the payment of any fine irrespective of whom it may be levied against, because the statute provides that if an order to detain on board has been served and such order is not complied with, the vessel shall not be granted clearance pending the determination of the liability to the payment of such fine, or while the fines remain unpaid, unless there be de-

posited a sum sufficient to cover such fine or a bond with sufficient surety to secure the payment thereof.

Actual service on the owners of the vessels of notice of liability to fines and their subsequent appearance and objection to the imposition of the fines is sufficient compliance with the statute and the immigration rules.

In administrative proceedings of this nature, all that the law requires is that the owner shall have an opportunity to be heard. *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 336. In the instant cases, the owners were served with notice of liability to fine; they participated in the hearings to determine whether fines should be imposed; and, in all respects, were parties to the proceedings. Therefore, due process was afforded these petitioners and their appearance and submission to the jurisdiction of the Secretary of Labor corrected any defect in the notices, if there were any such defect. *British Empire Steam Nav. Co.* v. *Elting, supra.*

By leave of Court, *Mr. Delbert M. Tibbetts* filed a brief on behalf of the Rio Cape Line and other steamship owners, as *amici curiae,* urging reversal of the judgment below.

Mr. Justice Van Devanter delivered the opinion of the Court.

These cases are much alike. Each involves the validity of a fine imposed on the owner of a foreign ship for an asserted failure to detain on board certain alien seamen after their examination. In both the owner seeks to recover money deposited with the collector of customs to cover the fine, if and when imposed. The deposit was made to obtain clearance of the vessel pending the administrative proceedings which resulted in the fine. A trial by jury resulted in a directed verdict and judgment for the collector, which the Circuit Court of Appeals

affirmed. 74 F. (2d) 209. The cases are here on certiorari, which was granted because of an apparent divergence in Court of Appeals decisions.

The material facts, taken largely from controlling allegations and admissions in the pleadings and in part from undisputed evidence are as follows:

In No. 6 the *Ile de France,* owned by a foreign corporation, arrived at the port of New York from a foreign port February 6, 1930, with two aliens in her crew. Under the supervision of the immigration officer in charge, an inspector boarded the ship, examined the crew, and directed the master to detain the two aliens on the ground that they were not shown to be bona fide seamen. The master endeavored to detain them, but they escaped during the night following the direction given to the master. The direction was in writing and addressed "To the Owner, Agent, Consignee, Master or Officer in Charge of the *Ile de France,*" but was neither served on the owner nor brought to its knowledge prior to the escape. The master reported the escape and the immigration officer then served on the New York agent of the ship a notice to the effect that a fine was about to be imposed for the failure to detain; that a hearing would be allowed if desired; and that the ship would be granted clearance for her outward-bound voyage upon condition that there be deposited with the collector of customs the sum of $2,000 to cover the fine, should one be imposed. The owner made the deposit under protest, and through counsel requested and participated in a hearing; after which the administrative officers imposed on the owner a fine of $1,000 in respect of each of the alien seamen not detained.

In No. 7 the owner was another foreign corporation. The direction to detain related to but one alien seaman, was delivered to the chief officer of the ship, and was then brought to the knowledge of the master but not to

the knowledge of the owner. The master took steps to detain, but the alien seaman escaped. The amount of the deposit, as also the fine, was $1,000. In all other material respects the facts are like those in No. 6.

The statute under which the fines were imposed is § 20 (a) of the Immigration Act of 1924, c. 190, 43 Stat. 164, 8 U. S. C. 167 (a), which provides:

"The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs."

The purpose of the section is to prevent aliens from unlawfully gaining entrance into the United States under the guise of seamen, and to this end it makes provision for detention on board, both temporary and continued, and for imposing fines on those who, when under a duty to detain, fail to do so. It relates to all vessels arriving within from without the United States with alien seamen employed thereon. Such vessels may be either do-

mestic or foreign, may be owned by individuals or corporations, may be engaged in transportation for hire or otherwise, and may be, as the section plainly contemplates, in the immediate control of the owner or of a charterer, agent, consignee or master.

The fine is laid, not on the owner generally, but on the "owner, charterer, agent, consignee or master of any vessel . . . who fails to detain" until an examination is made, or "who fails to detain" after examination "if required" by the immigration officer "to do so."

Our present concern is with a fine for failing to detain after examination. A duty so to detain does not arise unless and until such detention is required by the immigration officer. Obviously the requirement must be communicated to the one on whom the duty is to rest; otherwise he could not be regarded as "required" so to detain or as "failing" to do so. This is conceded in the brief for the collector, where it is said: "The statute employs the word 'required' in respect of the continued detention. Of course, this means that in some manner the order of detention must be brought home to the party sought to be charged."

Here the requirement was communicated to the master of the ship but was not in any way brought to the knowledge of the owner; and yet the administrative officers imposed the fine on the latter. The court below sustained this administrative action on the theory that the master of a ship represents the owner, and therefore notice given to the master may and should be imputed to the owner. But in our opinion the section does not admit of the application of that theory. It contains nothing indicative of a purpose to regard notice to one of the enumerated persons as binding the others or any of them. On the contrary, it deals with all in the same way, includes each of them in the enumeration by reason of his relation to the vessel and his authority over her,

and puts each on a plane of individual duty and liability regardless of any relation of one to another.

We conclude therefore that so much of the section as is pertinent here is intended to have effect as follows: A master in charge who is required by the immigration officer to detain alien seamen after examination becomes thereby personally charged with a duty to detain them, and, if he fails therein, becomes personally subject to the prescribed fine. The same thing is true of the owner, charterer, agent or consignee. But none is charged with a duty so to detain unless he is notified of that requirement, and notice to one does not without more operate as notice to another.

Earlier decisions in the Court of Appeals, while dealing with facts somewhat different from those now presented, gave to the section a construction similar to that which we give to it. In *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472, there was an effort to subject the agent of a foreign ship to a fine for a failure to detain after inspection. Notice to detain had been served on the master but not brought to the knowledge of the agent. Counsel for the Government urged that, as the ship was foreign, notice to the master bound all, including the agent. But the court held that the section makes no distinction between foreign and domestic vessels; that to be effective the notice to detain must be brought home to the party sought to be charged; and that notice to the master does not suffice to charge the agent. *United States* v. *Columbus Marine Corp.*, 62 F. (2d) 795, involved another effort to collect a fine from a ship's agent. A detention order addressed to all who are enumerated in the statute had been served on the master but not on the agent. The court followed the decision in the *Winchester* case, ruled that as the order was served only on the master it did not impose any duty on the agent, and therefore that he was not liable for the failure to detain.

Lancashire Shipping Co. v. *Elting,* 70 F. (2d) 699,[1] presented still another effort to fine a ship's agent where the order to detain had been communicated to the master only. The court held that the agent, being without notice of the order, was not required to detain; and in rejecting a contention that the notice to the master bound the agent the court said:

"The master was not the representative of the agent and in accepting service of the detention order, he may not be assumed to have acted for it [the agent]. The master is a party under the statute made liable for his violation. He must be regarded as acting in his individual capacity in taking the order."

While the admiralty law regards the master of a ship as the agent of the owner,[2] the section before us takes no account of that relation but deals with the master just as it does with the owner. If either is notified to detain he must comply or be subject to a fine. Nothing in the section indicates that notice to the master and a failure by him are to be imputed to the owner and made a basis for fining the latter.

We conclude that the direction of verdicts for the collector was error and that the judgments should be reversed and the cases remanded to the District Court for a new trial.

Judgments reversed.

---

[1] Certiorari denied, 293 U. S. 594.

[2] The agency is not general but special, as is explained in *General Interest Insurance Co.* v. *Ruggles,* 12 Wheat. 408, 411–412.

PREMIER-PABST SALES CO. *v.* GROSSCUP ET AL.

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

No. 745. Argued April 27, 1936.—Decided May 18, 1936.

1. One who would attack a state statute as obnoxious to the Federal Constitution, must show that the alleged unconstitutional feature injures him. P. 227.
2. The question whether a Pennsylvania law licensing the sale of beer in that State discriminates unconstitutionally against those who sell beer imported from without, by requiring of them a higher license fee and a bond of higher penal sum than are required for sale of beer made locally,—*held* a question that could not be raised by a corporation which was disqualified to sell any beer in the State because its officers, directors and a majority of its shareholders were not local residents, as required by the state law. P. 227.
3. A license to sell beer in a State may be revoked by the State. P. 228.

12 F. Supp. 970, affirmed.

APPEAL from a decree of the three-judge District Court dismissing a bill to enjoin enforcement of a state law regulating the sale of beer.

Messrs. M. J. Donnelly and *C. J. Lynch, Jr.*, with whom *Messrs. C. S. Wesley* and *J. W. McWilliams* were on the brief, for appellant.

Mr. Charles J. Margiotti, Attorney General of Pennsylvania, *Mr. Grover C. Ladner*, Deputy Attorney General, and *Mr. Horace A. Segelbaum* were on the brief for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Premier-Pabst Sales Company, a Delaware corporation, is a distributor of beer made in Illinois and Wisconsin. Having secured a license issued under a statute

of Pennsylvania enacted and amended in 1933, it engaged in business there. That statute was again amended by Act No. 398, approved July 18, 1935, which changed the licensing law so as to discriminate between distributors who sold beer made within the State and those who sold imported beer. The annual license fee of the former was made $400, and the penalty of the bond required of them was at $1,000; the license fee of the latter was made $900, and the penalty of the bond to be given by them was set at $2,000.

The Company did not apply for a license under the 1935 Act. Instead, it filed, in the federal court for eastern Pennsylvania, this suit against the Liquor Control Board and other state officials. Claiming that the Act violated the commerce clause and the equal protection clause of the Federal Constitution, the bill prayed for a judgment declaring the Act void and for an injunction restraining its enforcement. The case was heard before three judges upon application for a preliminary injunction. The facts were stipulated; and it was agreed that the hearing should be deemed also a final hearing upon the application for a permanent injunction. The court denied the injunctions and dismissed the bill as wanting in equity, because the discrimination complained of was authorized by the Twenty-first Amendment. 12 F. Supp. 970. An appeal was allowed.

We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him. *Heald* v. *District of Columbia,* 259 U. S. 114, 123. Under the Act of 1935, no one may sell beer in Pennsylvania unless duly licensed; and no license may issue to a corporation unless all its officers and directors, and fifty-one per cent of its stockholders, have been resi-

dents of the State for the period of at least two years prior to the application for a license. The constitutional validity of that provision is conceded; and it was agreed that all the officers and directors are, and were when the suit was begun, non-residents of Pennsylvania, and that all of its stock was, and is, held by another foreign corporation. As no license could legally issue to the Company in any event, it cannot be injured by the alleged unconstitutional discrimination; and hence has no standing to challenge provisions of the Act.

The Company urges that it has a standing because, if the 1935 Act is invalid, the license issued under the Act of 1933 as amended is still in force. The 1933 Act also prohibited the issue of a license to a corporation whose officers and directors are non-residents. The Commonwealth insists that the Company's officers and directors were non-residents when it secured its license. The stipulation as to the facts is silent on the subject; and the Company argues that we must assume, in favor of the validity of the license, that it was then qualified to receive one. We need not discuss the validity of that contention. For even if the license was valid when issued, the State had the power to terminate it. *Mugler* v. *Kansas,* 123 U. S. 623. And, as we construe the Act of 1935, it did so.

Affirmed.

WALLACE ET AL. *v.* CUTTEN.

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

No. 747. Argued April 27, 1936.—Decided May 18, 1936.

Section 6 (b) of the Grain Futures Act, which provides that if the Secretary of Agriculture has reason to believe that any person "is violating" the Act or the regulations thereunder, or "is attempting" to manipulate the market price of grain in violation of the Act, he may require such person to show cause why he should not be suspended from trading in Contract Markets, cannot be construed as authorizing suspension for wrong-doing that occurred more than two years before the filing of the complaint with the Secretary. P. 236.

80 F. (2d) 140, affirmed.

CERTIORARI, 297 U. S. 701, to review a decree setting aside on appeal an order whereby the commission established by the Grain Futures Act directed all "contract markets" (grain exchanges designated by the Secretary of Agriculture) to refuse to the respondent Cutten all trading privileges for the period of two years.

Mr. Wendell Berge, with whom *Solicitor General Reed, Assistant Attorney General Dickinson,* and *Mr. Leo F. Tierney,* were on the brief, for petitioners.

The construction given § 6 (b) by the Circuit Court of Appeals renders that section impracticable and ineffective as a means of dealing with persons who violate the provisions of the Grain Futures Act or attempt to manipulate the market price of grain.

The requirements of reports from individual traders is of the utmost importance in the statutory scheme set up by the Grain Futures Act. Full and complete knowledge as to the activities of individual traders is essential if the regulatory authority is effectively to prevent manipulation of the market price.

Because of the nature of the reporting, it is virtually impossible to apprehend a trader in the act of violating the reporting requirements. A violation of those requirements occurs and falls into the class of past transactions at one and the same moment. Apprehension cannot be contemporaneous with commission. Under the construction for which respondent contends, there is no way in which the Commission can proceed against one who violates the reporting requirements. If that construction is adopted, § 6 (b), as the court below said, will be rendered "sterile." This result cannot be escaped by contending that § 6 (b) applies to some past offenses and not to others. In any event, if § 6 (b) applies to any past offenses it must apply to those committed by respondent, because the Commission proceeded in this case as promptly as possible consonant with a full investigation of the secret and complicated transactions carried on by respondent.

If the jurisdiction of the Commission to enter an order under § 6 (b) were dependent upon final action sufficiently prompt to affect a trader before a violation was completed, it would be utterly impossible to observe the procedural requirements which the law establishes. There is no merit in the argument that the Commission's power under § 6 (b) is coincident with the existence or present threat of wrongdoing and ceases with the termination of such wrong-doing or threat. If the power of the Commission were so limited, then the term of suspension which the Commission might impose would likewise be limited because the preventive purpose would not be furthered by prolonging suspension beyond the present existence of threat or violation. But the continuation of a violation could not in any event last beyond the moment at which a suspension order becomes effective. If respondent's contentions are sound, every order would become illegal the moment it became effective because the

order would then and thereafter relate to an offense which the order itself had terminated and relegated to the past. No construction should be adopted which thus devitalizes the statute and makes a mockery of legislation designed to be remedial.

The amount of time necessary to dispose of violations is not always within the Commission's control. In this case, investigation was begun as soon as the Grain Futures Administration had reasonable cause to suspect the existence of respondent's illegal conduct. A cursory survey of the documentary evidence in this case shows that a long period of time was necessarily consumed in uncovering involved transactions deliberately designed and executed to avoid detection. The construction of § 6 (b) urged by respondent puts a premium on craftiness by permitting successful concealment to thwart the Commission's authority.

In this connection it is significant that the Grain Futures Act does not provide for cease and desist orders against those who violate the reporting requirements. If all that Congress intended was to give the Commission summary powers to act against violators caught in the commission of an offense, it would appear that the Commission would have been empowered to enter cease and desist orders which would have had the practical effect of stopping present violations. The fact that the Grain Futures Act does not provide for a criminal punishment for violation of the reporting requirements, in no way tends to prove that § 6 (b) was not intended to be effective as a means of barring from trading privileges those who violate the Act or attempt to manipulate the market price of grain.

The fact that § 6 (a) uses the words "has failed or is failing" whereas § 6 (b) uses the words "is violating" and "is attempting to manipulate" is not conclusive of the meaning of § 6 (b).

Section 6 (b), as construed by petitioners, is constitutional. Respondent's contention that § 6 (b), as construed by petitioners, is unconstitutional, rests upon the unwarranted assumption that so construed the section would be a criminal statute.

Messrs. Francis X. Busch, Orville J. Taylor, and *James J. Magner* were on the brief for respondent.

The theory of statutory regulation expressed in the Grain Futures Act contemplates the self-regulation of the licensed contract markets by the governing boards thereof, under governmental supervision. The responsibility for the making and filing of its reports, whether by the board or the members, for the prevention of the manipulation of prices and dissemination of false and misleading market information, is made a condition precedent and subsequent to the continued enjoyment by the contract market of its designation as such.

Comparison of the provisions of § 6 (a) and (b) and § 9 of the Grain Futures Act, requires the conclusion that § 6 (b) was intended only to provide a method for purging the contract markets of current practices seeking to manipulate the market price of grain. The section was not intended to authorize the institution of purely punitive proceedings long after the practices have ceased.

In each case arising under the statute, the essential inquiry is whether or not the evidence received will justify the conclusion that the accused person is attempting to manipulate the market price of grain, and each case presents a new and separate inquiry.

In the case at bar, it was neither alleged, nor proved, that the respondent was attempting to manipulate the market price of grain at the time of the filing of the complaint. The complaint was not initiated in accordance with either the letter or the intent of the statute.

If § 6 (b) may be invoked by the Secretary of Agriculture after the passage of three years, it can be invoked after the passage of ten years. To construe the Act as authorizing the Secretary to proceed thereunder at any time selected by him would be contrary to the national policy as expressed in statutes of limitations for far more serious offenses.

Examination of the legislative history of the Future Trading Act (the immediate statutory predecessor of the Grain Futures Act), indicates that the intent and purpose of the legislation was the prevention and frustration of manipulative practices.

The scrutiny, consideration and revision to which § 6 of the original Future Trading Act was subjected when it reached the Senate Committee on Agriculture and Forestry, which added § 6 (b), precludes any conclusion that the differing language employed in the respective sections was the result of "inadvertence." It appears from the context of the respective sections and from the testimony of witnesses before the Committee that the language of each section was advisedly chosen. It is apparent that the Congress recognized that in the one section it was dealing with the licensed contract market, as such, and in the other section, dealing with the rights of individuals.

It is not consistent with our theory of government to permit the fact of guilt and the duration, extent and nature of punishment, to be determined and adjudged by legislative agencies.

Authorities involving the revocation of licenses by administrative agencies are not here applicable, since the Congress of 1922 did not undertake to require licenses from individuals making contracts for the future delivery of grain.

The Commission's conclusion that respondent attempted to manipulate the market price of wheat during

1930 and 1931, which is predicated primarily upon the failure to comply with reporting requirements of the Secretary of Agriculture during 1930 and 1931, is not supported by the weight of the evidence.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Section 6 (b) of the Grain Futures Act, September 21, 1922, c. 369, 42 Stat. 998, 1001, provides that if the Secretary of Agriculture has reason to believe that any person "is violating" any provision of the Act, or any rules and regulations made pursuant thereto, or "is attempting" to manipulate the market price of grain in violation of the provisions of the Act, the Secretary may serve upon the person a complaint stating his charge in that respect and requiring him "to show cause why an order should not be made directing that all contract markets until further notice of the said commission refuse all trading privileges thereon to such person." The commission referred to is a board "composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General," before whom the hearing on the complaint is had. This case is here to review a decree of the United States Circuit Court of Appeals for the Seventh Circuit which set aside an order entered by the commission under that section. Certiorari was granted on account of the novelty and importance of the question presented.

April 11, 1934, the Secretary of Agriculture caused such a complaint to be served upon Arthur W. Cutten. It recited that during the years 1930 and 1931 he was, and since had been, continuously a member of the Chicago Board of Trade; and that by its regulations made pursuant to the Grain Futures Act he was required:

"to report to the Grain Futures Administration his net position in futures owned or controlled by him, long or short, by grain and by future, when he had net open

commitments in any one future equal to or in excess of 500,000 bushels. . . ." [and also] "daily trades made by him on the Board of Trade, in futures in which he owned or controlled open commitments equal to or in excess of 500,000 bushels."

The complaint alleged further that:
"during the years 1930 and 1931 [he] conspired and colluded with various persons and grain firms of the Board of Trade to conceal his trading and position in the market from the Grain Futures Administration. In furtherance of said conspiracy, respondent made inaccurate, incorrect and false reports of his position in the market to the Grain Futures Administration, failed and refused to report accurately and correctly his position in the market and trades made by him," etc.

Then followed, in 44 numbered paragraphs, specifications of Cutten's alleged violations of the regulations and the Act on dates between March 6, 1930 and December 31, 1931.

A referee was appointed to take the evidence. The hearings before him began on May 14, 1934. Upon the opening of those proceedings, Cutten moved to quash the complaint on the ground that § 6 (b) empowered the Commission to act only against persons who are presently committing offences; and that consequently, it had no authority to deny to him trading privileges for violations committed more than two years prior to the institution of the proceedings against him. The referee, without passing upon the motion to quash, proceeded to take the evidence; the hearings before him were concluded May 24, 1934; then the commission heard the complaint on briefs and oral argument; and before it the motion to quash was renewed. On February 12, 1935, the commission overruled the motion; made findings of fact on the evidence; concluded that Cutten's conduct "constitutes a violation of the Grain Futures Act,

and the Rules and Regulations made pursuant thereto"; and ordered that "all contract markets refuse all trading privileges thereon to Arthur W. Cutten for a period of two years from March 1, 1935."

This suit was brought to set aside that order. The Circuit Court of Appeals held that the power conferred by § 6 (b) is remedial, not punitive; that it is limited to suspending a trader who "is violating any of the provisions of this Act, or is attempting to manipulate the market price of any grain," in other words, one who is presently committing an offence; that at the time of the filing of the complaint there was no wrong existing to be remedied, the latest wrongdoing complained of having occurred more than two years before the filing of the complaint by the Secretary of Agriculture; that, therefore, the commission was without authority to entertain the complaint, and should have granted the motion to quash. 80 F. (2d) 140.

The Government argues that, since violations of the reporting requirements by their very nature cannot be detected during the course of commission, the literal construction thus given to § 6 (b) renders it impractical and ineffective as a means of dealing with those persons who violate any of the provisions of the Act or attempt to manipulate the market price of grain. Incidents in the history of the legislation are cited to support the Government's contention. In reply, it is argued that ample remedy is afforded by other provisions of the Act; that these confer broad power over boards of trade; and that the boards of trade may control their own members. It is urged that for the construction given to § 6 (b) by the lower court support may be found in the different language employed in § 6 (a). For it authorizes the commission to suspend "or to revoke the designation of a board of trade as a 'contract market' upon a showing that such board of trade has failed or is failing to comply"

with the requirements prescribed. Attention is also called to the penalty provisions of § 9.

It would be inappropriate for us to discuss these, and other, arguments presented. The language of § 6 (b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said in *Iselin* v. *United States,* 270 U. S. 245, 250–251: "The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *A fortiori,* it may not be done for the purpose of making punishable action which, on the face of the statute, is merely to be prevented. Compare *United States* v. *Weitzel,* 246 U. S. 533, 542–543.

Affirmed.

Syllabus.

CARTER *v.* CARTER COAL CO. ET AL. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CARTER ET AL.

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

R. C. TWAY COAL CO. ET AL. *v.* GLENN, COLLECTOR OF INTERNAL REVENUE. R. C. TWAY COAL CO. ET AL. *v.* CLARK.

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

Nos. 636, 651, 649, and 650. Argued March 11, 12, 1936.—Decided May 18, 1936.

1. A stockholder may maintain a bill to enjoin the corporation and its directors from submitting to legislative exactions and regulations which are unconstitutional and would seriously injure the business of the corporation. P. 286.
2. Where irreparable injury from unconstitutional legislation is certain and imminent, suit for an injunction need not be deferred until injury has been actually inflicted. P. 287.
3. The "Bituminous Coal Conservation Act of 1935" declares, with specifications, that the mining and distribution of such coal are so affected with a national public interest and so related to the general welfare that the industry should be regulated. It recites further, with details, that such regulation is necessary because interstate commerce is directly and detrimentally affected by the state of the industry and its practices, and that the right of the miners to organize and collectively bargain for wages, hours of labor and working conditions should be guaranteed in order to prevent constant wage-cutting and disparate labor costs, detrimental to fair interstate commerce, and in order to prevent the obstructions to that commerce that arise from disputes over labor relations at the mines. The Act thereupon provides an elaborate scheme for the creation of a national commission, the organization of numerous coal districts, the setting up of numerous boards in the districts, and the fixing of all prices for bituminous coal, and of the wages, hours and working conditions of the miners, throughout the country. *Held*:

(1) That a so-called excise tax, imposed by the Act, of 15% of the sale price or market value at the mine of all bituminous coal produced in the country, subject to a draw-back of 13½% allowed to those producers who submit to the price-fixing and labor provisions of the Act, is not a tax but a penalty to coerce submission, and cannot be upheld as an expression of the taxing power. P. 288.

(2) The provisions of the Act looking to the control of the wages, hours, and working conditions of the miners engaged in the production of coal, and seeking to guarantee their right of collective bargaining in these matters, are beyond the powers of Congress, because—

(a) The Constitution grants to Congress no general power to regulate for the promotion of the general welfare. P. 289.

(b) The power expressly granted Congress to regulate interstate commerce does not include the power to control the conditions in which coal is produced before it becomes an article of commerce. P. 297.

(c) The effect on interstate commerce in the coal of labor conditions involved in its production, including disputes and strikes over wages, etc., is an indirect effect. P. 307.

(3) Since a mine-owner, by refusing to accept the regulatory provisions, would incur a prohibitive tax and be deprived, by other provisions of the Act, of the right to sell coal to the United States or to any of its contractors for use in performing their contracts, the regulations are in fact compulsory. In view of this compulsion, provisions of the Act seeking to authorize part of the producers and miners to fix hours for the entire industry, and part of the producers and miners in the districts to fix minimum wages in their districts, are legislative delegation in its most obnoxious form, and clearly violate the Fifth Amendment. P. 310.

(4) The price-fixing provisions are not separable from the provisions concerning labor and therefore cannot stand independently. They are so related to and dependent upon the labor provisions, as conditions, considerations or compensations, as to make it clearly probable that, the latter being held bad, the former would not have been passed. P. 312.

(5) The constitutionality of the price-fixing provisions is not considered. P. 316.

4. Whether the end sought to be attained by an Act of Congress is legitimate is wholly a matter of constitutional power and not

at all of legislative discretion. Beneficent aims, however great or well-directed, can never serve in lieu of power. P. 290.

5. To a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed. P. 291.
6. The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to all purposes affecting the Nation as a whole with which the States severally cannot deal, or deal adequately, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have always been definitely rejected by this Court. P. 291.
7. Those who framed and those who adopted the Constitution meant to carve from the general mass of legislative powers, then possessed by the States, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty as to what was taken and what was left, the national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the States without change or impairment. P. 294.
8. The States, in respect of all powers reserved to them, are supreme. And since every addition to the national legislative power to some extent detracts from or invades the power of the States, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. P. 294.
9. The general government possesses no inherent power over the internal affairs of the States; and emphatically not with regard to legislation. P. 295.
10. The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the national government, is one of the plainest facts in the history of their deliberations. Adherence to that determination is incumbent equally upon the federal government and the States. State powers can neither be appropriated on the one hand nor abdicated on the other. P. 295.
11. If the federal government once begins taking over the powers of the States, the States may be so despoiled of their powers, or—what may amount to the same thing—be so relieved of the respon-

sibilities which the possession of the powers necessarily enjoins, as to reduce them to little more than geographical divisions of the national domain. P. 295.

12. The Constitution is a law—the supreme law of the land. Judicial tribunals are required to apply the law to the facts in every case properly brought before them; and in so doing, they are bound to give effect to this supreme law as against any mere statute conflicting with it. P. 296.

13. In the discharge of that duty, the opinion of the law-makers that a statute passed by them is valid must be given great weight; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial, is wholly irrelevant to the inquiry. P. 297.

14. As used in the commerce clause of the Constitution, the term "commerce" is the equivalent of intercourse for the purposes of trade, and includes transportation, purchase, sale and exchange of commodities between citizens of the different States. The power to regulate commerce embraces the instruments by which commerce is carried on. P. 297.

15. Production and manufacture of commodities are not commerce, even when done with intent to sell or transport the commodities out of the State. P. 299.

16. The possibility or even certainty of the exportation of a product or an article from a State does not put it in interstate commerce before it has begun to move from the State. To hold otherwise would be to nationalize all industries. P. 301.

17. One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures it, his business is purely local. So far as he sells or ships it, or contracts to do so, to customers in another State, he engages in interstate commerce. In respect of the former, he is subject to regulation by the State; in respect of the latter, to regulation only by the federal government. Production is not commerce, but a step in preparation for commerce. P. 303.

18. The incidents leading up to and culminating in the mining of coal,—the employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—each and all constitute intercourse for the purposes of production, not of trade. Commerce in the coal is not brought into

being by force of these purely local activities, but by negotiations, agreements and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence; commerce disposes of it. P. 303.

19. To say that an activity or condition has a "direct" effect upon commerce, implies that it operates proximately—not mediately, remotely, or collaterally—to produce the effect, without the presence of any efficient intervening agency or condition. P. 307.
20. The distinction between a direct and an indirect effect upon interstate commerce is independent of the magnitude of the effect or of its cause. P. 308.
21. The evils which come to interstate commerce from struggles between employer and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices, however extensive such evils may be, affect interstate commerce in a secondary and indirect way; they are local evils over which the federal government has no legislative control. P. 308.
22. The want of power in the federal government is the same whether the wages, hours of service, and working conditions and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495. P. 309.
23. A declaration in a statute that invalidity of any of its provisions shall not affect the others, reverses the presumption of inseparability, but it does not alter the rule that if one of two mutually dependent parts be unconstitutional, the other cannot be upheld. P. 312.

63 Washington Law Rep. 986, affirmed in part and reversed in part.

12 F. Supp. 570, reversed.

NUMBERS 636 and 651 were cross writs of certiorari, 296 U. S. 571, removing a case from the United States Court of Appeals for the District of Columbia, which had reached that court by appeal from the Supreme Court of the District, but which the upper court had not heard. It was a suit by Carter, stockholder and president of the Carter Coal Company, to enjoin the corporation, its officers and directors, from filing an acceptance of a code formulated under the Bituminous Coal Conservation Act

of 1935, and from paying the tax imposed by the Act. The Commissioner of Internal Revenue, a Collector of Internal Revenue, the Attorney General, and the United States Attorney for the District of Columbia, were joined as defendants, the bill praying that they be restrained from attempting to enforce the tax. The trial court found that the labor provisions of the Act and Code were unconstitutional, but that the price-fixing provisions were valid and were separable from the labor provisions. It therefore denied relief, except for granting a permanent injunction against collection of taxes accrued during the suit.

The other two cases (Nos. 649 and 650) were removed to this Court by certiorari, 296 U. S. 571, 572, from the Circuit Court of Appeals where they were pending on appeal from decrees of a District Court in Kentucky. One was a suit by several coal companies against a Collector, to enjoin him from collecting the taxes sought to be imposed by the Act mentioned above. The other was a suit brought by a stockholder against his corporation and some of its officers, to compel acceptance of the Act and Code, by mandatory injunction. In these cases, the District Court found the Act valid in its entirety, and decreed accordingly.

Summary of oral argument of *Mr. Frederick H. Wood* in behalf of Mr. James Walter Carter, petitioner in No. 636 and respondent in No. 651.

In view of the Government's concession that the taxing provisions may not stand unless the regulatory provisions are valid, the constitutional questions presented are, first, whether the Act is within the power of the Federal Government to regulate commerce, and, second, whether it is violative of the due process clause of the Fifth Amendment.

It is petitioner's position that the Act is not one to regulate interstate commerce but is an attempt, under

the guise of an assertion of the commerce power, to regulate the productive industry of bituminous coal mining, and that it is unconstitutional and void whether considered as a whole or considered in respect of its several regulatory provisions.

The wages, hours and labor relations provisions of the Act apply to all producers of coal whether or not it ever moves in interstate commerce. They also apply in respect of the production of "captive" coal by steel companies, industrial plants and railway companies who mine coal for their own use and who are not engaged in commerce in coal in any sense, either state or interstate. In any case these labor provisions are not regulations of interstate commerce but are regulations of the intrastate activity of production, and constitute a regulation of productive industry and not of interstate commerce, as was settled by this Court in the *Schechter* case, 295 U. S. 495.

The Government seeks to distinguish the *Schechter* case upon five grounds, none of which is tenable. It is first said that the defendants in the *Schechter* case were engaged in a strictly local activity, since interstate commerce had ceased in the articles in respect of which the labor sought to be regulated was performed. But no amount of argument can convert a regulation of production preceding interstate commerce in the articles produced into a regulation of interstate commerce. The decision in the *Schechter* case, while relating to a regulation of production occurring after interstate commerce had ceased, was not predicated upon this narrow ground, as is shown by the prior decisions of this Court cited and relied on in the *Schechter* opinion, holding that the production of articles intended for subsequent movement in interstate commerce is not subject to regulation by the Federal Government. These prior cases, reaffirmed in the *Schechter* decision, specifically included cases

involving the mining of coal as well as other productive operations.

It is next urged that wages affect cost and that cost controls price, and hence that wages are subject to federal regulation. The same argument was pressed upon this Court in the *Schechter* case and was rejected; and it is no distinction to urge in this case, as the Government does, that wages in bituminous coal mining represent 60% to 65% of the mining cost and hence that they are the governing factor in the determination of price. As appears from the opinion of this Court in the *Schechter* case, precisely the same argument was urged there, it being shown that labor costs in the live poultry slaughtering business also constituted 60% to 65% of the total cost of operating slaughter-houses. The argument based upon the relation of wages to cost, and of cost to price, and of price to interstate commerce, as this Court said in the *Schechter* case, proves too much and, if accepted, would have the result that all the activities of the people and all of the authority of the States over their domestic concerns would exist only by sufferance of the Federal Government.

Thirdly, it is urged that wages in the bituminous coal industry are *sui generis,* since they represent a greater proportion of costs than in any other industry. This argument ignores the fact that the test of constitutional power under the commerce clause in relation to intrastate activity is not whether the effect of that activity upon interstate commerce is substantial, but whether it is direct. To accept the Government's contention would potentially subject all matters which affect interstate commerce to federal regulation, resulting in the erection of a centralized government of unlimited authority not contemplated by the Constitution.

Fourthly, it is contended that wage-cutting has been the principal factor in price-cutting and hence may be

prevented and controlled by federal authority, since price-cutting results in the diversion of business from one mine or district to another. The same argument was pressed upon the Court in the *Schechter* case in a vivid recital by Mr. Richberg of the downward spiral of wages and prices composed of successive wage-cuts and price-cuts until industry had become prostrate. This argument the Court in the *Schechter* case rejected, and properly so, since it is no part of the authority or duty of the Federal Government to prevent the diversion of business from one producer to another, or from one State to another, under the free play of competition, or to determine where or in what amount any man or any State shall sell his or its production, either absolutely or in relation to others.

Fifthly and finally, it is urged that wages may be subjected to federal control in order to put an end to so-called unfair competition among coal producers and among producing States resulting from wage-cutting as translated into price-cutting; because, it is said, the States are powerless to establish uniform or properly related wage scales and hence the Federal Government is empowered to do so. This is but the timeworn and threadbare argument that the Federal Government is empowered to legislate as to all matters in which uniformity is deemed desirable in the interest of the general welfare of the nation as a whole, and that in such circumstances the Congress may, under the pretext of the commerce clause, provide for such uniformity. This argument was rejected by this Court in *McCulloch* v. *Maryland,* demolished in *Kansas* v. *Colorado,* and repudiated in the *Schechter* case.

The wage and hour provisions empower stated percentages of operators and miners to fix the wages and hours of other operators and miners at any level they see fit and regardless of the wishes of those bound thereby. No adequate reason has been advanced in support of the

conclusion that power may be delegated to non-official bodies without any standard to guide and control and limit their action, although, by confession, a similar grant of power to a public official or commission would be unconstitutional.

The collective bargaining provisions are likewise beyond the authority of the Congress under the commerce clause. This is so for the reason that collective bargaining requirements of the statute are also a regulation of productive industry and not a regulation of interstate commerce, and are even more remotely connected with interstate commerce and more indirect in their effect thereon than the attempted regulation of wages and hours of miners. The argument that the collective bargaining provisions may be imposed in order to prevent strikes and consequent interruptions of interstate commerce is but a repetition of the same argument urged in support of the NRA regulations in the *Schechter* case. Were the argument one of first impression, it would have to be rejected because of the indirect effect upon interstate commerce of the matters to be regulated and because the power asserted is an invasion of the powers reserved to the people or to the States by the Tenth Amendment. But the matter is not one of first impression, since in the first *Coronado* case, 259 U. S. 344, and in other cases, the Court has held that the prevention of production through labor disputes, with consequent interruption of interstate commerce in the articles produced, is not within the Anti-Trust Acts unless the interruption is accompanied by a direct and positive intent to interfere with and obstruct interstate commerce; and in the *Schechter* case, 295 U. S. 495, the Court pointed out the reasons why this requirement of direct intent is not merely a statutory requirement but is equally expressive of constitutional limitations upon the authority of the Federal Government.

The code contains provisions for the fixing of minimum and maximum prices, but due to the conditions of over

capacity and over production in the industry, the minimum prices fixed will for all practical purposes also be the maximum prices. The price-fixing provisions apply to all coal sold whether ever moving across state lines or not; and the statute thereby seeks to fix the prices of purely local sales which, as shown by the record, constitute at least 42% of all bituminous coal sold.

The statute states that prices are to be fixed "in order to extend the stabilization of wages, working conditions and maximum hours of labor," thus linking the provisions inseparably with the wage and hour provisions. The District Boards are given an uncontrolled authority to classify coals and to make price variations as between mine and mine and as between consuming areas such as they "may deem necessary and proper." The unbounded magnitude of the power thus conferred upon these agencies is made manifest by the fact that under the National Industrial Recovery Act there were over 27,000 various sizes, varieties and prices of bituminous coal within minimum price area No. 1, which comprises the great majority of the producing States and all of the largest producing States, such as Pennsylvania, Ohio, Illinois, West Virginia and Kentucky.

The provision for coördination of prices, without any definite standard to govern the coördination, amounts in fact to a power and duty to allocate production as between States and producing areas, and therefore the necessary effect and intended purpose of the coördination provisions of the minimum price fixing formula are to control and allocate the competitive situation of northern mines of Pennsylvania, Ohio and Illinois in common consuming markets, as against the southern mines in West Virginia, Kentucky and other States.

The Government asserts that power exists in the Congress to regulate the prices at which bituminous coal may be sold solely because after sale the coal moves across

state lines. If on this account Congress may fix or regulate the price of coal, it may fix the prices of every other article of common use; for substantially all of them are sold for transportation across state lines. But the Government does not stop there; it contends that it must also have the power to regulate the prices at which all articles of common use may be sold even though they are sold in purely local transactions, without any interstate transportation being contemplated or ever in fact resulting,—the argument being that in order to prevent discriminations arising against the interstate seller through the federal price regulation the Government must have the power likewise to control the price of purely local sales. The Government thereby seeks to destroy the economic system under which we have lived, developed and prospered for 150 years, and under which each citizen of this country, under the protection of constitutional guarantees, has exercised the right to live where he pleases, to work at what he pleases, to produce what he pleases and to buy and sell what and where he pleases, from whom or to whom he pleases, and at prices satisfactory to himself.

The power to fix prices, as this Court has said in the *Trenton Potteries* case, 273 U. S. 392, "involves the power to control the market," and this in turn involves the power to control production and to limit, allocate or destroy it. The power to control production in turn involves control not only over industry but over population as well; for population will naturally follow productive opportunity. The power to control the prices at which articles of common use may be sold in interstate commerce, therefore, carries with it the power to control the economic life of the Nation and hence of each of the several States. The question is not whether the power will be wisely or unwisely exercised, or whether the present statute would be wisely or unwisely adminis-

tered; the question is whether the power exists. If the Constitution had conferred upon the Congress the power to regulate for the general welfare, the question would be different; but the grant of such a power or its equivalent was four times voted down in the Constitutional Convention. The question presented is whether such power is comprised within the grant to the Congress of power "to regulate commerce among the several States."

The Federal Government has exercised the most complete control over the instrumentalities of interstate commerce, as for example, the railroads; and it has kept commerce free from artificial restraints and barriers imposed upon it by others, through legislation in the form of Anti-trust laws and by the decisions of this Court invalidating state statutes imposing such barriers and restraints. This is the first time in the 150 years of our history that it has been seriously suggested that the Congress is possessed of the power to impose a restraint or barrier of its own upon the free movement of interstate commerce by limiting prices at which all articles of common use may be sold. While the novelty of the proposal is not of itself sufficient ground for denying the power asserted, nevertheless the enormous consequences of the power claimed call for the most searching inquiry into the Constitution itself and into the intention of the framers and of the States and of the people at the time of its adoption, as well as into the history of the commerce clause as exemplified in the decisions of this Court construing it during the past 150 years, in order to ascertain whether a power of such consequence, carrying with it the power of complete control over the economic life of the people and of the States, lies submerged in the simple grant "to regulate commerce among the several States." We think it does not.

Numerous decisions of this Court have stated that the federal power over interstate commerce is narrower than

that over foreign commerce, and that while the Federal Government has complete power absolutely to prohibit the importation of commodities into the United States from foreign countries, it has no power to prohibit the movement of commodities from one State to another. This is because the framers intended this distinction between the powers. Even without these authoritative rulings of this Court, it is unthinkable that anyone would suggest that Congress could prohibit the movement of coal, cotton, corn, wheat, oil, cotton cloth, or boots and shoes, among the several States under the power to regulate interstate commerce. Consistently with the purpose of the commerce clause and the history of the purpose for which that power was conferred upon the Congress, it cannot be contended that that power was intended to authorize the Congress to limit the quantity of these ordinary and useful articles which can be transported across state lines, and thereby limit the quantity which may be produced in any given State, by limiting the prices to be received therefor, both absolutely, and in relation to the prices in competing States of production. The Constitution must be construed as a whole, and each clause given a scope and effect consistent with the provisions of that instrument as a whole. The underlying principle of the Constitution is duality of government. Each of the thirteen colonies was jealous of each other, and equally fearful of the establishment of a strong centralized government with power to encroach upon the rights of the States and of the people. The Constitutional Convention disclosed the liveliest apprehensions as to the effect of possible combinations of States against other States in the Federal Congress. The insistence of the framers of the Constitution upon the maintenance of the principle of duality of government, which preserves not merely the political existence but the economic existence and rights of the several States, completely negatives

any suggestion that the commerce clause was intended to confer upon the Federal Government the power to control the essential economic activities of the States and of the people through determination of the prices at which they might sell what they produced.

Although the case now before the Court is to be considered in the light of our whole experience, and not merely in that of what was said 150 years ago, the scope of the power intended to be conferred must be determined with regard to the conditions which gave rise to the adoption of the Constitution, and great weight is to be attached to contemporaneous exposition and interpretation. Considered from the historical standpoint, it is entirely clear that the power now asserted was not intended to be granted by the commerce clause. At the time of the adoption of the Constitution navigation was the chief agency of commerce, and among the purposes of the founders was to subject that instrumentality of commerce to federal control. All that the Congress has since done in the regulation of more modern systems of transportation may fairly relate to that purpose, that is, the regulation of instrumentalities of interstate commerce. But the clause had another purpose, which was to keep commerce among the States free from artificial barriers and restraints which the States prior to the adoption of the Constitution had placed upon it by the erection of impost duties and other regulations. These barriers were among the chief causes leading to the formation of the Federal Union and the adoption of the Constitution. It is impossible to conclude that the clause had another purpose not consistent with this last one, i. e. to permit the Federal Government to place restrictions upon interstate commerce through price control of the same type which it was the purpose of the commerce clause to prevent the several States from imposing upon it.

The jealousy with which the States in the formation of the Constitution sought to protect their right to sell their products beyond their own borders, free from interference by the central government, is brought out by the adoption of the provision in the Constitution forbidding the United States to lay any duty or tax upon exports from any State. At the time of the adoption of the Constitution the important trade of the States was foreign commerce; and while, as we have seen, the foreign commerce power conferred upon the Congress includes the power absolutely to prohibit importations into this country, the staple States, that is, the producing States, in the Constitutional Convention refused to permit the federal power over foreign commerce to extend to the placing of any barrier upon their right to export their products. The power to control the export of articles from the States was refused the Federal Government upon the express ground that the States feared a control over their productive activities.

The meaning of the interstate commerce clause is further made clear when it is considered that express provisions offered in the Constitutional Convention in place of the interstate commerce grant, in language unquestionably broad enough to have included the price-fixing power now claimed, were repeatedly rejected by the Convention. I refer to proposals repeatedly made in the Convention to give the Federal Government the power to negative state action when opposed to the general good, and to confer upon the Federal Government the power to legislate upon all matters in respect of which the States acting separately were incompetent to act.

When the Constitution was presented to the States for adoption, the friends of that instrument found it necessary to allay the fears of the States and of the people that provision had been made for a centralized govern-

ment which would control their economic existence; and it was for the purpose of allaying those fears that the States and the people were told in the Federalist papers that the very clause under which the Government in this case claims the power to prevent the free flow of commodities across state lines would have precisely the opposite effect and would provide "an unrestrained intercourse between the states themselves . . . and free circulation of commodities of every part."

The purpose of the present statute, as shown by its title, by its legislative history, by its recitals, by its substantive provisions, and by the factual background upon which it is attempted to be supported on the present record, is not to free interstate commerce in bituminous coal from artificial restraints or burdens but, on the contrary, to impose Federal burdens and restrictions upon such interstate commerce, to improve the economic well-being of persons engaged in the bituminous coal industry, or some of them, whether owners or workers, by the regulation of wages, the restriction of competition and the allocation of production to the several States through the establishment of coördinated prices. The purpose is to control cost and prices in order that the ability of the States and producing areas and of the persons engaged in the industry, competing with each other in the sale of coal in common consuming market areas, will be determined by federal agencies, to the end that those engaged in the industry, whether workers or producers, will obtain a larger share of the national income than they have hitherto enjoyed.

The power claimed cannot be limited to the coal industry. Coal is no more a national necessity than wheat, corn, cattle, iron and its products, salt, oil, clothing and many other articles that could be named. As in regard to coal, the predominant production of each of those is confined within a few States, while their consumption is

nation wide. If the argument advanced in support of the present statute be accepted, planned economy and complete paternalism in respect of all our economic activities await only an Act or a series of Acts of Congress to be made effective.

Mr. Wood and *Mr. William D. Whitney* filed a brief in behalf of Mr. Carter.

Oral argument, in part, of *Assistant Attorney General Dickinson* for respondents in Nos. 636 and 649 and for petitioner in No. 651:

There is general agreement that the statute rests upon the commerce power. The tax provision stands or falls with the validity of the scheme of regulation under the commerce power.

The Government contends that the power to regulate interstate commerce includes a power, when consistent with due process, to regulate prices in interstate-commerce transactions. The Government rests this power upon the admitted power of Congress to regulate sales and other contracts which are transactions in interstate commerce. As a matter of fact, Congress goes farther and regulates contracts, in many instances, which merely affect interstate commerce; as, for example, under the Anti-trust laws, agreements to monopolize or restrain interstate commerce, when the agreements obviously do not themselves have to be interstate transactions. And so, also, many of the contracts that are regulated by the Grain Futures Act and the Packers and Stockyards Act are not themselves interstate contracts, interstate transactions, but are simply contracts which have an effect in one way or another on interstate commerce.

The power of the States to regulate sales in interstate commerce has been expressly denied by this Court in cases like the *Dahnke-Walker* case, 257 U. S. 282, and the *Flanagan* case, 267 U. S. 222, and the reason why the

state power has been denied is because there exists a federal power to regulate them, so that a state power of regulation would be a usurpation of a power which exists in the Federal Government. So far, therefore, as relates to congressional regulation of transactions of that character, there is no violation of any reserved rights of the States under the Tenth Amendment.

So far as relates to the commerce power, it seems difficult to understand how or why there is any difference in the application of the commerce power to the price term as compared to any other term in an interstate contract. Congress, in the course of its legislation, has adopted provisions that go to the price term, as, for example, in § 2 of the Clayton Act. It has never, as far as I know, been claimed that that provision is unconstitutional either under the commerce clause or under the due process clause, because it relates to price.

The Government does not contend that Congress may, in the exercise of its commerce power, regulate prices in interstate commerce of all commodities. Price-fixing for any commodity always raises the question whether it is consistent with due process. [Counsel then pointed out the parallelism between conditions in the bituminous coal industry and those in the milk industry in New York to which this Court referred in *Nebbia* v. *New York,* 291 U. S. 502, in holding that state regulation of prices in that industry did not transgress the due process requirements of the Federal Constitution and, on the basis of these considerations, argued that if the commerce power included the power to regulate prices, the exercise of that power in the case of bituminous coal was not obnoxious to due process.]

In order to avoid the conclusion that the commerce power extends to the field of price regulation, counsel for petitioner is driven to contend for two propositions which

the Government submits are entire novelties in constitutional law, namely, that the commerce power has a broader scope when applied to the mere agency of commerce, namely, transportation, than when applied to the commerce itself; and, secondly, that while with respect to transportation the power to regulate is an affirmative power of regulation, yet with respect to commerce itself the power is purely negative—in fact, is not a power to regulate at all, but only a power to keep the commerce free from regulation, in the first instance by the States, and derivatively from regulation or obstructions by private individuals.

If the Constitution intends the commerce clause to be a mere prohibition against interference by the States with interstate commerce, why, it may be asked, is it not expressed as a prohibition against the States instead of in the form of an affirmative grant of power to Congress? The Constitution contains numerous and important prohibitions against state action.

First, as to history. Counsel undertakes to argue that the commerce clause must be given a limited or negative construction because of what happened at the Federal Convention in regard to Randolph's Sixth Resolution, a resolution proposing that the Federal Government should have the power to legislate in all cases in which the separate States are incompetent, or in which the harmony of the Union may be interrupted by the exercise of individual legislation. He says that that proposal was voted down three or four times, and that its persistent and continued rejection is an illustration of the jealousy of federal power that existed in the Convention.

The Sixth Randolph Resolution, so far from having been voted down by the Convention three or four times, was not voted down once, but was actually adopted by the Convention by a vote of eight States to two. The

resolution went to the Drafting Committee, the so-called committee on detail, and there it disappeared; and in view of the fact that it was a direction by the Convention to the Committee on Drafting, it seems reasonable to suppose that the omission to include the resolution in the specific language of the Constitution was due to the understanding by the Drafting Committee and by the Convention that the granted powers were to be construed as each extending, within its own field, to all matters which could be reached by that power and wherein the States were incompetent.

Petitioner refers to the jealousies and dissensions that existed among the States at that time, and he seems to imply that the purpose of the Constitution was to pamper and flatter and gratify those jealousies and dissensions. The opposite was the case. The men of 1787 were less afraid of federal power within the fields of proper federal action than are many men today, and one of the questions presented by this case is whether the Constitution is to be reduced today to what the Anti-Federalists of 1787 would have liked to see it.

It seems clear that the men who framed the Constitution, and the States which adopted it, used words broad enough, unless we import some unwritten and implied limitation into those words, to cover both the instance of the regulation of transportation rates and the regulation of prices in sales in interstate commerce; and the only basis for importing from the outside such an unwritten and implied limitation is speculation and hypothesis.

There can be no doubt that if the exercise of a federal power transgresses a plain constitutional limitation imposed in the interest of the States, the principle of duality may be said to operate when that exercise of federal power is outlawed in the interest of the state power. But where, on the other hand, there is a plainly expressed federal power on the one side, and nothing on

the other side but the mere general fact that we have a dual form of government, then the controlling consideration of where the line should be drawn seems to be the express language of the Constitution as to where it *is* drawn, rather than what to one mind or another might seem to be the proper distribution of powers which *ought* to prevail on the basis of a general conception and theory of dualism. To adopt the latter test, whether we call it dualism or any other name—that is, the test of where we think the line ought to be drawn in a dual system of government—is, after all, to appeal from the express constitutional provision itself to considerations of policy and to make those considerations the test of the constitutional distribution of powers rather than the language of the grant.

Finally, that the federal power to regulate interstate commerce is not purely a negative power, but may be asserted affirmatively by the Federal Government so long as the requirements of due process are met, is, we submit, firmly established by the decisions of this Court for over a hundred years. It is established, first of all, by the cases dealing with transportation, unless there is to be a new distinction established henceforth between transportation and commerce, making transportation commerce in a fuller sense than is commerce itself.

It is established also by all the cases which have upheld the exercise of the commerce power for the promotion of the health, safety, and morals of the Nation—cases which show that Congress has applied restrictive regulations to commerce other than transportation and not in any sense directed to merely protecting commerce from burdens or obstructions imposed by the States or by private individuals.

But perhaps the most conclusive answer to the claim that the commerce power confers no affirmative regulatory power upon Congress is the language of this Court in *In re Rahrer,* 140 U. S. 545, at p. 561:

"Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress."

Any statute may be branded by those not in sympathy with its policy with hostile descriptions of purpose. The Constitution does not describe the ultimate results or objectives which Congress may legitimately have in mind in exercising its granted powers. The Constitution speaks in terms of powers and not in terms of purposes or objectives. To hold that a granted power may not be validly exercised where it is possible to describe its exercise as aiming at some result which is not expressed by specific language in the Constitution, would nullify most exercises of the granted powers, because the Constitution does not specify such objectives of policy.

From the standpoint of power, the question is whether the direct and immediate objective of the statute is so unrelated to the power sought to be exercised as not to fall within it. In the case of the present Act, the Government contends that the direct and immediate objective is one that falls squarely within the commerce power, namely, the regulation of competitive practices and methods of marketing coal in interstate commerce, whatever ultimate results may or may not follow from such regulation.

The novel doctrine that the commerce power is purely negative in character means that there is no governmental power in this country which can regulate interstate commerce affirmatively, because the States are excluded by the commerce clause, *ex hypothesi*, and therefore it means, if we accept the argument of counsel for the peti-

tioner, that with relation to the great mass of our most important commercial transactions today, which are interstate transactions, the Constitution, wholly without reference to the due process clause or to any of the great intended guaranties of individual liberty, but simply and solely by virtue of a defect of power—a vacuum in the document itself—has stayed the arm of governmental action and has permanently enacted as a rule of our fundamental law the economic policy of *laissez faire*.

I come now to the Government's contention that this statute as a whole is a regulation of competition and competitive methods in interstate commerce for the purpose of removing burdens and restrictions on that commerce resulting from the hitherto prevailing methods of competition.

The Government claims, and the trial court has found, that the bituminous coal industry has been suffering for years from a condition of destructive, cut-throat competition. The Government contends that the price-regulatory provisions in this Act constitute a reasonable and appropriate method of remedying that condition, with its attendant evils and resulting burdens and restrictions on commerce, and hence a method lying within the range of permissible legislative choice.

The Government submits that a type of competition which operates through the progressive and endless spiral of price-cutting and wage-cutting, to bring about such results as have been proved by 10 years of actual experience—not by speculation, but by actual experience—to lead to continued loss and bankruptcy for the preponderant part of the industry and to starvation wages for the miners, and to a condition which requires for its perpetuation the maintenance of an un-American system of barricaded mines guarded by private strong-arm men—the Government submits that such a type of competition is at least—and I think I am not overstating it—an unwhole-

some and destructive type of competition which, so far as it operates in interstate-commerce transactions, can be properly and legitimately restrained by congressional action within the sphere of the commerce power.

We submit that Congress may restrict, and has restricted, competitive conduct in interstate commerce, when in the judgment of Congress, the result of the competitive practices has been deleterious to those engaged in the commerce, and that that is the justification and excuse, for example, of such prohibitions as those which are contained in § 2 of the Clayton Act and § 5 of the Federal Trade Commission Act.

As pointed out by the Court in the *Olsen* case, 262 U. S. 1, the evils of competition, when the competition reaches the point where it begins to produce effects that are thought to be undesirable, generally work themselves out through prices, or through their effect on prices; and accordingly, we submit that it is an appropriate means to deal with this particular competitive situation for the Congress, in its legislative discretion, to choose the device of price regulation.

On the point made by petitioner that the Act undertakes to extend price regulation to all transactions, including purely intrastate transactions, and is therefore bad, the Government contends that on a proper construction of the Act that is not the case, and that the price-regulation provisions are expressly limited in their scope to sales in or directly affecting interstate commerce. [Counsel referred to and discussed in this connection the second paragraph of § 4 and the last sentence of § 3 of the Act.]

One of the difficulties which inevitably arise when, as in the present proceeding, the constitutionality of a statute is sought to be tested in the abstract, before any attempted application of the statute, is the danger of assuming that this or that provision will be unconstitutionally applied, and that the statute as a whole must

therefore fall. Almost any statute may be unconstitutionally administered. It may be administratively applied, or sought to be applied, to facts to which it does not constitutionally apply. But if any such unconstitutional application should, in fact, be attempted hereafter, if it should turn out that the officers charged with applying the Act should attempt to apply it in a way that oversteps the boundaries of the commerce clause, then the Act itself affords ample opportunity for the affected individual to try out the constitutional question.

The Government, of course, does not deny that the Act contemplates that it will reach many sales which are not themselves direct interstate commerce transactions, but which, although they are intrastate, nevertheless have such a direct and immediate effect on interstate sales that, if the interstate sales are to be regulated, the intrastate sales must be regulated also, or otherwise the regulation of the interstate sales would be nullified. If, as to such a sale, a code member should fail to comply with the regulatory provisions of the Act, then, of course, he would be subject to those regulations.

The power to regulate interstate sales carries with it the power to regulate many intrastate sales—to make the exercise of the federal power effective. *Shreveport Cases,* 234 U. S. 342; *Ruppert* v. *Caffey,* 251 U. S. 264; *Everard's Breweries* v. *Day,* 265 U. S. 545.

If the power does exist to regulate the interstate sales, then presumably the Constitution, in conferring that power, meant it, as in the case of other powers, to carry with it everything necessary to make its exercise effective; and the mere fact that in order that it might be effectively exercised it would have to be exercised on a comparatively broad scale certainly seems no proper argument, except on the basis of an argument from policy, and by a kind of inverted logic, against the existence of the power itself.

I come now to the mechanism for price determinations, contained in Part II of the Act, as to which petitioner has made objections. First, it is clear that these prices are to have no binding effect except as and until approved by the Commission. [Referring to subsections (a) and (b) of Part II of § 4.] The Act provides standards and makes ample provision for correcting any injustice which may occur, through appeal to the Commission, and for judicial review of all orders of the Commission.

I come now to the labor provisions of the Act and, more particularly, to the major issue as to the constitutional right of the Federal Government to establish any regulation of labor relations at all, irrespective of the form that those regulations may take.

The Government contends that since wage-cutting and denial of the right of collective bargaining is one method through which destructive cut-throat competition in interstate commerce has been found to operate in this industry, the provisions of this Act relating to collective bargaining constitute a regulation of acts and transactions which have a direct, immediate, and substantial effect upon interstate commerce, and are therefore a valid exercise of the congressional power to regulate that commerce, just as Congress may reach down into a purely intrastate transaction, a transaction of a group of men sitting around a table and making a contract, because the effect of that contract will be to restrain interstate commerce. Just as the Government may reach down and control that contract because of its effect on interstate commerce, so we maintain that if, in their competition in interstate commerce, the distributors of bituminous coal resort to certain practices in connection with their labor relations through which they compete with other distributors in other States, and if the effect of those practices is to burden interstate commerce, then

the regulation of those practices is within the power of the Federal Government.

The record discloses as to this industry the immediate and direct reciprocal effects of wage-cutting and price-cutting, with their attendant dislocations and disruptions of interstate commerce. The causal connection between labor relations in this industry and the burdens on interstate commerce are as sharp and clean-cut as causal relations outside the realm of physics can be.

The trial court found that in the bituminous-coal industry the wage scale substantially affects the price of coal sold in interstate commerce, and the course of movement of such coal in interstate commerce. But the trial court held that no matter how direct, as well as substantial, the effect of the wage scale and of the labor relations might be on the sales in interstate commerce and on the course of movement in interstate commerce, nevertheless, under the decision in the *Schechter* case, 295 U. S. 495, wages and hours and labor relations had to be held, as a matter of law, something which had only an indirect effect on interstate commerce, and therefore lay beyond the reach of the federal commerce power.

We submit that on the basis of the language of the *Schechter* case, read in the light of the facts there presented, that case, so far from laying down any general rule that wages and hours, as a matter of law, always affect interstate commerce only indirectly, on the contrary, expressly states that while the distinction between that which directly affects interstate commerce and that which indirectly affects interstate commerce is clear in principle, nevertheless the application of the principle in particular situations can only be determined as those situations arise.

On the facts presented in the *Schechter* case there was no clear causal relationship between the effect of the local wages and the resulting local prices, on the one hand,

and the movement in interstate commerce, on the other. The effect, if one existed, had to be traced forward from the local wage-cutting to the local price-cutting, and thence back over a hypothetical chain of reasoning to the effect on the interstate-commerce transactions that lay behind the particular sale, on back toward the stage of production, while, in the case of the bituminous-coal industry, the wage-cutting operates directly upon, and brings about an immediately succeeding price-cutting in interstate commerce, with straight-line, unbroken certainty. We submit that that is an excellent illustration of the difference between a direct effect and an indirect effect.

We do not attempt to distinguish the *Schechter* case from the case at bar on the basis of the fact that there the employment was at the end of the commerce while here the employment is at the beginning of the commerce. Our contention is that the distinction is one of fact,—that the distinction here is whether or not, under the facts proved in the record, it is apparent that the relationship of wages and hours to interstate commerce—the causal relationship—is direct.

I come now to the broader contention of petitioner that the commerce power of Congress does not extend to the regulation of labor relations because labor is engaged in production, and therefore a regulation of labor relations is a regulation of production, and, as such, beyond the power of Congress.

It seems entirely clear, from the whole course of constitutional law, that if a transaction may be subsumed under two descriptive categories, the test of whether it may be regulated by Congress is not whether it may be subsumed under a category that the Federal Government *cannot* regulate, but whether it can be subsumed under another category which the Federal Government *can* regulate.

The record makes it plain that labor relations in this industry, I submit, are not merely connected with the production of coal but are connected with the sale of coal, with distribution, with competition in interstate commerce; and that their relationship to this aspect of the industry is far more important and significant than their relation to the mere physical removal of the coal from the ground. The fact that a federal regulation may touch a productive activity does not invalidate the regulation if the activity directly affects interstate commerce and if the regulation concerns its relation to commerce.

Thus, for example, under the Sherman Act, it soon became apparent that the regulation of the commerce reached to the regulation of acts and things that might from one standpoint be regarded as aspects of production; and this Court has gone even farther, and in the *Oil Cracking Case,* 283 U. S. 163, has definitely said that a combination which brings under control a decisive factor in the cost of production, so that such control is tantamount to the power to fix prices, may be within the Sherman Act.

Clearly, so far as the Anti-trust laws are concerned, it has been uniformly held that labor relations, even though they are incidental to production, may fall within the federal commerce power when a stoppage of production takes the form of a stoppage of interstate commerce. See *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *International Organization* v. *Red Jacket Consol. Coal Co.,* 18 F. (2d) 839, certiorari denied, 275 U. S. 536. It seems difficult to see why the fact that these labor relations are a matter of production should not take them out of the operation of the commerce power in one instance and yet do so in the other.

We contend that the Bituminous Coal Conservation Act regulates labor relations only because, and in so far as, they constitute an integral and essential part in the

competitive process in interstate commerce, and that those relations have a direct and causal effect and influence upon interstate commerce.

I might say also that the reason why the producers of coal, and the distributors of coal, deny the right of collective bargaining to their miners, or cut wage rates, is not because of anything which has to do with the physical removal of the coal from the ground; not because of anything having to do with the production of coal, but in order to gain an advantage over others in the sale of coal in interstate commerce.

[Counsel's two remaining arguments were (1) that the wage and hour provisions of the statute do not constitute an unconstitutional delegation of legislative power, and (2) that the various provisions of the statute and the code are separable, so that if any of them should be held invalid, this would not affect the remainder.]

One final word before I close. We are confronted here with the provisions of a new Act. We are confronted also with the broad question of federal power. Much may turn upon the decision of this Court and upon the opinion of this Court. The issues, in a certain sense, are momentous, far more momentous than the provisions of this particular Act. The issue of federal power is here at stake—the issue of whether there lurk within the interstices of the Constitution crevices through which effective governmental ability to deal with great public questions may unconsciously have sifted away.

We do not believe that that has happened. We believe that the Fathers, in setting up the Constitution under which we live, were wise enough to see that the perpetuation of that Constitution depended upon its supplying an instrument of government sufficiently strong to deal with all the crises of the future, not merely through the military arm, not merely through the hand of bounty and through subsidy and relief, but that the regulatory powers

conferred on the Federal Government were not so ineffective and limited that the Government will have to permit conditions to come into existence and to continue without being able to do anything about them until the time should come when, if the peace and order of our Union is to be preserved, if our Government is to be competent to deal with the forces of subversion and division, it will have to resort to other powers,—powers that, as American citizens, we do not care to see it resort to save in the last extremity.

We submit that the Government, under the Constitution, is a Government strong enough to deal by law with the great issues of national destiny that come before it. We believe that its power is not limited to the military power, not limited to the charitable power of subsidy and relief, but that the granted control over commerce extends to those fields where, more and more as our economic life draws us into difficulties, there must be one rule and one law.

Solicitor General Reed, Assistant Attorney General Dickinson, and *Messrs. Charles H. Weston, F. B. Critchlow, A. H. Feller, Charles Harwood,* and *Robert L. Stern* filed a brief in behalf of the government officers.

Mr. Charles I. Dawson, with whom *Mr. A. Shelby Winstead* was on the brief, for petitioners in Nos. 649 and 650.

Congress has no power under either the commerce or taxation clause of the Constitution to regulate production of bituminous coal.

Coal mining is just as much a local activity as is farming or manufacture. It is not commerce of any kind. It precedes commerce. It consists in the production and preparation for market of an article of commerce, and it has never been thought that the National Government has power to regulate such activities through the exertion of either the commerce power or the taxing power of

Congress conferred by the Constitution. The recent case of *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, announced no new principle on this subject. This Court has consistently held that manufacture, production and preparation for market of articles of commerce are purely local activities and beyond the control of the National Government. *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Kidd* v. *Pearson*, 128 U. S. 1; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Crescent Cotton Oil Co.* v. *Mississippi*, 257 U. S. 129; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, each holding that manufacture is not commerce and not within the regulatory power of Congress. *Delaware, L. & W. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, each holding that coal mining is not interstate commerce. *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, holding that the mining of iron ore is not interstate commerce.

The fact that the greater part of the bituminous coal produced in the United States, including that produced by petitioners, at the time it is mined is intended for sale and shipment in interstate commerce, does not in the slightest change the purely local character of the business of producing coal or transform this activity into commerce, either interstate or intrastate in character. *Kidd* v. *Pearson*, 128 U. S. 1, 21; *United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172; *Hammer* v. *Dagenhart*, 247 U. S. 251, 272.

Utah Power & Light Co. v. *Pfost*, 286 U. S. 165, fully sustains our contention that the production end of the mining business, for the purpose of determining federal power over it, is as separate and distinct from the selling end thereof as if they were conducted by entirely

different persons; and each of the foregoing cases makes it perfectly clear that Congress has no power under the commerce clause of the Constitution to regulate the production end of the bituminous coal industry.

Of course the mining of coal affects interstate commerce, but it is an indirect effect, no different from the indirect effect upon such commerce of the growing of wheat, corn, tobacco or cotton, the raising of live stock or the manufacture of goods. The contention is so effectively disposed of by this Court in the case of *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 546, that we are content to rely upon that case as a complete answer to this contention.

Both on reason and authority it is equally clear that Congress is without power to regulate the production of coal through the pretended exertion of its power to tax for the general welfare. The reason for denying the power of Congress to regulate production is that the activity is exclusively within state control. Of course, being exclusively within state control, its regulation is as much beyond the power of Congress under the taxing clause as under the commerce clause. *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *United States* v. *Butler*, 297 U. S. 1; *Hill* v. *Wallace*, 259 U. S. 44.

If Congress can regulate the production of coal through the exercise of the taxing power on the ground that such regulation is for the national welfare, it can also regulate the growing of agricultural products. Certainly the production of bituminous coal for fuel purposes, for which there are many substitutes, is of no greater national importance than the growing of foodstuffs for which there are no substitutes. This Court has definitely said in the *Butler* case that national concern for the welfare of the farmer cannot justify the regulation of his business by Congress.

The fact that one who is engaged in the intrastate sale of an article of commerce also engages in the interstate sale thereof, cannot possibly confer upon Congress the power to regulate the intrastate sales thereof. This proposition is so obvious that it seems hardly necessary to cite authority; but the language of this Court in the *First Employers' Liability Cases,* 207 U. S. 463, 502, is a conclusive demonstration of this proposition. Distinguishing: *Shreveport Case,* 234 U. S. 342.

If it be conceded that Congress, within proper limits, has the power to regulate the business of selling coal in interstate commerce, this entire Act, including the provisions dealing with interstate sales, must fall because of the inseparability of its provisions.

The repeated declaration of Congress of the necessity for regulating every phase of the bituminous coal industry to secure the desired result is conclusive evidence, it seems to us, that regulations of less scope would not have been acceptable to Congress.

The regulations required by § 4 to be embodied in the Code are as all-inclusive as Congress declared in § 1 it was intended they should be. They cover not only the marketing end of the business but the production end as well; not only the interstate part of the marketing end of the business but the intrastate part thereof as well. So we have in this Act, first a declaration on the part of Congress, four times repeated, of the necessity for regulating every phase of bituminous coal mining in order to effectuate the desired end; second, the declaration of Congress, four times repeated, of its intention to make the regulations as broad as the declared necessity therefor; third, a declaration preceding the regulations that they were intended to carry out the declared policy of the Act; fourth, regulations which, in their scope, cover the entire field which Congress de-

cleared its intention to cover and the necessity for covering. Therefore, notwithstanding the separability clause found in § 15 of the Act, the regulations dealing with the interstate sale of coal, even if within the power of Congress, must fall because it is plain that they are a definitely intended part of an integrated scheme of regulation of the bituminous coal industry, many material features of such system of regulation being undoubtedly beyond the power of Congress. *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241; *Hill* v. *Wallace*, 259 U. S. 44; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 361, 362.

The provisions dealing with the fixing of prices at which coal is sold and contracts for the sale of coal make no distinction between interstate and intrastate sales. They cover both character of sales and it is plain that it was the intention of Congress that they should do so.

So in this case, if the Court should rewrite the Act so as to confine the fixing of prices and the regulation of contracts to sales made in interstate commerce, we would have an Act plainly never intended to be passed by Congress. Furthermore, when we consider that 14% of the coal produced in the United States is sold within the State where produced, it becomes at once apparent that price-fixing confined to interstate sales will be entirely ineffective in accomplishing the declared purpose of Congress to stabilize the industry.

The regulations providing for fixing prices of coal sold in interstate commerce and for the policing of contracts in connection therewith are invalid, even if separable.

First, because they have no reasonable relation to any of the purposes or objects which Congress may take into consideration in exercising its power to regulate interstate commerce, but, on the contrary, as we have heretofore pointed out, their real purpose is to regulate mat-

ters not within the competency of Congress; and, second, assuming that under its power to regulate interstate commerce Congress has the power, in a proper case, to fix the prices and regulate contracts with reference to the sale of articles in interstate commerce, it has no such power with reference to bituminous coal, as the business of producing and selling bituminous coal is not one so affected with a public interest as to authorize price-fixing and the regulation of contracts in respect thereto by Congress.

Other provisions of the Act clearly show that even the regulation of prices of coal sold in interstate commerce was designed to regulate the producing end of the industry, and particularly the labor relations between the producer and his employees.

In § 4, Part II—Marketing, Congress declared that the dominant purpose in the fixing of minimum prices was the stabilization of wages and working conditions in the production end of the business. Hence, it seems entirely clear that in fixing minimum prices Congress was not attempting in good faith to regulate the interstate traffic in coal, but to regulate the production thereof.

Part III of § 4 dealing with labor relations was designed to bring about uniformity and stabilization of wages, working hours and conditions, through collective bargaining; and it is clear that the establishment of minimum prices was for the primary purpose of enabling each producer to pay the minimum wages and observe the hours and working conditions thus collectively bargained for.

It cannot be contended that Congress has any independent power to fix the prices at which articles of commerce are sold, or to regulate contracts with reference thereto. If the power exists, it is merely incidental to the exercise of its power to regulate interstate commerce. The power to regulate private business flows from the

police power. Inasmuch as Congress has no police power in the respective States, it can attain the purposes which ordinarily call into play the exercise of the police power only as an incident to the legitimate exercise of some one or more of its granted powers. Therefore, if, in the exercise of its power to regulate interstate commerce, Congress seeks incidentally to promote the general welfare, through the fixing of prices of an article of commerce, certainly it can do so only if the fixing of such prices is permissible in the independent exercise of the police power. Congress cannot, in the regulation of interstate commerce, incidentally fix prices, unless such price-fixing would be a legitimate exercise of the police power by a legislative body possessing that power.

We think it is thoroughly settled that the legislative department is without power to fix either prices or wages, except in respect of those businesses affected with a public interest. The question has been many times before this Court, and in each case the problem was to determine if the particular business was one affected with a public interest; and this is always a question for the Court. *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522; *Tyson & Bro.* v. *Banton,* 273 U. S. 418; *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1; *Ribnik* v. *McBride,* 277 U. S. 350; *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Nebbia* v. *New York,* 291 U. S. 502; *New State Ice Co.* v. *Liebmann,* 285 U. S. 262.

Distinguishing: *Munn* v. *Illinois,* 94 U. S. 113; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; *Wilson* v. *New,* 243 U. S. 332; *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253; *Frost* v. *Corporation Commission,* 278 U. S. 515; *Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

As we understand the case of *Nebbia* v. *New York*, 291 U. S. 502, it does not discard the long established rule of this Court that price-fixing is justified only in respect of businesses affected with a public interest. It does hold that businesses affected with a public interest are not confined to public utilities or to businesses of a monopolistic nature, or to those in which the owner is bound to serve all who apply. It seems to us, however, that price-fixing in the milk industry, upheld in that case, was sustained because it was thought that the facts in connection with that industry in the State of New York clearly showed that the business had become affected with a public interest. The legislation there involved was an exercise of the police power, primarily in the interest of the health of the public, and the Court held that because of peculiar and unusual conditions in the milk industry, price-fixing had a reasonable relation to the object sought to be accomplished, which was the assurance of an adequate supply of wholesome milk to the public, and was not an arbitrary exercise of the police power.

No comparable conditions, however, exist in the coal industry. There is no threatened shortage in production or supply. On the contrary, the only problem of the coal business is that which is incident to all business as to which at any given time there exists a capacity for production in excess of the market demand. If over-production and the consequent economic disorganization and distress of a business justifies price-fixing, then during periods of economic depression prices may be fixed by Congress in every important industry, the products of which move in interstate commerce.

Section 3 is not a revenue provision but an integral part of the illegal scheme to regulate the entire bituminous coal industry.

The Act delegates legislative power. If it be conceded that Congress has the power to deal with the mat-

ters required by § 4 to be incorporated in the Code, it cannot delegate that power. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495. Inasmuch as the statute, for all practical purposes, compels all producers to become Code members, every producer is thus required to submit to hours of labor and wages, fixed by private persons, whether he participates in the fixing or not. The legislative department cannot authorize private citizens to thus deal with the rights of others. *Eubank* v. *Richmond,* 226 U. S. 137; *Washington ex rel. Seattle Title & Trust Co.* v. *Roberge,* 278 U. S. 116.

Mr. Karl J. Hardy submitted for Carter Coal Co. et al., respondents in Nos. 636 and 651.

Mr. Joseph Selligman submitted for respondent in No. 650.

By leave of Court, briefs of *amici curiae* were filed as follows:

Mr. Otto Kerner, Attorney General of Illinois, and *Mr. Kent E. Keller,* on behalf of the State of Illinois; *Mr. Philip Lutz, Jr.,* Attorney General of Indiana, and *Mr. Urban C. Stover,* First Deputy Attorney General, on behalf of the State of Indiana; *Mr. A. E. Funk,* Assistant Attorney General of Kentucky, on behalf of the State of Kentucky; *Mr. Frank H. Patton,* Attorney General of New Mexico, on behalf of the State of New Mexico; *Mr. John Caren,* on behalf of the State of Ohio; *Mr. Charles J. Margiotti,* Attorney General of Pennsylvania, and *Messrs. Grover C. Ladner* and *Edward Friedman,* Deputy Attorneys General, on behalf of the Commonwealth of Pennsylvania; *Mr. G. W. Hamilton,* Attorney General of Washington, and *Messrs. Geo. G. Hannan* and *E. P. Donnelly,* Assistant Attorneys General, on behalf of the State of Washington; *Mr. Henry Warrum,* on behalf of

the United Mine Workers of America; and *Messrs. A. M. Liveright, Thurlow G. Essington, John L. Steinbugler,* and *C. F. C. Arensberg,* on behalf of members of the Bituminous Coal Code;—supporting the validity of the Act.

Messrs. Rolla D. Campbell, John W. Davis, E. L. Greever, Don Rose, Robert S. Spilman, Edwin S. S. Sunderland, Malcolm Fooshee, Walter T. Kinder, Wm. E. Stevenson, Edward E. Barthell, Lee C. Bradley, Jr., Henry E. Colton, Wm. C. Cherry, George T. Evans, Matthew C. Fleming, Virgil Y. Moore, J. Van Dyke Norman, Percy Allen Rose, and *Morris H. Winger,* on behalf of certain commercial producers of bituminous coal; and *Messrs. Forney Johnston* and *Jos. F. Johnston,* on behalf of certain producers of bituminous coal in the State of Alabama;—challenging the validity of the Act.

Mr. Justice Sutherland delivered the opinion of the Court.

The purposes of the "Bituminous Coal Conservation Act of 1935," involved in these suits, as declared by the title, are to stabilize the bituminous coal-mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on such coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of such coal to be affected with a national public interest; to conserve the national resources of such coal; to provide for the general welfare, and for other purposes. C. 824, 49 Stat. 991. The constitutional validity of the act is challenged in each of the suits.

Nos. 636 and 651 are cross-writs of certiorari in a stockholder's suit, brought in the Supreme Court of the District of Columbia by Carter against the Carter Coal Company and some of its officers, Guy T. Helvering (Commissioner of Internal Revenue of the United

States), and certain other officers of the United States, to enjoin the coal company and its officers named from filing an acceptance of the code provided for in said act, from paying any tax imposed upon the coal company under the authority of the act, and from complying with its provisions or the provisions of the code. The bill sought to enjoin the Commissioner of Internal Revenue and the other federal officials named from proceeding under the act in particulars specified, the details of which it is unnecessary to state.

No. 649 is a suit brought in a federal district court in Kentucky by petitioners against respondent collector of internal revenue for the district of Kentucky, to enjoin him from collecting or attempting to collect the taxes sought to be imposed upon them by the act, on the ground of its unconstitutionality.

No. 650 is a stockholder's suit brought in the same court against the coal company and some of its officers, to secure a mandatory injunction against their refusal to accept and operate under the provisions of the Bituminous Coal Code prepared in pursuance of the act.

By the terms of the act, every producer of bituminous coal within the United States is brought within its provisions.

Section 1 is a detailed assertion of circumstances thought to justify the act. It declares that the mining and distribution of bituminous coal throughout the United States by the producer are affected with a national public interest; and that the service of such coal in relation to industrial activities, transportation facilities, health and comfort of the people, conservation by controlled production and economical mining and marketing, maintenance of just and rational relations between the public, owners, producers and employees, the right of the public to constant and adequate supplies of coal at reasonable prices, and the general welfare of the nation,

require that the bituminous coal industry should be regulated as the act provides.

Section 1, among other things, further declares that the production and distribution by producers of such coal bear upon and directly affect interstate commerce, and render regulation of production and distribution imperative for the protection of such commerce; that certain features connected with the production, distribution, and marketing have led to waste of the national coal resources, disorganization of interstate commerce in such coal, and burdening and obstructing interstate commerce therein; that practices prevailing in the production of such coal directly affect interstate commerce and require regulation for the protection of that commerce; and that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and disparate labor costs detrimental to fair interstate competition, and in order to avoid obstructions to interstate commerce that recur in industrial disputes over labor relations at the mines. These declarations constitute not enactments of law, but legislative averments by way of inducement to the enactment which follows.

The substantive legislation begins with § 2, which establishes in the Department of the Interior a National Bituminous Coal Commission, to be appointed and constituted as the section then specifically provides. Upon this commission is conferred the power to hear evidence and find facts upon which its orders and actions may be predicated.

Section 3 provides:

"There is hereby imposed upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market

value of such coal at the mine, such tax, subject to the later provisions of this section, to be payable to the United States by the producers of such coal, and to be payable monthly for each calendar month, on or before the first business day of the second succeeding month, and under such regulations, and in such manner, as shall be prescribed by the Commissioner of Internal Revenue: *Provided,* That in the case of captive coal produced as aforesaid, the Commissioner of Internal Revenue shall fix a price therefor at the current market price for the comparable kind, quality, and size of coals in the locality where the same is produced: *Provided further,* That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue. Such right or benefit of drawback shall apply to all coal sold or disposed of from and after the day of the producer's filing with the Commission his acceptance of said code in such form of agreement as the Commission may prescribe. No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer."

Section 4 provides that the commission shall formulate the elaborate provisions contained therein into a working agreement to be known as the Bituminous Coal Code. These provisions require the organization of twenty-three

coal districts, each with a district board the membership of which is to be determined in a manner pointed out by the act. Minimum prices for coal are to be established by each of these boards, which is authorized to make such classification of coals and price variation as to mines and consuming market areas as it may deem proper. "In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'Minimum-price area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration." The district board must determine and adjust the total cost of the ascertainable tonnage produced in the district so as to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, which may have been established since January 1st, 1934.

Without repeating the long and involved provisions with regard to the fixing of minimum prices, it is enough to say that the act confers the power to fix the minimum price of coal at each and every coal mine in the United States, with such price variations as the board may deem necessary and proper. There is also a provision authorizing the commission, when deemed necessary in the public

interest, to establish maximum prices in order to protect the consumer against unreasonably high prices.

All sales and contracts for the sale of coal are subject to the code prices provided for and in effect when such sales and contracts are made. Various unfair methods of competition are defined and forbidden.

The labor provisions of the code, found in Part III of the same section, require that in order to effectuate the purposes of the act the district boards and code members shall accept specified conditions contained in the code, among which are the following:

Employees to be given the right to organize and bargain collectively, through representatives of their own choosing, free from interference, restraint, or coercion of employers or their agents in respect of their concerted activities.

Such employees to have the right of peaceable assemblage for the discussion of the principles of collective bargaining and to select their own check-weighman to inspect the weighing or measuring of coal.

A labor board is created, consisting of three members, to be appointed by the President and assigned to the Department of Labor. Upon this board is conferred authority to adjudicate disputes arising under the provisions just stated, and to determine whether or not an organization of employees had been promoted, or is controlled or dominated by an employer in its organization, management, policy, or election of representatives. The board "may order a code member to meet the representatives of its employees for the purpose of collective bargaining."

Subdivision (g) of Part III provides:

"Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the

preceding calendar year and the representatives of more than one-half of the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts."

The bill of complaint in Nos. 636 and 651 was filed in the Supreme Court of the District of Columbia on August 31, 1935, the day after the Coal Conservation Act came into effect. That court, among other things, found that the suit was brought in good faith; that if Carter Coal Company should join the code it would be compelled to cancel existing contracts and pay its proportionate share of administering the code; that the production of bituminous coal is a local activity carried on within state borders; that coal is the nation's greatest and primary source of energy, vital to the public welfare, of the utmost importance to the industrial and economic life of the nation and the health and comfort of its inhabitants; and that its distribution in interstate commerce should be regular, continuous, and free of interruptions, obstructions, burdens, and restraints.

Other findings are to the effect that such coal is generally sold f. o. b. mine, and the predominant portion of it shipped outside the state in which it is produced; that the distribution and marketing is predominantly interstate in character, and that the intrastate distribution

and sale are so connected that interstate regulation cannot be accomplished effectively unless transactions of intrastate distribution and sale be regulated.

The court further found the existence of a condition of unrestrained and destructive competition in the system of distribution and marketing such coal, and of destructive price-cutting, burdening and restraining interstate commerce and dislocating and diverting its normal flow.

The court concluded as a matter of law that the bringing of the suit was not premature; that the plaintiff was without legal remedy, and rightly invoked relief in equity; that the labor provisions of the act and code were unconstitutional for reasons stated, but the price-fixing provisions were valid and constitutional; that the labor provisions are separable; and, since the provisions with respect to price-fixing and unfair competition are valid, the taxing provisions of the act could stand. Therefore, except for granting a permanent injunction against collection of the "taxes" accrued during the suit (*Ex parte Young,* 209 U. S. 123, 147–148), the court denied the relief sought, and dismissed the bill.

Appeals were taken to the United States Court of Appeals for the District of Columbia by the parties; but pending hearing and submission in that court, petitions for writs of certiorari were presented asking us to review the decree of the Supreme Court of the District without awaiting such hearing and submission. Because of the importance of the question and the advantage of a speedy final determination thereof, the writs were granted.

The remaining two suits (Nos. 649 and 650), involving the same questions, were brought in the federal District Court for the Western District of Kentucky. That court held the act valid and constitutional in its entirety and entered a decree accordingly. 12 F. Supp. 570. Appeals were taken to the Circuit Court of Appeals for the Sixth

Circuit; but, as in the Carter case and for the same reasons, this court granted writs of certiorari in advance of hearing and submission.

The questions involved will be considered under the following heads:

1. The right of stockholders to maintain suits of this character.

2. Whether the suits were prematurely brought.

3. Whether the exaction of 15 *per centum* on the sale price of coal at the mine is a tax or a penalty.

4. The purposes of the act as set forth in § 1, and the authority vested in Congress by the Constitution to effectuate them.

5. Whether the labor provisions of the act can be upheld as an exercise of the power to regulate interstate commerce.

6. Whether subdivision (g) of Part III of the Code, is an unlawful delegation of power.

7. The constitutionality of the price-fixing provisions, and the question of severability—that is to say, whether if either the group of labor provisions or the group of price-fixing provisions be found constitutionally invalid, the other can stand as separable.

First. In the Carter case (Nos. 636 and 651) the stockholder who brought the suit had formally demanded of the board of directors that the company should not join the code, should refuse to pay the tax fixed by the act, and should bring appropriate judicial proceedings to prevent an unconstitutional and improper diversion of the assets of the company and to have determined the liability of the company under the act. The board considered the demand, determined that, while it believed the act to be unconstitutional and economically unsound and that it would adversely affect the business of the company if accepted, nevertheless it should accept the code provided for by the act because the penalty in the form

of a 15% tax on its gross sales would be seriously injurious and might result in bankruptcy. This action of the board was approved by a majority of the shareholders at a special meeting called for the purpose of considering it.

In the Tway Company cases, the company itself brought suit to enjoin the enforcement of the act (No. 649); and a stockholder brought suit to compel the company to accept the code and operate under its provisions (No. 650).

Without repeating the long averments of the several bills, we are of opinion that the suits were properly brought and were maintainable in a court of equity. The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, and requires no further discussion.

Second. That the suits were not prematurely brought also is clear. Section 2 of the act is mandatory in its requirement that the commission be appointed by the President. The provisions of § 4 that the code be formulated and promulgated are equally mandatory. The so-called tax of 15% is definitely imposed, and its exaction certain to ensue.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592–595, suits were brought by Pennsylvania and Ohio against West Virginia to enjoin the defendant state from enforcing an act of her legislature upon the ground that it would injuriously affect or cut off the supply of natural gas produced in her territory and carried by pipe lines into the territory of the plaintiff states and there sold and used. These suits were brought a few days after the West Virginia act became effective. No order had yet been made under it by the Public Service Commission, nor had it been tested in actual practice. But it appeared that the act was certain to operate as the complainant

states apprehended it would. This court held that the suit was not premature. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

Pierce v. *Society of Sisters,* 268 U. S. 510, 535–536, involved the constitutional validity of the Oregon Compulsory Education Act, which required every parent or other person having control of a child between the ages of eight and sixteen years to send him to the public school of the district where he resides. Suit was brought to enjoin the operation of the act by corporations owning and conducting private schools, on the ground that their business and property were threatened with destruction through the unconstitutional compulsion exercised by the act upon parents and guardians. The suits were held to be not premature, although the effective date of the act had not yet arrived. We said—"The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

See, also, *Terrace* v. *Thompson,* 263 U. S. 197, 215–216; *Swift & Co.* v. *United States,* 276 U. S. 311, 326; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 386; *City Bank Co.* v. *Schnader,* 291 U. S. 24, 34.

Third. The so-called excise tax of 15 *per centum* on the sale price of coal at the mine, or, in the case of captive coal the fair market value, with its drawback allowance of 13½%, is clearly not a tax but a penalty. The exaction applies to all bituminous coal produced, whether it be sold, transported or consumed in interstate commerce, or transactions in respect of it be confined wholly

to the limits of the state. It also applies to "captive coal"—that is to say, coal produced for the sole use of the producer.

It is very clear that the "excise tax" is not imposed for revenue but exacted as a penalty to compel compliance with the regulatory provisions of the act. The whole purpose of the exaction is to coerce what is called an agreement—which, of course, it is not, for it lacks the essential element of consent. One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail.

The exaction here is a penalty and not a tax within the test laid down by this court in numerous cases. *Child Labor Tax Case,* 259 U. S. 20, 37–39; *United States* v. *La Franca,* 282 U. S. 568, 572; *United States* v. *Constantine,* 296 U. S. 287, 293 *et seq.; United States* v. *Butler,* 297 U. S. 1, 70. While the lawmaker is entirely free to ignore the ordinary meanings of words and make definitions of his own, *Karnuth* v. *United States,* 279 U. S. 231, 242; *Tyler* v. *United States,* 281 U. S. 497, 502, that device may not be employed so as to change the nature of the acts or things to which the words are applied. But it is not necessary to pursue the matter further. That the "tax" is in fact a penalty is not seriously in dispute. The position of the Government, as we understand it, is that the validity of the exaction does not rest upon the taxing power but upon the power of Congress to regulate interstate commerce; and that if the act in respect of the labor and price-fixing provisions be not upheld, the "tax" must fall with them. With that position we agree and confine our consideration accordingly.

Fourth. Certain recitals contained in the act plainly suggest that its makers were of opinion that its constitutionality could be sustained under some general federal

power, thought to exist, apart from the specific grants of the Constitution. The fallacy of that view will be apparent when we recall fundamental principles which, although hitherto often expressed in varying forms of words, will bear repetition whenever their accuracy seems to be challenged. The recitals to which we refer are contained in § 1 (which is simply a preamble to the act), and, among others, are to the effect that the distribution of bituminous coal is of national interest, affecting the health and comfort of the people and the general welfare of the nation; that this circumstance, together with the necessity of maintaining just and rational relations between the public, owners, producers, and employees, and the right of the public to constant and adequate supplies at reasonable prices, require regulation of the industry as the act provides. These affirmations—and the further ones that the production and distribution of such coal "directly affect interstate commerce," because of which and of the waste of the national coal resources and other circumstances, the regulation is necessary for the protection of such commerce—do not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will in the present act. Nevertheless, this preamble may not be disregarded. On the contrary it is important, because it makes clear, except for the pure assumption that the conditions described "directly" affect interstate commerce, that the powers which Congress undertook to exercise are not specific but of the most general character—namely, to protect the general public interest and the health and comfort of the people, to conserve privately-owned coal, maintain just relations between producers and employees and others, and promote the general welfare, by controlling nation-wide production and distribution of coal. These, it may be conceded, are objects of great worth;

but are they ends, the attainment of which has been committed by the Constitution to the federal government? This is a vital question; for nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.

The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. Legislative congressional discretion begins with the choice of means and ends with the adoption of methods and details to carry the delegated powers into effect. The distinction between these two things—power and discretion—is not only very plain but very important. For while the powers are rigidly limited to the enumerations of the Constitution, the means which may be employed to carry the powers into effect are not restricted, save that they must be appropriate, plainly adapted to the end, and not prohibited by, but consistent with, the letter and spirit of the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421. Thus, it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution, all ways are closed.

The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court. Mr. Justice Story, as early as 1816,

laid down the cardinal rule, which has ever since been followed—that the general government "can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326. In the Framers Convention, the proposal to confer a general power akin to that just discussed was included in Mr. Randolph's resolutions, the sixth of which, among other things, declared that the National Legislature ought to enjoy the legislative rights vested in Congress by the Confederation, and "moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." The convention, however, declined to confer upon Congress power in such general terms; instead of which it carefully limited the powers which it thought wise to entrust to Congress by specifying them, thereby denying all others not granted expressly or by necessary implication. It made no grant of authority to Congress to legislate substantively for the general welfare, *United States* v. *Butler, supra,* p. 64; and no such authority exists, save as the general welfare may be promoted by the exercise of the powers which are granted. Compare *Jacobson* v. *Massachusetts,* 197 U. S. 11, 22.

There are many subjects in respect of which the several states have not legislated in harmony with one another, and in which their varying laws and the failure of some of them to act at all have resulted in injurious confusion and embarrassment. See *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 232–233. The state laws with respect to marriage and divorce present a case in point; and the great necessity of national legislation on that subject has been from time to time vigorously urged. Other pertinent examples are laws with respect to nego-

tiable instruments, desertion and non-support, certain phases of state taxation, and others which we do not pause to mention. In many of these fields of legislation, the necessity of bringing the applicable rules of law into general harmonious relation has been so great that a Commission on Uniform State Laws, composed of commissioners from every state in the Union, has for many years been industriously and successfully working to that end by preparing and securing the passage by the several states of uniform laws. If there be an easier and constitutional way to these desirable results through congressional action, it thus far has escaped discovery.

Replying directly to the suggestion advanced by counsel in *Kansas* v. *Colorado,* 206 U. S. 46, 89–90, to the effect that necessary powers national in their scope must be found vested in Congress, though not expressly granted or essentially implied, this court said:

"But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should

be granted by the people in the manner they had provided for amending that act."

The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment. Thus, "when it was found necessary to establish a national government for national purposes," this court said in *Munn* v. *Illinois*, 94 U. S. 113, 124, "a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people." While the states are not sovereign in the true sense of that term, but only *quasi*-sovereign, yet in respect of all powers reserved to them they are supreme—"as independent of the general government as that government within its sphere is independent of the States." *Collector* v. *Day*, 11 Wall. 113, 124. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government

be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. It is no longer open to question that the general government, unlike the states, *Hammer* v. *Dagenhart,* 247 U. S. 251, 275, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation. The question in respect of the inherent power of that government as to the external affairs of the nation and in the field of international law is a wholly different matter which it is not necessary now to consider. See, however, *Jones* v. *United States,* 137 U. S. 202, 212; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 705 *et seq.; Burnet* v. *Brooks,* 288 U. S. 378, 396.

The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in *Texas* v. *White,* 7 Wall. 700, 725—"the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so

relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.

And the Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. "We the people of the United States," it says, "do ordain and establish this Constitution . . ." Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly—"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . ." The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior stat-

ute whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter* v. *United States,* 295 U. S. 495, 549–550.

We have set forth, perhaps at unnecessary length, the foregoing principles, because it seemed necessary to do so in order to demonstrate that the general purposes which the act recites, and which, therefore, unless the recitals be disregarded, Congress undertook to achieve, are beyond the power of Congress except so far, and only so far, as they may be realized by an exercise of some specific power granted by the Constitution. Proceeding by a process of elimination, which it is not necessary to follow in detail, we shall find no grant of power which authorizes Congress to legislate in respect of these general purposes unless it be found in the commerce clause—and this we now consider.

Fifth. Since the validity of the act depends upon whether it is a regulation of interstate commerce, the nature and extent of the power conferred upon Congress by the commerce clause becomes the determinative question in this branch of the case. The commerce clause vests in Congress the power—"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The function to be exercised is that of regulation. The thing to be regulated is the commerce described. In exercising the authority conferred by this clause of the Constitution, Congress is powerless to regulate anything which is not commerce, as it is powerless to do anything about commerce which is not regulation. We first inquire, then—What is commerce? The term, as this court many times has said, is

one of extensive import. No all-embracing definition has ever been formulated. The question is to be approached both affirmatively and negatively—that is to say, from the points of view as to what it includes and what it excludes.

In *Gibbons* v. *Ogden,* 9 Wheat. 1, 189–190, Chief Justice Marshall said:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . ."

As used in the Constitution, the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade," and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states. And the power to regulate commerce embraces the instruments by which commerce is carried on. *Welton* v. *Missouri,* 91 U. S. 275, 280; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 241; *Hopkins* v. *United States,* 171 U. S. 578, 597. In *Adair* v. *United States,* 208 U. S. 161, 177, the phrase "Commerce among the several States" was defined as comprehending "traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States." In *Veazie* v. *Moor,* 14 How. 568, 573–574, this court, after saying that the phrase could never be applied to transactions wholly internal, significantly added: "Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase *foreign commerce,* or fairly im-

plied in any investiture of the power to regulate such commerce. A pretension as far reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned. . . ."

The distinction between manufacture and commerce was discussed in *Kidd* v. *Pearson,* 128 U. S. 1, 20, 21, 22; and it was said:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and

denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management."

And then, as though foreseeing the present controversy, the opinion proceeds:

"Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. . . . A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine."

Chief Justice Fuller, speaking for this court in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13, said:

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. . . .

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

". . . The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. . . ."

That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause. As this court said in *Coe* v. *Errol,* 116 U. S. 517, 526, "Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of

property in the State?" It is true that this was said in respect of a challenged power of the state to impose a tax; but the query is equally pertinent where the question, as here, is with regard to the power of regulation. The case was relied upon in *Kidd* v. *Pearson, supra,* p. 26. "The application of the principles above announced," it was there said, "to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter."

In *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259–260, we held that the possibility, or even certainty of exportation of a product or article from a state did not determine it to be in interstate commerce before the commencement of its movement from the state. To hold otherwise "would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production."

In *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 178, we said on the authority of numerous cited cases: "Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. . . . Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even

though the business be conducted in close connection with interstate commerce."

The same rule applies to the production of oil. "Such production is essentially a mining operation and therefore is not a part of interstate commerce even though the product obtained is intended to be and in fact is immediately shipped in such commerce." *Champlin Rfg. Co.* v. *Corporation Commission,* 286 U. S. 210, 235. One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 182. Production is not commerce; but a step in preparation for commerce. *Chassaniol* v. *Greenwood,* 291 U. S. 584, 587.

We have seen that the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade." Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by

force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.

A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. *Schechter Corp.* v. *United States, supra,* p. 542 *et seq.* Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products.

Certain decisions of this court, superficially considered, seem to lend support to the defense of the act now under review. But upon examination, they will be seen to be inapposite. Thus, *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310, and kindred cases, involved conspiracies to restrain interstate commerce in violation of the Anti-trust laws. The acts of the persons involved were local in character, but the intent was to restrain interstate commerce, and the means employed were calculated to carry that intent into effect. Interstate commerce was the direct object of attack; and the restraint of such commerce was the necessary consequence of the acts and the immediate end in view. *Bedford Stone Co.*

v. *Stone Cutters Assn.*, 274 U. S. 37, 46. The applicable law was concerned not with the character of the acts or of the means employed, which might be in and of themselves purely local, but with the intent and direct operation of those acts and means upon interstate commerce. "The mere reduction in the supply of an article," this court said in the *Coronado Co.* case, *supra*, p. 310, "to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."

Another group of cases, of which *Swift & Co.* v. *United States*, 196 U. S. 375, is an example, rest upon the circumstance that the acts in question constituted direct interferences with the "flow" of commerce among the states. In the *Swift* case, livestock was consigned and delivered to stockyards—not as a place of final destination, but, as the court said in *Stafford* v. *Wallace*, 258 U. S. 495, 516, "a throat through which the current flows." The sales which ensued merely changed the private interest in the subject of the current without interfering with its continuity. *Industrial Assn.* v. *United States*, 268 U. S. 64, 79. It was nowhere suggested in these cases that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow. If the court had held that the raising of the cattle, which were involved in the *Swift* case, including the wages paid to and working conditions of the herders and others employed in the business, could be regulated by Congress, that decision and decisions holding similarly would be in

point; for it is that situation, and not the one with which the court actually dealt, which here concerns us.

The distinction suggested is illustrated by the decision in *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 150–152. That case dealt with orders of a state commission fixing railroad rates. One of the questions considered was whether certain shipments of rough material from the forest to mills in the same state for manufacture, followed by the forwarding of the finished product to points outside the state, was a continuous movement in interstate commerce. It appeared that when the rough material reached the mills it was manufactured into various articles which were stacked or placed in kilns to dry, the processes occupying several months. Markets for the manufactured articles were almost entirely in other states or in foreign countries. About 95% of the finished articles was made for outbound shipment. When the rough material was shipped to the mills, it was expected by the mills that this percentage of the finished articles would be so sold and shipped outside the state. And all of them knew and intended that this 95% of the finished product would be so sold and shipped. This court held that the state order did not interfere with interstate commerce, and that the *Swift* case was not in point; as it is not in point here.

The restricted field covered by the *Swift* and kindred cases is illustrated by the *Schechter* case, *supra,* p. 543. There the commodity in question, although shipped from another state, had come to rest in the state of its destination, and, as the court pointed out, was no longer in a current or flow of interstate commerce. The *Swift* doctrine was rejected as inapposite. In the *Schechter* case the flow had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the same.

But § 1 (the preamble) of the act now under review declares that all production and distribution of bituminous coal "bear upon and directly affect its interstate commerce"; and that regulation thereof is imperative for the protection of such commerce. The contention of the government is that the labor provisions of the act may be sustained in that view.

That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the "preamble" recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the *Schechter* case, *supra*, p. 546, *et seq.* "If the commerce clause were construed," we there said, "to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control." It was also pointed out, p. 548, that "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system."

Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word "direct" implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency

or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since that question is not—What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the *relation* between the activity or condition and the effect?

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the

act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.

The government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the *Schechter* case, *supra.* The only perceptible difference between that case and this is that in the *Schechter* case the federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with commodities at rest before interstate commerce has begun. That difference is without significance. The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the *Schechter* case. On the contrary, the situations were recognized as akin. In the opinion, at page 546, after calling attention to the fact that if the commerce clause could be construed to reach transactions having an indirect effect upon interstate commerce the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government, we said: "Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control." And again, after pointing out that hours and wages have no direct relation to interstate commerce and that if the federal government had power to determine the wages and hours of employees in the internal commerce of a state because of their relation to cost and prices and their

indirect effect upon interstate commerce, we said, p. 549: "All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power." A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended.

Sixth. That the act, whatever it may be in form, in fact is compulsory clearly appears. We have already discussed § 3, which imposes the excise tax as a penalty to compel "acceptance" of the code. Section 14 provides that the United States shall purchase no bituminous coal produced at any mine where the producer has not complied with the provisions of the code; and that each contract made by the United States shall contain a provision that the contractor will buy no bituminous coal to use on, or in the carrying out of, such contract unless the producer be a member of the code, as certified by the coal commission. In the light of these provisions we come to a consideration of subdivision (g) of Part III of § 4, dealing with "Labor Relations."

That subdivision delegates the power to fix maximum hours of labor to a part of the producers and the miners—namely, "the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year" and "more than one-half of the mine workers employed"; and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district

or group of districts. The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To "accept," in these circumstances, is not to exercise a choice, but to surrender to force.

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp.* v. *United States,*

295 U. S. at p. 537; *Eubank* v. *Richmond,* 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 121–122.

Seventh. Finally, we are brought to the price-fixing provisions of the code. The necessity of considering the question of their constitutionality will depend upon whether they are separable from the labor provisions so that they can stand independently. Section 15 of the act provides:

"If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

In the absence of such a provision, the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability and create the opposite one of separability. Under the non-statutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. But under either rule, the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?

Under the statutory rule, the presumption must be overcome by considerations which establish "the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains," *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241 *et seq.;* or, as stated in *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 184–185, "the clear probability that the legislature would not have been satisfied with the statute un-

less it had included the invalid part." Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid. "But it is an aid merely; not an inexorable command." *Dorchy* v. *Kansas,* 264 U. S. 286, 290. The presumption in favor of separability does not authorize the court to give the statute "an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362.

The statutory aid to construction in no way alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another. Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the labor provisions had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the price-fixing provisions of the code.

Section 3 of the act, which provides that no producer shall, by accepting the code or the drawback of taxes, be estopped from contesting the constitutionality of any provision of the code, is thought to aid the separability clause. But the effect of that provision is simply to permit the producer to challenge any provision of the code despite his acceptance of the code or the drawback. It seems not to have anything to do with the question of separability.

With the foregoing principles in mind, let us examine the act itself. The title of the act and the preamble demonstrate, as we have already seen, that Congress desired to accomplish certain general purposes therein recited. To that end it created a commission, with man-

datory directions to formulate into a working agreement the provisions set forth in § 4 of the act. That being done, the result is a code. Producers accepting and operating under the code are to be known as code members; and § 4 specifically requires that, in order to carry out the policy of the act, "the code shall contain the following conditions, provisions, and obligations . . ." which are then set forth. No power is vested in the commission, in formulating the code, to omit any of these conditions, provisions, or obligations. The mandate to include them embraces all of them. Following the requirement just quoted, and, significantly, *in the same section* (*International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112–113) under appropriate headings, the price-fixing and labor-regulating provisions are set out in great detail. These provisions, plainly meant to operate together and not separately, constitute the means designated to bring about the stabilization of bituminous-coal production, and thereby to regulate or affect interstate commerce in such coal. The first clause of the title is: "To stabilize the bituminous coal-mining industry and promote its interstate commerce."

Thus, the primary contemplation of the act is stabilization of the industry through the regulation of labor *and* the regulation of prices; for, since both were adopted, we must conclude that both were thought essential. The regulations of labor on the one hand and prices on the other furnish mutual aid and support; and their associated force—not one or the other but both combined—was deemed by Congress to be necessary to achieve the end sought. The statutory mandate for a code upheld by two legs at once suggests the improbability that Congress would have assented to a code supported by only one.

This seems plain enough; for Congress must have been conscious of the fact that elimination of the labor provi-

sions from the act would seriously impair, if not destroy, the force and usefulness of the price provisions. The interdependence of wages and prices is manifest. Approximately two-thirds of the cost of producing a ton of coal is represented by wages. Fair prices necessarily depend upon the cost of production; and since wages constitute so large a proportion of the cost, prices cannot be fixed with any proper relation to cost without taking into consideration this major element. If one of them becomes uncertain, uncertainty with respect to the other necessarily ensues.

So much is recognized by the code itself. The introductory clause of Part III declares that the conditions respecting labor relations are "To effectuate the purposes of this Act." And subdivision (a) of Part II, quoted in the forepart of this opinion, reads in part: "In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, . . . equal as nearly as may be to the weighted average of the total costs, per net ton . . ." Thus wages, hours of labor, and working conditions are to be so adjusted as to effectuate the purposes of the act; and prices are to be so regulated as to *stabilize* wages, working conditions, and hours of labor which have been or are to be fixed under the labor provisions. The two are so woven together as to render the probability plain enough that uniform prices, in the opinion of Congress, could not be fairly fixed or effectively regulated, without also regulating these elements of labor which enter so largely into the cost of production.

These two sets of requirements are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one

set of which cannot be removed without fatal consequences to the whole. Paraphrasing the words of this court in *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126, 133, we inquire—What authority has this court, by construction, to convert the manifest purpose of Congress to regulate production by the mutual operation and interaction of fixed wages and fixed prices into a purpose to regulate the subject by the operation of the latter alone? Are we at liberty to say from the fact that Congress has adopted an entire integrated system that it probably would have enacted a doubtfully-effective fraction of the system? The words of the concurring opinion in the *Schechter* case, 295 U. S. at pages 554–555, are pertinent in reply. "To take from this code the provisions as to wages and the hours of labor is to destroy it altogether. . . . Wages and the hours of labor are essential features of the plan, its very bone and sinew. There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder." The conclusion is unavoidable that the price-fixing provisions of the code are so related to and dependent upon the labor provisions as conditions, considerations or compensations, as to make it clearly probable that the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former. *International Textbook Co.* v. *Pigg, supra,* p. 113; *Warren* v. *Charlestown,* 2 Gray [Mass.] 84, 98–99.

The price-fixing provisions of the code are thus disposed of without coming to the question of their constitutionality; but neither this disposition of the matter, nor anything we have said, is to be taken as indicating that the court is of opinion that these provisions, if separately enacted, could be sustained.

If there be in the act provisions, other than those we have considered, that may stand independently, the

question of their validity is left for future determination when, if ever, that question shall be presented for consideration.

The decrees in Nos. 636, 649, and 650 must be reversed and the causes remanded for further consideration in conformity with this opinion. The decree in No. 651 will be affirmed.

It is so ordered.

Separate opinion of MR. CHIEF JUSTICE HUGHES.

I agree that the stockholders were entitled to bring their suits; that, in view of the question whether any part of the Act could be sustained, the suits were not premature; that the so-called tax is not a real tax, but a penalty; that the constitutional power of the Federal Government to impose this penalty must rest upon the commerce clause, as the Government concedes; that production—in this case mining—which precedes commerce, is not itself commerce; and that the power to regulate commerce among the several States is not a power to regulate industry within the State.

The power to regulate interstate commerce embraces the power to protect that commerce from injury, whatever may be the source of the dangers which threaten it, and to adopt any appropriate means to that end. *Second Employers' Liability Cases,* 223 U. S. 1, 51. Congress thus has adequate authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570. But Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the States which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effects, Congress in its discretion

could assume control of virtually all the activities of the people to the subversion of the fundamental principle of the Constitution. If the people desire to give Congress the power to regulate industries within the State, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.

I also agree that subdivision (g) of Part III of the prescribed Code is invalid upon three counts: (1) It attempts a broad delegation of legislative power to fix hours and wages without standards or limitation. The Government invokes the analogy of legislation which becomes effective on the happening of a specified event, and says that in this case the event is the agreement of a certain proportion of producers and employees, whereupon the other producers and employees become subject to legal obligations accordingly. I think that the argument is unsound and is pressed to the point where the principle would be entirely destroyed. It would remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated officials or private persons whose orders or agreements would be treated as "events," with the result that they would be invested with the force of law having penal sanctions. (2) The provision permits a group of producers and employees, according to their own views of expediency, to make rules as to hours and wages for other producers and employees who were not parties to the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose. (3) The provision goes beyond any proper measure of protection of interstate

commerce and attempts a broad regulation of industry within the State.

But that is not the whole case. The Act also provides for the regulation of the prices of bituminous coal sold in interstate commerce and prohibits unfair methods of competition in interstate commerce. Undoubtedly transactions in carrying on interstate commerce are subject to the federal power to regulate that commerce and the control of charges and the protection of fair competition in that commerce are familiar illustrations of the exercise of the power, as the Interstate Commerce Act, the Packers and Stockyards Act, and the Anti-Trust Acts abundantly show. The Court has repeatedly stated that the power to regulate interstate commerce among the several States is supreme and plenary. *Minnesota Rate Cases,* 230 U. S. 352, 398. It is "complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Gibbons* v. *Ogden,* 9 Wheat. 1, 196. We are not at liberty to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce. See *Nebbia* v. *New York,* 291 U. S. 502.

Whether the policy of fixing prices of commodities sold in interstate commerce is a sound policy is not for our consideration. The question of that policy, and of its particular applications, is for Congress. The exercise of the power of regulation is subject to the constitutional restriction of the due process clause, and if in fixing rates, prices or conditions of competition, that requirement is transgressed, the judicial power may be invoked to the end that the constitutional limitation may be maintained. *Interstate Commerce Comm'n* v. *Union Pacific R. Co.,* 222 U. S. 541, 547; *St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38.

In the legislation before us, Congress has set up elaborate machinery for the fixing of prices of bituminous coal sold in interstate commerce. That provision is attacked *in limine*. Prices have not yet been fixed. If fixed, they may not be contested. If contested, the Act provides for review of the administrative ruling. If in fixing prices, due process is violated by arbitrary, capricious or confiscatory action, judicial remedy is available. If an attempt is made to fix prices for sales in intrastate commerce, that attempt will also be subject to attack by appropriate action. In that relation it should be noted that in the *Carter* cases, the court below found that substantially all the coal mined by the Carter Coal Company is sold f. o. b. mines and is transported into States other than those in which it is produced for the purpose of filling orders obtained from purchasers in such States. Such transactions are in interstate commerce. *Savage* v. *Jones,* 225 U. S. 501, 520. The court below also found that "the interstate distribution and sale and the intrastate distribution and sale" of the coal are so "intimately and inextricably connected" that "the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate commerce unless transactions of intrastate distribution and sale be regulated." Substantially the same situation is disclosed in the *Kentucky* cases. In that relation, the Government invokes the analogy of transportation rates. *Shreveport Case,* 234 U. S. 342; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563. The question will be the subject of consideration when it arises in any particular application of the Act.

Upon what ground, then, can it be said that this plan for the regulation of transactions in interstate commerce in coal is beyond the constitutional power of Congress? The Court reaches that conclusion in the view that the

invalidity of the labor provisions requires us to condemn the Act in its entirety. I am unable to concur in that opinion. I think that the express provisions of the Act preclude such a finding of inseparability.

This is admittedly a question of statutory construction; and hence we must search for the intent of Congress. And in seeking that intent we should not fail to give full weight to what Congress itself has said upon the very point. The Act provides (§ 15):

"If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby."

That is a flat declaration against treating the provisions of the Act as inseparable. It is a declaration which Congress was competent to make. It is a declaration which reverses the presumption of indivisibility and creates an opposite presumption. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184.

The above quoted provision does not stand alone. Congress was at pains to make a declaration of similar import with respect to the provisions of the Code (§ 3):

"No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer."

This provision evidently contemplates, when read with the one first quoted, that a stipulation of the Code may be found to be unconstitutional and yet that its invalidity shall not be regarded as affecting the obligations attaching to the remainder.

I do not think that the question of separability should be determined by trying to imagine what Congress would

have done if certain provisions found to be invalid were excised. That, if taken broadly, would lead us into a realm of pure speculation. Who can tell amid the host of divisive influences playing upon the legislative body what its reaction would have been to a particular excision required by a finding of invalidity? The question does not call for speculation of that sort but rather for an inquiry whether the provisions are inseparable by virtue of inherent character. That is, when Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

All that is said in the preamble of the Act, in the directions to the Commission which the Act creates, and in the stipulations of the Code, is subject to the explicit direction of Congress that the provisions of the statute shall not be treated as forming an indivisible unit. The fact that the various requirements furnish to each other mutual aid and support does not establish indivisibility. The purpose of Congress, plainly expressed, was that if a part of that aid were lost, the whole should not be lost. Congress desired that the Act and Code should be operative so far as they met the constitutional test. Thus we are brought, as I have said, to the question whether, despite this purpose of Congress, we must treat the marketing provisions and the labor provisions as inextricably tied together because of their nature. I find no such tie. The labor provisions are themselves separated and placed in a separate part (Part III) of the Code. It seems quite clear that the validity of the entire Act cannot depend upon the provisions as to hours and wages in paragraph (g) of Part III. For what was contemplated by that paragraph is manifestly independent of

the other machinery of the Act, as it cannot become effective unless the specified proportion of producers and employees reach an agreement as to particular wages and hours. And the provision for collective bargaining in paragraphs (a) and (b) of Part III is apparently made separable from the Code itself by § 9 of the Act, providing, in substance, that the employees of all producers shall have the right of collective bargaining even when producers do not accept or maintain the Code.

The marketing provisions (Part II) of the Code naturally form a separate category. The interdependence of wages and prices is no clearer in the coal business than in transportation. But the broad regulation of rates in order to stabilize transportation conditions has not carried with it the necessity of fixing wages. Again, the requirement, in paragraph (a) of Part II that district boards shall establish prices so as to yield a prescribed "return per net ton" for each district in a minimum price area, in order "to sustain the stabilization of wages, working conditions and maximum hours of labor," does not link the marketing provisions to the labor provisions by an unbreakable bond. Congress evidently desired stabilization through both the provisions relating to marketing and those relating to labor, but the setting up of the two sorts of requirements did not make the one dependent upon the validity of the other. It is apparent that they are not so interwoven that they cannot have separate operation and effect. The marketing provisions in relation to interstate commerce can be carried out as provided in Part II without regard to the labor provisions contained in Part III. That fact, in the light of the congressional declaration of separability, should be considered of controlling importance.

In this view, the Act, and the Code for which it provides, may be sustained in relation to the provisions for

marketing in interstate commerce, and the decisions of the courts below, so far as they accomplish that result, should be affirmed.

MR. JUSTICE CARDOZO (dissenting in Nos. 636, 649 and 650, and in No. 651 concurring in the result).

My conclusions compendiously stated are these:

(a) Part II of the statute sets up a valid system of price-fixing as applied to transactions in interstate commerce and to those in intrastate commerce where interstate commerce is directly or intimately affected. The prevailing opinion holds nothing to the contrary.

(b) Part II, with its system of price-fixing, is separable from Part III, which contains the provisions as to labor considered and condemned in the opinion of the court.

(c) Part II being valid, the complainants are under a duty to come in under the code, and are subject to a penalty if they persist in a refusal.

(d) The suits are premature in so far as they seek a judicial declaration as to the validity or invalidity of the regulations in respect of labor embodied in Part III. No opinion is expressed either directly or by implication as to those aspects of the case. It will be time enough to consider them when there is the threat or even the possibility of imminent enforcement. If that time shall arrive, protection will be given by clear provisions of the statute (§ 3) against any adverse inference flowing from delay or acquiescence.

(e) The suits are not premature to the extent that they are intended to avert a present wrong, though the wrong upon analysis will be found to be unreal.

The complainants are asking for a decree to restrain the enforcement of the statute in all or any of its provisions on the ground that it is a void enactment, and void in all its parts. If some of its parts are valid and are separable from others that are or may be void, and if the parts upheld and separated are sufficient to sustain a

regulatory penalty, the injunction may not issue and hence the suits must fail. There is no need when that conclusion has been reached to stir a step beyond. Of the provisions not considered, some may never take effect, at least in the absence of future happenings which are still uncertain and contingent. Some may operate in one way as to one group and in another way as to others according to particular conditions as yet unknown and unknowable. A decision in advance as to the operation and validity of separable provisions in varying contingencies is premature and hence unwise. "The court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Steamship Co.* v. *Emigration Commissioners,* 113 U. S. 33, 39; *Abrams* v. *Van Schaick,* 293 U. S. 188; *Wilshire Oil Co.* v. *United States,* 295 U. S. 100. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton* v. *United States,* 196 U. S. 283, 295." Per Brandeis, J., in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346. The moment we perceive that there are valid and separable portions, broad enough to lay the basis for a regulatory penalty, inquiry should halt. The complainants must conform to whatever is upheld, and as to parts excluded from the decision, especially if the parts are not presently effective, must make their protest in the future when the occasion or the need arises.

First: I am satisfied that the Act is within the power of the central government in so far as it provides for minimum and maximum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of intrastate commerce where interstate commerce is directly or intimately affected. Whether it is valid also in other provisions that have been considered and condemned in the opinion of the court, I do not find it necessary to determine at this time. Silence must not be taken as importing acquiescence. Much would have

to be written if the subject, even as thus restricted were to be explored through all its implications, historical and economic as well as strictly legal. The fact that the prevailing opinion leaves the price provisions open for consideration in the future makes it appropriate to forego a fullness of elaboration that might otherwise be necessary. As a system of price fixing the Act is challenged upon three grounds: (1) because the governance of prices is not within the commerce clause; (2) because it is a denial of due process forbidden by the Fifth Amendment; and (3) because the standards for administrative action are indefinite, with the result that there has been an unlawful delegation of legislative power.

(1) With reference to the first objection, the obvious and sufficient answer is, so far as the Act is directed to interstate transactions, that sales made in such conditions constitute interstate commerce, and do not merely "affect" it. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290; *Flanagan* v. *Federal Coal Co.,* 267 U. S. 222, 225; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 60; *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83, 90; *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.,* 273 U. S. 52, 64. To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences. The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. *Baldwin* v. *Seelig,* 294 U. S. 511. They must therefore be subject to the power of the nation unless they are to be withdrawn altogether from governmental supervision. Cf. *Head Money Cases,* 112 U. S. 580, 593; Story, Commentaries on the Constitution, § 1082. If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy. This does not mean, of course, that prices may be fixed for arbitrary reasons or in an arbitrary way. The commerce power of the nation is

subject to the requirement of due process like the police power of the states. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156; cf. *Brooks* v. *United States*, 267 U. S. 432, 436, 437; *Nebbia* v. *New York*, 291 U. S. 502, 524. Heed must be given to similar considerations of social benefit or detriment in marking the division between reason and oppression. The evidence is overwhelming that Congress did not ignore those considerations in the adoption of this Act. What is to be said in that regard may conveniently be postponed to the part of the opinion dealing with the Fifth Amendment.

Regulation of prices being an exercise of the commerce power in respect of interstate transactions, the question remains whether it comes within that power as applied to intrastate sales where interstate prices are directly or intimately affected. Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other. *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 544, 545, 546. Sometimes it is said that the relation must be "direct" to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. The underlying thought is merely this, that "the law is not indifferent to considerations of degree." *Schechter Poultry Corp.* v. *United States, supra,* concurring opinion, p. 554. It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circum-

stances the holding is not directed at prices or wages considered in the abstract, but at prices or wages in particular conditions. The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie. Perhaps, if one group of adjectives is to be chosen in preference to another, "intimate" and "remote" will be found to be as good as any. At all events, "direct" and "indirect," even if accepted as sufficient, must not be read too narrowly. Cf. Stone, J., in *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 44. A survey of the cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.

One of the most common and typical instances of a relation characterized as direct has been that between interstate and intrastate rates for carriers by rail where the local rates are so low as to divert business unreasonably from interstate competitors. In such circumstances Congress has the power to protect the business of its carriers against disintegrating encroachments. *Shreveport Case,* 234 U. S. 342, 351, 352; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 588; *United States* v. *Louisiana,* 290 U. S. 70, 75; *Florida* v. *United States,* 292 U. S. 1. To be sure, the relation even then may be characterized as indirect if one is nice or over-literal in the choice of words. Strictly speaking, the intrastate rates have a primary effect upon the intrastate traffic and not upon any other, though the repercussions of the competitive system may lead to secondary consequences affecting interstate traffic also. *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301, 306. What the cases really mean is that the causal relation in such circumstances is so close and intimate and obvious as to permit it to be called direct without subjecting the word to an unfair or excessive strain. There is a like imme-

diacy here. Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. The argument is strongly pressed by intervening counsel that this may not be true in all communities or in exceptional conditions. If so, the operators unlawfully affected may show that the Act to that extent is invalid as to them. Such partial invalidity is plainly an insufficient basis for a declaration that the Act is invalid as a whole. *Dahnke-Walker Co.* v. *Bondurant, supra,* p. 289; *DuPont* v. *Commissioner,* 289 U. S. 685, 688.

What has been said in this regard is said with added certitude when complainants' business is considered in the light of the statistics exhibited in the several records. In No. 636, the Carter case, the complainant has admitted that "substantially all" (over 97½%) of the sales of the Carter Company are made in interstate commerce. In No. 649 the percentages of intrastate sales are, for one of the complaining companies, twenty-five per cent, for another one per cent, and for most of the others two per cent or four. The Carter Company has its mines in West Virginia; the mines of the other companies are located in Kentucky. In each of those states, moreover, coal from other regions is purchased in large quantities, and is thus brought into competition with the coal locally produced. Plainly, it is impossible to say either from the statute itself or from any figures laid before us that interstate sales will not be prejudicially affected in West Virginia and Kentucky if intrastate prices are maintained on a lower level. If it be assumed for present purposes that there are other states or regions where the effect may be different, the complainants are not the champions of any rights except their own. *Hatch* v.

Reardon, 204 U. S. 152, 160, 161; *Premier-Pabst Sales Co.* v. *Grosscup, ante,* p. 226.

(2) The commerce clause being accepted as a sufficient source of power, the next inquiry must be whether the power has been exercised consistently with the Fifth Amendment. In the pursuit of that inquiry, *Nebbia* v. *New York,* 291 U. S. 502, lays down the applicable principle. There a statute of New York prescribing a minimum price for milk was upheld against the objection that price-fixing was forbidden by the Fourteenth Amendment.[1] We found it a sufficient reason to uphold the challenged system that "the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interest, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself." 291 U. S. at p. 538.

All this may be said, and with equal, if not greater force, of the conditions and practices in the bituminous coal industry, not only at the enactment of this statute in August, 1935, but for many years before. Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky

[1] *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156: "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations (*Ex parte Milligan,* 4 Wall. 2, 121–127; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *Joint Traffic Assn.,* 171 U. S. 505, 571; *McCray* v. *United States,* 195 U. S. 27, 61; *United States* v. *Cress,* 243 U. S. 316, 326); but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. *In re Kemmler,* 136 U. S. 436, 448; *Carroll* v. *Greenwich Ins. Co.,* 199 U. S. 401, 410." Cf. *Brooks* v. *United States,* 267 U. S. 432, 436, 437; *Nebbia* v. *New York,* 291 U. S. 502, 524.

handful. Wages came down along with prices and with profits. There were strikes, at times nation-wide in extent, at other times spreading over broad areas and many mines, with the accompaniment of violence and bloodshed and misery and bitter feeling. The sordid tale is unfolded in many a document and treatise. During the twenty-three years between 1913 and 1935, there were nineteen investigations or hearings by Congress or by specially created commissions with reference to conditions in the coal mines.[2] The hope of betterment was faint unless the industry could be subjected to the compulsion of a code. In the weeks immediately preceding the passage of this Act the country was threatened once more with a strike of ominous proportions. The plight of the industry was not merely a menace to owners and to mine workers: it was and had long been a menace to the public, deeply concerned in a steady and uniform supply of a fuel so vital to the national economy.

Congress was not condemned to inaction in the face of price wars and wage wars so pregnant with disaster. Commerce had been choked and burdened; its normal flow had been diverted from one state to another; there had been bankruptcy and waste and ruin alike for capital and for labor. The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot. "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 372. The free competition so often figured as a social good imports order and moderation and a decent regard for the welfare of the group. Cf. *Sugar Institute, Inc.* v.

[2] The dates and titles are given in the brief for the Government in No. 636, at pp. 15–18.

United States, 297 U. S. 553. There is testimony in these records, testimony even by the assailants of the statute, that only through a system of regulated prices can the industry be stabilized and set upon the road of orderly and peaceful progress.[3] If further facts are looked for, they are narrated in the findings as well as in congressional reports and a mass of public records.[4] After making every allowance for difference of opinion as to the most efficient cure, the student of the subject is confronted with the indisputable truth that there were ills to be corrected, and ills that had a direct relation to the maintenance of commerce among the states without friction or diversion. An evil existing, and also the power to correct it, the lawmakers were at liberty to use their own discretion in the selection of the means.[5]

(3) Finally, and in answer to the third objection to the statute in its price-fixing provisions, there has been no excessive delegation of legislative power. The prices

---

[3] See also the Report of the Fifteenth Annual Meeting of the National Coal Association, October 26–27, 1934, and the statement of the resolutions adopted at the Sixteenth Annual Meeting as reported at hearings preliminary to the passage of this Act. Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, 1st Sesssion, on H. R. 8479, pp. 20, 152.

[4] There is significance in the many bills proposed to the Congress after painstaking reports during successive national administrations with a view to the regulation of the coal industry by Congressisonal action. S. 2557, October 4, 1921, 67th Cong., 1st Sess.; S. 3147, February 13, 1922, 67th Cong., 2nd Sess.; H. R. 9222, February 11, 1926, 69th Cong., 1st Sess.; H. R. 11898, May 4, 1926 (S. 4177), 69th Cong., 1st Sess.; S. 2935, January 7, 1932 (H. R. 7536), 72nd Cong., 1st Sess.; also same session H. R. 12916 and 9924.

[5] "Price control, like any other form of discrimination, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Nebbia* v. *New York, supra,* at p. 538.

to be fixed by the District Boards and the Commission must conform to the following standards: they must be just and equitable; they must take account of the weighted average cost of production for each minimum price area; they must not be unduly prejudicial or preferential as between districts or as between producers within a district; and they must reflect as nearly as possible the relative market value of the various kinds, qualities and sizes of coal, at points of delivery in each common consuming market area; to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals on a competitive basis as has heretofore existed. The minimum for any district shall yield a return, per net ton, not less than the weighted average of the total costs per net ton of the tonnage of the minimum price area; the maximum for any mine, if a maximum is fixed, shall yield a return not less than cost plus a reasonable profit. Reasonable prices can as easily be ascertained for coal as for the carriage of passengers or property under the Interstate Commerce Act, or for the services of brokers in the stockyards (*Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420), or for the use of dwellings under the Emergency Rent Laws (*Block* v. *Hirsh,* 256 U. S. 135, 157; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242), adopted at a time of excessive scarcity, when the laws of supply and demand no longer gave a measure for the ascertainment of the reasonable. The standards established by this Act are quite as definite as others that have had the approval of this court. *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24; *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U. S. 266, 286; *Tagg Bros. & Moorhead* v. *United States, supra; Mahler* v. *Eby,* 264 U. S. 32. Certainly a bench of judges, not experts in the coal business, cannot

say with assurance that members of a commission will be unable, when advised and informed by others experienced in the industry, to make the standards workable, or to overcome through the development of an administrative technique many obstacles and difficulties that might be baffling or confusing to inexperience or ignorance.

The price provisions of the Act are contained in a chapter known as Part II. The final subdivisions of that part enumerate certain forms of conduct which are denounced as "unfair methods of competition." For the most part the prohibitions are ancillary to the fixing of a minimum price. The power to fix a price carries with it the subsidiary power to forbid and prevent evasion. Cf. *United States* v. *Ferger,* 250 U. S. 199. The few prohibitions that may be viewed as separate are directed to situations that may never be realized in practice. None of the complainants threatens or expresses the desire to do these forbidden acts. As to those phases of the statute the suits are premature.

Second: The next inquiry must be whether Part I of the statute which creates the administrative agencies, and Part II, which has to do in the main with the price-fixing machinery, as well as preliminary sections levying a tax or penalty, are separable from Part III, which deals with labor relations in the industry, with the result that what is earlier would stand if what is later were to fall.

The statute prescribes the rule by which construction shall be governed. "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby." § 15. The rule is not read as an inexorable mandate. *Dorchy* v. *Kansas,* 264 U. S. 286, 290; *Utah Power & Light Co.* v. *Pfost,* 286

U. S. 165, 184; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362. It creates a "presumption of divisibility," which is not applied mechanically or in a manner to frustrate the intention of the lawmakers. Even so, the burden is on the litigant who would escape its operation. Here the probabilities of intention are far from overcoming the force of the presumption. They fortify and confirm it. A confirmatory token is the formal division of the statute into "Parts" separately numbered. Part III which deals with labor is physically separate from everything that goes before it. But more convincing than the evidences of form and structure, the division into chapters and sections and paragraphs, each with its proper subject matter, are the evidences of plan and function. Part II, which deals with prices, is to take effect at once, or as soon as the administrative agencies have finished their administrative work. Part III in some of its most significant provisions, the section or subdivision in respect of wages and the hours of labor, may never take effect at all. This is clear beyond the need for argument from the mere reading of the statute. The maximum hours of labor may be fixed by agreement between the producers of more than two thirds of the annual national tonnage production for the preceding calendar year and the representatives of more than one half the mine workers. Wages may be fixed by agreement or agreements negotiated by collective bargaining in any district or group of two or more districts between representatives of producers of more than two thirds of the annual tonnage production of such districts or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein. It is possible that none of these agreements as to hours and wages will ever be made. If made, they may not be completed for months or even years. In the meantime, however, the provi-

sions of Part II will be continuously operative, and will determine prices in the industry. Plainly, then, there was no intention on the part of the framers of the statute that prices should not be fixed if the provisions for wages or hours of labor were found to be invalid.

Undoubtedly the rules as to labor relations are important provisions of the statute. Undoubtedly the lawmakers were anxious that provisions so important should have the force of law. But they announced with all the directness possible for words that they would keep what they could have if they could not have the whole. Stabilizing prices would go a long way toward stabilizing labor relations by giving the producers capacity to pay a living wage.[6] To hold otherwise is to ignore the whole history of mining. All in vain have official committees

---

[6] At a hearing before a Subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, First Session, on H. R. 8479, counsel for the United Mine Workers of America, who had coöperated in the drafting of the Act, said (p. 35):

"We have, as can be well understood, a provision of this code dealing with labor relations at the mines. We think that is justified; we think it is impossible to conceive of any regulation of this industry that does not provide for regulation of labor relations at the mines. I realize that while it may be contested, yet I feel that it is going to be sustained.

"Also, there is a provision in this act that if this act, or any part of it, is declared to be invalid as affecting any person or persons, the rest of it will be valid, and if the other provisions of this act still stand and the labor provisions are struck down, we still want the act, because it stabilizes the industry and enables us to negotiate with them on a basis which will at least be different from what we have been confronted with since April, and that is a disinclination to even negotiate a labor wage scale because they claim they are losing money.

"If the labor provisions go down, we still want the industry stabilized so that our union may negotiate with them on the basis of a living American wage standard."

inquired and reported in thousands of printed pages if this lesson has been lost. In the face of that history the court is now holding that Congress would have been unwilling to give the force of law to the provisions of Part II, which were to take effect at once, if it could not have Part III, which in the absence of agreement between the employers and the miners would never take effect at all. Indeed, the prevailing opinion goes so far, it seems, as to insist that if the least provision of the statute in any of the three chapters is to be set aside as void, the whole statute must go down, for the reason that everything from end to end, or everything at all events beginning with § 4, is part of the Bituminous Coal Code, to be swallowed at a single draught, without power in the commission or even in the court to abate a jot or tittle. One can only wonder what is left of the "presumption of divisibility" which the law-makers were at pains to establish later on. Codes under the National Recovery Act are not a genuine analogy. The Recovery Act made it mandatory (§ 7a) that every code should contain provisions as to labor, including wages and hours, and left everything else to the discretion of the codifiers. Wages and hours in such circumstances were properly described as "essential features of the plan, its very bone and sinew" (*Schechter Poultry Corp.* v. *United States, supra,* concurring opinion, p. 555), which taken from the body of a code would cause it to collapse. Here on the face of the statute the price provisions of one Part and the labor provisions of the other (the two to be administered by separate agencies) are made of equal rank.

What is true of the sections and subdivisions that deal with wages and the hours of labor is true also of the other provisions of the same chapter of the Act. Employees are to have the right to organize and bargain collectively through representatives of their own choos-

ing, and shall be free from interference, restraint or coercion of employers, or their agents, in the designation of such representatives, or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and no employee and no one seeking employment shall be required as a condition of employment to join any company union. No threat has been made by any one to do violence to the enjoyment of these immunities and privileges. No attempt to violate them may be made by the complainants or indeed by any one else in the term of four years during which the Act is to remain in force. By another subdivision employees are to have the right of peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own checkweighman to inspect the weighing or measuring of coal, and shall not be required as a condition of employment to live in company houses or to trade at the store of the employer. None of these privileges or immunities has been threatened with impairment. No attempt to impair them may ever be made by any one.

Analysis of the statute thus leads to the conclusion that the provisions of Part III, so far as summarized, are separable from Parts I and II, and that any declaration in respect of their validity or invalidity under the commerce clause of the Constitution or under any other section will anticipate a controversy that may never become real. This being so, the proper course is to withhold an expression of opinion until expression becomes necessary. A different situation would be here if a portion of the statute, and a portion sufficient to uphold the regulatory penalty, did not appear to be valid. If the whole statute were a nullity, the complainants would be at liberty to stay the hand of the tax-gatherer threatening to collect the penalty, for collection in such circumstances would be a trespass, an illegal and forbidden act. *Child Labor*

Tax Case, 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44, 62; *Terrace* v. *Thompson,* 263 U. S. 197, 215; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 536. It would be no answer to say that the complainants might avert the penalty by declaring themselves code members (§ 3) and fighting the statute afterwards. In the circumstances supposed there would be no power in the national government to put that constraint upon them. The Act by hypothesis being void in all its parts as a regulatory measure, the complainants might stand their ground, refuse to sign anything, and resist the onslaught of the collector as the aggression of a trespasser. But the case as it comes to us assumes a different posture, a posture inconsistent with the commission of a trespass either present or prospective. The hypothesis of complete invalidity has been shown to be unreal. The price provisions being valid, the complainants were under a duty to come in under the code, whether the provisions as to labor are valid or invalid, and their failure to come in has exposed them to a penalty lawfully imposed. They are thus in no position to restrain the acts of the collector, or to procure a judgment defeating the operation of the statute, whatever may be the fate hereafter of particular provisions not presently enforcible. The right to an injunction failing, the suits must be dismissed. Nothing more is needful—no pronouncement more elaborate—for a disposition of the controversy.

A last assault upon the statute is still to be repulsed. The complainants take the ground that the Act may not coerce them through the imposition of a penalty into a seeming recognition or acceptance of the code, if any of the code provisions are invalid, however separable from others. I cannot yield assent to a position so extreme. It is one thing to impose a penalty for refusing to come in under a code that is void altogether. It is a very different thing if a penalty is imposed for

refusing to come in under a code invalid at the utmost in separable provisions, not immediately operative, the right to contest them being explicitly reserved. The penalty in those circumstances is adopted as a lawful sanction to compel submission to a statute having the quality of law. A sanction of that type is the one in controversy here. So far as the provisions for collective bargaining and freedom from coercion are concerned, the same duties are imposed upon employers by § 9 of the statute whether they come in under the code or not. So far as code members are subject to regulation as to wages and hours of labor, the force of the complainants' argument is destroyed when reference is made to those provisions of the statute in which the effect of recognition and acceptance is explained and limited. By § 3 of the Act, "No producer shall by reason of his acceptance of the code provided for in section 4 or of the drawback of taxes provided for in section 3 of this Act be held to be precluded or estopped from contesting the constitutionality of any provision of said code, or its validity as applicable to said producer." These provisions are reinforced and made more definite by §§ 5 (c) and 6 (b), which so far as presently material are quoted in the margin.[7] For the subscriber to the code who is

[7] § 5 (c). "Any producer whose membership in the code and whose right to a drawback on the taxes as provided under this Act has been canceled, shall have the right to have his membership restored upon payment by him of all taxes in full for the time during which it shall be found by the Commission that his violation of the code or of any regulation thereunder, the observance of which is required by its terms, shall have continued. In making its findings under this subsection the Commission shall state specifically (1) the period of time during which such violation continued, and (2) the amount of taxes required to be paid to bring about reinstatement as a code member."

§ 6 (b). "Any person aggrieved by an order issued by the Commission or Labor Board in a proceeding to which such person is a

doubtful as to the validity of some of its requirements, there is thus complete protection. If this might otherwise be uncertain, it would be made clear by our decision in *Ex parte Young,* 209 U. S. 123, which was applied in the court below at the instance and for the benefit of one of these complainants to give relief against penalties accruing during suit. *Helvering* v. *Carter,* No. 651. Finally, the adequacy of the remedial devices is made even more apparent when one remembers that the attack upon the statute in its labor regulations assumes the existence of a controversy that may never become actual. The failure to agree upon a wage scale or upon maximum hours of daily or weekly labor may make the statutory scheme abortive in the very phases and aspects that the court has chosen to condemn. What the code will provide as to wages and hours of labor, or whether it will provide anything, is still in the domain of prophecy. The opinion of the court begins at the wrong end. To adopt a homely form of words, the complainants have been crying before they are really hurt.

My vote is for affirmance.

I am authorized to state that MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this opinion.

---

party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission or Labor Board be modified or set aside in whole or in part. . . . The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission or Labor Board, as the case may be, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, §§ 346 and 347.)"

McCANDLESS ET AL. *v.* UNITED STATES.

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

No. 552. Argued March 30, 1936.—Decided May 18, 1936.

1. In condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value. P. 345.
2. An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. It if be an appropriate link in the chain of proof, that is enough. P. 346.
3. In a suit to condemn land which would be adapted to the successful growth of sugar cane if provided with sufficient water for irrigation, *held:*

   (1) Erroneous to reject, upon the ground of immateriality, an offer to prove that a supply of water was available on other, distant land, and might be brought to the land sought to be condemned at an expense consistent with its profitable use. P. 345.

   (2) The error was prejudicial notwithstanding that the offer was not supplemented by a further offer to prove the cost of developing and delivering a sufficient supply, and what would be the value of the land when so reclaimed. P. 347.
4. Section 269, Jud. Code, requiring that judgment on review shall be given after an examination of the entire record "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties," does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. P. 347.

74 F. (2d) 596, reversed.

CERTIORARI, 296 U. S. 570, to review the affirmance of a judgment condemning land in Hawaii for the United States and fixing the compensation at a sum not satisfactory to the land owners, who on that account appealed.

Messrs. Urban Earl Wild and *Julius Russell Cades* for petitioners.

Assistant Attorney General Blair, with whom *Solicitor General Reed* and *Mr. Aubrey Lawrence* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit brought in the United States District Court for the Territory of Hawaii by the government against petitioners to condemn 4,080 acres of land on the Island of Oahu for a federal public purpose. The territorial law provides that in such a suit the value of the land and the value of the improvements thereon must be separately assessed. A common-law jury was empaneled, heard the case, and returned a verdict for petitioners fixing the value of the land at $206,503.51, and the value of the improvements thereon at $14,000. Judgment was entered in accordance with the verdict. On appeal to the court below, the judgment was affirmed. 74 F. (2d) 596.

The questions for our consideration are whether the ruling of the trial court refusing to admit certain evidence and offers of evidence was erroneous, and if so, whether the rejection of such evidence may be disregarded as not substantially prejudicial under § 269 of the Judicial Code as amended.

First. The lands sought to be condemned were in use, and had been used for many years, as a cattle ranch, although pineapples had been grown upon some small areas. The owners had in view the ultimate use of the lands for the growing of sugar cane, which would require the bringing of water from a distance for irrigation purposes. Testimony was introduced to the effect that upwards of 3,000 acres of the tract were suitable for growing cane, and would produce an average of 70 to 75 tons

of sugar cane to the acre, from which could be extracted eight or nine tons of sugar to the acre; and that the contour of the land was favorable to irrigation, and its general condition such as to make it adaptable to the purposes of a sugar plantation. Petitioners offered to prove that they had been for many years negotiating for the development of a sugar plantation on the land; that there were three sources of water supply, from one or the other of which petitioners had every reason to expect water would have been developed for the lands in question had it not been for the present suit; that any prospective purchaser of the lands would, at the time this suit was brought, take into consideration the reasonableness of the possibility of securing a supply of water for the purpose of raising sugar cane; that sugar-cane lands in the territory generally require the bringing of water from other lands for irrigation, and that the availability of water for such purpose is a factor in determining the value of prospective sugar cane lands; that such water in many instances is transported much greater distances than would be required in the pending case; that there are available artesian basins from which for many years fresh artesian water has been and is available, unused and flowing to waste, amounting to approximately 60,000,000 gallons per day; that petitioners own lands within these basins upon which wells may be sunk at distances of from eight to ten-and-one-half miles from the tract in question, and the water last described recovered; that it was practically and economically feasible to transport such water from the lands within these basins to the tract in question; that the cost of recovering and transporting such water would render the use of it economically feasible and profitable; and that such recovery and use of the water could be anticipated with reasonable certainty.

Petitioners offered further to prove that the surplus water could be captured and transported practicably and

economically and used profitably for the cultivation of sugar cane; and that the cost of recovering the water and transporting it would be less per million gallons than that incurred for recovery and transportation of water to other cane lands on the Island of Oahu and other islands in the territory.

These offers, and evidence of a similar character sought to be elicited from witnesses, were rejected by the trial court upon the ground that the possibility of bringing water from outside sources was too remote and speculative.

At the conclusion of the evidence, the court gave the following instruction to the jury:

"In estimating the compensation to be paid to the owners of the land which the government here seeks to condemn, I instruct you that you must entirely disregard any possibility of bringing water to the land in question from any other land, excepting the land which the government here seeks to condemn and the 284 acre tract, Lot B 1 A."

The 284-acre tract referred to is owned by petitioners, and adjoins the land sought to be condemned.

The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value. *Olson* v. *United States,* 292 U. S. 246, 255, 256.

That the greater part of the land here sought to be condemned was adapted to the successful growth of sugar cane if provided with sufficient water for irrigation is not controverted. Proof that a supply of water was available and might be brought to the land at an expense con-

sistent with its profitable use was, therefore, relevant and material. And this the evidence offered tended to establish. The ruling of the trial court rejecting the offers, and its instruction to the jury to disregard the possibility of bringing water from lands other than the land sought to be condemned and the 284-acre tract adjoining, were erroneous. This is well pointed out by the court below, and we see no occasion to enlarge upon its opinion.

The government now contends that the offer was insufficient because it does not exhibit an intention to show how much the value of the land would be increased, or the probable cost of the irrigation improvement. The evidence offered was material and relevant to the issue so far as it went. No objection was made on the part of the government such as is now urged. The objection specifically was that the possibility of bringing water from outside sources was too remote and speculative; and it is that objection which the trial court sustained. The ruling went not to the sufficiency of the offer, but to the materiality of the evidence. If it had been suggested or held that the offer was incomplete, it is not unfair, when we consider the nature of the specific matters named, to assume that the evidence in respect of them could have been supplied. In that view, what was said by the Supreme Court of California in *Palmer* v. *McCafferty,* 15 Cal. 334, 336, is pertinent:

"All that the Court can ask is, that the particular evidence offered conduces to establish any one proposition involved in the issue. . . . There must be a starting place somewhere, and the Court should never reject evidence merely because, unaided by other testimony, it is insufficient, if it tend legally to prove any part of the case."

An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough.

Second. The court below, while ruling that the rejection of the evidence was erroneous, held that it was not prejudicial error within the terms of § 269 of the Judicial Code, as amended (28 U. S. C. § 391), reproduced in the margin.[1] The court thought the offers of proof were not sufficiently specific to enable it to say that the rejection, although erroneous, was prejudicial. Apparently what was meant by the offers not being sufficiently specific, as indicated by a statement earlier in the opinion, is that they did not show what would be the value of the land when reclaimed, nor the cost of developing and delivering a sufficient water supply. But that seems to be the exact basis of the government's contention that the offer was not complete, which, affirming the court below, we have just held is without merit. We think equally it constitutes no ground for sustaining the ruling of the trial court as non-prejudicial. The action of the trial court in rejecting the offers plainly meant that it would be useless to offer further evidence supplementing and dependent upon that which had been rejected. Faced with that ruling and implication, counsel was not required to offer further evidence along that line. Cf. *Rogers* v. *Brent,* 10 Ill. 573, 588, 589.

In this situation, § 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless

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

it *affirmatively* appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82; *Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 26.

This the record does not disclose. In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation. The proof here offered necessarily related to the value of the land when used for a purpose to which it probably could be put within the rule laid down by the *Olson* case, *supra*. To exclude from the consideration of the jury evidence of this elementary character could not be otherwise than prejudicial.

We find no reason to differ with the holding of the court below as to the inadmissibility of evidence respecting the rent paid for other lands. It is unnecessary to consider whether the error was prejudicial, because the question cannot arise upon another trial.

The judgment of the court below must be reversed, and the cause remanded to the trial court for further proceedings in conformity with this opinion.

Reversed.

Syllabus.

BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 312. Argued January 14, 15, 1936. Reargued March 3, 4, 1936.—Decided May 18, 1936.

1. The function of the Interstate Commerce Commission in prescribing divisions of joint rates under § 15 (6) of the Interstate Commerce Act, is a legislative function. P. 356.
2. Exertion of the power of the Commission in that regard is conditioned upon its finding, after a full hearing, that the divisions in force do not, or in the future will not, comply with the standards specified by § 1 (4). *Id.*
3. In proceedings to determine and prescribe divisions, the Commission is governed by §§ 1 (4), 15 (6), and 15a (2) of the Act; it is not required or authorized to investigate or determine whether the joint rates are reasonable or confiscatory; its duty is to make the divisions fair, and this does not depend upon the level of the rates or the amounts of revenue to be divided. P. 357.
4. When made in accordance with the Act, the Commission's orders prescribing divisions are equivalent to Acts of Congress requiring the carriers to serve for the amounts so specified. *Id.*
5. An order of the Commission prescribing divisions, or continuing them in force, may be declared void and its enforcement permanently enjoined at the suit of a carrier whose share of the joint rate proves to be non-compensatory, even though the joint rate itself be not confiscatory. *Id.*
6. An order of the Commission denying relief to a carrier complaining under § 15 (6) of the Act of unjust and inequitable divisions of joint rates, operates to require service under them, and though negative in form is in effect affirmative. P. 358.
7. An order of the Commission sustaining divisions of joint rates as just, reasonable and equitable, under § 15 (6) of the Act, is not arbitrary and in excess of the Commission's power because based in part on the financial needs of the carriers. *Id.*
8. In determining, under § 15 (6) of the Act, the divisions of joint rates on a particular class of traffic, the Commission may consider not only the revenues, operating expenses, taxes and returns attributable to that particular traffic, but also those that are

attributable to all the operations of the railroad properties of the carriers. P. 360.

9. A report and order of the Interstate Commerce Commission from which some of the members dissent has the same legal effect as if supported by all. P. 361.
10. Findings of the Commission in fixing divisions under § 15 (6) of the Act and its determination of the significance of the particular facts found, *held* conclusive though too much weight was given to the financial needs of carriers. P. 362.
11. Where the application of carriers to the Interstate Commerce Commission for just, reasonable and equitable divisions of joint rates, under § 15 (6) of the Act, raised no question of confiscation, *held* that the findings in its report could not be construed as addressed to that issue. P. 363.
12. Denial by the Interstate Commerce Commission of a petition for rehearing of an order sustaining divisions of joint rates, the petition raising for the first time the issue of confiscation,—*held* to amount to a command by the Commission that, notwithstanding their invocation of constitutional protection, the petitioning carriers must make the adjustment ordered, involving the payment of enormous sums and the use of their property to serve the public for the compensation specified in the order. P. 363.
13. Upon the question whether the divisions of joint rates prescribed by the Interstate Commerce Commission constitute just compensation within the meaning of the Fifth Amendment, the findings of the Commission could not constitutionally be made conclusive. The District Court may receive evidence in addition to what was before the Commission and weigh all the evidence and make its own findings, in deciding the constitutional question. *St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38. P. 364.
14. A carrier petitioning the Commission for just, reasonable and equitable divisions of joint rates—the reasonableness of the rates themselves not being in question—is not obliged to raise in advance the question whether the existing divisions are confiscatory. *Held* that in this case the complaining carriers who sought in vain, by petition for rehearing, to have the Commission inquire into the alleged confiscatory results of its order, were entitled to seek judicial relief. P. 369.
15. Evidence *held* insufficient to prove with the requisite certainty that the divisions of joint rates on transportation of citrus fruit have proved or will prove to be confiscatory. P. 372.

9 F. Supp. 181, affirmed.

APPEAL from a decree of the District Court of three judges, which dismissed a bill to enjoin the enforcement of an order of the Interstate Commerce Commission determining divisions of joint rates on transportation of citrus fruit.

Mr. E. L. Beach, with whom *Messrs. Joseph F. Eshelman, M. Carter Hall, Jervis Langdon, Jr., Charles R. Webber,* and *Frederic D. McKenney* were on the brief, for appellants.

Mr. Edward M. Reidy, with whom *Solicitor General Biggs, Assistant Attorney General Dickinson,* and *Messrs. Daniel W. Knowlton* and *Elmer B. Collins* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. Frank W. Gwathmey, with whom *Messrs. Charles Clark* and *James F. Wright* were on the brief, for Atlantic Coast Line R. Co. et al., appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit in equity [1] brought by appellants against the United States to set aside and permanently to enjoin the enforcement of an order of the Interstate Commerce Commission based on its report made July 3, 1933, and modified in accordance with its report of January 8, 1934.[2] The commission, July 10, 1928, had prescribed rates on citrus fruit [3] from places of production in Florida to points in Official Classification Territory.[4] The order

[1] 28 U. S. C., §§ 41 (28), 44–46.

[2] 194 I. C. C. 729; 198 I. C. C. 375.

[3] 144 I. C. C. 603.

[4] Official classification territory, generally speaking, includes territory east of the Mississippi River and north of the Ohio and Potomac Rivers, including New England, portions of Virginia and West

here in controversy prescribes divisions as between southern carriers hauling from Florida to Richmond, Virginia, and other gateways, and northern carriers hauling to destinations, and prescribes adjustment to be made by the latter.[5] The Boston & Maine and other northern

---

Virginia, and certain destinations in Missouri, Iowa and Wisconsin. See map, 31 I. C. C. 350.

"Official territory is subdivided into three subterritories, which have been recognized in rate making for many years. These are New England, lying east of the eastern boundary of New York; trunk-line territory, which extends westward from there to a line drawn through Buffalo and Salamanca, N. Y., Warren, Oil City, Pittsburgh, and Washington, Pa., Wheeling, Parkersburg, Charleston and Gauley, W. Va., these cities being usually referred to as the 'western termini' of the trunk lines; and Central Freight Association territory, referred to herein as central territory, lying west of that line." Eastern Class Rate Investigation, 164 I. C. C. 314, 322.

[5]

Scale of southern factors		*Scale of northern factors*	
600 miles and less.....	161	240 miles and less.....	44
620 miles and over 600...	164	260 miles and over 240...	46
640 miles and over 620...	167	280 miles and over 260...	49
660 miles and over 640...	170	300 miles and over 280...	51
680 miles and over 660...	173	325 miles and over 300...	54
700 miles and over 680...	176	350 miles and over 325...	57
720 miles and over 700...	179	375 miles and over 350...	60
740 miles and over 720...	182	400 miles and over 375...	63
760 miles and over 740...	185	425 miles and over 400...	66
780 miles and over 760...	188	450 miles and over 425...	69
800 miles and over 780...	191	475 miles and over 450...	72
825 miles and over 800...	194	500 miles and over 475...	75
850 miles and over 825...	197	525 miles and over 500...	78
875 miles and over 850...	200	550 miles and over 525...	81
900 miles and over 875...	203	575 miles and over 550...	84
925 miles and over 900...	206	600 miles and over 575...	87
950 miles and over 925...	209	625 miles and over 600...	90
975 miles and over 950...	212	650 miles and over 625...	93
1,000 miles and over 975...	215	675 miles and over 650...	96
		700 miles and over 675...	99

The order directed carriers to adjust divisions in accordance with the basis above indicated on shipments which moved subsequent to November 22, 1930.

carriers intervened as parties plaintiff.[6] The commission and the Atlantic Coast Line and other southern carriers intervened as parties defendant.[7] The complaint assails the order upon the grounds that it is based on a misconstruction of the Act and is confiscatory. The case was tried by three judges. In addition to the evidence given before the commission there were offered and received at the trial the testimony of many witnesses and much documentary evidence. The court held plaintiffs not entitled to relief and dismissed the case.[8] They appealed.[9]

The history and structure of the joint rates shed light on questions to be decided. June 25, 1908, the commission found the rates, called "gathering rates," from places of shipment in Florida to junctions in the northern part of that State reasonable, but that the charges for transportation from the junctions to the north were unreason-

[6] The Boston & Maine Railroad; The New York Central Railroad Company; Pittsburgh and Lake Erie Railroad Company; The New York, New Haven & Hartford Railroad Company; The Central Railroad Company of New Jersey; Reading Company; Lehigh Valley Railroad Company; The Delaware, Lackawanna & Western Railroad Company; The Delaware & Hudson Railroad Corporation; Erie Railroad Company; Pere Marquette Railway Company; Charles M. Thompson, Trustee of The Chicago & Eastern Illinois Railway Company; The Chesapeake and Ohio Railway Company.

[7] Atlantic Coast Line Railroad Company; W. R. Kenan, Jr., and S. M. Loftin, receivers of the Florida East Coast Railway Company; Georgia, Southern & Florida Railway Company; L. R. Powell, Jr., and Henry W. Anderson, receivers of the Seaboard Air Line Railway Company; Southern Railway Company; Winston-Salem Southbound Railway Company; Florida, Central & Gulf Railway; Fort Myers Southern Railroad Company; Jacksonville, Gainesville & Gulf Railway; Tampa Southern Railroad Company; Tavares and Gulf Railroad Company; Louisville and Nashville Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company.

[8] 9 F. Supp. 181.

[9] 28 U. S. C., § 47 (a).

able. It prescribed "proportionals" which were added to the gathering rates to make joint rates applicable over through routes to destinations. Included in the proportionals were stated amounts, called "specifics," per box of estimated weight of 80 pounds to cover hauls beyond the gateways. These specifics went to the northern lines and constituted their share of the joint rates.[10]

In 1915 the commission allowed the carriers in official territory a general rate increase of five per cent.,[11] and in 1917 granted an additional 15 per cent.[12] These increases were applicable generally to interterritorial hauls. The specifics for northern lines were not advanced. In 1918, while the carriers were under federal control, the director general raised rates 25 per cent. The divisions to the southern and northern lines were increased by that ratio. In 1920, after the railroads were returned to their owners, the commission granted to carriers in the southern group a general rate increase of 25 per cent. and to those in the eastern group, which included the northern lines here involved, an advance of 40 per cent. It also authorized charges for interterritorial hauls to be raised by 33⅓%.[13] While that was enough to increase the southern carriers' shares by 25 per cent. and those of the northern lines by 40 per cent. in harmony with the respective rate increases, each group of carriers received divisions raised by 33⅓ per cent. The northern lines emphasize the fact that if their divisions had kept step with rates in that territory they would have been increased four times, whereas in fact their divisions did not share at all in either of the first two advances and only partially in the fourth, i.e., 33⅓ instead of 40 per cent.

---

[10] Florida Fruit & Vegetable Shippers' Protective Assn. *v.* A. C. L. R. Co., 14 I. C. C. 476.

[11] The Five Per Cent Case, 31 I. C. C. 351; 32 I. C. C. 325.

[12] Fifteen Per Cent Case, 45 I. C. C. 303.

[13] Ex parte 74, 58 I. C. C. 220.

The joint rates prescribed by the commission's order of July 10, 1928, were specified amounts per 100 pounds. The assumed weight of 80 pounds per box to which were applied the specifics to cover hauls of the northern carriers was too low. While the commission failed definitely to find actual average weight per box, its report distinctly indicates that it was about 90 pounds.[14] After the taking effect of the new rates the northern lines in trunk line and New England territories took, out of the freight charges they collected, and retained as their divisions per 100 pounds 25 per cent more than the specific per box. The northern lines in central territory adopted 90 pounds as the basis on which to make conversion of the rate per box to rate per 100 pounds. The increase was slightly over 11.1 per cent.

The divisions were not satisfactory to either group of carriers. November 22, 1930, the Atlantic Coast Line and other southern carriers filed their complaint[15] requesting the commission to condemn the divisions of citrus fruit rates to trunk line and New England territories, then being received by them, as a violation of the requirements of § 1 (4), to prescribe just, reasonable and equitable divisions in accordance with § 15 (6), and to require adjustment and refund to be made by northern lines in respect of transportation subsequent to the complaint. January 3, 1931, the commission instituted a general investigation[16] in respect of divisions of joint interterritorial rates between official and southern territory. April 20, 1931, the northern lines filed a cross-complaint. To prevent duplication, the general investigation, so far as it concerned divisions of rates on citrus fruit in central territory, was set for hearing on the same record as the complaint of the southern lines in respect

[14] 144 I. C. C. at pp. 615, 616, 626.

[15] Docket No. 24,069.

[16] Docket No. 24,160.

of divisions of rates to trunk line and New England territory.[17] Thus the issue concerning divisions of citrus fruit rates from Florida to destinations in official territory was segregated from the broader controversy. The order here assailed assigns to appellants divisions yielding more than did those accepted by them for a long time prior to the taking effect of the rate order of July 10, 1928.

There was before the commission no question as to the validity of the joint rates. There was no claim that they were not sufficient to cover "out-of-pocket costs," i. e., the amount by which performance of the service covered by the rates caused operating expenses and taxes to be higher than otherwise they would have been. Nor was it suggested that they were confiscatory, i. e., not sufficient to cover operating expenses and taxes justly apportionable to the traffic plus an amount reasonably sufficient in the circumstances to constitute just compensation for the use of the carriers' property in that service. The division of presumably reasonable rates was the only problem before the commission. Neither complaint alleged that existing divisions were not more than sufficient to cover the out-of-pocket costs or that they were confiscatory.

The commission was required to decide whether, in respect of the joint rates, the carriers had discharged the duties imposed upon them by § 1 (4), i. e., "to establish just, reasonable, and equitable divisions thereof as between the carriers . . . participating therein which shall not unduly prefer or prejudice any of such participating carriers." The prescribing of divisions is a legislative function.[18] Exertion of that power by the commission is conditioned upon its finding after a full hearing that

[17] 194 I. C. C. at p. 730.

[18] *Terminal R. R. Assn.* v. *United States,* 266 U. S. 17, 30. Cf. *Prentiss* v. *Atlantic Coast Line,* 211 U. S. 210, 226–227. *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298, 305, 307.

the divisions then in force do not, or in the future will not, comply with the specified standards. In proceedings to determine and prescribe divisions the commission is governed by §§ 1 (4), 15 (6), 15a (2); it is not required or authorized to investigate or determine whether the joint rates are reasonable or confiscatory. The question whether it complied with the requirements of the Act does not depend upon the level of the rates or the amounts of revenue to be divided. The purpose of the provisions just cited is to empower and require the commission to make divisions that colloquially may be said to be fair.[19]

But this does not imply that, without regard to amount, the carriers are bound to accept prescribed divisions. Congress is without power, directly or through the commission, to require them to serve the public at rates that are confiscatory. When made in accordance with the Act, the commission's orders prescribing divisions are the equivalent of Acts of Congress requiring the carriers to serve for the amounts specified. Taken, as they must be, in connection with the duties to the public imposed by law upon the carriers, they command service and for that purpose expropriate the use of carriers' property. If when made the prescribed divisions are or later shall become less than just compensation, the carriers may not be required to serve therefor.[20] And, if after appropriate effort they fail to obtain divisions of non-confiscatory joint rates that do constitute just compensation for their services including the use of their properties,

---

[19] *New England Divisions Case,* 261 U. S. 184, 195, 204. *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 284–286, 291. *Brimstone R. & C. Co.* v. *United States,* 276 U. S. 104, 115–117. *Beaumont, S. L. & W. Ry.* v. *United States,* 282 U. S. 74, 82, 89.

[20] *New England Divisions Case,* 261 U. S. 184, 195. *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 477, 485 *et seq.* *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 285. *Beaumont, S. L. & W. Ry.* v. *United States,* 282 U. S. 74, 88.

the carriers may by suit in equity have the order prescribing, or requiring to be kept in force, the challenged divisions adjudged void and its enforcement permanently enjoined.[21] Section 15 (6) requires the commission on complaint of any participating carrier to determine whether existing divisions are just, reasonable and equitable and, if not, to prescribe others that do comply with the law. Its denial of relief from existing divisions operates to direct service under them. Though negative in form, the order of denial is affirmative in effect. In some circumstances carriers may accept rates or divisions that do not yield enough to cover operating expenses and taxes that are fairly apportionable to the service plus a reasonable return for the use of their railroads. If revenues yielded exceed the amounts by which operating expenses are increased on account of the service covered by such charges, then legitimately the carriers' net earnings may thus be enhanced. When conditions permit, such rates or divisions may be established and kept in force without detriment to competing carriers, shippers, other transportation or the public. Just as an owner may sell his property for less than the amount he would be entitled to have upon expropriation, so may carriers, conditions warranting it, render service for less than, by exertion of sovereign power, they could be compelled to accept.

1. Appellants maintain that the order is arbitrary and in excess of statutory power "because the commission erroneously subordinated all matters, which under § 15 (6) . . . it is required to consider to the element of southern lines' supposed 'financial need.' "

In substance, Congress by that paragraph authorizes the commission to take into account all that is relevant to the ascertainment of fair divisions. While presumed

[21] Judicial Code, § 24 (28), 28 U. S. C., § 41 (28). *Alton R. Co.* v. *United States*, 287 U. S. 229. *United States* v. *New River Co.*, 265 U. S. 533, 540. Cf. *Chicago Junction Case*, 264 U. S. 258, 263.

valid, its order may be annulled if shown to rest on a misconstruction of the Act or upon inadequate or unsupported findings of fact.[22] The commission alone is authorized to decide upon weight of evidence or significance of facts. There is no single test by which "just," "reasonable" or "equitable" divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases. Error as to the weight to be given financial needs, operating costs or other material facts is not a misconstruction of the Act.

The report shows that the commission received much evidence bearing upon the standards set by § 15 (6) to govern it in making the divisions. Appellants' claim that the order rests exclusively upon the southern lines' financial needs is negatived by the record. Many other facts were shown to have been presented and considered. There is no requirement that the commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached.[23] Useful precision in respect of either would be impossible. And it would be futile upon the record to attempt defi-

---

[22] *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481. *Chicago Junction Case*, 264 U. S. 258, 265. *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 291. *Brimstone R. & C. Co.* v. *United States*, 276 U. S. 104, 116–117. *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 487. *Florida* v. *United States*, 282 U. S. 194, 214–215. *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 462 *et seq.* *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 202.

[23] *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 427. *Florida* v. *United States*, 282 U. S. 194, 215. *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464. Cf. *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86.

nitely to ascertain the weight assigned to any fact or argument in prescribing the divisions. We find no support for appellants' claim.

2. Appellants also maintain that the order is in excess of power granted by the Act because, as they assert, the commission considered rates of return from the carriers' entire operations on all their railroad property instead of fair return from transportation of citrus fruit on the use fairly attributable to that service.

More specifically, the substance of their claim is that the commission transgressed or disregarded the clause of § 15 (6) which requires that it "shall give due consideration, among other things, to . . . the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation. . . ." Their contention assumes and depends upon a construction of the quoted clause that would limit consideration of the return to services covered by the divisions under consideration and prohibit taking into account returns from all service. But that is not the meaning of the clause. The language, "property held for and used in the service of transportation," is broad enough to include all carrier property. It requires no discussion to demonstrate that § 15 (6) authorizes the commission to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property. And unquestionably the paragraph also empowers the commission to take into account the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration. The record shows that the commission received and considered evidence in relation to both these matters of fact.

The question whether the carriers in the southern or northern groups were in the worse financial position was a close and difficult one. After full hearing, the commission decided that the needs of the southern lines were greater. It appears to have given much weight to that fact. Four members dissented and filed an opinion in which they compared and commented on the prescribed divisions in substance as follows:

For a haul of 600 miles the northern factor is 87 and the southern 161. The latter is 85 per cent. higher than the former. The average hauls are about 825 miles in the south and 375 miles in the north. For these distances the factors are 194 for the south and 60 for the north, or 0.235 per mile for the longer haul in the south and 0.160 per mile for the shorter haul in the north. The advantage per mile is 47 per cent. for the south. Taking into consideration the respective lengths of haul and the fact that divisions, like rates, should decrease per mile as the length of haul increases, this 47 per cent. checks well within the 85 per cent. in the first test.

For the average southern haul of 825 miles the southern factor is 94 per cent. of the corresponding first-class rate, whereas the northern factor is 62.5 per cent. Yet the southern class rates average more than 30 per cent. higher than the eastern class rates, and the commission has several times found that this difference is not fully justified by transportation conditions.

Transportation conditions in Florida are less favorable than in the south generally; but a Florida arbitrary is added to the rate. It is deducted before proration and added to the southern division of the balance of the joint rate. Gathering expense is high but so is delivery expense at destination. The commission was obliged to lean heavily on history and on the fact that, while both sets of carriers are badly off financially, the southern lines appear to be worse off than the northern. Historical

considerations were not entitled to much weight. While financial need is important, the report and order of the commission gave it too much weight.

The wide difference of opinion among the members may suggest doubt as to some basic findings of fact, but it gives no support to appellants' claim that the commission acted arbitrarily or in excess of powers granted by the Act. The legal effect of the challenged report and order is the same as if supported by all members of the commission.[24] Although it may be plain that, if considered without regard to the facts other than relative transportation and costs of the service, the divisions would seem extremely favorable to the southern lines, the commission's findings based on evidence and its determination as to the significance of pertinent facts found are conclusive. Appellants' contention cannot be sustained.

3. Before taking up appellants' claim of confiscation, some preliminary questions require consideration.

At the trial the United States and commission moved that no evidence be received other than that contained in the record before the commission. The court denied the motion. Counsel for the United States and commission do not here claim that the ruling was erroneous. But it has been suggested that the trial court should not have received evidence other than that introduced before the commission; that it was not permitted to make findings but was bound to accept those of the commission if supported by evidence. Decisions in lower federal courts

---

[24] *Boyle* v. *Zacharie*, 6 Pet. 348. *Williams* v. *Eggleston*, 170 U. S. 304, 311. *Matthews* v. *Clark*, 105 S. C. 13, 19; 89 S. E. 471. *L. D. Willcutt & Sons Co.* v. *Driscoll*, 200 Mass. 110, 115; 85 N. E. 897. *Feige* v. *Michigan Central R. Co.*, 62 Mich. 1, 4; 28 N. W. 685. *Lombard* v. *Lombard*, 57 Miss. 171, 174. Cf. *McDowell* v. *Peyton*, 10 Wheat. 454, 461. *Woodruff* v. *Parham*, 8 Wall. 123, 139.

touching the points thus raised are not harmonious.[25] Their determination has an important bearing upon the decision here to be made. It is therefore necessary to decide what, in respect of admission and consideration of evidence, should have been the scope of the trial in the district court.[26]

There is no statute that can be held to limit as suggested trial of an issue of confiscation. No question as to compensation in the constitutional sense was raised by the complaints to the commission. The issues there concerned only the fairness of divisions. Prior to the taking effect of the order, appellants filed a petition for rehearing in which they claimed that its enforcement would confiscate their property; they then made substantially the same contentions as they make in this suit and sought opportunity to support them by evidence in order to obtain the commission's findings of fact and decision upon the question of confiscation. But the commission denied their application. That denial of hearing amounted to a command of the commission that, notwithstanding their petition to it invoking constitutional protection, appellants must make the specified adjustment involving the payment of enormous sums and use their property to serve the public for the compensation specified in the order. As the carriers' application to the commission for just, reasonable and equitable divisions under § 15 (6) raised no question of confiscation, its findings in the report may not be construed as addressed to that issue.

---

[25] *Denver Union Stock Yard Co.* v. *United States,* 57 F. (2d) 735, 739. *St. Joseph Stockyards Co.* v. *United States,* 58 F. (2d) 290, 295. *Morgan* v. *United States,* 8 F. Supp. 766, 769. *Union Stock Yards Co.* v. *United States,* 9 F. Supp. 864, 875. *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322, 326. *American Commission Co.* v. *United States,* 11 F. Supp. 965, 969.

[26] Cf. *King Mfg. Co.* v. *Augusta,* 277 U. S. 100, 102.

4. There is a wide and fundamental difference between the question whether the commission, in prescribing divisions found by it to be just, reasonable and equitable, complied with the procedural requirements of the Act, and whether, if enforced against objecting carriers, the order will confiscate their property. The commission's findings of fact in the field first mentioned, if based on evidence, are conclusive. But, upon the question whether prescribed divisions constitute just compensation within the meaning of the Fifth Amendment, Congress is without power conclusively to bind the carriers. As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment.[27]

In *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, this court held repugnant to the due process clause of the Fourteenth Amendment a Minnesota statute construed to provide that rates prescribed by the state commission shall be final and conclusive as to what are equal and reasonable charges and that as to reasonableness there can be no judicial inquiry. The court said (p. 458): "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus,

[27] *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276. *St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38.

in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States."

In *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, this court held repugnant to the Fifth Amendment an Act of Congress purporting to exclude an element of value. It said (p. 327): "By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

In *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, a fully considered case presenting the question whether a circuit court of the United States had power to enjoin enforcement of confiscatory state-made railroad rates, this court, upon an abundance of authority found in the earlier decisions, held that it had. The opinion declares (p. 399): "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing

new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

Seaboard Air Line v. *United States,* 261 U. S. 299, was a suit to recover just compensation for expropriated land. A jury found value at the time of the taking. The district court entered judgment for that amount with interest from the date of taking. The Circuit Court of Appeals held the owner not entitled to interest. Here its judgment was reversed and that of the district court affirmed. We said (p. 306): "The Constitution safeguards the right [to just compensation] and § 10 of the Lever Act directs payment. The rule above referred to, that in the absence of agreement to pay or statute allowing it [Jud. Code, § 177; 28 U. S. C., § 284] the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement

that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

United States v. *New River Collieries Co.*, 262 U. S. 341, involved the question of pay for requisitioned coal. We said (pp. 343–4): "The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard." See *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301. *Phelps* v. *United States*, 274 U. S. 341.

In *West* v. *C. & P. Tel. Co.*, 295 U. S. 662, called upon to decide whether the order of a state commission prescribing charges for telephone service was confiscatory, we said (p. 671): "When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value."

St. Joseph Stock Yards Co. v. *United States*, *ante*, p. 38, presented the question whether an order of the Secretary of Agriculture prescribing rates for stockyards services was confiscatory. The case was submitted to the district court upon the evidence contained in the record before the Secretary. This court was called on to decide whether the district court was required to weigh the evidence. We answered affirmatively. We said (p. 51): "When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these [constitutional] limits of power. The legislature cannot preclude that scrutiny or determination by any declaration

or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. . . . It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. If as to the value of his property the owner accepts legislative or administrative determinations or challenges them merely upon the ground that they were not made in accordance with statutes governing a subordinate agency, no constitutional question arises. But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function

involved. That includes the right to introduce evidence [28] and have judicial findings based upon it.[29]

5. Although not suggested by appellees, it is here urged that the lower court was without power to consider the question whether the order is confiscatory. Grounds taken are that appellants did not seasonably raise that issue or present their evidence upon it to the commission, and that in respect of divisions, as distinguished from the joint rates to be divided, confiscation can never be the ultimate issue.

But neither group of carriers claimed before the commission or here asserts that the joint rates are not sufficient to permit nonconfiscatory divisions that are just, reasonable and equitable within the meaning of § 15 (6). By failure to suggest the contrary, they virtually concede them adequate for all purposes. The order prohibits the application of any other divisions and, unless enjoined, must be given effect according to its terms. It directs adjustment on the prescribed basis on shipments made after November 22, 1930. 144 I. C. C. 603. If that part of the order is carried into effect, the amounts to be paid under it by the northern lines to the southern lines will exceed, as asserted by appellants, $1,200,000.

---

[28] *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 50. *Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 525. Cf. *Chicago, B. & Q. R. Co.* v. *Osborne*, 265 U. S. 14.

[29] *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287. *Bluefield Water Works Co.* v. *Public Service Comm'n*, 262 U. S. 679, 689. *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 485–486. *Ohio Utilities Co.* v. *Utilities Commission*, 267 U. S. 359, 364. *Lehigh Valley R. Co.* v. *Utility Commissioners*, 278 U. S. 24, 36–41. *United Railways* v. *West*, 280 U. S. 234, 251. *Crowell* v. *Benson*, 285 U. S. 22, 46, 56, 60. *State Corporation Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 569. Cf. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 443. *Phillips* v. *Commissioner*, 283 U. S. 589, 600. *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168.

And the application of the prescribed basis to future shipments will correspondingly reduce northern lines' compensation.

They could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the commission's findings and report, to set up a fear of transgression of their constitutional rights. Presumably the commission would keep within the law. The boundaries of the power conferred upon it by § 15 (6) had been clearly defined. Expounding that provision, we had held: "It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system,' provided the share left to its connections is 'adequate to avoid a confiscatory result.' " [30] The limitation noted in that statement merely applies the principle that "there is no place in our constitutional system for the exercise of arbitrary power." [31]

Appellees do not claim that appellants were required to or could have raised the question of confiscation upon the proposed report of the examiners. That report is not a part of the record. At the trial appellants offered it in evidence. The commission objected to it on the ground that it is "a mere recommendation of an employee of the commission to the commission." The court sustained the objection. The report of the commission

---

[30] *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 284–285, citing *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 477; *New England Divisions Case*, 261 U. S. 184, 194, 195.

[31] *Garfield* v. *Goldsby*, 211 U. S. 249, 262. *Jones* v. *Securities & Exchange Comm'n*, *ante*, p. 1.

does not disclose the examiners' recommendations but states that its conclusions differ somewhat from those proposed by the examiners. For the reason given in the commission's objection, upon which the court excluded what the examiners proposed to the commission, the appellants would not have been justified in raising the question of confiscation upon the proposed report.

No Act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the commission for rehearing, repeal or modification. Nor has Congress attempted to limit the time within which the carrier may sue to enjoin enforcement of an order of the commission prescribing rates or divisions. That is so for the reason, among others, that divisions valid when made may later become confiscatory.[32] For example, the evidence as to the cost of service introduced before the commission and at the trial was based on operations in 1929. The appellants were not given and could not obtain a hearing before the commission upon the question of confiscation. Their failure earlier to invoke constitutional protection does not bar this suit. That they diligently sought relief from the commission is shown in the latter's brief here in which, justifying or explaining its denial of the second petition for rehearing, it says: "When the Commission denied the second petition, it already had before it and had considered the proffered evidence in support of the claim of confiscation that appellants desired it to consider, as well as the entire record of the previous hearings, much of the testimony in which consisted of cost calculations and other statistical data offered by the appellants." Appellants conformed to practice appropriate and desirable as indicated

[32] *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 418. *Bluefield Water Works Co.* v. *Public Service Comm'n*, 262 U. S. 679, 693. *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 400. *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 162.

in *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 489, and recently expounded in *St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38.

Appellants appropriately invoked judicial power to obtain constitutional protection against the commission's order. The district court rightly held them entitled to introduce evidence in addition to that contained in the record before the commission, and rightly proceeded, upon consideration of all the evidence, to make findings and, upon the basis of the facts that it found, to decide upon the constitutional question.

6. As to proof of confiscation.

By this appeal we are required to analyze findings of the commission and of the court, in so far as they bear upon the question of confiscation, and, to the extent that may be found necessary, to review the evidence and to decide whether appellants have proved, with the degree of certainty required in cases such as this, that the enforcement of the commission's order will operate to deprive them of their property without due process of law or to take its use for the service of the public without just compensation in contravention of the Fifth Amendment.[33]

The commission having refused to consider the question of confiscation, we are deprived of the benefits of its analysis of the evidence, findings of fact and inferences based upon them that necessarily would have been involved in its determination of the question whether the prescribed divisions are, and for a reasonable time in the

[33] *Kansas City So. Ry.* v. *Albers Commission Co.,* 223 U. S. 573, 591–594. *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 223 U. S. 655, 668–669. *Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 528. *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 69. *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 315–316. *Norris* v. *Alabama,* 294 U. S. 587, 589–590. *United States* v. *Idaho, ante,* p. 105. *St. Joseph Stock Yards Co.* v. *United States, ante,* pp. 38, 51.

immediate future will be, sufficient to constitute just compensation, within the meaning of the Fifth Amendment, for the services covered by the divisions.

To warrant reversal in so far as the order directs adjustment and refund, it must clearly appear from the evidence before us that its enforcement, in respect of the period involved, would leave appellants less than enough to cover operating expenses, taxes and just compensation for the use of their property fairly attributable to the service covered by the divisions. To warrant reversal of the decree in other respects, the evidence must show that the prescribed divisions were and in the future will be confiscatory.

Appellees' suggestion that the challenged report and order come to this court upon concurrent findings of the commission and district court is without force. Denial without more of the second petition for rehearing involved no finding of fact. It was merely a refusal to pass upon the question of confiscation then for the first time presented. And, as the commission in prescribing divisions acted legislatively and not judicially, the rule that where two courts have reached the same conclusion on a question of fact it will be accepted here unless clearly erroneous, does not apply.

Appellants' method of calculation.—For each carrier figure system costs per car mile thus: Ascertain from its reports to the commission operating expenses and taxes; apportion total between freight and passenger according to formula prescribed by the commission; from freight expense deduct cost of car repairs, depreciation and retirements; divide remainder by total freight car miles and to the quotient add two cents per mile paid for use and maintenance of refrigerator cars used to haul citrus fruit. The result is taken to represent the cost per car mile of transportation of that freight. It depends upon the assumption that citrus fruit car mile cost is at least as high as the average of system car mile cost.

To ascertain property value apportionable to the service covered by the prescribed divisions: Divide investment in road and equipment as reported to commission on the basis of freight operating expenses—less cost of repair, depreciation and retirement of freight cars—to total operating expenses, and take such proportion of value so assigned to freight as citrus fruit car miles are to total freight car miles. Citrus fruit net revenues divided by value assigned to that traffic gives rate of return.

The shipping season of 1928–29 was the test period. There were hauled 17,324 carloads by the Atlantic Coast Line and Seaboard Air Line from Florida points to Richmond, Virginia; and by the Richmond, Fredericksburg & Potomac to Potomac Yards; whence the Pennsylvania hauled the larger part, and the Baltimore & Ohio the rest, to destinations. Comparison of expenses determined by application of the estimated citrus fruit car mile cost with revenues calculated on the basis of the challenged divisions follows:

	Revenues	*Expenses*	*Deficit*
R., F. & P.	$411,051.64	$412,311.20	$1,259.56
Pennsylvania	748,339.98	813,918.88	65,578.90
B. & O.	87,845.90	74,477.23	*13,368.67

* Surplus.

In the same season 4,662 carloads of citrus fruit from Florida were hauled by southern carriers to other gateways named in the order and by northern lines thence to destinations in central territory. Calculations on the same basis indicate revenues $285,064.02, estimated expenses $232,456.87, surplus $52,607.15. Appellants say of this surplus $39,644.92 is accounted for by 1,253 cars, hauled a short distance by northern carriers, affected by minimum provisions of the order, and that the cost assigned to them is understated.

Comparisons of divisions.—Divisions of revenues from 29,221 cars hauled to destination in Trunk Line and New

England Territory, as settled, amounted to about $285,000 less than if made on mileage prorate. Divisions on basis prescribed by the order would have been about $600,000 less than if made on mileage prorate. The prescribed divisions on shipments to New York and Philadelphia are more than 94 per cent. of local rates from the south to Richmond and are less than 35 per cent. of local rates north from Richmond. Southern weighted average hauls calculated on short line distances were 810 miles and the northern 358 miles. Contrary to the established general rule, the order prescribes higher divisions per mile for the longer than for the shorter haul. The average earning per loaded car mile south was 31.4¢ and north 21¢.

Appellants claim that the cost per citrus fruit car mile is greater than the average of all. To support that contention they emphasize evidence introduced to support these facts: Refrigerator cars used are very much heavier than the cars used to haul dead freight; additional inspection service is required, hauling over road and handling in terminals is more expeditious than that given to ordinary cars. There are required at destination relatively very expensive produce terminals. Diversions and reconsignments are more frequent. Expedited service requires, at intermediate and final terminals, more employees for inspection, repairing, and keeping records than otherwise would be necessary, extra engines and crews are required promptly to classify, to switch to ice houses, to effect reconsignments, to make up trains and to haul them. The relatively high percentage of empty car movement makes it hard to balance movement in both directions and frequently requires operation of locomotives over the road without cars.

Appellants cite a statement in the report of the commission to the effect that in general the evidence indicates that citrus fruit like other perishable traffic is

given a specialized, expedited service which is undoubtedly more expensive than the ordinary run of freight. They refer to the testimony of experts, who expressed opinion to the effect that the cost of transporting citrus fruit was greater than the average cost of handling all freight, to evidence tending to show that physical conditions, such as bridges, grades, tunnels, complex terminals, affecting operating conditions on those portions of northern lines used for the transportation of relatively large amounts of citrus fruit, are more adverse than on their respective systems as a whole.

They draw comparisons indicating 10.56 cents to be the Baltimore & Ohio system average cost per car mile as against 14.61 cents on the operating division over part of which most of its citrus fruit is hauled; correspondingly 10.95 cents appears to be the Pennsylvania system average as against 11.59 cents for its Eastern Region and New York Zone over a part of which most of its citrus fruit is hauled.[34] Basing the statement on mere opinion of an expert, they say that on hauls over the Pennsylvania line through Baltimore and Philadelphia to New York the transportation expense alone was 14.2 cents per car mile.

They claim that tested by the car mile study the prescribed divisions failed by substantial margins to afford any return to the Richmond, Fredericksburg & Potomac or to the Pennsylvania, and that they afforded a return to the Baltimore & Ohio of only 4.42 per cent.

Appellants maintain that the principles underlying their estimates of cost are sound and that the assumptions

---

[34] The Baltimore Division of the Baltimore & Ohio extends from Brunswick, Md. through Washington, D. C., and Baltimore to Park Junction (Philadelphia).

The combined Eastern Region and New York Zone (P. R. R. portion) of the Pennsylvania embraces system lines east of Altoona, Pa., and Renovo, Pa., except the Long Island Railroad.

made are reasonable. Conceding that they have not proved what the exact cost per car mile chargeable to citrus fruit was in the test period, or has been since, or what it will be in the future, they refer to decisions of the commission [35] and of this court [36] recognizing the impossibility of making exact proof of cost of transportation of any commodity and indicating that sometimes resort must be had to system average costs. They emphasize the fact that railway cost accounting cannot with exactness apportion to one commodity its fair proportion of cost incurred in common with transportation of other freight or of passengers; insist that special cost studies in this case would have been impracticable; urge that they should not be held to impracticable exactness, and that reasonable determinations are sufficient.[37]

Appellees call attention to the commission's rejection of the average unit costs as a method of approximating cost of handling a single commodity.[38] They seek to discredit appellants' method by showing it would prove confiscatory the divisions that for a long time they had accepted. Their evidence tends to show: Much of the operating expenses chargeable to maintenance of way, maintenance of equipment and transportation is not affected by volume of traffic, and therefore the greater the

---

[35] Citing Sloss-Sheffield Steel & Iron Co. *v.* L. & N. R. Co., 30 I. C. C. 597, 602. Sugar from Key West, 112 I. C. C. 347, 348. Georgia Public Service Comm'n *v.* Atlantic Coast Line R. Co., 186 I. C. C. 157, 187.

[36] Citing *Atlantic Coast Line* v. *Florida,* 203 U. S. 256, 260. *Wood* v. *Vandalia R. Co.,* 231 U. S. 1, 6, 7.

[37] *Florida* v. *United States,* 292 U. S. 1, 9.

[38] Citing Iron Ore Rate Cases, 41 I. C. C. 181, 281. California Growers' & Shippers' Protective League *v.* S. P. Co., 129 I. C. C. 25, 52. Georgia Public Service Comm'n *v.* Atlantic Coast Line R. Co., 186 I. C. C. 157, 183. R. W. Burch, Inc. *v.* Railway Express Agency, 190 I. C. C. 520, 535; 197 I. C. C. 85.

number of units of service the less the cost per unit; the very large volume of citrus fruit hauled by the Pennsylvania from Potomac Yards makes for low cost per car mile. Terminal services are not affected by length of haul. The Pennsylvania citrus fruit average haul, loaded and empty, being much greater than the system average haul, apportionment on a car mile basis makes for excessive assignment of terminal operating expenses to citrus fruit. And they rightly say that opinions of experts unsupported by adequate actual tests may not safely be substituted for concrete data.[39]

The burden on appellants, heavy though it is, does not require them to prove with arithmetical accuracy the cost of the transportation covered by the challenged divisions or the value of the property used to perform it, or the proportion attributable to that service. It is enough, if the evidence preponderating in their favor reasonably warrants findings sufficient to support the decree sought. Many issues as to which demonstrable accuracy is impossible have to be decided by the courts. In ascertaining cost of transportation of one out of many commodities hauled by railroads it is impossible to attain precision. Mere lack of it is not ground for objection either to the evidence offered or the facts which it tends to prove.[40]

We may say at once that no substantial weight is to be given to appellants' comparison of divisions prescribed for northern carriers with those given the southern lines. As shown above, the commission acting under § 15 (6) was dealing merely with fairness of divisions of a joint

[39] *Northern Pacific Ry.* v. *North Dakota,* 216 U. S. 579, 580. *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 18. *Minnesota Rate Cases,* 230 U. S. 352, 466. *Missouri Rate Cases,* 230 U. S. 474, 507. Cf. *Pacific Gas Co.* v. *San Francisco,* 265 U. S. 403, 406. *McCardle* v. *Indianapolis Co.,* 272 U. S. 400, 416.

[40] *Chicago, M. & St. P. Ry. Co.* v. *Tompkins,* 176 U. S. 167, 178.

rate and not with just compensation within the meaning of the Fifth Amendment.

The commission's statement to the effect that citrus fruit transportation service "is undoubtedly more expensive than the ordinary run of freight" is not entitled to any weight, for it does not appear that the statement referred to cost per car mile. For aught that appears, some other unit may have been meant. And, as they lack disclosed definite bases of established fact, no weight may be given to cited opinions of appellants' expert witnesses to the effect that citrus fruit car mile cost is higher than system average.

Nor is there any force in appellees' suggestion to the effect that the evidence on which appellants seek to prove the prescribed divisions confiscatory would similarly condemn divisions that they accepted for a long time prior to the reduction of the joint rates November 9, 1928. As shown above, carriers advantageously to themselves and the public may and sometimes do apply rates and divisions that are lower than they could be compelled by law to accept.

The test period 1928–29 ended more than: one year before the first complaint to the commission, four years before its final decision and the commencement of this suit, five years before entry of the decree appealed from, and six years before submission to this court. In that period there intervened a profound business depression out of which there has been some progress.[41] The evidence fails to show that the relation of citrus fruit car mile cost to the system average has remained the same as appellants claim it was in the test period. Appellants should have brought forward evidence and estimates based on operations subsequent to the complaint, No-

[41] *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, 260, 261. *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 311. *Great Northern R. Co.* v. *Weeks,* 297 U. S. 135.

vember 22, 1930, and also as near as possible to the time of trial in the district court. The order prescribing the challenged division has been in effect for a long time, and in the absence of proof clearly showing that on the basis of present and prospective conditions it is confiscatory, its enforcement ought not to be enjoined.

Appellants' evidence was addressed primarily to the question whether as to citrus fruit traffic moving through the Richmond gateway the prescribed divisions were confiscatory. In determining whether as to any carrier that evidence was sufficient, appellants' estimated citrus fruit car mile cost is of prime importance. A slight variation in that figure is sufficient to change the balance from one side of the account to the other; to change surplus revenue to deficit. If since the order took effect that cost has been, or in the immediate future will be, substantially less than the contemporaneous system car mile cost, appellants' proof is not sufficient to show confiscation. It is very difficult to attain the high degree of certainty in respect of this vital factor that is obviously necessary to make dependable proof.

Operating expenses are incurred in innumerable services few of which, if any, are the same in respect of car mile cost as is the transportation of citrus fruit here in question. There are many elements that affect system average that have no relation to citrus fruit car mile costs. It would seem that, without specific knowledge of details of operation affecting cost during representative periods, no dependable opinion could be reached as to the cost relationship on which the appellants' case depends.

The facts that they brought forward to show that citrus fruit car mile cost is at least as high as the system average undoubtedly tend in a general way to aid that contention. But they lack useful certainty. Appellees' criticisms above referred to are substantial and at least sufficient reasonably to warn against acceptance of ap-

pellants' claim. A very small part of the Pennsylvania system mileage is used to haul substantial quantities of Florida citrus fruit. The principal volume moves over the lines north from Potomac Yards. Ordinarily, density of such traffic would make for lower car mile cost. Appellants claim that there it is relatively high, but the evidence fails adequately to support that contention. Appellants' failure to introduce evidence based on observations or tests made contemporaneously with transportation, in representative periods subsequent to the taking effect of the order and near to the time of trial, strongly suggests that the figures on which appellants' calculations are based could not be supported and leaves in grave doubt the validity of their proof.

We conclude that the evidence is not sufficient to establish with requisite certainty what has been or will be the cost of the service covered by the prescribed divisions and that the district court rightly dismissed the suit.

Affirmed.

MR. JUSTICE BRANDEIS, concurring.

I agree that the suit is without merit and that the District Court was right in dismissing the bill. Two objections to the order of the Commission, unsubstantial but otherwise proper subjects for judicial review, were disposed of briefly below and have rightly received like treatment here. It is the third objection—the claim of "confiscation" to which the attention of both courts has been directed. That claim imposed upon the lower court six days of hearings. It imposed upon this Court a reargument and a huge record. With the briefs, it weighs avoirdupois 67 pounds. The narrative statement of the testimony occupies 1237 pages of the printed record in this Court; the briefs fill 546 pages. There are, besides, 428 exhibits. In my opinion, the applicable rules of procedure forbade the lower court from passing upon the

question of "confiscation" in this suit. If "confiscation" is threatened, there is ample remedy; but the redress must be sought in a different proceeding.

First. The question on which I differ from the Court is this: Where, in a suit to set aside a divisions-order, under the Urgent Deficiency Act of October 22, 1913, c. 32, 38 Stat. 208, 216, the court concludes that there was, in entering the order, no error of law or of fact and no irregularity of procedure or abuse of discretion, may it proceed to enquire into a charge, not seasonably made before the Commission, that the divisions-order would result in "confiscation" when applied to the through rates prescribed by a rate-order then in force, which rate-order had been acquiesced in by all participating carriers and was not then under review? In my opinion, the answer should be "No." For, if the charged "confiscation" is due to the alleged inadequacy of the prescribed through rates, the appropriate remedy is to apply to the Commission to revise the rate-order. If the charged "confiscation" is due to alleged failure of the Commission to allot to the complaining carriers their fair share of an adequate through rate, they are barred from complaining in this suit, because they failed seasonably to raise, before the Commission, that issue and present there the evidence in support thereof. They could of course apply to the Commission to modify the order so as to make it just for the future.

While the Commission may, at any time, modify or supersede an order, no court has power to set an order aside except for inherent error or procedural irregularity. To hold that this divisions-order may be set aside because "confiscation" will result if it is applied in connection with the rate-order not under review, and not objected to, would make of that claim a paramount and prerogative right hitherto unknown to the law.

Second. The treatment of the suit as a "confiscation case" has led to serious misconceptions. The term "con-

fiscation" is appropriately used only in a proceeding for the fixing of rates, where the objection is made that the Commission, in prescribing rates, made them so low that they are not compensatory; and that the Government is thereby taking private property for the public without paying compensation. The order under review is not a rate-order. It is an order under § 15 (6) of the Interstate Commerce Act which fixes, as between the carriers participating in existing through rates, "just, reasonable, and equitable divisions," but leaves the through rate undisturbed. Ordinarily, divisions of through rates are governed by agreement between the carriers. It is only where they fail to agree that an application is made under that section.

In a proceeding to fix "just, reasonable, and equitable divisions," "confiscation" can never be an ultimate issue. For, as a matter of substantive law, the fact that the share allotted to one is not compensatory is without legal significance. The Commission's task is solely to make a fair division of existing rates. A division, although fair, may conceivably fail to give any of the connecting carriers adequate compensation for the service rendered, because the through rate—the thing to be divided—is itself inadequate. Or conceivably, the through rate may be so generous that all participants will receive compensatory divisions, although, as between themselves, the division itself is unfair. The fact that the share assigned to one is non-compensatory will be of evidential value if accompanied by evidence that some other carrier is receiving better treatment. But, unless it appears that some other carrier was so favored, the non-compensatory character of the division would be entirely immaterial. And even when relevant, may be of little or no weight because of other considerations.

At best, the non-compensatory character of the share, if proved, would be only one of the many subsidiary

evidential facts which Congress, by § 15 (6), has commanded the Commission to take into consideration in determining what a fair division is. These are "among other things":

"the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

Thus, a division may be "just, reasonable and equitable," although it allots to one carrier a non-compensatory share and to another carrier a compensatory share, because it was inefficiency in operation by the former which rendered its share non-compensatory. Or, the seemingly preferential treatment of the latter might be justified by the fact that it was the originating carrier, and hence entitled by established transportation practice to the larger share of the through rate.

If inadequacy of a prescribed through rate is the reason why the share of one of the participating carriers is non-compensatory it has ample remedies under the Interstate Commerce Act and the Constitution. It may, at any time, apply to the Commission for an increase of the through rate; and if the increase is improperly denied, a remedy is available in the courts by a "confiscation" suit. That remedy would be open although the prescribed rate had been acquiesced in; for every rate order is subject to revision at any time upon application to the Commission. A divisions-order, likewise, is always subject to revision;

but change in the through rate would not necessarily render the existing divisions unfair.

Third. The through rates which the Commission was requested to divide in the proceeding under review are those on citrus fruit from Florida to points north of the Potomac and Ohio Rivers. These had been prescribed by order entered July 10, 1928, Railroad Commissioners of Florida *v.* Aberdeen & Rockfish R. Co., 144 I. C. C. 603; and the level of rates thereby prescribed was acquiesced in. That order did not deal with divisions. The divisions governing the Florida citrus fruit traffic had, for many years prior to July 10, 1928, been fixed by agreement. After entry of that order (which reduced the through rates on the average about 67 cents a ton), there developed a controversy as to the divisions. Being unable to agree, all the carriers—the southern lines by original complaint, the northern lines by cross-complaint—applied to the Commission, under § 15 (6) of the Interstate Commerce Act, and asked it to fix the "just, reasonable, and equitable divisions." By order entered July 3, 1933, the Commission did so, Atlantic Coast Line R. Co. *v.* Arcade & Attica R. Co., 194 I. C. C. 729. It is that divisions-order which it is sought to have set aside with a view to having the share of the northern carriers increased at the expense of the southern. Two alleged errors of law charged to the Commission were quickly disposed of by the Court as being unsubstantial. Did it commit any error of law or of fact; or was it guilty of an abuse of discretion in respect to the claim of "confiscation"?

The proceedings which resulted in the entry of the divisions order, and the efforts to have it set aside, were as follows:

(a) The southern lines filed their complaint with the Commission on November 22, 1930. The cross-complaint

of the northern lines followed on April 20, 1931. Hearings began on May 11, 1931, and continued for more than seven months. Briefs were filed before the examiners. When their proposed report was submitted to the parties, both sides filed exceptions. In the proceedings before the examiners there was no claim by the northern lines that the divisions sought by the southern lines would be confiscatory. The examiners' proposed report did not mention that subject; and there was no claim made that divisions recommended by them would be confiscatory. The case was argued orally before the full Commission on the exceptions to the examiners' report, and extensive briefs were submitted. There was no claim or suggestion before the Commission that the division sought or proposed would be confiscatory. On July 3, 1933, the Commission entered the order for the divisions which it found to be "just, reasonable, and equitable." There was no reference to the subject of confiscation in the accompanying report which occupies 34 pages. Atlantic Coast Line R. Co. *v.* Arcade & Attica R. Co., 194 I. C. C. 729–762.

(b) The northern lines presented a petition requesting that the hearing be reopened for reconsideration on the evidence already introduced and supplemental data culled from statistical reports in the Commission's files, which it was agreed should be treated as evidence. On October 9, 1933, the proceedings were reopened as requested to reconsider, upon the evidence originally submitted and that then added, whether there had been an error of judgment in fixing the divisions. There was no claim made in this petition for a rehearing that the divisions which had been prescribed by the order of July 3, 1933, were confiscatory. The Commission discussed in a supplemental report of 13 pages the errors assigned; concluded that the objections were unfounded; and on January 8, 1934, affirmed the divisions prescribed. There was no reference in the supplemental report to the subject of confiscation. 198 I. C. C. 375–387.

(c) On April 27, 1934, the northern carriers presented a second petition for a rehearing; and with it presented, as additional evidence, "cost studies." There was no suggestion that these were, in a legal sense, newly discovered evidence; nor was there a contention that they were evidence of a change in economic or traffic conditions which required that the Commission's conclusion should be changed. The main claim was, as in the first petition for rehearing, that the Commission erred in its judgment. But the second petition contained a claim that the divisions awarded to the northern lines were confiscatory. On May 14, 1934, this second petition was denied without opinion.

(d) On May 25, 1934, the northern carriers brought this suit in the federal court for Eastern Virginia to set aside the order of July 3, 1933. The bill sought relief on five grounds. Prominent among them was the claim that this division was confiscatory. At the hearing before the three judges, which began on September 17, 1934, and occupied six days, the plaintiffs introduced in evidence a transcript of the evidence before the Commission on which the order complained of had been entered and confirmed, consisting of 2,054 pages of oral testimony and 358 exhibits. Over objections of the defendants the plaintiffs were permitted to introduce additional oral evidence, of which the transcript fills 1,066 pages; also, 70 exhibits. On December 31, 1934, the court entered a final decree dismissing the bill. Its unanimous opinion disposes briefly of the objections other than confiscation. To that subject nearly all of the 18-page opinion is devoted. 9 F. Supp. 181–199.

(e) The application for appeal to this Court was filed February 26, 1935. Of the grounds for relief set forth in the bill, only three were insisted on at the original argument, namely: (1) That the Commission subordinated all matters which under § 15 (6) it was required to take

into consideration to the single element of the southern lines' supposed financial needs. (2) That, while purporting to give "due consideration" to a "fair return" on the railway property of the southern lines, the Commission "considered only the rates of return of said Southern lines from the *entire operations* of such lines instead of a fair return on Southern lines' property *fairly attributable to the service of transporting citrus fruit*"; (3) That the divisions allowed are confiscatory. On the reargument, confiscation was the only subject discussed; and the opinion of the Court deals mainly with it.

Fourth. Clearly, the Commission did not err either in a ruling of law or a finding of fact as to "confiscation";—since it made no ruling or finding on that subject. Was it guilty of an abuse of discretion in refusing to pass upon it? Congress conferred upon the Commission power to grant or deny, in its discretion, a petition for rehearing of a decision. Interstate Commerce Act, § 16a. It may be granted after entry of an order or before; and the case may be reopened to admit additional evidence. The "cost studies" submitted with the second petition for rehearing were not, in a legal sense, newly discovered evidence. There was a belated offering of evidence in support of a belated contention. The purpose was to introduce, at that late day, more evidence bearing upon the question of what would be fair.

The refusal to grant the second petition for a rehearing was not an abuse of discretion. Federal appellate courts will not in civil cases, upon review of the judgment of the trial court, consider any objection not seasonably presented below; and an objection first presented in a petition for rehearing which has been denied is not seasonably presented unless in connection with the denial that objection was specifically passed upon. This rule is of general application. It governs the appellate court's action whether the objection raises a constitutional ques-

tion, or relates to a matter of lesser dignity. No reason has been suggested why that rule should not apply equally to a judicial review by the district courts, and this Court, of the action of the Commission. And no case has been found in which the applicability of the rule to a case like the present has been questioned.

The case at bar is not like *Atchison, T. & S. F. Ry.* v. *United States,* 284 U. S. 248, where the order was set aside because the Commission refused to reopen the case and hear additional evidence. That offered was of changed conditions; important, because every rate-order is subject to revision upon changes in conditions, and the change which had occurred since the hearings was catastrophic. To refuse to reopen the hearing under those circumstances was held to be an abuse of discretion. In the case at bar no controlling change of condition was alleged. There was not even a claim of newly discovered evidence. The *Atchison* case rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing. Compare *United States* v. *Northern Pacific Ry.,* 288 U. S. 490, 492 *et seq.; Illinois Comm'n* v. *United States,* 292 U. S. 474, 480–481; *St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38.

Fifth. Thus, the divisions-order is free of inherent error. Paragraph 4 of § 1 imposes upon the Commission the duty of establishing "just, reasonable and equitable divisions" [of through rates] "which shall not unduly prefer or prejudice any of such participating carriers." As the Court says, the purpose of Congress is "to empower and require the Commission to make divisions that colloquially may be said to be fair." It adds:

"When made in accordance with the Act, the commission's orders prescribing divisions are the equivalent of Acts of Congress requiring the carriers to serve for the amounts

specified. Taken, as they must be, in connection with the duties to the public imposed by law upon the carriers, they command service and for that purpose expropriate the use of carriers' property. If when made the prescribed divisions are or later shall become less than just compensation, the carriers may not be required to serve therefor. And, if after appropriate effort they fail to obtain divisions that do constitute just compensation for their services including the use of their properties, the carriers may by suit in equity have the order prescribing, or requiring to be kept in force, the challenged divisions adjudged void and its enforcement permanently enjoined."

That additional statement is, in my opinion, without support in any act of Congress. No law gives to a divisions-order any greater, or other, effect than that expressed in its words. The divisions-order, which alone is here under review, contains no command that the "carriers serve for the amounts specified." Nor does it "command service" at all. It merely directs

"that said complainants, cross-complainants, defendants and respondents, according as they participate in the transportation be, and they are hereby notified and required to cease and desist, on and after November 1, 1933, and thereafter to abstain from asking, demanding, collecting or receiving, divisions of said joint rates upon other bases than those prescribed."

The only command to serve is contained in the rate-order not here under review.

The Court states further: "Prescribing of divisions is a legislative function." It would be more accurate to say that the task imposed by § 15 (6) is a judicial, or quasi-judicial function, incident to the legislative process of rate-regulation. Despite the doctrine of the separation of powers, the Commission, like other governmental bodies, exercises certain administrative and judicial, as well as legislative functions. Many of its administrative or judicial orders may affect the earnings and net-income

of the carriers, and thus affect indirectly the adequacy of existing rates; but they are, in no sense, rate-orders.

Prominent among determinations judicial in their nature are those under § 3, whether allowances made to one shipper for the use of his facilities, or for services, are, as between him and competing shippers, fair, or whether they constitute preferential treatment; determinations under Paragraph 15 of § 1, of the fair amount payable by one carrier to another for the use of terminals or equipment or for services rendered; determinations under Paragraph 12 of § 1, whether distribution made of coal cars among shippers is just and reasonable; determinations under the Valuation Act of March 1, 1913, c. 92, 37 Stat. 701, of the fair value of railroad properties. Among the administrative functions is that of determining under the Safety Appliance and Boiler Inspection Acts what changes in equipment are required in order to insure safety; under Paragraphs 4 and 9 of § 1, what additional facilities and equipment are required to ensure adequate transportation service; under Paragraphs 2 to 10 of § 20a, whether a carrier should be permitted to issue securities or assume financial obligations, and if so, on what terms; under Paragraphs 18 to 22 of § 1, whether a carrier should be permitted to construct, acquire or control an additional line, or to abandon the whole, or any part of, one existing.

In such judicial or administrative determinations it might conceivably be contended that expenditures ordered would so reduce net-earnings as to render non-compensatory some existing prescribed rates. But the contention would not convert the proceeding into a rate-case. If the claim that by reason of the expenditure ordered, prescribed rates would cease to be compensatory proved to be well-founded, the appropriate remedy would be to seek a modification of the rate-order which had thus become confiscatory, not to set aside the ad-

ministrative or judicial order which inherently was, and remained, free of error.

Sixth. The question discussed is not one of merely procedural importance. To permit enquiry into the question of confiscation under the procedure here pursued might affect seriously the substantive rights of other participating carriers. As the divisions-order merely allots the share of each in existing rates, any addition to the share given to one must necessarily be taken from the share of others. For aught that appears, the share of the southern carriers received, or insisted upon, is no more than a compensatory return. If the Court had in this case concluded that the share allotted to the northern carriers was non-compensatory, and pursuant to its action their share were increased, the result might be to make the share of the southern carriers non-compensatory.

In passing upon the issue of confiscation the Court discussed the question, whether the trial court properly admitted evidence which had not been introduced before the Commission; and decided that the evidence was admissible. I do not agree with the Court's conclusion on that subject. But as the issue of "confiscation" was, in my opinion, not properly before the trial court, I refrain from discussing the question what evidence would have been admissible if that issue had been. See *Crowell* v. *Benson,* 285 U. S. 22 and *St. Joseph Stock Yards Co.* v. *United States, supra.*

MR. JUSTICE STONE, MR. JUSTICE ROBERTS and MR. JUSTICE CARDOZO join in this opinion.

GRAVES, GOVERNOR OF ALABAMA, ET AL. *v.* TEXAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 727. Argued April 2, 3, 1936.—Decided May 18, 1936.

1. A State may not tax sales of gasoline made to the United States. *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218. P. 395.
2. The Alabama Act of July 10, 1935, providing that "Every distributor, refiner, retail dealer or storer of gasoline . . . shall pay an excise tax of six cents per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline . . .," does not tax storing as such; the tax accrues upon withdrawal from storage for "sale or other use," and is measured by the amount withdrawn. P. 398.

   This statute is construed in connection with earlier Acts and in the light of practical construction by state authorities.
3. A tax on storage, or withdrawal from storage, essential to sales of gasoline to the United States, is as objectionable, constitutionally, as a tax on the sales themselves. P. 400.
4. In view of requirements of the Alabama laws taxing sales of gasoline, no plain, adequate and complete remedy at law existed in this case; and suit to enjoin collection was proper. P. 401.

13 F. Supp. 242, affirmed.

APPEAL from a decree of the District Court of three judges permanently enjoining Graves, the Governor, and other officials of the State of Alabama, from collecting taxes on sales of gasoline made by the appellee to the United States.

Mr. Frontis H. Moore, Assistant Attorney General of Alabama, and *Mr. Richard T. Rives,* with whom *Mr. Albert A. Carmichael,* Attorney General, was on the brief, for appellants.

The trial court was without jurisdiction to enjoin appellants from collecting the tax on past transactions, the only procedure contemplated being suits in which ap-

pellee would have its day in court and full advantage of any defenses it might have.

The trial court was without jurisdiction to enjoin the collection of the tax on future transactions (1) because any such writ of injunction would necessarily be supervisory, leaving the question to be decided in each case of whether the gasoline was purchased for use by the United States or its agency as an instrumentality in the performance of a constitutional governmental function; (2) because the appellee has a complete and adequate remedy at law under the statutes of Alabama.

The tax is upon the privilege of storing gasoline within the State and accrues upon withdrawal from storage and is measured by the amount withdrawn irrespective of sale or use after such withdrawal.

The tax, therefore, is not, as applied to gasoline sold to the United States, a tax upon the Government or its agencies, nor a tax which operates in such manner as to retard, impede, or burden the exercise by the United States of its constitutional powers. *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218; *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Alabama* v. *Montgomery,* 228 Ala. 93; *Foster & Creighton Co.* v. *Graham,* 154 Tenn. 412; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Woco Pep Co.* v. *Montgomery,* 219 Ala. 73; *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572; *Trinityfarm Construction Co.* v. *Grosjean,* 291 U. S. 466; *Lash's Products Co.* v. *United States,* 278 U. S. 175; *American Airways* v. *Wallace,* 57 F. (2d) 877.

Mr. John S. Coleman for appellee.

By leave of Court, *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. David E. Hudson, Sewall Key, John M. Hudson,* and *Paul R. Russell* filed a brief on behalf of the United States, as *amicus curiae,* challenging the taxes in question.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellee brought this suit against appellants, officers of the State of Alabama, to restrain the collection under statutes of that State of taxes in respect of gasoline and other liquid motor fuels—which for brevity we shall call "gasoline"—sold to the United States and used by it in performing governmental functions. Plaintiff applied to the court of three judges for a temporary and a permanent injunction. After hearing on an agreed statement of facts, the court held that the Alabama statutes assailed are not distinguishable from the Mississippi exaction condemned as unconstitutional in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and granted a permanent injunction. 13 F. Supp. 242. The governor and the other state officers appealed. 28 U. S. C., § 345. The United States, by brief filed here as amicus curiae, presented its argument asking affirmance on the ground that the taxes impose a burden on sales to it.[1]

In substance the Alabama statutes [2] provide: The Act of February 10, 1923, (not here involved) required every distributor and retail dealer to pay an excise tax of two cents per gallon "upon the sale" of gasoline. A distributor is one who sells gasoline at wholesale. A retail

[1] The government's brief states: On the basis of purchases in Alabama during the current year, it is estimated that the total annual added cost of gasoline would amount to $143,145.54. If Alabama succeeds in collecting the tax, other States will probably modify their statutes to produce a similar revenue; it is estimated that this would add a burden of $4,479,661.40 per year upon the United States. That figure is arrived at on the basis of four cents a gallon. The use of fuel oil by the Navy Department, which purchased 273,354,228 gallons in 1934, suggests a further burden on the United States.

[2] Enacted July 10, 1923, Gen. Acts 1923, p. 36, and amended August 27, 1927, Gen. Acts 1927, p. 326; January 25, 1927, Gen. Acts 1927, p. 16; July 27, 1931, Gen. Acts 1931, p. 859; November 5, 1932, Gen. Acts 1932, p. 314; January 31, 1935, Gen. Acts 1935, p. 30; July 10, 1935, Gen. Acts 1935, p. 508.

dealer is a distributor who also sells gasoline in broken quantities. The Act of January 25, 1927, required every distributor, retail dealer "or storer" to pay two cents per gallon "upon the selling, distributing or withdrawing from storage for any use." A storer is one "who ships gasoline into this State . . . and stores the same and withdraws or uses the same for any purpose." The Act of August 27, 1927, amending that of 1923, employed the same form of words to define the exaction and made a total tax of four cents upon selling, distributing or withdrawing for any use. The Act of July 25, 1931, added a cent and that of November 5, 1932 added another. The Act of January 31, 1935, repealed the 1931 and 1932 statutes and, in lieu of the excises laid by them, imposed one of two cents. The Act of July 10, 1935, repealed all the Acts then in force and in their place enacted that "Every distributor, refiner,[3] retail dealer or storer of gasoline . . . shall pay an excise tax of six cents ($0.06) per gallon upon the selling, distributing, storing or withdrawing from storage in this State for any use, gasoline . . ."

All the Acts here involved declare that the excise shall not be laid upon sales in interstate commerce and that the specified tax shall be paid but once. They make the excise apply whether "withdrawals be for sale or other use," declare that sellers may pay on the basis of their sales and require that others upon whom the excise is laid shall compute and pay the tax on the basis of their withdrawals. All must make monthly return of "sales and withdrawals" and preserve records of "sales, distributions or withdrawals." Anyone who shall violate any provision may be restrained "from distributing, refining, selling or withdrawing from storage any gasoline, the sale or withdrawal of which is taxable."

---

[3] The term "refiner" first appears in the 1932 Act; it has no application to this case.

Appellee is a Delaware corporation, authorized to do business in Alabama. It sells gasoline in the 67 counties of that State. Gasoline refined at Port Arthur, Texas, is transported by barges to the company's terminals at Mobile, Alabama, and Pensacola and Millville, Florida. Gasoline sold in Alabama is delivered from the Mobile terminal or the company's bulk plants in that State to which gasoline is shipped from the terminals and at which it is held in tanks until withdrawn for delivery at the plants to customers or for transportation to service stations where it is sold at retail to the public.

Practically all the gasoline received by the United States from the company in Alabama is sold and delivered pursuant to written contracts. Some provide for deliveries at the Mobile terminal, some at bulk plants and some at service stations. The deliveries from the Mobile terminal are made in railroad tank cars on tracks adjacent to the terminal. Gasoline delivered from bulk plants is that shipped from the terminals and stored in tanks at the plants until withdrawn. That delivered from service stations is shipped from the terminals to bulk plants and thence conveyed to the stations.

The United States requires that prices specified in bids and contracts shall be exclusive of state and municipal taxes. Between January 1, 1930, and September 22, 1935, the company sold and delivered to the United States in Alabama 286,639.36 gallons of gasoline. At the time of the trial, there were in force two contracts for sale and delivery of gasoline by the company to the United States in Alabama. One covered the period from October 1 to December 31, 1935, and called for deliveries at the Mobile terminal for the United States Army and the Tennessee Valley Authority. The other covered the period from October 1, 1935, to June 30, 1936, and called for service station deliveries for the Department of the Interior.

March 22, 1923, the attorney general of Alabama ruled that sales to the United States were taxable under the 1923 Act. But, after our decision May 14, 1928, in the *Panhandle* case, the attorney general, August 22, 1928, held that the Alabama statutes then in force (those enacted in 1927) were not distinguishable from that of Mississippi held repugnant to the federal constitution in the *Panhandle* case. He said: "Alabama also [in addition to taxing selling] taxes the distributing or withdrawing from storage for any use. It taxes but once, and where there is a sale, the tax is on the sale. Where there is no sale, but a distribution or withdrawing from storage for some use, other than selling, there is a tax on such withdrawal or distribution. We are not here considering such withdrawals, but only sales to the United States."

That construction was accepted by the state taxing officers and followed until July 5, 1935, when the then attorney general advised the tax commission that the taxes levied under the Acts of 1927, 1931 and 1932 were essentially different in character from those condemned in the *Panhandle* case. His ruling did not depend upon or result from the statutes enacted after 1927. He held the taxes were laid not upon sale but upon storage and subsequent withdrawal, accruing at the time of withdrawals, and to be computed upon the basis of withdrawals. He said that "so far as purchases of gasoline by the United States Government are concerned, these tax acts in question do not impose a burden upon the United States. . . . True it may be that the effect of these taxes may be to increase the price of the commodity which the Federal Government may desire to purchase."

The company has not reported for taxation or paid any tax under these Acts on gasoline sold to the United States since the attorney general's ruling of August 22, 1928. On August 30, 1935, the commission informed appellee that it could not "permit deductions from gasoline sales by

reason of gallonage sold to the United States." And, prior to the bringing of this suit, the State made demand for taxes upon all gasoline withdrawn and sold in Alabama during the preceding five years.

Appellants say that, upon the privilege of storing gasoline, the company is subject to a tax accruing upon and measured by the amount withdrawn, irrespective of subsequent sale or use. Upon that basis they maintain that the tax in respect of gasoline sold and delivered by the company to the United States is not one that operates to retard, impede or burden the exercise by the United States of its constitutional functions.

But mere storing, i. e., that unassociated with selling, distributing or withdrawing from storage, was not taxable under prior laws and is not taxable under the Act of July 10, 1935 now in force. While a storer is subject to excise in the Act of January 25, 1927 and subsequent statutes, storing without more is not enough to make one a storer. To be a storer, one must ship into the State and there store and withdraw gasoline for some use. Storing was not included among the acts or things taxed until the Act of July 10, 1935. That Act supersedes and consolidates the earlier levies. We read its taxing clause with its other provisions that in substance were taken from the earlier statutes. In all the measures involved, it unmistakably appears—and it is conceded by the taxing officers—that one who has paid a tax on selling is not taxable on distributing, storing or withdrawing from storage. The opinion of the attorney general, August 22, 1928, rightly held that the State taxes but once and, where there is a sale, the tax is on the sale. The purpose of the statutes subsequent to that of 1923 was to reach gasoline which was used but not sold within the State. But, excepting only the addition of the word "storing" in the taxing clause of the Act of July 10, 1935, there is nothing to suggest intention to tax "storing" as such.

Other provisions indicate that it was not the purpose so to tax. In all the Acts, it is stated: The excise shall apply whether the withdrawal be for "sale or other use"; sellers may pay on the basis of their sales but others shall pay on the basis of their withdrawals; all shall report their "sales and withdrawals" and keep records of the "sales, distributions or withdrawals"; violators of the Act may be restrained from distributing, refining, selling or withdrawing from storage (but not from storing) gasoline, the "sale or withdrawal" of which is taxable. Omission of storing from these and all other provisions relating to ascertainment of amount or enforcement of the taxes imposed tend strongly to negative intention to tax storing as such.

There are other indications that storing alone was not intended to be taxed. The tax commission has never required, and distributors, retail dealers and storers have not made, reports in respect of gasoline until it passes from seller to purchaser or until withdrawn for use. The State has never claimed a tax upon storing of gasoline withdrawn for sale and delivery in interstate commerce. In the absence of withdrawal, there is no tax no matter how long gasoline is stored. The amount at any time received or held in storage is immaterial. The tax depends solely upon the amount withdrawn. No notice is taken of losses by evaporation or otherwise, or of storing for hire or of storing after taxable sale, distribution or withdrawal for use. Clearly, storing alone is not the thing taxed; withdrawing is essential. *Ervin* v. *Alabama,* 80 F. (2d) 432. *Pan American Petroleum Corp.* v. *Alabama,* 67 F. (2d) 590. *State* v. *Montgomery,* 228 Ala. 93, 95; 151 So. 856. *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 293.

But, assuming that, by the Acts under consideration the State meant to tax mere storing, that purpose cannot be given effect in respect of the company's sales and

deliveries to the United States without infringing the constitutional principle which safeguards the federal government against state taxation. Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gasoline to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat "a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing." *Brown* v. *Maryland,* 12 Wheat. 419, 444. As held in the *Panhandle* case (p. 222): "A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. . . . The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons." So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawal so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional.

Appellants suggest that appellee has an adequate remedy at law and therefore may not resort to equity.

It was required to give a bond and obtain a license to carry on its business. Section 6, Act of October 6, 1932, Gen. Acts 1932, p. 57. It is required monthly to report and pay taxes to the tax commission for the previous month. Act of July 10, 1935, schedule 156.3.[4] All, including amounts paid under protest, are by the commission handed over to the state treasurer who retains

[4] The same provisions are found in the statutes repealed by the Act of July 10, 1935.

half and distributes the other half equally among the counties. Sch. 156.9–156.11. Failure for any month so to report is punishable by fine from $50 to $300, sch. 156.7, and the commission is required to fix the amount of the tax and to impose a penalty of 25%, sch. 156.14. And, in the absence of satisfactory showing by the company to the contrary, the commission may revoke its license, § 6, *supra,* and issue summary execution against its bond and property. The tax and penalties constitute a debt to the State and a lien upon all its property prior to all others save earlier liens for state taxes. Sch. 156.15. Appellants assume that suit to collect the taxes claimed is the only procedure contemplated. But that assumption is without support in the record. They have not bound themselves to refrain from doing anything that the statute empowers them to do to enforce payment of the taxes claimed. It does not appear that they are authorized so to bind themselves. In the absence of injunction against them, appellee, failing to pay the taxes they demand, is liable to be proceeded against in accordance with the state law.

November 22, 1928, the attorney general of Alabama advised the attorney general of the United States that Alabama had no statute authorizing refund of taxes that had been collected upon sales of gasoline to the United States. January 28, 1935, the gasoline department of the tax commission wrote appellee that, where the tax had been paid upon gasoline furnished the United States by a dealer for appellee's account, there was no provision for refund.

Appellants intimate, but do not definitely claim, that a distributor or dealer, if illegally compelled to pay taxes on sales to the United States, would under Alabama law be entitled to recover the amount so collected. They cite the Act of September 9, 1927, Gen. Acts 1927, p. 635. It appears to extend only to taxes paid while their

amount or validity is in litigation. It contains no provision for interest. It was in effect when the attorney general made his ruling of November 22, 1928. They also cite the Act of July 17, 1931, Gen. Acts 1931, p. 527. It does not permit suit but merely authorizes the tax commission to refund. And finally they cite the Act of July 10, 1935. Section 379 gives to one who has paid taxes under protest the privilege of bringing suit within 60 days against the officer making the collection; it directs the court to determine what amount, if any, is excessive or illegal and to order it to be returned with interest by the State or its agencies receiving the same. Failure to sue within the specified period bars the claim. It is likely that a year or more would elapse before final determination of such a suit. In the meantime, monthly collections would have to be made, and so appellee would be compelled repeatedly, and at least as often as once every 60 days, to bring suits against the commission involving the same question. Upon obtaining the court's determination in its favor, appellee would be authorized, on presentation of certified copies of the judgment, to receive from the State the half it retained and from each of the counties its share of the other half. It would be necessary to follow the same course as to the amounts claimed in each of the suits. Resort may be had to equity in order to avoid the multiplicity of suits necessarily involved in the procedure prescribed for recovery of illegal exactions.

Appellee suggests that the provisions of the Act of July 10, 1935, are repugnant to § 14 of the Constitution of Alabama: "That the State of Alabama shall never be made a defendant in any court of law or equity." In support of that view, it shows that, since this suit was commenced, a telephone company brought suit under § 379 in the court below against the members of the state commission, appellants here, to recover license taxes paid

under protest, and that they have filed a plea to the jurisdiction of the court, asserting that "the real party in interest is the State of Alabama"; that § 379 purports to give the State's consent to be sued only in its own courts, and that it "is immune from being impleaded in a court of the United States under the provisions of the Eleventh Amendment."

It sufficiently appears that appellee had no plain, adequate or complete remedy at law. *Union Pacific R. Co.* v. *Weld County,* 247 U. S. 282, 285–286. *Atlantic Coast Line* v. *Daughton,* 262 U. S. 413, 426. *Di Giovanni* v. *Camden Fire Ins. Assn.,* 296 U. S. 64, 69. *Risty* v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378, 388. *American Airways* v. *Wallace,* 57 F. (2d) 877, 879. *Hopkins* v. *Southern California Tel. Co.,* 275 U. S. 393, 399–400.

Affirmed.

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

MR. JUSTICE CARDOZO, dissenting.

Under the Alabama statute, the appellee, the Texas Company, is a "storer." It is one "who ships or causes to be shipped or receives, gasoline into this State in any quantities, and stores the same in any manner and withdraws or uses the same for any purpose." If it did business in some other way, it might be taxable as a "distributor," or "refiner," or "retail dealer." Doing business as it does, it is taxable as a "storer." It brings into Alabama a dangerous commodity which it keeps there indefinitely for indefinite uses. For the privilege of doing this it must make a payment to the state upon the termination of the storage, whether the purpose of the withdrawal is sale or something else. The statute was amended by adding the word "storing" in order to cover

such activities. What the lawmakers have put into a statute, a court may not take out of it.

In its application to appellee, a tax thus conditioned is an excise upon the privilege of storage, and so the cases hold. *State* v. *Montgomery,* 228 Ala. 93; 151 So. 856; *Ervin* v. *Alabama,* 80 F. (2d) 432, 433; *Pan American Petroleum Corp.* v. *Alabama,* 67 F. (2d) 590. It is not transformed into a tax upon something else, or, more particularly, into a tax upon the privilege of sale, because payable when the gasoline is taken out of storage or because measured by the amount withdrawn. *Edelman* v. *Boeing Air Transport, Inc.,* 289 U. S. 249, 252; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 268; *Ervin* v. *Alabama, supra; Pan American Petroleum Corp.* v. *Alabama, supra; State* v. *Montgomery, supra.* The nature of the excise being what it is, liability is the same whether withdrawal of the gasoline is for one purpose or another.

Panhandle Oil Co. v. *Knox,* 277 U. S. 218, is not a decision to the contrary. The tax considered in that case and condemned when applied to transactions with the government was upon the privilege of sale exclusively, and not upon some activity or condition antecedent thereto. The decision evoked dissent from four members of the court. It is now carried to new bounds by the ruling that "a tax upon anything so essential to the sale of the gasoline to the United States [as storage followed by withdrawal] is as objectionable as would be a tax upon the sale itself." If that ruling is to stand, it will equally forbid a tax upon the process of refining or upon transportation to a market (*Wheeler Lumber B. & S. Co.* v. *United States,* 281 U. S. 572), since these, as much as storage, are preliminary to sale. Cf. *Edelman* v. *Boeing Air Transport, Inc., supra; Nashville, C. & St. L. Ry. Co.* v. *Wallace, supra.* Not yet has the

immunity of government from indirect obstructions been pushed to that extreme.

Gasoline refined in Texas and transported to Alabama to be stored in tanks or terminals is there for general uses. Part of it in the usual course of business will be sold to the United States; part of it will be sold to others; part will be withdrawn without sale to anyone. This is not to say that the result would be any different though a definite sale were in view at the beginning of the storage. Even in such conditions, storage, like transportation, would be "not part of the sale but preliminary to it and wholly the vendor's affair." *Wheeler Lumber B. & S. Co.* v. *United States, supra,* at p. 579. However, the indefinite extension of the uses simplifies the problem. The burden, if any, upon the activities of government is remote and indeterminate. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Burnet* v. *A. T. Jergins Trust,* 288 U. S. 508; *Trinityfarm Construction Co.* v. *Grosjean,* 291 U. S. 466. Sales to the United States are made under contracts for a stated term. There is no assurance that the tax or any part of it will be shifted to the buyer.

The decree should be reversed and the bill dismissed.

I am authorized to state that MR. JUSTICE BRANDEIS joins in this opinion.

MORF *v.* BINGAMAN, COMMISSIONER OF REVENUE FOR NEW MEXICO.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

No. 772. Argued April 30, May 1, 1936.—Decided May 18, 1936.

1. A state law (New Mexico Laws, 1935, c. 56) exacting a fee for the privilege of transporting motor vehicles, on their own wheels, over the highways of the State for purpose of sale—*held* consistent with the commerce clause of the Constitution and the due process and equal protection clauses of the Fourteenth Amendment. P. 410.

   So held of its application to a distinct business of moving such cars interstate, for purposes of sale, in caravans or processions, usually in units of two coupled together, each unit being operated from the foremost of the two cars composing it, by a single driver. The drivers, because of their casual employment, had little interest in the business and were likely to be careless. The coupled cars caused unusual damage to the roads by skidding. For this and other reasons the caravans increased the inconvenience and hazards of traffic and the burden and expense of state policing.
2. As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. P. 412.
3. It is not important that a part of the fees collected is not devoted directly to highway maintenance, the cost of which the State pays in part from the proceeds of a general property tax. *Id.*
4. If a state taxing provision, of whatever form its words, results in the application of the tax to a class which may be separately taxed without a denial of equal protection, those within the taxed class may not complain because the class might have been more aptly defined by the statute or because others, not of that class, are taxed improperly. P. 412.

---

* Together with No. 898, *U. S. Fidelity & Guaranty Co.* v. *Bingaman, Commissioner of Revenue for New Mexico.* Appeal from the District Court of the United States for the District of New Mexico.

5. The validity of the above-mentioned tax as applied to cars driven for purposes of sale, but driven singly and not in caravans, is not involved in this case. P. 413.
6. The fee provisions of c. 56, New Mexico Laws, 1935, were not repealed by c. 136 of the same session. P. 414.

12 F. Supp. 765, affirmed.

APPEAL from a decree of the three-judge District Court dismissing a bill by which a dealer in automobiles sought to enjoin the State Commissioner of Revenue from collecting a tax. Separate appeals were taken by the plaintiff and the surety on his injunction bond.

Messrs. Ralph K. Pierson and *George E. Remley,* with whom *Mr. Harry S. Bowman* was on the brief, for appellants.

Mr. Quincy D. Adams, Assistant Attorney General of New Mexico, with whom *Mr. Frank H. Patton,* Attorney General, and *Mr. Amos M. Mathews* were on the brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on appeal, Judicial Code, § 238, from a decree of the district court for New Mexico, three judges sitting, 12 F. Supp. 755, dismissing the bill of complaint by which appellant sought to enjoin appellee, the state Commissioner of Revenue, from enforcing the provisions of a state law exacting a permit fee for the privilege of transporting motor vehicles over the highways of the state for purpose of sale.

The statute assailed, Chapter 56 of the New Mexico Session Laws of 1935, denies to all persons the use of the highways of the state for the transportation of any motor vehicle, on its own wheels, for the purpose of selling it or offering it for sale within or without the state, unless the vehicle is (1) licensed by the state, or is (2) owned by a licensed automobile dealer and operated under a

dealer's license, or is (3) operated under a special permit issued by the state Commissioner of Revenue for its transportation. For such a permit the statute levies a fee of $7.50 if the vehicle is transported by its own power, and a fee of $5.00 if it is towed or drawn by another vehicle.

A later act, Chapter 136 of New Mexico Session Laws of 1935, provides for establishing registration stations or "ports of entry," on the main highways of the state, at which permits are to be issued and fees collected. It provides that no vehicle for which a permit is required shall receive a permit or be allowed to proceed until inspected and found to be "in safe and roadworthy condition, properly equipped with all lights, brakes and other appliances" required by state law.

Appellant, a resident and citizen of California, is engaged in the business of purchasing new and used automobiles in eastern and southern states of the United States, and transporting them, on their own wheels, over state highways to California, where he offers them for sale. He customarily transports such cars over the highways of New Mexico for a distance of about one hundred and sixty-six miles, in processions, or caravans.

Chapter 56 is challenged here, as it was below, as imposing an unconstitutional burden on interstate commerce, and as infringing the due process and equal protection clauses of the Fourteenth Amendment. Appellant also urges that the taxing provisions of this Act, enacted February 21, 1935, were repealed by the passage, a week later, of the "Ports of Entry Act," Chapter 136 of the Session Laws of 1935. The trial court held that the earlier Act had not been repealed, and construed it as exacting the permit fee for the privilege of using the state highways, and as not exempting, from the fee, cars operated under a dealers' license when transported for sale. It thought that the statute is aimed at the consid-

erable business in the state, as shown by the record, of transporting automobiles, usually in caravans, over state highways for sale; that such transportation constitutes a distinct class of automobile traffic, which causes increased wear and tear of the highways and interferes with their safe and convenient use by others; that these circumstances justify a separate classification of the traffic for the purpose of exercising police control over it and fixing a fee or tax for the privilege of transporting automobiles over the highways in such traffic. The court accordingly held that the statute infringes no constitutional limitation on state power.

1. We see no reason, and none is suggested, for not accepting the construction of the statute adopted by the trial court. The statute applies alike to all automobiles transported for sale, whether moving intrastate or interstate. Unlike the general tax in *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, the levy of which was unrelated to the use of the highways, grant of the privilege of their use is by the present statute made conditional upon payment of the fee. The manner of its collection, not unlike that of a toll for the privilege of entering and using the highways, definitely identifies it as a charge for the privilege. It is not shown to exceed a reasonable charge for the privilege and for defraying the cost of police regulation of the traffic involved, such as a state may impose, if non-discriminatory, on automobiles moving over its highways interstate. *Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *Clark* v. *Poor,* 274 U. S. 554; *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S., 183; *Aero Mayflower Transit Co.* v. *Georgia Public Service Commn.,* 295 U. S. 285.

The facts, as stipulated, establish that the transportation of automobiles across the state in caravans, for purpose of sale, is a distinct class of business, of considerable magnitude. Large numbers of such cars move over the

highways in caravans or processions. Seventy-five to eighty per cent of the cars in appellant's caravans are in units of two, coupled together by tow bars. Each unit is in charge of a single driver, who operates the forward car and thus controls the movement of both cars by the use of the mechanism and brakes of one. Appellant's drivers, except two or three regularly employed, are casually engaged. They usually serve without pay and bear their own expenses in order to secure transportation to the point of destination, although a few receive very small remuneration and expenses. The legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than drivers of state licensed cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increase the inconvenience and hazard to passing traffic. Car trouble to any one car sometimes results in stalling the entire caravan. The state has found it expedient to make special provisions for the inspection and policing of caravans moving in this traffic.

There is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways, with enhanced wear and tear on the roads and augmented hazards to other traffic, which imposes on the state a heavier financial burden for highway maintenance and policing than do other types of motor car traffic. We cannot say that these circumstances do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the

state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways.

As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. See *Clark* v. *Poor, supra; Aero Mayflower Transit Co.* v. *Georgia Public Service Comm'n, supra.*

Nor is it important that a part of the fees collected is not devoted directly to highway maintenance, the cost of which the state pays in part from the proceeds of a general property tax. The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. *Interstate Transit, Inc.* v. *Lindsey, supra.* But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other.

2. It is not denied that automobiles moving in caravans, as do appellant's, constitute a class of traffic which may be taxed differently from other classes without infringing the equal protection clause. But it is insisted that such is not the classification of the statute. It is said that the statute in terms imposes the special permit fee on every automobile transported for sale, whether moving singly or in a caravan; that when moving singly a car, merely because intended for sale, presents no differences from like cars, moving for other purposes, which would afford any basis for a difference in taxation. But this argument both ignores the actual circumstances in

which the statute is applied, as shown by the record, and seeks to take advantage of an alleged discrimination which, if it exists, does the appellant no harm.

There is nothing in the Fourteenth Amendment which requires classification for taxation to follow any particular form of words. If that adopted results in the application of the tax to a class which may be separately taxed without a denial of equal protection, those within the class who are called upon to pay the tax cannot complain that the taxed class might have been more aptly defined, or that the statute may tax others who are not within the class. Here it is the practice of transporting automobiles over the highways for purpose of sale which has given rise to the practice of moving them in caravans. The use of automobiles for other business purposes, or for pleasure, does not have that result. So far as it appears, the movement of cars singly for purposes of sale is negligible, and it is shown affirmatively that the cars transported for sale by appellant move in caravans. The classification of the statute thus, in its practical operation, embraces and is constitutionally applicable to cars moving in caravans, the class of traffic in which the appellant engages and on which he is alone taxed. Such discrimination as there may be is not between those who, like appellant, drive their automobiles to market in caravans and others who drive them singly, for both are taxed. Discrimination, if any, is between those who drive their cars to market singly and others who drive them for other purposes, and may be subjected to a different tax. Appellant does not assert that he belongs to either class. As the traffic in which he participates is properly taxed he cannot complain of the imposition of the tax on a business which he does not do. *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54, 55; *Keeney* v. *New York,* 222 U. S. 525, 536, 537; *Hatch* v. *Reardon,* 204 U. S. 152, 160, 161; Cf. *Collins* v. *Texas,* 223 U. S. 288; *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374. We have no occasion

to pass upon the validity of the tax as applied to cars driven singly.

3. In the absence of a controlling decision by the state courts, we see no reason for rejecting the conclusion of the district court that the fee provisions of Chapter 56 of the New Mexico Session Laws of 1935 were not repealed by Chapter 136, passed a week later at the same session of the Legislature. As already indicated, the latter makes provision for the administration of the special permit provisions of the earlier statute. It also, by §§ 8, 6 and 13 levies a graduated mileage tax of (1½ cents per mile for cars not exceeding 15,000 pounds in weight) upon motor vehicles not registered or licensed in the state, transported over the highways for purpose of sale. The statute declares that the tax is levied for the support of the administration of the Act, and for the maintenance of the highways.

Appellant does not assail this tax, but insists that it was intended as a substitute for the flat fee charged by the earlier provisions for a special permit. If the later tax, as the district court held, is imposed on motor cars transported as are appellant's, it is not inconsistent with the imposition of the flat permit fee, but supplementary to it. Repeal by implication is not favored, especially where the one Act follows close upon the other, at the same session of the legislature. Cf. *Graham & Foster* v. *Goodcell,* 282 U. S. 409; *Rodgers* v. *United States,* 185 U. S. 83, 89; *Beals* v. *Hale,* 4 How. 37, 53. Moreover, the later Act in this case was careful to provide that the new mileage tax which it imposes is not to apply to vehicles licensed and entitled to license plates, and otherwise taxed, under state law. The statute thus grants an explicit exemption from double taxation which it omits to extend to motor cars which, like appellant's, secure a special permit and do not receive state licenses and license plates.

Affirmed.

Syllabus.

BASSICK MANUFACTURING CO. *v.* R. M. HOLLINGSHEAD CO.*

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

No. 23. Argued October 21, 1936.—Decided May 18, 1936.

1. Claims 1, 2, 3, 4, 5, 6, 8, and 10 of Gullborg Patent No. 1,307,734, for a means of lubricating metal bearings, particularly those of automobiles, claimed a combination of (1) a type of pin fitting; (2) a grease gun; (3) a connecting hose; and (4) a type of coupler. The only novel feature of the combination was in the construction of the coupler, which, utilizing a perforated sealing disk mounted to reciprocate in the bore of the coupler with means for yieldingly pressing the disk against the end of the pin fitting, operates upon uncoupling to produce a suction effect which removes excess lubricant from the point of contact of the two members. *Held*, to that extent the claims disclose novelty and invention. P. 420.
2. The finding of the Circuit Court of Appeals that the accused grease gun of respondent (in No. 23) lacked the only novel feature of the Gullborg patented combination and that it therefore did not infringe,—sustained. P. 422.
3. Claims 14 and 15 of Gullborg Patent, No. 1,307,734, for a combination of the type of pin fitting covered by Gullborg Patent, No. 1,307,733, with a grease gun of any type, *held* not contributorily infringed either (1) by the sale of pin fittings of a type not covered by Patent No. 1,307,733, even though a grease gun of the "suction effect" type could be used therewith; or (2) by the sale of grease guns which could be used with the patented pin fitting but which did not embody the improved coupler evidenced by the patent in suit. Pp. 424–425.
4. A patentee cannot, by improving one element of an old combination whose construction and operation is otherwise unchanged, in effect repatent the old combination by reclaiming it with the improved element substituted for the old element. P. 425.

73 F. (2d) 543, affirmed.

74 F. (2d) 1019, reversed.

---

* Together with No. 31, *Rogers et al.* v. *Alemite Corporation.* Certiorari to the Circuit Court of Appeals for the Third Circuit.

CERTIORARI, 295 U. S. 726, to review judgments in two cases from different circuits, involving questions of the validity and infringement of a patent. The cases are stated in the opinion.

Mr. Lynn A. Williams, with whom *Messrs. Albin C. Ahlberg* and *Elwood Hansmann* were on the brief, for petitioner in No. 23.

Mr. Frank S. Busser, with whom *Mr. Leonard L. Kalish* was on the brief, for respondent in No. 23.

Mr. Leonard L. Kalish for petitioners in No. 31.

Mr. Lynn A. Williams, with whom *Mr. Albin C. Ahlberg* was on the brief, for respondent in No. 31.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

In these cases writs of certiorari were granted to resolve conflicts with respect to the scope and alleged infringement of claims 1 to 6, 8, 10, 14 and 15 of the Gullborg Patent No. 1,307,734. In No. 23 the Circuit Court of Appeals, while holding the claims valid, so construed them as to exculpate the accused devices from the charge of contributory infringement.[1] In No. 31 the Circuit Court of Appeals gave the claims a broader construction and adjudged that the petitioners were guilty of contributory infringement.[2]

The subject of the patent is a device for lubricating metal bearings, particularly those of automobiles. It has occasioned much litigation.[3] Before the date of Gull-

[1] *Hollingshead Co.* v. *Bassick Mfg. Co.,* 73 F. (2d) 543.

[2] *Rogers* v. *Alemite Corporation,* 74 F. (2d) 1019.

[3] Many district court decisions are unreported. Reported decisions in district and circuit courts of appeal are: *Bassick Mfg. Co.* v. *Auto*

borg's invention grease cups were used for bearing lubrication. The cup was connected with the bearing by a tube and oil or grease was forced through the tube into the bearing by screwing down a cap or plunger which was part of the cup. It became common to substitute, in place of the grease cup, a tubular fitting and to force grease through the fitting by means of a "gun" consisting of a compression chamber and an attached hose, the latter coupled to the fitting by a screw thread or bayonet coupling. In the case of the bayonet coupler the fitting had lugs or pins and the coupler device had slots which engaged such lugs or pins to form a tight union. The grease would then be forced from the chamber of the gun into the bearing by the use of a plunger or pump. In some of the prior art appliances the aperture of the fitting was kept closed when greasing was not being done by a ball or capsule held against the opening of the fitting by a spring. This closure is opened, during the greasing operation, by the pressure of the grease. Gullborg conceived the idea of a fitting in which, instead of pins or lugs set on either side, there should be a pin running directly through the tube and extending out on either side. He used that portion of the pin which bisected the tube as the base of a spring to hold in place a metal ball which closed the aperture of the fitting. This invention was novel in the respect that while others

---

Equipment Co., 13 F. (2d) 463; *Lyman Mfg. Co.* v. *Bassick Mfg. Co.*, 18 F. (2d) 29; *Bassick Mfg. Co.* v. *Standard Products Mfg. Co.*, 19 F. (2d) 937; *Bassick Mfg. Co.* v. *Larkin Automotive Parts Co.*, 19 F. (2d) 939; *Larkin Automotive Parts Co.* v. *Bassick Mfg. Co.*, 19 F. (2d) 944; *Bassick Mfg. Co.* v. *Ready Auto Supply Co.*, 22 F. (2d) 331; *Bassick Mfg. Co.* v. *Rogers*, 26 F. (2d) 724; *Alemite Mfg. Corp.* v. *Hi-Pressure Sales Co.*, 33 F. (2d) 912; *Bassick Mfg. Co.* v. *Adams Grease Gun Corp.*, 39 F. (2d) 904, 52 F. (2d) 36; *Bassick Mfg. Co.* v. *United Grease Gun Corp.*, 40 F. (2d) 549; *Alemite Corporation* v. *Lubrair Corporation*, 62 F. (2d) 899.

65773°—36——27

had similarly closed the aperture of the fitting none had employed the pin both to form the lugs for engaging the slots of the coupler and to form the base of the spring supporting the ball closure. For this invention he applied for and obtained a patent, No. 1,307,733, which is not here in suit. Recognizing that when a bayonet coupler is secured to the pin fitting, and the grease is forced through the fitting into the bearing under great pressure, upon uncoupling the gun from the fitting some grease will remain around the end of the fitting and the orifice of the coupler which is not only useless but likely to soil the clothing of the operator or others using the machine, and litter the place where the greasing is done, Gullborg set about to devise a means for eliminating this residuum of grease. He conceived the idea of placing a movable perforated cup-shaped disk or washer in the barrel of the coupler held by a spring against the orifice of the coupler. The intended operation of his device was that when the coupler had been fastened over the pin fitting the spring should press the washer against the ball in the pin fitting so that the tube in the fitting would be open to receive the grease and, upon application of pressure to the grease, the washer would thereby be firmly pressed against the opening of the pin fitting, thus causing a tight union and preventing exudation of grease. His specification asserts that the invention makes possible the injection of grease under very high pressure. The design of the bayonet slots is such that, in uncoupling, the coupling member of the gun will at first be moved slightly forward on the pin fitting thus backing up the perforated washer in the bore of the coupler. As the two parts are then drawn apart by the retraction of the coupler, the cup-shaped washer will be forced forward by the spring. This will cause a vacuum behind the washer and the air rushing in through the

perforation in the washer will draw with it any grease which would otherwise adhere about the orifices of the fitting and the coupling.

While Gullborg's invention was confined to an improvement in the hose coupler, which is but one element in the old and well understood combination of a compression chamber or pump, a hose, a hose-coupler, and a grease cup or fitting connected to the bearing to be lubricated, his claims are not for the improvement as such but all are for a combination of the old elements with the improved form of coupler. They are too long to set forth in full. Claim 2 may be taken as typical of a number of them. It reads:

"2. The combination with a hollow coupling member having a pin projecting from one side thereof and a spring-pressed closure, of a pump, a discharge conduit having one end secured to the outlet of said pump, a second hollow coupling member for receiving the closed end of said first named coupling member secured to the other end of said conduit and provided with a bayonet slot adapted to co-act with said pin, a perforated sealing disk mounted to reciprocate in the bore of said coupling member, means for yieldingly urging said sealing disk against the closed end of said first named coupling member, and means for limiting the movement of said sealing disk in the direction of said second coupling member."

The claimed combination is, therefore, of four things: (1) a type of pin fitting which was old in the art; (2) a pump for creating pressure, which was old; (3) a hose to connect the two; and (4) a well-known type of coupler, the only novel feature of which is the perforated sealing disk mounted to reciprocate in the bore of the coupler with means for yieldingly pressing the disk against the end of the pin fitting and means for limiting the movement of the disk in the direction of the pin fitting (which

signifies merely some sort of shoulder at the orifice of the coupler to prevent the spring from forcing the disk out of the end of the bore).

Nothing is said in specification or claims concerning the release of the high pressure in the gun before uncoupling, but evidently this must be done if the movement of the perforated disk is to create a vacuum. The petitioner concedes that if the high pressure is maintained the grease packed behind the washer will move forward with it and not only prevent the creation of a vacuum back of the washer but continue to exude from the coupler through the perforation in the washer. It is explained that the pressure may be released by a slight retraction of the plunger in the grease gun so as to permit the spring and washer to perform their function of creating a suction when the pin and coupler are disengaged.

Claims 1 to 6, inclusive, and 8 and 10, have been repeatedly held valid, but the invention has generally been limited to the novel means whereby upon the uncoupling of the gun from the pin fitting a suction is produced which removes excess lubricant from the point of contact of the two members. Although in the instant cases the validity of the claims is denied, we think they disclose novelty and invention to the extent indicated.

Claims 14 and 15 are of a different order. Claim 15 may be taken as typical. It is:

"15. The combination with a grease cup comprising a tubular member having a closure seat, a closure, a pin extending through said tubular member and from both sides thereof, and a spring confined between said pin and closure, and tending to hold said closure on its seat, of a grease pump having a discharge conduit, and means coacting with the ends of said pin for detachably connecting the discharge end of said conduit with said grease cup."

It will be noted that this claim describes a combination consisting of the pin fitting of Gullborg's patent

No. 1,307,733, with any grease pump having a bayonet type coupler. Nothing in the claim discloses the cup shaped reciprocating disk yieldingly pressed forward against the closure of the pin fitting. Grease guns having such a bayonet coupling were old in the art. The question is whether claims 14 and 15, unless restricted to the combination of a grease gun and coupler and a pin fitting such as are described in the specifications of the patent, are void as attempting to extend the monopoly of Gullborg's patent No. 1,307,733, to exclude the use therewith of any grease gun except one having the suction device of the patent in suit.

With this background we pass to consideration of the specific cases presented.

No. 23.

The petitioner, as owner of the Gullborg patent, filed a bill in the district court to restrain alleged infringement by the respondent. The latter did not sell pin fittings but did sell two types of grease pumps. The slotted coupler of the first has no slidably mounted cup-shaped perforated disk in its bore. Confessedly there is no means for producing the suction effect claimed for Gullborg's invention. The Circuit Court of Appeals, reversing the decision of the district court, held that in view of the limited scope of the invention disclosed in claims 1 to 6, inclusive, and 8 and 10, this device did not infringe. It further decided that as claims 14 and 15 must be limited to a combination embracing couplers embodying the suction effect,—the only novel feature of the patent,—or else be held void as attempting to gain protection for something not covered by the invention, this grease pump did not infringe those claims. The petitioner does not contest the holdings. The second gun sold by the respondent combines a receptacle containing grease under a pneumatic pressure of about one hundred pounds, the

exit of which is connected to a pipe discharging into the chamber of a plunger-operated pump and a hose attached at the base of the pump chamber terminating in a coupling device like that of the Gullborg patent. The method of operation is that when the plunger is retracted beyond the orifice of the supply pipe grease is forced into the pump chamber by the air pressure in the receptacle. By the downward stroke of the plunger the entrance to the pump-chamber is closed and the grease therein forced into the hose and through the coupling and pin fitting to the bearing. By successive strokes a very high pressure can be built up in the hose. The Circuit Court of Appeals found, and we think correctly, that with this arrangement it was impossible to release the pressure in the grease line between the pump and the bearing before uncoupling the hose from the pin fitting, so as to permit the spring to force the disk forward in the bore of the coupler and create a suction as in Gullborg's patent; and that the accused device was subject to the very exudation of grease at the point of union which Gullborg's invention was intended to obviate. It therefore held that the accused grease gun lacked the only novel feature of the patented combination.

The decision went upon a question of fact. The petitioner offered no evidence to prove that the accused device operated to produce the suction effect claimed in the patent but relied upon the physical exhibits consisting of its own and the respondent's apparatus and upon ocular demonstrations of their operation. The respondent introduced evidence to show the absence of the suction effect in its device and combatted the inference sought to be drawn from the physical operation of the two exhibits. We are satisfied that the Circuit Court of Appeals was correct in its decision that the accused device did not embody the novel feature claimed in the patent.

As respects claims 14 and 15, which are for a combination of the pin fitting covered by Gullborg's patent No. 1,307,733 with a grease gun and coupler of any type, the Court of Appeals held that these must be read as claiming a combination of the patented pin fitting and a gun with the coupling device described in the specifications and having the suction effect set forth in the other claims or must be held void as unlawful attempts to extend the monopoly of the pin fitting which is described in patent 1,307,733. The court sustained these claims by restricting their scope to conform to the other claims based on the suction effect and held they were not infringed by the respondent's apparatus. We do not understand the petitioner to seek a reversal of this holding. Its petition for certiorari and the assignments of error are bare of any attack upon this portion of the Circuit Court of Appeals' decision. These claims, however, are drawn in question in No. 31 and may more properly be discussed in that connection.

No. 31.

In this case the respondent, as owner of the Gullborg patent No. 1,307,734, sued the petitioners, who neither made nor sold pin fittings of the type covered by Gullborg's patent No. 1,307,733, nor grease pumps or guns having the coupler construction of those described and claimed in the patent in suit. But the petitioners did sell pin fittings of a type with which a grease gun of the description of Gullborg's could be used, and grease guns having a bayonet slotted coupler, which could be used either with the pin fittings of Gullborg's patent No. 1,307,733 or with others not covered thereby. These sales were charged to be contributory infringements of patent No. 1,307,734. The district court so held and the Circuit Court of Appeals affirmed.

What has been said with respect to claims 14 and 15 need not be repeated. The petitioners' grease guns are

of an old unpatented type having couplers of a different construction from that disclosed in the patent. There is no assertion that they produce the suction effect of Gullborg's invention. The petitioners' pin fittings are not of the type described in Gullborg's patent No. 1,307,733.

The proofs establish that the prior art embraced the use in combination of a grease gun composed of a chamber or pump, a hose, a hose-coupler, and a spring-closed fitting, the coupling being of the pin and slot or bayonet type. The respondent's position is, nevertheless, that if the petitioners furnish a gun, a part of this old unpatented and unpatentable combination, for use with the patented pin fitting of Gullborg's No. 1,307,733, they contributorily infringe claims 14 and 15 of the patent in suit because those claims described the combination of any grease gun with the patented pin fittings. Again, the respondent says that as pin fittings made in accordance with the prior art, but susceptible of use with a gun covered by the patent in suit, were sold by petitioners, these sales constituted contributory infringements of all the claims of the patent.

It is plain that Gullborg invented improvements of two of the mechanical elements of an old combination consisting of grease pump, hose, hose-coupler, and a grease cup or pin fitting. First, he contrived an improved pin fitting. This he patented as such (No. 1,307,733.) Secondly, he invented an improved form of coupler to be attached to the end of the hose leading from the pump to the fitting. Instead of patenting this, as he did the pin fitting, he claimed a combination of pump, hose-coupler, and pin fitting, and embodied in the combination his improved form of coupler. (No. 1,307,734, the patent in suit; claims 1–6, 8 and 10). He further claimed the combination between his patented pin fitting and any form of grease gun whether that

claimed in his patent or unpatented and old in the art. (Claims 14 and 15.) The question then is whether, by this method, the patentee, by improving one element of an old combination whose construction and operation is otherwise unchanged, may, in effect, repatent the old combination by reclaiming it with the improved element substituted for the old element. That this cannot be done is shown by numerous cases in this and other federal courts.[4]

Leeds & Catlin v. *Victor Talking Machine Co.*, 213 U. S. 301, 325, on which the respondent relies, is not in point. There the patent was a pioneer patent and the combination was of elements which were novel and neither of which possessed utility without the other. Each element was necessary to the operation of the other. The invention did not, as here, consist of the mere improvement of one element of an old combination.

We are of the opinion that the owner of the patents cannot extend the monopoly of its patent for a pin fitting to preclude the use therewith of any grease gun not embodying the improvement in the coupling device evidenced by the patent in suit; and cannot extend the monopoly of the combination patent in suit to prevent the use of a pin fitting which does not infringe the fitting patent, 1,307,733, with a gun having a coupler such as that claimed in the patent in suit.

---

[4] *Edison Electric Light Co.* v. *Peninsular Light P. & H. Co.*, 101 Fed. 831; *Heald* v. *Rice*, 104 U. S. 737, 755; *Underwood* v. *Gerber*, 149 U. S. 224, 227, 229; *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, 431, 432; *Carbice Corporation* v. *American Patents Development Corp.*, 283 U. S. 27, 31, 32; *Wagner Typewriter Co.* v. *Webster Co.*, 144 Fed. 405, 409; *Langan* v. *Warren Axe & Tool Co.*, 184 Fed. 720; *Harvey Hubbell, Inc.* v. *General Electric Co.*, 267 Fed. 564; *Troy Wagon Works Co.* v. *Ohio Trailer Co.*, 274 Fed. 612; *General Electric Co.* v. *Ohio Brass Co.*, 277 Fed. 917; *Radio Corporation* v. *Lord*, 28 F. (2d) 257; *Wall Pump & C. Co.* v. *Gardner Governor Co.*, 28 F. (2d) 334.

In No. 23 the decree is affirmed. In No. 31 the decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

So ordered.

The CHIEF JUSTICE took no part in the consideration or decision of these cases.

ACKER ET AL. *v.* UNITED STATES ET AL.

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

No. 655. Argued April 3, 6, 1936.—Decided May 18, 1936.

1. In ascertaining a reasonable unit cost, as the basis for a uniform rate for Market Agencies, under the Packers & Stockyards Act, the Secretary of Agriculture was not bound to adopt any one agency's costs or an average of the costs of all of them; to do so would be to leave out of consideration relative size, relative volume, and relative efficiency of individual agencies. P. 429.
2. In fixing such rates, the Secretary was not bound to adopt as his allowance for salesmen's salaries an average of salaries theretofore paid; and he was justified in refusing to assign, as part of the selling cost, fictitious salaries to the proprietors of such agencies whose actual recompense for their activities is the profit from their own business. P. 429.
3. In the fixing of such rates the Secretary may determine from the evidence what is a fair and adequate allowance for the cost of getting and maintaining business; this is not purely a question for the managerial judgment of the market agencies. P. 430.
4. The objections that the Secretary arbitrarily used a single year as the test period and arbitrarily refused a rehearing, are not sustained. P. 431.
5. Under § 316 of the Packers & Stockyards Act, the District Court sits not to afford a trial *de novo* but to review the administrative action. Where the issue before the Secretary was the reasonableness of the charges of market agencies for their personal services, no question of confiscation being involved, and where adequate notice and hearings were afforded, and the evidence carefully

weighed by him, as demonstrated by voluminous and detailed findings, and the facts and considerations forming the basis of his ultimate conclusions were candidly exposed in his decision,—*held* that the function of the court was confined to the questions raised upon the record made before the Secretary. P. 433.

12 F. Supp. 776, affirmed.

APPEAL from a decree of the three-judge District Court dismissing a bill to set aside orders of the Secretary of Agriculture fixing uniform rates for Market Agencies under the Packers & Stockyards Act.

Mr. George I. Haight, with whom *Messrs. John S. Boyd* and *M. K. Hobbs* were on the brief, for appellants.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed* and *Messrs. Wendell Berge* and *G. N. Dagger* were on the brief, for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

September 23, 1932, the Secretary of Agriculture, acting under the Packers and Stockyards Act, 1921,[1] ordered an inquiry and gave notice of a hearing to determine the reasonableness of rates charged by market agencies doing business at the Union Stockyards in Chicago. After protracted hearings and argument, he made findings of fact, announced his conclusion that the existing rates were unreasonable, and fixed new maximum rates. The appellants, who conduct market agencies, petitioned for rehearing. This the Secretary denied but by a supplemental order he increased some rates. An amended petition for rehearing was dismissed and the appellants then filed their bill in the district court seeking an injunction against enforcement of the original and supplemental orders. The case was heard by three judges who granted an interlocutory injunction. At final hearing the appel-

[1] 42 Stat. 159; U. S. C., Tit. 7, Chap. 9.

lants offered in evidence the record of the proceedings before the Secretary and also proffered additional testimony which was received over the appellees' objection and subject to their exception. The court dismissed the bill, holding that the Secretary's findings were supported by substantial evidence. In the light of the evidence before him, and that adduced at the trial, the court adopted the Secretary's findings as its own; adjudged the prescribed rates reasonable, and concluded the orders entered were not arbitrary and did not operate so as to take the agencies' property without due process of law.

The appellants contended in the court below, and here insist, that the Secretary failed to apply the principles for ascertaining reasonable rates approved by this court in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; improperly invaded the field of management in determining reasonable unit costs; used an improper test period for ascertaining costs; disregarded the evidence in fixing an allowance for salesmanship costs and expense of getting and maintaining business, and arbitrarily denied the petitions for rehearing. These errors, so they claim, resulted in the fixing of unreasonable and confiscatory rates.

The services performed by commission merchants in the Chicago yards are substantially the same as those described in the opinion in *Tagg Bros. & Moorhead* v. *United States, supra,* touching the market agencies at the Omaha stockyards. Little capital is invested; the business is the rendering of personal services for which charges are made according to a uniform schedule. In ascertaining whether the rates are reasonable the prime factor is the agencies' costs, of which the most important are salesmen's compensation and the expense of getting and maintaining business. The old schedule of rates, like that prescribed for the Omaha yards, and considered in *Tagg Bros. & Moorhead* v. *United States, supra,* was

based upon carload lots. In the present case the Secretary determined that a more accurate and reasonable schedule could be prepared on the basis of the consignment rather than that of the carload. In order to ascertain unit costs it was necessary for him to break down the total costs into three principal items,—salaries, other expenses, and interest. These in turn were subdivided thus: salaries into selling and buying, yarding, business getting and maintaining, office and administrative; other expenses into yarding, office, business getting and maintaining, administrative and general, and risk. Interest was calculated on the value of fixed assets, inventory of supplies, and cash working capital equivalent to one month's expense allowance. Costs were thus determined for each sort of livestock handled. In arriving at the rate an allowance was made for management and uninsurable risks; that is, for profit. The Secretary stated that he adopted the same principles for determining rates as were approved in the *Tagg Bros.* case. The complaints against the rates are not directed to these principles but to their application in the present case. We think they are without merit.

1. In general, the Secretary's findings are challenged as not giving proper weight to the past experience of the market agencies. As the findings demonstrate, full consideration was given to the costs incurred, but in ascertaining a reasonable unit cost as the basis of a uniform rate the Secretary was not bound to, and indeed he could not, adopt any one agency's costs or an average of the costs of all of them; to do so would be to leave out of consideration relative size, relative volume, and relative efficiency of individual agencies.

2. The attack upon the allowance for salesmen's salaries is bottomed on the fact that the Secretary refused to adopt an average of salaries heretofore paid. He was not required so to do. What is a typical salesman's

performance, and a fair recompense for it, is a matter of judgment based upon all the facts. That the Secretary considered and weighed the evidence is clearly shown by his findings; that he exercised an informed judgment upon it cannot successfully be denied.

Many proprietors of agencies take part in the activities of buying, selling, yarding, etc. As they own the enterprise they receive no salaries. Their recompense is the profit realized from the business. What each of them thus earned during the test period was disclosed at the hearing. The appellants insisted that the Secretary should in his cost computations fix a salary allowance for such owners without reference to their actual earnings. In order to furnish a basis for a finding in this behalf they procured independent persons, said to have knowledge of the subject, to make appraisals of the value of the services of these owners and introduced the appraisals in evidence. They insist that because the Secretary in arriving at selling costs ignored these hypothetical salaries his action was arbitrary and unreasonable. We cannot so hold. We think it evident that he was justified in considering conditions as he found them and refusing to load the business with a cost having no relation to actualities.

3. With respect to the cost of getting and maintaining business, the Secretary had before him a complete analysis of the actual expenditures made during an adequate test period. He had ample evidence pro and con as to the necessity and wisdom of these expenditures. It appears that he weighed the proofs, found that in certain respects the expenditures had been extravagant and wasteful, and, in the exercise of judgment, arrived at a cost he considered fair and adequate. The contention is that the amount to be expended for these purposes is purely a question of managerial judgment. But this overlooks the consideration that the charge is for a public

service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any purposes. We are not persuaded that the conclusions as to proper allowances on this head were without substantial support in the record.

4. It is charged that the Secretary erred in using a single year, 1932, as a test period. For detailed figures he used only that year, but he had before him a cost analysis for 1931, a survey of the economic history of the Chicago market and the factors which have influenced it since its establishment in 1865, a record of the annual receipts for each year from 1865 to 1932, and a tabulation of the monthly receipts for the years 1923 to 1932, inclusive. In addition he had data as to the relation of the volume of receipts at this market between 1920 and 1932, inclusive, to the total receipts of all the important livestock markets in the country; the ratios of rail and truck receipts for the years 1923 to 1932, inclusive, and a record of seasonal variations in rail and truck receipts for 1932. He had studies showing distribution of receipts amongst the different classes of animals in each year from 1923 to 1932, inclusive. His findings show that he gave consideration to changing economic conditions affecting the Chicago market. They show that he used 1932 as a test period because it was favorable to the appellants, since the receipts at Chicago in that year were lower than those for any of the preceding ten years, and therefore unit costs calculated on the basis of receipts in that year would naturally tend to be higher than those of preceding years. In the light of the proofs and the findings, we are unable to find anything arbitrary or unreasonable in the selection of the data on which to base a judgment.

5. The appellants assert the Secretary acted arbitrarily in refusing to rehear the case. Hearings began

May 15 and ended November 7, 1933. December 13 the matter was argued. January 8, 1934, the original order was entered prescribing maximum rates effective February 7, 1934. On the day last mentioned the appellants presented a petition for rehearing which is not in the record. From the summary of its contents found in the bill it appears that petitioners claimed the reduction in revenues consequent upon the new rates made it impossible for them to pay necessary operating expenses which had been increased by the National Recovery Act and the Agricultural Adjustment Act; that costs should have been calculated by using the draft rather than the consignment as a basis; that the rates were inconsistent with the level of costs and the trend of costs during 1933; and that the petitioners desired to prove the efficiency of their methods of handling animals during 1933. Data in support of the petition were tendered and received. The Secretary reconsidered his prior decision, refused a rehearing, and ordered certain increases in the rates. Within a month appellants presented an amended petition for rehearing which is not in the record but is sketched in the bill of complaint. The reasons advanced in support of the application are alleged to have been: a net reduction of twenty-five per cent. of gross income as compared with 1933 would result from the new schedule; such a reduction would render petitioners' income insufficient to pay the costs of doing business; the schedules promulgated were based on findings for the years 1931 and 1932, whereas, during 1933 and 1934, profound changes occurred which adversely affected the petitioners' business; the federal legislation of 1933 increased petitioners' expenses. It thus appears that although the appellants had opportunity until one month prior to the making of the order to produce any evidence as to conditions prevailing during 1933, and to call attention to any conclusions to be drawn therefrom, they delayed

doing so until shortly after the order was issued. The delay in presenting proofs concerning these matters is unexplained.[2]

The amended petition was filed about three months after the original order issued. It is inconceivable that economic conditions had so altered in this brief period as to demonstrate that the new schedule of rates, if just when promulgated, had become unjust and oppressive. The schedule should have been given a trial and any alteration or modification should have been asked in the light of more extensive experience. We are unable to find anything arbitrary or unreasonable in the denial of the petitions.

6. The appellants insist that they were entitled to a trial *de novo* on the issue of confiscation and on the issue of the denial of the petitions for rehearing.

A majority of the District Court said:

"Having considered the new evidence offered for the first time in this court, and all the evidence offered before the Secretary, and having concluded, as we have, that there is no showing of confiscation, we find it unnecessary to determine whether the evidence offered for the first time in this court was admissible. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420."

One of the judges, in a separate opinion, stated:

"I do not concur in the findings of this court which adopt in toto the findings of fact made by the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses are, in my opinion, against the weight of evidence. However, I am not prepared to say that the findings were made without any evidence to support them. I join, therefore, in the entry of the decree dismissing the bill."

---

[2] Compare *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490.

It is to be noted that in spite of the allegations of the bill the case does not involve any question of confiscation. The appellants employ little physical property in their business and no complaint is made as to the allowance of interest on such as they do employ. They render a personal service and the issue before the Secretary was whether the uniform schedule of rates for that service was or was not reasonable. On this issue he was bound to afford the appellants due process. In fact he gave them adequate notice and accorded them a full hearing. He carefully weighed the evidence, as demonstrated by voluminous and detailed findings; he exposed with candor the facts and considerations forming the basis of his ultimate conclusions. The appellants had opportunity for a full presentation of their case. Under § 316 of the Packers and Stockyards Act the district court sits not to afford a trial *de novo* but to review the administrative action. *Tagg Bros. & Moorhead* v. *United States, supra,* p. 443. No reason appears why the appellants could not be afforded due process of law by a review of any questions they deemed material upon the record as made in the administrative proceeding, or why the delay, expense and burden of a new trial should be imposed simply because they demanded it. The issue before the Secretary was not confiscation but the reasonableness of a charge for personal service. No new or different issue could have been presented upon a trial *de novo.* We think the court correctly held that its function was the consideration of questions raised upon the record made before the Secretary.

Little need be said concerning the claim that a trial *de novo* should have been afforded the appellants on the question of their right to a rehearing. As has been said, the bill of complaint summarizes the petition and amended petition for rehearing and asserts that the Secretary arbitrarily refused to grant them. No evidence in

support of this allegation was tendered in the District Court. It is idle to discuss the right of the appellants to make a showing in this behalf in the District Court when in fact none was made or attempted and the court was left, as we are, with no light on the subject save what is afforded by the record before the Secretary and the averments of the complaint.

The decree is

Affirmed.

UNITED STATES ET AL. v. CORRICK ET AL.

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

No. 656. Argued April 6, 1936.—Decided May 18, 1936.

1. On appeal from the granting or refusal of an interlocutory injunction, inquiry is limited to the question whether the court abused its discretion. P. 437.
2. A bill by operators of Market Agencies to enjoin the Secretary of Agriculture from instituting prosecutions for violations of an order fixing their rates under the Packers & Stockyards Act, the ultimate purpose of the suit being to secure a decree upholding a rate schedule posted by the plaintiffs, is not a bill to set aside or suspend the order, within the jurisdiction of the District Court. P. 438.
3. When the Secretary of Agriculture, pursuant to § 310 of the Packers & Stockyards Act, orders specified rates thereafter to be charged by Market Agencies, these become the only lawful rates and so remain until the further order of the Secretary. P. 439.
4. The Secretary of Agriculture, after inquiry and full hearing, fixed rates thereafter to be charged by the Market Agencies, and these had not been set aside or enjoined in any appropriate judicial proceeding or been altered by subsequent order of the Secretary. *Held* that the District Court was without power to enjoin the prosecution of the operators of the Agencies for charging rates other than those set by the Secretary. P. 440.
5. Lack of jurisdiction in a federal court over the subject matter of the litigation cannot be waived by the parties. The court should decline to proceed with the cause. P. 440.

6. If the record discloses that the lower court was without jurisdiction, this Court will notice the defect although the parties make no contention concerning it. P. 440.
7. This Court has jurisdiction on appeal to correct the error of a District Court in entertaining a suit over which it had no jurisdiction. *Id.*

Reversed.

APPEAL from an interlocutory decree of a three-judge District Court enjoining prosecution of plaintiffs for violation of the Packers & Stockyards Act. Cf. the last preceding case.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed* and *Messrs. Wendell Berge* and *G. N. Dagger* were on the brief, for appellants.

Mr. George I. Haight, with whom *Messrs. John S. Boyd* and *M. K. Hobbs* were on the brief, for appellees.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is an appeal from a decree of a specially constituted district court awarding an interlocutory injunction against the Secretary of Agriculture and others restraining them from prosecuting the appellees, operators of market agencies at the Chicago stockyards, for violation of the Packers and Stockyards Act, 1921.[1]

The appellees are, for the most part, the same persons and corporations as the appellants in No. 655, *Acker* v. *United States, ante,* p. 426. While that case was pending on appeal to this court, and the rates therein prescribed by order of the Secretary of Agriculture were suspended until final determination respecting their validity, the appellees prepared and posted, on October 19, 1935, a schedule of rates for market services at the Chicago

[1] 42 Stat. 159; U. S. C. Tit. 7, Chap. 9.

stockyards to become effective November 1, 1935. These rates were, in most instances, higher than those prescribed by the Secretary's orders of January 8 and March 12, 1934. On the same day the appellees tendered the schedule to the Secretary for filing. He declined to receive it, assigning as reasons for his refusal that once rates are fixed by him no change therein may be made except by his order or by action of a court of competent jurisdiction and that litigation was then pending challenging the validity of his outstanding orders. Thereupon the appellees filed their bill in the district court reciting the course of the Secretary's proceedings referred to in No. 655, the orders made, and the suit to restrain their enforcement. The pleading asserts that the orders were based on data for the years 1931 and 1932; that, subsequently to promulgation of the orders, conditions had so changed that to prevent destruction of their business the appellees were compelled to adopt a new schedule of charges; it recites the Secretary's refusal to file the new schedule and alleges that the refusal was a violation of his duty under the act; it charges that his refusal was of no effect since his only power in the premises was to file the schedule and, if he believed the rates named therein unjust, unreasonable, or discriminatory, to suspend them, pursuant to the provisions of the act, and, after hearing, fix reasonable and nondiscriminatory rates. The bill alleges that the schedule of October 19, 1935, became effective November 1, 1935, and that if appellees failed to conform thereto they would incur heavy penalties while, on the other hand, the Secretary was threatening to prosecute them unless they adhered to the rates prescribed by his orders of January 8 and March 12, 1934. After a hearing upon the bill and a supporting affidavit the court granted an injunction.

On appeal from the granting or refusal of an interlocutory injunction our inquiry is limited to the ques-

tion whether the court abused its discretion.[2] The appellants urge that the action taken constituted such an abuse for the reason that want of jurisdiction is evident upon the face of the bill. With this contention we agree.

Section 316 of the Packers and Stockyards Act [3] adopts the same procedure for restraining enforcement of or setting aside orders of the Secretary as is provided by law with respect to orders of the Interstate Commerce Commission. By § 1 of the Commerce Court Act [4] jurisdiction was conferred upon the Commerce Court "over all cases . . . brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913,[5] transferred the jurisdiction of the Commerce Court to the district courts and provided that such cases should be heard by three judges. The words of the statute exclude a mere refusal to act from the section conferring jurisdiction, and this court has accordingly held that an order negative in form and substance is not within the relief accorded.[6] It is clear that

---

[2] *Farrington* v. *Tokushige,* 273 U. S. 284, 290; *United Fuel Gas Co.* v. *Public Service Comm'n,* 278 U. S. 322, 326; *Alabama* v. *United States,* 279 U. S. 229, 230; *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 338.

[3] 42 Stat. 168. U. S. C. Tit. 7, § 217: ". . . the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title."

[4] c. 309, 36 Stat. 539.

[5] c. 32, 38 Stat. 208, 219; U. S. C., Tit. 28, §§ 41 (8) (27) (28), 47.

[6] *Procter & Gamble* v. *United States,* 225 U. S. 282, 292; *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 412; *United States* v. *Illinois Central R. Co.,* 244 U. S. 82; *United States* v. *Atlanta, B. & C. R. Co.,* 282 U. S. 522; *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238.

the instant bill was not one to set aside or suspend any order of the Secretary. The proceeding brought for that purpose was No. 655, just decided. This suit is to restrain the Secretary and others from instituting prosecution for violations of an order. Its ultimate purpose is to secure a decree affirming the validity and effectiveness of the rate schedule posted by the appellees October 19, 1934. The injunction restrains the defendants from preventing, or attempting to prevent, or from interfering with the appellees in the collection of the rates of charge fixed by the schedule tendered to the Secretary October 19, 1935.

The District Court was without jurisdiction for a further reason. Section 306 of the Packers and Stockyards Act [7] directs that within sixty days after the Secretary shall have given notice that a stockyard falls within the definition of § 302 every market agency at such stockyard shall file with him, and keep open for inspection, schedules of rates and charges for its services. No changes are to be made in the rates so filed and published except after ten days' notice to the Secretary and to the public. Section 310 authorizes an order for investigation and a hearing by the Secretary on complaint, or on his own initiative, as to whether existing rates are unjust, unreasonable, or discriminatory, and empowers him, after such hearing, to "determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, *to be thereafter observed* in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory *to be thereafter followed; . . .*".[8] Section 306 prescribes the method of initiating rates upon the act's becoming effective, and of voluntary alteration of them from time to time. But when the Secretary, pur-

[7] c. 64, 42 Stat. 164. U. S. C. Tit. 7, § 207.

[8] c. 64, 42 Stat. 166. U. S. C. Tit. 7, § 211.

suant to § 310, orders specified rates thereafter to be charged these become the only lawful rates and so remain until the further order of the Secretary.[9]

The bill shows that the Secretary, after inquiry and full hearing, fixed rates thereafter to be charged by the appellees, and these had not been set aside or enjoined in any appropriate judicial proceeding or been altered by subsequent order of the Secretary. The court was, therefore, without power to enjoin the prosecution of the appellees for charging rates other than those established by the Secretary.

The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined *sua sponte*, to proceed in the cause.[10] And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.[11] While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.[12] The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill.

Reversed.

---

[9] Compare *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 386, 387.

[10] See *Cutler* v. *Rae*, 7 How. 729, 731; *Morris* v. *Gilmer*, 129 U. S. 315, 325; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62; *Mattingly* v. *Northwestern V. R. Co.*, 158 U. S. 53; *443 Cans* v. *United States*, 226 U. S. 172; *Mitchell* v. *Maurer*, 293 U. S. 237, 244.

[11] *Perez* v. *Fernandez*, 202 U. S. 80, 100; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 13.

[12] *United States* v. *Huckabee*, 16 Wall. 414, 435; *Stickney* v. *Wilt*, 23 Wall. 150, 163; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19.

Counsel for Parties.

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

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

No. 774. Argued May 1, 1936.—Decided May 18, 1936.

1. Common voting shares of a corporation received by the holder of cumulative preferred shares as a dividend—*held* income and not to be treated as returns of capital. P. 443.

   Therefore, upon a subsequent sale or other disposition of the preferred shares no part of their original cost is to be apportioned to such common shares for the purpose of determining the gain or loss from such disposition.
2. An administrative construction, the effect of which is to convert an income tax imposed by a statute into a capital levy, cannot be adopted. P. 445.
3. Where the provisions of an Act are unambiguous and its directions specific, there is no power to amend it by regulations. P. 446.

81 F. (2d) 641, reversed.

REVIEW by certiorari, 297 U. S. 702, of a judgment reversing a decision of the Board of Tax Appeals, 33 B. T. A. 634, and approving the action of the Commissioner of Internal Revenue in increasing an income tax assessment.

Mr. John C. Altman for petitioner.

Assistant Attorney General Jackson, with whom *Solicitor General Reed* and *Messrs. David E. Hudson, Sewall Key,* and *Berryman Green* were on the brief, for respondent.

By leave of Court, *Mr. Roger S. Baldwin* filed a brief as *amicus curiae,* urging affirmance of the decision of the Circuit Court of Appeals.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The writ of certiorari was granted in this case to resolve a conflict between the decision below[1] and one by the Circuit Court of Appeals for the Sixth Circuit.[2]

The question is whether, under the Revenue Acts of 1926 and 1928, a taxpayer who purchases cumulative non-voting preferred shares of a corporation upon which a dividend is subsequently paid in common voting shares, must, upon a sale or other disposition of the preferred shares, apportion their cost between preferred and common for the purpose of determining gain or loss.

The petitioner, in 1924 and 1926, purchased preferred stock of Columbia Steel Corporation. The company's articles of incorporation provided that holders of preferred stock should receive annual dividends of seven dollars a share in cash or, at the company's option, one share of common stock for each share of preferred. Dividends on the preferred were to be paid in full before any could be paid on the common; the common had voting rights, the preferred none. The preferred was redeemable at $105 per share, plus accrued dividends; and upon dissolution or liquidation was entitled to preferential payment of $100 per share, plus accrued dividends, and no more. The common alone was entitled in such event to the assets of the corporation remaining after payment of the preferred.

In each of the years 1925 to 1928, inclusive, the company had a surplus sufficient to pay the preferred dividends in cash, but elected to pay them in common stock. The petitioner received, in each of those years, shares of common stock as dividends on her preferred. In 1930 the corporation redeemed its preferred stock at $105 per

[1] *Commissioner* v. *Koshland*, 81 F. (2d) 641.

[2] *Commissioner* v. *Tillotson Mfg. Co.*, 76 F. (2d) 189.

share. In computing the profit realized by the petitioner the Commissioner allocated to the common stock so received, in each instance, a proportionate amount of the cost of the preferred stock. He thereby decreased the resulting cost basis per share and increased the gain. The Board of Tax Appeals reversed, holding that the dividends were taxable income, were not stock dividends within the meaning of the Revenue Acts,[3] and their receipt did not reduce the cost basis of the preferred stock. The Circuit Court of Appeals reversed the Board and approved the Commissioner's action.

The petitioner contends, first, that the dividends she received were not stock dividends exempted from taxation by the revenue acts; and, secondly, if exempted, they were none the less income and cannot be treated as returns of capital in computing capital gain or loss. The respondent answers that the distributions were stock dividends because made in the capital stock of the corporation and come within the plain meaning of the provisions exempting stock dividends from income tax; accordingly, the Treasury regulations have consistently and continuously treated them as returns of capital, and required the original cost to be apportioned between the shares originally acquired and those distributed as dividends to obtain the cost basis for the calculation of gain or loss. We hold that the dividends were income and may not be treated as returns of capital.

The Revenue Act of 1913 imposed an income tax on dividends.[4] In *Towne* v. *Eisner,* 245 U. S. 418, it was held that where a corporation declared a dividend on its common stock, in the form of common stock, the dividend was not income within the intendment of the act.

---

[3] Revenue Act of 1928, § 115 (f), c. 852, 45 Stat. 791, 822; Revenue Act of 1926, § 201 (f), c. 27, 44 Stat. 9, 11: "A stock dividend shall not be subject to tax."

[4] 38 Stat. 114, 166, 167.

The Revenue Act of 1916 provided that a stock dividend should be considered income to the amount of its cash value.[5] In *Eisner* v. *Macomber,* 252 U. S. 189, it was decided that a dividend in the corporation's common stock paid to the then common stockholders, was not income within the meaning of the Sixteenth Amendment and therefore the effort to tax such dividends exceeded the power granted by the Amendment. It was said that such a dividend was not income because, by its payment, no severance of corporate assets was accomplished and the preëxisting proportionate interests of the stockholders remained unaltered. After the decision the Treasury revoked regulations to the effect that a dividend paid in the corporation's stock is income and issued amended regulations, broadly phrased, to exempt all income in the form of stock dividends, whether the dividend shares be of the same class as those theretofore held by the stockholder or of a different class, and prescribing the method of allocating the original cost as between the old and the new stock for purposes of calculating gain or loss upon realization. Subsequently Congress adopted the Revenue Act of 1921 which provided, in § 201 (d): "A stock dividend shall not be subject to tax . . ."[6] The reason for the exemption was the decision in *Eisner* v. *Macomber, supra.* The reports of both the House and the Senate Committees dealing with the bill state that the act "modifies the definition of dividends in existing law by exempting stock dividends from the income tax, as required by the decision of the Supreme Court in *Eisner* v. *Macomber* (252 U. S. 189)."[7]

---

[5] 39 Stat. 756, 757. Compare Revenue Act of 1918, 40 Stat. 1057, 1059.

[6] 42 Stat. 227, 228. The same provision was repeated in all subsequent revenue acts; Revenue Acts of 1924 and 1926, § 201 (f); Revenue Acts of 1928, 1932 and 1934, § 115 (f).

[7] H. R. 350, 67th Cong., 1st Sess., p. 8. Senate Report No. 275, 67th Cong., 1st Sess., p. 9.

Although *Eisner* v. *Macomber* affected only the taxation of dividends declared in the same stock as that presently held by the taxpayer, the Treasury gave the decision a broader interpretation which Congress followed in the Act of 1921. Soon after the passage of that Act, this court pointed out the distinction between a stock dividend which worked no change in the corporate entity, the same interest in the same corporation being represented after the distribution by more shares of precisely the same character, and such a dividend where there had either been changes of corporate identity or a change in the nature of the shares issued as dividends whereby the proportional interest of the stockholder after the distribution was essentially different from his former interest.[8] Nevertheless the successive statutes and Treasury regulations respecting taxation of stock dividends remained unaltered.[9] We give great weight to an administrative interpretation long and consistently followed, particularly when the Congress, presumably with that construction in mind, has reënacted the statute without change.[10] The question here, however, is not merely of our adopting the administrative construction but whether it should be adopted if in effect it converts an income tax into a capital levy.

We are dealing solely with an income tax act. Under our decisions the payment of a dividend of new common shares, conferring no different rights or interests than did the old,—the new certificates, plus the old, representing the same proportionate interest in the net assets

---

[8] *United States* v. *Phellis,* 257 U. S. 156; *Rockefeller* v. *United States,* 257 U. S. 176; *Cullinan* v. *Walker,* 262 U. S. 134; *Marr* v. *United States,* 268 U. S. 536.

[9] See Regulations 65 and 69, Articles 1547, 1548; Regulations 74 and 77, Articles 627, 628; Regulations 86, Articles 115–7, 115–8.

[10] *Poe* v. *Seaborn,* 282 U. S. 101, 116; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *McFeely* v. *Commissioner,* 296 U. S. 102, 108.

of the corporation as did the old,—does not constitute the receipt of income by the stockholder. On the other hand, where a stock dividend gives the stockholder an interest different from that which his former stock holdings represented he receives income. The latter type of dividend is taxable as income under the Sixteenth Amendment. Whether Congress has taxed it as of the time of its receipt, is immaterial for present purposes.

The relevant capital gains provisions of the Revenue Act of 1928 are § 111 (a):

". . . the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in Section 113 . . ." [11]

and § 113:

"The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; . . ." (with exceptions having no relevancy here).[12]

The property disposed of was the petitioner's preferred stock. In plain terms the statute directs the subtraction of its cost from the proceeds of its redemption, if the latter sum be the greater. But we are told that Treasury Regulations [13] long in force require an allocation of the original cost between the preferred stock purchased and the common stock received as dividend. And it is said that while no provision of the statute authorizes a specific regulation respecting this matter, the general power conferred by the law to make appropriate regulations comprehends the subject. Where the act uses ambiguous terms, or is of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts. And the same principle

[11] 45 Stat. 815.

[12] 45 Stat. 818.

[13] Regulations 74, Articles 58, 628, and 600.

governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation.[14] Congress having clearly and specifically declared that in taxing income arising from capital gain the cost of the asset disposed of shall be the measure of the income, the Secretary of the Treasury is without power by regulatory amendment to add a provision that income derived from the capital asset shall be used to reduce cost.

The judgment is

Reversed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO are of the opinion that the judgment should be affirmed.

The meaning of the Act of Congress exempting stock dividends from taxation as income at the time of distribution has had a practical construction through administrative action and legislative acquiescence. Even though the meaning may have been uncertain in the beginning, it has now become fixed in accordance with long continued practice. *Morrissey* v. *Commissioner,* 296 U. S. 344, 355; *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 384. This is not denied in the opinion of the court. Congress did not intend, however, when it refused to tax the newly acquired shares as income *in praesenti,* to exclude them from taxation *in futuro* if disposed of at a profit. A tax upon a gainful use either of capital or of income, when the gain is fully realized, is a true tax upon income and not a capital levy. The question is merely one as to how the profit shall be computed. Following the analogy

[14] *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, and cases cited.

of *Miles* v. *Safe Deposit & Trust Co.*, 259 U. S. 247, 253, the cost of all the shares is properly distributed between the investment and its accretions, between the old shares and the new. The Regulations so provide. Regulations 45, 1916 Act, Article 1547; Regulations 65, 1924 Act, Articles 1547 and 1548; Regulations 69, 1926 Act, Articles 1547 and 1548; Regulations 74, 1928 Act, Articles 627 and 628; Regulations 77, 1932 Act, Articles 627 and 628; Regulations 86, 1934 Act, Articles 115–7 and 115–8.

DUPLATE CORPORATION ET AL. *v.* TRIPLEX SAFETY GLASS CO.

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

Nos. 767 and 768. Argued May 1, 4, 1936.—Decided May 18, 1936.

1. In an accounting to a patent-owner by an infringer who acted in good faith factory losses incurred by the infringer as a necessary or normal incident to the completion of sales effected at a gain are deducted from the profits. P. 452.
2. In reckoning the profits made by the infringers in this case from sales of patented shatter-proof glass, allowance was properly made for the cost of labor and material wasted without fault in the manufacturing process, but no allowance should have been made for the cost of labor and material that entered into the manufacture of glass that was returned by customers for defects discovered after sale. *Crosby Valve Co.* v. *Safety Valve Co.*, 141 U. S. 441, considered. Pp. 453, 455.
3. In such an accounting, fabricated materials sold by one infringer to another and used by the other in completing the infringing product should be set down at cost of manufacture. So *held* where the contributing infringer could not have sold the materials in his business, and allowance of a higher value would have meant a profit to him from his own wrong-doing. P. 456.
4. In such an accounting, an infringer cannot have compensation, in the nature of royalties, for savings effected by use of his own patented devices in manufacturing the infringing product. P. 457.

5. Where some sales of a patented product by an infringer result in profit and others in loss, the patent-owner is entitled to the profit undiminished by the loss. Pp. 452, 458.
6. Upon such an accounting, where it is impracticable to ascertain the specific costs of operation attributable to sales made by the infringers at known prices, average cost is to be compared with the specific prices,—not the average cost with average prices. P. 458.
7. Where damages for infringements of patent are awarded upon the reasonable royalty basis, interest, as a general rule, should run from the date when the damages are liquidated rather than the date of the last infringement. P. 458.

81 F. (2d) 352, affirmed, with modifications.

CERTIORARI, 297 U. S. 702, to review two decrees entered by the Circuit Court of Appeals on cross appeals taken from a decree of the District Court upon an accounting following an injunction against infringements of the respondent's patent. The opinions of both courts on the question of infringement are reported in 42 F. (2d), pp. 737 and 739. For the opinion of the District Court on the issue of the accounting, see 10 F. Supp. 420.

Mr. William Watson Smith, with whom *Mr. Leon E. Hickman* was on the brief, for petitioners.

Mr. Ambrose L. O'Shea, with whom *Messrs. William B. Greeley* and *Drury W. Cooper* were on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The subject of this controversy is the measure of petitioners' liability for damages and profits under a decree for an accounting by infringers of a patent.

Respondent, complainant below, is the owner of a patent, number 1,182,739, for the making of laminated glass, which will crack, but not shatter. The product is better known as "safety" or "shatter-proof" glass, and is

used very largely in the making of automobiles. In the process of manufacture, a sheet of pyralin or celluloid is sandwiched between two thin sheets of plate glass, each $\frac{1}{8}$ of an inch thick, the pyralin being cemented to the opposite glass sheets by a film of gelatin. The heat and pressure necessary to induce adhesion are applied to the "sandwiches" in a receptacle known as an autoclave, a steel boiler of large size. At the end of the process, the glass and the pyralin are firmly joined together with the appearance of a single sheet. For users of motor cars the risk of injury from flying glass is greatly reduced, if not removed altogether.

Complainant had a decree against the Duplate Corporation, one of the petitioners here, for an infringement of this patent. 42 F. (2d) 737; 42 F. (2d) 739. Later a supplemental decree was entered against the other petitioner, Pittsburgh Plate Glass Company, the owner of fifty per cent of the stock of Duplate. Pittsburgh was a contributory infringer, supplying Duplate, its subsidiary, with the glass, which was then wrought into the finished product. An accounting followed before a master. The defendants satisfied the master that they were not conscious or deliberate infringers. The finding by the master in that regard was approved by the District Court and later by the Court of Appeals. It will be accepted as a datum here. The account is to be stated on the assumption that the defendants, though infringers, have acted in good faith. Cf. R. S. §§ 4919, 4921; 35 U. S. C. §§ 67, 70; *Larson Co.* v. *Wrigley Co.*, 277 U. S. 97.

The controversy as to the measure of liability divides itself into two branches, one concerned with the defendants' profits, the other with the complainant's damages. In reckoning the profits, the master made allowance to the defendants for the cost of labor and material wasted without fault in the manufacturing process. This

amounted to $1,192,264.32 ($435,207.52 for loss of glass; $219,036.93 for loss of pyralin; $538,019.87 for loss of labor and material other than glass or pyralin.) The master made allowance also for the cost of labor and material that entered into merchandise returned by the defendants' customers for defects afterwards discovered. This amounted to $504,137.45. He refused to make allowance for more than the manufacturing cost of the material bought by one defendant from the other, but did allow the saving effected by the use of patented devices. He found himself unable to ascertain the specific costs of operation to be attributed to sales that had been made at known prices, and refused in stating the account to compare specific prices with average costs of operation, and fix the liability accordingly. Instead, he treated the business as one continuous infringement, a unitary transaction, comparing average costs with average prices. Through this method of computation he arrived at the conclusion that during the period covered by the accounting the defendants had operated at a net loss of $276,857.47 in the sale of the infringing product. That being so there was nothing owing on the score of profits.

"In patent nomenclature what the infringer makes is 'profits'; what the owner of the patent loses by such infringement is 'damages.'" *Diamond Stone-Sawing Machine Co.* v. *Brown,* 166 Fed. 306. The master found the evidence insufficient to show the extent of the sales that the complainant could have made if the defendants had not infringed, or what the sales would have netted even if they had been made. He did find, however, that the effect of the infringement had been to drive the complainant out of business, and that a few sales which had been made were at greatly reduced prices, with a loss of $2,807.89 as a result of the enforced reduction. The diverted sales, if any, and their value being not susceptible of proof, the master held that general damages should be

awarded on the basis of a reasonable royalty to be paid by the defendants upon their sales of the infringing product, whether gainful or the opposite. Cf. *McKee Glass Co.* v. *H. C. Fry Glass Co.*, 248 Fed. 125, 129. This royalty was ascertained to be $414,120.70. Nothing was said by the master as to an award of interest.

The District Court modified the report by striking out the item of damages by reason of price reductions ($2,807.89) and confirmed it as thus modified, adding, however, interest on $414,120.70, the award of general damages, from the date of the last infringement (May 31, 1930). 10 F. Supp. 420. There were cross-appeals to the Circuit Court of Appeals for the Third Circuit. On the appeal by the defendants, the decree was affirmed. On the appeal by the complainant there were far-reaching modifications. All allowances for factory losses and for customers returns were rejected. These amounted altogether to $1,696,401.77. There was also a rejection of the savings effected by the use of patents. They had been fixed by the master at $1,108,692.73. The method of stating the account was recast by directing a comparison between average costs and specific prices instead of average costs and average prices. The cause was remanded with instructions to restate the account in conformity with the principles laid down in the opinion. 81 F. (2d) 352. To settle important questions as to the liability of infringers, writs of certiorari were granted by this court.

1. *Factory losses incurred as a necessary or normal incident to the completion of sales effected at a gain.*

A sale resulting in a loss may not be offset by an infringer against another and independent sale resulting in a gain for the purpose of extinguishing or reducing a liability for profits. *Crosby Valve Co.* v. *Safety Valve Co.*, 141 U. S. 441, 457. On the other hand, the extent of the gain resulting from a sale is not susceptible of ascer-

tainment without the deduction and allowance of the incidental costs. *MacBeth Evans Glass Co.* v. *L. E. Smith Glass Co.*, 21 F. (2d) 553, 555; *Canda Bros.* v. *Michigan Malleable Iron Co.*, 152 Fed. 178, 180; *Levin Bros.* v. *Davis Mfg. Co.*, 72 F. (2d) 163, 165, 166; *Stromberg Motor Devices Co.* v. *Detroit Trust Co.*, 44 F. (2d) 958, 963, 964. To make the product of a factory ready for the market labor and material must be consumed by the seller-manufacturer. The cost of such consumption does not cease to be a charge against the proceeds because viewed in isolation it may be classified as waste. If the waste is unavoidable or even fairly to be expected in the normal course of such a business there is a diminution of the profit for an infringer as for others. Cf. *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804. "Losses occurring concurrently with the gaining of profits should be taken into account, if they resulted from the particular transaction on which profits are allowed." *MacBeth Evans Glass Co.* v. *L. E. Smith Glass Co., supra; Canda Bros.* v. *Michigan Malleable Iron Co., supra.* They are the charges that must be known before profits can be estimated.

Adherence to that principle sustains the ruling of the master that in measuring the gain from particular transactions the defendants should have allowance for the expense of incidental wastage, unless the wastage is so great as to overpass the bounds of reason. Cf. *Continuous Glass Press Co.* v. *Schmertz Wire Glass Co.*, 219 Fed. 199, 203. No such excess may be imputed to the manufacturing defendant, as is evident from the testimony and the findings of the master. The causes of waste are many. Inevitably a certain amount of glass is lost in the cutting. Grit and dust clinging to the pyralin even in minute particles produce defects destructive of the product as a merchantable commodity. A like result will follow from the intrusion of a hair. To make the situation worse, a sheet of pyralin is charged with static electricity which

acts as an attractive force to bring loose particles together. There is also chipping of the glass as well as other damage in the course of transportation from one department to another. Even more destructive is the damage to the sheets under pressure in the autoclave, the crimping of the edges opening a channel into which water tends to seep. Most of this wastage is unavoidable, though extraordinary precautions have been taken to overcome it. To some extent, however, the loss has been diminished by improved methods of manufacture, unknown to the business in its infancy, but progressively developed as the outcome of experience. Thus, to purify the atmosphere and dispel dust or other particles a separate room has been built, supplied with filtered air. Experiments carefully made have been followed by improvements that reduce the risk of damage when the sheets are under pressure. At all times the business has been conducted with a high degree of care. Even when glass has been chipped or broken in being moved from place to place, there is no evidence that appropriate precautions were omitted to make the loss as small as possible. Some percentage of breakage is a normal, indeed a necessary incident to the handling by human instruments of so fragile a commodity. The situation is tersely summarized in the findings of the master. "The Master is satisfied from the evidence that a considerable amount of the finished product had to be turned out only to be rejected or returned in order that a certain volume of perfect specimens might be sold. It was also established by the evidence that even the Ford Motor Company, in making laminated glass under its agreement with the plaintiff, was required to produce five million windshields in order to obtain four million good ones,—and it appears as self-evident to the Master that in the case of Ford, as in the case at bar, the cost of producing the good ones necessarily included the cost of producing the million bad ones, but for which the good ones could not have been produced."

In the light of these findings and others to the same effect, the distinction becomes evident between the situation in this case and that in the case of the Crosby valves. 141 U. S. 441, 454, 457. Metal valves had been manufactured as the result of a process of experiment (*Ibid.*, p. 454), and had been destroyed when returned or when found to be defective. "The defendants were not charged on valves which were subsequently destroyed, or, if so, they were not charged upon the new valves which replaced them." *Ibid.*, p. 457. They asked, however, for something more. They contended that the valves so destroyed "ought to form a credit against the profits actually realized . . . on other valves." This contention was rejected. The valves discarded or returned were experimental only, as the opinion of the court informs us. *Ibid.*, p. 454. Cf. *Union Electric Welding Co.* v. *Curry,* 279 Fed. 465, 467; *Page Machine Co.* v. *Dow, Jones & Co.,* 238 Fed. 369, 374. The record does not indicate that the defects were necessary or normal incidents to producing the infringing article. Credit will be allowed for the cost of abortive effort when cost has been incurred as an unavoidable or reasonable preliminary to the particular transaction on which profits are recovered. *MacBeth Evans Glass Co.* v. *L. E. Smith Co., supra.* Credit will be refused when this nexus is not established. We have no thought to impugn the correctness of the decision in the case of the defective valves either as applied to its own facts or in cognate situations. We are unwilling to extend it to the costs in controversy here.

The ruling of the master as to the items here considered is accordingly approved.

2. *The allowance of the cost of glass sold by Duplate to its customers, and returned by the customers for defects afterwards discovered.*

These sales were mere futilities. They did not yield a profit for which the sellers have been charged. They

were not preliminary to other sales refilling the same orders. At least there is nothing in the record to imprint that quality upon them. They have no place in the account at all. By the ruling of the master the cost of these futilities was allowed to the infringers. This we think was error. The infringers being relieved of any charge by reason of such transactions are not entitled to a credit. The case of the *Crosby Valve Company* (141 U. S. 441, 457) gives the applicable rule. The very equities that exact the allowance of a credit where costs are but a means to realizing a profit, exact a different conclusion where profit is impossible.

3. *The measure of the allowance for glass fabricated by one infringer and furnished to the other.*

Duplate bought its glass in sheets ⅛ of an inch thick from its contributory infringer, Pittsburgh. In the computation of the profits allowance has been made for the material so furnished on the basis of manufacturing cost. The defendants now insist that the basis should be market value. The acceptance of such a measure would enable the infringers to profit by their wrong. There was no use in the automobile industry for glass so thin as this except in connection with the process described in the complainant's patent. Cf. *Duplate Corporation* v. *Triplex Safety Glass Co.*, 42 F. (2d) 739, 741. If there had been no infringing business, the large amount of glass that went into the infringing product would never have been sold at all. True, glass of that thickness was used in other industries, in train windows and toilet mirrors. The master finds, however, that Pittsburgh had been able, while supplying glass to Duplate, to respond to all demands that came from other users, the railroads and the glaziers. If as part of this accounting it is given credit for the glass at a price above the cost, it will thereby have enlarged its market to an equivalent extent and reaped a profit as infringer. Equity forbids that this result should be attained. We

are referred by the defendants to *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.,* 30 F. (2d) 281, 284, as well as other cases. They were well decided on their facts, or so we now assume. The facts do not suggest the inference that the effect of the infringement was to open up a market that would otherwise have been lost.

4. *The allowance of the saving effected by the use of patented devices.*

Pittsburgh was the owner of twenty-six patents which it used for its own benefit in the making of its glass. The claim is made that if the glass is not to be taken on the basis of market value, there must at least be an allowance of a reasonable royalty as compensation for the economies effected through the patented devices. But this is to misconceive utterly the position of an infringer accounting for illicit profits. "An infringer cannot be heard to say that his superior skill or intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized." *Lawther* v. *Hamilton,* 64 Fed. 221, 224. Cf. *Westinghouse Electric Co.* v. *Wagner Electric Co.,* 225 U. S. 604, 614; *Carborundum Co.* v. *Electric Smelting & Aluminum Co.,* 203 Fed. 976, 982; *Conroy* v. *Penn Electrical & Mfg. Co.,* 199 Fed. 427, 430; *Armstrong* v. *Belding Bros. & Co.,* 297 Fed. 728, 732. He will be heard with no more patience in an endeavor to diminish liability by ascribing his profits to the capacity indwelling in a patent. Whatever is at his call in the service of the enterprise—brawn and intelligence, factories and lands, patents and machinery—will be viewed upon an accounting as if held upon a quasi-trust to contribute what it can to the profits of the business. The wrongdoer must yield the gains begotten of his wrong.

5. *The method to be employed in stating an account.*

Sales of the infringing product were not made at a level price. At times the price was high; at others it was low.

The owner of the patent in holding the infringers to an accounting is not confined to all or nothing. There may be an acceptance of transactions resulting in a gain with a rejection of transactions resulting in a loss. Upon a statement of an account, a patentee is not looked upon as a "quasi-partner of the infringers," under a duty to contribute to the cost of the infringing business as a whole. *McKee Glass Co.* v. *H. C. Fry Glass Co.*, 248 Fed. 125, 128. He is the victim of a tort, free at his own election to adopt what will help and discard what will harm. *Crosby Valve Co.* v. *Safety Valve Co., supra; Permutit Co.* v. *Refinite Co.*, 27 F. (2d) 695, 698; *Starr Piano Co.* v. *Auto Pneumatic Action Co.*, 12 F. (2d) 586, 589; *Canda Bros.* v. *Michigan Malleable Iron Co., supra;* cf. *Oliver* v. *Piatt*, 3 How. 333, 401; *Buffum* v. *Barceloux Co.*, 289 U. S. 227, 236; *King* v. *Talbot*, 40 N. Y. 76, 91.

The privilege of election is not contested by the defendants if costs as well as prices can be ascertained with precision. They take the ground, however, that if such precision is unattainable, the privilege must fail. But the master has found, and the parties are agreed, that in a business of this order there is no method of accounting, not impracticably burdensome, whereby the costs of operation can be apportioned and distributed except upon an average basis. At all events, if such a method was available, the defendants did not use it. They kept their books upon the basis of the method they decry, and measured loss or gain accordingly. Average cost, even if not identical with actual cost, is the best approximation known to accountants. Cf. *Norfolk & Western R. Co.* v. *North Carolina*, 297 U. S. 682. The defendants will not be suffered to charge the complainant with the losses of unprofitable transactions because the gains of the profitable ones cannot be reckoned to a nicety. The wrongdoer bears the burden in cases of confusion. *Westinghouse Electric Co.* v. *Wagner Electric Co., supra*, at pp. 618, 620.

6. *Damages, interest and an inspection of the books.* The master advised an award of damages measured by a reasonable royalty on the amount of the defendants' sales. R. S. § 4921; 35 U. S. C. § 70. This was done on the assumption that the complainant had been unable to make proof of actual damages by reason of diverted sales, and that the defendants were not accountable for profits for the reason that the business had been conducted at a loss. Much of the discussion of this subject in the briefs and at the bar may be discovered to be moot when the account has been restated in accordance with the principles laid down in this opinion.

If, however, an award of damages upon the basis of a reasonable royalty becomes appropriate again, we think that interest should run from the date when the damages are liquidated, and not, as by the present decree, from the date of the last infringement. *Crosby Valve Co.* v. *Safety Valve Co., supra,* at pp. 457, 458; *Tilghman* v. *Proctor,* 125 U. S. 136, 160, 161; *Mowry* v. *Whitney,* 14 Wall. 620, 653. There are no exceptional circumstances justifying a departure from what is at least the general rule.

A word is needed in conclusion as to the asserted right of the defendants to examine the complainant's books. The defendants insist that with the aid of an inspection they can show that actual damages were suffered by reason of diverted sales, and damages so substantial as to forbid the award of a reasonable royalty, a substituted method of assessment to be used if other standards fail. It is not easy to see how the diversion of business, a negative condition, will be made apparent by the books. As we interpret the record, the defendants did not so contend when they asked for an inspection at the hearing before the master. Their position then was that "the damage to the plaintiff arising out of its alleged loss of sales was inconsiderable in amount." If, however, it shall appear upon the restatement of the account that in

the belief of the defendants, reasonably entertained, an inspection of the books is still material and necessary, the propriety of such a remedy may be reconsidered by the master and the court in the light of the entire situation developed at that time.

The decree should be modified in accordance with this opinion, and as modified affirmed.

It is so ordered.

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

HILL, WARDEN, *v.* UNITED STATES EX REL. WAMPLER.

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

No. 847. Argued May 4, 1936.—Decided May 18, 1936.

1. A federal court imposing a fine in a criminal case may in its discretion direct that the defendant be imprisoned until the fine is paid; such direction, being an exercise of the judicial function, must be expressed in the sentence. P. 463.
2. The only sentence known to the law is the sentence entered upon the records of the court—the judgment. P. 464.
3. If a sentence has been entered inaccurately, it may be corrected in a direct proceeding; but when assailed collaterally it imports verity and the presumption that it says what the judge meant is irrebuttable. P. 464.
4. A commitment departing in matter of substance from the judgment back of it is void and its nullity may be established upon *habeas corpus*. P. 465.
5. To a sentence of fine and imprisonment was added by the commitment prepared by the Clerk a direction that the imprisonment continue until the fine was paid. *Held:*

   (1) That such addition to the sentence could not be justified by a usage in the District or by unrecorded instructions from the judge to the clerk. P. 465.

(2) An order of the court refusing to strike the added direction from the commitment was not binding, as *res judicata,* in a proceeding by *habeas corpus* to test the legality of the continued confinement after the term specified in the sentence had expired. P. 466.

RESPONSE to questions certified in relation to an appeal to the court below from a judgment of the District Court, 11 F. Supp. 540, discharging the relator on *habeas corpus.*

Mr. Gordon Dean argued the cause and *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. William W. Barron* filed a brief, for Hill, Warden.

Mr. Robert E. Lynch for Wampler.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

By an indictment in two counts the relator Wampler was charged with an attempt to evade and defeat the payment of his income tax under the laws of the United States through the filing in the years 1930 and 1931 of false and fraudulent returns. He was convicted in the United States District Court for the District of Maryland. On December 28, 1933, the judgment of the court was pronounced as follows: "Fine five thousand dollars and eighteen months in penitentiary on each count of the indictment, said terms of imprisonment to be computed as beginning this 28th day of December 1933; fines to be cumulative and terms of imprisonment to run concurrently and that traverser pay costs of proceedings." On the same day the clerk of the court issued and forwarded to the United States Northeastern Penitentiary at Lewisburg, Pennsylvania, a commitment in which the judgment was set out as follows: "That the traverser pay a fine of Five Thousand Dollars and be imprisoned in the United States Northeastern Penitentiary at Lewis-

burg, Pennsylvania, for eighteen months on each count of the indictment; said term of imprisonment to be computed as beginning this 28th day of December 1933; the fines to be cumulative and the terms of imprisonment to run concurrently; and that the traverser pay the costs of prosecution; and in default of payment of said fines and costs, he stand further committed until the payment of said fines and costs or until discharged by due process of law."

On April 21, 1935, when the term of eighteen months was approaching an end, Wampler filed in the United States District Court for the District of Maryland a petition directed to the judge of that court in which he alleged that the court had not adjudged or ordered that he was to stand committed until the payment of the fine and costs; that this provision had been inserted in the commitment by the clerk; and that it was no part of the sentence. He prayed for an order amending the commitment by striking therefrom the words so added.

On April 25, 1935 the petition for amendment was denied, the judge filing an opinion in which he pointed out that Maryland is a common law state; that the practice in the state courts is not to include in the judgment of the court the express direction that the defendant stand committed until the fines are paid; that it has always been the practice in the District Court for the District of Maryland to follow the procedure in the state court, but that the clerk of the court has instructions from the court to include in the commitment the express provision that the defendant stand committed until the fines are paid, unless otherwise directed.[1] There was no appeal from that decision.

On July 23, 1935, the relator filed in the United States District Court for the Middle District of Pennsylvania a petition for a writ of habeas corpus alleging that the

[1] See 10 F. Supp. 609, 611.

proper term of his imprisonment had expired and that his detention had become unlawful. The petition was granted, and the relator discharged. 11 F. Supp. 540. The warden of the penitentiary appealed to the Circuit Court of Appeals for the Third Circuit. That court after certifying the facts substantially as summarized above, requested our instructions upon the following questions (Judicial Code, § 239; 28 U. S. C. § 346):

"1. Was the provision in the commitment for imprisonment for nonpayment of fine and costs which was inserted by the Clerk but not included in the sentence orally pronounced by the judge, (a) void? or (b) merely irregular?

"2. Was the determination of the District Court on the petition to correct the commitment, a final judgment conclusive on the issue as to the validity of such commitment until reversed by appropriate proceedings for review?

"3. Will habeas corpus lie in one court to correct the commitment of another court which certainly, definitely, and specifically directs the imprisonment of relator for nonpayment of fine and costs on the ground that such provision was inserted by the Clerk, but was not the sentence orally pronounced by the Court?"

The payment of a fine imposed by a court of the United States in a criminal prosecution may be enforced by execution against property in like manner as in civil cases. R. S. § 1041; 18 U. S. C. § 569. In the discretion of the court the judgment may direct also that the defendant shall be imprisoned until the fine is paid. *Ibid.;* and see R. S. § 1042; 18 U. S. C. § 641; *Ex parte Jackson,* 96 U. S. 727, 737; *Ex parte Barclay,* 153 Fed. 669; *Haddox* v. *Richardson,* 168 Fed. 635, 639. If the direction for imprisonment is omitted, the remedy by execution is exclusive. Imprisonment does not follow automatically upon a showing of default in payment. It follows, if at all,

because the consequence has been prescribed in the imposition of the sentence. The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment. *Miller* v. *Aderhold,* 288 U. S. 206, 210; *Wagner* v. *United States,* 3 F. (2d) 864; *State* v. *Vaughan,* 71 Conn. 457, 458; 42 Atl. 640; *Manke* v. *People,* 74 N. Y. 415, 424.

Two of the questions certified to us, the first question and the third, make mention of a variance between the commitment and the sentence "orally pronounced." If that were the only variance, we should deem it unimportant. The only sentence known to the law is the sentence or judgment entered upon the records of the court. *Miller* v. *Aderhold, supra; Wagner* v. *United States, supra; Manke* v. *People, supra.* If the entry is inaccurate, there is a remedy by motion to correct it to the end that it may speak the truth. *People ex rel. Trainor* v. *Baker,* 89 N. Y. 460, 466. But the judgment imports verity when collaterally assailed. *Ibid.* Until corrected in a direct proceeding, it says what it was meant to say, and this by an irrebuttable presumption. In any collateral inquiry, a court will close its ears to a suggestion that the sentence entered in the minutes is something other than the authentic expression of the sentence of the judge.

The questions are to be read, however, in the light of the preliminary statement certifying the facts out of which the questions have arisen. Rule 37; *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 422; *Dillon* v. *Strathearn S. S. Co.,* 248 U. S. 182, 184. From that certificate it is clear that the sentence spread upon the records is identical with the sentence orally pronounced and that the only variance complained of is between sentence and commitment.[2] In such circumstances the

[2] In *United States* v. *Wampler,* 10 F. Supp. 609, 611, the court said: "The judgment as entered on the docket by the clerk recites

word "orally" in questions 1 and 3 may be disregarded as superfluous, and the answers to the questions made as we would make them if the word had been omitted.

A warrant of commitment departing in matter of substance from the judgment back of it is void. *Boyd* v. *Archer,* 42 F. (2d) 43; *Wagner* v. *United States, supra.* Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. *People ex rel. Trainor* v. *Baker, supra; Boyd* v. *Archer, supra; McNally* v. *Hill,* 293 U. S. 131. "The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence." *Biddle* v. *Shirley,* 16 F. (2d) 566, 567; *Howard* v. *United States,* 75 Fed. 986, 989; *Ex parte Wilson,* 114 U. S. 417, 422; *People ex rel. Trainor* v. *Baker, supra.* If the judgment and sentence do not authorize his detention, no "mittimus" will avail to make detention lawful.

The argument is made that there is a practice in the Maryland District to make the commitment broader than the judgment, and that the practice should be given the quality of law. There is no such overriding virtue in usage or tradition. The court speaks through its judgment, and not through any other medium. It is not within the power of a judge by instructions to a clerk to make some other medium the authentic organ of his will. We are told that the instructions may be likened to a rule of court. They were not published; they were not reduced to writing; they are lacking in the formal safeguards that protect against mistake and perhaps against oppression. Cf. *Rio Grande Irrigation Co.* v. *Gildersleeve,* 174 U. S. 603, 608; *Weil* v. *Neary,* 278 U. S.

---

the term of imprisonment and the amount of the fine or fines, as announced in the sentence but does not recite the commitment in default of payment of the fine. This has been the long established practice, and was followed in this particular case."

65773°—36——30

160, 169. There are times when settled usage is as efficacious as a written rule to fix the forms of practice. *United States* v. *Stevenson,* Fed. Cas. No. 16,395; *Norton* v. *Rich,* Fed. Cas. No. 10,352; *Detroit Heating & Lighting Co.* v. *Kemp,* 182 Fed. 847. A court will be cautious in applying such a doctrine where liberty is at stake. But here the traditional instructions have a defect more deep-seated than the absence of a writing. Taken at their face value, they fall short of the effect imputed to them. They do not profess to regulate the form or content of the sentence, which is to be recorded by the clerk without addition or amendment. They are aimed at the commitment, at that and nothing else, imparting to it a capacity, a superseding virtue, unknown to the law. Something more is needed than a few words of unrecorded talk between a judge and a prothonotary to compass that result.

The refusal to modify the warrant of commitment is not a bar to the relief now prayed by the relator. Finality within the doctrine of *res judicata* does not attach to every ruling upon law made by a judge upon the decision of a motion. *Denny* v. *Bennett,* 128 U. S. 489, 499; *Riggs* v. *Pursell,* 74 N. Y. 370, 378; cf. *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 166. This is true though the ruling may have been pertinent or even necessary to the conclusion reached. In such circumstances finality will rarely be extended beyond the terms of the order, and applied to the supporting reasons. There is nothing in this case to call for a departure from the general rule.

A warrant of commitment spends its force, it fulfills what is at least its primary purpose, upon delivery of the prisoner at the place of his imprisonment. When "a prisoner is safely in the proper custody, there is no office for a *mittimus* to perform." *People ex rel. Trainor* v. *Baker, supra; Howard* v. *United States, supra.* Even

after such delivery, the warrant is convenient evidence for the protection of the jailer, but it may be lost or destroyed, and detention may be justified by the underlying judgment. *Ibid.;* and see *Ex parte Wilson, supra.* The effect of an order refusing an amendment is to be adjudged with due regard to the character and office of the thing to be amended. At the time of that order the relator was lawfully imprisoned, the term of eighteen months being still unexpired. At the time of this petition the term was at an end, and imprisonment from then on had been turned into a wrong. The commitment was neither better nor worse because of the ruling of the judge that he would let it stand as written. If void, it was still void; if valid, it had received no accession of validity. What was said by the judge in the course of his opinion may be significant as a precedent; it is ineffective as a bar. The writ of habeas corpus searches the record back of the commitment. It lays a duty on the court to explore the foundations, and pronounce them false or true.

We answer the questions submitted to us as follows, interpreting them, however, as explained in the opinion:

To the first question we say that the provision is void.

To the second question we answer "no," and to the third question "yes."

Ordered accordingly.

MORGAN ET AL. *v.* UNITED STATES ET AL.

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

No. 686. Argued April 29, 30, 1936.—Decided May 25, 1936.

1. Under § 310 of the Packers & Stockyards Act, a hearing is prerequisite to a valid order of the Secretary of Agriculture fixing rates for Market Agencies. P. 473.
2. Upon review under the Packers & Stockyards Act of an order of the Secretary of Agriculture fixing rates of such agencies, all questions touching the regularity and validity of the proceedings before the Secretary are open. P. 477.
3. The Secretary's recitals of his procedure in such cases are not conclusive on the question whether the statutory requirements were obeyed. *Id.*
4. If upon the facts alleged before the court on review of the Secretary's order the full hearing required by the Act was not given, the plaintiffs are entitled by the terms of the Act itself to prove the facts and have the order set aside. *Id.*
5. It is not essential to the validity of a rate order made by the Secretary of Agriculture under the Packers & Stockyards Act that each of several respondents be given a separate hearing, or that a preliminary report be made by the examiner who took the testimony and be submitted to the parties in order that they may take their exceptions and address their arguments to the points thus raised. P. 478.
6. The function of the Secretary of Agriculture in fixing rates under the Packers & Stockyards Act is not that of ordinary executive action, but is both legislative and judicial in quality; fundamental procedural requirements must be obeyed; a full hearing of both evidence and argument must be given; nothing can be treated as evidence which is not introduced as such; facts and circumstances which ought to be considered must not be excluded and those that should not legally influence the conclusion must not be considered; findings based on the evidence must embrace the basic facts needed to sustain the order. P. 479.
7. An order of the Secretary of Agriculture fixing rates for Market Agencies under the Packers & Stockyards Act is invalid if the evidence and arguments were heard and considered by an assistant to the Secretary but not by the Secretary himself. P. 481.

8. If the duty of ascertaining and fixing just and reasonable rates for Market Agencies, imposed by the Packers & Stockyards Act on the Secretary of Agriculture, may lawfully be delegated by him in a particular case to an assistant,—a question not here presented or determined—it would be for the assistant to make the order as well as to conduct the hearing. Pp. 478, 481.

8 F. Supp. 766, reversed.

APPEALS from decrees of the District Court of three judges dismissing fifty bills brought by Market Agencies, under the Packers & Stockyards Act, to enjoin the enforcement of an order of the Secretary of Agriculture fixing maximum rates to be charged by them for buying and selling livestock. The cases were consolidated in the court below for trial.

Messrs. Frederick H. Wood and *John B. Gage* for appellants.

Assistant Attorney General Dickinson, with whom *Solicitor General Reed* and *Messrs. Wendell Berge, Henry McClernan,* and *G. N. Dagger* were on the brief, for the United States et al., appellees.

Appellants' insistence on rates which will cover actual costs is unwarranted in principle and is designed to defeat and nullify the rate-making power conferred by the Packers & Stockyards Act.

This case does not present any issue of confiscation.

There is no merit in appellants' contention that the prescribed rates are "ruinous" in their effect upon appellants' businesses.

The rates prescribed by the Secretary were determined by a lawful method.

The Secretary's findings with respect to reasonable unit costs and profits are supported by substantial evidence.

The Act of Feb. 9, 1889, 5 U. S. C. 517, confers upon the Assistant Secretary the power to perform such duties

as may be assigned by the Secretary and is not limited to the performance by the Assistant Secretary of mere ministerial matters.

There is no support for the contention that an administrative officer, authorized by law to make quasi-judicial decisions, cannot rely upon the assistance and advice of subordinate officers and departmental employees. *Inhabitants of West Springfield* v. *Mayo,* 265 Mass. 41. See also *Hisey* v. *Peters* (1896), Patent Decisions, p. 22; *In re Jem Yuen,* 188 Fed. 350.

If, as appellants contend, it was incumbent upon the Secretary to hear oral arguments personally, it would seem likewise incumbent upon him, and far more important, personally to hear the testimony of the witnesses.

The fact is, however, that the Act expressly provides in § 402 that "The Secretary, *in person or by such agents as he may designate,* may prosecute any inquiry necessary to his duties under this Act in any part of the United States," and in § 407 that "The Secretary shall have the power to appoint, remove, and fix the compensation of such officers and employees . . . as shall be necessary to the administration of this Act . . ." It is plain that the Act contemplates that testimony shall be taken by such examiners and agents as the Secretary designates; and indeed it is obvious that this is the only practicable procedure.

The Act, moreover, does not expressly provide for oral argument before the Secretary. The provisions with respect to hearing are found in § 310, which requires merely a full hearing.

As for the contention that the District Court erred in striking the allegations made on information and belief to the effect that the Secretary had not read the record, the briefs, or considered the oral arguments, the best answer is found in the language of that court, that the

theory of these allegations is supported by nothing in the Act and that a construction of the Act consistent with that theory would destroy it altogether as a measure capable of practical administration. Cf. *United States* v. *Great Northern Ry.*, 287 U. S. 144.

It would indeed be a novel and dangerous doctrine if parties affected by administrative decisions, by alleging upon information and belief that the administrative tribunal had not given pending matters careful consideration or had signed orders upon insufficient deliberation, could go behind such orders and compel the members of such tribunals to testify in court as to the adequacy of the consideration given by them to the issues involved. It might well lead to the paralysis of administrative tribunals. It is enough that public officials are presumed to be conscientious and to do their duty, and that they take full legal responsibility for their decisions.

The cases cited by appellants (*Southern Ry. Co.* v. *Virginia*, 290 U. S. 190; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Crowell* v. *Benson*, 285 U. S. 22, 56–57) are not in point. Those cases merely hold that due process requires a fair hearing—a general proposition of undisputed validity.

A motion to strike only admits the truth of the allegations to secure a ruling upon their legal adequacy. By moving to strike these allegations the Government did not admit their truth in the same sense that would attach to an admission in an answer.

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

These are fifty suits, consolidated for the purpose of trial, to restrain the enforcement of an order of the Secretary of Agriculture, fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards. Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C. 181–229.

The proceeding was instituted by an order of the Secretary of Agriculture in April, 1930, directing an inquiry into the reasonableness of existing rates. Testimony was taken and an order prescribing rates followed in May, 1932. An application for rehearing, in view of changed economic conditions, was granted in July, 1932. After the taking of voluminous testimony, which was concluded in November, 1932, the order in question was made on June 14, 1933. Rehearing was refused on July 6, 1933.

Plaintiffs then brought these suits attacking the order, so far as it prescribed maximum charges for selling livestock, as illegal and arbitrary and as depriving plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution. The District Court of three judges entered decrees sustaining the order and dismissing the bills of complaint. 8 F. Supp. 766. Motions for rehearing were denied and, by stipulation, the separate decrees were set aside and a joint and final decree was entered to the same effect. Plaintiffs bring this direct appeal. 7 U. S. C. 217; 28 U. S. C. 47.

On the merits, plaintiffs assert that the ultimate basis for the reduction in commission rates is the Secretary's opinion that there are too many market agencies, too many salesmen, and too much competition in the business; that the Secretary has departed entirely from the evidence as to the actual cost of employing salesmen in selling cattle at these yards and has made an allowance for salaries which is based on pure speculation and is wholly inadequate to meet the cost of the service; that he has substituted in place of his accountants' figures as to actual expenditures, with respect to the item entitled "Business Getting and Maintaining Expense," a hypothetical allowance greatly less than actual cost; and that the Secretary has thus made findings without evidence and an order, essentially arbitrary, which prescribes

unreasonable rates. The Government answers that, while the Secretary is not authorized expressly to prescribe or limit the number of firms that may engage in the market agency business, he is under a duty to take cognizance of evidence tending to show that, under present competitive conditions, certain costs actually incurred are unreasonable; that in determining what are just and reasonable rates, he must give consideration to evidence of the excessiveness of costs and if such evidence shows that there are many market agencies not receiving a sufficient volume of business to entitle their costs to be regarded as reasonable, the Secretary must take cognizance of that fact; that it was in this view that the Secretary made certain findings as to the inadequacy of the present business at the stockyards to support economically all the firms now striving to make a profit; that his findings, supported by evidence, were directly pertinent to the determination of reasonable costs, and so determining the Secretary was authorized to fix the rates prescribed in his order.

Before reaching these questions we meet at the threshold of the controversy plaintiffs' additional contention that they have not been accorded the hearing which the statute requires. They rightly assert that the granting of that hearing is a prerequisite to the making of a valid order. The statute provides (42 Stat. 159, 166, § 310; 7 U. S. C. 211):

"Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; . . ."

The allegations as to the failure to give a proper hearing are set forth in Paragraph IV of the bill of complaint, quoted in full in the margin.[1] The allegations in substance are: That separate hearings were not accorded to the respective respondents (plaintiffs here). That at the

[1] Paragraph IV of the bill of complaint is as follows:

"Petitioner states that the Order is null and void in that this petitioner was denied a full hearing before the Secretary upon the matters and things referred to in the Order of Inquiry as provided for in said Packers and Stockyards Act, 1921, and the enforcement of the Order would take Petitioner's property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States, in that:

"(a) The Secretary overruled and denied the request of this petitioner for a separate, individual and independent hearing apart from any other of the respondents named in said Notice of Inquiry to the prejudice of this petitioner.

"(b) This petitioner requested at the conclusion of the hearings held under said Notice of Inquiry before the said John C. Brooke, that said Examiner prepare a tentative report upon the evidence to be presented to the petitioner and the Secretary subject to oral argument as to any exceptions thereto which the petitioner might care to present, so that in this manner a hearing might be had before the Secretary without undue inconvenience to the Secretary, but said request was denied and no tentative report was exhibited to petitioner and no oral argument upon the issues presented by said Order of Inquiry and the evidence taken by said Examiner was at any time had before the Secretary.

"(c) The Secretary, without warrant or authority of law, delegated to the said R. W. Dunlap and Rexford G. Tugwell, purporting to be at the times hereinbefore named Acting Secretaries of Agriculture, authorities and powers vested solely in the Secretary involving the exercise of discretion and the determination of issues in respect to the justice, reasonableness and lawfulness of the rates and charges

conclusion of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to Acting Secretaries the determination of issues

---

of this petitioner. At each and all of the times hereinabove referred to, when the said oral arguments were presented after the original hearing in said proceeding and after the re-hearing thereof, the then Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at said time was neither sick, absent, nor from any other cause disabled in the performance of official duties of said Secretary of Agriculture, and a purported appointment of any other person as Acting Secretary of Agriculture was illegal, null and void under the laws of the United States.

"(d) Petitioner states on information and belief, and, therefore, alleges the fact to be, that the Secretary at the time said Order was signed by him had not personally heard or read any of the evidence presented at any hearing in connection with this proceeding and had not heard or considered oral arguments relating thereto submitted on behalf of this petitioner and had (*sic*) read or considered any briefs submitted by petitioner in this proceeding, but that the sole information of said Secretary with respect to said proceeding was derived from consultation with employees in the Department of Agriculture, out of the presence of this petitioner or any representative of this petitioner.

"By reason of each and all of the foregoing facts, petitioner avers that said course of action so taken by the Secretary was without warrant and authority of law, and by reason of each and all of the acts and omissions in this paragraph referred to (including the denial of petitioner's request for a separate hearing and the overruling of objections) this petitioner has been denied the 'full hearing' before the Secretary to which the petitioner is entitled under said Packers and Stockyards Act, 1921, and under the Constitution of the United States."

with respect to the reasonableness of the rates involved. That when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither sick, absent, nor otherwise disabled, but was at his office in the Department of Agriculture and the appointment of any other person as Acting Secretary was illegal. That the Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding and had not heard or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives.

On motion of the Government, the District Court struck out all the allegations in Paragraph IV of the bill of complaint and the plaintiffs were thus denied opportunity to require an answer to these allegations or to prove the facts alleged.

Certain facts appear of record. The testimony was taken before an examiner. At its conclusion, counsel for respondents stated "that he would continue to demand that the Secretary hear personally the argument of the evidence in behalf of the individual respondents, or at least have some definite course of procedure adopted whereby the examiner, or some one else, should formulate a report on the evidence so that the respondents could have the character of hearing and right to present their side of the issues in this case, which they believe the law entitles them to." The Government does not suggest that this request was granted and plaintiffs say that it was denied. Oral argument upon the evidence was had before the Acting Secretary of Agriculture. Subsequently, brief was filed on plaintiffs' be-

half. Thereafter, reciting "careful consideration of the entire record in this proceeding," findings of fact and conclusions, and an order prescribing rates, were signed by the Secretary of Agriculture.

First.—The Packers and Stockyards Act makes the provisions of all laws relating to the "suspending or restraining the enforcement" or the "setting aside" of the orders of the Interstate Commerce Commission applicable to the "jurisdiction, powers and duties of the Secretary" in enforcing the provisions of the Act. § 316; 7 U. S. C. 217. These suits for the review of the administrative action were thus directly authorized and appeal lies under the Urgent Deficiencies Act of October 22, 1913. 38 Stat. 219, 220; 28 U. S. C. 47. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443; *Acker* v. *United States, ante,* p. 426. All questions touching the regularity and validity of the proceeding before the Secretary are open to review. *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 286–290; *Florida* v. *United States,* 282 U. S. 194, 212–215. When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive. *Tagg Bros. & Moorhead* v. *United States, supra; St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38; *Acker* v. *United States, supra.* But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion. If upon the facts alleged, the "full hearing" required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was

denied. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *United States* v. *Abilene & Southern Ry. Co., supra; Florida* v. *United States, supra; United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464.

Second.—The outstanding allegation, which the District Court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department.

The other allegations of the stricken paragraph do not go to the root of the matter. Thus, it cannot be said that the failure to hear the respondents separately was an abuse of discretion. Again, while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented,—a practice found to be of great value in proceedings before the Interstate Commerce Commission—we cannot say that that particular type of procedure was essential to the validity of the hearing. The statute does not require it and what the statute does require relates to substance and not form.

Nor should the fundamental question be confused with one of mere delegation of authority. The Government urges that the Acting Secretary who heard the oral argument was in fact the Assistant Secretary of Agriculture whose duties are prescribed by the Act of February 9, 1889 (5 U. S. C. 517), providing for his appointment and authorizing him to perform such duties in the conduct of the business of the Department of Agriculture as may be assigned to him by the Secretary. If the Secretary had assigned to the Assistant Secretary the duty of holding the hearing, and the Assistant Secretary accordingly

had received the evidence taken by the examiner, had heard argument thereon and had then found the essential facts and made the order upon his findings, we should have had simply the question of delegation. But while the Assistant Secretary heard argument he did not make the decision. The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume that responsibility.

We may likewise put aside the contention as to the circumstances in which an Acting Secretary may take the place of his chief. In the course of administrative routine, the disposition of official matters by an Acting Secretary is frequently necessary and the integrity of administration demands that credit be given to his action in that capacity. We have no such question here. The Acting Secretary did not assume to make the order.

Third.—What is the essential quality of the proceeding under review, and what is the nature of the hearing which the statute prescribes?

The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to the proceeding its distinctive character (*Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298, 307), it is a proceeding which by virtue of the authority conferred has special attributes. The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be "unjust, unreasonable, or discrimina-

tory." If and when he so finds, he may "determine and prescribe" what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. *United States* v. *Abilene & Southern Ry. Co., supra.* Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co., supra; Chicago Junction Case*, 264 U. S. 258, 263; *United States* v. *Abilene & Southern Ry. Co., supra; Florida* v. *United States, supra; United States* v. *B. & O. R. Co., supra.*

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who de-

termines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

There is thus no basis for the contention that the authority conferred by § 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact, and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making deter-

minations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred.

The Government presses upon our attention the case of *Local Government Board* v. *Arlidge* [1915] A. C. 120, reversing *King* v. *Local Government Board* [1914] 1 K. B. 160. That case has provoked much discussion, but we do not think it necessary to review it, as it relates to a different sort of administrative action and is not deemed to be pertinent to a proceeding under the statute before us and to the hearing which is required by the principles established by our decisions.

Our conclusion is that the District Court erred in striking out the allegations of Paragraph IV of the bill of complaint with respect to the Secretary's action. The defendants should be required to answer these allegations and the question whether plaintiffs had a proper hearing should be determined.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES *v.* ATLANTIC MUTUAL INSURANCE CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 21. Argued October 18, 1935.—Decided May 25, 1936.

1. A claim of contribution in general average presented against the United States by suit in the Court of Claims filed more than six years after the claim first accrued, is barred by U. S. C., Title 28, § 262. P. 488.
2. The right to contribution in general average accrues when all the elements essential to its existence are present, regardless of whether the appropriate means of enforcement be a suit *in rem* or a suit *in personam*. P. 488.
3. The right to contribution in general average accrues and becomes enforceable upon the arrival of the ship at port of destination and delivery of the cargo, even though the amount of the required contribution has not then been liquidated. P. 489.
4. Claims against the United States for general average contribution are brought and adjusted in the Court of Claims under U. S. C., Title 28, § 250 (1). The claim may accrue and be sued on even though the damages sought be unliquidated. P. 490.
5. An adjuster, engaged by a ship-owner to make up a general average statement, is not an arbitrator nor is his statement binding, as an account stated or otherwise, upon his principal. P. 491.

80 Ct. Cls. 11, reversed.

CERTIORARI, 295 U. S. 727, to review a judgment for the Insurance Company upon its claim in general average contribution against the United States.

Mr. J. Frank Staley, with whom *Solicitor General Reed, Assistant Attorney General MacLean,* and *Mr. Paul A. Sweeney* were on the brief, for the United States.

A suit for a general-average contribution may be brought from the time the vessel arrives at its port of destination. A general-average statement is not a condi-

tion precedent. A general-average statement is not an account stated. The statute of limitations had run before the general-average statement was issued. Officers of the Government have no authority to issue an account stated, and revive an action which is barred.

The United States is not liable for contribution in general average in so far as public vessels are concerned. The case of *Johnson & Higgins* v. *United States,* 287 U. S. 459, expressly left this question open. An Army transport is part of the sovereignty to which she belongs and her liability is merged in that of her sovereign. Equitable principles would deny the application of the rule of general average to this case. The voyage here was part of a military operation and should not be classed as a common maritime venture.

The Court of Claims erred in rendering judgment in excess of the amount actually paid by the respondent. It was error to include interest.

Mr. J. M. Richardson Lyeth for respondent.

A claim for general average is cognizable in the Court of Claims.

Salvage claims, even in the absence of any express contract, fall within the scope of the Tucker Act. *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184; *The Davis,* 10 Wall. 15; *McGowan* v. *United States,* 20 Ct. Cls. 147; *United States* v. *Morgan,* 99 Fed. 570. The similarity between claims for salvage, where no express contract has been made, and claims for general average has been recognized. *The Davis, supra*; Abbott's Merchant Ships and Seamen, 14th ed. (1901), p. 751.

The voyage of the *Logan* was subject to general average rules. It makes no difference whether the *Logan* was engaged in a military operation. In fact she was a public vessel, owned by the Government, and immune from attachment, seizure, or any proceeding *in rem.* The proposition that, because no liability *in rem* against

the vessel may be enforced, no liability *in personam* arises against the owner of the vessel is completely answered by this Court in *Workman* v. *New York City,* 179 U. S. 552, 572. See *United States* v. *The Thekla,* 266 U. S. 328; *In re U. S. Steel Products Co.,* 24 F. (2d) 657.

The cases generally recognize no distinction between the commercial or public character of the service upon which the vessel is engaged for the purpose of determining liability of the Government in general average, salvage, or collision. *Brown* v. *United States,* 15 Ct. Cls. 392; *Prince Line, Ltd.* v. *United States,* 61 Ct. Cls. 632; *United States* v. *Wilder,* 28 Fed. Cas. 16,694.

The cause of action is not barred. The period did not begin to run until the issue of the general average statement in 1926. *The Allianca,* 64 Fed. 871, aff'd, 79 Fed. 989; *Frederick H. Leggett & Co.* v. *500 Cases of Tomatoes,* 15 F. (2d) 270; *Dupont* v. *Vance,* 19 How. 162; *The Eugenia J. Diacakis,* 1923 A. M. C. 305; *Wellman* v. *Morse,* 76 Fed. 573; *Det Forenede Dampskibs Sellskab* v. *Insurance Co.,* 31 F. (2d) 658.

No action *in rem* could have been maintained against the transport *Logan,* because she was a public vessel. *Western Maid,* 257 U. S. 419; *The Siren,* 7 Wall. 152. Even if she had been a private vessel, we contend that the right of action which would have arisen at the time of the arrival of the vessel would have been in the nature of an action to obtain security by the enforcement of a lien, rather than a suit upon a liquidated obligation.

A cargo owner has two causes of action upon a general average sacrifice, one arising upon the arrival of the vessel, and the second arising upon the completion of the general average statement by the vessel owner.

The United States, as owner of the *Logan,* was under a duty to prepare or cause to be prepared the general average statement. *Johnson & Higgins* v. *United States,* 287 U. S. 459; *The Emilia S. De Perez,* 22 F. (2d) 585.

Until the vessel owner has expressed an intention to refuse to perform these obligations, or until he has failed to perform them after the lapse of a reasonable time, there is no basis or reason for the cargo owner to sue him *in personam.*

The rule that the statute of limitations in a suit brought upon the general average statement does not begin to run until the issue of the statement by the adjusters accords with commercial practice and business necessity.

The custom of deferring collection and distribution of general average payments until after the preparation of the statement is based not merely on convenience but on necessity. The facts which are the necessary basis for preparing a general average statement are numerous and complicated, and must be gathered frequently from widely separated and distant points.

The respondent as insurer was entitled to the full amount of the award, including interest.

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

This was a suit to obtain a contribution in general average by reason of the sacrifice of part of a ship's cargo for the benefit of the ship and cargo as a whole. The Court of Claims gave judgment for the claimant and the case is here on certiorari. The material facts, as shown by the findings below, are as follows:

In 1918 the *Logan,* an army transport owned and operated by the United States, left San Francisco for Manila with a cargo consisting of military supplies belonging to the United States, certain property belonging to the government of the Philippine Islands and its railroad, and other property belonging in large part to the American Red Cross and in lesser part to officers of the United States Army, none of which was being transported for

hire. During the voyage fire broke out in the hold from a cause free from negligence, and to prevent a loss of both vessel and cargo the master caused part of the cargo to be jettisoned and water to be let into the hold, whereby other parts of the cargo were damaged. After the fire was extinguished the transport continued the voyage and arrived at the port of destination January 19, 1919. All that remained of the cargo was then discharged and, with the master's assent, was delivered to its owners without obtaining from them any bond to secure payment of general average.

The part of the cargo belonging to the Philippine government and its railroad was insured against marine perils, including fire, by policies obtained before the voyage was begun. Substantial portions of this property were jettisoned or damaged at the time of the fire. April 12, 1921, the underwriter, in compliance with the policies, paid to the Philippine government and its railroad the amounts of their respective losses, and thereby became subrogated to their rights, if any, under the maritime rule respecting general average.

May 15, 1921, the underwriter presented to the War Department a claim for general average contribution based on the facts here stated, and the claim was denied. But the Judge Advocate General disapproved that ruling and gave an opinion that the claim was well grounded. Thereafter, on August 22, 1922, an administrative officer in the army transport service transmitted the files relating to the claim to a company doing business as an average adjuster and insurance broker at San Francisco and requested that the adjuster prepare "a statement of general average in order that the responsibility of the various parties concerned may be determined." The adjuster accepted that task and completed and rendered such a statement December 31, 1926. In this statement the adjuster computed the net contribu-

tion to be made by the United States to the underwriter by reason of the latter's subrogation to the rights of the Philippine government and its railroad at something over $40,000; and also computed the contributions to be made to the underwriter by other cargo owners. On March 28, 1928, the accounting officers of the United States denied the claim for contribution, and on December 10, 1928, the Comptroller General, on review, sustained that ruling. The claimant brought the present suit in the Court of Claims February 18, 1929.

One of the defenses interposed by the government and rejected by the court is that the claim had become completely barred before the suit was begun. The statute [1] invoked by this defense declares:

"Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court . . . within six years after the claim first accrues."

The government contends that the claim first accrued on January 19, 1919, when the transport reached its destination and delivered what remained of the cargo to the cargo owners. On the other hand, the claimant insists the claim first accrued on December 31, 1926, when the adjuster completed and rendered the general average statement. The court rejected the government's contention and sustained that of the claimant. In this we think it erred.

The court recognized that the transport, had it been privately owned, would have become subject to a suit *in rem* for contribution in general average upon its arrival at destination and the delivery of the cargo, but held that as the transport was government owned and in the public service such a suit would not lie against it. We assent to this, but think the accrual of the right to contri-

[1] U. S. C., Title 28, § 262.

bution did not depend upon whether it could be enforced by a suit *in rem* against the ship. Such a right accrues if and when all the elements essential to its existence are present, regardless of whether the appropriate means of enforcement be a suit *in rem* or a suit *in personam*. In this instance, as we shall show, a suit of the latter class was the appropriate means.

The law of general average is an ancient feature of the maritime law and proceeds on the equitable principle that that which is sacrificed by one for the benefit of all in the course of a common venture at sea should be made good by the contribution of all.[2]

Various means of enforcing such contribution have become well recognized, such as a suit *in rem* in admiralty against ship or cargo, a suit *in personam* in admiralty against ship owner or cargo owner,[3] and an action at law [4] or a suit in equity [5] against ship owner or cargo owner. Save for exceptional rulings afterwards disapproved, the courts in dealing with such suits and actions have regarded the right to contribution as accruing and becoming enforceable upon the arrival of the ship at the port of destination and the delivery of the cargo. In reason the rule could not well be otherwise, for every element of the right is then present. That the amount of the required

---

[2] *Barnard* v. *Adams*, 10 How. 270, 303; *Ralli* v. *Troop*, 157 U. S. 386; *Simonds* v. *White*, 2 Barn. & Cress. 805, 811.

[3] *Bark San Fernando* v. *Jackson*, 12 Fed. 341; *The Emilia S. De Perez*, 22 F. (2d) 585, 586; *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America*, 31 F. (2d) 658 (certiorari denied, 280 U. S. 571); *Kohler & Chase* v. *United American Lines*, 60 F. (2d) 530. And see *Insurance Co.* v. *Dunham*, 11 Wall. 1; 1 Benedict on Admiralty, 5th ed. § 98.

[4] *Birkley* v. *Presgrave*, 1 East 220; *Price* v. *Noble*, 4 Taunt. 123; *Dobson* v. *Wilson*, 3 Camp. 480; *Strang, Steel & Co.* v. *A. Scott & Co.*, L. R. 14 App. Cas. 601, 606–607.

[5] *Sturgess* v. *Cary*, Fed. Cas. No. 13,572; 1 Story's Equity Jur. 14th ed. §§ 661 et seq.

contribution may then be unliquidated is no obstacle, for in proper sequence liquidation comes after accrual, and can be made in the suit or action wherein the right is presented for adjudication. In this regard a claim for contribution does not differ from many others where at the time of accrual the recoverable damages or amount due remains unliquidated. As was well said in a related case,[6] "The law is familiar enough in actions of tort and in many actions in contract, with liabilities which are presently due, although unliquidated."

The United States is not suable without its assent, and therefore a suit *in personam* against it as the owner of the vessel needed the support of a permissive statute. But there is such a statute,[7] which has been long in force. It in direct terms invests the Court of Claims with jurisdiction to hear and determine all claims against the United States founded—

"upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

It is under this statute that claims against the United States for general average contribution are brought and adjudicated in the Court of Claims. Obviously the statute contemplates that a claim may accrue and be sued on even though the damages sought be unliquidated.

For these reasons we think it quite plain that the present claim accrued January 19, 1919, when the ship reached its destination and the cargo was delivered.

---

[6] *Det Forenede Dampskibs Selskab* v. *Insurance Co. of North America*, 31 F. (2d) 658, 660 (certiorari denied, 280 U. S. 571).

[7] U. S. C., Title 28, § 250 (1).

The court below attached much importance to the statement in general average made by the adjuster at the request of an administrative officer in the army transport service. Indeed, the court treated the statement as being "in the nature of an account stated," and ruled that the right to contribution accrued when it was rendered. In this we think the court misconceived the functions of the adjuster and the nature of the statement. The adjuster was not an arbitrator,[8] nor was the statement anything more than a provisional estimate and calculation which his principal, the owner, was free to adopt or to put aside. In the absence of some stipulation on the subject, and there was none, his function was only that of aiding or assisting the owner in gathering and stating data and making appropriate calculations as a suggested basis for an adjustment to be made by the owner, or under the owner's direction. It is not shown that the owner adopted the statement or put it forth as an authorized statement. In this situation the statement had no binding force as a stated account or otherwise. As was explained by Lord Herschell when speaking for the Judicial Committee of the Privy Council in *Wavertree Sailing Ship Co.* v. *Love,* L. R., (1897) App. Cas. 373—

"The right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves as their calling to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons or indeed to employ any one at all. He might if he pleased make out his own average statement, and he may do the same at the present time if so minded. If he en-

[8] *The Alpin,* 23 Fed. 815, 819; *The Santa Anna Maria,* 49 Fed. 878, 879.

gages the services of an average stater, it is merely as a matter of business convenience on his part."

What we have said suffices to show that the claim accrued more than six years before the suit was begun, and therefore was barred by the statute.

Judgment reversed.

UNITED STATES *v.* ELGIN, JOLIET & EASTERN RAILWAY CO.

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

No. 660. Argued April 8, 9, 1936.—Decided May 25, 1936.

1. Legislative approval of a construction placed by this Court upon an Act of Congress is evidenced by failure to amend. P. 500.
2. The mere fact that all the shares of a railroad corporation and all the shares of a manufacturing corporation are owned by a holding company does not make transportation by the one of the products of the other unlawful under the commodities clause of the Interstate Commerce Act. P. 499.

   United States v. *Reading Co.*, 253 U. S. 26, distinguished. Existence of power in the holding company to control the railway company, not exercised in the present case, did not make the railway company the *alter ego* of the holding company.

11 F. Supp. 435, affirmed.

APPEAL from a decree of the District Court of three judges, which dismissed a bill brought by the United States to enjoin the Railway Company from hauling the products of certain manufacturing companies in alleged violation of the commodities clause of the Interstate Commerce Act.

Assistant Solicitor General Bell, with whom *Solicitor General Reed* and *Messrs. Daniel W. Knowlton, M. S. Huberman,* and *Elmer B. Collins* were on the brief, for the United States.

The very purpose and function of a holding company, such as the United States Steel Corporation, is to control, direct, and supervise the management of its various subsidiaries. A holding company, together with its subsidiaries, constitutes one industrial organization consisting of various departments and branches, and such subsidiaries are in fact the agents, instrumentalities, or departments of the holding company.

The Commodities Clause was designed to divorce transportation from production in order "to put an end to the injustice to the shipping public, which experience had shown to result from discriminations of various kinds which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper." *United States* v. *Reading Co.*, 253 U. S. 26, 60–61. When appellee transports the commodities of the producing subsidiaries it plainly is in the "dual and inconsistent positions of public carrier and private shipper." *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 525. Clearly, the evils sought to be reached by the Commodities Clause are no less present than if the Steel Corporation owned title directly to the railroad and producing properties; the incentive to discriminations against the shipping public is just as strong in the one case as in the other.

The Court recognized in the *Reading* case that the subsidiaries of a holding company are necessarily its mere agents, instrumentalities, or departments.

In holding it incumbent upon the Government to show by evidence of actual practices that the subsidiaries are administered as the agents, instrumentalities, or departments of the holding company, the court below applied the rule applicable where a railroad company owns the stock of a producing company; it failed to distinguish between a holding company which is created and exists only for the purpose of directing the

affairs of its subsidiaries, and an operating company which, though it may own stock in another company, is itself engaged directly in operations. In the latter case the stock may be held only for investment and "in a manner normal and usual with stockholders." *United States* v. *Reading Co., supra,* p. 63.

In any event, proof of the holding company relationship should have been held to be sufficient to establish at least *prima facie* that the subsidiaries are in fact administered as the agents, instrumentalities or departments of the Steel Corporation.

Even if the burden rested upon the Government to establish affirmatively that the subsidiaries are so administered in practice, the burden has been satisfied in this case by the clear weight of the evidence.

Appellee neither is, nor resembles, an "industrial railroad." Moreover, there is no basis for the suggestion that the Commodities Clause does not apply to the transportation by such a road of commodities of an industrial corporation with which it is affiliated. Appellee also appeared to contend that a railroad subsidiary of a holding company may not, as a matter of law, be deemed to have an interest within the Commodities Clause in commodities owned by subsidiary producing companies of that holding company. The *Reading* case, *supra,* is direct authority to the contrary.

The Commodities Clause does not prohibit ownership by a railroad company of the stock of a producing company; or ownership by a producing company of the stock of a railroad company; or ownership by a holding company of the stock of a railroad company and of a producing company; or common ownership by individuals of the stock of a railroad company and a producing company. The Commodities Clause is not a prohibition against stock ownership at all. It prohibits the trans-

portation of commodities under certain circumstances. The effect of the decree in a suit in a Commodities Clause case is simply to enjoin the transportation of such commodities. Furthermore, the statute does not specify what constitutes an interest direct or indirect. It does not make such an interest turn upon stock-ownership. It does not mention stock or stock-ownership.

Decisions of this Court make it clear that whether a railroad has an interest direct or indirect in commodities is to be determined upon the basis of the relationship between the railroad and the owner of the commodities, considered in the light of the purpose of the Commodities Clause "to prevent railroads from occupying the dual and inconsistent positions of public carrier and private shipper" and "to separate the business of transportation from the business of selling." *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 525.

Mr. Nathan L. Miller, with whom *Messrs. Kemper K. Knapp, Frank B. Kellogg,* and *Charles S. Belsterling* were on the brief, for appellee.

Appellant argues that notwithstanding the facts stated in the court's findings, this Court ought to adopt the fiction that appellee does what in fact it does not do. Appellant's argument consists in presenting reasons why the Commodities Clause should be distorted from the meaning conveyed by the simple and natural meaning of the words used.

That the Commodities Clause means just what appears on its surface and does not apply to the business carried on by appellee is shown in many ways. It is shown by comparing it with other provisions of the same statute. It is shown by the proceedings in Congress when the statute was under consideration, particularly by the rejection by Congress of an amendment which would have made the statute apply to situations such as

shown by the evidence in this case. The purpose of the statute, it is shown, is in accordance with the language of the statute, no more, no less. Furthermore, the authorities whose duties require them to enforce the statute have, during many years, held that the statute means just what appears on its face. This includes the Interstate Commerce Commission and several Attorneys General. Congress itself has taken the same view.

The previous decisions of this Court are analyzed and discussed. The theories deduced by appellant from those decisions are controverted.

The United States Steel Corporation owns the stock of appellee. The evidence shows that it evinced its interest in appellee in various ways. Appellant presents the facts bearing on the relation between the two companies at great length. Appellee points out in this connection that the Interstate Commerce Act, including the Commodities Clause, is directed to the transportation services performed by common carriers. Its field is such transportation services. Its purpose is not the prevention or regulation of the internal affairs of common carriers. Its concern is the relation between carriers and the shipping public. Appellee therefore contends that the incidents which appellant presents at such great length are irrelevant to any issue in this case. They relate only to the internal affairs of appellee. The evidence and the findings of the District Court show that the United States Steel Corporation does not interfere in any way with the operation by appellee of its railroad. Appellee operates its railroad and serves the several subsidiaries of the United States Steel Corporation and the shipping public independently and freely and to the entire satisfaction of everyone concerned. Appellee has been guilty of no wrong and has violated no public policy against the Commodities Clause or against any statute.

By leave of Court, *Mr. Clarence A. Miller* filed a brief on behalf of The American Short Line Railroad Association, as *amicus curiae,* urging affirmance of the decree of the lower court.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellee, incorporated under the laws of Illinois and Indiana, has been an interstate common carrier by railroad since 1884. It operates the "Chicago Outer Belt Line," 195 miles long, which runs from a point on Lake Michigan, north of Chicago, around that city to South Chicago, Gary and Porter, south and east. This line connects and interchanges freight with every railroad entering Chicago and serves many industrial plants. Among them are certain large producers of steel and steel products, operated by corporations, sometimes called "Subsidiaries," all of whose shares belong to the United States Steel Corporation: Illinois Steel Company, American Bridge Company, American Sheet and Tin Plate Company, National Tube Company, American Steel and Wire Company, and Cyclone Fence Company. Transportation of products—raw, semi-finished and finished—to and from and amongst the plants of the six constitutes 60% of appellee's business. It files tariffs and complies generally with the Interstate Commerce Act and Commission regulations. During the years 1926–1930, its annual operating revenue exceeded $20,000,000.

The United States Steel Corporation, a holding—non-operating—corporation organized in 1901, then acquired and has ever since held, all shares of appellee, also all those of the producing companies.

By an Original Bill filed 1930 (amended 1932), the United States instituted this proceeding against appellee, sole defendant, in the District Court, Northern Dis-

trict of Illinois. They alleged that by transporting articles manufactured, mined, produced, or owned by subsidiaries of the United States Steel Corporation, appellee violated the Commodities Clause of the Interstate Commerce Act, Act June 29, 1906, c. 3591, 34 Stat. 584, 585; U. S. C., Title 49, § 1 (8), copied in the margin,[1] and asked for an injunction prohibiting such action.

After answer, voluminous evidence and trial, the court below made findings of fact and announced an opinion. It concluded—

Mere ownership by the United States Steel Corporation of all shares of both appellee and a producing subsidiary was not enough to show that products made or owned by the latter were articles or commodities produced by the former, or under its authority, or which it owned in whole or in part, or in which it had an interest, direct or indirect, and was forbidden to transport by the Commodities Clause.

Also, "no single piece of evidence taken alone, nor all taken together and considered as a whole warrant the inference that the defendant and the producing and manufacturing subsidiaries are under the domination, control, direction, and management of the Steel Corporation, in the sense that the defendant and the other subsidiaries are mere departments, branches, adjuncts, and instrumentalities of the Steel Corporation. The evidence fails to show that the defendant has any interest, direct or indi-

[1] From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

rect, legal or equitable, in the articles or commodities which it transports for the subsidiaries of the Steel Corporation."

A final decree dismissed the Bill for want of equity and the cause is here by direct appeal (U. S. C., Title 49, § 45). Both conclusions are challenged and we are asked to reverse the decree and grant relief as originally prayed.

The Commodities Clause became part of the Interstate Commerce Act in 1906, U. S. C., Title 49, § 1 (8), and has remained without material change. It was first interpreted here in *United States* v. *Delaware & Hudson Co.*, (1909) 213 U. S. 366, 415, where, by Mr. Justice White, the Court said:

"We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder."

This construction has been accepted and followed in the later cases. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 266; *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 526; *United States* v. *Reading Co.*, 253 U. S. 26, 62; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, 266.

Through Mr. Justice Lamar, the court said, in *United States* v. *Delaware, L. & W. R. Co.*—

"But mere stock ownership by a railroad, or by its stockholders, in a producing company cannot be used as a test by which to determine the legality of the transportation of such company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of anthracite roads which at that time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such road to transport coal belonging to such company. The amendment, however, was voted down; and, in the light of that indication of congressional intent, the Commodity Clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 414. For a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company."

Notwithstanding the intent imputed to Congress by this opinion, announced in 1915, no amendment has been made to the Commodities Clause. We must, therefore, conclude that the interpretation of the Act then accepted has legislative approval.

It is now insisted that, although a railroad company may own the shares of a producing company and yet transport the latter's products without violating the Commodities Clause, if a holding company acquires the shares of both carrier and producer, then such transportation becomes illegal. The theory is that the subsidiaries of holding companies are necessarily no more than parts of it. Evidently, this is entirely out of harmony with the reasoning advanced to support the construction of the

Act adopted in *United States* v. *Delaware & Hudson Co., supra;* also in direct conflict with the above quoted language from *United States* v. *Delaware, L. & W. R. Co.*

Considering former rulings, it is impossible for us now to declare as matter of law that every company all of whose shares are owned by a holding company necessarily becomes an agent, instrumentality, or department of the latter. Whether such intimate relation exists is a question of fact to be determined upon evidence.

Counsel for appellants submit that the record compels the inference of fact that appellee and the subsidiary producing companies are but departments of the United States Steel Corporation; and that, as in *United States* v. *Reading Co., supra,* we should find the carrier is violating the Commodities Clause. It is not claimed that this inference derives from any single fact, but out of the mass. The following portion of the opinion in *United States* v. *Reading Company* is heavily relied upon—

"But the question which we have presented by this branch of the case [alleged violation of the Commodities Clause] is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all of the stock of a carrier and of all of the stock of a coal company results in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act."

And, having regard to this, they say—"The affirmative answer given in the *Reading* case is controlling here."

Obviously, what was there stated cannot be taken as declaration of an abstract principle; it had application

to the relevant circumstances. Later (pp. 61–62) in the same opinion the essential ones are revealed—

"All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same 'authority' that operated the Reading Railway lines."

If the evidence here showed the relationship between the holding company, the carrier, and the producing companies to be substantially as in the *Reading* case, that opinion well might be regarded as controlling. But there is material difference and we must look elsewhere for guidance.

Properly to appraise the situation now presented particular attention must be given to the following facts. All shares of appellee and the subsidiary producing companies have been owned by the United States Steel Corporation since 1901. The railroad has been under constant supervision by the Interstate Commerce Commission. In The Matter of Alleged Rebates to the United States Steel Corporation, 36 I. C. C. 557, (1915). It functions as a separate corporate carrier under imme-

diate control of its own directors, no one of whom is on the board of the holding company; it owns all necessary equipment, makes its own contracts, manages its own finances, serves its patrons without discrimination and apparently to their satisfaction. The lawfulness of the relationship between the holding company and subsidiaries was challenged in *United States* v. *United States Steel Corp.,* decided here in 1920, 251 U. S. 417. After long and thorough investigation and consideration, this court held the Anti-trust Act was not being violated. The present proceeding is one to prevent probable future unlawful conduct and not to punish acts long since completed, however reprehensible. "Our consideration should be of not what the Corporation had power to do or did, but what it has now power to do and is doing." *United States* v. *United States Steel Corp., supra,* p. 444.

The court below made definite findings of fact and upon them reached the conclusions stated above. Although criticized, and notwithstanding certain isolated acts may indicate undue control over the carrier at their dates, we think that the findings are essentially correct and support the decree. Instances of participation in the affairs of the appellee by the officers of the United States Steel Corporation, stressed by counsel, are relatively few; a material part of them occurred years ago—some of the more important in 1909. They are not adequate to support the claim that appellee must be regarded as the *alter ego* of its sole stockholder. The mere power to control, the possibility of initiating unlawful conditions, is not enough, as clearly pointed out in *United States* v. *Delaware & Hudson Co., supra.* That a stockholder should show concern about the company's affairs, ask for reports, sometimes consult with its officers, give advice and even

object to proposed action is but the natural outcome of a relationship not inhibited by the Commodities Clause.

We find no adequate reason for disapproving the challenged decree and it must be

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment should be reversed.

The language of the commodities clause, read in the light of its legislative history, can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier, which experience had shown are likely to occur when a single business interest occupies the inconsistent position of carrier and shipper. See *United States* v. *Reading Co.*, 253 U. S. 26, 60, 61. Before the enactment of the commodities clause, Congress, by sweeping prohibitions, had made unlawful every form of rebate to shippers and every form of discrimination in carrier rates, service and facilities, injurious to shippers or the public. By the Sherman Act it had forbidden combinations in restraint of interstate commerce. But it did not stop there. The commodities clause was aimed, not at the practices of railroads already penalized, but at the suppression of the power and the favorable opportunity, inseparable from actual control of both shipper and carrier by the same interest, to engage in practices already forbidden and others inimical to the performance of carrier duties to the public. See *Delaware, L. & W. R. Co.* v. *United States*, 231 U. S. 363, 370; *United States* v. *Reading Co., supra.*

It is not denied that the "indirect" interest of the carrier in the commodity transported, at which the statute strikes, may be effected through the instrumentality of a

holding company which owns the stock both of the carrier and the company which manufactures and ships the commodity. This was definitely established by the decision in *United States* v. *Reading Co., supra,* where it was held that the power of control through holding company ownership of all the capital stock both of an interstate rail carrier and a shipper producing the commodity carried, plus an active exercise of that control, are enough to make the transportation unlawful.

While it was recognized, as had been held in *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, that mere ownership, by a carrier or a shipper, of the stock of the other, does not call the statute into operation, the Court was careful to point out, pp. 62, 63, that "where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent or instrumentality or department of another company, the courts will look through the forms to the reality of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require." Domination in fact by a holding company both of the rail carrier and the producing shipper of commodities, in addition to its legal power to dominate them, is enough to bring the carrier within the prohibition of the commodities clause.

The only question for our decision is whether the complete power of the United States Steel Corporation, through stock ownership, to dominate both appellee and certain shippers over its lines, has been exercised sufficiently to exemplify the evil which the commodities clause was intended to prevent, and so to bring appellee within its condemnation. It is of no consequence that complaints of rebates by appellee to United States Steel

Corporation subsidiaries have not been sustained, 36 I. C. C. 557, or that the Steel Corporation and its subsidiaries have been held not to infringe the Sherman Anti-Trust Act. *United States* v. *United States Steel Corp.*, 251 U. S. 417. The commodities clause does not forbid rebating or attempts to monopolize interstate commerce, which are dealt with by other statutes. It is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest, through the exercise of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult.

It is not important, as the court below thought, that in the relations between the Steel Corporation and its subsidiaries "there was a scrupulous recognition of the separate entities," or that all transactions between them were "in the form of transactions and communications between two separate and distinct corporations," or that the business and accounts of each subsidiary "were kept separate and distinct" from those of others. Nor is it of any moment, as this Court seems to imply, that the affiliates do not have the same officers and directors, and that some years ago they abandoned the practice of maintaining interlocking directorates.

Those familiar with present day methods of corporate control will not be so naïve as to suppose that the complete domination in fact of its subsidiaries by a holding company owning all their stock is in any way inconsistent with scrupulous recognition of their separate corporate entities, or with the maintenance of separate accounts and distinct personnels of officers and directors. Every holding company presupposes a relationship between it and a distinct corporate entity and its power to control the

latter. Where the issue is whether that power has been exercised, "courts will look through the forms to the realities of the relation between the companies as if the corporate agencies did not exist." Hence we are presently concerned with what is in fact done in the Steel Corporation's exercise of its power to control, not with the particular legal forms or methods under cover of which control may in fact be effected. And since we must look to its acts of control, in addition to its power acquired by stock ownership, as the decisive test, we must scrutinize what has occurred in the past as the best indication of the manner and extent of the use which may be made of the power in the future.

In appraising the Steel Corporation's acts of control over the appellee, it is of significance that the dominant interest in the inter-company relationship, unlike that in the earlier cases brought before the Court, is that of production, and not transportation. Appellee, although a common carrier, subject to public duties and responsibilities, is, in its relation to the Steel Corporation and its subsidiaries, but an appanage to their vast steel producing business. While the commodities clause makes no distinction between the one type of domination and the other, such control of a railroad is far more menacing to the public and to rival producers than is domination of producer interests by a carrier. When the carrier interest predominates, extension of its transportation facilities beyond the demands of its producing affiliates, and even to their competitors, with resulting benefit to the public, may well ensue. But where the producing interest is dominant, and the carrier is chiefly engaged in transporting the commodities of producing affiliates, restricted or indifferent service to competing producers and to the public, tardy or inadequate extension of facilities, discrimination in furnishing service and facilities, are dangers especially to be anticipated.

In such a relationship, control of carrier capital accumulation, expansion and expenditure, is a peculiarly convenient and effective means of subordinating carrier public service to the interests of production, by restriction of carrier expansion which would benefit the public and competing producers, or by allowing it only under discriminatory conditions. It is with these general considerations in mind, especially pertinent to the present case, that its facts should be examined.

Since its formation in 1901 the Steel Corporation has owned all the capital stock of the appellee railroad and of the Illinois Steel Company, a manufacturing company which appellee serves. Through lease, in 1909, of the Chicago, Lake Shore and Eastern Railway line, and the acquisition of appurtenant trackage rights over another line, appellee secured and maintains direct transportation facilities between the Illinois Steel Company and mines and quarries, all subsidiaries of the Steel Corporation. Sixty per cent. of appellee's tonnage is furnished by Steel Corporation subsidiaries.

Although the Steel Corporation is exclusively a holding and not an operating company, its by-laws defining the president's duties provide that he "shall have general charge of the business of the corporation relating to manufacturing, mining and transportation." The record shows that this authority is exercised by close and constant supervision over the business and affairs of Steel Corporation subsidiaries, not through the formal proceedings of stockholders and directors meetings, but through conferences and correspondence taking place directly between the officers of the Steel Corporation and those of its subsidiaries.

From 1901 to 1920 there were on appellee's board of directors never less than four officers or directors of the Steel Corporation, selected from its most important officers. Since 1920 the appellee's board of directors has

been selected by appellee's president and elected by him acting as proxy for the Steel Corporation. He has likewise selected the officers, who have been elected by the Board at his suggestion. The record is replete with evidence, chiefly correspondence, showing the complete subservience of appellee's president to the officers of the Steel Corporation in matters of corporate policy. The subservience of appellee's board of directors to its president, and through him in turn to the Steel Corporation, is exemplified by appellee's settled practice from 1910 until the time of suit of entering into contracts without any previous approval by its board of directors. At its annual meeting of directors the contracts which have been previously entered into, and often have already been performed, are ratified and confirmed. This procedure was followed with respect to all contracts, some 2,313 in number, executed on behalf of appellee between 1910 and 1933.

Appellee's fiscal policy has for many years been dominated and rigidly controlled by the Steel Corporation. Dividends have been habitually declared and the amount of them fixed only after securing, by correspondence, the consent and approval of the officers of the Steel Corporation. The Steel Corporation draws to itself the surplus funds of its subsidiaries, including appellee, which are deposited with it, for its own use, often upon its specific request or demand, and at a rate of interest which it fixes. These funds are withdrawn by draft of the subsidiary, payable only upon acceptance by the Steel Corporation, and customarily upon notice given in advance. From 1920 to 1933 appellee's aggregate deposits with the Steel Corporation were $79,000,000, of which $32,000,000 were made at the request or demand of the Steel Corporation.

Since its formation the Steel Corporation has maintained under its direction and control a clearance account, by which monthly settlement is made of inter-company

accounts among its various subsidiaries. All of appellee's settlements of such accounts, except freight charges and traffic claims, are cleared through this account. The account is managed by the controller of the Steel Corporation. Interest is charged or allowed on balances due in the account at a rate of interest fixed by the treasurer of the Steel Corporation. Terms of settlement are controlled by it and not by free bargaining of debtor and creditor.

By direction of the finance committee of the Steel Corporation, its subsidiaries, including appellee, are required to obtain in advance the approval of the committee of all expenditures for capital account and improvements in excess of a specified amount. From 1920 to 1932 the limit was $10,000, since which it has been $5,000. Since 1908 the officers of the Steel Corporation have issued from time to time, to all its subsidiaries, instructions outlining in detail the rules and procedure governing their application to the Steel Corporation for its approval of their expenditures for improvements. This requirement was not perfunctory. Failure to secure from the officers of the Steel Corporation, in advance, the approval of capital expenditures, brought from them by letter or telegram swift reminder of the neglect. Requests for approval of proposed expenditures have been the occasion for careful inquiry by the officers of the Steel Corporation as to their necessity and propriety. In recent years approximately 70 per cent. of appellee's total capital expenditures have been of the class requiring consent by the Steel Corporation.* Included were items directly

* Out of an annual average capital expenditure by appellee of approximately $900,000, during each of the years from 1926 to 1930 inclusive, an average of over $600,000 annually required the prior approval of the Steel Corporation. In 1930, appellee made capital expenditures of $1,910,755, of which $1,315,773 required the approval of the Steel Corporation. Appellee's total capital expenditures from 1926 to 1930 amounted to $4,597,925, of which $3,153,817 required such approval.

affecting appellee's transportation service, such as the cost of rolling stock, procuring an adequate water supply for its engines, improvement of its right-of-way, and additional yard facilities.

With such minute and continuous control of capital outlays of appellee by an organization primarily interested in production rather than common carrier service, it is not surprising that the only expansion of appellee during the period of control has been its lease of the line of the Chicago, Lake Shore and Eastern Railway, a subsidiary of a Steel Corporation producing affiliate, the Illinois Steel Company, which it served almost exclusively, and the acquisition through this lease of a trackage privilege over the Chicago & Eastern Illinois Railroad, restricted to the hauling of products of producing subsidiaries of the Steel Corporation—an arrangement by which appellee raised its tonnage from subsidiaries of the Steel Corporation from 25% to 60%.

It was the chairman of the board of the Steel Corporation, not the officers of appellee, who had the deciding voice in determining whether the lease should be taken and who assumed active control of the negotiations for its acquisition. Again, in 1920, when the trackage agreement was subject to cancellation by reason of the receivership of the Chicago & Eastern Illinois, it was the chairman of the board of the Steel Corporation who actively controlled the successful negotiation for a continuance of the agreement.

The record discloses many other forms of actual control of the business and affairs of appellee by the Steel Corporation which it is unnecessary to detail. It is enough that those mentioned, when examined in their setting, show with convincing force that the appellee railroad is in fact obedient to the dominating control of producers of commodities which it transports. In every instance when the Steel Corporation has conceived that it had any

interest to subserve, appellee has willingly done its bidding. In none has there been any indication of a disposition to pursue any policy not at least tacitly approved by the Steel Corporation. The active and continuous control over appellee's finances and expenditures is alone sufficient to create a continuing danger of neglect and abuse of appellee's carrier duties in favor of the dominating production and shipping interest, a temptation and an opportunity which it was the purpose of the commodities clause to forestall. In addition, the Steel Corporation has exerted that power, in the acquisition of the Lake Shore lease and its appurtenant trackage rights, to secure special advantages for its producing subsidiaries. The trackage rights extend only to hauling their own product, not that of their rivals.

This relationship passes far beyond that which is normal between a railroad and its stockholders and establishes a control over appellee's policy as complete as though it were but a department of the Steel Corporation. If the commodities clause permits control such as is exhibited here, one is at a loss to say what scope remains for the operation of the statute. Whatever views may be entertained of the soundness and wisdom of the decision in *United States* v. *Delaware & Hudson Co., supra,* it neither requires nor excuses our reduction of the commodities clause to a cipher in the calculations of those who control the railroads of the country.

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

ASHTON ET AL. *v.* CAMERON COUNTY WATER IMPROVEMENT DISTRICT NO. ONE.

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

No. 859. Argued April 29, 1936.—Decided May 25, 1936.

1. A district organized to furnish water for irrigation and domestic uses, which became a County Water Improvement District, all pursuant to the Constitution and statutes of Texas, with power to sue and be sued, issue bonds, and levy and collect taxes,—*held* a political subdivision of the State. P. 527.
2. The Act of May 24, 1934, added three sections (§§ 78–80) to the Bankruptcy Act, purporting to permit municipal corporations and other political subdivisions of States, unable to pay their debts as they mature, to resort to the federal courts of bankruptcy to effect readjustment of obligations. Plans involving a scaling down, compromise, or repudiation of debts, without surrender of any property whatever, if approved initially by creditors holding 30%, and finally by those holding 66⅔%, of the indebtedness, could be enforced by the court, under conditions specified, though opposed by minority creditors. *Held* that the power claimed in support of the Act necessarily implies power in the Federal Government materially to restrict the States in the control of their fiscal affairs. Such authority is not found in the power of Congress to establish uniform laws on the subject of bankruptcies. Pp. 527, 530.
3. In determining the existence of a constitutional power, inquiry is not limited to the results of its attempted exercise; it is of the first importance to consider what might be the results of its future exercise. P. 530.
4. It is the especial purpose of all bankruptcy legislation to change, modify or impair the obligations of contracts. The Act in question expresses this design in plain terms; it undertakes to extend the supposed power of the Federal Government incident to bankruptcy over any embarrassed district which may apply to the court. P. 530.
5. If their obligations may be subjected to the interference here attempted, States and their political subdivisions are no longer free to manage their own affairs; the will of Congress prevails over them. P. 531.

65773°—36——33

6. A State cannot constitutionally impair the obligations of contracts by a law in the form of a bankruptcy law, nor can she reach the same end by granting permission necessary to enable Congress to do so. P. 531.
7. Neither consent nor submission by the States can enlarge the powers of Congress. The sovereignty essential to the proper functioning of a State under the Constitution cannot be surrendered, nor can it be taken away by any form of legislation. *Id.*
8. The same basic reasoning which leads to the conclusion that the taxing power of Congress does not extend to the States or their subdivisions requires a like limitation upon the power springing from the bankruptcy clause. P. 532.

81 F. (2d) 905, reversed.

CERTIORARI * to review the reversal of a judgment of the Bankruptcy Court dismissing a petition filed by the Water District for a reduction of its bonded indebtedness.

Mr. Palmer Hutcheson, with whom *Messrs. J. W. Terry* and *W. P. Hamblen* were on the brief, for petitioners.

The Act conflicts with *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U. S. 315; *United States* v. *Butler,* 297 U. S. 1, 74; *United States* v. *Constantine,* 296 U. S. 287. See *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

The Texas Constitution and statutes provide for the organization of irrigation and water improvement districts, which are governmental agencies with power to levy and collect taxes for public purposes. *Texas Pacific Ry. Co.* v. *Ward County Irrigation District,* 112 Tex. 593; *Parker* v. *El Paso Water Imp. District,* 116 Tex. 631; *Hester and Roberts* v. *Donna Irrigation District,* 239 S. W. 992.

The rights of the bondholders include the right to compel collection of taxes by the municipality issuing the bonds. *Voorhies* v. *Houston,* 70 Tex. 331; *Hidalgo*

* See Table of Cases Reported in this volume.

County v. *Morey,* 74 F. (2d) 101; *Von Hoffman* v. *Quincy,* 4 Wall. 535.

The tax being sanctioned by the State, and provision therefor being required as a prerequisite to the issuance of the bonds, and the bonds being issued for the performance of a public purpose by a governmental agency of the State, neither the State nor the Federal Government can interfere—the State, because it cannot impair the obligation of contracts, and the Federal Government because it cannot impair the sovereignty of the State. *Rorick* v. *Commissioners, Everglades Drainage District,* 57 F. (2d) 1048; *Meriwether* v. *Garrett,* 102 U. S. 472; *Lane County* v. *Oregon,* 7 Wall. 71.

Irrigation, drainage, and related public projects are all State governmental functions. *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *O'Neill* v. *Leamer,* 239 U. S. 244; *Houck* v. *Little River Drainage District,* 239 U. S. 254.

The maintenance of the faith and credit of the State involves the maintenance of the faith and credit of its political subdivisions. *Anderson County Road District No. 8* v. *Pollard,* 116 Tex. 547; *Tom Green County* v. *Moody,* 116 Tex. 299; *Robbins* v. *Limestone County,* 114 Tex. 356.

The power to "lay and collect taxes" under the Federal Constitution is embraced in the same section as the power to pass "uniform laws on the subject of bankruptcies throughout the United States." § 8, Art. I. It has long been recognized that this power of taxation cannot be exercised in a manner that invades state sovereignty. *Buffington* v. *Day,* 11 Wall. 113; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429; 158 *id.* 601.

A statute of Texas expressly provides that the directors of such a district shall levy a tax upon all property within the district sufficient to pay the interest on the bonds and to provide for their redemption at maturity. Rev. Civ. Sts. 1925, art. 7712.

The faith, credit and resources of the District were pledged by the Constitution and statutes of the State, for payment of the bonds. See *Rorick* v. *Commissioners, Everglades Drainage District, supra; Village of Kent* v. *United States,* 113 Fed. 232. The bonds and taxes were acts of sovereignty in performance of governmental duties. *United States* v. *Railroad Co.,* 17 Wall. 322.

The mere declaration in § 80 (k) of the Act in question that "nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any political subdivision thereof in the exercise of its political or governmental powers" cannot save the Act from the charge of unconstitutionality, because the Act seeks to reach the political subdivision, not only when the State consents, but also when the State has not exercised its power "to require the approval by any governmental agency of the State of the filing of any petition," or has no existing fiscal agency whose affirmative approval is required under the terms of the Act.

The State can no more impair its obligations through action in the federal court, than it can through action in the state court. The protection of the Constitution, both national and state, surrounds both forms. The State can waive venue or jurisdiction, and appear in the federal court, but cannot thereby submit itself to the application of a federal Act which has no power otherwise to reach it.

The mere fact that the Eleventh Amendment does not prohibit suits against counties and other political subdivisions does not change their nature or characteristics. No distinction has been drawn between the powers of the Federal Government in levying taxes against state bonds, or bonds issued by political subdivisions of a State.

State sovereignty cannot be waived except by constitutional amendment, delegating power to the Federal Government.

The Act is unconstitutional because it is not uniform throughout the United States. It depends for its application not upon the will of Congress, but upon the will of the Legislature of each State. See *International Shoe Co.* v. *Pinkus,* 278 U. S. 261. It does not apply in every State of the Union which has political subdivisions that could invoke it, but only in such States as may not object to its application. Furthermore, one district within a State may be permitted by the State to invoke the Act, and another district may be denied that privilege. *Florida* v. *Mellon,* 273 U. S. 12, distinguished.

State legislation giving consent to the application of the Act would impair the obligation of contracts contrary to § 10, Art. I, of the Federal Constitution, and § 16, Art. I, of the Texas Constitution. *In re Dillard,* 7 Fed. Cas. 3912; *In re Rahrer,* 140 U. S. 545, 560; *Travelers Insurance Co.* v. *Marshall,* 124 Tex. 45; *Cattle Raisers Loan Co.* v. *Doan,* 86 S. W. (2d) 252; *Pryor* v. *Goza,* 159 So. 99.

The Act violates the Fifth Amendment. Bondholders are deprived of their right to compel the levy and collection of taxes and the enforcement of tax liens by sale if necessary. *Voorhies* v. *Houston,* 70 Tex. 331; *Hidalgo County* v. *Morey,* 74 F. (2d) 101; *Louisville Joint Stock Land Bank* v. *Radford, supra.*

The bondholders in the case at bar are entitled to invoke the Fifth Amendment because an interference with the taxing power of the district, or a discharge of the obligation of the district to levy and collect taxes to pay the bonds, would deprive them of a part of their security. *Rorick* v. *Commissioners, Everglades Drainage District,* 57 F. (2d) 1048; *Los Angeles County* v. *Rockhold,* 44

P. (2d) 340. See also *Von Hoffman* v. *Quincy, supra.* Distinguishing: *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. Ry.*, 294 U. S. 648. Cf. *In re Tennessee Publishing Co.*, 81 F. (2d) 463.

The petition revealed that the plan of readjustment was dependent upon a loan to the district by the Reconstruction Finance Corporation, under conditions, imposed by § 36 of the Agricultural Adjustment Act, and by the loan contract, which invaded the exercise of governmental powers of the district.

Messrs. David M. Wood and *W. B. Lewis* for respondent.

The Act is a Bankruptcy Act. *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. Ry.*, 294 U. S. 648. It differs from the Act before this Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, in that it is a composition Act.

The Act is a uniform law upon the subject of bankruptcies throughout the United States.

There is nothing in the provisions of subdivision K of the Act providing that the Act is inapplicable in any State. That subdivision merely recognizes the fact that the taxing districts, to which the Act is applicable, are not free agents, and provides that in those States in which there are state agencies authorized to exercise supervision or control over the fiscal affairs of the taxing districts, the petition may not be received by the District Court, unless accompanied by the written approval of such state agency. In short, the Act creates a special class of petitioners and modifies slightly the procedure, incident to the filing of a petition under the Act, in the case of members of that class. It is intended merely to prevent the filing of a petition in the District Court of the United States by a petitioner which has not complied with all the formalities required by the laws of the State in which it is located to authorize it to do so.

The uniformity required of a bankruptcy act, to conform to the Constitution of the United States, is geographic and not personal in the sense of being alike applicable to all members of the community. *Hanover National Bank* v. *Moyses,* 186 U. S. 181; *Leidigh Carriage Co.* v. *Stengel,* 95 Fed. 637.

The power of Congress to classify persons who may take advantage of bankruptcy acts is well settled.

The Act does not violate the Fifth Amendment.

The present Act is so dissimilar to the Frazier-Lemke Act and so similar to § 77 of the Bankruptcy Act that the decision in *Louisville Joint Stock Land Bank* v. *Radford, supra,* is not applicable, and the case which is in point is *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. Ry., supra.*

The Act does not invade the sovereignty of the States in violation of the Tenth Amendment.

Public corporations, being unable to meet their obligations at maturity, found that their outstanding bonds, notes and other evidences of indebtedness were held by large numbers of persons. Almost invariably they were unable to reach adjustments because of refusal by minority holders of the obligations. There was no law under which the minority could be bound by an agreement entered into by the holders of the great majority in amount of the outstanding obligations. The result was that Congress was petitioned, not only by the municipalities but by creditor interests, to enact legislation under its bankruptcy powers, to substitute the democratic principle of majority rule for the virtual anarchy which then existed with reference to the adjustment of the debts of insolvent municipal corporations and taxing districts.

The Municipal Bankruptcy Act was enacted by Congress to meet this situation. There was no intention, nor was it necessary, to extend the powers of the federal

courts over the taxing districts. The powers of the federal courts with reference to the enforcement of the defaulted municipal obligations were deemed to be adequate.

For generations federal courts, including this Court, have entertained suits for the enforcement of defaulted obligations of cities, towns, counties, townships, school districts, and other districts of every conceivable variety. It has never been considered that these powers were invasions of the sovereignty of the States. In *Lincoln County* v. *Luning*, 133 U. S. 5, it was contended that the Eleventh Amendment prohibited suits against counties in a federal court. That contention was expressly denied by this Court, and it has never been questioned since that the Eleventh Amendment prohibits only suits against the State itself.

The extension of the jurisdiction of the federal courts by the Municipal Bankruptcy Act, therefore, was an extension of jurisdiction over creditors only. The court was merely authorized to enter a decree, the effect of which was to require minority creditors to accept a composition, agreed upon by the holders of the requisite majority in amount of the obligations affected by the plan. So far as secured claims are concerned they could be affected by the decree only when the holder was a member of a class, and then only when the composition was desired by the requisite majority of the class and approved by the court. No power vested in the federal court by this Act, which might be exercised against the municipality or taxing district, can be pointed to which the court did not possess prior to the enactment.

The Act merely gave municipalities and taxing districts the right to institute a proceeding in the federal courts, which they did not theretofore possess. The proceeding must be instituted by the municipality itself. We fail to see how the extension of a right, which may or

may not be availed of at the option of the municipality or taxing district, can be construed as an invasion of the sovereignty of the States.

The rights of the bondholders to compel the collection of taxes by the municipality issuing the bonds in order to provide for their payment, are rights of private individuals, not the prerogatives of the sovereign. We admit that the federal courts cannot interfere with the control of the States over the fiscal affairs of their municipalities, with this qualification,—that they may require such municipalities to perform their contracts. No attempt is made by this Act, however, to control the fiscal affairs of the municipalities or taxing districts of the States.

Taxing districts, to which the Act is applicable, notwithstanding their public character, are corporations, entities distinct from the State. In their relations with creditors they are treated by the courts for all practical purposes as corporations. *Broughton* v. *Pensacola,* 93 U. S. 266; *Mount Pleasant* v. *Beckwith,* 100 U. S. 514; *Mobile* v. *Watson,* 116 U. S. 289. The Act merely undertakes to permit these corporations to enter into composition agreements with the majority of their creditors and to file a petition in the United States court praying for a decree making that composition binding upon all creditors.

The Act does not violate § 10 of Art. I of the Constitution of the United States, nor § 16 of Art. I of the Constitution of Texas.

Subdivisions like this Water Improvement District are not merely departments or branches of the state government; they are distinct entities; otherwise they could not be sued without the State's consent. Petitioners seem to contend that the Act is inoperative without concurrent legislation upon the part of the States expressly authorizing their municipalities and taxing districts to take advantage of it, and that such state legislation impairs the obligation of contracts.

The argument that concurrent legislation on the part of the States is necessary seems to proceed from the notion that the Act is an invasion of the sovereignty of the States, and, therefore, the several States must affirmatively give their consent to its provisions before the Act can be applicable to their municipalities. No other reason for the necessity for such concurrent legislation is given or even hinted at in the petitioners' brief.

But even assuming such concurrent legislation were necessary, such acts of the States consenting to the filing of bankruptcy petitions by municipalities would not constitute acts in violation of the obligation of contract. The right to file a petition in bankruptcy can only be conferred by Congress. If there is any impairment of the obligation of contracts, therefore, it is impairment by Act of Congress, under the bankruptcy power, which is constitutional.

The validity of the contract made between the District and the Reconstruction Finance Corporation cannot be attacked in this appeal.

By leave of Court, briefs of *amici curiae* were filed as follows:

Messrs. Stephen W. Downey, Harry W. Horton, and *George Herrington,* on behalf of the Merced Irrigation District of California, et al.; *Mr. Charles D. Frierson,* on behalf of Drainage District No. 7, Poinsett County, Arkansas; *Messrs. R. L. Ward* and *Charles Claflin Allen, Jr.,* on behalf of Drainage Districts Nos. 6 and 8, Pemiscot County, Missouri, et al.; *Mr. C. F. Metteer,* on behalf of Reclamation District No. 1,000, of California, et al.; *Mr. John D. McCall,* as bond counsel for several water improvement districts in Texas; *Messrs. Harvey Roney, George D. Beardsley, Harry L. Donnelly,* and *Martin E. Lawson,* on behalf of Birmingham Drainage District, Clay County, Missouri; and *Mr. George M.*

Corlett, on behalf of irrigation districts in Colorado—all in support of the validity of the Act.

Messrs. Herman Phleger and *Maurice E. Harrison,* and *Messrs. James N. Gillett, W. Coburn Cook, A. Heber Winder, Henry W. Coil, Ross T. Hickcox,* and *Charles L. Childers,* on behalf of creditors of irrigation districts, challenging the validity of the Act.

Solicitor General Reed and *Messrs. James B. Alley, Max O'Rell Truitt, Hans A. Klagsbrunn, Warner Gardner,* and *William Radner,* on behalf of the Reconstruction Finance Corporation.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Respondent, a water improvement district embracing 43,000 acres in Cameron County, Texas, was organized in 1914 under the laws of that State. Claiming to be insolvent and unable to meet its debts as they matured, it presented to the United States District Court, December 5, 1934, an Amended Petition with plan for adjusting its obligations—$800,000 six percent bonds. This proposed final settlement of these obligations through payment of 49.8 cents on the dollar out of funds to be borrowed from the Reconstruction Finance Corporation at four percent.

The petition follows and seeks relief under the Act of Congress approved May 24, 1934, c. 345, §§ 78, 79 and 80, 48 Stat. 798; Title 11 U. S. C., §§ 301, 302 and 303.* It alleges that more than thirty percent of the bondholders had accepted the plan and ultimately more than two-thirds would do so. The prayer asks confirmation of the proposal and that non-assenting bondholders be required to accept it.

Owners of more than five percent of outstanding bonds appeared, said there was no jurisdiction, denied the ex-

* Originally, this was limited to two years. By Act approved April 10, 1936, it was extended to January 1, 1940, c. 186, 49 Stat. 1198.

istence of insolvency, and asked that the petition be held insufficient.

The trial court dismissed the petition for lack of jurisdiction. It held—

The petitioner is a mere agency or instrumentality of the State, created for local exercise of her sovereign power—reclamation of arid land through irrigation. It owns no private property and carries on public business only. The bonds are contracts of the State, executed through this agency, and secured by taxes levied upon local property. Congress lacks power to authorize a federal court to readjust obligations, as provided by the Act. Also, the allegations of fact are insufficient.

The Circuit Court of Appeals took the cause, considered the points presented, and held that the allegations were adequate to show jurisdiction and to warrant introduction of evidence. Also that Congress had exercised the power "To establish . . . uniform Laws on the subject of Bankruptcies," granted by § 8, cl. 4, Art. 1 of the Constitution. Accordingly, it reversed the trial court and remanded the cause.

The Act of May 24, 1934 amended the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, by adding Chapter IX (three sections, 78, 79, 80), captioned "Provisions for the Emergency Temporary Aid of Insolvent Public Debtors and to Preserve the Assets thereof and for other Related Purposes."

Section 78 asserts an emergency rendering imperative further exercise of the bankruptcy powers. Section 79 directs that "in addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in this chapter."

Section 80—long and not free from ambiguities—in twelve paragraphs (a to l) prescribes the mode and con-

ditions under which, when unable to pay its debts as they mature, "any municipality or other political subdivision of any State, including . . . any county, city, borough, village, parish, town, or township, unincorporated tax or special assessment district, and any school, drainage, irrigation, reclamation, levee, sewer, or paving, sanitary, port, improvement or other districts" may effect a readjustment. A brief outline of the salient provisions, with some quotations, will suffice for present purposes.

The petition for relief must be filed in the District Court and submit plan for readjustment approved by creditors holding thirty percent of the obligations to be affected; also complete list of creditors. If satisfied that the petition is in good faith and follows the statute, the judge shall enter an approving order; otherwise, it must be dismissed. Creditors holding five percent of the indebtedness may appear in opposition.

"A plan of readjustment within the meaning of this chapter (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; and (2) may contain such other provisions and agreements, not inconsistent with this chapter, as the parties may desire."

Upon approval of the petition, creditors must be notified; if the plan is not seasonably accepted, extension may be granted, etc.

Hearings must be accorded. The judge, with its approval, "may direct the rejection of contracts of the taxing district executory in whole or in part." He may require the district to open its books; allow reasonable compensation; stay suits; enter an interlocutory decree declaring the plan temporarily operative, etc. "But [he] shall not, by any order or decree, in the proceeding or otherwise, interfere with any of the political or govern-

mental powers of the taxing district, or any of the property or revenues of the taxing district necessary in the opinion of the judge for essential governmental purposes, or any income-producing property, unless the plan of readjustment so provides."

After hearing, the judge shall confirm the plan, if satisfied that it is fair, equitable, for the best interests of the creditors, does not unduly discriminate, complies with the statute, and has been accepted by those holding two-thirds of the indebtedness. Also, that expenses incident to the readjustment have been provided for, that both plan and acceptance are in good faith and the district is authorized by law to take all necessary action.

The provisions of the plan, after order of confirmation, shall be binding upon the district and all creditors, secured or unsecured. Final decree shall discharge the district from all debts and liabilities dealt with by the plan, except as otherwise provided.

"(k) Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any political subdivision thereof in the exercise of its political or governmental powers, including expenditures therefor, and including the power to require the approval by any governmental agency of the State of the filing of any petition hereunder and of any plan of readjustment, and whenever there shall exist or shall hereafter be created under the law of any State any agency of such State authorized to exercise supervision or control over the fiscal affairs of all or any political subdivisions thereof, and whenever such agency has assumed such supervision or control over any political subdivision, then no petition of such political subdivision may be received hereunder unless accompanied by the written approval of such agency, and no plan of readjustment shall be put into temporary effect or finally confirmed without the written approval of such agency of such plans."

We need not consider this Act in detail or undertake definitely to classify it. The evident intent was to authorize a federal court to require objecting creditors to accept an offer by a public corporation to compromise, scale down, or repudiate its indebtedness without the surrender of any property whatsoever. The Act has been assailed upon the ground that it is not in any proper sense a law on the subject of bankruptcies and therefore is beyond the power of Congress; also because it conflicts with the Fifth Amendment. Passing these, and other objections, we assume for this discussion that the enactment is adequately related to the general "subject of bankruptcies." See *Hanover National Bank* v. *Moyses,* 186 U. S. 181; *Continental Illinois N. B. & T. Co.* v. *C., R. I. & P. Ry. Co.,* 294 U. S. 648; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

The respondent was organized in 1914 as Cameron County Irrigation District No. One, to furnish water for irrigation and domestic uses; in 1919, it became the Cameron County Water Improvement District No. One, all as authorized by statutes passed under § 52, Art. 3, Constitution of Texas, which permits creation of political divisions of the State, with power to sue and be sued, issue bonds, levy and collect taxes. An amendment to the Constitution—§ 59a, Art. 16—(October 2, 1917) declares the conservation and development of all the natural resources of the State, including reclamation of lands and their preservation, are "public rights and duties." Most of the bonds now in question were issued during 1914; the remainder in 1919.

By Act approved April 27, 1935, the Texas Legislature declared that municipalities, political subdivisions, taxing districts, &c., might proceed under the Act of Congress approved May 24, 1934.

It is plain enough that respondent is a political subdivision of the State, created for the local exercise of

her sovereign powers, and that the right to borrow money is essential to its operations. *Houck* v. *Little River Drainage District,* 239 U. S. 254, 261–262; *Perry* v. *United States,* 294 U. S. 330. Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right so to do is definitely accorded by the Federal Constitution.

The pertinent doctrine, now firmly established, was stated through Mr. Chief Justice Chase in *Texas* v. *White,* 7 Wall. 700, 725.—

"We have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Collector v. *Day,* 11 Wall. 113, 125, 126—

"Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Con-

stitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575, *et seq.,* relevant cases are collected and the following conclusion announced—

"This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system."

Notwithstanding the broad grant of power "to lay and collect taxes," opinions here plainly show that Congress could not levy any tax on the bonds issued by the respondent or upon income derived therefrom. So to do would be an unwarranted interference with fiscal matters of the State—essentials to her existence. Many opinions explain and support this view. In *United States* v. *Railroad Co.,* 17 Wall. 322, 329, this court said—

"A municipal corporation like the city of Baltimore is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As

a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."
See also *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 586; 158 U. S. 601, 630.

The power "To establish . . . uniform Laws on the subject of Bankruptcies" can have no higher rank or importance in our scheme of government than the power "to lay and collect taxes." Both are granted by the same section of the Constitution, and we find no reason for saying that one is impliedly limited by the necessity of preserving independence of the States, while the other is not. Accordingly, as application of the statutory provisions now before us might materially restrict respondent's control over its fiscal affairs, the trial court rightly declared them invalid.

If federal bankruptcy laws can be extended to respondent, why not to the State? If voluntary proceedings may be permitted, so may involuntary ones, subject of course to any inhibition of the Eleventh Amendment. *In re Quarles,* 158 U. S. 532, 535. If the State were proceeding under a statute like the present one, with terms broad enough to include her, apparently the problem would not be materially different. Our special concern is with the existence of the power claimed—not merely the immediate outcome of what has already been attempted. And it is of the first importance that due attention be given to the results which might be brought about by the exercise of such a power in the future.

The especial purpose of all bankruptcy legislation is to interfere with the relations between the parties concerned—to change, modify or impair the obligation of their contracts. The statute before us expresses this design in plain terms. It undertakes to extend the supposed power of the Federal Government incident to bankruptcy over any embarrassed district which may ap-

ply to the court. See *Perry* v. *United States,* 294 U. S. 330, 353.

If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist. *McCulloch* v. *Maryland,* 4 Wheat. 316, 430. *Farmers & Mechanics Bank* v. *Minnesota,* 232 U. S. 516, 526.

The Constitution was careful to provide that "No State shall pass any Law impairing the Obligation of Contracts." This she may not do under the form of a bankruptcy act or otherwise. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 191. Nor do we think she can accomplish the same end by granting any permission necessary to enable Congress so to do.

Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. *United States* v. *Butler,* decided January 6, 1936, 297 U. S. 1. The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation. See *United States* v. *Constantine,* 296 U. S. 287.

Like any sovereignty, a State may voluntarily consent to be sued; may permit actions against her political subdivisions to enforce their obligations. Such proceedings against these subdivisions have often been entertained in federal courts. But nothing in this tends to support the view that the Federal Government, acting under the bankruptcy clause, may impose its will and impair state powers—pass laws inconsistent with the idea of sovereignty.

The power to regulate commerce is necessarily exclusive in certain fields and, to be successful, must prevail

over obstructive regulations by the State. But, as pointed out in *Houston, E. & W. T. Ry.* v. *United States,* 234 U. S. 342, 353, "This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce." No similar situation is before us.

The difficulties arising out of our dual form of government, and the opportunities for differing opinions concerning the relative rights of State and National Governments are many; but for a very long time this court has steadfastly adhered to the doctrine that the taxing power of Congress does not extend to the States or their political subdivisions. The same basic reasoning which leads to that conclusion, we think, requires like limitation upon the power which springs from the bankruptcy clause. *United States* v. *Butler, supra.*

The challenge to the validity of the statute must be sustained. The judgment of the Circuit Court of Appeals is reversed. The cause will be returned to the District Court for further action, consistent with this opinion.

Reversed.

MR. JUSTICE CARDOZO, dissenting.

The question is a narrow one: Is there power in the Congress under the Constitution of the United States to permit local governmental units generally, and irrigation or water improvement districts in particular, to become voluntary bankrupts with the consent of their respective states?

Cameron County Water Improvement District Number One is a public corporation created by the laws of Texas. It has issued bonds for the construction of a canal system, which bonds are outstanding in the amount of $802,000. Default has been suffered to the extent of $147,000, either

for principal or for interest, upon its obligations now matured. But its own indebtedness is only a part of the financial burden that oppresses it. The bonded debt of other municipalities is a superior lien upon the property in the District for $10,386,000, and accumulated interest. The population is mainly agricultural. The farmers have been unable by reason of the great depression to make a living from their farms, and unable to pay their taxes in appreciable amounts. The District has made diligent effort to enforce collections, but without success. When it has attempted to foreclose its liens, it has been compelled for lack of bidders to buy the lands in and pay the court costs. After buying the lands in, it has been unable to get rid of them, for they have been subject to other tax liens prior to its own. The defaults are steadily mounting. For the year 1932, they were 63%; for the year 1933, 88.9%. The average market value of lands in the District does not exceed $75 per acre; and the total bonded debt per acre, principal and interest, is approximately $100. In these circumstances little good can come of levying more taxes to pyramid the existing structure. The remedies of bondholders are nominal, not real.

What is true of Cameron County Water Improvement District Number One is true in essentials of thousands of other public corporations in widely scattered areas. The hearings by committees of the Congress before the passage of the statute exhibit in vivid fashion the breadth and depth of the mischief which the statute was designed to remedy.[1] In January, 1934, 2019 municipalities, counties and other governmental units were known to be in default.[2] On the list, which was incomplete, were large

[1] See Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1868 and H. R. 5950, 1934, 73rd Cong., 2nd Sess.; Hearings before the House Committee on the Judiciary on H. R. 1670, etc., 1933, 73rd Cong., 1st Sess.

[2] See Senate Committee Hearings, *supra,* at p. 12.

cities as well as tiny districts. Many regions were included: 41 out of 48 states. Students of government have estimated that on January 1, 1933, out of securities to the extent of $14,000,000,000 issued by units smaller than the states, a billion were in default.[3] The plight of the debtors was bad enough; that of the creditors was even worse. It is possible that in some instances the bonds did not charge the municipalities or other units with personal liability. Even when they did, however, execution could not issue against the property of the debtor held for public uses,[4] and few of the debtors were the owners of anything else. In such circumstances the only remedy was a mandamus whereby the debtor was commanded to tax and tax again. *Rees* v. *Watertown,* 19 Wall. 107; *Meriwether* v. *Garrett,* 102 U. S. 472, 501.[5] The command was mere futility when tax values were exhausted. Often the holders of the bonds to the extent of ninety per cent or more were ready to scale down the obligations and put the debtor on its feet. A recalcitrant minority had capacity to block the plan. Nor was there hope for relief from statutes to be enacted by the states. The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts, and a state insolvency act is of no avail as to obligations of the debtor incurred before its passage. *Sturges* v. *Crowninshield,* 4 Wheat. 122. Relief must come from Congress if it is to come from any one.

The next step in the inquiry has to do with the power of the Congress to eradicate the mischief. Is the Act in question, adopted May 24, 1934, to continue for two years (§§ 78, 79 and 80 of the Bankruptcy Act of 1898, as amended by 48 Stat. 798; 11 U. S. C. §§ 301, 302, 303),

---

[3] See the statistics gathered in 46 Harvard Law Review 1317.

[4] For a collection of the cases, see 3 McQuillin, Municipal Corporations, 2nd ed., § 1262.

[5] The cases are collected in 33 Columbia Law Review 28, 44.

and now extended to January 1, 1940 (April 10, 1936, c. 186, 49 Stat. 1198), a law "on the subject of Bankruptcies" within Article I, Section VIII, Clause 4 of the Constitution of the United States? Recent opinions of this court have traced the origin and growth of the bankruptcy power. *Continental Illinois National Bank* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 668; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 588. The history is one of an expanding concept. It is, however, an expanding concept that has had to fight its way. *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 184; Charles Warren, Bankruptcy in United States History (1935), p. 9. Almost every change has been hotly denounced in its beginnings as a usurpation of power. Only time or judicial decision has had capacity to silence opposition. At the adoption of the Constitution the English and Colonial bankruptcy laws were limited to traders and to involuntary proceedings. An Act of Congress passed in 1800 added bankers, brokers, factors and underwriters. Doubt was expressed as to the validity of the extension (*Adams* v. *Storey,* 1 Paine 79, 82), which established itself, however, with the passing of the years. *Hanover National Bank* v. *Moyses, supra.* Other classes were brought in later, through the bankruptcy Act of 1841 and its successors, "until now practically all classes of persons and corporations are included." *Continental Illinois National Bank* v. *Chicago, R. I. & P. Ry. Co., supra,* at p. 670. For nearly a century, voluntary proceedings have been permitted at the instance of the debtor as well as involuntary proceedings on the petition of creditors. The amendment, however, was resisted. The debates in Congress bear witness to the intensity of the feeling aroused by its proposal. Warren, *op. cit. supra,* at p. 72 *et seq.* For more than sixty years, the debtor has been able to compel a minority of his creditors to accept a composition if the terms have been approved by a designated majority as well as by the judge.

This change like the others had to meet a storm of criticism in Congress and the courts. Warren, *op. cit. supra,* at pp. 44, 45, 118–120; *In re Klein,* reported in a note to *Nelson* v. *Carland,* 1 How. 265, 277; *Louisville Joint Stock Land Bank* v. *Radford, supra.* Since the enactment of § 77 in March, 1933 (47 Stat. 1474; 11 U. S. C. § 205), a court of bankruptcy has been empowered to reorganize railroad corporations unable to pay their debts as they mature (*Continental Illinois National Bank* v. *Chicago, R. I. & P. Ry. Co., supra*), and since the enactment of § 77 B in June, 1934 (48 Stat. 912; 11 U. S. C. § 207), a like jurisdiction has existed in respect of business corporations generally. The Act for the relief of local governmental units is a stage in an evolutionary process which is likely to be misconceived unless regarded as a whole.[6]

Throughout that evolutionary process, the court has hewn a straight path.[7] Disclaiming a willingness to bind

---

[6] Warren, Bankruptcy in United States History (1935), p. 9: "The trail [of the bankruptcy clause] is strewn with a host of unsuccessful objections based on constitutional grounds against the enactment of various provisions, all of which are now regarded as perfectly orthodox features of a bankruptcy law. Thus, it was at first contended that, constitutionally, such a law must be confined to the lines of the English statute; next, that it could not discharge prior contracts; next, that a purely voluntary law would be non-uniform and therefore unconstitutional; next, that any voluntary bankruptcy was unconstitutional; next, that there could be no discharge of debts of any class except traders; next, that a bankruptcy law could not apply to corporations; next, that allowance of State exemptions of property would make a bankruptcy law non-uniform; next, that any composition was unconstitutional; next, that there could be no composition without an adjudication in bankruptcy; next, that there could be no sale of mortgaged property free from the mortgage. All these objections, so hotly and frequently asserted from period to period, were overcome either by public opinion or by the Court."

[7] The Emergency Farm Mortgage Act of 1933 was condemned in *Louisville Joint Stock Land Bank* v. *Radford, supra,* because destructive of rights of property protected by the Fifth Amendment.

itself by a cramping definition, it has been able none the less to indicate with clearness the main lines of its approach. In substance, it agrees with Cowen, J., who wrote: "I read the constitution thus: 'Congress shall have power to establish uniform laws on the subject of any person's general inability to pay his debts throughout the United States'" (*Kunzler* v. *Kohaus,* 5 Hill 317, 321), and with Blatchford, J., writing in the *Matter of Reiman,* Fed. Cas. No. 11,673, p. 496, that the subject of bankruptcy cannot properly be defined as "anything less than the subject of the relations between an insolvent or nonpaying . . . debtor, and his creditors, extending to his and their relief." See *Hanover National Bank* v. *Moyses supra; Continental Illinois National Bank* v. *Chicago, R. I. & P. Ry. Co., supra; Louisville Joint Stock Land Bank* v. *Radford, supra.* Such was Story's view also. "A law on the subject of bankruptcies in the sense of the Constitution is a law making provision for persons failing to pay their debts." Story, Commentaries on the Constitution, § 1113, n. 3; cf. Warren, *op. cit. supra,* at p. 68. It is not necessary that the debtor have any property to surrender. One may resort to a court of bankruptcy though one has used up all one's property or though what is left is exempt. *Vulcan Sheet Metal Co.* v. *North Platte Valley Irrigation Co.,* 220 Fed. 106, 108; *In re Hirsch,* 97 Fed. 571, 573; *In re J. M. Ceballos & Co.,* 161 Fed. 445, 450. It is enough that in an omnibus proceeding between a nonpaying debtor on the one side and the creditors on the other, the debtor-creditor relation is to be readjusted or extinguished. Cf. Warren, *op. cit. supra,* at pp. 8, 144.

Cameron Water Improvement District Number One has no assets to surrender. If it shall turn out hereafter that there are any not exempt, the creditors may have them. Cameron Water Improvement District Number One is a debtor in an amount beyond its capacity for

payment, and has creditors, the holders of its bonds, who are persuaded that a reduction of the debt will redound to their advantage. Thirty per cent of the creditors had signified their approval of a proposed plan of composition before the filing of the petition, and 66⅔ per cent must give approval before the judge can act.[8] Even then the plan will count for nothing unless the judge upon inquiry shall hold it fair and good. A situation such as this would call very clearly for the exercise by a court of bankruptcy of its distinctive jurisdiction if the debtor were a natural person or a private corporation. Is there anything in the position of a governmental unit that exacts a different conclusion?

The question is not here whether the statute would be valid if it made provision for involuntary bankruptcy, dispensing with the consent of the state and with that of the bankrupt subdivision. For present purposes one may assume that there would be in such conditions a dislocation of that balance between the powers of the states and the powers of the central government which is essential to our federal system. Cf. *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U. S. 315; *United States* v. *California,* 297 U. S. 175. To read into the bankruptcy clause an exception or proviso to the effect that there shall be no disturbance of the federal framework by any bankruptcy proceeding is to do no more than has been done already with reference to the power of taxation by decisions known of all men. *McCulloch* v. *Maryland,* 4 Wheat. 316. The statute now in question does not dislocate the balance. It has been framed with sedulous regard to the structure of the federal system. The governmental units of the state may not act under this statute except through the medium of a voluntary

[8] For taxing districts other than drainage, irrigation, reclamation and levee districts, the requisite percentages are 51% and 75% respectively.

petition which will evince their own consent, their own submission to the judicial power. Even that, however, is not enough. By subdivision (k), which is quoted in the margin,[9] the petition must be accompanied by the written approval of the state, whenever such consent is necessary by virtue of the local law. There is still another safeguard. By subdivision (e) (6), the composition, though approved by the requisite majority, shall not be confirmed by the judge unless he is satisfied that "the taxing district is authorized by law, upon confirmation of the plan, to take all action necessary to carry out the plan." To cap the protective structure, Texas has a statute whereby all municipalities, political subdivisions and taxing districts in the state are empowered to proceed under the challenged Act of Congress, and to do anything appropriate to take advantage of its provisions. This statute became a law on April 27, 1935 (Texas, Laws 1935, c. 107), after the dismissal of the proceeding in the District Court, but before the reversal of that decision by the Court of Appeals. Being law at that time it was to be considered and applied. *United States* v. *The Peggy,* 1 Cranch 103, 110; *Danforth* v. *Groton Water*

[9] "(k) Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any political subdivision thereof in the exercise of its political or governmental powers, including expenditures therefor, and including the power to require the approval by any governmental agency of the State of the filing of any petition hereunder and of any plan of readjustment, and whenever there shall exist or shall hereafter be created under the law of any State any agency of such State authorized to exercise supervision or control over the fiscal affairs of all or any political subdivisions thereof, and whenever such agency has assumed such supervision or control over any political subdivision, then no petition of such political subdivision may be received hereunder unless accompanied by the written approval of such agency, and no plan of readjustment shall be put into temporary effect or finally confirmed without the written approval of such agency of such plans."

Co., 178 Mass. 472, 475, 476; 59 N. E. 1033; *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 281; 144 N. E. 579. There are like statutes in other states. Arizona, Laws 1935, c. 17; California, Laws (Extra Session) 1934, c. 4; Florida, Laws 1933, c. 15878; Ohio, Laws (2nd Special Session) 1934, No. 77. In Texas, at all events, it is clear to the point of demonstration, that the filing of a voluntary petition by a political subdivision does not violate the local law or any local public policy. Petitioners are not the champions of any rights except their own. *Premier-Pabst Sales Co.* v. *Grosscup, ante,* p. 226; *Hatch* v. *Reardon,* 204 U. S. 152, 160, 161.

To overcome an Act of Congress invalidity must be proved beyond a reasonable doubt. *Ogden* v. *Saunders,* 12 Wheat. 213, 270; *Sinking-Fund Cases,* 99 U. S. 700, 718. Sufficient reasons do not appear for excluding political subdivisions from the bankruptcy jurisdiction if the jurisdiction is so exerted as to maintain the equilibrium between state and national power. Persuasive analogies tell us that consent will preserve a balance threatened with derangement. A state may not tax the instrumentalities of the central government. It may do so, however, if the central government consents. *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209. Reciprocally, the central government, consent being given, may lay a tax upon the states. Cf. *United States* v. *California, supra.* So also, interference by a state with interstate or foreign commerce may be lawful or unlawful as consent is granted or withheld. *In re Rahrer,* 140 U. S. 545; *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311; *Whitfield* v. *Ohio,* 297 U. S. 431. The prevailing opinion tells us in summing up its conclusions that the bankruptcy power and the taxing power are subject to like limitations when the interests of a state are affected by their action. Let that test be applied, and the Act must be upheld, for jurisdiction is withdrawn if the state does not approve.

Reasons of practical convenience conspire to the same conclusion. If voluntary bankruptcies are anathema for governmental units, municipalities and creditors have been caught in a vise from which it is impossible to let them out. Experience makes it certain that generally there will be at least a small minority of creditors who will resist a composition, however fair and reasonable, if the law does not subject them to a pressure to obey the general will. This is the impasse from which the statute gives relief. "The controlling purpose of the bill is to provide a forum where distressed cities, counties and minor political subdivisions, designated in the bill as 'taxing districts,' of their own volition, free from all coercion, may meet with their creditors under the necessary judicial control and assistance in an effort to effect an adjustment of their financial matters upon a plan deemed mutually advantageous. If a plan is agreed upon by the taxing district and its creditors holding two-thirds [in some instances three-fourths] in amount of the claims of each class of indebtedness, and if the court is satisfied that the plan is workable and equitable, it may confirm the plan, and the minority creditors are bound thereby." Report No. 207, House Judiciary Committee, June 7, 1933. To hold that this purpose must be thwarted by the courts because of a supposed affront to the dignity of a state, though the state disclaims the affront and is doing all it can to keep the law alive, is to make dignity a doubtful blessing. Not by arguments so divorced from the realities of life has the bankruptcy power been brought to the present state of its development during the century and a half of our national existence.

The Act does not authorize the states to impair through their own laws the obligation of existing contracts. Any interference by the states is remote and indirect. Cf. *In re Imperial Irrigation District,* 10 F. Supp. 832, 841. At most what they do is to waive a personal privilege that

they would be at liberty to claim. Cf. *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 284. If contracts are impaired, the tie is cut or loosened through the action of the court of bankruptcy approving a plan of composition under the authority of federal law. There, and not beyond in an ascending train of antecedents, is the cause of the impairment to which the law will have regard. Cf. *Howard Fire Insurance Co.* v. *Norwich & New York Transportation Co.*, 12 Wall. 194, 199; *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 533. Impairment by the central government through laws concerning bankruptcies is not forbidden by the Constitution. Impairment is not forbidden unless effected by the states themselves. No change in obligation results from the filing of a petition by one seeking a discharge, whether a public or a private corporation invokes the jurisdiction. The court, not the petitioner, is the efficient cause of the release.

The Act is not lacking in uniformity because applicable only to such public corporations as have the requisite capacity under the law of the place of their creation. *Hanover National Bank* v. *Moyses, supra,* at p. 190. *Stellwagen* v. *Clum,* 245 U. S. 605, 613. Capacity existing, the rule is uniform for all. *Ibid.*

No question is before us now, and no opinion is intimated, as to the power of Congress to enlarge the privilege of bankruptcy by extending it to the states as well as to the local units. Even if the power exists, there has been no attempt to exercise it. There is room at least for argument that within the meaning of the Constitution the bankruptcy concept does not embrace the states themselves. In the public law of the United States a state is a sovereign or at least a quasi-sovereign. Not so, a local governmental unit, though the state may have invested it with governmental power. Such a governmental unit may be brought into court against its will

without violating the Eleventh Amendment. *Lincoln County* v. *Luning,* 133 U. S. 529; *Hopkins* v. *Clemson College,* 221 U. S. 636, 645. It may be subjected to mandamus or to equitable remedies. See, e. g., *Norris* v. *Montezuma Valley Irrigation District,* 248 Fed. 369, 372; *Tyler County* v. *Town,* 23 F. (2d) 371, 373. "Neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty." *Hopkins* v. *Clemson College, supra.*

No question as to the merits of any plan of composition is before us at this time. *Abrams* v. *Van Schaick,* 293 U. S. 188. Attention, however, may be directed to the fact that by the terms of the statute, subdivision c (11), the judge "shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the taxing district, or (b) any of the property or revenues of the taxing district necessary in the opinion of the judge for essential governmental purposes, or (c) any income-producing property, unless the plan of readjustment so provides," and that "the taxing district shall be heard on all questions." These restrictions upon remedies do not take from the statute its quality as one affecting the "subject of Bankruptcies," which, as already pointed out, includes a readjustment of the terms of the debtor-creditor relation, though there are no assets to be distributed. On the other hand, the restrictions are important as indicating the care with which the governmental powers of the state and its subdivisions are maintained inviolate.

The statute is constitutional, and the decree should be affirmed.

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

UNITED STATES *v.* KNOTT, STATE TREASURER, ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 643. Argued March 30, 31, 1936.—Decided May 25, 1936.

1. A surety company which by court order upon its own petition had been placed in the hands of a statutory liquidator in the State of its incorporation, was "insolvent" within the meaning of R. S., § 3466, giving priority to debts due to the United States whenever a person so indebted is insolvent. P. 547.
2. U. S. Code, Title 6, §§ 1–11, prescribing the conditions under which a surety company may write certain surety bonds in favor of the United States, was not intended to exclude from the operation of R. S., § 3466, liabilities arising upon such bonds. P. 547.
3. A claim of the United States upon judgments recovered against a surety company on estreated bail bonds *held* entitled to priority under R. S., § 3466. P. 548.
4. This Court accepts as conclusive a decision of the state supreme court construing a statute of the State. P. 548.
5. An inchoate lien is not enough to defeat the priority of the United States under R. S., § 3466. P. 549.
6. The interest of persons who may become entitled to the proceeds of a deposit made with the State Treasurer pursuant to Compiled General Laws of Florida, §§ 6302, 6303, either as unsatisfied judgment creditors, or as Florida creditors at the time when insolvency supervenes, lacks the characteristics of a specific perfected lien which alone would bar the priority of the United States. Pp. 550–551.
7. The judgment of the state court denying priority prejudiced the rights of the United States. P. 551.
8. The judgment of the state supreme court here under review, denying the claim of the United States to priority, was a final judgment under the rules governing the jurisdiction of this Court. That the order of the lower court from which appeal was taken to the supreme court of the State may not, under the state practice, have been a final order, is here immaterial. P. 551.
9. The Florida courts had jurisdiction to award priority to the claim of the United States out of the proceeds of the deposit, even though the general assets were being liquidated in New Jersey. P. 552.

120 Fla. 580; 163 So. 64, reversed.

CERTIORARI, 297 U. S. 700, to review a judgment which denied the United States a claim of priority under R. S., § 3466. The state supreme court had affirmed, with some modification, an order of the trial court. Sub nom. *Kelly* v. *Knott.*

Mr. Alger Hiss, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Paul A. Sweeney* and *Hadley W. Libbey* were on the brief, for the United States.

Mr. C. L. Waller, with whom *Mr. Claude Pepper* was on the brief, for D. M. Lowry, Receiver, respondent.

Mr. H. E. Carter, Assistant Attorney General of Florida, with whom *Mr. Cary D. Landis,* Attorney General, was on the brief, for W. V. Knott, State Treasurer, respondent.

Mr. Herbert U. Feibelman, with whom *Mr. Saul Nemser* was on the brief, for Carl K. Withers, Commissioner of Banking and Insurance of New Jersey, respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The New Jersey Fidelity and Plate Glass Insurance Company is a surety company organized under the laws of that State. In 1932, it became insolvent; was upon its petition placed by a New Jersey court for liquidation in the hands of Kelly, the New Jersey Commissioner of Banking and Insurance; and he sought to take possession of its assets wherever situated. In 1930, the company had deposited securities of the face value of $75,000 with the State Treasurer of Florida in order to qualify there pursuant to §§ 6302 and 6303 of Florida Compiled General Laws. It entered into many surety obligations in Florida

prior to its insolvency; but no unsatisfied judgment against it was outstanding there when the New Jersey liquidation proceeding was begun.

Kelly brought suit in Florida against State Treasurer Knott to restrain disposition of the deposited securities except upon order of that court. After the institution of his suit, an amendment to § 6303 made by Chapter 16248 of the Florida Laws, 1933, provided that in case the assets of a surety company should be placed in liquidation in the state of its incorporation, a Florida court "shall have jurisdiction, upon bill filed by any party in interest, to take charge of the securities so deposited with the State Treasurer" and "distribute the proceeds of the sale of said securities proportionally among all of the Florida creditors who may make proof of their claims," "the surplus, if any, to be disposed of by proper order of such court." Thereupon, a Florida creditor brought suit under the amendment; that suit was consolidated with the one which Kelly had instituted; and a receiver was appointed who took possession of the securities and sold them.

In the receivership proceeding the United States filed, and under Revised Statutes 3466 claimed priority for, a debt of $14,075, that sum being the aggregate of twenty judgments which it recovered against the company in Florida on estreated appearance, or bail, bonds given there. The Florida officials insisted that the claim of the United States must be postponed to those of Florida creditors; the New Jersey commissioner, that priority can be accorded the United States, in any event, only in the domiciliary proceeding. The trial court denied it priority; and directed that debts due Florida, its political subdivisions, citizens or residents, be paid. The decree left undetermined whether the United States was entitled to receive in Florida payment from the residue after satisfaction of such Florida debts, or whether the residue

should be transmitted to the domiciliary liquidator. The United States appealed on the ground that it has been denied priority; the New Jersey commissioner on the ground that the domiciliary liquidator was entitled to the residue remaining after satisfying the claims of creditors reduced to judgment prior to the institution of the proceedings in New Jersey. The order of the trial court was affirmed by the Supreme Court, with some modification. *Kelly* v. *Knott,* 120 Fla. 580; 163 So. 64. We granted certiorari, because of the importance of the question involved.

First. Revised Statutes, § 3466, provides that "whenever any person indebted to the United States is insolvent" "the debts due to the United States shall be first satisfied." It is clear that, within the meaning of the section, the company had become insolvent, *Bramwell* v. *United States Fidelity & Guaranty Co.,* 269 U. S. 483, 488–490, and that, ordinarily, debts due on judgments recovered by the United States are "debts due to the United States." *Price* v. *United States,* 269 U. S. 492, 499–500. Compare *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 134; *Pierce* v. *United States,* 255 U. S. 398, 401–402. See also *United States* v. *Mack,* 295 U. S. 480. The Florida officials contend that, since the priority accorded the United States depends entirely upon the statutory provision and is not an attribute of sovereignty, *United States* v. *State Bank,* 6 Pet. 29, Congress may deny to the Government the right of priority; and that, by prescribing elsewhere the conditions under which a surety company may write certain surety bonds in favor of the United States, U. S. C., Tit. 6, §§ 1–11, it has indicated its intention to exclude the liabilities here involved from the operation of § 3466. We do not construe the legislation concerning surety bonds as having such effect. The cases relied upon dealt with legislation of a different character. *Davis* v. *Pringle,* 268 U. S. 315; *Mellon* v. *Michi-*

gan Trust Co., 271 U. S. 236; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478. We are of opinion that the claim presented is, in its nature, one entitled to priority.

Second. The main question for decision is whether the Florida statute divested the company's title to the deposited securities or created a perfected lien thereon, so as to give the Florida creditors precedence over the United States.

Section 6302 of the Florida Laws, which required the deposit declares:

"And whenever such company ceases to do business in this State, and has settled up all claims against it, as hereinafter provided, and has been released from all the bonds upon which they have been taken as sureties said bonds [securities] shall be delivered up to the proper party on presentation of the Treasurer's receipt for said bonds."

Section 6303, as amended, provides:

"Whenever a final judgment has been rendered against any surety company on a fidelity, appearance, supersedeas or surety bond, the surety on said bond shall pay the same within thirty days. Upon notice of failure to pay the amount due under said bond within said time, the State Treasurer shall retain the bonds or securities deposited with him by said surety company . . . to cover said judgment and costs, subject to the order of the court trying any suit that may be brought upon said bond . . . ." [Then follows the amendment of 1933 authorizing institution of the suit.]

The trial court found that, by the deposit, the securities had been segregated and set apart out of the general assets of the company prior to the accrual of any liens of, or obligations to, the United States. We accept that finding as conclusive of the facts. The Supreme Court declared that the securities deposited by the company with the State Treasurer constituted "a trust fund

to be held by him for the protection and benefit of all Florida claimants entitled to seek satisfaction thereout, regardless of the continued solvency of the depositing corporation or its voluntary cessation of business in the State of Florida"; and that, in enacting the legislation requiring such deposit, Florida did so with the intention of protecting those whom it had the power and duty to protect. It held that the deposit with the State Treasurer constituted a trust fund for the benefit of Florida, its political subdivisions, citizens and residents; that they were entitled to be paid first out of it; and that the United States was not a beneficiary of such trust fund. Insofar as the decision of the Supreme Court is a construction of the statute of the State, we accept it as conclusive.

Third. The question for our decision is the legal effect upon the asserted federal right of the statute so construed. As was said in *Thelusson* v. *Smith,* 2 Wheat. 396, 426: "The United States are to be first satisfied; but then, it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fi. fa.,* the property is divested out of the debtor, and cannot be made liable to the United States." See also *Beaston* v. *Farmers' Bank of Delaware,* 12 Pet. 102, 135–136. The deposit of the securities rendered them subject to process within the State; and it may be assumed that the contemplated beneficiaries would have acquired thereby precedence over those claiming under a later voluntary assignment by the company or any later levy. But it is settled that an inchoate lien is not enough to defeat the priority. *United States* v. *Oklahoma,* 261 U. S. 253; *Spokane County* v. *United States,* 279 U. S. 80; *New York* v. *Maclay,* 288 U. S. 290. Unless the law

of Florida effected, at least as early as the date of insolvency, either a transfer of title from the company, or a specific perfected lien in favor of the Florida creditors, the United States is entitled to priority.

The Supreme Court of Florida holds, in the case at bar, that the amendment, which was not enacted until after the institution of the liquidation proceeding in New Jersey, did not change substantive rights. And in *State* v. *Knott,* 114 Florida 95, 99; 153 So. 606, also decided after enactment of the amendment, the court describes thus the effect of a deposit:

"The correct interpretation of the statute is that the securities in the hands of the State Treasurer so held in trust by him for the account of the depositing company, are merely segregated assets of the surety company which, while capable of being specifically applied to the satisfaction of such final judgments against the surety company on fidelity and surety bonds as shall remain unpaid for thirty days, do not become impressed with the judgment lien until after the notice pursuant to which they may be expressly subjected thereto by the order of the court rendering a judgment on a bond executed by the depositing surety company."

Obviously, the deposit did not divest the company's title to the securities. No one was appointed trustee; and, at the time of the deposit, there was no ascertainable beneficiary. Who would share in the proceeds of the securities could not be known until they were exhausted in satisfaction of judgments, or until the entry of the decree of distribution in a suit authorized by the 1933 amendment. While in the case at bar the Supreme Court declared that the deposit created a "trust fund," the term appears to have been used to connote an inchoate general lien for the benefit of those persons who may become entitled to be paid from the proceeds, either as unsatisfied judgment creditors, or as Florida creditors at the time

when insolvency supervenes. Such an interest lacks the characteristics of a specific perfected lien which alone bars the priority of the United States.

Fourth. The Florida officials construe the opinion of its Supreme Court as holding that the United States is entitled to be paid in this proceeding from the surplus remaining after payment of the Florida creditors. They urge that from the report of the receiver it appears that such surplus will be adequate to satisfy the claim of the United States; they contend that, hence, the United States is not adversely affected by the judgment under review; and they ask that the judgment be affirmed, or the certiorari be dismissed, on this ground. But no order has been entered in either of the Florida courts directing payment of the surplus to the United States; and, moreover, it is not clear that the surplus, if so applied, would satisfy its claim. As the debt due the United States remains unpaid, the judgment denying it priority prejudices its right.

Fifth. Finally, the Florida officials contend that this Court lacks jurisdiction, because the order of the trial court (that of May 28, 1934) which gave the local creditors priority over the United States, constituted the final order in the case and disposed of the right which the United States is here asserting; that this order was not appealed from; and that the later order of the trial court (that of October 27, 1934) from which an appeal was taken to the Supreme Court of Florida, was not a final order. We have no occasion to enquire into these matters which are of local concern. The judgment here under review is that of the Supreme Court. It denied to the United States the priority claimed under § 3466. That denial is a final judgment under the rules governing our jurisdiction. *Ex parte Tiffany,* 252 U. S. 32, 36.

Sixth. The New Jersey commissioner contends that the proceeds of the securities remaining after satisfying the

claims of the local creditors must be transmitted to New Jersey; and that the Florida courts are without jurisdiction to award priority to the United States. It is true that the priority statute is not applicable unless insolvency has been manifested by some proceeding equivalent to an assignment of all of the debtor's property, *United States* v. *Oklahoma,* 261 U. S. 253, 262; *United States* v. *Hooe,* 3 Cranch 73, 91. The priority could not have been asserted in Florida or elsewhere, if there had been no such assignment. But this requirement of the statute was satisfied by the liquidation suit in New Jersey. *United States* v. *Butterworth-Judson Corp.,* 269 U. S. 504. The United States properly intervened in Florida in order to prevent the assets there from being applied in payment of local claims believed to be subordinate to its own. No rule of law precludes it from asserting its priority by an appropriate proceeding in any jurisdiction in which property of the insolvent is being administered. The Florida court did not lack power to entertain its application; and the fact that the claim originated in Florida and was reduced to judgment there, made it appropriate that the United States should seek there satisfaction from funds deposited to assure payment of judgments entered on surety bonds given there by the company. No good reason has been suggested why the United States should be denied the right to secure in this proceeding payment of its debt.

Reversed.

Syllabus.

ATLANTIC LUMBER CO. *v.* COMMISSIONER OF CORPORATIONS AND TAXATION OF MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 715. Argued April 2, 1936.—Decided May 25, 1936.

1 A corporation, organized under the laws of Delaware and engaged in the wholesale lumber business, had its principal office in Massachusetts. The corporate books and records were kept in Massachusetts; there also the treasurer of the company was located, directors' meetings were held and dividends declared. It maintained within the State a sales office, which was used as a headquarters for its salesmen, who solicited orders both within and outside of the State. No stocks of lumber were kept within the State, the only tangible property there being office equipment and salesmen's automobiles. Orders received at the Massachusetts office were filled from a distributing yard or a mill of a subsidiary, both located outside of the State. Remittances from its customers were made to the Massachusetts office. Of several bank accounts the one which it maintained within the State was the most active, and such dividends as had been paid were paid out of that account. The company owned practically all the stock of three subsidiaries, two of which were engaged in cutting timber and manufacturing lumber in other States, and the third merely holding title to timber lands in another State. *Held,* an excise tax imposed by Massachusetts for the privilege of carrying on business within the State, measured by a percentage of such proportion of the fair value of the capital stock of the corporation as the value of the assets employed within the State bore to the value of its total assets, did not impose an unconstitutional burden upon interstate commerce. *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, followed; *Ozark Pipe Line Co.* v. *Monier,* 266 U. S. 555, distinguished. P. 556.

2. The burden of the tax, if any, on interstate commerce, is not immediate and direct but remote and incidental—a distinction which, in respect of the class of legislation here involved, marks the line between a tax which is valid and one which is not. P. 557.

197 N. E. 525, affirmed.

APPEAL from a judgment sustaining a decision of the state board of tax appeals and upholding the validity of a corporation privilege tax.

Mr. Robert C. McKay for appellant.

Mr. James J. Ronan, Assistant Attorney General of Massachusetts, with whom *Mr. Paul A. Dever,* Attorney General, was on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

A Massachusetts statute (Gen. Laws, Ter. ed., c. 63, §§ 39–43) imposes upon a foreign corporation, with respect to the carrying on or doing of business by it within the commonwealth, an excise in a sum to be ascertained as the statute provides. So far as the present case is concerned, the amount of the excise is a specified percentage of the value of the corporate excess employed by the corporation within the commonwealth. Such corporate excess (§ 30, par. 4) means, in the case of a foreign corporation, such proportion of the fair value of its capital stock as the value of the assets employed in the commonwealth bears to the value of its total assets, less certain deductions. Under this statute appellant's tax was fixed at approximately $1,500. We find nothing in the record to justify the conclusion that the amount of the tax was not fairly arrived at under the provisions of the statute as construed by the court below, or that it was so allocated as to result in imposing a tax upon property outside the state; and the only question is whether the tax constitutes an unconstitutional burden upon interstate commerce. The court below, sustaining the action of the state board of tax appeals, held that the exaction was an excise for the privilege of having a place for the transaction of intrastate business in the state with the protection of state law and the appertaining advantages;

and that the effect upon interstate commerce was at most incidental and remote. 197 N. E. 525.

Appellant is a corporation engaged in the wholesale lumber business, and is organized under the laws of Delaware. Its principal office is in Massachusetts, where it also maintains a sales office. Its Massachusetts office is used as headquarters for salesmen, who solicit orders in Massachusetts and other states. In that office it carries on correspondence and other business activities in connection with orders for and shipments of goods for the designated territory. Orders are accepted at the Massachusetts office, and are filled from the distributing yard of the company or the mill of a subsidiary outside the state. Remittances from its customers are made to the Massachusetts office. No stocks of lumber are kept in that state; and the only tangible property in the state is office furniture and equipment and salesmen's automobiles. Appellant has bank accounts in Boston, New York City, Buffalo, Brooklyn, and Toronto, Canada, the Boston account being the most active. The corporate books and records are kept in Massachusetts, where its treasurer is located, its directors' meetings are held, and dividends are declared. Dividends, so far as declared, have been paid out of the Boston account.

Appellant owns practically all the stock of three subsidiaries. Two of them are engaged in cutting timber and manufacturing lumber—one in Tennessee, Arkansas, and Louisiana, and the other in South Carolina. The third subsidiary simply holds title to timber lands in Louisiana.

If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution. *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Cheney Brothers Co.* v. *Massachusetts,* 246 U. S. 147, 153; *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555, 562 *et seq.*

But such is not the case. Although organized in Delaware, so far as the record shows appellant does not function there but in Massachusetts, to which state the exercise of its corporate powers was transferred and is confined. In the *Champion Copper Company* case, decided by this court in *Cheney Brothers Co.* v. *Massachusetts, supra,* p. 155, a Michigan corporation maintained an office in Boston, pursuant to a provision in its articles of association. The proceeds of its business in Michigan were deposited in Boston banks, which, after paying salaries and expenses, were distributed as dividends from the Boston office. Directors' meetings were held frequently during each year at the Boston office, at which meetings reports from the treasurer and general manager were received, dividends were voted, officers were elected, and other corporate duties were discharged. This court held—"These corporate activities in Massachusetts are not interstate commerce and may be made the basis of an excise tax by that State."

The same decision involved a similar tax imposed upon another Michigan corporation, the Copper Range Company. That company also maintained an office in Boston. It was, like the appellant here, a holding company. In Massachusetts it held stockholders' and directors' meetings, kept corporate records and books of account, received dividends from its stock holdings, deposited the money in Boston banks, and paid the same out, after deducting salaries and expenses, in dividends to its stockholders. We held—"The exaction of a tax for the exercise of such corporate faculties is within the power of the State. Interstate commerce is not affected."

The decision in respect of those companies covers the present case; and since that decision has never been overruled or qualified, it would be unnecessary to go further, except for *Ozark Pipe Line* v. *Monier, supra,* upon which appellant confidently leans. The situation there,

however, was quite different from that presented in the present case or in the cases of the two Michigan corporations just mentioned—a difference plainly recognized by the opinion in the *Ozark* case. There, a Maryland corporation owned and operated a pipe line extending from Oklahoma through Missouri to Illinois, by which crude petroleum was carried from Oklahoma to Illinois. No oil was received or delivered in Missouri. The license issued by the state was to engage "exclusively in the business of transporting crude petroleum by pipe line." The company, it is true, maintained its principal office in Missouri and there kept its books and bank accounts, paid its employees, purchased supplies, employed labor, maintained telephone and telegraph lines, and carried on various other activities; but all were linked exclusively to the pipe line and operated only to further the flow of oil in interstate commerce. Neither property nor activities were anything more than aids to the operation of the pipe line; and together with that line they combined to constitute in practical effect an instrumentality of that commerce. Thus, the burden of the tax which the State imposed fell upon interstate transportation immediately and directly, while here the effect upon interstate commerce, so far as there is any, is remote and incidental—a distinction which, in respect of such legislation as we are now considering, marks the line between a tax which is valid and one which is not.

Judgment affirmed.

ARIZONA *v.* CALIFORNIA ET AL.

PETITION FOR LEAVE TO FILE BILL OF COMPLAINT.

No. —, original. Argued April 28, 1936.—Decided May 25, 1936.

1. The United States is not subject to be sued without its consent, even by a State. P. 568.
2. Arizona tendered to this Court her original bill against California and the other States of the Colorado River Basin, praying for a judicial apportionment among them all of the unappropriated waters of that river and that she be decreed the unclouded right to the permanent use of her share. The United States, by the Boulder Canyon Project Act, and by acts of its officers thereunder, had undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the stream not already appropriated; it was not denied that the natural, dependable flow was already over-appropriated; and it did not appear that, without the storage of the impounded water, any substantial amount of water would be available for appropriation. *Held* that permission to file the bill must be denied upon the ground that the United States would be an indispensable party. P. 570.
3. The fact that no decree rendered in its absence can bind the United States, is not an inducement for this Court to decide the rights of the States before it, by a decree which, because of the absence of the United States, could have no finality. P. 572.
4. Permission to file an original bill will not be granted if the bill, when filed, must be dismissed because of the absence of the United States as a party. P. 572.

Petition denied.

Arizona, on November 25, 1935, asked leave to file a bill against California and the five other States of the Colorado River Basin, praying in effect for a partition of the right to appropriate in the future the waters of the stream not as yet appropriated. The defendants were ruled to show cause, December 9, 1935, 296 U. S. 552. Returns to the rule were made on March 16, 1936. A motion by Fred T. Colter and others for leave to intervene was denied March 30, 1936, 297 U. S. 699. The case was

argued and presented on the Arizona petition and the returns of the other States.

Mr. James R. Moore, with whom *Mr. John L. Sullivan,* Attorney General of Arizona, and *Mr. Charles L. Strouss* were on the brief, for plaintiff.

Mr. William W. Ray, with whom *Mr. Paul P. Prosser,* Attorney General of Colorado, *Mr. Frank H. Patton,* Attorney General of New Mexico, *Mr. Joseph Chez,* Attorney General of Utah, *Mr. Ray E. Lee,* Attorney General of Wyoming, and *Messrs. Charles Roach, Shrader P. Howell, L. Ward Bannister,* and *Grover A. Giles* were on the brief, for the defendant States of Colorado et al.

Mr. Phil D. Swing, with whom *Mr. U. S. Webb,* Attorney General of California, and *Mr. Gray Mashburn,* Attorney General of Nevada, were on the brief, for the defendant States of California et al.

MR. JUSTICE STONE delivered the opinion of the Court.

This case arises upon the petition of the State of Arizona for leave to file in this Court her bill of complaint against the several states named as defendants and upon their returns to the order of this Court, directing them to show cause why the prayer of the petition should not be granted. The returns raise numerous objections to the sufficiency of the proposed bill of complaint, only two of which we find it necessary to consider. One is that the proposed bill fails to present any justiciable case or controversy within the jurisdiction of the Court. The other is that the United States, which is not named as a defendant and has not consented to be sued, is an indispensable party to any decree granting the relief prayed by the bill.

The relief sought is: (1) That the quantum of Arizona's equitable share of the water flowing in the Colo-

rado River, subject to diversion and use, be fixed by this Court, and that the petitioner's title thereto be quieted against adverse claims of the defendant states. (2) That the State of California be barred from having or claiming any right to divert and use more than an equitable share of the water flowing in the river, to be determined by the Court, and not to exceed the limitation imposed upon California's use of such water by the Boulder Canyon Project Act, 45 Stat. 1057, and the Act of the California legislature of March 4, 1929, Ch. 16, Stats. of Calif., 1929, p. 38. (3) That it be decreed that the diversion and use by any of the defendant states of any part of the equitable share of the water decreed to Arizona pending its diversion and use by her shall not constitute a prior appropriation or confer upon the appropriating state any right in the water superior to that of Arizona. (4) That any right of the Republic of Mexico to an equitable share in any increased flow of water in the Colorado River made available by works being constructed by or for California, shall be supplied from California's equitable share of the water, and that neither petitioner nor the defendant states other than California shall be required to contribute to it from their equitable shares as adjudicated by the Court.

The proposed bill thus, in substance, seeks a judicial apportionment among the states in the Colorado River Basin of the unappropriated water of the river, with the limitation that the share of California shall not exceed the amount to which she is limited by the Boulder Canyon Project Act and by her statute, and with the proviso that any increase in the flow of water to which the Republic of Mexico may be entitled shall be supplied from the amount apportioned to California. Our consideration of the case is restricted to an examination of the facts alleged in the proposed bill of complaint and of those of which we may take judicial notice.

The Colorado River, a navigable stream, see *Arizona* v. *California,* 283 U. S. 423, having a total length of 1,293 miles, rises in Colorado and flows through that state 245 miles, then through Utah 285 miles, then through Arizona 292 miles, then on the boundary between Arizona and Nevada 145 miles, then on the boundary between Arizona and California 235 miles, then on the boundary between Arizona and Mexico 16 miles, and then through the Republic of Mexico to the Gulf of California 75 miles. For 688 miles, more than half its length, the river flows in Arizona or upon her boundary.

Two dams have been built across the Colorado River by the Secretary of the Interior, acting under authority of acts of Congress. One, Boulder Dam, 378 miles below the intersection of the river with the boundary between Arizona and Utah, creates Boulder Reservoir, extending along the bed of the river 115 miles above the dam. The other, Laguna Dam, is located 18 miles above the point where the Colorado River becomes the boundary between Arizona and Mexico. Two other dams are projected and in course of construction under contracts entered into by the Secretary of the Interior, pursuant to acts of Congress. Boulder Canyon Project Act, § 1; United States Session Laws, 1935, p. 1039; see *United States* v. *Arizona,* 295 U. S. 174. Both are in that part of the river which flows between Arizona and California. One, Parker Dam, is approximately 150 miles south of Boulder Dam, and the other, Imperial Dam, is 4½ miles above Laguna Dam.

The average annual undepleted flow of the Colorado River in Arizona, at Imperial Dam, is approximately 16,840,000 acre feet.[1] Of the total undepleted flow approxi-

[1] At Lees Ferry, twenty-three miles below the point where the river enters Arizona from Utah, the average undepleted annual flow is 16,660,000 acre feet. At Boulder Dam it is 17,720,000 acre feet. At the Imperial Dam it is 16,840,000. Non-diversion river losses

mately 6,100,000 acre feet per annum have been appropriated and put to beneficial use in the United States and the Mexican Republic.[2] After deducting all existing appropriations there remains in the river subject to future appropriation a net average annual flow of at least 9,720,000 acre feet.[3]

About 2,027,000 acres of land are under irrigation by water diverted from the Colorado River and its tributaries other than the Gila, of which 72,120 acres are in Arizona.[4] There are more than 2,000,000 acres of land in Arizona that are not irrigated, but are susceptible of economic irrigation from the unappropriated water of the Colorado River and its tributaries other than the Gila, and which

---

and evaporation below Lees Ferry aggregate 1,400,000 acre feet annually and are about offset by the river's gains between Lees Ferry and Boulder Dam.

[2] Of this amount approximately 2,500,000 acre feet are diverted annually above Lees Ferry, and are used and consumed in Utah, New Mexico, Colorado and Wyoming, and 3,600,000 acre feet are diverted annually below Lees Ferry from the river and its tributaries other than the Gila. The average annual diversions taking place below the southern boundary of Utah, stated in acre feet are as follows: Arizona, 585,000; California, 2,475,000; Nevada, 40,000; Mexican Republic, 500,000.

[3] At Lees Ferry 10,500,000 acre feet, at Boulder Dam 11,100,000 acre feet, at Imperial Dam 9,720,000 acre feet. Allowing for estimated increase in use of the water now appropriated for irrigation of land above Boulder Dam and for diversions by projects now under construction in Colorado, it is estimated that the flow of the Colorado River into and out of the Boulder Dam will, in 1938, average 15,069,000 acre feet per year.

[4] The acreage under irrigation by water diverted from the Colorado River and its tributaries, other than the Gila, is distributed among the Colorado River basin states as follows: Arizona 72,120; California 464,653; Colorado 856,413; New Mexico 45,937; Nevada 12,308; Utah 347,452; Wyoming 228,699. Approximately 525,000 acres of land in the Gila River basin are irrigated from the waters of that river and its tributaries, of which 520,000 acres are located in Arizona.

cannot be irrigated from any other source. There are 5,000,000 additional acres of land in Arizona "potentially susceptible of economic irrigation" from the waters of the river. There are pending projects to irrigate more than 1,000,000 acres of this unirrigated but irrigable land of which more than 100,000 acres are owned by the State of Arizona. The amount of water required for such irrigation is in excess of 4,000,000 acre feet annually.

By the Colorado River Compact, see *Arizona* v. *California, supra,* entered into by the defendant states and approved by Congress, but to which Arizona is not a party, the undepleted flow of water of the Colorado River is apportioned between the upper basin and the lower basin of the river valley, the point of division being Lees Ferry, 23 miles below the southern boundary of Utah. To each basin there is apportioned 7,500,000 acre feet per annum and the lower basin has the additional right to increase its "beneficial consumptive use" of the water by 1,000,000 feet per annum.

By the Boulder Canyon Project Act, the Secretary of the Interior was authorized, subject to the terms of the Colorado River Compact, to construct, operate and maintain a dam and incidental works at the present site of Boulder Dam, with an appurtenant hydro-electric plant, and to use and dispose of the water stored above the dam for irrigation and for the development of power. The Act also provided that no authority should be exercised under it until six of the states in the Colorado River basin, including California, should ratify the Compact, and unless the State of California, by act of its Legislature, should agree with the United States, for the benefit of all the states in the river basin, that the aggregate annual use of water from the river by the State of California should not exceed 4,400,000 acre feet annually, plus one-half of any excess of surplus waters unapportioned by the Compact. The Compact was duly ratified by the six

defendant states, and the limitation upon the use of the water by California, was duly enacted into law by the California Legislature by Act of March 4, 1929, *supra*. By its provisions the use of the water by California is restricted to 5,485,500 acre feet annually.[5]

The Secretary of the Interior, acting under authority of § 5 of the Boulder Canyon Project Act, has entered into contracts with California corporations for the storage in the Boulder Dam reservoir and the delivery, for use in California,[6] of 5,362,000 acre feet of water annually, for a stipulated compensation. The proposed bill of complaint charges that, notwithstanding the limitation upon the use of the water by California, certain California corporations, with the aid of the United States, propose to divert from the river and use consumptively in California an aggregate amount of 14,330,000 acre feet annually, including that which the Secretary of the Interior has contracted to deliver, or 8,444,500 acre feet in excess of the amount which California is permitted to take by the Boulder Canyon Project Act and her own statute, and sufficient to use all but about 1,000,000 acre feet of the unappropriated annual flow of the river.[7]

---

[5] The surplus water of the river in the lower basin, unapportioned by the Compact, is 2,171,000 acre feet, one-half of which, or 1,085,500 acre feet, California is entitled, under the Boulder Canyon Project Act, and her own statute, to add to the 4,400,000 acre feet which they specifically allot to her, making a total allotment of 5,485,500 acre feet annually.

[6]

Metropolitan Water District.....	1,100,000 acre feet
Imperial Valley and others.....	3,850,000 acre feet
City of San Diego.....	112,000 acre feet
Palo Verde.....	300,000 acre feet
Total.....	5,362,000 acre feet

[7] By way of specification of this general statement it is alleged that such corporations have made application to the Division of Water Resources, Department of Public Works of the State of California,

Arizona asserts that she is damaged by the impending appropriations of water by California by reason of the fact that future reclamation of land in Arizona can be accomplished only by large scale projects, contemplating the irrigation of large areas to be operated and administered as a single unit, and, because of the great cost of diversion works and large expenditures required to establish such projects, it will be impossible to finance them "unless water for the irrigation of said land can be appropriated and unclouded, undisputed and incontestable rights to the permanent use thereof acquired at or prior to the time of constructing such works."

It is conceded both by the bill of complaint and the returns that all the states in the Colorado River basin except California, and California so far as material to the present case, apply the doctrine of appropriation to the waters of flowing streams in their respective territories. Under this doctrine, diversion and application of water to

---

for permits to divert and appropriate annually from the river quantities of water aggregating more than 12,670,000 acre feet, and that the State of California will grant the permits so applied for, upon completion by such corporations of the necessary diversion works. In addition, it is alleged that the Secretary of the Interior, pursuant to § 1 of the Boulder Canyon Project Act, has entered into a contract with the Imperial Irrigation District, a California corporation, in connection with the building of the Imperial Dam for the construction of a main canal known as the "All American Canal," to connect the dam with the Imperial and Coachella Valleys, which provides for the delivery to the United States, at the Imperial Dam, of 1,460,000 acre feet per year, to be used for irrigation and power. Approximately 200,000 acre feet of this amount will be used for the irrigation of lands in the United States Yuma Reclamation Project in Arizona. The remainder will be used for irrigation of the Yuma Indian Reservation in California and for power. An additional 400,000 acre feet will be used for desilting the canal. The water to be used for desilting and power will be returned to the river at a point where it cannot be recaptured for further use in the United States.

a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used. The appropriator first in time is prior in right over others upon the same stream, and the right, when perfected by use, is deemed effective from the time the purpose to make the appropriation is definitely formed and actual work upon the project is begun, or from the time statutory requirements of notice of the proposed appropriation are complied with, provided the work is carried to completion and the water is applied to a beneficial use with reasonable diligence. See *Arizona* v. *California, supra; Kansas* v. *Colorado,* 206 U. S. 46; *Wyoming* v. *Colorado,* 259 U. S. 419.

Arizona, by her proposed bill of complaint, asserts no right arising from her own appropriation of the waters of the Colorado River. No infringement of her rights acquired by appropriation is alleged, and no relief for their protection is prayed. While it is alleged that definite plans have been made for the irrigation of 1,000,000 acres of unirrigated land in Arizona, and a right to share in the water for that purpose is asserted, it does not appear that any initial step toward appropriation of water for such a project has been taken.

The right of the California corporations to withdraw from the river a total of 5,362,000 acre feet annually under the contracts with the Secretary of the Interior, is challenged only insofar as the prayer for relief asks that the unappropriated water of the river be equitably apportioned among Arizona and the defendant states, and that any increased amount to which the Republic of Mexico may be entitled be directed to be supplied from the amount to which California may otherwise be found to be equitably entitled.

Arizona does not assert any right to the benefit of the undertaking of California, in conformity to the Boulder Canyon Project Act, to restrict its own use of the water. The brief for Arizona disclaims the assertion of any rights under "the Boulder Canyon Project Act, the Colorado River Compact, or the Boulder Project itself."

The allegations and prayer of the bill are of significance only if Arizona, in advance of any act of appropriation, and independently of any rights which she may have acquired under the Boulder Canyon Project Act, may demand a judicial decree exempting the available water of the river, or some of it, from appropriation by other states until the indefinite time in the future when she or her inhabitants may see fit to appropriate it. A justiciable controversy is presented only if Arizona, as a sovereign state, or her citizens, whom she represents, have present rights in the unappropriated water of the river, or if the privilege to appropriate the water is capable of division and when partitioned may be judicially protected from appropriations by others pending its exercise.

The defendant states deny that there is any such right or privilege upon which this Court can act judicially in advance of appropriation. While California, by statement of her attorney general in brief and argument, disclaims any purpose to take more than the water to which she is restricted by the Boulder Canyon Project Act and by her own statute, she, and the other defendant states, nevertheless maintain that the authority of this Court is limited to the application of the local law of appropriation in adjudicating their rights. They deny that Arizona and her inhabitants have or can assert any right in the water before its appropriation, and challenge the jurisdiction of the Court to make any division of the unexercised privilege among the states entitled to share in the unappropriated water. Pursued to its logical end, their con-

tention is that California, save as she may have renounced the privilege, is free, subject to prior appropriations, to appropriate to her own use the entire flow of the water in the river, to the exclusion of any future beneficial enjoyment of it by Arizona.

Arizona insists that this court, in adjudicating the rights of states in the water of interstate streams, has declared that it will not hold itself restricted to rigid application of local rules of law governing private rights; that independently of those rules it may have recourse to applicable principles of international law and equity tending to secure to sovereign states equality of right in such water. *Kansas* v. *Colorado,* 185 U. S. 125, 146; *Missouri* v. *Illinois,* 200 U. S. 496, 520; *Kansas* v. *Colorado,* 206 U. S. 46, 97, *et seq.; Wyoming* v. *Colorado, supra,* 465, 470; *Connecticut* v. *Massachusetts,* 282 U. S. 660, 670; *New Jersey* v. *New York,* 283 U. S. 336, 342, 343. It points out that departure from the local formula may be compelled where the contending states apply, locally, different and irreconcilable doctrines, *Kansas* v. *Colorado, supra,* and that the common law of private riparian rights has been modified, even in suits between states adhering to it, by the application of principles of equitable apportionment. *Missouri* v. *Illinois, supra,* 526; *Connecticut* v. *Massachusetts, supra,* 671; *New Jersey* v. *New York, supra,* 343. But we have no occasion to consider the arguments urged upon us in support of the adoption, in this case, of a different rule from that of appropriation, as applied locally, for we are of the opinion that in the circumstances disclosed by the bill of complaint there can be no adjudication of rights in the unappropriated water of the Colorado River without the presence, as a party, of the United States, which, without its consent is not subject to suit even by a state. *Kansas* v. *United States,* 204 U. S. 331, 343.

The Colorado River is a navigable stream of the United States. The privilege of the states through which it flows and their inhabitants to appropriate and use the water is subject to the paramount power of the United States to control it for the purpose of improving navigation. *Arizona* v. *California, supra.* The Boulder Canyon Project Act, § 1, authorized the Secretary of the Interior to construct, at the expense of the United States, the Boulder Dam, with storage reservoir, and a hydro-electric plant. It provides, §§ 5, 6, for control, management and appropriation of the water by the United States, and declares, §§ 1, 8, (a), that this authority is conferred subject to the terms of the Colorado River Compact "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generating of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking."

To carry out the purpose of the Act, § 1 directs the creation of a storage reservoir of a capacity of not less than 20,000,000 acre feet. According to the allegations of the proposed bill, the actual capacity of the completed reservoir is 30,500,000 acre feet, which is nearly twice the undepleted annual flow of the river, and four and one-half times the amount of water remaining unappropriated after deducting that which California is to receive under the contracts with the Secretary of the Interior.

By § 6 of the Act the dam and reservoir are directed to be used "first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights . . .; and third, for power." Section 5 pro-

vides that "no person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." Section 5 also provides that the Secretary of the Interior may contract for the storage of water and for delivery thereof upon charges which will provide revenue, and § 5 (c) directs that "Contracts for the use of water . . . shall be made with responsible applicants therefor who will pay the price fixed by the Secretary with a view to meeting the revenue requirements herein provided for." Acting under this authority the Secretary of the Interior has substantially completed the project and has entered into contracts, so the bill of complaint alleges, for the delivery of 5,362,000 acre feet of stored water to California corporations, and for the financing and construction of Parker and Imperial Dams and the All American Canal to facilitate the use of this water in California.

Without more detailed statement of the facts disclosed, it is evident that the United States, by Congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated. The defendant states contend, and Arizona does not deny, that the natural dependable flow of the river is already over-appropriated, and it does not appear that without the storage of the impounded water any substantial amount of water would be available for appropriation.

The decree sought has no relation to any present use of the water thus impounded which infringes rights which Arizona may assert subject to superior but unexercised powers of the United States. Cf. *Wisconsin* v. *Illinois*, 278 U. S. 367; see *Arizona* v. *California, supra,* 464; *United States* v. *Arizona, supra,* 183. The prayer is for a decree of equitable division of the privilege of future

appropriation. The relief asked, and that which upon the facts alleged would alone be of benefit to Arizona, is a decree adjudicating to petitioners the "unclouded . . . rights to the permanent use of" the water. Such a decree could not be framed without the adjudication of the superior rights asserted by the United States. The "equitable share" of Arizona in the unappropriated water impounded above Boulder Dam could not be determined without ascertaining the rights of the United States to dispose of that water in aid and support of its project to control navigation, and without challenging the dispositions already agreed to by the Secretary's contracts with the California corporations, and the provision as well of § 5 of the Boulder Canyon Project Act that no person shall be entitled to the stored water except by contract with the Secretary.

It is argued that the constitutional power of the United States to exert any control over the water stored at Boulder Dam is subject to the rights of Arizona to an equitable share in the unappropriated water "until such a time as commerce is actually moving on the river," and that in any case Congress has subordinated that power to Arizona's rights by the provisions of § 4 (a) of the Boulder Canyon Project Act, which authorizes Arizona, California and Nevada to enter into an agreement as to their relative rights in the water of the river. But these and similar contentions, so far as they were not answered adversely to Arizona in *Arizona* v. *California, supra,* 456, cannot be judicially determined in a proceeding to which the United States is not a party and in which it cannot be heard.

Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other. Although no decree

rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.*, 157 U. S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 245–247; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606; *Texas* v. *Interstate Commerce Comm'n*, 258 U. S. 158, 163. A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party. *Louisiana* v. *McAdoo*, 234 U. S. 627.

The petition to file the proposed bill of complaint is denied. We leave undecided the question whether an equitable division of the unappropriated water of the river can be decreed in a suit in which the United States and the interested states are parties. Arizona will be free to assert such rights as she may have acquired, whether under the Boulder Canyon Project Act and California's undertaking to restrict her own use of the water or otherwise, and to challenge, in any appropriate judicial proceeding, any act of the Secretary of the Interior or others, either states or individuals, injurious to it and in excess of their lawful authority.

Petition denied.

Syllabus.

WYOMING *v.* COLORADO.

BILL IN EQUITY.

No. 10, original. Argued February 11, 12, 1936.—Decided June 1, 1936.

1. Under the decree of this Court in *Wyoming* v. *Colorado*, 259 U. S. 419; 260 U. S. 1, the claims of Colorado therein recognized and confirmed are the only ones in virtue of which diversion of water may lawfully be made in Colorado from the Laramie River and its tributaries, as against Wyoming and her appropriators. P. 579.
2. The decree in the former suit (260 U. S. 1) recognized and confirmed an appropriation "enabling the State of Colorado, or anyone recognized by her as duly entitled thereto," to divert and take from the headwaters of Deadman Creek, a tributary of the Laramie, "the relatively small amount of water appropriated therefrom prior to the year 1902 by and through what is designated in the evidence as the Wilson Supply Ditch." The record in that suit shows that the appropriation is of 2000 acre feet per annum. *Held*,

   (1) That the decree is to be taken as though the amount, 2000 acre feet, were written into it. P. 580.

   (2) Wyoming is bound by the former finding and adjudication. *Id.*

   (3) The evidence in the present case shows that diversions from the headwaters of Deadman Creek through the Wilson Supply Ditch have not exceeded 2000 acre feet per annum. *Id.*
3. The former decree, in confirming the right of Colorado "to divert and take" from the Laramie River and its tributaries a stated number of acre feet of water per annum in virtue of certain meadow land appropriations, refers to the water taken from the stream at point of diversion, and was violated by diverting and applying to the meadows much larger quantities under the claim that the greater part would return to the stream through surface drainage and percolation and that the amount actually consumed would not exceed the amount fixed in the decree. P. 581.
4. In both Colorado and Wyoming, water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily; and the use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators. The rules in this

regard are but incidental to the doctrine of appropriation, which prevails in both States. P. 584.

5. It was not the purpose of the earlier suit between Wyoming and Colorado, or of the decree therein, to withdraw the water claims confirmed by the decree from the operation of local laws relating to their transfer, or to restrict their utilization in ways not affecting the rights of one State and her claimants as against the other State and her claimants. P. 584.
6. The decree in the earlier suit confirmed the right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to divert and take in Colorado from the Laramie River and tributaries the water included in designated appropriations, for use in another watershed. By agreement of the owners and with the consent of Colorado, part of the water accredited by the decree to some of these appropriations was diverted and conveyed by the ditch appertaining to another of them, in addition to its own proper supply; but all the ditches together diverted and took no more than the aggregate of their several appropriations as severally confirmed by the decree. *Held* that the decree was not violated. Pp. 582–585.
7. Wyoming is granted leave to apply later on for an appropriate order respecting the measurement and recording of all diversions in Colorado of water from the Laramie and its tributaries if the two States cannot agree and there is need for action by this Court. Jurisdiction is retained accordingly. P. 585.

On Final Hearing of a suit brought in this Court by Wyoming charging Colorado and her water claimants with departures from the decree by which this Court, in an earlier suit, adjudicated the relative rights of the two States and their respective citizens to use the waters of the Laramie River and its tributaries. See 259 U. S. 419; 260 U. S. 1. An earlier phase of the present case was reported in 286 U. S. 494. By the decision now reported, the prayer of Wyoming for injunctive relief is granted in part and in part denied. Jurisdiction is retained in part, as indicated in the concluding paragraph of the syllabus.

Mr. Ray E. Lee, Attorney General of Wyoming, and *Mr. James A. Greenwood,* with whom *Mr. Wm. C. Snow* was on the brief, for plaintiff.

Messrs. Shrader P. Howell, William R. Kelly, and *C. D. Todd,* with whom *Mr. Paul P. Prosser,* Attorney General of Colorado, and *Messrs. Lawrence R. Temple* and *William A. Bryans, III,* were on the brief, for defendant.

Mr. Justice Van Devanter delivered the opinion of the Court.

By this suit the State of Wyoming complains of the State of Colorado and asserts that the latter and her water claimants have been and are departing from a decree rendered by this Court in an earlier suit between these States (259 U. S. 419, 496; 260 U. S. 1), and that the asserted departures have been and are working material injury to Wyoming and her water claimants. The principal relief sought is an injunction enforcing adherence to that decree.

The earlier suit and decree dealt with the relative rights of the two States and their respective water claimants to divert and use for irrigation the waters of the Laramie River, an innavigable stream which has its source in the mountains of northern Colorado, flows northerly 27 miles in that State, crosses into Wyoming, and there flows northeasterly 150 miles to the North Platte River, of which it is an affluent. That suit was largely provoked by a proposed and threatened diversion in Colorado (called the Laramie-Poudre Tunnel Project) of 50,000 acre feet or more from the Laramie River, which Wyoming alleged would not leave in the river sufficient water to satisfy older appropriations in that State.

Shortly after the present suit was begun the complainant's right to relief was challenged by a motion to dismiss, one ground of which was that the suit proceeds on the erroneous assumption that the earlier decree determined, as against Colorado and her water claimants, the full quantity of water which rightly may be diverted

within that Sate from the stream, and likewise the quantity which Wyoming and her water claimants are entitled to receive and use within her borders. The motion was overruled (286 U. S. 494), the scope of the ruling and the reasons for it being shown in the following excerpts from the opinion then delivered.

"We are of opinion that the record, opinion and decree in the prior suit, here reviewed at length, show very plainly that the decree must be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered and resolved in the opinion. Not only so, but the question of priority in time and right as between the appropriations in Colorado and those in Wyoming was directly presented by the pleadings and evidence and distinctly dealt with and resolved in the opinion.

"As appears from the opinion, the Court held that the doctrine, long recognized and enforced in both States, whereby priority of appropriation gives superiority of right, furnished the only equitable and right basis on which to determine the controversy between them shown in the pleadings and evidence.

"And as further appears from the opinion, the Court made specific findings showing the amount of water in the available supply, its insufficiency to satisfy all asserted appropriations, the date when the proposed tunnel appropriation in Colorado was initiated, the names and amounts of the appropriations in Colorado which were senior to that appropriation, the amount of water included in the Wyoming appropriations which were senior to it, and the amount which would remain in the supply and be subject to that appropriation after deducting what was required to satisfy the senior appropriations in both States.

"These findings were pertinent to the issues, and upon them the Court pronounced its decree. Under a familiar rule the facts thus determined are not open to dispute in a subsequent suit between the same States."

And again:

"Construing the decree in the light of the record and opinion, to which counsel for both States appeal, we think it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators.

"But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other . . . the water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree."

The earlier decree, so construed, confirms and establishes "the right of the State of Colorado, or of any one recognized by her as duly entitled thereto," to divert and take within that State:

(1) 18,000 acre feet of water per annum from the Laramie River and its tributaries in virtue of the Skyline Ditch appropriation;

(2) 4,250 acre feet of water per annum from such stream and its tributaries in virtue of certain meadowland appropriations;

(3) The relatively small amount of water appropriated prior to 1902 from the headwaters of Deadman Creek, a tributary of the Laramie River, through the Wilson Supply Ditch;

(4) 15,500 acre feet of water per annum from the Laramie River and its tributaries, in virtue of the Laramie-Poudre Tunnel appropriation;

and that decree also confirms and establishes the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries in virtue of appropriations prior in time and right to the tunnel appropriation in Colorado. A further provision in the decree enjoins the defendant State from diverting or taking from the river and its tributaries in virtue of the tunnel appropriation any water in excess of the confirmed right to 15,500 acre feet per annum, the reason for limiting the injunction to that appropriation being that there was no showing of an exigency requiring that it be broader.

In this view of the earlier suit and decree, we further held, in overruling the motion to dismiss the present suit, that the bill contains allegations of such material departures by Colorado and her water claimants from the earlier decree that she should be called upon to answer. Colorado did answer; evidence was then taken and reported by commissioners; and the cause has since been submitted on briefs and oral argument.

The departures from the decree which are charged against Colorado in the bill are of two classes—one comprising diversions under claims not confirmed or recognized in the decree, and the other consisting of diversions under each of the confirmed Colorado claims of more water than the decree accredits to the claim. In the answer Colorado denies that certain of the diversions have been excessive or otherwise contrary to the decree, and admits that other designated diversions have not been in accord with the decree as construed in our opinion overruling the motion to dismiss, but asserts that they have been made in good faith and in accord with what the State's officers have understood the decree to be.

One complaint is of diversions through what are described in the bill and answer as Bob Creek ditch, Bob Creek extension ditch, Columbine ditch, and Lost Lake Reservoir system. These diversions are admitted in the answer. They are made, not under claims recognized or confirmed in the decree, but quite independently of it. Under the decree, as is pointed out in our opinion overruling the motion to dismiss, the Colorado claims which the decree recognizes and confirms are the only ones in virtue of which diversions may be made as against Wyoming and her appropriators. Claims not so recognized and confirmed are excluded. It follows that the diversions just described contravene the decree and infringe Wyoming's rights under it. They were being practiced when the present suit was begun and for a time thereafter, but when the motion to dismiss was overruled they were discontinued pending further action by us. Counsel for Colorado now assure us in their brief that the State does not propose to permit a resumption of these diversions if we hold as we now do, that they contravene the decree. Because of this assurance, which we accept, there is no present need for granting an injunction in respect of these diversions.

Another complaint is of the diversion of water through the Wilson Supply ditch from the headwaters of Deadman Creek, a tributary of the Laramie. The substance of the complaint is (a) that there has been no appropriation under which this diversion may be made, and (b) that, even if there has been such an appropriation, the Wilson Supply ditch recently has been enlarged and is now made the means of diverting more water from the headwaters of Deadman Creek than was included in the appropriation. Neither phase of the complaint is tenable. The decree in the earlier suit (260 U. S. 1), distinctly recognizes and confirms the existence of an appropriation enabling "the State of Colorado, or anyone recognized by

her as duly entitled thereto," to divert and take from the headwaters of Deadman Creek "the relatively small amount of water appropriated therefrom prior to the year 1902 by and through what is designated in the evidence as the Wilson Supply ditch." Wyoming is bound by this finding and adjudication. While the appropriation is there described as including a "relatively small amount of water" the record in that suit, to which the decree refers, shows that the appropriation is of 2,000 acre feet of water per annum—a relatively small amount when contrasted with the other appropriations of 18,000 and 4,250 acre feet which the decree recognizes in its next preceding parts. The decree is to be taken as if the exact amount of this appropriation were written into it.

While the evidence bearing on the alleged enlargement of the Wilson Supply ditch is conflicting, we are persuaded by it that what was done was more in the nature of repair than of enlargement. But this is not very material; for the evidence convinces us that the water diverted from the headwaters of Deadman Creek through the ditch has not been in excess of 2,000 acre feet per annum, the amount of the recognized appropriation.

It is well to state with some emphasis that what we have just said relates to the appropriation through the Wilson Supply ditch from the headwaters of Deadman Creek. The need for this statement arises out of the fact that other water which forms no part of this appropriation, but is part of the natural flow of Sand Creek, is carried by the same ditch from Sand Creek to Sheep Creek. Sand Creek lies between Deadman Creek and Sheep Creek and for a part of its length is used as a section of the Wilson Supply ditch. We are not here concerned with the diversion or appropriation of the water naturally flowing in Sand Creek.

It is further complained that the diversions made under the meadowland appropriations which are recognized and confirmed in the decree are excessive, in that, while the decree fixes the amount of these appropriations at 4,250 acre feet per annum, the actual diversions thereunder have ranged from 36,000 to 62,000 acre feet per year. In the answer Colorado does not deny that waters greatly in excess of the amount fixed in the decree are taken from the stream into ditches leading to the meadowlands where it is to be applied, but asserts that after the water is applied the greater part of it returns to the stream through surface drainage and percolation and that the part actually consumed does not exceed the amount fixed in the decree.

It is apparent from the opinion in the earlier suit that 4,250 acre feet was fixed as the measure of these appropriations because the water is appropriated for the irrigation of 4,250 acres of native-hay meadows and one acre foot per acre is deemed sufficient for that purpose when the water is rightly and not wastefully applied.

The evidence shows that the water is being applied to the native-hay meadows by a process of continuous flooding whereby 10 or more acre feet are put on each acre during the irrigating season of 50 or 60 days. That this is a distinctly wasteful process is obvious. It is true that when water is so applied a considerable portion ultimately finds its way back into the stream unless the place of application be remote from the stream or in another watershed, which is not the case in this instance. But it is also true that a material percentage of the water is lost by evaporation and other natural processes and that there is no way of determining with even approximate certainty how much of the water returns to the stream.

Colorado insists that the decree, in fixing the measure of these meadowland appropriations, refers to the

amount of water consumptively used and not to the amount taken from the stream into the ditches leading to the place of use. The thing dealt with by the decree is described therein as the right "to divert and take" from the stream and its tributaries a designated amount of water. We think these words refer to the water taken from the stream at the point of diversion, and not to the variable and uncertain part of it that is consumptively used.

As it is plainly shown that diversions are being made under these meadowland appropriations in quantities largely in excess of the amount fixed in the decree, we think an injunction should issue forbidding further departures from the decree in this regard.

Another complaint is that the diversions under the Skyline ditch appropriation and those under the Laramie-Poudre tunnel appropriation have been and are in excess of the quantities accredited to them by the decree. In the answer Colorado admits the charge in respect of the Skyline ditch appropriation; denies that the diversions under the Laramie-Poudre tunnel appropriation have been in excess of the quantity accredited to it; and asserts that, with the possible exception of the year 1929, the total diversions under the recognized Colorado appropriations have been at all times within the aggregate of the quantities accredited to them severally, and that, consistently with the decree, she lawfully may permit diversions under any of the recognized appropriations in excess of its accredited quantity so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally. It is a necessary conclusion from the answer that all of the actual diversions have been made with Colorado's permission express or implied.

The evidence respecting diversions under the Skyline ditch appropriation and under the tunnel appropriation

is conflicting; and this is true of the evidence respecting the total diversions under the recognized Colorado appropriations. After considering all of it, and such admissions as are made in the answer, we reach the conclusion that the diversions under the Skyline ditch appropriation have exceeded the quantity named in the decree, the excess ranging from 1,000 to 5,000 acre feet per year; that the diversions under the tunnel appropriation have closely approached, but have not exceeded, the quantity fixed in the decree; that the total diversions under the recognized Colorado appropriations, including those for the meadowlands, have uniformly exceeded the aggregate of the quantities which the decree accredits to them severally; and that, if the appropriations and the diversions for the meadowlands be put aside, the total diversions under the other appropriations have at times closely approached, but at no time have exceeded, the aggregate of the quantities accredited to them as distinct appropriations.

We already have dealt with the excessive diversions under the meadowland appropriations and have said that an injunction will be granted forbidding any further departure from the decree in that regard. That injunction will eliminate the excess in those diversions; and when that is done the total diversions under the several appropriations will be, as has just been pointed out, within the aggregate of the quantities which are accredited to them severally by the earlier decree—and this notwithstanding the diversions under the Skyline ditch appropriations are in excess of the quantity accredited to it.

We therefore must consider the contention made by Colorado that, consistently with the decree, she lawfully may permit diversions under any of the recognized appropriations in excess of its accredited quantity, so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally.

In both Colorado and Wyoming water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily; and the use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators.[1] The rules in this regard are but incidental to the doctrine of appropriation. That doctrine prevails in both States and the decree in the earlier suit was based on it. It was not the purpose of that suit or of the decree to withdraw water claims dealt with therein from the operation of local laws relating to their transfer or to restrict their utilization in ways not affecting the rights of one State and her claimants as against the other State and her claimants.

We perceive no reason for thinking that it is in any wise material to Wyoming and her water claimants whether the water in question is diverted and conveyed to the place of use through the Skyline ditch, the Wilson Supply ditch or the ditches of the Laramie-Poudre Tunnel Project. All are trans-mountain ditches and deliver the water in the Cache La Poudre Valley, which is in another watershed.

The diversions through the trans-mountain ditches in the quantities here shown are made with the consent of the owners of the water rights and with the full sanction of Colorado. Therefore as respects the present question the situation is not different from what it would be had the owners of the other claims formally transferred parts of their water rights to the Skyline owners. The appropriations remain as they were when the decree was entered and are still limited to the quantities which it

[1] *Sieber* v. *Frink*, 7 Colo. 148, 154; 2 Pac. 901; *Strickler* v. *Colorado Springs*, 16 Colo. 61, 68, *et seq.*; 26 Pac. 313; *Frank* v. *Hicks*, 4 Wyo. 502, 523; 35 Pac. 475, 1025; *McPhail* v. *Forney*, 4 Wyo. 556, 560; 35 Pac. 773; *Johnston* v. *Little Horse Creek Irrigating Co.*, 13 Wyo. 208, 225, *et seq.*; 79 Pac. 22.

accredits to them. But the Skyline owners are now permitted by the owners of the other claims and by Colorado to take and use part of the waters included in those claims. Wyoming and her claimants are in no way injured by this. No departure from the decree is involved. The thing which the decree recognizes and confirms is "the right of the State of Colorado, *or of any one recognized by her as duly entitled thereto,* . . . to divert and take" the water included in the designated appropriations.

We are accordingly of opinion that in the circumstances here shown the Skyline ditch diversions do not constitute an infraction of the decree.

In the brief for Wyoming we are asked to adjudicate the relative rights of the two States and of their respective citizens to divert and use the waters of Sand Creek, a small interstate stream, which is not a tributary of the Laramie. (259 U. S. 490.) The bill contains no showing in respect of these rights, there is no prayer in it for their adjudication, and they are not relevant to the controversy which it presents. We therefore must decline to consider them at this time.

In the bill it is complained that Colorado, although requested so to do, has refused to permit Wyoming to install measuring devices at the places of diversion for the purpose of ascertaining the amount of water being diverted in Colorado from the river and its tributaries, and there is a prayer for a decretal order permitting such installation. The evidence bearing on this matter hardly can be regarded as establishing the propriety of such an order, and yet it tends to show a need for improving the means and methods of measuring the diversions, for keeping accurate and complete records thereof, and for according to the representatives of Wyoming full access to both the measuring devices and the records. Recognizing this need, Colorado in her brief assures us that

through her officers she will accord to Wyoming's officers free access to the measuring devices and to the registering charts, records, and other available data, will coöperate freely with them in devising an appropriate plan for measuring the diversions, and will give full consideration to such suggestions as they may make respecting the improvement of the measuring equipment. In this situation the order which is asked would be inappropriate. While the problem of measuring and recording the diversions is a difficult one, we entertain the hope that the two States will by coöperative efforts accomplish a satisfactory solution of it. But we think Wyoming should have leave to apply to us for an appropriate order in the matter if the two States are unable to agree and it is found that there is real need for invoking action by us.

For the reasons given in this opinion we conclude that the only relief to which Wyoming is now entitled is an injunction forbidding further diversions under the meadowland appropriations of more than 4,250 acre feet per year measured at the headgates through which the water is diverted.

Such an injunction will be granted, Wyoming will be given leave to apply later on for an appropriate order respecting the measurement and recording of all diversions in the event the two States are unable to agree and there is need for action by this Court, jurisdiction of the cause will be retained for the purposes of such an application, and the costs will be taxed one-half to each of the two States.

It is so ordered.

Syllabus.

MOREHEAD, WARDEN, *v.* NEW YORK EX REL. TIPALDO.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 838. Argued April 28, 29, 1936.—Decided June 1, 1936.

1. This Court, in certiorari cases, confines itself to the ground upon which the writ was asked for and granted. P. 604.
2. A New York Act, Laws of 1933, c. 584, declares it to be against public policy for any employer to employ any woman at an oppressive or unreasonable wage, defined as one which is "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health"; it defines "a fair wage" as one "fairly and reasonably commensurate with the value of the service or class of service rendered"; and empowers a commissioner, if he be of the opinion that any substantial number of women in any occupation are receiving "oppressive and unreasonable" wages, to appoint a wage board to make inquiry and report its recommendations as to minimum fair wage standards. Standards so reported, when accepted by the commissioner, after publication and further hearings, may be enforced by his mandatory order, violation of which is punishable by fine and imprisonment. The New York Court of Appeals, in this case, construed the statute as requiring that the minimum wages to be fixed under it shall be not only equal to the fair and reasonable value of the services rendered, but also sufficient to meet the minimum cost of living necessary for health, and decided that, so construed, it was unconstitutional. *Held:*

   (1) This Court is bound to accept the state court's construction of the statute. Pp. 605, 609.

   (2) So far as concerns the validity of this Act, the restraint imposed by the due process clause of the Fourteenth Amendment upon the legislative power of the State is the same as that imposed by the due process clause of the Fifth Amendment upon the legislative power of the United States. P. 610.

   (3) The Act, as construed by the state court, is in conflict with the due process clause of the Fourteenth Amendment. *Adkins* v. *Children's Hospital*, 261 U. S. 525. P. 609 *et seq.*
3. The decision in *Adkins* v. *Children's Hospital, supra,* and the reasoning upon which it rests, clearly show that the State is without power by any form of legislation to prohibit, change, or

nullify contracts between employers and adult women workers as to the amount of wages to be paid. The dominant issue in that case was whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped the Act of Congress as arbitrary and invalid was an additional ground of subordinate consequence. P. 610.

4. The "factual background" of this case does not distinguish it in principle from the *Adkins* case, *supra*. P. 614.

270 N. Y. 233, affirmed.

CERTIORARI, 297 U. S. 702, to review a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals. Tipaldo had been placed in custody on a charge of disobeying an administrative order prescribing minimum wages for women employees. The trial court's dismissal of a writ of habeas corpus was reversed by the decision under review.

Mr. Henry Epstein, Solicitor General of New York, with whom *Mr. John J. Bennett, Jr.,* Attorney General, and *Mr. John F. X. McGohey,* Assistant Attorney General, were on the brief, for petitioner.

The ultimate end sought by the New York Minimum Wage Law is the promotion of the public good. The immediate end is the establishment of a wage for women and minors which is reasonably and fairly commensurate with the value of the services rendered. The Legislature, in addition, by means of a minimum wage, endeavored to protect industry from the evils of unfair competition which accompany the exploitation of employees by the least conscionable group of employers.

The wage found for the laundry industry was less than the necessary normal health standard for an employed woman, and was based solely upon the fair value of the services rendered. Thus the cost of living standard is

not used to raise the minimum wage above what is found to be a fair return for the services rendered.

The use of the standard of reasonable value for services rendered and the method of determining this reasonable value are familiar to the Courts. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548. The Federal Trade Commission Act, the Clayton Act, and the Interstate Commerce Act all look to the elimination of unfair competitive tactics. An employer who regularly pays less than a "fair wage" would have a definite and unfair advantage over his less grasping competitor were it not for the equalizing effect of such a statute. See *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *Whitfield* v. *Ohio,* 297 U. S. 431; *Nebbia* v. *New York,* 291 U. S. 502.

Minimum wage legislation for women and minors has received legislative recognition in many of our States and in many foreign countries. The health of women in industry is of deep concern to the State.

The social and economic circumstances surrounding the employment of women, affected as they are by physiological considerations, have repeatedly been the basis of judicial statements to the effect that women are in a class by themselves, as a special concern of the State. Their health and welfare in the performance of physical labor so fundamentally affect the public welfare and are of such public concern that legislation designed for their special protection has been sustained even when like legislation for men might not be. *Muller* v. *Oregon,* 208 U. S. 412; *Riley* v. *Massachusetts,* 232 U. S. 671; *Hawley* v. *Walker,* 232 U. S. 718; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385; *Radice* v. *New York,* 264 U. S. 292; *People* v. *Charles Schweinler Press,* 214 N. Y. 395.

Changes in modern industry affecting the economic status of the family have brought to women growing re-

sponsibilities for shouldering the support of others. Their capacity, as well as the physical circumstances surrounding their employment, bears a definite relation to the health and welfare of themselves, their families and the community. There has been an influx of women and minors into industry in New York State in recent years. Great numbers of women are employed outside the home. There is a growing tendency for women to continue working after marriage.

Women can not bargain and secure a fair return for their services as men can. They are particularly unable to bargain with unconscionable employers. Reasons of this disadvantage are, tradition and the fact that their sources of employment are subject to sharp seasonal movements. They are not as well informed as men are about the labor market. They are less mobile as a labor group. In these respects the low wage level of women has been self-perpetuating. Those who do not earn enough to support themselves must live with their families and be partially supported by others. Their family ties make them unable to move from place to place in search of better opportunities. These women whose earnings are supplemented from other sources are a constant drag on the wage level and offer formidable competition to the growing thousands of women dependent on their own labor for support, and often for the support of others dependent upon them. Low wages cause one of the vicious circles in our modern economic life. The community pays the bill continually, whether directly by supplementing low wages with relief funds, or indirectly through the social costs of physical deterioration and poverty.

The lack of trade union organization among women is another important factor affecting their wages.

A worker is entitled legally and ethically to full payment for what he has earned. The legal duty placed upon the employer by this statute is that he must pay

women and minor employees the fair value of services rendered. When the wage equals or is more than the cost of maintaining a normal health standard, the condition of the women in a particular industry ceases to be a menace to public welfare. If within this defined limit an employer pays less than the fair value of the services rendered, by virtue of his more secure and potent economic position, the transaction smacks of fraud, exploitation and over-reaching. *Holden* v. *Hardy,* 169 U. S. 366.

Restraints upon the liberty of contract between employer and employee have been declared constitutional in many cases. *Patterson* v. *The Eudora,* 190 U. S. 169; *Keokee* v. *Taylor,* 234 U. S. 224; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; *McLean* v. *Arkansas,* 211 U. S. 531; *Erie R. Co.* v. *Williams,* 233 U. S. 685; *New York Central R. Co.* v. *Williams,* 199 N. Y. 108; *St. Louis, I. M. & S. Ry.* v. *Paul,* 173 U. S. 404; *Strathearn Steamship Co.* v. *Dillon,* 252 U. S. 348. The underlying principle in these cases is the State's right and duty to interfere when inequality of bargaining power makes it illusory to speak of liberty of contract. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 417. These cases have all involved legislation whose purpose was to protect the right of the worker to what he had earned and to invalidate devices used to avoid honest remuneration.

Instances in which legislation has directly or indirectly restrained the bargaining power of the more powerful in order to prevent them from enjoying its full economic potency are numerous. In the foreground are cases involving the validity of usury laws. *Griffiths* v. *Connecticut,* 218 U. S. 563. Combinations in restraint of trade are another example. It was the lack of any real freedom of bargaining which made the New York Rent Laws valid (*Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v.

Feldman, 256 U. S. 170), and which justified the State in fixing the price of milk (*Nebbia* v. *New York,* 291 U. S. 502). See also *Ribnik* v. *McBride,* 277 U. S. 350, 360; *Brazee* v. *Michigan,* 241 U. S. 340; *National Union Fire Ins. Co.* v. *Wanberg,* 260 U. S. 71; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; *Atkins* v. *Kansas,* 191 U. S. 207.

This New York law recognizes that desperate competition for jobs gives an unscrupulous employer power to deprive his employee of what she has fairly earned. The result is another and a most effective means of defrauding the worker and avoiding full payment, and as such can be invalidated as any other scheme having the same effect. The Minimum Wage Law promotes and does not restrict real freedom of contract.

"Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." *Vernon* v. *Bethell,* 2 Eden 110, 113.

The Minimum Wage Law, to paraphrase the language of Mr. Justice Butler in *Highland* v. *Russell Car Co.,* 279 U. S. 253, 262, merely deprives the employer of the right or opportunity by negotiation to pay less than the fair value of the services rendered. See also *Chicago & Grand Trunk Ry.* v. *Wellman,* 143 U. S. 339–346; *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345.

The courts have permitted the fixing of wages in industry. Citing: *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251; *Bunting* v. *Oregon,* 243 U. S. 426; *Holcombe* v. *Creamer,* 231 Mass. 99, and a number of cases in state courts sustaining laws like the one in question, and other cases adjudging such laws unconstitutional.

Adkins v. *Children's Hospital,* 261 U. S. 525, is distinguishable. The statutes are vitally dissimilar.

The purpose of the statute in the *Adkins* case was to guarantee a wage based solely upon the necessities of the

workers, without regard to earning power. It applied to all vocations. It was exclusively a price-fixing statute, with the "vague, variable standard" of the "cost of living," with no relationship between the wage set and the work done. It did not consider the industry's ability to pay.

In contrast, the New York law provides a definite standard,—not more than the value of the services rendered. The minimum wage is to be fixed after considering all relevant circumstances and applying the principles that would guide a court in a suit for the reasonable value of services rendered. In each industry there must be a separate investigation conducted by a separate Board.

Moreover, the very different conditions to which it is addressed serve to sustain the New York legislation. *O'Gorman & Young* v. *Hartford Fire Ins. Co., supra.* Cf. *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365. *Green* v. *Frazier,* 253 U. S. 233.

The differences in the underlying facts and in the statutes are sufficient to make the rule of the *Adkins* case inapplicable to this case. Furthermore, we find for every objection offered by this Court in the *Adkins* case a complete answer in the New York statute; for every affirmative qualification indicated, a standard in the New York law which meets the qualification. It may be stated with confidence that the majority opinion in *Adkins* v. *Children's Hospital, supra,* furnishes the fullest justification for declaring the New York Minimum Wage Law a valid enactment under the Fourteenth Amendment.

Analysis of the actual results of the Minimum Wage Law, as applied to the laundry industry, is extremely persuasive in any evaluation of the legitimacy of the end and the reasonableness of the means.

It is of the essence of Anglo-American law, and particularly of constitutional decisions thereunder, that the courts decide only specific cases, presented by specific records, and involving definite issues before the court. It cannot be said that this Court in the *Adkins* case holds that all minimum wage statutes, wherever found, are unconstitutional. On the contrary, the method of the District of Columbia statute was decried, but not its purpose. The purpose, in fact, was commended (p. 558).

This canon of constitutional interpretation is particularly compelling when dealing with the broad language in the Fourteenth Amendment. The "police power" depends ultimately upon pure questions of fact. The Fourteenth Amendment expresses a compromise between the liberty of the individual and the welfare of the people of the State. All cases under the Amendment present individual instances, varying with the facts.

The delegation of powers to the Wage Board and to the Industrial Commissioner, as contained in the Minimum Wage Law, is a proper exercise of legislative authority.

The contention of respondent that the Minimum Wage Law is unconstitutional, in that it operates to compel him to be a witness against himself in a criminal case, is not relevant to the decision on this petition.

Messrs. Arthur Levitt and *Nathan L. Miller,* with whom *Messrs. Harold Allen Gates* and *Challen B. Ellis* were on the brief, for Tipaldo.

The challenged statute vests the Wage Board and the Industrial Commissioner with arbitrary power; it prescribes no standard of measure whatsoever. *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n,* 260 U. S. 48, 59. A board is empowered to impose a standard, not for one employer or one group of employees, but for all employees in an industry; and in the last analysis any

such standard is bound to be merely a compromise of individual opinion.

The statute permits a review only of questions "of law included or embodied in any decision or order of the commissioner or the director."

The construction given by the New York Court of Appeals is controlling. *Hicklin* v. *Coney,* 290 U. S. 169, 172; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32; *Tioga R. Co.* v. *Blossburg & Corning R. Co.,* 20 Wall. 137, 143; *McKeen* v. *Delaney's Lessee,* 5 Cranch 22, 32.

The standard of "value of the service or class of service rendered" possesses the infirmities of the living wage standard considered in the *Adkins* case, and whilst superficially the language of subdivision 8 of § 551 of the Act may appear to have some relation to the service performed, upon analysis the wage basis has no substantial "causal connection" with the business, the contract of employment, or the work done by the employee.

We have understood, and believe the bench and bar throughout the country have understood, that the *Adkins* case decided a question much more fundamental than that of the standard involved, namely,—the question of validity of any mere wage-fixing law as applied to adult, legally competent women.

The decision in that case was twice reaffirmed by this Court. *Murphy* v. *Sardell,* 269 U. S. 530; *Donham* v. *West-Nelson Mfg. Co.,* 273 U. S. 657.

It was cited with approval in *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 534, and in *Near* v. *Minnesota,* 283 U. S. 697, 707–708.

It is unnecessary to consider whether a statute would be constitutional which enabled the employee to recover the reasonable value of her services despite an agreement for a lesser sum. We are concerned here with the establishment of standards by a Wage Board which need have little or no relation to the value of the particular service

rendered. To say that such a standard is based on *quantum meruit* is to ignore the essentials of *quantum meruit*.

As in the *Adkins* case, the challenged Act "is not a law dealing with any business charged with a public interest, or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe the hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, . . ." (p. 554).

Nebbia v. *New York,* 291 U. S. 502 and *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251 fall under the exceptions considered in the *Adkins case.*

The suggestion that there has been a change in conditions to warrant a departure now from the *Adkins* case is fanciful. We have had a depression, but the challenged Act is not an emergency statute. The Legislature of New York did pass a companion Act at the same time, known as the Desmond Act, which was applicable to both men and women and was called an emergency measure; but the Governor vetoed it because of doubts of its constitutional validity. So far from justifying a minimum wage law, a depression makes such a law the more harmful and oppressive by increasing the difficulty of the least efficient in securing employment. But the statute is not an emergency statute. There is nothing new in the alleged inequality of bargaining power and there is nothing peculiar to women in it; indeed the breadwinner of the family, usually a man, is under as great compulsion to secure employment as women, certainly under greater compulsion than those women who seek employment to eke out other means of income or support. The inequality of bargaining power was recognized by this Court as far back as *Holden* v. *Hardy,* 169 U. S. 366, 397, sustaining a health measure.

The fact brief submitted by the Attorney General of New York indicates an increase in the number of women employed in industry, but of course there are still a great many more necessitous men than women so employed. The increase would appear to indicate an improvement in the status of women in industry; and from facts adduced by the Attorney General it would appear that the wages of women were much less seriously affected by the depression than the wages of men. Nothing new is added to the factual situation presented to this Court in the *Adkins* case. A social philosophy in conflict with the fundamental principles of the American Constitution has doubtless gained many adherents since that case was decided, but every argument that can be presented in favor of minimum wage legislation was heard and considered then.

Few bargains have ever been made between parties of exactly equal bargaining power, and undoubtedly that is especially true in the case of contracts of employment. Adam Smith considered the disparity in bargaining power between employee and employer in his "Wealth of Nations" in 1776. To overcome that inequality, the law favors and zealously safeguards the right of collective bargaining. That inequality justifies statutes to prevent fraud and overreaching. *McLean* v. *Arkansas,* 211 U. S. 539; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; *Erie R. Co.* v. *Williams,* 233 U. S. 685. But all this is very far from the establishment by a state agency of a standard of wages, whether minimum or maximum, for an industry.

This Court has always considered freedom of contract not only as a constitutional right, but as a natural right,—as one of the inalienable rights with which man was endowed by his Creator. *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 757; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589; *Adair* v. *United States,*

208 U. S. 161, 174; *Coppage* v. *Kansas,* 236 U. S. 1, 14; *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 536; *Truax* v. *Raich,* 239 U. S. 33, 41; *Meyer* v. *Nebraska,* 262 U. S. 390, 399–400; *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 534.

Distinguishing: *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251; *Bunting* v. *Oregon,* 243 U. S. 426; *Holcombe* v. *Creamer,* 231 Mass. 99.

The Fourteenth Amendment is a limitation of the police power and that power cannot be so exercised as to destroy the limitation. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 439.

The instant case involves the destruction, as a permanent policy, of the right of parties, under no disability, freely to contract, the one to render services and the other to pay therefor. Terms are to be prescribed by an administrative agency. We say that the direct end sought is private benefit and that the supposed public benefit is at most indirect. Constitutional guarantees cannot be stricken down for the benefit of individuals or groups on the theory that that will ultimately benefit the public.

The indirect public interest in the wages paid the workers is greatest in the case of wages paid to men. Men, as a rule, are the heads of the families, the breadwinners. Many more men than women are employed in industry. Inequality of bargaining power between employer and employee is not peculiar to women employees; indeed the pressure upon the breadwinner is the greatest.

The so-called "chiseler," who pays low wages and is thus able to undersell his competitor, has long been in disfavor, but the "chiseler's" main advantage results from low wages paid to men. Enlightenment and the pressure of public opinion are gradually removing that so-called source of unfair competition. The suggestion that it is competent for the State to fix the price which every employer shall pay to his employees, indirectly to prevent

some employers from underselling their competitors, serves to emphasize the point that the so-called public interest claimed to be promoted is wholly indirect. The liberties of all are not to be destroyed because of the sins of some.

The claim still made that this is a health measure also emphasizes our point. This Court has three times rejected that claim. *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Murphy* v. *Sardell,* 269 U. S. 530; *Donham* v. *West-Nelson Mfg. Co.,* 273 U. S. 657. If it were a health measure, the wages paid to heads of families would most certainly be the first to be regulated. There is basis for saying that excessive hours of labor and night work for women directly affect the health of the worker; and therefore hours and night work statutes, whether wise or unwise, were within the competency of the legislatures, though thousands of women were deprived of comfortable jobs under healthful surroundings by the night statutes; but the wages paid affect the health of the recipients only indirectly, as this Court necessarily decided in the cases just cited.

The physical differences between men and women may furnish reason for discrimination between them, both as to night statutes and as to hours statutes, but the alleged differences in bargaining power are illusory and are wholly irrelevant to the question before the Court. It is said that the statistics show that the wages paid women are on the whole less than the wages paid men for similar work. Undoubtedly that is one of the reasons for the alleged increase in the number of women employed in industry. It might solve the unemployment problem as far as men are concerned to require equal pay for men and women, but that would furnish little consolation to women deprived of the right and opportunity to work for a wage which they were glad to receive. It is said that men are better organized than women, but women may

organize the same as men. It is said that the garment workers receive higher wages than the laundry workers because they are better organized. That merely indicates that the women are learning the advantages of collective bargaining. It is said that women are willing to work for less than men to supplement income from other sources. We say that that is their right, protected by the Constitution, and that it is not for the State to deny them that right on the theory that it may indirectly affect others. The fact is, that the inevitable tendency of establishing minimum wages is to lower the maximum, if the minimum is high enough to be effective, and to displace women with men workers wherever men can be employed at comparable rates.

Freedom from price-fixing is the rule and not the exception. *Patterson* v. *Bark Eudora,* 190 U. S. 169, 174; *Ribnik* v. *McBride,* 277 U. S. 350, 357; *Adair* v. *United States,* 208 U. S. 161, 174–175.

The desirability of price-fixing as a speedy remedy for supposed evils, and the difficulty of dealing with them by other methods, constitute no warrant for this interference with the "freedom of contract." *Hurtado* v. *California,* 110 U. S. 516; *Loan Association* v. *Topeka,* 20 Wall. 655–662; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, 37; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 394, 415; *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 445; *Ribnik* v. *McBride,* 277 U. S. 350, 358.

Rate-making, being a taking of property for supposed public benefit, must comply with the requirements of just compensation. *Cotting* v. *Kansas City,* 183 U. S. 79, 91; *Smyth* v. *Ames,* 169 U. S. 466, 547; *Board* v. *N. Y. Telephone Co.,* 271 U. S. 23, 31; *West* v. *Chesapeake & Potomac Tel. Co.,* 295 U. S. 662, 671.

Price-fixing is justified only as a protection to the consuming and using public, and the price regulated is the price paid by the public. *O'Gorman & Young* v. *Hart-*

ford Insurance Co., 282 U. S. 251; *Nebbia* v. *New York*, 291 U. S. 502; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420.

The results reached in these cases and in many others on this subject, are uniformly consistent with the vital distinction between property and labor in the matter of constitutional price-fixing; one is the taking of "property," the other is a taking of "liberty," both mentioned in the Constitution and both protected by the constitutional guaranties, as rights; but the right of property and the right to liberty are essentially different in their nature and in the relation of the State to them. Property, however absolute and unqualified may be the title to it, originates from the State, and is held under the implied condition that its use shall not be injurious to an equal enjoyment by others having an equal right. *Holden* v. *Hardy*, 169 U. S. 366, 392, quoting Chief Justice Shaw in *Commonwealth* v. *Alger*, 7 Cush. 84. But liberty is not held at the will of the State. It does not revert to the State, and it cannot be taken by the State except as a punishment for crime or in time of war. The right of property is a conditioned right, but the right to liberty is a prerequisite to the very organization of a government such as ours. Nothing is better settled in our constitutional law than that liberty does not mean merely freedom from physical restraint, but includes the right to work for a living by using the powers of brain and muscle in the ordinary activities of mankind. *Truax* v. *Raich*, 239 U. S. 33, 41.

When property is taken for public use, the equivalent may always be given in return. But liberty has no constitutional "equivalent in money," under our system of government.

Working for wages cannot, in the very nature of things, be a business devoted to a public use. *Ribnik* v.

McBride, 277 U. S. 350, 356; *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 539, 540.

By leave of Court, *Mr. Dean G. Acheson* argued the case on behalf of the States of Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, and Rhode Island, as *amici curiae,* in support of the statute. With him on the brief were *Mr. Edward J. Daly,* Attorney General of Connecticut; *Mr. Otto Kerner,* Attorney General of Illinois; *Mr. Paul A. Dever,* Attorney General of Massachusetts; *Mr. David T. Wilentz,* Attorney General of New Jersey; *Mr. Francis U. Johnston,* Attorney General of New Hampshire; and *Mr. John P. Hartigan,* Attorney General of Rhode Island.

By leave of Court, briefs of *amici curiae* were filed as follows:

Mr. John W. Bricker, Attorney General, *Messrs. Isadore Topper* and *John K. Evans,* Assistant Attorneys General, and *Messrs. William S. Evatt* and *Marvin C. Harrison,* on behalf of the State of Ohio; and *Messrs. Paul Windels, Paxton Blair,* and *Paul J. Kern,* on behalf of the City of New York, supporting the statute.

Mr. Charles J. Campbell, on behalf of the New York State Hotel Assn.; and *Burnita Shelton Matthews* and *Rebekah Scandrett Greathouse,* on behalf of the National Women's Party et al., challenging the statute.

Mr. Justice Butler delivered the opinion of the Court.

This is a habeas corpus case originating in the supreme Court of New York. Relator was indicted in the county court of Kings county and sent to jail to await trial upon the charge that as manager of a laundry he failed to obey the mandatory order of the state industrial commissioner prescribing minimum wages for women employees.

The relator's petition for the writ avers that the statute, c. 584 of the Laws of 1933 (Cons. Law, c. 31, art. 19) under which the commissioner made the order, insofar as it purports to authorize him to fix women's wages, is repugnant to the due process clause, Art. I, § 6, of the constitution of the State and the due process clause of the Fourteenth Amendment to the Constitution of the United States. The application for the writ is grounded upon the claim that the state statute is substantially identical with the minimum wage law enacted by Congress for the District of Columbia, 40 Stat. 960, which in 1923 was condemned by this court as repugnant to the due process clause of the Fifth Amendment. *Adkins* v. *Children's Hospital,* 261 U. S. 525.

The warden's return, without disclosing the commissioner's order, the prescribed wages, the findings essential to his jurisdiction to establish them, things done in pursuance of the Act, or the allegations of the indictment, merely shows that under an order of the county court he was detaining relator for trial. The case was submitted on petition and return. The court dismissed the writ. 156 Misc. 522; 282 N. Y. S. 576. Relator took the case to the Court of Appeals. It held the Act repugnant to the due process clauses of the state and federal constitutions. 270 N. Y. 233; 200 N. E. 799. The remittitur directed that the order appealed from be reversed, the writ sustained and the prisoner discharged; it certified that the federal constitutional question was presented and necessarily passed on. The supreme court entered judgment as directed. We granted a writ of certiorari.

The Act extends to women and minors in any "occupation" which "shall mean an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor

on a farm." § 551 (6). It is not an emergency law. It does not regulate hours or any conditions affecting safety or protection of employees. It relates only to wages of adult women and minors. As the record is barren of details in respect of investigation, findings, amounts being paid women workers in laundries or elsewhere prior to the order, or of things done to ascertain the minimum prescribed, we must take it as granted that, if the State is permitted as against employers and their women employees to establish and enforce minimum wages, that power has been validly exerted. It is to be assumed that the rates have been fairly made in accordance with the procedure prescribed by the Act and in full compliance with the defined standards. If, consistently with the due process clause, the State may not enter upon regulation of the sort undertaken by the challenged enactment, then plainly it cannot by diligence to insure the establishment of just minima create power to enter that field. Cf. *St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38; *Baltimore & Ohio R. Co.* v. *United States, ante,* p. 349.

The *Adkins* case, unless distinguishable, requires affirmance of the judgment below. The petition for the writ sought review upon the ground that this case is distinguishable from that one. No application has been made for reconsideration of the constitutional question there decided.[1] The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was

[1] Briefs of *amici curiae* in support of the application were filed by the City of New York and the State of Illinois. Briefs on the merits supporting the New York Act, were filed by the State of Ohio, and by the States of Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. Briefs for affirmance were filed by the New York State Hotel Association, National Woman's Party, National Association of Women Lawyers, et al.

asked or granted. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242. *Clark* v. *Williard*, 294 U. S. 211, 216. Here the review granted was no broader than that sought by the petitioner. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494. He is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar.

The District of Columbia Act provided for a board to ascertain and declare "standards of minimum wages" for women in any occupation and what wages were "inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals." § 9. Violations were punishable by fine and imprisonment. § 18. The declared purposes were to protect women from conditions detrimental to their health and morals, resulting from wages inadequate to maintain decent standards of living. § 23.

The New York Act declares it to be against public policy for any employer to employ any woman at an oppressive and unreasonable wage (§ 552) defined as one which is "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." § 551 (7). "A fair wage" is one "fairly and reasonably commensurate with the value of the service or class of service rendered." § 551 (8). If the commissioner is of opinion that any substantial number of women in any occupation are receiving oppressive and unreasonable wages he shall appoint a wage board to report upon the establishment of minimum fair wage rates. § 554. After investigation, the board shall submit a report including its recommendations as to minimum fair wage standards. § 555.

And for administrative guidance, the Act declares: "In establishing a minimum fair wage for any service or class

of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards." § 551 (8).

If the commissioner accepts the report, he shall publish it and a public hearing must be held. § 556. If after the hearing he approves the report, he "shall make a directory order which shall define minimum fair wage rates." § 557. Upon hearing and finding of disobedience the commissioner may publish the name of an employer as having failed to observe the directory order. § 559. If, after a directory order has been in effect for nine months, the commissioner is of opinion that persistent non-observance is a threat to the maintenance of the prescribed standards, he may after hearing make the order mandatory. § 560. Violation of a mandatory order is a misdemeanor punishable by fine, imprisonment or both. § 565 (2).

Thus it appears: The minimum wage provided for in the District Act was one not less than adequate "to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals." The New York Act defines an oppressive and unreasonable wage as containing two elements. The one first mentioned is: "less than the fair and reasonable value of the services rendered." The other is: "less than sufficient to meet the minimum cost of living necessary for health." The basis last mentioned is not to be distin-

guished from the living wage defined in the District act. The exertion of the granted power to prescribe minimum wages is by the State act conditioned upon a finding by the commissioner or other administrative agency that a substantial number of women in any occupation are receiving wages that are oppressive and unreasonable, i. e., less than value of the service and less than a living wage. That finding is essential to jurisdiction of the commissioner. In the state court there was controversy between the parties as to whether the "minimum fair wage rates" are required to be established solely upon value of service or upon that value and the living wage. Against the contention of the attorney general, the Court of Appeals held that the minimum wage must be based on both elements.

Speaking through its chief judge, that court said: "We find no material difference between the act of Congress and this act of the New York State Legislature. The act of Congress, it is said, was to protect women from conditions resulting from wages which were inadequate to maintain decent standards of living." The opinion then quotes from the brief of the attorney general: " 'The purpose of the statute in the *Adkins* case was to guarantee a wage based solely upon the necessities of the workers. The statute did not provide for the wages to have any relationship to earning power; was applicable to all vocations and not to the character of the work . . . As contrasted with this statute, the New York Minimum Wage Law provides a definite standard for wages paid. It provides that the worker is to be paid at least the value of the services rendered.' " The opinion continues: "This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and*

less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act. Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the *Adkins* case. The distinctions between this case and the *Adkins* case are differences in details, methods and time; the exercise of legislative power to fix wages in any employment is the same."

The petitioner does not suggest and reasonably it cannot be thought that, so far as concerns repugnancy to the due process clause, there is any difference between the minimum wage law for the District of Columbia and the clause of the New York Act, "less than sufficient to meet the minimum cost of living necessary for health." Petitioner does not claim that element was validated by including with it the other ingredient, "less than the fair and reasonable value of the services rendered."

His brief repeats the state court's declaration: "'The act of Congress had one standard, the living wage; this State act has added another, reasonable value. *The minimum wage must include both.* What was vague before has not been made any clearer. *One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act.*'" Then he says: "The italicized lines carry the Court's misconception of the statute. It is a basic misconception. From it flows the erroneous conclusion of the Court of Appeals that there exists no material difference between the two statutes . . . Those two factors *do not* enter into the determination of the minimum '*fair wage*' as in the statute defined, nor as determined in this case. The only basis for

evaluating and arriving at the 'fair minimum wage' is the fair value of the services rendered."

There is no blinking the fact that the state court construed the prescribed standard to include cost of living or that petitioner here refuses to accept that construction. Petitioner's contention that the Court of Appeals misconstrued the Act cannot be entertained. This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the State. We are not at liberty to consider petitioner's argument based on the construction repudiated by that court. The meaning of the statute as fixed by its decision must be accepted here as if the meaning had been specifically expressed in the enactment. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32. Exclusive authority to enact carries with it final authority to say what the measure means. *Jones* v. *Prairie Oil Co.,* 273 U. S. 195, 200. The standard of "minimum fair wage rates" for women workers to be prescribed must be considered as if both elements—value of service and living wage—were embodied in the statutory definition itself. *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 220. As our construction of an Act of Congress must be deemed by state courts to be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purpose of her lawmakers. *Green* v. *Neal's Lessee,* 6 Pet. 291, 295–298.

The state court rightly held that the *Adkins* case controls this one and requires that relator be discharged upon the ground that the legislation under which he was indicted and imprisoned is repugnant to the due process clause of the Fourteenth Amendment.

The general statement in the New York Act of the fields of labor it includes, taken in connection with the work not covered, indicates legislative intention to reach

nearly all private employers of women. The Act does not extend to men. It does extend to boys and girls under the age of 21 years but there is here involved no question as to its validity in respect of wages to be prescribed for them. Relator's petition for the writ shows that the charge against him is that as manager of a laundry he "disobeyed a mandatory order prescribing certain minimum wages for certain adult women employees of the said laundry." The rights of no other class of workers are here involved.

Upon the face of the act the question arises whether the State may impose upon the employers state-made minimum wage rates for all competent experienced women workers whom they may have in their service. That question involves another one. It is: Whether the State has power similarly to subject to state-made wages all adult women employed in trade, industry or business, other than house and farm work. These were the questions decided in the *Adkins* case. So far at least as concerns the validity of the enactment under consideration, the restraint imposed by the due process clause of the Fourteenth Amendment upon legislative power of the State is the same as that imposed by the corresponding provision of the Fifth Amendment upon the legislative power of the United States.

This court's opinion shows (pp. 545, 546): The right to make contracts about one's affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and employee fixing the wages to be paid. In making contracts of employment, generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining. Legislative abridgement of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the

general rule and restraint the exception. This court has found not repugnant to the due process clause statutes fixing rates and charges to be exacted by businesses impressed with a public interest, relating to contracts for the performance of public work, prescribing the character, methods and time of payment of wages, fixing hours of labor. Physical differences between men and women must be recognized in proper cases and legislation fixing hours or conditions of work may properly take them into account, but (p. 553) "we cannot accept the doctrine that women of mature age, *sui juris,* require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships. . . . [p. 554] Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This Court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages."

The decision and the reasoning upon which it rests clearly show that the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid.

Then, the opinion emphasizes objections specifically applicable to the requirement that the minimum wages to be prescribed under the District Act shall be adequate "to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals." Some of them were: The price fixed by the board need have no relation to earning powers, hours or place or character of work; it is based wholly on opinion of the board as to what amount will be necessary to comply with the standard; it applies to every occupation without regard to the kind of work; the standard is so vague as to be impossible of practical application; the Act takes account of the necessities of only the employee; to the extent that the sum fixed exceeds fair value of service rendered, it amounts to a compulsory exaction for the support of a partially indigent person for whose condition there rests upon the employer no peculiar responsibility; the statute exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business or the contract or the work the employee engages to do; the declared basis is not the value of the service rendered but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The court said (p. 558): "The ethical right of every worker, man or woman, to a living wage may be conceded. . . . The fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement, implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered and these arise outside of the employment and are as great in one occupation as in another."

Illustrating particular constitutional difficulties encountered by the enactment then before us, the opinion proceeds (p. 559): "Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States."

Petitioner does not attempt to support the Act as construed by the state court. His claim is that it is to be tested here as if it did not include the cost of living and as if value of service were the sole standard. Plainly that position is untenable. If the State has power to single out for regulation the amount of wages to be paid women, the value of their services would be a material consideration. But that fact has no relevancy upon the question whether the State has any such power. And utterly without significance upon the question of power is the suggestion that the New York prescribed standard includes value of service with cost of living whereas the District of Columbia standard was based upon the latter

alone. As shown above, the dominant issue in the *Adkins* case was whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid was an additional ground of subordinate consequence.

The dissenting opinion of Mr. Chief Justice Taft (in which Mr. Justice Sanford concurred) assumes (p. 564) "that the conclusion in this [*Adkins*] case rests on the distinction between a minimum of wages and a maximum of hours." That is the only point he discussed; he did not refer to the validity of the standard prescribed by the Act. The dissenting opinion of Mr. Justice Holmes begins (p. 567): "The question in this case is the broad one, Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress has no power to meddle with the matter at all." And, after assuming that women would not be employed at the wages fixed unless they were earned or unless the employer could pay them, the opinion says (p. 570): "But the ground on which the law is held to fail is fundamental and therefore it is unnecessary to consider matters of detail." If the decision of the court turned upon the question of the validity of the particular standard, that question could not have been ignored by the justices who were in favor of upholding the Act. Clearly they understood—and rightly—that, by the opinion of the court, it was held that Congress was without power to deal with the subject at all.

To distinguish this from the *Adkins* case, petitioner refers to changes in conditions that have come since that decision, cites great increase during recent years in the number of women wage earners and invokes the first section of the Act, called "Factual background."

The Act is not to meet an emergency; it discloses a permanent policy; the increasing number of women workers suggests that more and more they are getting and holding jobs that otherwise would belong to men. The "Factual background" must be read in the light of the circumstances attending its enactment. The New York legislature passed two minimum wage measures and contemporaneously submitted them to the governor. One was approved; it is the Act now before us. The other was vetoed and did not become law. They contained the same definitions of oppressive wage and fair wage and in general provided the same machinery and procedure culminating in fixing minimum wages by directory orders. The one vetoed was for an emergency; it extended to men as well as to women employees; it did not provide for the enforcement of wages by mandatory orders.

It is significant that their "factual backgrounds" are much alike. They are indicated in the margin.[2] These

---

[2] Omitting the words in brackets, the following is the factual background in the first section of the Act before us. Adding the words in brackets and omitting those in italics, there is indicated the background in the bill that was not approved.

"The employment of [men and] women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many [men and] women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances, forced to accept whatever wages are offerd to them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. *Women and minors employed for gain are peculiarly subject to the over-*

legislative declarations, in form of findings or recitals of fact, serve well to illustrate why any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all, that in them is said in justification of the regulations that the Act imposes in respect of women's wages applies with equal force in support of the same regulation of men's wages. While men are left free to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful to prevent or lessen the evils listed in the first section of the Act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents and because of need will work for whatever wages they can get and that without regard to the value of the service and even though the pay is less than minima prescribed in accordance with this Act. It is plain that, under circumstances such as those por-

---

reaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, [and] the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates *for women and minors,* the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of *the workers* [a large proportion of the population of the state] and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages *as they affect women and minors employed in the state of New York* are such as to render imperative the exercise of the police power of the state for the protection of industry and of the [men and] women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. *In the considered judgment of the legislature this article is constitutional."*

trayed in the "Factual background," prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work.

This court, on the authority of the *Adkins* case and with the acquiescence of all the justices who dissented from the decision,[3] held repugnant to the due process clause of the Fourteenth Amendment statutes of Arizona and Arkansas,[4] respectively, fixing minimum wages for women. *Murphy* v. *Sardell,* 269 U. S. 530. *Donham* v. *West-Nelson Mfg. Co.,* 273 U. S. 657. We have adhered to the principle there applied and cited it as a guide in other cases. *Meyer* v. *Nebraska,* 262 U. S. 390, 399. *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522, 534. *Ribnik* v. *McBride,* 277 U. S. 350, 356. See *Near* v. *Minnesota,* 283 U. S. 697, 707-708. States having similar enactments have construed it to prevent the fixing of wages for adult women. *Topeka Laundry Co.* v. *Court of In-*

[3] Mr. Justice Brandeis took no part in the consideration of the *Adkins* case. He noted dissent without more in the Arizona case and Arkansas case.

[4] The Arizona Act declared: "No person . . . shall employ any female in any store, office, shop, restaurant, dining room, hotel, rooming house, laundry or manufacturing establishment at a weekly wage of less than Sixteen Dollars ($16.00) per week; a lesser amount being hereby declared inadequate to supply the necessary cost of living to any such female, to maintain her health, and to provide her with the common necessaries of life." Laws of Arizona, 1923, c. 3, § 1.

The Arkansas Act declared: "It shall be unlawful for any employer . . . to pay any female worker in any establishment or occupation less than the wage specified in this section, to-wit, except as hereinafter provided: "All female workers who have had six months' practicable experience in any line of industry or labor shall be paid not less than one dollar and twenty-five cents per day. The minimum wage for inexperienced female workers who have not had six months experience in any line of industry or labor shall be paid not less than one dollar per day." § 7108, Crawford & Moses Digest.

dustrial Relations, 119 Kan. 12; 237 Pac. 1041. *Stevenson* v. *St. Clair,* 161 Minn. 444; 201 N. W. 629. See *Folding Furniture Works* v. *Industrial Commission,* 300 Fed. 991. *People* v. *Successors of Laurnaga & Co.,* 32 P. R. 766.

The New York court's decision conforms to ours in the *Adkins* case, and the later rulings that we have made on the authority of that case. That decision was deliberately made upon careful consideration of the oral arguments and briefs of the respective parties and also of briefs submitted on behalf of States and others as amici curiae. In the Arizona case the attorney general sought to distinguish the District of Columbia Act from the legislation then before us and insisted that the latter was a valid exertion of the police power of the State. Counsel for the California commission submitted a brief amicus curiae in which he elaborately argued that our decision in the *Adkins* case was erroneous and ought to be overruled. In the Arkansas case the state officers, appellants there, by painstaking and thorough brief presented arguments in favor of the same contention. But this court, after thoughtful attention to all that was suggested against that decision, adhered to it as sound. And in each case, being clearly of opinion that no discussion was required to show that, having regard to the principles applied in the *Adkins* case, the state legislation fixing wages for women was repugnant to the due process clause of the Fourteenth Amendment, we so held and upon the authority of that case affirmed per curiam the decree enjoining its enforcement. It is equally plain that the judgment in the case now before us must also be

Affirmed.

MR. CHIEF JUSTICE HUGHES, dissenting.

I am unable to concur in the opinion in this case. In view of the difference between the statutes involved, I

cannot agree that the case should be regarded as controlled by *Adkins* v. *Children's Hospital,* 261 U. S. 525. And I can find nothing in the Federal Constitution which denies to the State the power to protect women from being exploited by overreaching employers through the refusal of a fair wage as defined in the New York statute and ascertained in a reasonable manner by competent authority.

First.—Relator in his petition for *habeas corpus* raises no question as to the fairness of the minimum wage he was required to pay. He does not challenge the regularity of the proceedings by which the amount of that wage was determined. We must assume that none of the safeguards of the statute was ignored and that its provisions for careful and deliberate procedure were followed in all respects. It is important at the outset to note the requirements of that procedure, as they at once dispose of any question of arbitrary procedural action.

The statute states its objectives. It defines an "oppressive and unreasonable wage" as one which "is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." It defines a "fair wage" as one "fairly and reasonably commensurate with the value of the service or class of service rendered." It relates to an industry, trade or business, other than domestic service or labor on a farm. The industrial commissioner is authorized to investigate and ascertain the wages of women and minors. If he is of the opinion that any substantial number of women or minors are receiving "oppressive and unreasonable" wages, he must appoint a wage board to make report. That board is to be composed of not more than three representatives of employers, an equal number of representatives of employees, and not more than three disinterested persons representing the public. The wage board is fully equipped with

authority to conduct a comprehensive investigation. It may differentiate and classify employments in any occupation according to the nature of the service rendered. It may recommend minimum fair wage rates varying with localities. It may recommend a suitable scale of rates for learners and apprentices which may be less than those recommended for experienced women or minor workers. The wage board may take into account all relevant circumstances affecting the value of the service or class of service. It may be guided by such considerations as would guide a court in a suit for the reasonable value of services rendered. It may consider the wages paid in the State for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

The commissioner may approve or disapprove the report of the wage board. If the commissioner disapproves, he may resubmit the matter to the same or a new board. In case the report is approved, the commissioner is to make a "directory order" which defines minimum "fair wage rates" and is to include appropriate administrative regulations. The latter may embrace regulations governing learners, apprentices, piece rates or their relation to time rates, overtime or part-time rates, bonuses or special pay for special or extra work, deductions for board, lodging and other items or services supplied by the employer, and other special conditions. Special licenses, authorizing employment at lower rates, may be issued to a woman or minor whose earning capacity is impaired by age or physical or mental deficiency or injury.

If the commissioner has reason to believe that an employer is not observing the provisions of the "directory order," he may, upon notice, summon the employer to show cause why his name should not be published as having failed to comply with the order. And, after hearing and in case of a finding of non-observance, the com-

missioner may cause the name of the employer to be published. After a "directory minimum fair wage order" has been in effect for nine months, if it appears that there has been persistent non-observance, notice may be given of the intention to make the order mandatory and of a public hearing at which all persons in favor of, or opposed to, such a mandatory order may be heard. And it is after such hearing that the commissioner may make the previous directory order or any part of it mandatory and publish it accordingly.

It is disobedience to such a mandatory order which is punished by fine or by imprisonment. It is the violation of such an order, made after the inquiries, report, the tentative order, and the hearings which the statute enjoins, that is the basis of the prosecution in the case at bar.

Second.—In reaching its conclusion, the state court construed the opinion in the *Adkins* case and deemed that ruling applicable here. That, however, is a construction of the decision of this Court. That construction is not binding upon us.

When the opinion of the state court is examined in order to ascertain what construction was placed upon the statute, we find little more than a recital of its provisions. The state court says: "The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health." This is a repetition of the words of the statute in subdivision 7 of § 551 defining an "oppressive and unreasonable wage." The court adds: "The act of Congress [in the *Adkins* case] had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements,

therefore, in fixing the fair wage is the very matter which was the basis of the congressional act." But the court expressly recognizes that a wage is not denounced by the New York act as "oppresive and unreasonable" unless it is less than the fair and reasonable value of the services rendered. The statute also provides in explicit terms that the "fair wage" which is to be prescribed is one that is "fairly and reasonably commensurate with the value of the service or class of service rendered." I find nothing in the opinion of the state court which can be taken to mean that this definite provision of the statute is not obligatory upon the authorities fixing a fair wage. Certainly, the court has not said so, and I think that we must assume that the standard thus described is set up by the New York act. And there is no suggestion that the "fair wage" as prescribed in the instant case was not commensurate with the reasonable value of the service rendered by the employees.

When the opinion of the state court goes beyond the statement of the provisions of the act, and says that the setting up of such a standard does not create a material distinction when compared with the Act of Congress in the *Adkins* case, the state court is not construing the state statute. It is passing upon the effect of the difference between the two acts from the standpoint of the Federal Constitution. It is putting aside an admitted difference as not controlling. It is holding, as the state court says, that "Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the *Adkins* case."

That, it seems to me, is clearly a federal and not a state question, and I pass to its consideration.

Third.—The constitutional validity of a minimum wage statute like the New York act has not heretofore been passed upon by this Court. As I have said, the required correspondence of the prescribed "fair wage" to

the reasonable value of the service which the employee performs stands out as an essential feature of the statutory plan. The statute for the District of Columbia which was before us in the *Adkins* case did not have that feature. That statute provided for a minimum wage adequate "to supply the necessary cost of living to women workers" and "to maintain them in health and to protect their morals." 40 Stat. 963. The standard thus set up did not take account of the reasonable value of the service rendered. As this Court said, it compelled the employer "to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee." In the cases of *Murphy* v. *Sardell,* 269 U. S. 530, and *Donham* v. *West-Nelson Co.,* 273 U. S. 657, the statutes of Arizona and Arkansas, respectively, were of a similar character, and both these cases were decided upon the authority of the *Adkins* case. New York and other States have been careful to adopt a different and improved standard, in order to meet the objection aimed at the earlier statutes, by requiring a fair equivalence of wage and service.

That the difference is a material one, I think is shown by the opinion in the *Adkins* case. That opinion contained a broad discussion of state power, but it singled out as an adequate ground for the finding of invalidity that the statute gave no regard to the situation of the employer and to the reasonable value of the service for which the wage was paid. Upon this point the Court said (261 U. S. pp. 558, 559):

"The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already

pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. . . . A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States."

As the New York act is free of that feature, so strongly denounced, the question comes before us in a new aspect. The Court was closely divided in the *Adkins* case, and that decision followed an equal division of the Court, after reargument, in *Stettler* v. *O'Hara,* 243 U. S. 629, with respect to the validity of the minimum wage law of Oregon. Such divisions are at times unavoidable, but they point to the desirability of fresh consideration when there are material differences in the cases presented. The fact that in the *Adkins* case there were dissenting opin-

ions maintaining the validity of the federal statute, despite the nature of the standard it set up, brings out in stronger relief the ground which was taken most emphatically by the majority in that case, and that there would have been a majority for the decision in the absence of that ground must be a matter of conjecture. With that ground absent, the *Adkins* case ceases to be a precise authority.

We have here a question of constitutional law of grave importance, applying to the statutes of several States in a matter of profound public interest. I think that we should deal with that question upon its merits, without feeling that we are bound by a decision which on its facts is not strictly in point.

Fourth.—The validity of the New York act must be considered in the light of the conditions to which the exercise of the protective power of the State was addressed.

The statute itself recites these conditions and the State has submitted a voluminous factual brief for the purpose of showing from various official statistics that these recitals have abundant support. Judge Lehman, in his dissenting opinion in the Court of Appeals, states that the relator "does not challenge these findings of fact by the Legislature, nor does he challenge the statements in the 'factual brief' submitted by the respondent to sustain and amplify these findings." The majority opinion in the Court of Appeals has nothing to the contrary. Nor is the statement of the conditions which influenced the legislative action challenged, or challengeable, upon the record here. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–80; *Radice* v. *New York,* 264 U. S. 292, 294; *Clarke* v. *Deckebach,* 274 U. S. 392, 397; *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, 257, 258; *Nebbia* v. *New York,* 291 U. S. 502, 530; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209.

The Legislature finds that the employment of women and minors in trade and industry in the State of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of vital public concern; that many women and minors are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and that 'freedom of contract' as applied to their relations with employers is illusory; that, by reason of the necessity of seeking support for themselves and their dependents, they are forced to accept whatever wages are offered; and that judged by any reasonable standard, wages in many instances are fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service. The Legislature further states that women and minors are peculiarly subject "to the overreaching of inefficient, harsh or ignorant employers," and that, in the absence of effective minimum fair wage rates, the constant lowering of wages by unscrupulous employers, constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The Legislature deemed it essential to seek the correction of these evils by the exercise of the police power "for the protection of industry and of the women and minors employed therein and of the interest of the community at large in their health and well-being and in the prevention of the deterioration of the race." § 550.

In the factual brief, statistics are presented showing the increasing number of wage earning women, and that women are in industry and in other fields of employment because they must support themselves and their dependents. Data are submitted, from reports of the Women's Bureau of the United States Department of Labor, showing such discrepancies and variations in wages paid for

identical work as to indicate that no relationship exists between the value of the services rendered and the wages paid. It also appears that working women are largely unorganized and that their bargaining power is relatively weak. The seriousness of the social problem is presented. Inquiries by the New York State Department of Labor in coöperation with the Emergency Relief Bureau of New York City disclosed the large number of women employed in industry whose wages were insufficient for the support of themselves and those dependent upon them. For that reason they had been accepted for relief and their wages were being supplemented by payments from the Emergency Relief Bureau. Thus the failure of overreaching employers to pay to women the wages commensurate with the value of services rendered has imposed a direct and heavy burden upon the taxpayers. The weight of this burden and the necessity for taking reasonable measures to reduce it, in the light of the enormous annual budgetary appropriation for the Department of Public Welfare of New York City, is strikingly exhibited in the brief filed by the Corporation Counsel of the City as an *amicus curiae*.

We are not at liberty to disregard these facts. We must assume that they exist and examine respondent's argument from that standpoint. That argument is addressed to the fundamental postulate of liberty of contract. I think that the argument fails to take account of established principles and ignores the historic relation of the State to the protection of women.

Fifth.—We have had frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.

We have repeatedly said that liberty of contract is a qualified and not an absolute right. "There is no absolute freedom to do as one wills or to contract as one chooses. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 567. The numerous restraints that have been sustained have often been recited. *Id.,* p. 568. *Nebbia* v. *New York, supra,* pp. 526–528. Thus we have upheld the limitation of hours of employment in mines and smelters (*Holden* v. *Hardy,* 169 U. S. 366); the requiring of redemption in cash of store orders or other evidences of indebtedness issued in payment of wages (*Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13); the prohibition of contracts for options to sell or buy grain or other commodities at a future time (*Booth* v. *Illinois,* 184 U. S. 425); the forbidding of advance payments to seamen (*Patterson* v. *Bark Eudora,* 190 U. S. 169); the prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean* v. *Arkansas,* 211 U. S. 539); the regulation of the size and weight of loaves of bread (*Schmidinger* v. *Chicago,* 226 U. S. 578; *Petersen Baking Co.* v. *Bryan,* 290 U. S. 570); the regulation of insurance rates (*German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389; *O'Gorman & Young* v. *Hartford Insurance Co., supra*); the regulation of the size and character of packages in which goods are sold (*Armour & Co.* v. *North Dakota,* 240 U. S. 510); the limitation of hours of employment in manufacturing establishments with a specified allowance of overtime payment (*Bunting* v. *Oregon,* 243 U. S. 426); the regulation of sales of stocks and bonds to prevent fraud (*Hall* v. *Geiger-Jones Co.,* 242 U. S. 539); the regulation of the price of milk (*Nebbia* v. *New York,*

supra). The test of validity is not artificial. It is whether the limitation upon the freedom of contract is arbitrary and capricious or one reasonably required in order appropriately to serve the public interest in the light of the particular conditions to which the power is addressed.

When there are conditions which specially touch the health and well-being of women, the State may exert its power in a reasonable manner for their protection, whether or not a similar regulation is, or could be, applied to men. The distinctive nature and function of women—their particular relation to the social welfare—has put them in a separate class. This separation and corresponding distinctions in legislation is one of the outstanding traditions of legal history. The Fourteenth Amendment found the States with that protective power and did not take it away or remove the reasons for its exercise. Changes have been effected within the domain of state policy and upon an appraisal of state interests. We have not yet arrived at a time when we are at liberty to override the judgment of the State and decide that women are not the special subject of exploitation because they are women and as such are not in a relatively defenceless position.

More than forty years after the adoption of the Fourteenth Amendment, we said that it did not interfere with state power by creating "a fictitious equality." *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 63. We called attention to the ample precedents in regulatory provisions for a classification on the basis of sex. We said—"It has been recognized with regard to hours of work. . . . It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. Often it is expressed in the time fixed for coming of age. . . . The particular points at which that difference shall be emphasized by legislation are

largely in the power of the State." *Id.* Not long before the decision in the *Quong Wing* case, the question had received elaborate consideration in *Muller* v. *Oregon,* 208 U. S. 412, where a regulation of the working hours of women was sustained. We thought that the disadvantage at which woman was placed in the struggle for subsistence was obvious and we emphasized the point that she "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We added that "though limitations upon person and contractual rights may be removed by legislation," woman will still be in a situation "where some legislation to protect her seems necessary to secure a real equality of right." She therefore still may be "properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained." *Muller* v. *Oregon, supra,* pp. 421, 422. This ruling has been followed in *Riley* v. *Massachusetts,* 232 U. S. 671, *Miller* v. *Wilson,* 236 U. S. 373, and *Bosley* v. *McLaughlin,* 236 U. S. 385, with respect to hours of work, and in *Radice* v. *New York, supra,* in relation to night work.

If liberty of contract were viewed from the standpoint of absolute right, there would be as much to be said against a regulation of the hours of labor of women as against the fixing of a minimum wage. Restriction upon hours is a restriction upon the making of contracts and upon earning power. But the right being a qualified one, we must apply in each case the test of reasonableness in the circumstances disclosed. Here, the special conditions calling for the protection of women, and for the protection of society itself, are abundantly shown. The legislation is not less in the interest of the community as a whole than in the interest of the women employees who are paid less than the value of their services. That lack must be made good out of the public

purse. Granted that the burden of the support of women who do not receive a living wage cannot be transferred to employers who pay the equivalent of the service they obtain, there is no reason why the burden caused by the failure to pay that equivalent should not be placed upon those who create it. The fact that the State cannot secure the benefit to society of a living wage for women employees by any enactment which bears unreasonably upon employers does not preclude the State from seeking its objective by means entirely fair both to employers and the women employed.

In the statute before us, no unreasonableness appears. The end is legitimate and the means appropriate. I think that the act should be upheld.

I am authorized to state that MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE CARDOZO join in this opinion.

MR. JUSTICE STONE, dissenting.

While I agree with all that the CHIEF JUSTICE has said, I would not make the differences between the present statute and that involved in the *Adkins* case the sole basis of decision. I attach little importance to the fact that the earlier statute was aimed only at a starvation wage and that the present one does not prohibit such a wage unless it is also less than the reasonable value of the service. Since neither statute compels employment at any wage, I do not assume that employers in one case, more than in the other, would pay the minimum wage if the service were worth less.

The vague and general pronouncement of the Fourteenth Amendment against deprivation of liberty without due process of law is a limitation of legislative power, not a formula for its exercise. It does not purport to say in what particular manner that power shall be exerted.

It makes no fine-spun distinctions between methods which the legislature may and which it may not choose to solve a pressing problem of government. It is plain too, that, unless the language of the amendment and the decisions of this Court are to be ignored, the liberty which the amendment protects is not freedom from restraint of all law or of any law which reasonable men may think an appropriate means for dealing with any of those matters of public concern with which it is the business of government to deal. There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their services for less than is needful to keep body and soul together. But if this is freedom of contract no one has ever denied that it is freedom which may be restrained, notwithstanding the Fourteenth Amendment, by a statute passed in the public interest.

In many cases this Court has sustained the power of legislatures to prohibit or restrict the terms of a contract, including the price term, in order to accomplish what the legislative body may reasonably consider a public purpose. They include cases, which have neither been overruled nor discredited, in which the sole basis of regulation was the fact that circumstances, beyond the control of the parties, had so seriously curtailed the regulative power of competition as to place buyers or sellers at a disadvantage in the bargaining struggle, such that a legislature might reasonably have contemplated serious consequences to the community as a whole and have sought to avoid them by regulation of the terms of the contract. *Munn* v. *Illinois,* 94 U. S. 113; *Brass* v. *Stoeser,* 153 U. S. 391; *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389, 409; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252; *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242; *Nebbia* v. *New*

York, 291 U. S. 502; see also, *Frisbie* v. *United States,* 157 U. S. 160; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; *McLean* v. *Arkansas,* 211 U. S. 539; *Mutual Loan Co.* v. *Martell,* 222 U. S. 225.

No one doubts that the presence in the community of a large number of those compelled by economic necessity to accept a wage less than is needful for subsistence is a matter of grave public concern, the more so when, as has been demonstrated here, it tends to produce ill health, immorality and deterioration of the race. The fact that at one time or another Congress and the legislatures of seventeen states, and the legislative bodies of twenty-one foreign countries, including Great Britain and its four commonwealths, have found that wage regulation is an appropriate corrective for serious social and economic maladjustments growing out of inequality in bargaining power, precludes, for me, any assumption that it is a remedy beyond the bounds of reason. It is difficult to imagine any grounds, other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest.

If it is a subject upon which there is power to legislate at all, the Fourteenth Amendment makes no distinction between the methods by which legislatures may deal with it, any more than it proscribes the regulation of one term of a bargain more than another if it is properly the subject of regulation. No one has yet attempted to say upon what basis of history, principles of government, law or logic, it is within due process to regulate the hours and conditions of labor of women, see *Muller* v. *Oregon,* 208 U. S. 412; *Riley* v. *Massachusetts,* 232 U. S. 671, 679; *Hawley* v. *Walker,* 232 U. S. 718; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S.

385, and of men, *Bunting* v. *Oregon,* 243 U. S. 426, and the time and manner of payment of the wage, *McLean* v. *Arkansas, supra; Knoxville Iron Co.* v. *Harbison, supra; Patterson* v. *Bark Eudora,* 190 U. S. 169; compare *New York Central R. Co.* v. *White,* 243 U. S. 188; *Arizona Employers' Liability Cases,* 250 U. S. 400, but that regulation of the amount of the wage passes beyond the constitutional limitation; or to say upon what theory the amount of a wage is any the less the subject of regulation in the public interest than that of insurance premiums, *German Alliance Insurance Co.* v. *Lewis, supra,* or of the commissions of insurance brokers, *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, or of the charges of grain elevators, *Munn* v. *Illinois, supra; Brass* v. *Stoeser, supra,* or of the price which the farmer receives for his milk, or which the wage earner pays for it, *Nebbia* v. *New York, supra.*

These considerations were developed at length in *Tyson & Bros.* v. *Banton,* 273 U. S. 418, 447 *et seq.,* and in *Ribnik* v. *McBride,* 277 U. S. 350, 359, *et seq.,* and need not be further elaborated now. It is true that the Court rejected them there, but it later accepted and applied them as the basis of decision in *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co., supra; Nebbia* v. *New York, supra; Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163; *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251. Both precedent, and, what is more important, reason, require their acceptance now. See *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 405. In upholding state minimum price regulation in the milk industry, in *Nebbia* v. *New York, supra,* the Court declared, p. 537:

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.

The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.*"

That declaration and decision should control the present case. They are irreconcilable with the decision and most that was said in the *Adkins* case. They have left the Court free of its restriction as a precedent, and free to declare that the choice of the particular form of regulation by which grave economic maladjustments are to be remedied is for legislatures and not the courts.

In the years which have intervened since the *Adkins* case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation. I can perceive no more objection, on constitutional grounds, to their solution by requiring an industry to bear the subsistence cost of the labor which it employs, than to the imposition upon it of the cost of its industrial accidents. See *New York Central R. Co.* v. *White, supra; Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

It is not for the courts to resolve doubts whether the remedy by wage regulation is as efficacious as many believe, or is better than some other, or is better even than the blind operation of uncontrolled economic forces. The legislature must be free to choose unless government is to be rendered impotent. The Fourteenth Amendment has no more embedded in the Constitution our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we may happen to approve.

I know of no rule or practice by which the arguments advanced in support of an application for certiorari restrict our choice between conflicting precedents in deciding a question of constitutional law which the petition, if granted, requires us to answer. Here the question which the petition specifically presents is whether the New York statute contravenes the Fourteenth Amendment. In addition, the petition assigns as a reason for granting it that "the construction and application of the Constitution of the United States and a prior decision" of this Court "are necessarily involved," and again, that "the circumstances prevailing under which the New York law was enacted call for a reconsideration of the *Adkins* case in the light of the New York act and conditions aimed to be remedied thereby." Unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the *Adkins* case, we could not rightly avoid its reconsideration even if it were not asked. We should follow our decision in the *Nebbia* case and leave the selection and the method of the solution of the problems to which the statute is addressed where it seems to me the Constitution has left them, to the legislative branch of the government. The judgment should be reversed.

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

DECISIONS PER CURIAM, FROM MARCH 31 TO AND INCLUDING JUNE 1, 1936.*

No. 797. CRAIG *v.* UNITED STATES; and

No. 798. WEINBLATT *v.* SAME. March 31, 1936. The application for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit is dismissed upon the ground that it is premature, without prejudice to a renewal of the application within thirty days after action by the Circuit Court of Appeals on the petition for rehearing. *Messrs. Mark L. Herron* and *Aloysius I. McCormick* for petitioners. No appearance for the United States. Reported below: 81 F. (2d) 816.

No. 856. FOLEY, DISTRICT ATTORNEY OF THE COUNTY OF BRONX, ET AL. *v.* WACHS. Appeal from the District Court of the United States for the Southern District of New York. April 6, 1936. *Per Curiam:* The motion for leave to file jurisdictional statement is granted. The decree granting an interlocutory injunction is affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *Langer* v. *Grandin Farmers Coöperative Elevator Co.,* 292 U. S. 605; *Baldwin* v. *G. A. F. Seelig, Inc.,* 293 U. S. 522; *Grosjean* v. *Texas Co.,* 297 U. S. 697. *Mr. Paul Windels* for appellants. No appearance for appellee.

No. 817. P. J. CARLIN CONSTRUCTION CO. ET AL. *v.* HEANEY ET AL. Appeal from the Supreme Court of New York. Jurisdictional statement distributed March 28,

* For decisions on applications for certiorari, see *post,* pp. 647, 654; for rehearing, *post,* p. 691.

1936. Decided April 6, 1936. *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, 5, 6; *Indian Territory Co.* v. *Board of Equalization,* 287 U. S. 573; *Lewis* v. *New York,* 289 U. S. 709. Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari, § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is granted. *Mr. Elmer Clyde Sherwood* for appellants. *Messrs. Henry Epstein* and *Joseph A. McLaughlin* for appellees. Reported below: 269 N. Y. 93, 199 N. E. 16; 243 App. Div. 648, 277 N. Y. S. 754.

No. 787. National City Bank of New York City *v.* Oelbermann et al. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 6, 1936. *Per Curiam:* Petition for writ of certiorari granted. The judgment is modified by substituting a direction for a judgment of dismissal on the merits with costs in place of the direction for a new trial, and, as so modified, is affirmed. *Baltimore & C. Line* v. *Redman,* 295 U. S. 654. *Messrs. Carl A. Mead* and *Frank A. F. Severance* for petitioner. *Messrs. Kenneth E. Walser* and *Ralph B. Evans* for respondents. Reported below: 79 F. (2d) 534.

No. —, original. Ex parte Mortimer. April 6, 1936. The motion for leave to file petition for writ of mandamus is denied. *Messrs. Hubert E. Rogers, John T. Dooling,* and *John F. Condon, Jr.,* for petitioner.

No. 15, original. TEXAS *v.* NEW MEXICO ET AL. April 6, 1936. The answers of the defendants are received and ordered to be filed. The motion to make additional parties defendant is denied.

No. 168. MICHALEK *v.* UNITED STATES GYPSUM CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 13, 1936. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed with respect to the fifth cause of action with directions to remand the case to the District Court for further proceedings. *Schmidt* v. *Merchants Despatch Transportation Co.*, 270 N. Y. 287. *Mr. William L. Clay* for petitioner. *Mr. E. Willoughby Middleton* for respondent. Reported below: 76 F. (2d) 115.

No. —, original. EX PARTE O'TOOLE. April 13, 1936. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Arthur O'Toole, pro se.*

No. 772. MORF *v.* BINGAMAN, COMMISSIONER. Appeal from the District Court of the United States for the District of New Mexico. April 13, 1936. The motion to join in the appeal is granted.

No. 867. BROWN *v.* SOUTH CAROLINA. Appeal from the Supreme Court of South Carolina. Jurisdictional statement distributed April 11, 1936. Decided April 27, 1936. *Per Curiam:* The appeal herein is dismissed for the want of a final judgment. *Bostwick* v. *Brinkerhoff*, 106

U. S. 3; *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608, 610, 611; *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437; *Moran* v. *Loudoun National Bank*, 297 U. S. 698. *Mr. Sam M. Wolfe* for appellant. No appearance for appellee. Reported below: 178 S. C. 294; 182 S. E. 838.

No. 869. MILES ET AL. *v.* DEPARTMENT OF TREASURY OF INDIANA ET AL. Appeal from the Supreme Court of Indiana. Jurisdictional statement distributed April 18, 1936. Decided April 27, 1936. *Per Curiam:* The appeal herein is dismissed upon the ground that the appellants have failed to show any interest entitling them to invoke the protection of the Federal Constitution. *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 406, 407, 410; *Southern Ry. Co.* v. *King*, 217 U. S. 524, 534; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550. *Messrs. Walter Bachrach, Schuyler C. Mowrer,* and *Martin M. Hugg* for appellants. *Messrs. Philip Lutz, Jr., Joseph W. Hutchinson,* and *Joseph P. McNamara* for appellees. Reported below: 209 Ind. —; 199 N. E. 372.

No. 921. COLLINS *v.* STREITZ. Appeal from the Supreme Court of Arizona. Motion to dismiss distributed April 25, 1936. Decided May 4, 1936. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted and the appeal is dismissed for the want of properly presented substantial federal questions. (1) *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84, 98; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 349; *Ownbey* v. *Morgan*, 256 U. S. 94, 111; *Washington* v. *Superior Court*, 289 U. S. 361, 366; (2) *Cleveland & Pittsburgh R. Co.* v. *Cleveland*, 235 U. S. 50, 53; *Hiawassee Power Co.* v. *Carolina-Tennessee Co.*, 252 U. S. 341, 344;

Whitney v. *California,* 274 U. S. 357, 360; *White River Co.* v. *Arkansas,* 279 U. S. 692, 700. *Mr. John W. Ray* for appellant. *Mr. Thomas A. Flynn* for appellee. Reported below: 54 P. (2d) 264.

No. —, original. Ex parte Pollitt. May 4, 1936. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Basil H. Pollitt, pro se.*

Nos. 956 and 957. Mountain States Power Co. *v.* Public Service Commission of Montana et al. May 4, 1936. The motion for injunction pending appeal is granted upon condition that the impounding be continued, as provided by the restraining order in the court below, and that bond be given in the same amount as therein provided. The order to be settled on notice. Mr. Justice Brandeis dissents. *Mr. Hance H. Cleland* for appellant in support of the motion. *Mr. A. H. Angstman* for appellees in opposition thereto.

No. 872. Smith, Collector of Revenue, et al. *v.* Ajax Pipe Line Co. On certificate from the Circuit Court of Appeals for the Eighth Circuit. Motion submitted May 4, 1936. Decided May 18, 1936. *Per Curiam:* The motion to bring up the entire record and cause is denied. The certificate is dismissed. *Jewell* v. *Knight,* 123 U. S. 426, 433; *Cross* v. *Evans,* 167 U. S. 60, 63; *B. & O. R. Co.* v. *Interstate Commerce Comm'n,* 215 U. S. 216, 221; *United States* v. *Mayer,* 235 U. S. 55, 66; *Larabee Flour Mills Co.* v. *First National Bank of Dublin,* 290 U. S. 594; *Mantle Lamp Co.* v. *Aluminum Products Co.,* 297 U. S. 638. *Mr. William L. Vandeventer* for Smith et al. *Messrs. Charles F. Newman* and *L. G. Owen* for Ajax Pipe Line Co.

No. —, original. EX PARTE HAGMAN. May 18, 1936. The motion for leave to file petition for writ of habeas corpus is denied. *Mr. Axel Hagman, pro se.*

No. —, original. EX PARTE TEGTMEYER. May 18, 1936. The application for leave to file petition for writ of habeas corpus is denied. *Mr. William Chones* for petitioner.

No. —, original. EX PARTE RUBIN. May 18, 1936. The application for leave to file petition for writ of habeas corpus is denied. *Mr. Lloyd Rubin, pro se.*

Nos. —, original (2 cases). EX PARTE FOX. May 18, 1936. The motion for leave to file petition for writs of certiorari is denied. *Mr. Benjamin Reass* for petitioner.

No. 2, original. VERMONT *v.* NEW HAMPSHIRE. May 18, 1936. The application for the appointment of a Special Commissioner to locate and mark additional points on the boundary is granted and Samuel S. Gannett, Esq., is appointed Special Commissioner for that purpose.

No. 13, original. NEBRASKA *v.* WYOMING. May 18, 1936. The answer and cross bill of the State of Colorado is ordered to be filed and leave is granted to the States of Nebraska and Wyoming to answer within 60 days.

No. 270. PRUDENCE COMPANY, INC. *v.* FIDELITY & DEPOSIT CO. ET AL. May 18, 1936. It is ordered that the mandate of this Court in the above-entitled cause on file in the District Court of the United States for the

Southern District of New York be, and the same is hereby, recalled; and that said mandate be amended so as to give petitioner recovery for additional costs in the sum of $908.40, being the expenses incurred in furnishing records for the use of this Court.

No. 990. WARNER BROS. PICTURES, INC. ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Eastern District of Missouri. Motion distributed May 16, 1936. Decided May 25, 1936. *Per Curiam:* The motion of the appellee to affirm is granted and the decree is affirmed. *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 145–146; *McGowan* v. *Columbia River Packers' Assn.*, 245 U. S. 352, 358; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 93–94; *Jones* v. *Securities & Exchange Comm'n, ante,* p. 1. *Messrs. Frederick H. Wood, James A. Reed, Sam B. Jeffries, R. W. Perkins, Louis Phillips, S. W. Fordyce, Wm. R. Gentry, Wm. J. Donovan,* and *Jacob M. Lashly* for appellants. *Solicitor General Reed* for the United States. Reported below: 13 F. Supp. 614.

No. 991. PIPER ET AL. *v.* BINGAMAN, COMMISSIONER OF REVENUE OF NEW MEXICO. Appeal from the District Court of the United States for the District of New Mexico. Jurisdictional statement distributed May 16, 1936. Decided May 25, 1936. *Per Curiam:* The decree is affirmed on the authority of *Morf* v. *Bingaman, ante,* p. 407. *Mr. A. S. Baskett* for appellants. No appearance for appellee. Reported below: 12 F. Supp. 755.

No. —, original. EX PARTE GIFFORD. May 25, 1936. The motion for leave to file petition for writ of mandamus is denied. *Mr. Charles H. Gifford, pro se.*

No. 15, original. TEXAS *v.* NEW MEXICO ET AL. May 25, 1936. The motion for the appointment of a Special Master is granted, and it is ordered that Charles Warren, Esquire, of Washington, D. C., be, and he is hereby, appointed Special Master in this cause, with authority to summon witnesses, issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to make findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions, and recommendations of the Master shall be subject to consideration, revision, or approval by the Court. [The order makes provision also for the compensation and expenses of the Master; and for a new appointment by the Chief Justice if this one be not accepted or become vacant during the recess of the Court.]

No. —. ISBRANDTSEN-MOLLER CO., INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of New York. May 25, 1936. Motion to stay running of penalties submitted by *Mr. James W. Ryan* for appellant, and the motion granted. The order to be settled on notice.

No. 1032. PARKER, ADMINISTRATOR, ET AL. *v.* JAMES GRANGER, INC., ET AL. Appeal from the Supreme Court of California. Jurisdictional statement distributed May 23, 1936. Decided June 1, 1936. *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

a writ of certiorari, § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. Frank F. Nesbit* and *Lasher B. Gallagher* for appellants. *Mr. Oscar Lawler* for appellees. Reported below: 4 Cal. (2d) 668; 52 P. (2d) 226.

No. 967. Dixie Terminal Co. *v.* United States. On certificate from the Court of Claims. Motion submitted May 25, 1936. Decided June 1, 1936. *Per Curiam:* The motion to dismiss the certificate is granted and the certificate is dismissed. *Jewell* v. *Knight,* 123 U. S. 426, 433; *Cross* v. *Evans,* 167 U. S. 60, 63; *B. & O. R. Co.* v. *Interstate Commerce Comm'n,* 215 U. S. 216, 221; *United States* v. *Mayer,* 235 U. S. 55, 66; *Larabee Flour Mills Co.* v. *First National Bank of Dublin,* 290 U. S. 594; *Mantle Lamp Co.* v. *Aluminum Products Co.,* 297 U. S. 638; *Smith, Collector* v. *Ajax Pipe Line Co., ante,* p. 641. *Solicitor General Reed* for the United States in support of the motion. *Messrs. Charles P. Taft* and *Robert A. Taft* for Dixie Terminal Co.

No. 1049. Mozingo *v.* Marion Steam Shovel Co. Appeal from the Supreme Court of Ohio. Jurisdictional statement distributed May 29, 1936. Decided June 1, 1936. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *New York Central R. Co.* v. *White,* 243 U. S. 188, 197, 198, 200–202; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 236; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 163; *Rolette* v. *Rothstein Dental Laboratories, Inc.,* 289 U. S. 736. *Messrs. Paul D. Smith* and *Thomas H. Sutherland* for appellant. No appearance for appellee. Reported below: 130 Ohio St. 591; 200 N. E. 756.

No. 1076. MONTJOY *v.* KENTUCKY. Appeal from the Court of Appeals of Kentucky. Motion distributed May 29, 1936. Decided June 1, 1936. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. The appeal is dismissed for the want of properly presented substantial federal questions. (1) *Smith* v. *Mississippi,* 162 U. S. 592, 600–601; *Tarrance* v. *Florida,* 188 U. S. 519, 520–522; *Brownfield* v. *South Carolina,* 189 U. S. 426; *Martin* v. *Texas,* 200 U. S. 316, 318–320; (2) *New York* v. *Kleinert,* 268 U. S. 646, 650; *Whitney* v. *California,* 274 U. S. 357, 362; *Home Cab Co.* v. *Wichita,* 295 U. S. 716. The mandate is ordered to issue forthwith. *Mr. Alfred Bettman* for appellant. No appearance for appellee. Reported below: 262 Ky. 426; 90 S. W. (2d) 362.

No. 202. STONE ET AL. *v.* WHITE, FORMER COLLECTOR OF INTERNAL REVENUE. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. June 1, 1936. The motion to extend the time for filing petition for rehearing until November 2, 1936, is granted. The motion to stay entry of judgment by the District Court is denied.

No. 686. MORGAN ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of Missouri. June 1, 1936. The motion to substitute New Amsterdam Casualty Co. as a party appellant in the place and stead of Harry J. Kennaley is granted.

DECISIONS GRANTING CERTIORARI, FROM MARCH 31 TO AND INCLUDING JUNE 1, 1936.

No. 817. P. J. CARLIN CONSTRUCTION CO. ET AL. *v.* HEANEY ET AL. See *ante*, p. 637.

No. 787. NATIONAL CITY BANK *v.* OELBERMANN ET AL. See *ante*, p. 638.

No. 777. BOURDIEU *v.* PACIFIC WESTERN OIL CO. ET AL. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Jefferson P. Chandler* and *Howard W. Wright* for petitioner. *Messrs. Herbert W. Clark, Felix T. Smith, George W. Nilsson,* and *Herman Phleger* for respondents. Reported below: 80 F. (2d) 774.

Nos. 785 and 786. MCKEY, TRUSTEE IN BANKRUPTCY, *v.* PARADISE, TRUSTEE. April 6, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Wm. E. Leahy* and *Wm. J. Hughes, Jr.,* for petitioner. *Messrs. Jack N. Pritzker* and *Stanford Clinton* for respondent. Reported below: 80 F. (2d) 478.

No. 168. MICHALEK *v.* UNITED STATES GYPSUM CO. See *ante*, p. 639.

No. 804. VALENTINE, POLICE COMMISSIONER, ET AL., *v.* UNITED STATES EX REL. B. COLES NEIDECKER;

No. 805. SAME *v.* UNITED STATES EX REL. GEORGE W. NEIDECKER; and

No. 806. SAME *v.* UNITED STATES EX REL. AUBREY NEIDECKER. April 13, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Second

Circuit granted. *Mr. Porter R. Chandler* for petitioners. *Messrs. Frederic R. Coudert* and *Frederic R. Coudert, Jr.*, for respondents. Reported below: 81 F. (2d) 32.

No. 828. CHISHOLM ET AL. *v.* GILMER, RECEIVER. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted, limited to the question of the jurisdiction of the District Court. *Messrs. Minitree Jones Fulton* and *Homan W. Walsh* for petitioners. *Messrs. John S. Eggleston* and *George Gilmer* for respondent. Reported below: 81 F. (2d) 120.

No. 859. ASHTON ET AL. *v.* CAMERON COUNTY WATER IMPROVEMENT DISTRICT NO. ONE. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Palmer Hutcheson, J. W. Terry,* and *W. P. Hamblen* for petitioners. *Mr. Vincent M. Miles* for respondent. Reported below: 81 F. (2d) 905.

No. 837. PICK MANUFACTURING CO. *v.* GENERAL MOTORS CORP. ET AL. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Carl B. Rix* for petitioner. *Messrs. Thomas Francis Howe* and *Henry S. Rademacher* for respondents. Reported below: 80 F. (2d) 641.

No. 853. MECHANICS UNIVERSAL JOINT CO. ET AL. *v.* CULHANE, RECEIVER. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. S. R. Kenworthy* for peti-

tioners. *Mr. Roy F. Hall* for respondent. Reported below: 80 F. (2d) 147.

No. 864. PUPAHL, RECEIVER, *v.* ESTATE OF ELVIRA J. PARKS. April 27, 1936. Petition for writ of certiorari to the Appellate Court, First District, of Illinois, granted. *Messrs. Otis F. Glenn* and *George P. Barse* for petitioner. *Messrs. Emmett J. McCarthy* and *Robert F. Carey* for respondent. Reported below: 283 Ill. App. 95.

No. 877. FOUST, ADMINISTRATOR, *v.* MUNSON STEAMSHIP LINES. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Simone N. Gazan* for petitioner. *Messrs. Arthur M. Boal* and *Alfred N. Heuston* for respondent. Reported below: 80 F. (2d) 859; 82 F. (2d) 289.

No. 879. ESSEX RAZOR BLADE CORP. *v.* GILLETTE SAFETY RAZOR CO. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. George E. Middleton* for petitioner. *Messrs. Charles Neave* and *Henry R. Ashton* for respondent. Reported below: 83 F. (2d) 541.

No. 894. FOX *v.* CAPITAL COMPANY. May 18, 1936. Petition for writ of certiorari to review the order of the Circuit Court of Appeals for the Second Circuit of March 5, 1936, dismissing the appeal from the order of the United States District Court for the Southern District of New York, entered on February 20, 1936, granted, limited to the question of the jurisdiction of the Circuit Court of

Appeals. *Mr. Benjamin Reass* for petitioner. No appearance for respondent. Reported below: 85 F. (2d) 97.

No. 911. GULLY, STATE TAX COLLECTOR, *v.* FIRST NATIONAL BANK. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted, limited to the question of the jurisdiction of the District Court. *Mr. J. C. Floyd* for petitioner. *Messrs. R. E. Wilbourn* and *Albert S. Bozeman* for respondent. Reported below: 81 F. (2d) 502.

No. 895. ALGERNON S. SCHAFER *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE;

No. 896. EDWARD SCHAFER *v.* SAME; and

No. 897. LEONARD SCHAFER *v.* SAME. May 18, 1936. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia granted. *Mr. Eugene Untermyer* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Miss Louise Foster* for respondent. Reported below: 65 App. D. C. 292; 83 F. (2d) 317.

No. 903. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* ILLINOIS LIFE INSURANCE CO. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Lewis C. Jesseph* for respondent. Reported below: 80 F. (2d) 280.

No. 904. KVOS, INC. *v.* ASSOCIATED PRESS. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Clarence*

C. Dill for petitioner. *Messrs. John W. Davis, William C. Cannon, Clinton W. Howard,* and *Harold W. Bissett* for respondent. Reported below: 80 F. (2d) 575.

No. 934. DUKE POWER CO. ET AL. *v.* GREENWOOD COUNTY ET AL. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. W. S. O'B. Robinson, Newton D. Baker, Raymond T. Jackson, W. R. Perkins, H. J. Haynsworth,* and *J. H. Marion* for petitioners. Mr. *D. W. Robinson, Jr.,* and *Solicitor General Reed* for respondents. Reported below: 81 F. (2d) 986.

No. 988. TENNESSEE PUBLISHING CO. *v.* AMERICAN NATIONAL BANK ET AL. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. A. H. Roberts,* and *A. H. Roberts, Jr.,* for petitioner. *Messrs. William Waller, Cecil Sims, Charles C. Trabue,* and *Thomas H. Malone, Jr.,* for respondents. Reported below: 81 F. (2d) 463.

No. 923. CATE ET AL. *v.* BEASLEY ET AL. May 25, 1936. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Mr. Richard W. Stoutz* for petitioners. *Messrs. James A. Veasey* and *L. G. Owen* for respondents. Reported below: 175 Okla. 494; 53 P. (2d) 549.

No. 928. JOSE RIVERA SOLER & CO., INC. *v.* UNITED STATES FIREMEN'S INSURANCE CO. May 25, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Francis H.*

Dexter for petitioner. *Messrs. Henri Brown* and *Carroll G. Walter* for respondent. Reported below: 81 F. (2d) 385.

No. 948. UNITED STATES *v.* WOOD. May 25, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General Reed* for petitioner. *Messrs. Robert I. Miller, Wm. E. Leahy,* and *Wm. J. Hughes, Jr.,* for respondent. Reported below: 65 App. D. C. 330; 83 F. (2d) 587.

No. 949. SMITH *v.* HALL ET AL.; and

No. 950. SAME *v.* JAMES MANUFACTURING CO. ET AL. May 25, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Albert L. Ely, Charles Neave,* and *Dean S. Edmonds* for petitioner. *Mr. Arthur E. Paige* for respondents in No. 949. *Messrs. H. A. Toulmin* and *H. A. Toulmin, Jr.,* for respondents in No. 950. Reported below: 83 F. (2d) 217, 221.

No. 1003. WAINER ET AL. *v.* UNITED STATES. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted, limited to the question whether the statute upon which the second count of the indictment is based was repealed and has not been reënacted. *Mr. Harry C. Heyl* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 82 F. (2d) 305.

No. 953. BRITISH-AMERICAN OIL PRODUCING CO. *v.* BOARD OF EQUALIZATION ET AL. June 1, 1936. Petition for writ of certiorari to the Supreme Court of Montana

granted. *Messrs. E. K. Cheadle, Jr.,* and *E. J. McCabe* for petitioner. *Mr. Raymond T. Nagle* for respondents. Reported below: 101 Mont. 293; 54 P. (2d) 129.

No. 963. UNITED STATES *v.* ESNAULT-PELTERIE. June 1, 1936. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Reed* for the United States. *Messrs. Eugene V. Myers* and *Edwin J. Pringle* for respondent. Reported below: 81 Ct. Cls. 785.

No. 973. FARREN, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 974. MCCRARY *v.* SAME. June 1, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Charles H. Garnett, James H. Maxey, Wilbur J. Holleman,* and *Nathan A. Gibson* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Sewall Key* for respondent. Reported below: 82 F. (2d) 141.

No. 983. SOUTHEASTERN EXPRESS CO. *v.* PASTIME AMUSEMENT CO. June 1, 1936. Petition for writ of certiorari to the Supreme Court of South Carolina granted. *Messrs. Harry L. Greene, Rembert Marshall,* and *Nath B. Barnwell* for petitioner. No appearance for respondent. Reported below: 181 S. C. 203; 186 S. E. 283.

DECISIONS DENYING CERTIORARI, FROM MARCH 31 TO AND INCLUDING JUNE 1, 1936.

No. 858. PORESKY *v.* RYAN, REGISTRAR OF MOTOR VEHICLES. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Joseph Poresky, pro se.* No appearance for respondent. Reported below: 82 F. (2d) 311.

No. 865. COSSACK *v.* UNITED STATES. April 6, 1936. 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. Loeb L. Cossack, pro se.* No appearance for the United States. Reported below: 82 F. (2d) 214.

No. 752. OELBERMANN ET AL. *v.* NATIONAL CITY BANK. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Kenneth E. Walser* and *Ralph B. Evans* for petitioners. *Messrs. Carl A. Mead* and *Frank A. F. Severance* for respondent. Reported below: 79 F. (2d) 534.

No. 770. WIMBERLY ET AL. *v.* COWAN INVESTMENT CORP. ET AL. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. L. Chenault* for petitioners. No appearance for respondents. Reported below: 80 F. (2d) 452.

No. 773. J. T. KNIGHT & SON, INC. *v.* SUPERIOR FIRE INSURANCE CO. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Cir-

cuit denied. *Mr. Henry D. Gaggstatter* for petitioner. *Mr. Alex. W. Smith, Jr.,* for respondent. Reported below: 80 F. (2d) 311.

No. 776. HARTFORD ACCIDENT & INDEMNITY CO. *v.* JONES. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Paul McMahon* for petitioner. No appearance for respondent. Reported below: 80 F. (2d) 680.

No. 779. HENWOOD, TRUSTEE, *v.* ANGLO-CONTINENTALE TREUHAND, A. G. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frank C. Nicodemus, Jr., George L. Buland, Ben C. Dey,* and *H. Brua Campbell* for petitioner. *Mr. Milton E. Mermelstein* for respondent. Reported below: 81 F. (2d) 11.

No. 780. MCCARTHY COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John A. Jorgensen* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Ellis N. Slack* for respondent. Reported below: 80 F. (2d) 618.

No. 783. BEARD ET AL. *v.* UNITED STATES. April 6, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. John J. Sirica, Maurice McInerney,* and *Leo A. Rover* for petitioners. *Solicitor General Reed, Assistant*

Attorney General McMahon and *Mr. William W. Barron* for the United States. Reported below: 65 App. D. C. 231; 82 F. (2d) 837.

No. 788. VAN VLECK *v.* COMMISSIONER OF INTERNAL REVENUE. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George S. Hills* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. John MacC. Hudson, Sewall Key,* and *F. E. Youngman* for respondent. Reported below: 80 F. (2d) 217.

No. 789. KELLER, HEUMANN & THOMPSON CO., INC. *v.* COE. April 6, 1936. Petition for writ of certiorari to the United States Court of Customs and Patent Appeals denied. *Mr. Harold E. Stonebraker* for petitioner. *Solicitor General Reed* and *Mr. Robert F. Whitehead* for respondent. Reported below: 23 C. C. P. A. (Patents) 837; 81 F. (2d) 399.

No. 791. ATLANTIC COAST LINE R. CO. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 792. CAROLINA, CLINCHFIELD & OHIO RY. *v.* SAME. April 6, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Nathan L. Miller, Wm. W. Miller, Carl H. Davis,* and *Edward C. Bailly* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Morton K. Rothschild* for respondent. Reported below: 81 F. (2d) 309.

No. 793. OLD LINE LIFE INSURANCE CO. *v.* FULTON, SUPERINTENDENT OF BANKS, ET AL. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals

for the Sixth Circuit denied. *Mr. Luther Day* for petitioner. *Messrs. John W. Bricker* and *J. Roth Crabbe* for respondents. Reported below: 79 F. (2d) 718.

No. 799. PATTERSON ET AL. *v.* UNITED STATES. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Ernest Woodward, Province M. Pogue,* and *Leonard S. Coyne* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon* and *Mr. Wm. W. Barron* for the United States. Reported below: 82 F. (2d) 937.

No. 802. MILLER *v.* HOCKLEY ET AL., RECEIVERS. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Isaac Lobe Straus* and *J. Wallace Bryan* for petitioner. *Mr. George Moore Brady* for respondents. Reported below: 80 F. (2d) 980.

No. 850. WATSON ET AL. *v.* O'CONNER, COMPTROLLER OF THE CURRENCY, ET AL. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Howard B. Warren* for petitioners. No appearance for respondents. Reported below: 81 F. (2d) 833.

No. 842. HOUSTON, COLLECTOR OF INTERNAL REVENUE, *v.* IOWA SOAP CO. April 6, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Solicitor General Reed* for petitioner. *Messrs. J. G. Gamble, R. L. Read,* and *A. B. Howland* for respondent. Reported below: 13 F. Supp. 517 (District Court).

65773°—36——42

No. 883. GOOCH *v.* UNITED STATES. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. W. F. Rampendahl* for petitioner. No appearance for the United States. Reported below: 82 F. (2d) 534.

No. 885. LYNCH *v.* UNITED STATES. April 13, 1936. 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. John J. McCreary* for petitioner. No appearance for the United States. Reported below: 80 F. (2d) 418.

No. 888. RHOADS *v.* KURTZ. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Apepals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jacob N. Halper* for petitioner. No appearance for respondent. Reported below: 80 F. (2d) 1018.

No. 800. ARON ET AL. *v.* PENNSYLVANIA R. Co. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John A. Kelly* for petitioners. *Mr. Livingston Platt* for respondent. Reported below: 80 F. (2d) 100.

No. 809. SUMMERALL *v.* UNITED FRUIT Co. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Simone N. Gazan* for petitioner. *Messrs. Roscoe H. Hupper* and *G. Hunter Merritt* for respondent. Reported below: 80 F. (2d) 1020.

No. 811. BROOKLYN TRUST CO., TRUSTEE *v.* COMMISSIONER OF INTERNAL REVENUE. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jackson A. Dykman* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Carlton Fox* for respondent. Reported below: 80 F. (2d) 865.

No. 812. HOCKING GLASS CO. *v.* MILLER, COLLECTOR OF INTERNAL REVENUE. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Paul E. Shorb, Dwight Taylor,* and *J. W. Deffenbaugh* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *S. Dee Hanson* for respondent. Reported below: 80 F. (2d) 436.

Nos. 813 and 814. VAN DOREN *v.* OAK PARK TRUST & SAVINGS BANK. April 13, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Kentner Elliott* for petitioner. *Mr. Henry N. Shabsin* for respondent. Reported below: 79 F. (2d) 859.

No. 816. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES ET AL. *v.* CAMERON ET AL. April 13, 1936. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Saul Nemser* for petitioners. *Mr. Wallace P. Berkowitz* for respondents. Reported below: 119 N. J. Eq. 577; 183 Atl. 157.

No. 818. BOONE, RECEIVER, ET AL. *v.* AMERICAN VETERINARY MEDICAL ASSN. ET AL. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for

the Sixth Circuit denied. *Messrs. D. C. Webb* and *John W. Green* for petitioners. *Mr. John Jennings, Jr.*, for respondents. Reported below: 85 F. (2d) 616.

No. 819. ALLEN *v.* CLOISTERS BUILDING CORP. ET AL. April 13, 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. *Messrs. Walter E. Beebe, Claude A. Roth,* and *Arthur M. Cox* for respondents. Reported below: 82 F. (2d) 1002.

Nos. 821 and 822. KATTELMAN *v.* MADDEN, RECEIVER. April 13, 1936. 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 petitioner. *Mr. Howard G. Cook* for respondent. Reported below: 82 F. (2d) 1012.

No. 825. MILLER *v.* TRAVELERS INSURANCE CO. April 13, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John A. Bloomingston* for petitioner. *Mr. Weymouth Kirkland* for respondent. Reported below: 80 F. (2d) 503.

No. 829. BERMAN *v.* MCDONNELL, U. S. MARSHAL. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Eugene L. Garey* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon* and *Mr. Wm. W. Barron* for respondent. Reported below: 80 F. (2d) 361.

No. 836. KANSAS CITY BRIDGE CO. *v.* STATE HIGHWAY COMMISSION. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Richard S. Righter* and *J. Fairfax Loughborough* for petitioner. *Messrs. Carl E. Bailey* and *Walter L. Pope* for respondent. Reported below: 81 F. (2d) 689.

No. 866. FIDELITY & DEPOSIT CO. *v.* PENNSYLVANIA R. CO. April 13, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Francis B. Bracken, Wm. Clarke Mason,* and *John Russell, Jr.,* for petitioner. *Messrs. Robert T. McCracken, George G. Chandler,* and *Henry Wolfe Biklé* for respondent. Reported below: 81 F. (2d) 526.

No. 905. JOBISSY *v.* MURPHY, WARDEN, ET AL. April 27, 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. John Jobissy, pro se.* No appearance for respondents. Reported below: 268 N. Y. 695; 198 N. E. 562.

No. 914. KUSTOFF *v.* STATE BAR OF CALIFORNIA. April 27, 1936. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Michael I. Kustoff, pro se.* No appearance for respondent.

No. 841. CABANERO ET AL. *v.* TORRES, SECRETARY OF LABOR, ET AL. April 27, 1936. Petition for writ of certiorari to the Supreme Court of the Commonwealth of

the Philippines, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Guillermo B. Guevara* for petitioners. *Messrs. W. H. Lawrence* and *L. S. Tillotson* for respondents.

No. 932. GORSON *v.* NORTH CAROLINA EX REL. ATTORNEY GENERAL. April 27, 1936. Petition for writ of certiorari to the Supreme Court of North Carolina, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. J. Will Pless* for petitioner. No appearance for respondent. Reported below: 209 N. C. 320; 183 S. E. 392.

No. 882. DUKE *v.* COMMITTEE ON GRIEVANCES ET AL. April 27, 1936. 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. Jesse C. Duke, pro se.* No appearance for respondents. Reported below: 65 App. D. C. 284; 82 F. (2d) 890.

No. 794. NORTON *v.* LYON VAN & STORAGE CO. ET AL. April 27, 1936. Petition for writ of certiorari to the District Court of Appeal, of California, denied. *Mr. M. G. Norton, pro se.* No appearance for respondents. Reported below: 9 Cal. App. (2d) 199; 49 P. (2d) 311.

No. 807. COUNTY OF WESTCHESTER *v.* MONTROSE CONTRACTING CO., INC. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William A. Davidson* and *Francis J. Morgan* for petitioner. *Mr. Frederick W. Newton* for respondent. Reported below: 80 F. (2d) 841.

No. 815. CINEMA PATENTS CO., INC. *v.* COLUMBIA PICTURES CORP. ET AL. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Herbert A. Huebner* for petitioner. *Mr. Frank L. A. Graham* for respondents. Reported below: 80 F. (2d) 332.

No. 820. NORTON ET UX. *v.* BRANIFF INVESTMENT CO. ET AL. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. T. Miller* for petitioners. *Mr. R. C. Johnson* for respondents. Reported below: 80 F. (2d) 598.

No. 823. LONDON SHOE CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin A. Javits* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson, Mr. Sewall Key,* and *Miss Helen R. Carloss* for respondent. Reported below: 80 F. (2d) 230.

No. 827. WALSH *v.* ROSENBERG. April 27, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Cornelius H. Doherty* for petitioner. *Messrs. Alvin L. Newmyer, David G. Bress,* and *Lewis H. Shapiro* for respondent. Reported below: 65 App. D. C. 157; 81 F. (2d) 559.

No. 833. ROBINSON *v.* COMMISSIONER OF INTERNAL REVENUE. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Cir-

cuit denied. *Mr. Bernhard Knollenberg* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Sewall Key* for respondent. Reported below: 80 F. (2d) 1018.

No. 839. CARNAHAN *v.* MISSOURI-KANSAS-TEXAS RY. CO. April 27, 1936. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Oscar S. Hill* for petitioner. *Messrs. Joseph M. Bryson* and *Charles S. Burg* for respondent. Reported below: 338 Mo. 23; 88 S. W. (2d) 1027.

No. 840. ADAMOWICZ ET AL. *v.* UNITED STATES. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leo H. Klugherz* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 82 F. (2d) 288.

No. 846. PIQUETT *v.* UNITED STATES. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Elliott Byrne* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 81 F. (2d) 75.

No. 852. EQUITABLE LIFE ASSURANCE SOCIETY *v.* SALMEN. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. H. Watkins, S. C. Mize, P. H. Eager, Jr.,* and *James H. McIntosh* for petitioner. *Messrs. Arthur A. Moreno* and *Earle N. Floyd* for respondent. Reported below: 81 F. (2d) 571.

No. 803. WONG SHONG BEEN *v.* PROCTOR, COMMISSIONER OF IMMIGRATION. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Fred H. Lysons* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Bart W. Butler, Wm. W. Barron,* and *Lee A. Jackson* for respondent. Reported below: 79 F. (2d) 881.

No. 826. HENNEFORD ET AL. *v.* PARAMOUNT PICTURES DISTRIBUTING CO., INC. ET AL. April 27, 1936. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. R. G. Sharpe* for petitioners. *Messrs. Gabriel L. Hess* and *Arthur G. Cohen* for respondents. Reported below: 184 Wash. 376; 51 P. (2d) 385.

No. 830. LANDAU *v.* UNITED STATES ATTORNEY. April 27, 1936. 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 McMahon,* and *Messrs. Wm. W. Barron* and *Young M. Smith* for respondent. Reported below: 82 F. (2d) 285.

No. 831. OUTLAW *v.* UNITED STATES. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Walter B. Scott* and *W. P. McLean* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 81 F. (2d) 805.

No. 832. FIDELITY & DEPOSIT CO. *v.* UNITED STATES. April 27, 1936. Petition for writ of certiorari to the Cir-

cuit Court of Appeals for the Ninth Circuit denied. *Mr. Joe Crider, Jr.*, for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. John MacC. Hudson, Sewall Key,* and *S. Dee Hanson* for the United States. Reported below: 80 F. (2d) 24.

No. 848. CITY NATIONAL BANK ET AL. *v.* FLOOD. April 27, 1936. Petition for writ of certiorari to the Supreme Court of Iowa denied. *Messrs. J. B. Flick* and *H. M. Havner* for petitioners. *Messrs. James C. Davis, A. A. McLaughlin,* and *George E. Hise* for respondent. Reported below: 220 Iowa 935; 263 N. W. 321.

No. 855. PEAK *v.* COMMISSIONER OF INTERNAL REVENUE. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Richard S. Doyle, Howard J. Clark,* and *W. W. Ross* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Harry Marselli* for respondent. Reported below: 80 F. (2d) 761.

No. 861. MARYLAND CASUALTY CO. *v.* MOORE, TRUSTEE. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Edward F. McClennen* for petitioner. *Mr. Harold S. Davis* for respondent. Reported below: 82 F. (2d) 189.

No. 868. SIMON *v.* NEW JERSEY. April 27, 1936. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Messrs. Edmund M. Toland* and *Wm. E. Leahy* for petitioner. *Messrs. Abe*

J. David and *Joseph Lanigan* for respondent. Reported below: 116 N. J. L. 134; 182 Atl. 631.

Nos. 870 and 871. HAWKINS ET AL., RECEIVERS, *v.* RAILROAD CREDIT CORP. April 27, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. W. B. Rodman, W. G. Brantley, Jr.,* and *Carl H. Richmond* for petitioners. *Messrs. Richard H. Wilmer* and *Daniel Willard, Jr.,* for respondent. Reported below: 80 F. (2d) 818.

No. 873. DU VALL *v.* UNITED STATES. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Leslie C. Hardy* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron* and *Young M. Smith* for the United States. Reported below: 82 F. (2d) 382.

No. 875. ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE CO., LTD. *v.* DAFFERN. April 27, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Daffan Gilmer* for petitioner. No appearance for respondent. Reported below: 81 F. (2d) 179.

No. 947. BELT *v.* ZERBST, WARDEN. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. J. S. Belt, pro se.* No appearance for respondent. Reported below: 82 F. (2d) 18.

No. 851. SUN-MAID RAISIN GROWERS *v.* CALIFORNIA PACKING CORP. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Wm. J. Hughes, Jr., A. W. Boyken,* and *Edward S. Rogers* for petitioner. *Mr. Frank D. Madison* for respondent. Reported below: 81 F. (2d) 674.

No. 860. DALLAS *v.* GARDNER, TRUSTEE. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George Sergeant* for petitioner. No appearance for respondent. Reported below: 81 F. (2d) 425.

No. 862. BRIMMER *v.* UNION OIL CO. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. F. Chatterton, Frank W. Mondell,* and *Harold C. Morton* for petitioner. *Mr. Lewis W. Andrews* for respondent. Reported below: 81 F. (2d) 437.

No. 863. WEST MISSOURI POWER CO. *v.* WASHINGTON ET AL. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. B. I. Litowich* for petitioner. *Mr. Ralph T. O'Neil* for respondents. Reported below: 80 F. (2d) 420.

No. 876. WHITNEY REALTY CO., LTD. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Ferris D. Stone* and *Cleveland Thurber* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs.*

Sewall Key and *J. P. Jackson* for respondent. Reported below: 80 F. (2d) 429.

No. 880. ROSENBERG ET AL. *v.* UNITED STATES ET AL. May 4, 1936. Petition for writ of certiorari to the Surrogates' Court, of New York, denied. *Messrs. Joseph M. Hartfield, Martin A. Schenck,* and *Orrin G. Judd* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Warner W. Gardner* for the United States et al. Reported below: 269 N. Y. 247; 199 N. E. 206.

No. 881. DUKE POWER CO. ET AL. *v.* SOUTH CAROLINA TAX COMMISSION. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. J. H. Marion, W. S. O'B. Robinson,* and *H. J. Haynsworth* for petitioners. *Mr. John M. Daniel* for respondent. Reported below: 81 F. (2d) 513.

No. 884. HOUBIGANT, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Allen G. Gartner* and *Karl Knox Gartner* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Arnold Raum* for respondent. Reported below: 80 F. (2d) 1012.

No. 890. METRO-GOLDWYN PICTURES CORP. ET AL. *v.* SHELDON ET AL. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Thomas D. Thacher* and *Nathan Burkan* for petitioners. *Mr. Arthur F. Driscoll* for respondents. Reported below: 81 F. (2d) 49.

No. 892. UPROAR COMPANY *v.* NATIONAL BROADCASTING CO. ET AL. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Samuel Gottlieb* for petitioner. *Messrs. Melville F. Weston, Harry T. Klein, T. K. Schmuck, A. L. Ashby,* and *Richard Wait* for respondents. Reported below: 81 F. (2d) 373.

No. 915. BALDWIN ET AL. *v.* NATIONAL SAVINGS & TRUST CO., TRUSTEE, ET AL. May 4, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Charles D. Hamel* and *Raymond Benjamin* for petitioners. *Messrs. Benjamin S. Minor, H. Prescott Gatley, Arthur P. Drury,* and *Lloyd W. Dinkelspiel* for respondents. Reported below: 65 App. D. C. 174; 81 F. (2d) 901.

No. 952. GUARANTY TRUST CO. *v.* MONIER ET AL. May 4, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Theodore Kiendl* and *John W. Davis* for petitioner. *Mr. Lorenzo D. Armstrong* for respondents. Reported below: 82 F. (2d) 252.

Nos. —, original (2 cases). EX PARTE FOX. See *ante,* p. 642.

No. 951. LINDH ET AL. *v.* BOOTH FISHERIES CORP. May 18, 1936. 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. Edwin J. Brown* for petitioners. No appearance for respondent. Reported below: 80 F. (2d) 733.

No. 994. MOYERMAN *v.* HALE, TRUSTEE. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Anna D. Moyerman, pro se.* No appearance for respondent. Reported below: 81 F. (2d) 864.

No. 999. DAVIS, ADMINISTRATRIX, *v.* RUZICKA. May 18, 1936. Petition for writ of certiorari to the Court of Appeals of Maryland, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. I. Irwin Bolotin* and *Bernard H. Conn* for petitioner. No appearance for respondent. Reported below: 170 Md. 112; 183 Atl. 569.

No. 916. A. C. SPARK PLUG CO. *v.* MOTOR IMPROVEMENTS, INC. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. The CHIEF JUSTICE and MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Messrs. Harold W. Norman* and *John M. Zane* for petitioner. *Messrs. Nathan L. Miller, Theo. S. Kenyon,* and *Carl M. Owen* for respondent. Reported below: 80 F. (2d) 385.

No. 854. PORTO RICO BROKERAGE CO., INC. ET AL. *v.* UNITED STATES. May 18, 1936. Petition for writ of certiorari to the United States Court of Customs and Patent Appeals denied. *Mr. James R. Beverly* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Aubrey Lawrence* and *William Cattron Rigby* for the United States. Reported below: 23 C. C. P. A. (Cust.) 259; 80 F. (2d) 521.

No. 874. WELBORN ET AL., TRUSTEES, ET AL. *v.* BURNS TRADING CO. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. William V. Hodges* for petitioners. *Messrs. David P. Strickler* and *Ben S. Wendelken* for respondent. Reported below: 81 F. (2d) 691.

No. 889. NATIONAL CASKET CO. *v.* UNITED STATES. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John E. Hughes, Richard T. Green,* and *James L. Dohr* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Joseph M. Jones* for the United States. Reported below: 79 F. (2d) 1004.

No. 893. FOX *v.* CAPITAL COMPANY. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Benjamin Reass* for petitioner. *Messrs. Frederick H. Wood, William D. Whitney,* and *Samuel B. Stewart, Jr.,* for respondent. Reported below: 85 F. (2d) 97.

No. 899. CAMDEN FIRE INSURANCE ASSN. *v.* MARTIN. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Samuel Levin* for petitioner. *Mr. Charles S. Deneen* for respondent. Reported below: 80 F. (2d) 275.

No. 900. ENSMINGER *v.* LEHIGH VALLEY R. Co. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr.*

Thomas J. O'Neill for petitioner. *Mr. Clifton P. Williamson* for respondent. Reported below: 80 F. (2d) 1010.

No. 901. C. M. KEMP MANUFACTURING CO. *v.* HOELTKE. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Arlon V. Cushman* and *Lewis W. Lake* for petitioner. *Mr. Frank Keiper* for respondent. Reported below: 80 F. (2d) 912.

No. 902. CITIZENS PASSENGER RY. CO. ET AL. *v.* PUBLIC SERVICE COMMISSION. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Ulric J. Mengert, W. W. Montgomery, Jr., John Russell, Jr., F. B. Bracken, Wm. E. Mikell, Jr., Maurice B. Saul, John J. Sullivan,* and *Joseph Gilfillan* for petitioners. *Messrs. Richard J. Beamish, Louis E. Levinthal,* and *Charles J. Margiotti* for respondent. Reported below: 82 F. (2d) 481.

No. 910. ALLEN ET AL. *v.* GEORGIAN HOTEL CORP. ET AL. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Meyer Abrams* and *Max Shulman* for petitioners. *Messrs. George M. Burditt, Arthur M. Cox,* and *Isaac E. Ferguson* for respondents. Reported below: 82 F. (2d) 917.

No. 912. WOLFF ET AL. *v.* JORDAN MARSH CO. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Arthur B. Marsh* for petitioners. *Mr. Nathan Heard* for respondent. Reported below: 80 F. (2d) 314.

65733°—36——43

No. 943. OLIVER ET AL. *v.* RICHMOND; and

No. 944. RUDDOCK *v.* SAME. May 18, 1936. Petition for writs of certiorari to the Supreme Court of Appeals of Virginia denied. *Messrs. Thomas B. Gay, T. Justin Moore,* and *Joseph F. Hall* for petitioners. *Mr. James E. Cannon* for respondent. Reported below: 165 Va. 538, 552; 178 S. E. 48, 44.

No. 891. TROJAN POWDER CO. *v.* UNITED STATES. May 18, 1936. Petition for writ of certiorari to the Court of Claims denied. *Mr. John H. Jackson* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Sewall Key* for the United States. Reported below: 82 Ct. Cls. 312; 13 F. Supp. 61.

No. 908. CROWN WILLAMETTE PAPER CO. *v.* MCLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Alfred Sutro, Felix T. Smith,* and *Eugene D. Bennett* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. John MacC. Hudson, Sewall Key,* and *Carlton Fox* for respondent. Reported below: 81 F. (2d) 365.

No. 909. MCCONNAUGHEY ET AL. *v.* PERSONAL INDUSTRIAL BANKERS, INC. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. S. McConnaughey* for petitioners. *Messrs. U. G. Denman* and *Wm. M. Matthews* for respondent. Reported below: 80 F. (2d) 327.

No. 913. MADSEN *v.* BALTIMORE MAIL STEAMSHIP CO. May 18, 1936. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, 2d Department, denied. *Mr. Simone N. Gazan* for petitioner. *Messrs. Raymond Parmer* and *Vernon S. Jones* for respondent. Reported below: 247 App. Div. 739, 287 N. Y. S. 159; 269 N. Y. 379, 199 N. E. 628.

No. 917. COURIER PUBLISHING CO., INC. *v.* POLICE JURY ET AL. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Eberhard P. Deutsch* for petitioner. No appearance for respondents. Reported below: 82 F. (2d) 1.

No. 918. MOFFETT, EXECUTRIX, ET AL. *v.* ROBBINS, ADMINISTRATOR. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. William Buckholz* and *Martin J. O'Donnell* for petitioners. *Messrs. Orlin A. Weede, Edwin S. McAnany, John B. Pew,* and *Douglas Hudson* for respondent. Reported below: 81 F. (2d) 431.

No. 919. KLEINSCHMIDT ET AL. *v.* WALLACE. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James A. Reed* and *Oscar E. Buder* for petitioners. *Messrs. Lon O. Hocker, James C. Jones, Frank Y. Gladney,* and *James C. Jones, Jr.,* for respondent. Reported below: 80 F. (2d) 897.

No. 922. EVANS PRODUCTS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth

Circuit denied. *Mr. Briggs G. Simpich* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson* and *Messrs. Sewall Key, John Mac C. Hudson, F. E. Youngman,* and *Warner W. Gardner* for respondent.

No. 924. LIKLY & ROCKETT TRUNK CO. *v.* PROVIDENT MUTUAL LIFE INSURANCE CO. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Thomas H. Garry* for petitioner. No appearance for respondent.

No. 925. GANS STEAMSHIP LINE *v.* BOWERS, EXECUTOR. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John E. Hughes* and *Jacob S. Seidman* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Carlton Fox* for respondent. Reported below: 82 F. (2d) 181.

No. 926. RUDOLPH WURLITZER CO. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 927. WURLITZER GRAND PIANO CO. *v.* SAME. May 18, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Elden McFarland, Ike Lanier,* and *Oscar Stoehr* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *John MacC. Hudson* for respondent. Reported below: 81 F. (2d) 971.

No. 929. DOHERTY *v.* KNOWLTON; and

No. 930. SAME *v.* TREMBLAY. May 18, 1936. Petition for writs of certiorari to the Circuit Court of Appeals

for the First Circuit denied. *Messrs. Robert G. Dodge* and *Harold S. Davis* for petitioner. *Mr. George L. Dillaway* for respondents. Reported below: 81 F. (2d) 920.

No. 933. LEONARDI ET AL. *v.* CHASE NATIONAL BANK. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan April* for petitioners. *Mr. Henry Root Stern* for respondent. Reported below: 81 F. (2d) 19.

No. 940. FIREMAN'S MUTUAL AID ASSN. *v.* VIRGINIA. May 18, 1936. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Andrew D. Christian* for petitioner. *Messrs. Abram P. Staples* and *W. W. Martin* for respondent. Reported below: 166 Va. 34; 184 S. E. 189.

No. 941. SUN INDEMNITY CO. ET AL. *v.* BRUCKNER-MITCHELL, INC. May 18, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. P. J. J. Nicolaides, William F. Kelly,* and *Christopher B. Garnett* for petitioners. *Mr. Fontaine C. Bradley* for respondent. Reported below: 65 App. D. C. 178; 82 F. (2d) 434.

No. 945. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* MATCHETTE. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Reed* for petitioner. *Messrs. R. Kemp Slaughter* and *Hugh C. Bickford* for respondent. Reported below: 81 F. (2d) 73.

No. 955. FRANKLIN *v.* CHALAIRE. May 18, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank E. Hinckley* and *Wm. H. Lawrence* for petitioner. *Messrs. Warren Olney, Jr., Farnham P. Griffiths,* and *Walter Chalaire* for respondent. Reported below: 81 F. (2d) 105.

No. 958. ANRAKU *v.* GENERAL ELECTRIC CO.; and

No. 959. PACIFIC IMPORTING CO. ET AL. *v.* SAME. May 18, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. J. Calvin Brown* and *Charles C. Montgomery* for petitioners. *Messrs. Charles Neave* and *Hubert Howson* for respondent. Reported below: 80 F. (2d) 958.

No. 1014. COSSACK *v.* UNITED STATES. May 25, 1936. 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. Loeb L. Cossack, pro se.* No appearance for the United States. Reported below: 82 F. (2d) 214.

No. 1017. DORRANCE ET AL. *v.* MARTIN, STATE TAX COMMISSIONER; and

Nos. 1018 and 1055. CAMDEN SAFE DEPOSIT & TRUST CO. ET AL. *v.* SAME. May 25, 1936. Petitions for writs of certiorari to the Court of Errors and Appeals of New Jersey denied. MR. JUSTICE STONE took no part in the consideration and decision of these applications. *Mr. Wm. A. Schnader* for petitioners in No. 1017. *Mr. Merritt Lane* for petitioners in Nos. 1018 and 1055. *Messrs. George S. Hobart* and *Duane E. Minard* for respondent. Reported below: 116 N. J. L. 362; 184 Atl. 743.

Nos. 906 and 907. UNITED STATES RUBBER CO. *v.* FIRESTONE TIRE & RUBBER CO. May 25, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Merrell E. Clark* and *E. Clarkson Seward* for petitioner. *Messrs. A. L. Ely, Arthur C. Denison,* and *Frank O. Richey* for respondent. Reported below: 79 F. (2d) 948.

No. 935. UEBERSEE FINANZ-KORPORATION AKTIEN GESELLSCHAFT *v.* ROSEN ET AL. May 25, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Davis, Isidor J. Kresel,* and *Bernard Hershkopf* for petitioner. *Messrs. Alex. B. Siegel, Walter S. Logan,* and *Dean G. Acheson* for respondents. Reported below: 83 F. (2d) 225.

No. 936. HILLSBOROUGH COUNTY *v.* EQUITABLE LIFE INSURANCE CO.;

No. 937. SAME *v.* KEEFE;

No. 938. SAME *v.* BUCK; and

No. 939. SAME *v.* EQUITABLE LIFE INSURANCE CO. May 25, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. Sutton* for petitioner. *Mr. F. P. Fleming* for respondents. Reported below: 82 F. (2d) 127.

No. 942. NOXON CHEMICAL PRODUCTS CO., INC. *v.* UNGER ET AL. May 25, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George H. Rosenstein* for petitioner. *Mr. George S. Silzer* for respondents. Reported below: 82 F. (2d) 312.

No. 962. LIGGETT & MYERS TOBACCO CO. *v.* DE PARCQ. May 25, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. F. H. Stinchfield* for petitioner. *Mr. Mortimer H. Boutelle* for respondent. Reported below: 81 F. (2d) 777.

Nos. 965 and 966. IN RE LEE. May 25, 1936. Petition for writs of certiorari to the Court of Appeals of Maryland denied. *Mr. Stuart S. Janney* for petitioner. *Messrs. Herbert R. O'Conor* and *Wm. L. Henderson* for the State of Maryland in opposition. Reported below: 170 Md. 43; 183 Atl. 560.

No. 968. ENELOW *v.* NEW YORK LIFE INSURANCE CO. May 25, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Charles H. Sachs* and *Louis Kaplan* for petitioner. *Messrs. William H. Eckert* and *Louis H. Cooke* for respondent. Reported below: 83 F. (2d) 550.

No. 969. STARR *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 970. TRUE ET AL. *v.* SAME; and

No. 971. DOHME *v.* SAME. May 25, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles Markell* for petitioners. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *John MacC. Hudson* for respondent. Reported below: 82 F. (2d) 964.

No. 976. MCGEE ET AL. *v.* BAXTER. May 25, 1936. Petition for writ of certiorari to the Circuit Court of

Appeals for the Eighth Circuit denied. *Mr. Charles T. Coleman* for petitioners. *Mr. Lamar Williamson* for respondent. Reported below: 82 F. (2d) 695.

No. 995. BACHMAN *v.* DAVIS, RECEIVER. May 25, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. William S. Oppenheim* for petitioner. *Mr. Lewis C. Jesseph* for respondent. Reported below: 81 F. (2d) 600.

No. 1011. PROVIDENT LIFE & ACCIDENT INSURANCE CO. *v.* CRADY. May 25, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. B. Sizer* for petitioner. *Mr. Haveth E. Mau* for respondent. Reported below: 82 F. (2d) 900.

No. 1031. SHEPARD BROADCASTING SERVICE, INC. ET AL. *v.* AEOLIAN-SKINNER ORGAN CO. May 25, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Paul D. P. Spearman* for petitioners. *Messrs. Robert Cushman* and *Clarence S. Walker* for respondent. Reported below: 81 F. (2d) 392.

No. 1032. PARKER, ADMINISTRATOR, ET AL. *v.* JAMES GRANGER, INC. ET AL. See *ante,* p. 644.

No. 1051. DEBENQUE *v.* UNITED STATES. June 1, 1936. 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. James J. Laughlin* for petitioner. No appearance for the United States. Reported below: 85 F. (2d) 202.

No. 1057. SIMS *v.* RIVES. June 1, 1936. 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. James J. Laughlin* for petitioner. No appearance for respondent. Reported below: 84 F. (2d) 871.

No. 1061. CARDEN *v.* NORTH CAROLINA. June 1, 1936. Petition for writ of certiorari to the Supreme Court of North Carolina, and motion for leave to proceed further *in forma papueris,* denied. *Mr. J. B. Carden, pro se.* No appearance for respondent. Reported below: 209 N. C. 404; 183 S. E. 898.

No. 1062. VINCENT *v.* ALABAMA. June 1, 1936. Petition for writ of certiorari to the Supreme Court of Alabama, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Jesse L. Drennan* for petitioner. No appearance for respondent. Reported below: 231 Ala. 657; 165 So. 844.

No. 886. ATLANTIC COAST LINE R. CO. *v.* BETHEL. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Thomas W. Davis* and *W. B. Rodman, Jr.,* for petitioner. *Mr. James W. H. Roberts* for respondent. Reported below: 81 F. (2d) 60.

No. 920. GLOBE GAZETTE PRINTING CO. *v.* UNITED STATES. June 1, 1936. Petition for writ of certiorari to the Court of Claims denied. *Mr. Edward S. Bentley* for petitioner. *Solicitor General Reed, Assistant Attorney*

General Jackson, and *Mr. Sewall Key* for the United States. Reported below: 82 Ct. Cls. 586; 13 F. Supp. 422.

No. 954. CROOK ET AL. *v.* WALLACE, RECEIVER, ET AL. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. B. D. Tarlton* for petitioners. *Mr. Lewis Fisher* for respondents. Reported below: 80 F. (2d) 787.

No. 960. VIRGINIAN RY. CO. *v.* SCOTT. June 1, 1936. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Messrs. John R. Pendleton* and *W. H. T. Loyall* for petitioner. No appearance for respondent. Reported below: 117 W. Va. —; 184 S. E. 559.

No. 964. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* MAYO. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Raymond G. Wright* for petitioner. *Mr. Shirley D. Parker* for respondent. Reported below: 81 F. (2d) 661.

No. 975. NEW YORK EX REL. RICE *v.* GRAVES ET AL. June 1, 1936. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Howard E. Reinheimer* for petitioner. *Mr. Joseph M. Mesnig* for respondents. Reported below: 270 N. Y. 498; 200 N. E. 288.

No. 977. SILK CENTER BUILDING, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for

the Third Circuit denied. *Mr. Fred A. Woodis* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Sewall Key* for respondent. Reported below: 82 F. (2d) 20.

No. 978. NEW YORK LUMBER TRADE ASSN. ET AL. *v.* LACEY ET AL. June 1, 1936. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Walter Gordon Merritt* and *John W. Simpson, 2d,* for petitioners. *Messrs. Louis B. Boudin, Ray Wood Allen,* and *Harry D. Thirkield* for respondents. Reported below: 269 N. Y. 677; 200 N. E. 54.

No. 981. AMERICAN DIAMOND LINES, INC. ET AL. *v.* PETERSON, ADMINISTRATRIX, ET AL.; and

No. 982. THE BLACK GULL ET AL. *v.* SAME. June 1, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John W. Crandall* for petitioners. *Messrs. Richard L. Sullivan* and *Harry D. Thirkield* for respondents. Reported below: 82 F. (2d) 758.

No. 985. FREY & HORGAN CORPORATION *v.* SUPERIOR COURT ET AL. June 1, 1936. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Raimond E. Dee* for petitioner. *Mr. W. F. Williamson* for respondents. Reported below: 5 Cal. (2d) 401; 55 P. (2d) 203.

No. 989. CHESAPEAKE & OHIO RY. CO. *v.* RICH. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. W. T. Kinder* for petitioner. *Mr. David F. Anderson* for respondent. Reported below: 81 F. (2d) 584.

No. 993. TOUSEY ET AL. *v.* WABASH-HARRISON BUILDING CORP. ET AL. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Meyer Abrams* and *A. L. Myers* for petitioners. *Messrs. Arthur M. Cox, Edwin B. Mayer,* and *Claude A. Roth* for respondents. 85 F. (2d) 395.

No. 1004. BEALE ET AL. *v.* SNEAD, REFEREE IN BANKRUPTCY, ET AL. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph F. Hall* for petitioners. *Mr. Meade T. Spicer, Jr.,* for respondents. Reported below: 81 F. (2d) 970.

No. 1010. HARPER *v.* CRENSHAW ET AL. June 1, 1936. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. William C. Sullivan* for petitioner. *Messrs. Roger J. Whiteford, P. H. Marshall, Arthur P. Drury, George Monk, James O'D. Moran, A. C. Wells,* and *George C. Gertman* for respondents. Reported below: 65 App. D. C. 239; 82 F. (2d) 845.

No. 1020. CALLAGHAN ET AL. *v.* MARINE MIDLAND TRUST CO., TRUSTEE;

No. 1021. SAME *v.* CITY BANK FARMERS TRUST CO.;

No. 1022. SAME *v.* CENTRAL HANOVER BANK & TRUST CO., TRUSTEE; and

No. 1023. SAME *v.* PRESIDENT AND DIRECTORS OF THE MANHATTAN CO., TRUSTEES. June 1, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Emil Weitzner* for petitioners. *Messrs. John Ross Delafield, Emery H. Sykes, John M. Perry,* and *J. M. Richardson Lyeth* for respondents. Reported below: 82 F. (2d) 755.

No. 1041. H. M. BYLLESBY & Co. *v.* WELCH. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Henry L. Jost* for petitioner. *Mr. Paul R. Stinson* for respondent. Reported below: 82 F. (2d) 539.

No. 931. CERRO DE PASCO COPPER CORP. *v.* UNITED STATES. June 1, 1936. Petition for writ of certiorari to the Court of Claims denied. *Mr. Campbell E. Locke* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Sewall Key* for the United States. Reported below: 82 Ct. Cls. 442; 13 F. Supp. 633.

No. 979. DRISCOLL BENEVOLENT ESTATE, LTD. ET AL. *v.* SHIPP ET AL. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Calvin S. Mauk* for petitioners. *Mr. W. I. Gilbert* for respondents. Reported below: 80 F. (2d) 1010.

No. 1002. IRVING TRUST CO., TRUSTEE IN BANKRUPTCY, ET AL. *v.* UNITED STATES ET AL. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. William D. Whitney* and *Irwin N. Loeser* for petitioners. *Messrs. W. B. Stewart* and *James R. Garfield* for respondents. Reported below: 83 F. (2d) 20.

No. 1005. MARIFIAN *v.* UNITED STATES;

No. 1006. KOLAR *v.* SAME; and

No. 1007. FINK *v.* SAME. June 1, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the

Eighth Circuit denied. *Mr. Charles A. Lich* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 82 F. (2d) 628.

No. 1050. BRUKENFELD ET AL. *v.* NEW YORK RAILWAYS CORP. ET AL. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frank E. Karelsen, Jr.,* and *Godfrey Goldmark* for petitioners. *Messrs. Thomas O'G. FitzGibbon, Boykin C. Wright, Robert T. Swaine, Edwin S. S. Sunderland,* and *Samuel C. Duberstein* for respondents. Reported below: 82 F. (2d) 739.

No. 984. CONNECTICUT FIRE INSURANCE CO. *v.* OAKLEY IMPROVED BUILDING & LOAN CO. ET AL. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. Louis Kohl* for petitioner. *Messrs. Frank E. Wood, Robert S. Marx,* and *Harry Kasfir* for respondents. Reported below: 80 F. (2d) 717.

No. 992. CENTRAL STATES LIFE INSURANCE CO. *v.* KOPLAR COMPANY. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George B. Logan* for petitioner. *Mr. Samuel H. Liberman* for respondent. Reported below: 80 F. (2d) 754.

No. 996. HOPWOOD *v.* ABRAHAM LINCOLN LIFE INSURANCE CO. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Carrington T. Marshall* and *Curtis C.*

Williams for petitioner. *Messrs. Francis J. Wright* and *W. Edgar Sampson* for respondent. Reported below: 81 F. (2d) 284.

No. 998. MEMPHIS NATURAL GAS CO. *v.* GULLY, STATE TAX COLLECTOR, ET AL.; and

No. 1025. GULLY, STATE TAX COLLECTOR, ET AL. *v.* MEMPHIS NATURAL GAS CO. June 1, 1936. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Marcellus Green, Garner W. Green, T. A. McEachern, Jr.,* and *Walter P. Armstrong* for Memphis Natural Gas Co. *Messrs. Greek L. Rice, J. A. Lauderdale,* and *Edward W. Smith* for Gully. Reported below: 82 F. (2d) 150.

No. 1026. GULLY, STATE TAX COLLECTOR, ET AL. *v.* INTERSTATE NATURAL GAS CO. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Edward W. Smith, Greek L. Rice,* and *J. A. Lauderdale* for petitioners. *Messrs. William A. Dougherty* and *David Clay Bramlette* for respondent. Reported below: 82 F. (2d) 145.

No. 1009. JOHNSON ET AL. *v.* UNITED STATES. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Wallace Muir* and *Francis Burke* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 82 F. (2d) 500.

No. 1012. FREEMAN *v.* UNITED STATES. June 1, 1936. Petition for writ of certiorari to the Circuit Court of

Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 82 F. (2d) 1022.

No. 1013. LASKA *v.* UNITED STATES. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Ralph L. Carr, Jean S. Breitenstein* and *John G. Reid* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron* and *Warner W. Gardner* for the United States. Reported below: 82 F. (2d) 672.

No. 986. MUNOZ ET AL. *v.* PORTO RICO RAILWAY, LIGHT & POWER CO. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby* and *Nathan R. Margold* for petitioners. *Messrs. Carroll G. Walter* and *Henri Brown* for respondent. Reported below: 83 F. (2d) 262.

No. 997. WASHINGTON *v.* COMMISSIONER OF INTERNAL REVENUE. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Bernhard Knollenberg* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 80 F. (2d) 829.

No. 1015. UNITED STATES *v.* CHICAGO, BURLINGTON & QUINCY R. Co. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth

Circuit denied. *Solicitor General Reed* for the United States. *Messrs. J. C. James* and *Bruce Scott* for respondent. Reported below: 82 F. (2d) 131.

No. 1043. CRAIG *v.* UNITED STATES; and

No. 1044. WEINBLATT *v.* SAME. June 1, 1936. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Mark L. Herron, Aloysius I. McCormick,* and *John Walsh* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 81 F. (2d) 816.

No. 1046. J. V. LANE & Co., INC., *v.* THE CALIFORNIAN. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Neil P. Cullom* for petitioner. *Mr. L. deGrove Potter* for respondent. Reported below: 82 F. (2d) 283.

No. 1068. WILLIAMS BROTHERS WELL TREATING CORP. *v.* DOW CHEMICAL CO. June 1, 1936. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Nathan A. Gibson, James H. Maxey,* and *Wilbur J. Holleman* for petitioner. *Messrs. Arthur C. Brown, Russell Wiles,* and *George A. Chritton* for respondent. Reported below: 81 F. (2d) 495.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM MARCH 31 TO AND INCLUDING JUNE 1, 1936.

No. 796. FROST ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. April 13, 1936. Dismissed on motion of *Messrs. Lewis Fisher* and *Hugh H. Obear* for petitioners. *Solicitor General Reed* and *Mr. George W. Wilson* for the United States. Reported below: 80 F. (2d) 341.

PETITIONS FOR REHEARING DENIED, FROM MARCH 31 TO AND INCLUDING JUNE 1, 1936. *

No. 866 (October Term, 1934). EVERETT MILLS *v.* UNITED STATES. April 6, 1936. 295 U. S. 866.

No. 386. PHILLIPS PETROLEUM CO. ET AL. *v.* JENKINS. April 27, 1936. 297 U. S. 629.

No. 388. TRIPLETT ET AL. *v.* LOWELL ET AL. April 27, 1936. 297 U. S. 638.

No. 583. CHANDLER, RECEIVER, *v.* PEKETZ. April 27, 1936. 297 U. S. 609.

No. 733. BLUME *v.* UNITED STATES. April 27, 1936. 297 U. S. 722.

No. 865. COSSACK *v.* UNITED STATES. April 27, 1936.

No. 791. ATLANTIC COAST LINE R. Co. *v.* COMMISSIONER OF INTERNAL REVENUE; and

---

* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 792. CAROLINA, CLINCHFIELD & OHIO RY. CO. *v.* SAME. May 4, 1936.

No. 819. ALLEN *v.* CLOISTERS BUILDING CORP. ET AL. May 18, 1936.

No. 858. PORESKY *v.* RYAN, REGISTRAR OF MOTOR VEHICLES. May 18, 1936.

No. 885. LYNCH *v.* UNITED STATES. May 18, 1936.

No. 659. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, *v.* STEIN, GUARDIAN. May 25, 1936. *Ante*, p. 94.

No. 667. THE ARIZONA ET AL. *v.* ANELICH, ADMINISTRATRIX. May 25, 1936. *Ante*, p. 110.

No. 696. CHICAGO GREAT WESTERN R. CO. *v.* RAMBO, ADMINISTRATRIX. May 25, 1936. *Ante*, p. 99.

No. 794. NORTON *v.* LYON VAN & STORAGE CO. ET AL. May 25, 1936.

No. 655. ACKER ET AL. *v.* UNITED STATES ET AL. June 1, 1936.

No. 656. UNITED STATES ET AL. *v.* CORRICK ET AL. June 1, 1936.

No. 1017. DORRANCE ET AL. *v.* MARTIN, STATE TAX COMMISSIONER. June 1, 1936.

AMENDMENTS OF RULES.

ORDER.

It is ordered that the Rules of this Court be, and they hereby are, amended as follows:

That the words "Court of Appeals of the District of Columbia" in Rule 37, title and paragraph 1 thereof; in Rule 38, title and paragraphs 1, 2, and 5c thereof, and in Rule 39, title and text thereof, be changed to read "United States Court of Appeals for the District of Columbia."

That the words "Supreme Court of the Philippine Islands" in Rule 42, title and text thereof be changed to read "Supreme Court of the Commonwealth of the Philippines."

May 25, 1936.

AMENDMENTS OF BANKRUPTCY RULES.

ORDER, JUNE 1, 1936.

IT IS ORDERED that Rules XII, paragraph 3; XIV; XVII, paragraphs 1 and 7; XVIII, paragraph 4; XXI, paragraph 8; XXVIII; XXIX; XXXVIII; XLII, paragraph 2; XLIV, second paragraph; XLVII; XLVIII; and L, paragraphs 1, 5, 6 and 12, of the General Orders in Bankruptcy be, and they hereby are, amended, effective immediately, to read respectively as follows:

XII

3. Applications for a discharge, or for the confirmation of a composition where the proceeding is had under section 12 of the Act, or for an injunction to stay proceedings of a court or officer of the United States or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee, or in proceedings under section 77 and section 77 B of the Act, to a special master, to ascertain and report the facts. Unless otherwise ordered by the judge, applications for the confirmation of a debtor's proposal under section 74 of the Act, and all objections thereto, shall be heard and decided by the referee.

XIV

NO OFFICIAL OR GENERAL TRUSTEE

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

XVII

1. The trustee shall, immediately upon entering upon his duties, send notice by mail to the Commissioner of Internal Revenue, Washington, D. C., of the adjudication

of bankruptcy, and prepare a complete inventory of all the property of the bankrupt or debtor that comes into his possession.

7. This general order shall not apply to reorganization proceedings under section 77 or section 77 B of the Act.

XVIII

4. This general order shall not apply to reorganization proceedings under section 77 or section 77 B of the Act.

XXI

8. The provisions of this general order shall not apply to reorganization proceedings under section 77 or section 77 B of the Act.

XXVIII

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS

Whenever it may be deemed for the benefit of an estate to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate, the trustee, or the bankrupt or debtor, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee. This general order shall not apply to reorganization proceedings under section 77 or section 77 B of the Act.

XXIX

PAYMENT OF MONEYS DEPOSITED

No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks. This general order shall not apply to reorganization proceedings under section 77 or section 77 B of the Act.

XXXVIII

FORMS

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case. In proceedings under any of the sections of Chapter VIII of the Bankruptcy Act, unless and until the debtor is adjudicated a bankrupt all forms used shall refer to him as a "debtor" and not a "bankrupt" and shall be captioned "In proceedings for a composition or extension," "In proceedings for the reorganization of a railroad," or "In proceedings for the reorganization of a corporation," as the case may be, and not "In bankruptcy."

XLII

2. Except in reorganization proceedings under section 77 and section 77 B of the Act, such petition shall be heard at a meeting of creditors, and the referee in sending the notice of such meeting prescribed by section 58 of the Act shall state by whom and in what amount the allowance of the compensation or reimbursement for expenses is asked.

XLIV

Nothing herein contained shall prevent the court, in proceedings under section 77 or section 77 B of the Act, from authorizing the employment of attorneys who are attorneys of the corporation, or associated with its legal department, in connection with the operation of the business of the corporation by a trustee or trustees under subsection (c) of section 77 and subsection (c) of section 77 B, when such employment is found by the court to be in the public interest in relation to such operation and is not adverse to the interests of the trustee or trustees or of the creditors of the corporation.

XLVII

REPORTS OF REFEREES

The reports of referees in all proceedings under the Act, and of special masters in proceedings under section 77 and section 77 B of the Act, shall be deemed presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: Provided, That when any matter is referred by consent of all parties in interest and the intention is plainly expressed in the consent order that the submission is to the referee or master as an arbitrator, the court may review the same only in ac-

cordance with the principles governing a review of an award and decision by an arbitrator.

XLVIII

PROCEEDINGS UNDER SECTION 74 OF THE ACT

The following additional rules shall apply to proceedings under section 74 of the Act:

1. Notice to creditors of the proposed appointment of a custodian or receiver may, in the interests of expedition, be given by publication instead of in writing, if the court so directs.

2. If a custodian or receiver is appointed, the notice of the first meeting which he is required to prepare shall be in form approved by the referee and the date of the meeting shall be fixed by the referee.

3. If the debtor is a wage-earner or a farmer, and any happenings occur which under the provisions of subdivision (l) of said section would otherwise be followed by an order of liquidation, and the debtor does not consent to liquidation, the court shall dismiss the proceedings and notify the creditors accordingly. If a composition or extension proposal is set aside for fraud as provided in subdivision (k) of said section, the case shall be reinstated and such proceedings shall be had as upon denial of confirmation under subdivision (l).

4. The commissions of the referee and of the custodian or receiver shall not exceed those payable to referees and receivers under sections 40 and 48 of the Act in the event of a composition in bankruptcy, and the amount of the debts whose maturity is to be extended shall be included for that purpose as part of "the amount to be paid creditors" within the meaning of those sections, but if the compensation so computed shall appear to be in excess of what is fair and reasonable it shall be correspondingly reduced, the intent of this provision being that the amount of such fees shall be subject at all times to the approval of the court. If the estate is liquidated

under the provisions of subdivision (l) of section 74 of the Act, the referee shall return to the estate any commissions previously received and shall be entitled to commissions on all moneys disbursed to creditors by the trustee as provided in section 40 of the Act.

5. The personal representative of a deceased individual who desires in his representative capacity to effect, under section 74, a settlement or composition of the debts of the estate, shall attach to his petition, in lieu of schedules, the following papers, certified as correct by the court which appointed him (hereinafter referred to as the probate court): (a) a copy of the order of his appointment, (b) a copy of an order of the probate court authorizing him to file the petition, (c) a detailed inventory of so much of the property constituting the estate as under the laws of the State of which the decedent died a resident would be available for creditors, and (d) a list of the names and addresses of the creditors, showing the amounts allowed or apparently owing to each, the nature of the securities or liens, if any, held by each, and the claims which are entitled to priority. If the petition is approved by the judge as properly filed under section 74, the clerk shall file a certified copy of the order of approval with the probate court, and from the date of such order until the case is dismissed the district court shall exercise exclusive jurisdiction over the property required to be listed in the inventory as above provided.

6. Upon the approval of a personal representative's petition the case shall be referred to a referee and proceeded with as in all other cases under section 74 and this general order, except that (a) the original and any amended or supplementary inventory filed by the petitioner with the approval of the probate court shall be deemed to be correct, and no inventory shall be made by the custodian or receiver; (b) all claims allowed by the probate court, and only such claims, shall be allowed by the referee; (c)

the petitioner shall file with the application for confirmation a completed list of the claims allowed up to the date of the application, certified as correct by the probate court; and (d) the clerk shall file with the probate court certified copies of all orders of the referee or judge confirming or denying the proposal, dismissing the proceedings before or after confirmation, or directing liquidation of the estate.

L

1. Upon the expiration of the term of office of a conciliation commissioner, the judge may reappoint him or appoint other or additional conciliation commissioners.

5. The money to be paid upon the confirmation of a composition shall be placed in a depository to be designated by order of the judge, subject to withdrawal by the depositor upon the countersignature of the conciliation commissioner. The judge shall furnish a copy of this general order to the depositories and also the name of any conciliation commissioner whose countersignature is authorized.

6. Application for confirmation shall be filed with the conciliation commissioner who shall forthwith transmit it to the judge with (a) the acceptances, (b) the proofs of claims which have been allowed and those which have been disallowed, (c) a list of the debts having priority, (d) a list of the secured debts, with a description of the security of each, (e) the final inventory, with a list of the exemptions, and (f) a report of the commissioner recommending or opposing confirmation and, in the case of an extension, stating to what extent, if any, it would be desirable for the court after confirmation to retain jurisdiction of the farmer and his property.

12. The twenty-five dollar fees of the conciliation commissioner, and the fees and expenses of the supervisory conciliation commissioner, shall be payable out of appropriated funds in accordance with such instructions as may be issued from time to time by the Attorney General.

It is further ordered that Forms Nos. 65, 72, 73 and 74 of the Forms in Bankruptcy be, and they hereby are, amended and that Form No. 76 be, and it hereby is, approved. The forms to read respectively as follows:

FORM No. 65

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT

To the Honorable ....., Judge of the District Court of the United States for the ..... District of .....:

The petition of ....., of ....., in the county of ....., and district and State of ....., respectfully represents:

That he is primarily bona fide personally engaged in producing products of the soil [*or* that he is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations] as follows: .....
.....
.....;

that such operations occur in the county [*or* counties] of .....
....., within said judicial district; that he is insolvent [*or* unable to meet his debts as they mature]; and that he desires to effect a composition or extension of time to pay his debts under section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

.....
....., Attorney.

United States of America, District of ....., ss:

I, ..., the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

.....,

Petitioner.

Subscribed and sworn to before me this ..... day of ....., A. D. 19...

.....,

.....

[*Official character.*]

FORM NO. 72

APPLICATION FOR CONFIRMATION OF A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 74

In the District Court of the United States for the ..... District of .....

In the Matter of ..... *Debtor* } In Proceedings for a Composition or Extension

To the Honorable ....., Referee in Bankruptcy of the District Court of the United States for the ..... District of .....:

At ....., in said district, on the ..... day of ....., A. D. 19.., now comes ....., the above-named debtor, and respectfully represents to the court that, after he had filed in court a schedule of his property and a list of his creditors, as required by law, he offered a proposal for a composition or an extension to his creditors, which proposal has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims [*or* and after the first meeting of the creditors, he offered a proposal for an extension to his creditors, which proposal has not been accepted by a majority in number of all creditors whose claims are affected by the proposal, which number represents a majority in amount of such claims, but which proposal includes a feasible method of financial rehabilitation of the above-named debtor and is for the best interest of all the creditors, and includes an equitable liquidation for the secured creditors whose claims are affected]; that the consideration to be paid to the cred-

itors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ..... dollars, have been deposited, subject to the order of the court, in the ..... Bank, of ....., a designated depository.

Wherefore the said ..... respectfully asks that the said proposal be confirmed by the court.

....., *Debtor.*

FORM No. 73

ORDER CONFIRMING A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 74

In the District Court of the United States for the..... District of.....

In the Matter of ..... *Debtor* } In Proceedings for a Composition or Extension

An application for the confirmation of the proposal offered by the debtor under section 74 of the Bankruptcy Act having been filed in court, and it appearing that the proposal has been accepted by a majority in number of creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims; [*or* and it appearing that the debtor, having failed to obtain the acceptance of a majority of all creditors whose claims are affected by the proposal, submitted the said proposal for an extension after the first meeting of the creditors;] and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the said court, and subject to its order; and it also appearing that the proposal includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; that it is for the best interests of all creditors; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a ground for denying his discharge; and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary

to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said proposal be, and it hereby is, confirmed.

Witness my hand, this ..... day of ....., A. D. 19...

....., *Referee in Bankruptcy.*

FORM NO. 74

ORDER CONFIRMING A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 75

In the District Court of the United States for the ..... District of .....

In the Matter of ..... *Debtor* } In Proceedings for a Composition or Extension

An application for the confirmation of the proposal offered by the debtor under section 75 of the Bankruptcy Act having been filed in court, and it appearing that the proposal has been accepted by a majority in number of creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims; and it also appearing that the proposal includes an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; that it is for the best interests of all creditors; and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said proposal be, and it hereby is, confirmed.

Witness the Honorable ....., judge of said court, and the seal thereof, this ..... day of ....., A. D. 19...

....., *Clerk.*

[Seal of the court]

FORM No. 76

APPLICATION FOR CONFIRMATION OF A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 75

In the District Court of the United States for the.....
District of.....

In the Matter of
.....
Debtor
} In Proceedings for a Composition or Extension

To the Honorable....., Judge of the District Court of the United States for the.....
District of.....:

At....., in said district, on the.....day of ....., A. D. 19.., now comes ....., the above-named debtor, and respectfully represents to the court that, after he had filed in court a schedule of his property and a list of his creditors, as required by law, he offered a proposal for a composition or an extension to his creditors, which proposal has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are to be affected by the proposal, which number represents a majority in amount of such claims.

Wherefore the said ..... respectfully asks that the said proposal be confirmed by the court.

.....,
Debtor.

It is further ordered that Form No. 75 of the Forms in Bankruptcy entitled "Petition of farmers for the appointment of a Conciliation Commissioner" be, and it hereby is, abrogated and annulled.

June 1, 1936.

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1933, 1934, AND 1935

	ORIGINAL			APPELLATE			TOTALS		
Terms	1933	1934	1935	1933	1934	1935	1933	1934	1935
Total cases on dockets	19	18	16	1,113	1,022	1,076	1,132	1,040	1,092
Cases disposed of during terms	4	5	4	1,025	926	986	1,029	931	990
Cases remaining on dockets	15	13	12	88	96	90	103	109	102

	TERMS		
	1933	1934	1935
Distribution of cases disposed of during terms:			
Original cases	4	5	4
Appellate cases on merits	293	256	269
Petitions for certiorari	732	670	717
Cases remaining on dockets:			
Original cases	15	13	12
Appellate cases on merits	43	51	56
Petitions for certiorari	45	45	34

INDEX

ABANDONMENT. See **Interstate Commerce Acts,** 10–12; **Jurisdiction,** I, 4; III, 18.

ACCOUNTING.

Accounting to patent owner for profits from infringement. *Duplate Corp.* v. *Triplex Co.,* 448.

ACCOUNTS RECEIVABLE.

Situs for taxation. *Wheeling Steel Corp.* v. *Fox,* 193.

ADMINISTRATIVE LAW. See **Constitutional Law,** IV, 2–9; V, (B), 5; **Interstate Commerce Acts,** 5–6, 13–20; **Statutes,** 8–9.

1. Function of Interstate Commerce Commission in prescribing divisions of joint rates; validity and review of orders. *B. & O. R. Co.* v. *U. S.,* 349.

2. Proceedings under Packers & Stockyards Act; function of District Court. *Acker* v. *U. S.,* 426.

3. *Administrative Regulations* under revenue acts; validity. *Koshland* v. *Helvering,* 441.

ADMIRALTY. See **Immigration Acts.**

1. Master is special agent of owner. *Compagnie Generale* v. *Elting,* 217.

2. *Negligence. Personal Injury or Death of Seaman.* Remedy afforded by jury trial construed liberally in accordance with pre-existent maritime law. *The Arizona* v. *Anelich,* 110; *Beadle* v. *Spencer,* 124.

3. *Id. Assumption of Risk* not a defense to suit for injury or death caused by defective appliance furnished seaman. *The Arizona* v. *Anelich,* 110; *Beadle* v. *Spencer,* 124.

4. *Id.* Rule applies to coasting vessel in port at time of accident. *Beadle* v. *Spencer,* 124.

5. *Contributory Negligence* not a defense under the Merchant Marine Act or maritime law; is ground only for apportionment of the damages. *Id.*

6. *General Average.* Claim against United States for general average contribution. *U. S.* v. *Atlantic Ins. Co.,* 483.

AGENTS. See **Admiralty**, 1.

ALABAMA. See **Statutes**, 12.

ALIENS. See **Immigration Acts.**

AMENDMENTS. See **Judgments**, 4.

AMOUNT IN CONTROVERSY. See **Jurisdiction**, III, 2–5.

ANTITRUST ACTS. See **Clayton Act.**

ARIZONA. See **Jurisdiction**, II, 1.

ASSESSMENT. See **Constitutional Law**, V, (B), 5.

ASSIGNMENT OF ERROR. See **Jurisdiction**, II, 19–20.

ASSUMPTION OF RISK. See **Admiralty**, 3–4.

ATTORNEYS FEES. See **Pensions**, 1–2.

AUTOMOBILES.

1. *Licenses.* Fee for privilege of transporting motor vehicles interstate on own wheels over highways of State for purpose of sale, sustained. *Morf* v. *Bingaman*, 407.

2. *Id.* Flat fee not unreasonable in amount, rather than fee based on mileage, not forbidden. *Id.*

3. *Id.* Fee not invalid because not devoted directly to highway maintenance. *Id.*

BANK DEPOSITS.

Situs for taxation. *Wheeling Steel Corp.* v. *Fox*, 193.

BANKRUPTCY.

For Amendments of Bankruptcy Rules, see p. 695.

1. *Powers of Congress.* Act of May 24, 1934, permitting political subdivision of State to avail of Bankruptcy Act, invalid. *Ashton* v. *Cameron County*, 513.

2. *Railroad Reorganization Proceedings.* Right of bank to set off deposit owing railroad against railroad bonds owned by bank. *Lowden* v. *Northwestern Bank*, 160.

BANKS. See **Constitutional Law**, III, 3.

Right of set-off. See Bankruptcy, 2.

BITUMINOUS COAL CONSERVATION ACT.

Unconstitutional in provisions regulating labor and these inseparable from others regulating prices. *Carter* v. *Carter Coal Co.*, 238.

BOILER INSPECTION ACT. See **Employers' Liability Act**, 2.

BONDS. See **Bankruptcy, 2; Public Moneys.**

Liability on surety bonds; priority of United States under R. S. § 3466. *U. S.* v. *Knott,* 544.

BOUNDARIES.

Appointment of special master to mark boundary. *Vermont* v. *New Hampshire,* 642.

BROKERS. See **Commission Merchants, 1–2; Grain Futures Act.**

BURDEN OF PROOF.

Of Jurisdictional Amount. See Jurisdiction, III, 3.

CALIFORNIA. See **Jurisdiction, II, 1; Safety Appliance Acts, 3.**

CARRIERS. See **Interstate Commerce Acts.**

CERTIFIED QUESTION. See **Jurisdiction, II, 8.**

CLAIMS.

1. *Claim Against United States* for general average contribution. *U. S.* v. *Atlantic Ins. Co.,* 483.

2. *Id.* When claim accrues. *Id.*

3. *Id.* Effect of fact that damages sought are unliquidated. *Id.*

4. *Id.* Six year limitation. *Id.*

CLASSIFICATION. See **Constitutional Law, V, (C), 1–3.**

CLAYTON ACT.

1. *Tying Clause* in lease of patented machine violates § 2. *International Machines Corp.* v. *U. S.,* 131.

2. *Id.* Prohibition applies to patented supplies. *Id.*

3. *Id.* Protection of good will of lessor's customers in case of patented tabulating machines requiring particular kind of cards for successful operation. *Id.*

4. *Id.* Tendency to monopoly. *Id.*

CLERKS OF COURT. See **Criminal Law, 5.**

COAL. See **Bituminous Coal Conservation Act; Constitutional Law, I, 5; II, 2, 4.**

COLLATERAL ATTACK. See **Judgments, 1.**

COLLECTIVE BARGAINING. See **Constitutional Law, II, 4.**

COLORADO. See **Waters, 2.**

COMBINATIONS. See **Patents for Inventions, 2.**

COMMERCE. See **Constitutional Law, II, 1–11.**

COMMISSION MERCHANTS. See **Packers & Stockyards Act.**

1. *License, Bond, etc.,* for protection of consignors. *Hartford Co.* v. *Illinois,* 155.

2. *Id.* Illinois regulations *held* consistent with federal statute. *Id.*

COMMITMENT. See **Criminal Law,** 4–5.

COMMODITIES CLAUSE. See **Interstate Commerce Acts,** 4.

COMMON CARRIER. See **Interstate Commerce Acts.**

CONDEMNATION. See **Eminent Domain,** 1–2.

CONFISCATION. See **Constitutional Law,** IV, 6–10; **Evidence,** 6; **Interstate Commerce Acts,** 6, 9, 15–16.

CONSTITUTIONAL LAW. See **Eminent Domain,** 1–2.

I. Miscellaneous, p. 712.
II. Commerce Clause, p. 713.
III. Contract Clause, p. 714.
IV. Fifth Amendment, p. 714.
V. Fourteenth Amendment.
(A) In General, p. 715.
(B) Due Process Clause, p. 715.
(C) Equal Protection Clause, p. 715.

I. **Miscellaneous.**

1. *Arbitrary Power.* No room for, under Constitution. Legitimate end necessary to justify means. *Jones* v. *Securities Comm'n,* 1.

2. *Investigations.* Investigations must be based on specific and authorized grounds, and the person interrogated about his private affairs has a right to know why the inquiry is made. *Id.*

3. *Testimony.* Compulsion of. *Id.*

4. *General Welfare.* No general power in Congress to protect. *Carter* v. *Carter Coal Co.,* 238.

5. *Wages and Working Conditions* in production of coal not subject to regulation by Congress. *Id.*

6. *Constitutionality of Ends* not subject of legislative discretion. *Id.*

7. *Difference Between Ends and Means. Id.*

8. *Supremacy of State Power,* and lack of inherent power in Federal Government, in internal affairs of States. *Carter* v. *Carter Coal Co.,* 238; *Ashton* v. *Cameron County,* 513.

9. *Id. Abdication of State Power. Id.*

10. *Id.* Neither consent nor submission by States can enlarge powers of Congress. *Ashton* v. *Cameron County,* 513.

CONSTITUTIONAL LAW—Continued.

11. *Immunity of Federal Government* from state taxation. *Graves* v. *Texas Co.*, 393.

12. *Id.* State tax on sale (or on storing and withdrawal—essential to sale) of gasoline to the United States, invalid. *Id.*

13. *Judiciary.* Duty to enforce Constitution. *Carter* v. *Carter Coal Co.*, 238.

14. *Opinion of Lawmakers* on constitutionality given weight. *Id.*

15. *Beneficence of Statute* not evidence of validity. *Id.*

16. *Separability of Statute,* when part is bad. *Id.*

17. *Legislative Declaration of Separability.* Where ineffective. *Id.*

18. *Bankruptcy Powers. Limitation.* Act of May 24, 1934, permitting political subdivisions of State to avail of Bankruptcy Act, invalid. *Ashton* v. *Cameron County,* 513.

19. *Party Attacking Statute* must show injury to himself. *Premier-Pabst Co.* v. *Grosscup,* 226.

II. **Commerce Clause.**

1. *Commerce Defined. Carter* v. *Carter Coal Co.*, 238.

2. *Production of Coal* to be subsequently shipped interstate, not commerce. *Id.*

3. *Direct Effect* on commerce means proximate effect. *Id.*

4. *Id.* Effect on interstate commerce in coal of struggles between miners and mine-owners over wages, working conditions, hours, collective bargaining, etc., is indirect. *Id.*

5. *Distinction Between Direct and Indirect Effect,* independent of magnitude of effect or its cause. *Id.;* see also, *Atlantic Lumber Co.* v. *Commissioner,* 553.

6. *Id.* Want of power in federal government to regulate wages in industry is the same whether the activity regulated precedes interstate commerce in the things produced or follows it. *Carter* v. *Carter Coal Co.*, 238.

7. *Motor Vehicles. Transportation. License.* Fee for privilege of transporting motor vehicles on own wheels over highways of State for purpose of sale, though movement interstate, valid. *Morf* v. *Bingaman,* 407.

8. *Id.* Flat fee not unreasonable in amount, rather than fee based on mileage, not forbidden. *Id.*

9. *Id.* Fee not invalid because not devoted directly to highway maintenance. *Id.*

CONSTITUTIONAL LAW—Continued.

10. *Foreign Corporations.* Massachusetts tax on foreign corporation for privilege of doing business in State did not impose unconstitutional burden on interstate commerce. *Atlantic Lumber Co.* v. *Commissioner,* 553.

11. *Commission Merchants* subject to state regulation not in conflict with federal law for protection of consignors of produce from other States. *Hartford Co.* v. *Illinois,* 155.

III. **Contract Clause.**

1. *Bankruptcy Laws. State* may not impair obligations of contracts indirectly by sanctioning extension of federal bankruptcy power to municipalities. *Ashton* v. *Cameron County,* 513.

2. *Employer and Employee. Wage Laws.* New York minimum wage law for women (Laws 1933, c. 584), as construed by state court, invalid. *Morehead* v. *New York,* 587.

3. *Statutory Release of Surety* of bank or public official unassailable by taxpayer having no vested interest in the public funds secured. *Schenebeck* v. *McCrary,* 36.

IV. **Fifth Amendment.**

1. Analogy of due process clause of Fourteenth Amendment to that of Fifth Amendment. *Morehead* v. *New York,* 587.

2. *Administrative Rate Fixing.* Legislative and judicial functions of administrative body. *St. Joseph Co.* v. *U. S.,* 38; *Morgan* v. *U. S.,* 468.

3. *Due Process* in administrative proceeding. *Id.*

4. *Full Hearing* required. *Morgan* v. *U. S.,* 468.

5. *Id.* Order made under Packers & Stockyards Act by Secretary, when evidence and argument were heard and considered not by him but by an assistant, invalid. *Id.*

6. *Confiscatory Rates.* Duty and function of courts in correcting. *St. Joseph Co.* v. *U. S.,* 38; *Morgan* v. *U. S.,* 468; *B. & O. R. Co.* v. *U. S.,* 349.

7. *Id.* Findings of administrative body not conclusive. *St. Joseph Co.* v. *U. S.,* 38; *B. & O. R. Co.* v. *U. S.,* 349.

8. *Id.* Evidence before administrative body may be supplemented in court review. *Id.*

9. *Right to Judicial Determination* of adequacy of return. *B. & O. R. Co.* v. *U. S.,* 349.

10. *Eminent Domain. Just Compensation. McCandless* v. *U. S.,* 342.

CONSTITUTIONAL LAW—Continued.

V. **Fourteenth Amendment.**

(A) In General.

1. *Challenging Statute.* One within class properly taxed cannot complain that taxed class might have been more aptly defined or that others, not of that class, were taxed improperly. *Morf* v. *Bingaman,* 407.

2. *Id.* Party attacking statute must show injury to himself. *Premier-Pabst Co.* v. *Grosscup,* 226.

(B) Due Process Clause.

1. Analogy of due process clause of Fourteenth Amendment to that of Fifth Amendment. *Morehead* v. *New York,* 587.

2. *Employer and Employee. Wages.* New York minimum wage law for women (Laws 1933, c. 584), as construed by state court, invalid. *Id.*

3. *Motor Vehicles. Privilege Tax.* Fee for privilege of transporting motor vehicles on own wheels over highways of State for purpose of sale, valid. *Morf* v. *Bingaman,* 407.

4. *Taxation of Foreign Corporation.* Intangibles such as bank deposits and accounts receivable in other States are taxable by the State in which the corporation has established its business situs or commercial domicile. *Wheeling Steel Corp.* v. *Fox,* 193.

5. *Delegation of Power.* No unconstitutional delegation of authority is involved in the West Virginia statute requiring state tax officials to fix assessment by applying the law to the facts. *Id.*

6. *Intoxicating Liquor.* License to sell may be revoked by State. *Premier-Pabst Co.* v. *Grosscup,* 226.

(C) Equal Protection Clause.

1. *Classification for Taxation. Morf* v. *Bingaman,* 407.

2. *Taxation of Intangible Property* of foreign corporation under West Virginia law consistent with equal protection. *Wheeling Steel Corp.* v. *Fox,* 193.

3. *Highways. Motor Vehicles.* Fee for privilege of transporting motor vehicles on own wheels over highways of State for purpose of sale, valid as applied to one moving cars in caravans. *Morf* v. *Bingaman,* 407.

CONTRACT MARKETS. See **Grain Futures Act.**

CONTRACTS. See **Constitutional Law,** III, 1–3; V, (B), 2.

CONTRIBUTORY NEGLIGENCE. See **Admiralty,** 5.

CONVICTS. See **Criminal Law,** 1.

CORPORATIONS. See **Constitutional Law,** II, 10; V, (B), 4–5; V, (C), 2; **Interstate Commerce Acts,** 4.

Stockholders' Suit. See Injunction, 3.

Tax on Intangible Property. See Taxation, III, 3.

COUNTERCLAIM. See **Bankruptcy,** 2.

COURT OF CLAIMS. See **Claims,** 1–4; **Jurisdiction,** IV.

CRIMINAL LAW.

1. *Self Defense.* Killing of guard by convict not felonious in Virginia if done in self defense. *Hart* v. *Virginia,* 34.

2. *Sentence. Fines. Imprisonment.* Direction that defendant be imprisoned until fine is paid must be expressed in sentence. *Hill* v. *U. S. ex rel. Wampler,* 460.

3. *Id.* Only sentence known to the law is the sentence or judgment entered on the records of the court. *Id.*

4. *Id. Commitment.* A commitment departing in matter of substance from the judgment back of it is void and its nullity may be established on habeas corpus. *Id.*

5. *Id.* Addition to sentence of fine and imprisonment, by clerk in preparing commitment, directing imprisonment until fine is paid, could not be justified by usage or by unrecorded instructions from judge to clerk. *Id.*

DAMAGES. See **Claims,** 3.

Apportionment of in negligence cases. See Admiralty, 5.

Infringement of Patent. Measure of Liability. Damages and Profits. Deductions from profits; cost of labor and material wasted without fault in manufacturing process; losses from return of defective merchandise; cost of materials sold by one infringer to another; savings effected by use of infringer's own patents; comparison of average cost with specific prices; interest on damages. *Duplate Corp.* v. *Triplex Co.,* 448.

DEBTS. See **United States,** 2, 4.

DECREE. See **Judgments,** 1–4; **Waters,** 2.

DELEGATION OF POWER. See **Constitutional Law,** V, (B), 5

DEPOSIT. See **Bankruptcy,** 2; **Jurisdiction,** V.

DISCRETION. Abuse of. See **Injunction.**

DISMISSAL. See **Jurisdiction,** I, 4.

DIVIDENDS. See **Taxation,** II, 1–2.

DIVISIONS. See **Interstate Commerce Acts,** 5–9, 13–17.

DOMICILE. See **Constitutional Law,** V, (B), 4.

DUE PROCESS. See **Constitutional Law,** IV, 1–9; V, (B), 1–6.

EMINENT DOMAIN.

1. As to just compensation in prescribing divisions of joint rates of carriers, see *B. & O. R. Co.* v. *U. S.*, 349.

2. *Just Compensation. Lands. Market Value.* Materiality of evidence as to value of lands when used for a purpose to which they probably could be put, though in connection with other lands. *McCandless* v. *U. S.*, 342.

EMPLOYER AND EMPLOYEE. See **Constitutional Law,** I, 5; III, 2; V, (B), 2.

EMPLOYERS' LIABILITY ACT.

1. Evidence of injuries, reviewable by this Court. *Chicago G. W. R. Co.* v. *Rambo,* 99.

2. *Id. Boiler Inspection Act.* Headlights, evidence as to sufficiency of. *Id.*

EQUAL PROTECTION. See **Constitutional Law,** V, (C), 1–3.

EQUITY. See **Injunction; Jurisdiction.**

ERROR.

Prejudicial Error in exclusion of evidence. *McCandless* v. *U. S.*, 342.

ESTOPPEL. See **Packers & Stockyards Act,** 8.

EVIDENCE. See **Constitutional Law,** I, 3; IV, 5, 8; **Employers' Liability Act,** 1–2; **Jurisdiction,** I, 7; II, 21; III, 11, 14; **Packers & Stockyards Act,** 4.

1. *Market Value* of lands in condemnation case. *McCandless* v. *U. S.*, 342.

2. *Id.* Most profitable use to which lands could be put in connection with other lands, as material. *Id.*

3. *Id.* Sufficiency of offer of evidence. *Id.*

4. *Patents.* Finding of Circuit Court of Appeals that accused grease gun lacked the only novel feature of the Gullborg patented combination and did not infringe, sustained. *Bassick Co.* v. *Hollingshead Co.*, 415.

5. *Erroneous Exclusion* of material evidence, prejudicial error requiring reversal; effect of Jud. Code, § 269, relating to harmless error. *McCandless* v. *U. S.*, 342.

6. *Sufficiency of Evidence* of confiscatory rates. *B. & O. R. Co.* v. *U. S.*, 349.

FEDERAL INSTRUMENTALITY. See **Constitutional Law**, I, 11–12.

FELONY. See **Criminal Law**, 1.

FINDINGS. See **Constitutional Law**, IV, 7; **Interstate Commerce Acts**, 13–16; **Jurisdiction**, I, 6, 10; III, 11, 17; **Packers & Stockyards Act**, 10.

FINES. See **Criminal Law**, 2, 5.

FOREIGN CORPORATIONS. See **Constitutional Law**, II, 10; V, (B), 4–5; V, (C), 2; **Taxation**, III, 2–3.

GASOLINE. See **Constitutional Law**, I, 12; **Taxation**, III, 1.

GENERAL AVERAGE.

1. *Contribution.* Claim against United States; when right accrues. *U. S.* v. *Atlantic Ins. Co.*, 483.

2. *Id.* Unliquidated damages. *Id.*

3. *Function of Adjuster. Id.*

GENERAL WELFARE. See **Constitutional Law**, I, 4.

GOOD WILL. See **Clayton Act**, 3.

GRAIN EXCHANGES. See **Grain Futures Act.**

GRAIN FUTURES ACT.

Suspension from Trading under § 6 (b) cannot be imposed as penalty for past misconduct. *Wallace* v. *Cutten*, 229.

GREASE GUNS. See *Bassick Co.* v. *Hollingshead Co.*, 415.

GUARDIANS. See **Pensions**, 1–2.

HABEAS CORPUS.

1. *Nullity of Commitment* varying in substance from sentence may be established on habeas corpus. *Hill* v. *U. S. ex rel. Wampler*, 460.

2. Order of court refusing to strike from commitment direction added by clerk that imprisonment continue until fine paid, was not res judicata upon habeas corpus to test legality of continued confinement after term specified in sentence had expired. *Id.*

HARMLESS ERROR. See **Evidence**, 5.

HEADLIGHTS. See **Employers' Liability Act**, 2.

HEARING. See **Constitutional Law**, IV, 4–5; **Packers & Stockyards Act**, 3–4.

HIGHWAYS. See **Automobiles**; **Constitutional Law**, II, 7–9; V, (B), 3; V, (C), 3.

HOLDING COMPANIES. See **Interstate Commerce Acts**, 4.

HOMICIDE. See **Criminal Law**, 1.

HOURS OF LABOR. See **Constitutional Law**, II, 4.

IMMIGRATION ACTS.

Alien Seamen. Notice to detain on board, served by immigration officer on master, not binding on owner of ship. *Compagnie Generale* v. *Elting*, 217.

IMPRISONMENT. See **Criminal Law**, 2, 4–5.

INCOME TAX. See **Taxation**, II, 1–2.

INFRINGEMENT. See **Patents for Inventions**, 3–4.

INJUNCTION. See **Jurisdiction**, II, 10; III, 9, 13, 16.

1. After notice, defendant acts at his peril. *Jones* v. *Securities Comm'n*, 1.

2. Power of the court to restore the status quo. *Id.*

3. Stockholders' suit to enjoin corporation from complying with unconstitutional Act. *Carter* v. *Carter Coal Co.*, 238.

4. *Irreparable Injury.* Suit to enjoin need not await actual infliction. *Id.*

5. *Taxes.* Injunction to restrain collection of state tax, where no plain, adequate and complete remedy at law available. *Graves* v. *Texas Co.*, 393.

6. On appeal from grant or denial of interlocutory injunction, inquiry is limited to question whether court abused its discretion. *U. S.* v. *Corrick*, 435.

INSOLVENCY. See **Constitutional Law**, I, 18; III, 1.

Surety company in hands of statutory liquidator by court order on own petition, as "insolvent" within meaning of R. S. § 3466, giving priority to debts due United States. *U. S.* v. *Knott*, 544.

INTANGIBLE PROPERTY. See **Taxation**, III, 3.

INTEREST. See **Damages.**

INTERSTATE COMMERCE. See **Constitutional Law**, II, 1–11; **Interstate Commerce Acts.**

INTERSTATE COMMERCE ACTS.

1. *Common Carriers* only are regulated by Interstate Commerce Act. *Pennsylvania R. Co.* v. *Public Utilities Comm'n*, 170.

2. *Beginning of Transportation* when goods have been placed in possession of common carrier. *Id.*

INTERSTATE COMMERCE ACTS—Continued

3. *Carriage by Owners.* Private facilities not part of interstate movement subject to Act. *Id.*

4. *Commodities Clause. Holding Company.* Mere fact that railroad and manufacturing corporations were owned by holding company did not make transportation of products of one by the other unlawful. *U. S.* v. *Elgin Ry.*, 492.

5. *Divisions of Joint Rates.* Proceedings to determine and prescribe divisions; function of Commission is legislative. *B. & O. R. Co.* v. *U. S.*, 349.

6. *Id.* Remedy of carrier whose share of joint rate proves noncompensatory. *Id.*

7. *Id.* Validity of order sustaining divisions based in part on financial needs of carriers. *Id.*

8. *Id.* Consideration of return from all service of carrier as well as that covered by divisions under investigation. *Id.*

9. *Id.* Evidence held insufficient to prove divisions of joint rate confiscatory. *Id.*

10. *Abandonment of Trackage.* Orders of Commission. *U. S.* v. *Idaho*, 105.

11. *Id.* Suit to annul order. *Id.*

12. *Id.* Whether track is a "spur" is a mixed question of law and fact. *Id.*

13. *Findings.* Power of Commission in prescribing divisions is conditioned on findings and hearing. *B. & O. R. Co.* v. *U. S.*, 349.

14. *Id.* Conclusiveness of findings. *Id.*

15. *Id.* Finding of Commission on question whether divisions constituted just compensation within meaning of Fifth Amendment could not constitutionally be made conclusive. *Id.*

16. *Id.* Findings could not be construed as addressed to issue of confiscation when that question was not raised in application of carriers. *Id.*

17. *Orders.* Though negative in form, order denying relief to carrier complaining of unjust divisions was in effect affirmative. *Id.*

18. *Id. Divided Commission.* Report and order to which some members dissent has same legal effect as if supported by all. *Id.*

19. *Id.* Judicial review. *Id.*

20. *Petition for Rehearing.* Effect of denial when petition for first time raised issue of confiscation. *Id.*

INTOXICATING LIQUOR.

Revocation of License. See *Premier-Pabst Co.* v. *Grosscup*, 226.

INVENTION. See **Patents for Inventions.**

INVESTIGATIONS. See **Constitutional Law**, I, 2–3.

JOINT RATES. See **Interstate Commerce Acts**, 5–9, 13–16.

JONES ACT. See **Admiralty**, 2, 5.

JUDGMENTS. See **Criminal Law**, 2–5; **Interstate Commerce Acts**, 18.

1. *Attacking Judgment.* Sentence entered inaccurately may be corrected in direct proceeding; but is not open to collateral attack. *Hill* v. *U. S. ex rel. Wampler*, 460.

2. *Res Judicata.* Order of court refusing to strike from commitment direction added by clerk that imprisonment continue until fine was paid, was not res judicata on habeas corpus to test legality of continued confinement after term specified in sentence had expired. *Id.*

3. *Modification of Judgment.* Substituting direction for judgment of dismissal on merits in place of direction for a new trial. *National City Bank* v. *Oelbermann*, 638.

4. Effect of extending term to allow amendment. *Zimmern* v. *United States*, 167.

JUDICIARY. See **Constitutional Law**, I, 13.

JURISDICTION. See **Constitutional Law**, I, 13–19.

I. In General, p. 722.
II. Jurisdiction of this Court, p. 722.
III. Jurisdiction of District Courts, p. 724.
IV. Jurisdiction of Court of Claims, p. 725.
V. Jurisdiction of State Courts, p. 725.

References to particular subjects under title Jurisdiction: Amendment of Decree, I, 8; Appeal, I, 8; II, 6–7, 9–10; Assignments of Error, II, 20; Certified Questions, II, 8; Certiorari, II, 11, 19; Consent, II, 1, 4; III, 1; Court of Claims, IV; Dismissal, I, 4; Employers' Liability Act, II, 21; Evidence, I, 7; II, 21; III, 14; Federal Question, II, 14–16; Finality of Judgment, II, 12–13; Findings, I, 6, 10; III, 11, 17; Injunction, I, 2–3, 9; II, 10, 22; III, 9, 13; Interstate Commerce Commission, III, 12–17; Judgment, I, 12; Jurisdictional Amount, III, 2–5; Mandate, II, 24; Packers & Stockyards Act, I, 10; II, 23; III, 6–11; Parties, I, 1;

JURISDICTION—Continued.

II, 1, 4; III, 1; Prejudicial Error, I, 12; Priority, V; Rehearing, II, 27; Scope of Review, I, 9–10; II, 19–22; Securities & Exchange Act, III, 18; States, II, 1–2; State Statutes, I, 11; II, 17–18; Stay, II, 25; Subpoena, III, 18; Taxes, I, 2; Three-Judge Court, II, 9; III, 16; Trial De Novo, III, 7; United States, II, 1–3; V; Waiver, I, 1; III, 1.

I. **In General.**

1. *Want of Jurisdiction.* Cannot be waived by parties. *U. S.* v. *Corrick,* 435.

2. *Injunction* to restrain collection of state tax, where no plain, adequate and complete remedy at law available. *Graves v. Texas Co.,* 393.

3. *Injunction.* Power of courts to restore the status quo. *Jones* v. *Securities Comm'n,* 1.

4. *Dismissal.* Unqualified right of plaintiff, in absence of rule of court, if defendant will not be prejudiced. *Id.*

5. *Confiscatory Rates.* Duty of courts to reëxamine. *St. Joseph Co.* v. *U. S.,* 38.

6. *Id.* Legislative declarations and findings not binding. *Id.*

7. *Id. New Evidence.* District Court not confined to evidence used by rate-making body. *Id.*

8. *Time for Appeal.* Extended by extension of term to amend decree. *Zimmern* v. *U. S.,* 167.

9. *Scope of Review. Injunction.* On appeal from grant or denial of interlocutory injunction, inquiry is limited to question whether court abused its discretion. *U. S.* v. *Corrick,* 435.

10. *Scope of Review* under Packers & Stockyards Act; conclusiveness of findings of Secretary. *Morgan* v. *U. S.,* 468; *Acker* v. *U. S.,* 426.

11. *State Statute.* A construction of a state statute by the state courts resulting from their erroneous conception of federal statutes, is not binding on the federal courts. *Tipton* v. *Atchison Ry.,* 141.

12. *Judgment on Review. Prejudicial Error.* Effect of Jud. Code, § 269, requiring judgment on review after examination of entire record without regard to technical errors, defects, or exceptions not affecting substantial rights of parties. *McCandless* v. *U. S.,* 342.

II. **Jurisdiction of this Court.**

1. *Original Jurisdiction. Parties.* Leave to file bill by State denied on ground that United States was indispensable party and had not consented to suit. *Arizona* v. *California,* 558.

JURISDICTION—Continued.

2. *Id.* That a decree rendered in its absence cannot bind or affect the United States is no inducement to decide rights of States by decree which could have no finality. *Id.*

3. *Id.* Bill which, if filed, must be dismissed because of absence of United States as party, will not be entertained. *Id.*

4. *Want of Jurisdiction.* Consent of parties cannot give federal court jurisdiction. *U. S.* v. *Corrick,* 435.

5. *Id.* This Court will notice defect when record discloses want of jurisdiction in lower court, though parties make no contention concerning it. *Id.*

6. *Id.* This Court has jurisdiction on appeal to correct error of District Court in entertaining suit over which it had no jurisdiction. *Id.*

7. *Id.* Appeal dismissed for want of jurisdiction. *P. J. Carlin Co.* v. *Heaney,* 637; *Parker* v. *James Granger, Inc.,* 644.

8. *Certificate.* Questions not answered if irrelevant, too general, or obscure. *Lowden* v. *Northwestern Bank,* 160.

9. *Appeal* from three-judge District Court. *U. S.* v. *Idaho,* 105.

10. *Injunction* pending appeal. *Mountain States Co.* v. *Public Service Comm'n,* 641.

11. *Application for Certiorari* dismissed as premature. *Craig* v. *U. S.,* 637.

12. *Finality of Judgment* of state court. *U. S.* v. *Knott,* 544.

13. *Id.* Appeal dismissed for want of final judgment. *Brown* v. *South Carolina,* 639.

14. *Federal Question.* Appeal dismissed for want of properly presented substantial federal questions. *Collins* v. *Streitz,* 640; *Montjoy* v. *Kentucky,* 646.

15. *Id.* Dismissal for want of substantial federal question. *Mozingo* v. *Marion Shovel Co.,* 645.

16. *Id.* Appeal dismissed on ground that appellants failed to show any interest entitling them to invoke protection of Federal Constitution. *Miles* v. *Treasury,* 640.

17. *Construction of State Statute.* State statute applied as construed by state court. *Hart* v. *Virginia,* 34.

18. *Id.* Construction by state court binding on this Court. *Morehead* v. *New York,* 587; *U. S.* v. *Knott,* 544. *Sed vide Tipton* v. *Atchison Ry.,* 141.

19. *Scope of Review.* On certiorari Court confines itself to the ground upon which the writ was asked for and granted. *Morehead* v. *New York,* 587.

JURISDICTION—Continued.

20. *Id.* This Court will not examine points not made in the complaint nor included in the assignments of error or the statement of points relied upon for reversal. *Pennsylvania R. Co.* v. *Public Utilities Comm'n,* 170.

21. *Id. Employers' Liability Act.* Evidence as to injuries, reviewable by this Court. *Chicago G. W. R. Co.* v. *Rambo,* 99.

22. *Scope of Review.* On appeal from the granting or refusal of an interlocutory injunction, injury is limited to question whether court abused its discretion. *U. S.* v. *Corrick,* 435.

23. *Appeal under Urgent Deficiencies Act* from judgment in suit under Packers & Stockyards Act. *Morgan* v. *U. S.,* 468.

24. *Mandate* recalled and amended. *Prudence Co.* v. *Fidelity Co.,* 642.

25. *Stay* of running of penalties. *Isbrandtsen-Moller Co.* v. *U. S.,* 644.

26. *Retaining Jurisdiction. Wyoming* v. *Colorado,* 573.

27. *Rehearing.* Extension of time for filing petition. *Stone* v. *White,* 646.

III. **Jurisdiction of District Courts.**

1. *By Consent.* Lack of jurisdiction over subject matter cannot be waived by parties. *U. S.* v. *Corrick,* 435.

2. *Jurisdictional Amount* in suit attacking statute regulating business is not the value of the business, but the damage that would result from the regulation. *McNutt* v. *General Motors Corp.,* 178; *McNutt* v. *McHenry Co.,* 190.

3. *Id.* Plaintiffs must allege and prove jurisdictional amount. *Id. Id.*

4. *Id.* Duty of court to inquire on its own motion. *Id. Id.*

5. *Id.* Allegation of jurisdictional amount may be traversed by answer. *Id. Id.*

6. *Jurisdiction Under Packers & Stockyards Act.* Review of administrative action authorized by § 316 of Act. *Morgan* v. *U. S.,* 468.

7. *Id.* Under § 316 District Court affords not trial *de novo* but review of administrative action. *Acker* v. *U. S.,* 436.

8. *Id.* When function of District Court limited to questions raised upon record made before Secretary. *Id.*

JURISDICTION—Continued.

9. *Id.* Bill by market agencies to enjoin prosecution for charging rates other than those fixed by Secretary under Packers & Stockyards Act was not bill to set aside or suspend order of Secretary and was not within jurisdiction of District Court. *U. S.* v. *Corrick,* 435.

10. *Confiscatory Rates* for stockyards; duty of court to inquire. *St. Joseph Co.* v. *U. S.,* 38.

11. *Id.* Findings of administrative body not binding. *Id.*

12. *Orders of Interstate Commerce Commission. U. S.* v. *Idaho,* 105.

13. *Id.* Suit to enjoin order sustaining divisions of joint rates; claim of confiscation. *B. & O. R. Co.* v. *U. S.,* 349.

14. *Id.* Introduction of evidence not before the Commission. *U. S.* v. *Idaho,* 105; *B. & O. R. Co.* v. *U. S.,* 349.

15. *Id. Parties. U. S.* v. *Idaho,* 105.

16. *Id.* When suit should be before three-judge court with appeal to this Court. *Id.*

17. *Findings* of Commission not conclusive. *Id.*

18. *Jurisdiction Under Securities & Exchange Act.* Authority to enforce Commission's subpoena ends with withdrawal of registration statement. *Jones* v. *Securities Comm'n,* 1.

19. *Extension of Term* for amendment of decree. *Zimmern* v. *U. S.,* 167.

IV. **Jurisdiction of Court of Claims.**

Claim against United States for general average contribution. *U. S.* v. *Atlantic Ins. Co.,* 483.

V. **Jurisdiction of State Courts.**

Jurisdiction of Florida court to award United States priority in proceeds of deposit made by foreign corporation with state treasurer, though general assets were being liquidated elsewhere. *U. S.* v. *Knott,* 544.

JURISDICTIONAL AMOUNT. See **Jurisdiction,** III, 2–5.

JUST COMPENSATION. See **Eminent Domain,** 1–2.

LABOR. See **Bituminous Coal Conservation Act; Constitutional Law,** I, 5; II, 4, 6; III, 2; V, (B), 3; **Minimum Wage Laws.**

LANDS. See **Eminent Domain,** 2; **Evidence,** 1–2; **Packers & Stockyards Act,** 9.

LEASES. See **Clayton Act**, 1–4.

LEGISLATION.

Function of Interstate Commerce Commission in prescribing division of joint rates is legislative. *B. & O. R. Co.* v. *U. S.*, 349.

LICENSES. See **Automobiles; Constitutional Law, II, 7–11; V,** (B), 3, 6; V, (C), 3.

LIEN. See **United States**, 6.

LIMITATIONS.

1. Claim against United States for general average contribution accrued more than six years before suit brought and was barred. *U. S.* v. *Atlantic Ins. Co.*, 483.

2. *Time for Appeal.* Tolling of limitation by extension of time to amend decree. *Zimmern* v. *U. S.*, 167.

LUBRICATING APPARATUS. See **Patents for Inventions**, 1.

MANDATE. See **Jurisdiction**, II, 24.

MARITIME LAW. See **Admiralty**, 1–6.

MARKET AGENCIES. See **Packers & Stockyards Act**, 1, 6, 11.

MARKET VALUE. See **Eminent Domain**, 2; **Evidence**, 1–3.

MASTER AND SERVANT. See **Constitutional Law**, I, 5; III, 2; V, (B), 2.

MERCHANT MARINE ACT. See **Admiralty.**

MINIMUM WAGE LAWS.

New York minimum wage law for women (Laws 1933, c. 584), as construed by state court, invalid. *Morehead* v. *New York*, 587.

MINING. See **Bituminous Coal Conservation Act; Constitutional Law**, I, 5; II, 2, 4.

MONOPOLY. See **Clayton Act**, 4.

MOTOR VEHICLES. See **Constitutional Law**, II, 7–9; V, (B), 3; V, (C), 3.

MUNICIPAL CORPORATIONS. See **Constitutional Law**, I, 18.

Water improvement district a political subdivision of State. *Ashton* v. *Cameron County*, 513.

MURDER. See **Criminal Law**, 1.

NEGLIGENCE. See **Admiralty**, 2–5; **Employers' Liability Act**, 1–2.

NEW MEXICO. See **Statutes,** 13.

NEW TRIAL.

Prejudicial Error in admission and exclusion of evidence. *McCandless* v. *U. S.,* 342.

OPINION. See **Constitutional Law,** I, 14; **Interstate Commerce Acts,** 18.

PACKERS & STOCKYARDS ACT.

1. *Stockyards Rates.* Principles governing Secretary of Agriculture in fixing. *St. Joseph Co.* v. *U. S.,* 38; *Acker* v. *U. S.,* 426; *Morgan* v. *U. S.,* 468.

2. Validity and regularity of proceedings before Secretary. *Morgan* v. *U. S.,* 468.

3. *Full Hearing* as prerequisite to making of valid order. *Id.*

4. *Id.* Order made by Secretary invalid where evidence and arguments were heard and considered not by him but by Assistant Secretary. *Id.*

5. Rates prescribed by Secretary pursuant to § 310 become the only lawful rates and so remain until further order of Secretary. *U. S.* v. *Corrick,* 435.

6. Ascertaining reasonable unit cost as basis for uniform rate; allowance for salesmen's salaries; fictitious salaries; cost of getting and maintaining business; test period; denial of rehearing. *Acker* v. *U. S.,* 426.

7. Rehearing by Secretary. *St. Joseph Co.* v. *U. S.,* 38.

8. Estoppel of Secretary from earlier proceeding. *Id.*

9. Land. Valuation of. *Id.*

10. *Legislative Declarations and Findings* do not conclude courts. *Id.*

11. *Violations of Orders.* Bill by market agencies to enjoin prosecutions for charging rates other than those fixed by Secretary was not bill to set aside or suspend order and was not within jurisdiction of District Court. *U. S.* v. *Corrick,* 435.

12. *Review of Rate Order. St. Joseph Co.* v. *U. S.,* 38.

13. *Id.* Under § 316 District Court sits not to afford trial *de novo* but to review the administrative action. *Acker* v. *U. S.,* 426.

14. *Id.* Where issue before Secretary was not confiscation, but reasonableness of charge for personal service, court was limited to questions raised upon record made before the Secretary. *Id.*

PARTIES. See **Interstate Commerce Acts,** 11; **Jurisdiction,** II, 1–5; III, 1, 15.

1. *United States* was indispensable party and had not consented to be sued. *Arizona* v. *California,* 558.

2. *Party Attacking Statute* must show injury to himself. *Premier-Pabst Co.* v. *Grosscup,* 226.

3. *Dismissal* by plaintiff, matter of right. *Jones* v. *Securities Comm'n,* 1.

PATENTS FOR INVENTIONS.

Use of tying clauses in leasing patented machines. See Clayton Act, 1–4.

1. Validity and scope of Gullborg Patent No. 1,307,734, for means of lubricating metal bearings. *Bassick Mfg. Co.* v. *Hollingshead Co.,* 415.

2. *Combinations.* Patentee cannot repatent old combination by reclaiming it with improved element substituted for old element. *Id.*

3. *Infringement.* Finding of Circuit Court of Appeals that accused device did not embody novel feature of patent and did not infringe, sustained. *Id.*

4. *Id. Accounting.* Measure of liability for damages and profits under decree for accounting by infringers. *Duplate Corp.* v. *Triplex Co.,* 441.

PENALTY. See **Criminal Law,** 2–5; **Grain Futures Act.**

PENITENTIARY. See **Criminal Law,** 1.

PENSIONS.

1. *Attorneys Fees.* State court has power to fix fees payable by guardian of incompetent veteran for services of attorney. *Hines* v. *Stein,* 94.

2. *Id.* Executive regulations do not control. *Id.*

PERSONAL INJURIES. See **Admiralty,** 2–5; **Employers' Liability Act,** 1–2; **Safety Appliance Acts,** 1–3.

PLEADING.

Pleading Jurisdictional Amount. See Jurisdiction, III, 3, 5.

PRICE-FIXING. See **Bituminous Coal Conservation Act; Minimum Wage Laws.**

PRIORITY. See **United States,** 2–8.

PROFITS. See **Damages; Patents for Inventions,** 4.

PROOF. See **Evidence.**

PUBLIC MONEYS.

Interest of taxpayer in. *Schenebeck* v. *McCrary*, 36.

PUBLIC OFFICERS. See **Constitutional Law**, III, 3.

RAILROADS. See **Bankruptcy**, 2; **Interstate Commerce Acts.**

RATES. See **Constitutional Law**, I, 5–7; IV, 9–10, 13; **Interstate Commerce Acts**, 5–9, 13–17; **Jurisdiction**, I, 5–7; III, 9–14; **Packers & Stockyards Act**, 1, 5–6, 11–14.

REAL ESTATE. See **Eminent Domain**, 2; **Evidence**, 2.

RECEIVERS. See **Insolvency.**

REGISTRATION. See **Securities & Exchange Act**, 1.

REGULATIONS. See **Pensions**, 2; **Statutes**, 8.

REHEARING. See **Interstate Commerce Acts**, 20; **Jurisdiction**, II, 27; **Packers & Stockyards Act**, 7.

REORGANIZATION. See **Bankruptcy**, 2.

REPEAL. See **Statutes**, 11.

RES JUDICATA. See **Habeas Corpus**, 2; **Judgments**, 2.

RETROACTIVE PENALTY. See **Grain Futures Act.**

REVERSAL. See **Evidence**, 5.

RULES. See **Criminal Law**, 5.

Amendments of Bankruptcy Rules, p. 695.
Amendments of Rules of Court, p. 693.

SAFETY APPLIANCE ACTS.

1. Intrastate commerce included. *Tipton* v. *Atchison Ry.*, 141.

2. *Remedy for Breach.* Dependent on state law. *Id.*

3. *Id.* Workmen's compensation law is the remedy in California. *Id.*

SALES. See **Constitutional Law**, I, 12; **Taxation**, III, 1.

SEAMEN. See **Admiralty**, 2–5; **Immigration Acts.**

SEARCHES AND SEIZURES. See *Jones* v. *Securities Comm'n*, 1.

SECRETARY OF AGRICULTURE. See **Packers & Stockyards Act**, 1, 4–5, 7, 14.

Performance of duties by assistant. *Morgan* v. *U. S.* 468.

SECURITIES ACT OF 1933. See *Jones* v. *Securities Comm'n*, 1.

SECURITIES & EXCHANGE ACT.

1. *Registration Statement.* Effect of stop order. *Jones* v. *Securities Comm'n,* 1.

2. *Id.* Right of appellant to withdraw. *Id.*

SELF DEFENSE. See **Criminal Law,** 1.

SENTENCE. See **Criminal Law,** 2–5.

SEPARABILITY. See **Bituminous Coal Conservation Act; Constitutional Law,** I, 16–17.

SET-OFF. See **Bankruptcy,** 2.

SPECIAL MASTER.

Appointments. *Vermont* v. *New Hampshire,* 642; *Texas* v. *New Mexico,* 644.

"SPUR." See **Interstate Commerce Acts,** 12.

STATES. See **Constitutional Law,** I, 8–12, 18; **Jurisdiction,** II, 1–3; **United States,** 1; **Waters,** 1–2.

Political Subdivisions. Obligations. Bankruptcy. Act of May 24, 1934, permitting political subdivision of State to avail of Bankruptcy Act, invalid. *Ashton* v. *Cameron County,* 513.

STATUTES. See **Constitutional Law.**

1. *Attacking Statute.* One as to whom statute validly applies cannot complain of invalidity as to others. *Morf* v. *Bingaman,* 407.

2. *Id.* Party attacking statute must show injury to himself. *Premier-Pabst Co.* v. *Grosscup,* 226.

3. *Construction of State Statute* by highest state court, binding on federal court. *U. S.* v. *Knott,* 544.

4. *Id.* A construction of a state statute by the state courts resulting from their erroneous conception of federal statutes, is not binding on the federal courts. *Tipton* v. *Atchison Ry.,* 141.

5. *"Factual Background."* *Morehead* v. *New York,* 587.

6. *Clear Meaning* cannot be enlarged by construction to make statute more effective. *Wallace* v. *Cutten,* 229.

7. Failure to amend evidences legislative approval of judicial construction. *U. S.* v. *Elgin Ry.,* 492.

8. *Administrative Construction.* Where provisions of statute are unambiguous and its directions specific, there is no power to amend it by regulations. *Koshland* v. *Helvering,* 441.

9. *Id.* Administrative construction of tax Act which converts an income tax into a capital levy, cannot be adopted. *Id.*

STATUTES—Continued.

10. *Separability. Carter* v. *Carter Coal Co.*, 238.

11. *Repeal* by implication not favored. *Morf* v. *Bingaman*, 407.

12. *Particular Statutes.* Tax imposed by Alabama Act of July 10, 1935, accrued upon withdrawal of gasoline from storage for sale or other use and was not upon storing as such. *Graves* v. *Texas Co.*, 393.

13. *Id.* Fee provisions of c. 56, New Mexico Laws, 1935, were not repealed by c. 136. *Morf* v. *Bingaman*, 407.

STATUTORY LIQUIDATOR. See **Insolvency.**

STAY. See **Jurisdiction,** II, 25.

STOCKHOLDERS. See **Injunction,** 3.

STOCKYARDS. See **Constitutional Law,** IV, 1–8; **Packers & Stockyards Act.**

STORING. See **Constitutional Law,** I, 12; **Statutes,** 12; **Taxation,** III, 1.

STRIKES. See **Constitutional Law,** II, 4.

SUBPOENA. See **Jurisdiction,** III, 18.

TAXATION. See **Constitutional Law,** V, (B), 5; **Public Moneys; Statutes,** 12.

I. In General, p. 731.

II. Federal Taxation, p. 731.

III. State Taxation, p. 732.

I. In General.

1. *Construction of Tax Acts.* Administrative construction. *Koshland* v. *Helvering*, 441.

2. *Classification for Taxation.* See *Morf* v. *Bingaman*, 407.

3. *Challenging Tax.* Who may challenge. *Id.*

4. *Purpose* to which proceeds of tax are applied as affecting validity. *Id.*

II. Federal Taxation.

1. *Income Tax. Capital Gains and Losses.* Dividend in common voting shares to holder of preferred stock was income, not return of capital. *Koshland* v. *Helvering*, 441.

2. *Id.* On disposition of preferred stock no part of original cost is to be apportioned to such common shares for purpose of determining gain or loss. *Id.*

TAXATION—Continued.

III. **State Taxation.**

1. *Federal Instrumentality.* State tax on sale (or on storage and withdrawal—essential to sale) of gasoline to United States, invalid. *Graves* v. *Texas Co.*, 393.

2. *Foreign Corporations.* Validity of tax on foreign corporation for privilege of doing business in State. *Atlantic Lumber Co.* v. *Commissioner,* 553.

3. *Id.* Intangible property of foreign corporation properly taxed in State of business situs. *Wheeling Steel Corp.* v. *Fox,* 193.

4. *Motor Vehicles.* Fee for privilege of transporting motor vehicles on own wheels over highways of State for purposes of sale, valid. *Morf* v. *Bingaman,* 407.

TAXPAYER. See **Public Moneys.**

TRACKS. See **Interstate Commerce Acts,** 10–12.

TRADING. See **Grain Futures Act.**

TRANSPORTATION. See **Constitutional Law,** II, 7; **Interstate Commerce Acts.**

TRIAL.

Admission and Exclusion of Evidence. Prejudicial error. *McCandless* v. *U. S.,* 342.

TRIAL DE NOVO. See **Jurisdiction,** III, 7.

TYING CLAUSE. See **Clayton Act,** 1–4.

UNITED STATES. See **Claims,** 1.

1. *Suits Against.* United States may not be sued, even by a State, without its consent. *Arizona* v. *California,* 558.

2. *Priority* to debts due United States by insolvent; construction of R. S. § 3466. *U. S.* v. *Knott,* 544.

3. *Id.* Surety company in hands of statutory liquidator by court order on its own petition was "insolvent." *Id.*

4. *Id.* Judgment as "debt due to the United States." *Id.*

5. *Id. Liability* on surety bonds within operation of R. S. § 3466. *Id.*

6. *Id.* Inchoate lien not enough to defeat priority under R. S. § 3466; creditors' interest in proceeds of deposit made by foreign corporation with treasurer of Florida, not of character which would bar priority of United States. *Id.*

UNITED STATES—Continued.

7. *Id.* Jurisdiction of state court to award priority in local assets of insolvent foreign corporation. *Id.*

8. *Id.* Judgment of state court denying priority prejudiced rights of United States. *Id.*

USAGE. See **Criminal Law**, 5.

VALUE. See **Eminent Domain**, 2; **Evidence**, 1–3.

VETERANS. See **Pensions**, 1.

WAGES. See **Bituminous Coal Conservation Act**; **Constitutional Law**, I, 5; II, 4, 6; **Minimum Wage Laws.**

WAIVER. See **Jurisdiction**, I, 1.

WATERS.

1. Apportionment of waters between States. See *Arizona* v. *California*, 558.

2. Rights of Wyoming and Colorado in waters of Laramie River and tributaries; diversions; interpretation of former decree. *Wyoming* v. *Colorado*, 573.

3. Transfer of water rights; change of use. *Id.*

4. *Water Improvement District*, a political division of State. *Ashton* v. *Cameron County*, 513.

WITNESSES. See **Constitutional Law**, I, 2–3.

WOMEN. See **Constitutional Law**, III, 2; IV, (B), 2.

WORKMEN. See **Constitutional Law**, I, 5; II, 4, 6.

WORKMEN'S COMPENSATION ACTS. See **Safety Appliance Acts**, 3.

WYOMING. See **Waters**, 2.

○